

Teletext--Searching for the First Amendment: Telecommunications Research and Action Center v. FCC

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TELETEXT—SEARCHING FOR THE FIRST AMENDMENT: *TELECOMMUNICATIONS RESEARCH AND ACTION CENTER v. FCC*

The first amendment to the United States Constitution guarantees freedom of speech and freedom of the press.¹ In applying the first amendment, the Supreme Court has distinguished broadcast from print media, allowing content regulation of television and radio broadcasts² while prohibiting such regulation of the print

¹ See U.S. CONST. amend. I. The first amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.* It was the belief of the founding fathers "that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Thus, government intrusion upon free expression has always been assumed to be forbidden by the first amendment. See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931); see also Kalven, "Uninhibited, Robust and Wide-Open"—A Note on Free Speech and the Warren Court, 67 MICH. L. REV. 289, 297-99 (1968) (discussing invalidation of various state statutes for infringement of first amendment rights).

The framers of the Constitution believed that in order to keep society free, the citizenry and the press must have freedom to criticize the government and its officials. E. HUDON, *FREEDOM OF SPEECH AND PRESS IN AMERICA* 6-7 (1963). Thus, legislative or judicial restrictions of political discourse have been held to be at odds with the guarantees of the first amendment. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (state law prohibiting election day editorials invalid); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (state defamation damages for public official invalid without showing actual malice). The first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *New York Times Co.*, 376 U.S. at 270 (quoting Justice Hand's opinion in *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). This principle of the first amendment seeks to promote robust, wide-open debate, and a marketplace of ideas from which it is hoped that truth will emerge to an informed electorate. See *id.*

There is dispute, however, whether the first amendment is an affirmative sword permitting state mandated access (content regulation) or a shield against governmental interference. Compare Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 *passim* (1967) (suggesting first amendment requires public access to press) with Baldasty & Simpson, *The Deceptive "Right to Know": How Pessimism Rewrote the First Amendment*, 56 WASH. L. REV. 365 *passim* (1981) (first amendment commands no government interference).

² See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). *Red Lion* is the leading case upholding the lesser first amendment protection of the broadcast media. In *Red Lion*, the Court upheld an FCC right of reply rule to a "personal attack" which took place on a

media.³ This distinction is based on the notion that the limited availability of broadcast frequencies causes the broadcast media to enjoy a monopoly that the print media do not, thus necessitating government regulation to ensure that the broadcast media serve the public interest.⁴ Advancements in information technology,

radio program. *See id.* at 379. The Court justified limiting first amendment rights of broadcasting because of the scarcity of radio frequencies. *Id.* at 379. The *Red Lion* Court asserted that, because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Id.* at 388; *see also* FCC v. League of Women Voters, 468 U.S. 364, 374 (1984) (different first amendment standard applies to broadcast regulation); Columbia Broadcasting Sys., Inc. v. FCC, 453 U.S. 367, 395 (1981) (licensee must grant reasonable access to public).

At one time, radio and television news were not considered a source of serious journalism, and were not granted full first amendment protection. *See* Bollinger, *Freedom of The Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 19-20 (1976); *see also* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 219-20 (1975) (lack of journalistic effort at inception of radio and television partially explains different first amendment treatment). However, because of the growth in size and quality of broadcast journalism the feeling arose that, "[w]hile it may have been once true that TV was not the source of high quality . . . programming deserving of full First Amendment protection," it is deserving of such protection today. *Id.* at 220.

³ *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Tornillo*, the Supreme Court overruled a Florida "right to reply" statute which granted political candidates newspaper space equal to the space used by the newspapers in criticizing the candidate or attacking his record. *See id.* at 256-58. The Court held that the statute intruded on editorial function and infringed on freedom of the press under the first amendment. *See id.* The Court stated that "[i]t has yet to be demonstrated how governmental regulation of this crucial [editorial] process can be exercised consistent with First Amendment guarantees of a free press." *Id.* at 258.

The traditional basis for print media protection was noted by Justice White in *Tornillo*, when he stated: "[W]e have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials." *Id.* at 261 (White, J., concurring). However, the *Tornillo* Court does not mention *Red Lion* or any possible conflict between the two. *See generally* Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 26 STAN. L. REV. 536 (1976) (constitutional rationale for broadcast regulation is based on inadequate distinction between print and broadcast media).

⁴ *See, e.g.,* FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (given spectrum scarcity, licensees must serve as fiduciaries for the public). "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." Office of Communications of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.).

Due to the unique nature of electronic media, Congress established the Federal Radio Commission in 1927 to allocate radio frequencies because not all who wished to speak could do so because of the scarcity of channels. *See Red Lion*, 395 U.S. at 376 n.5. Congress chose to give exclusive, short term licenses on the condition that the licensee served the "public convenience, interest, and necessity." *See* Radio Act of 1927, Pub. L. No. 632, ch. 169, 44 Stat. 1162, 1163 (1927) (repealed 1934); Communications Act of 1934, 47 U.S.C. §§ 301,

however, have blurred the distinctions between broadcast and print media, raising the issue of whether content regulation may be constitutionally applied to newly developed forms of electronic media under the Supreme Court's spectrum scarcity distinction.⁵ Recently, in *Telecommunications Research and Action Center v. FCC* ("TRAC"),⁶ the Circuit Court of Appeals for the District of Columbia Circuit questioned, without deciding, the continued viability of the Supreme Court's scarcity distinction,⁷ and held that the Federal Communications Commission ("FCC") had acted reasonably in not applying certain content regulations to the teletext information system.⁸

In *TRAC*, the respondent FCC issued a report and order ("Teletext Order"), concluding that the authorization of teletext transmission by television broadcast stations would serve the public interest.⁹ The Teletext Order also determined that certain con-

309(a) (1982). In 1943, the Supreme Court agreed that the physical scarcity of airwaves justified broadcast regulation. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943). In *National Broadcasting*, the Court noted that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why . . . it is subject to governmental regulation." *Id.* at 226.

⁵ See NEUSTADT, *THE BIRTH OF ELECTRONIC PUBLISHING* 28-31 (1982); see also Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1074-91 (1985) (uncertainty about new technology has given rise to regulation which limits first amendment rights of such media).

Advances in technology have allowed for more efficient use of the radio spectrum, making scarcity a debatable issue. Compare Bazelon, *supra* note 2, at 233 (development of UHF and more efficient VHF promises end to scarcity) with *Freedom of Expression and the Electronic Media: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 2d Sess. 20 (1982) (statement of William Van Alstyne) ("Scarcity may exist despite the existence of many channels.").

⁶ 801 F.2d 501 (D.C. Cir. 1986).

⁷ See *id.* at 506-09.

⁸ See *id.* at 513, 518. Teletext systems allow viewers whose sets are equipped with a special decoder to receive broadcasts of printed news reports, stock quotations, classified ads, restaurant menus, and movie guides. Carlson, *New Age Front Page*, 3 CAL. LAW. at 14 (June 1983). Digital data are inserted in a few lines of the television picture called the "vertical blanking interval" ("VBI"). Arlon, "Teletext Takes to the Air" [1984 *Field Guide*], CHANNELS at 41. The VBI is the black bar that appears between pictures when the picture is rolled vertically. It has twenty-one of the 525 lines that make up the television signal. It has been estimated that by dedicating two lines of the VBI to teletext, 100 pages of text plus simple graphics could be cycled every twenty-five seconds. This limits most broadcast teletext systems to about 150 pages or screens of text. See generally Neustadt, Skall & Hammer, *The Regulation of Electronic Publishing*, 33 FED. COMM. L.J. 331, 332-41 (1981) (survey of teletext systems). Although not at issue in *TRAC*, teletext may also be transmitted by way of cable or telephone. See *id.*

⁹ See Report and Order, 53 Rad. Reg. 2d (P & F) 1309, 1320 (1983). The FCC had previously released a Notice of Proposed Rulemaking to explore possible authorization for

tent regulation provisions of the Communications Act of 1934 ("the Act"),¹⁰ including the reasonable access rule,¹¹ the equal opportunity rule,¹² and the fairness doctrine,¹³ would not be applica-

television stations to operate teletext systems. See 46 Fed. Reg. 60,851 (1981) (to be codified at 47 C.F.R. § 73) (proposed Nov. 27, 1981). The FCC announced its goal as seeking "to provide a regulatory environment that is conducive to the emergence and implementation of new technology and new uses of the [broadcast spectrum]." *Id.* Additionally, the FCC concluded that "[i]n the case of teletext, the available evidence appears to indicate that the forces of competition and the open market are well suited to obtaining the kinds and amounts of service that are most desirable in terms of the public interest." *Id.* at 60,852. The Notice, therefore, proposed that "teletext . . . be treated as an ancillary [sic] service" and that "[s]tatements . . . not be required to observe service guidelines or other performance standards." *Id.* at 60,853.

¹⁰ Act of June 19, 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-800 (1982 & Supp. III 1985)). In passing the Communications Act, Congress centralized the regulation of the telephone, telegraph, and broadcasting industries. See 47 U.S.C. at § 152 (1982). The purpose of the Communications Act of 1934 is to make available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." *Id.* at § 151. The Act provides the FCC with a broad mandate of power, including the power to determine who may speak. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-17 (1943).

¹¹ 47 U.S.C. § 312(a)(7) (1982). Section 312(a)(7) provides in part: "The Commission may revoke station license or construction permit for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." *Id.*

The Supreme Court has construed section 312(a)(7) as creating an affirmative right of reasonable access to broadcast facilities for federal candidates. See *Columbia Broadcasting Sys., Inc. v. FCC*, 453 U.S. 367, 386 (1981).

¹² 47 U.S.C. § 315 (1982). Section 315(a) provides in part: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . ." *Id.*

Section 315(b) imposes the so-called "lowest unit rate" obligation upon licensees. This provision provides that:

The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. § 315(b) (1982).

¹³ 47 C.F.R. § 73.1910 (1986). The fairness doctrine "provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." *Id.* The doctrine arose "under the Commission's power to issue regulations consistent with the 'public interest' . . . [and] imposes two affirmative obligations on the broadcaster: the coverage of issues of public importance must be adequate and such coverage must fairly reflect differing viewpoints." *Columbia Broadcasting Sys., Inc. v. Dem-*

ble to teletext.¹⁴ The petitioners, Telecommunications Research and Action Center and Media Access Project, each filed motions for reconsideration of the FCC decision, contending that teletext services are broadcasting as defined under the Act, and are, therefore, subject to the content regulations of the Act.¹⁵ The FCC, in rejecting these motions, asserted that teletext must be considered a "print medium" for first amendment purposes, and is thereby entitled to full freedom of press protection.¹⁶ On appeal, the Circuit

ocratic Nat'l Comm., 412 U.S. 94, 110-11 (1973). Additionally, the fairness doctrine includes the personal attack rule, 47 C.F.R. § 73.1920(a) (1986), and the political editorial rule, 47 C.F.R. § 73.1930 (1986), to ensure that public issues are given balanced treatment. See Swilinger, *Candidates and the New Technologies: Should Political Broadcasting Rules Apply?*, 49 Mo. L. REV. 85 (1984); but see R. LABUNSKI, *THE FIRST AMENDMENT UNDER SEIGE* 20 (1981) (broadcasters have complained that these rules are costly and violate first amendment rights); see also Bollier, *The Strange Politics of 'Fairness'*, CHANNELS, at 46-52 (Jan.-Feb. 1986) (sensing time is right for broadcasters to be mounting constitutional challenge to fairness doctrine).

The Supreme Court has recently sent signals that it would reconsider the constitutionality of the fairness doctrine if the FCC could show that it limits rather than enhances free speech. See Weinberg, *Are the FCC and the Supreme Court Changing Signals on the Fairness Doctrine*, 3 COMM. LAW. at 7 (Summer 1985) (citing *FCC v. League of Women Voters*, 468 U.S. 364, 379 n.12 (1984)). Notwithstanding the constitutional question, the D.C. Circuit has recently said that the FCC has the power to repeal the doctrine on public interest grounds. See *Appeals Court to FCC on Fairness Doctrine: If You Don't Like It, Don't Enforce It*, BROADCASTING at 58 (Oct. 6, 1986).

¹⁴ See Report and Order, 53 Rad. Reg. 2d (P & F) 1309, 1322 (1983). Relying on Commission Policy in Enforcing Section 312(a)(7) of the Communications Act of 1934, 68 F.C.C.2d 1079, 1083 (1978), the FCC suggested that, by providing a candidate access to the broad television audience attracted to the station's regular broadcast operation, a licensee satisfied its section 312(a)(7) duties even if the broadcaster contemporaneously denied access to the more limited audience viewing the "ancillary or subsidiary" teletext service. See 53 Rad. Reg. 2d (P & F) at 1322-23.

The Commission found the equal opportunity rule of section 315 wholly inapposite to teletext. Noting that a broadcast "use" triggered section 315's substantive obligations, that a "use" required "a personal appearance by a legally qualified candidate by voice or picture," and that the textual and graphics nature of teletext made it "inherently not a medium by which a candidate [could] make a personal appearance," the Commission held that teletext could not trigger the requirements of section 315. See 53 Rad. Reg. 2d (P & F) at 1323; see also *supra* note 12 (statutory provisions of section 315).

¹⁵ *TRAC*, 801 F.2d at 505. Telecommunications Research and Action Center (formerly the National Citizens Committee for Broadcasting) and Media Access Project, the petitioners, are two public interest groups who act as "watchdogs" of the FCC. See Schwartzman, *The Fairness Doctrine Inquiry—Let's Leave This Job to Congress*, 3 COMM. LAW. at 3 (Summer 1985). The two groups had submitted comments in the Notice of Proposed Rulemaking, 46 Fed. Reg. 60,851 (1981), objecting to any change in the application of the political broadcast rules. See Brief for Petitioners at 9.

¹⁶ See *TRAC*, 801 F.2d at 505-06 (citing 101 F.C.C.2d at 833); see also 101 F.C.C. 2d at 834 & n.16. The Commission found that "neither the letter nor the purposes of the First Amendment would be served by . . . a ruling . . . [requiring the FCC] to intrude into the

Court of Appeals for the District of Columbia affirmed the FCC's decision with regard to the reasonable access rule and the fairness doctrine, but reversed and remanded its decision with respect to the equal opportunity rule.¹⁷

Writing for the court, Circuit Judge Bork undertook an analysis of the Supreme Court's spectrum scarcity doctrine,¹⁸ and suggested that "[e]mploying the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results."¹⁹ The majority acknowledged the possibility that the Supreme Court would one day reevaluate the doctrine, but stated that until it did, neither the circuit court of appeals nor the FCC were empowered "to seek new rationales to remedy the inadequacy of the doctrine in this area."²⁰ The court concluded, therefore, that it was bound by precedent to apply the scarcity doctrine to teletext and thus could not, on first amendment grounds, refuse to apply the content regulations provided for in the Communications Act.²¹

editorial judgments of teletext writers." *Id.*

¹⁷ See *TRAC*, 801 F.2d at 502-03.

¹⁸ See *id.* at 506-09. The court challenged the scarcity rationale stating, "[a]ll economic goods are scarce, not least the newsprint, ink, delivery trucks . . . and other resources that go into the production . . . of print journalism. . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another." *Id.* at 508; see also Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959) (price mechanism should determine access to scarce resources).

One commentator has rejected the scarcity doctrine developed in *Red Lion* as "economic nonsense." See R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 634 (1986). Posner notes that while each frequency may be used by only one party within a particular area, different frequencies constitute perfect substitutes for one another. See *id.* Some markets have a dozen television stations, not including cable and satellite stations. *Id.* Posner notes that invariably, the number of broadcast media stations exceeds the number of newspapers in a given market. See *id.* But see Comment, *A "Better" Marketplace Approach to Broadcast Regulations*, 36 FED. COMM. L.J. 27, 36 (1984) (marketplace approach does not take into account certain societally desirable commodities).

It is submitted, however, that economic analysis fails to account for the fact that newsprint and other products that go into producing print media are economic goods available on the free market, while the airwaves are subject to a licensing system. Government licensing requirements contribute to the scarcity of the airwaves. It may be presumed, however, that these licensing requirements are enforced with an eye towards the betterment of the public interest, despite the resultant scarcity. See W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 76 (1984); but see Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 150-54 (1967) (justifying regulation because of government licensing constitutes a circular argument).

¹⁹ *TRAC*, 801 F.2d at 508.

²⁰ *Id.* at 509.

²¹ See *id.*

With its scope of review thus limited, the court confined its analysis to whether the Communications Act permitted the FCC to choose not to apply content regulations to teletext.²² The court held that section 312(a)(7) of the Act,²³ allowing candidates for federal elective office reasonable access to broadcasting stations, did not prohibit the FCC from adopting rules of reasonableness which would exempt minor portions of a station's operations from the requirements of the section.²⁴ The court similarly held that the FCC was not bound to apply the fairness doctrine to teletext, ruling that the doctrine is not a "binding statutory obligation" on the FCC, but a policy created by the FCC and subject to application pursuant to its discretion.²⁵ The court disagreed, however, with the FCC determination that section 315 of the Act,²⁶ which provides for equal broadcast opportunity for all political candidates, did not require application to teletext, holding that the FCC's construction of the statute was "plainly at odds with the language and intent of the statute."²⁷

²² See *id.* at 509-19. The court noted that the FCC's "construction of the statute[s] is entitled to judicial deference unless there are compelling reasons [to conclude] that it is wrong." *Id.* at 514 (citing *Columbia Broadcasting System v. FCC*, 453 U.S. 367, 390 (1981) and quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

²³ 47 U.S.C. § 312(a)(7) (1982); see *supra* note 11.

²⁴ See *TRAC*, 801 F.2d at 512. Petitioners contended that the reasonable access rule prohibits "blanket bans on candidate advertising and require[s] broadcasters to accommodate the reasonable needs of candidates." *Id.* at 510 (quoting Brief for TRAC/MAP at 49). However, the court concluded that the "Commission's policy of proscribing 'blanket rules' . . . meant only that broadcasters could not adopt policies that would effectively nullify . . . access to federal candidates." *Id.* at 511. This did not mean that the Commission could not determine that excluding a minor portion of a station's operations (such as teletext) from the reasonable access rule was appropriate. *Id.* at 511-12.

The court found that the propriety of the FCC's approach was also supported by the Commission's treatment of subscription television ("STV") under section 312(a)(7) in its 1978 Policy Statement, 68 F.C.C.2d 1079, 1093. See *TRAC*, 801 F.2d at 512. "In that decision, the Commission accepted the argument that an STV station should not have to provide access for political broadcasting during prime time hours. . . ." *Id.* The exemption of the subscription service was justified because of the limited nature of the transmission vehicle and the limited nongeneral interest nature of the service to be provided. See 68 F.C.C.2d at 1093-94. The FCC Teletext ruling relies on the limited nature of the transmission vehicle alone as sufficient justification for its exemption. See Hammond, *To Be or Not to Be: FCC Regulation of Video Subscription Technologies*, 35 CATH. U.L. REV. 737, 749-50 (1986).

²⁵ See *TRAC*, 801 F.2d at 517-18; see also *supra* note 13.

²⁶ 47 U.S.C. § 315 (1982); see *supra* note 12.

²⁷ See *TRAC*, 801 F.2d at 515. The court stated: "We believe that the agency erred in concluding that teletext does not constitute 'traditional broadcast services' within the contemplation of the statute and that teletext is incapable of a 'use' as that statutory term has evolved." *Id.* at 514; see also *supra* note 12 (text of section 315 of the Act).

In a separate opinion, Judge MacKinnon agreed with the majority that the court was bound to apply the scarcity doctrine, and that the equal opportunity rule was necessarily applicable to teletext.²⁸ Judge MacKinnon disagreed, however, with the court's holding that the FCC, in its discretion, may choose not to apply the reasonable access rule and the fairness doctrine to teletext.²⁹

The *TRAC* court, deciding that it was bound by constitutional precedent, nevertheless applied content regulation to teletext only in the context of the equal opportunity rule.³⁰ It is suggested that the court's dissatisfaction with the scarcity doctrine led it to decide the *TRAC* case on questionable statutory grounds. This Comment will examine the differing first amendment treatment of the broadcast and print media with a view toward application to teletext. In addition, it will be asserted that despite the fact that the *TRAC* court did not consider distinguishing teletext from traditional broadcast media for first amendment purposes, it achieved virtually the same result by misapplying content regulation to teletext. Finally, a constitutional approach for teletext will be suggested which is designed to promote first amendment goals while accommodating the statutory obligations of the Communications Act.

FIRST AMENDMENT DISTINCTIONS BETWEEN BROADCAST AND PRINT MEDIA

While the Supreme Court permits reasonable content regulation of broadcast media, it allows print publishers to be virtually unencumbered by such regulation.³¹ The fundamental rationale for this distinction was enunciated in *Red Lion Broadcasting Co. v. FCC*,³² where the Supreme Court determined that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be

²⁸ See *TRAC*, 801 F.2d at 519 (MacKinnon, J., concurring in part, dissenting in part).

²⁹ See *id.* at 519.

³⁰ See *id.* at 516.

³¹ Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (content regulation of broadcast media permitted) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (content regulation of newspaper proscribed); see *supra* notes 2 and 3. The various broadcast media have been examined to determine the first amendment protection appropriate to each. See, e.g., *Columbia Broadcasting System v. FCC*, 453 U.S. 367 (1981) (television); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943) (radio); *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (cable television).

³² 395 U.S. 367 (1969).

expressed on this unique medium.”³³ Thus, broadcasters may be subject to content regulation based on the principle that the first amendment permits the grant of an exclusive use of broadcast airwaves, a limited resource, conditioned on the fulfillment of certain public policy objectives.³⁴ In contrast, the Court in *Miami Herald Publishing Co. v. Tornillo*³⁵ struck down content regulation when applied to print media as violative of the first amendment.³⁶ The Court noted that, “[i]t has yet to be demonstrated how governmental regulation of this crucial [editorial] process can be exercised consistent with First Amendment guarantees of a free press.”³⁷

The *Red Lion* Court reconciled its holding with first amendment guarantees by asserting that regulation of the broadcast media is necessary to achieve the public dissemination of a diversity of ideas.³⁸ Commentators, however, have discredited this rationale, countering that the first amendment rejects content regulation as a means of achieving diversity, and instead advocate reliance on the

³³ *Id.* at 390; see W. VAN ALSTYNE, *supra* note 18, at 80. The division of the airwaves so that they may be used intelligibly constitutes necessary government regulation but such regulation is neither expedient nor appropriate to protect the intelligibility of speech in newspapers. *Id.* But see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1222, at 697 (1978) (describing dangers of government control of media).

Professor Tribe has suggested that problems arise when government is given the power to assure media access. *Id.* First, there is a danger of deterring those items of coverage that will require the media to afford access at its own expense. *Id.* Second, there is the danger of government bureaucrats exercising pressure to manipulate the media into acquiescence. *Id.* Finally, it is possible that access regulation could be increased into areas of more dubious government control. *Id.*

³⁴ See *Red Lion*, 395 U.S. at 389. “A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.” Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.).

³⁵ 418 U.S. 241 (1974).

³⁶ See *id.* at 256. The print media has been characterized as a “rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets.” *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Therefore, government regulation relates only as to matters such as libel, slander, or obscenity and even then there exists considerable first amendment freedom so as to ensure breathing space for uninhibited, robust, and wide-open debate. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³⁷ *Tornillo*, 418 U.S. at 258.

³⁸ See *Red Lion*, 395 U.S. at 390; see, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 375 (1984) (government has interest in preserving diversity of ideas through regulation of broadcast media); *Columbia Broadcasting Sys., Inc. v. FCC*, 453 U.S. 367, 395 (1981) (government must preserve marketplace of ideas).

marketplace and structural regulation to ensure variety in the media.³⁹ It is submitted that, while stating that it reluctantly followed the scarcity doctrine, the *TRAC* court misconstrued the reasonable access rule and fairness doctrine to reach the same result it would have were it not limited by the *Red Lion* precedent.

TRAC COURT'S APPLICATION OF CONTENT REGULATION TO TELETEXT

In *TRAC*, the court conceded the validity of the scarcity doctrine as applied to teletext, thus requiring it to apply certain content regulations provided for in the Communications Act.⁴⁰ Notwithstanding this concession, the court refused to apply the reasonable access rule and the fairness doctrine to this new technology.⁴¹ It is submitted, however, that the court's subsequent finding, that teletext is a "use" within the meaning of the Act for the purpose of determining the applicability of the equal opportunity rule, creates a substantial issue as to whether the reasonable access rule should not be similarly applicable. When Congress amended the Communications Act to require that broadcasting stations give candidates for federal elective office reasonable access to their stations, it also stipulated that the term "broadcasting station" has the same meaning as in section 315 of the Act.⁴² This cross reference would apparently make some form of the reasona-

³⁹ See Bazelon, *supra* note 2, at 223-29; Mueller, *Reforming Telecommunications Regulation*, in *TELECOMMUNICATIONS IN CRISIS* 57, 65-73. Mueller asserts that the primary factor creating scarcity is not technology or the "finite" limits of the spectrum, but the government's system of allocation. See Mueller, *supra*, at 68-69. Additionally, the absence of property rights in spectrum space eliminates many of the incentives to either expand the channels or make more efficient use of the existing channels. See *id.* Mueller concludes that there is no justification for distinguishing broadcast from print media based on a "scarcity" rationale, especially now that newspapers are relying on telecommunications to an increasing degree. See *id.* at 72.

⁴⁰ See *TRAC*, 801 F.2d at 509. In construing the statutes, the court elected to follow the judicial tradition of adopting a reading that would avoid rather than implicate constitutional questions. See *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 509 (1979). It is submitted, however, that tradition notwithstanding, this approach was inappropriate. Had the *TRAC* court decided the constitutional issue, it would have avoided misconstruing the statutes while providing teletext with the desired freedom necessary under the first amendment.

⁴¹ See *supra* notes 24 and 25.

⁴² See Pub. L. No. 92-225, 86 Stat. 3 (1972) (adding 47 U.S.C. § 312(a)(7)). The provision was originally designated "§ 315(f)," but was recodified without change as "§ 315(c)." *Id.*

ble access rule applicable to teletext.⁴³ It is submitted, therefore, that the *TRAC* court's conclusory agreement with the FCC that the exclusion of the reasonable access provision is "a rule of per se reasonableness as to a minor portion of the station's operations" is an inappropriate "blanket" exemption concerning an issue that should instead be handled on a case by case basis by the FCC.⁴⁴

Turning to the fairness doctrine, the majority held that it is not a "binding statutory obligation" under the Act; therefore, the FCC is not precluded from altering the fairness obligation on teletext services.⁴⁵ Whether the fairness doctrine is a statutory obligation or a Commission policy centers around a 1959 amendment to section 315 of the Act, which the majority construed as merely ratifying the Commission's policy authorizing the fairness doctrine.⁴⁶ The majority interpreted the language in section 315(a), "under the Act," to mean that the fairness doctrine was promul-

⁴³ Cf. *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1200 (D.C. Cir. 1984) (Direct Broadcast Systems subject to political broadcast provisions). Noting that the FCC's discretion is not boundless, the court stated that the Commission has no authority to experiment with its statutory obligations. *See id.*

⁴⁴ It is submitted that the court erred in accepting the FCC's treatment of teletext as an ancillary service because it will be carried with the broadcast signal as an offering to the general public. Commission precedent has generally relied on "audience potential" to determine whether to exempt a particular service as ancillary. A service offered to the general public, such as teletext, has the same audience potential as regular broadcast television. *See Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1090-91 (1978); Swillinger, *supra* note 13, at 93. *See generally* Note, *Teletext and the FCC: Turning the Content Regulatory Clock Backwards*, 64 B.U.L. REV. 1059 (1984) [hereinafter Note, *Teletext and the FCC*] (FCC misconstrued content regulation); Note, *The Future of Teletext: Legal Implications of the FCC Deregulation of Electronic Publishing*, 70 IOWA L. REV. 709 (1985) (FCC acted beyond scope of authority in exempting teletext from content regulation).

The *TRAC* court framed the scope of its review very narrowly, stating that "[t]he question here is the rationality of the Commission's decision about the applicability of the [reasonable access] provision to teletext." *TRAC*, 801 F.2d at 510. This was unlike their finding that the agency's construction of the equal opportunity rule was "plainly at odds with the language and intent of the statute," with the court concluding that the FCC's construction violated the statute on its face. *Id.* at 515. Having cleared the statutory hurdle in the first instance, reversal of the FCC decision could only take place if it was found to be arbitrary and capricious. *See National Ass'n of Broadcasters*, 740 F.2d at 1207. Thus, even if the court disagrees with the agency's wisdom, it must uphold the decision if rational. *Id.* at 1197. Even so, one is reminded of the concurring opinion of Commissioner Jones in the Teletext Order, "there is to my mind a basic inconsistency between the justifications given for permitting broadcasting licensees to . . . provide teletext while at the same time exempting teletext from broadcasting regulation. This sounds to me like having one's cake and eating it too." 53 Rad. Reg. 2d (P & F) at 1333.

⁴⁵ *See TRAC*, 801 F.2d at 516-19.

⁴⁶ *See id.* at 517.

gated pursuant to authority conferred to the FCC.⁴⁷ This interpretation, it is submitted, contradicts the legislative history of section 315 and is irreconcilable with construction of that provision by the Supreme Court.⁴⁸

AN ALTERNATIVE APPROACH FOR TELETEXT

The failure of the *TRAC* court to treat teletext as a discrete, unique medium forced the majority to confine itself to the broadcast regulatory model and, it is submitted, resulted in a decision which suffers from strained reasoning and artificial results.⁴⁹ The court concluded that since teletext uses broadcast frequencies, the scarcity doctrine must apply, ignoring the fact that cable and telephone systems are alternative transmission methods available to electronic publishing.⁵⁰ Thus, it is suggested, that the limited broadcast spectrum rationale of *Red Lion*, with its concern for diversity, is distinguishable when applied to teletext.⁵¹ Indeed, it is submitted that regulating teletext when using broadcast frequencies but not when transmitted by other methods will result in unequal application of the law.

Moreover, teletext, a system that delivers textual and graphic information, is essentially a print medium, and regardless of the particular mode of transmission, the text presented remains the

⁴⁷ See *id.* at 518.

⁴⁸ See *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *reh'g denied*, 806 F.2d 1115, 1116 (Mikva, J., dissenting). Five of the nine judges participating would have granted rehearing, but two of the circuit's eleven judges did not vote, and the court rules require a majority (or six) of the active judges to grant rehearing. See *Fairness Doctrine Another Step Closer to Supreme Court*, BROADCASTING, at 39 (Dec. 22, 1986). The deep split within the court was reflected in Judge Mikva's dissent, declaring that the panel's conclusion was "flatly wrong" and asserting that Congress in 1959 clearly intended to incorporate the fairness doctrine into the law. See *id.* In addition, for the past several years Congress has adopted resolutions attached to appropriations legislation making clear it opposes Commission action modifying the doctrine. See *id.*

⁴⁹ Cf. *Quincy Cable T.V., Inc. v. FCC*, 768 F.2d 1434, 1448 (D.C. Cir. 1985) (cable television warrants first amendment standard of review distinct from broadcasters). In *Quincy Cable*, the court noted that, "once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media is compelling." *Id.* at 1450.

⁵⁰ See NEUSTADT, *supra* note 5, at 10-14.

⁵¹ See, e.g., Watts, *A Major Issue of the 1980's: New Communication Tools*, in *THE FIRST AMENDMENT RECONSIDERED* 181, 183 (1982) (existence of old and new media in tandem will erode further any meaningful differences between them); see also Neustadt, Skall & Hammer, *supra* note 8 at 345-58 (new electronic media pose fundamental questions for communications policy).

same.⁵² Thus, given the multiple transmission vehicles available for teletext and its clear resemblance to print, it is submitted that the *Tornillo* print model is the best suited means of teletext regulation. It is not enough to say that teletext must be regulated because it uses broadcast frequencies. Rather, the proper analysis is whether the restriction is narrowly tailored to further a substantial government interest.⁵³ In the case of the written word, like teletext, the sound tradition is that diversity of expression is best left to editorial discretion, rather than government regulators.⁵⁴

It is submitted that regulation which is imposed solely because of the transmission medium produces constitutionally suspect results. Content regulation may be appropriate for traditional broadcasting, so long as spectrum scarcity exists, since such broadcasting poses its own unique and special problems.⁵⁵ However, as regards electronic publishing, there are less chilling methods of regulation available, which would structurally achieve diversity, while not impinging on first amendment goals.⁵⁶

CONCLUSION

The Supreme Court has upheld the constitutionality of content regulation by walking a "tightrope" of interests, tipping the balance in favor of those who seek access to the airwaves. In *TRAC*, the court of appeals confined itself to the broadcast regulatory model, and thereby placed artificial constraints upon its reasoning, resulting in a decision of dubious merit. It is submitted that the expanding field of electronic publishing forces a rethinking of first amendment methodology and suggests that an environ-

⁵² See NEUSTADT, *supra* note 5, at 8-10.

⁵³ See *FCC v. League of Women Voters*, 468 U.S. 364, 369 (1984). Deciding whether a restriction is narrowly tailored to further substantial government interests "requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case." *Id.* at 381.

⁵⁴ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *supra* note 3.

⁵⁵ See *supra* note 4. It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas rather than to accept monopolization of that market, whether it be by the government or by a private interest. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Network broadcasting, with its broad appeal and limited access, still appears to fit the definition of scarcity, thus justifying content regulation. See Note, *Teletext and the FCC*, *supra* note 44, at 1068 n.66 (more people want to broadcast than there are channels available).

⁵⁶ See NEUSTADT, *supra* note 5, at 45-48.

ment free from government regulation would be the more prudent approach.

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