

Revisiting Red Lion By Way of O'Brien

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Abstract

There are currently two bills in Congressional committees that would bring back a form of the Fairness Doctrine. Two previous attempts at resurrecting the Doctrine received strong bipartisan support only to fall to a Presidential veto (Reagan) and threat of a veto (the first George Bush).

Should the right mix of Congressional will and Presidential willingness occur and the Fairness Doctrine reemerges, there will no doubt be a test of whether Red Lion is still constitutional given the current status of the broadcast industry. This study uses the criteria put forth in *U.S. v. O'Brien* to analyze whether the Doctrine would still serve a substantial state interest and whether it would lead to an impermissible infringement of broadcaster's First Amendment rights. The answers to these questions lie largely in the choice of definitions of various terms that the FCC and Supreme Court might utilize.

These decisions include which definition of marketplace, which definition of scarcity and what level of First Amendment scrutiny will be applied to the broadcast industry. This study will analyze the choices within the context of the current telecommunications industry and the intended audience.

The original rationale for the FCC's vote to terminate the Fairness Doctrine will be analyzed. Included in that discussion will be analysis of whether the Commission illegally changed the definition of scarcity from its use in *Red Lion* to a different standard in the 80's. Evidence will be presented that an arbitrary change in definition used to justify a change in policy is contrary to federal law and Supreme Court holdings.

REVISITING RED LION BY WAY OF O'BRIEN

By way of an unceremonious oral vote, the Federal Communications Commission declared the Fairness Doctrine nullified. With this vote, the device designed to allow the general public access to broadcast television and radio had been taken away. FCC general counsel Diane Killory stated that the Doctrine no longer served the public interest and, given the current status of the broadcasting industry, was unconstitutional.¹

¹ The author would like to thank the two anonymous reviewers and to Elisa Altomore.

Since then, there have been at least four attempts to resurrect the Fairness Doctrine,² including two current bills which, at this writing, are mired in various conferences.^{3,4} Should these bills come to a vote, the question of the constitutionality of the Fairness Doctrine will certainly be reexamined.

To find the Fairness Doctrine unconstitutional, the Supreme Court would have to reverse its decision on *Red Lion*, a cornerstone of broadcast regulation. It has been questioned whether the current status of broadcasting has changed so radically since *Red Lion* that a major revision of judicial views on the industry is justified. The rationale given by the FCC that led to the end of the Fairness Doctrine is due greater analysis.

While there have been many arguments in the last two decades discussing the value and need of the Fairness Doctrine, few have specified the criteria by which the judgment should be based. This study will use the criteria set forth in the 1967 case *U.S. v. O'Brien*⁵ a case cited 611 times by federal courts in deciding the constitutionality of an alleged infringement of the First Amendment.⁶ The *O'Brien* criteria demand analysis of whether the need for the Doctrine exists and whether the Doctrine would still fulfill its mandate. Within that, will be a discussion of whether the criteria used by the FCC to overturn the doctrine were, in fact, improperly redefined to facilitate the justification of their arguments. U.S. law suggests that arbitrary redefinition of terms used to justify decisions might render the decisions invalid. Within the broader discussion, this study will investigate whether such an arbitrary redefinition occurred.

In *O'Brien*, Justice Warren Burger stated, “a government regulation is sufficiently justified if: (numbers added)

1. it is within the constitutional power of the government..
2. it furthers an important or substantial government interest..
3. the government interest is unrelated to the suppression of free expression and..
4. the incidental restriction of alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.”⁷

O'Brien is the standard used for intermediate level First Amendment scrutiny. This is the level of scrutiny that the Supreme Court has applied when considering issues such as ownership levels on cable television. The strict scrutiny analysis level would require a determination that proposed rules are “the least restrictive means available of achieving a compelling state interest.”⁸

Comparatively, the FCC applied the least challenging standard, the “rational basis standard” to broadcast ownership rules.⁹ This rational basis standard forces regulators to merely prove that the prospective rules are a “reasonable means of promoting the public interest in diversified mass communications.”¹⁰ Though the broadcast industry is given the most minimal level of First Amendment scrutiny in certain matters, the more restrictive intermediate level of First Amendment analysis will be utilized in this study.

Though the O’Brien case predates *Red Lion*, the intermediate level of scrutiny was not available as a standard in the sixties. Bhagwat¹¹ suggests that the rational basis and strict scrutiny levels of analysis were the only options until a series of Supreme Court decisions coalesced to become a distinct standard to judge whether a statute unduly restricted First Amendment freedom. The intermediate level of scrutiny became an identifiable option in the early to mid eighties.

While the strict level of scrutiny is usually the standard for laws restricting speech in a public forum or speech that is content-specific or viewpoint-specific, the intermediate level of scrutiny is appropriate when the provisions of the injunction or ordinance are content-neutral.¹²

Yoo notes that the *Tornillo* case was decided on a standard that was based on “an almost prohibitive degree of protection against governmental interference.”¹³ Broadcasters have traditionally been accorded less protection from government regulation due to its pervasive nature, especially when dealing with indecent speech¹⁴ and in matters of access for the public due to spectrum scarcity.¹⁵

Tornillo differs in other ways from *Red Lion*. The Supreme Court in the case noted that the Florida statute that compelled the newspaper to allow responses actually, “exact[s] a penalty on the basis of the content of a newspaper.” That penalty included the cost of print and the use of column inches for material the newspaper did not wish to print. Further, failure of the newspaper to allow access was a misdemeanor under the statute.¹⁶ The perceived punitive nature of the ordinances considered in *Tornillo* and the medium involved seem to justify different levels of First Amendment scrutiny than those utilized for the broadcast industry.

The first of the criteria of O’Brien necessary to show that the Doctrine does not cause excessive infringement of the First Amendment was decided in the affirmative in 1943. In *NBC v. U.S.*,¹⁷ the Supreme Court concluded that the FCC can indeed regulate to guarantee efficient

use of the limited spectrum. Efficient use of the spectrum is such that effectively serves the public interest, convenience and necessity.

The courts have stated that while public interest is a vague criterion, it is as concise as can be used. FCC Commissioner Gloria Tristani articulated a strong defense for the public interest standard, stating:

Our system of broadcasting—relying on private parties acting under an obligation to serve the public interest—is the finest broadcasting system in the world. But the point here is that broadcast licenses are government benefits conferred on certain citizens and not others. It's preferential treatment. It's as if the government set up a megaphone in the park for the exclusive use of certain citizens, and then stationed a policeman next to the podium to ensure that none of the non-speakers was allowed to interfere with the selected group's exclusivity.¹⁸

Thus, if the Fairness Doctrine would allow the megaphone to be shared among non-licensed speakers, it would work toward fulfilling the public interest. The FCC does indeed have the authority to initiate and reinforce rules that serve the public interest. Of course, should the Commission conclude that the Fairness Doctrine does not serve the public interest, they may nullify the rule.

The second criterion involves whether such regulation furthers a substantial government interest. Serving the public interest is well established as being a worthy goal. A definition of the public interest is a more elusive goal.

Krugman and Reid¹⁹ sought to ascertain a working definition of public interest by interviewing four of the seven FCC commissioners and 17 other assistants to the commissioners. The interviews yielded five constructs: balancing of the needs of the various interest groups, heterogeneity of viewpoints represented, localism, diversity and dynamism as related to ever-changing technology, society and the economy.

To fulfill the public interest, the Fairness Doctrine should fulfill some, if not all, of the elements as defined by the authors. Indeed the courts have previously affirmed the importance of heterogeneity of viewpoints. In *Great Lakes Broadcasting*²⁰ the FRC stated that, "(The) public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies... to all discussions of issues of public importance."

Judge Learned Hand reaffirmed the importance of diversity of viewpoint in the 1945 *Associated Press v. U.S.* case, when he stated, "...it is only by cross-lights from varying directions that full illumination can be secured."²¹ Hand acknowledged, and the Supreme Court ultimately concurred with a theory put forth by Zechariah Chafee.²² This theory suggested that the First Amendment rights of the media are based on a 'public service principle' that would promote diversity of viewpoint and access for all to information.²³

Providing those "cross-lights" by way of the broadcast medium is acknowledged as a unique challenge. In 1943, the courts found that, "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike 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."²⁴

Thus, the Supreme Court acknowledged that scarcity exists in the broadcast medium. Scarcity was subsequently defined by the FCC in its 1974 report on the Doctrine, as, "not predicated upon a comparison between the number of broadcast stations and the number of daily newspapers in a given market. The true measure of scarcity is in terms of the number of persons who wish to broadcast and, in Justice White's language, there are still, 'substantially more individuals who want to broadcast than there are frequencies to allocate.'²⁵

Thus, scarcity is not defined by the sheer number of available media outlets, but by the question of whether there is an outlet for all those who wish to speak. *Red Lion* makes numerous references to the number of speakers wishing access to the broadcast medium. Spectrum scarcity is thus defined by the FCC and subsequently the Supreme Court as a situation in which some that wish to speak via the airwaves are denied the ability to do so. As stated in *Red Lion*, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."²⁶ Priority is given to the ability of a community's speakers to speak, not of broadcasters to broadcast.

For the second criterion of O'Brien to continue to be satisfied, the presence of a scarcity rationale must remain. Yet, the definition of scarcity has been changed by the FCC over the years. The appropriateness, if not legality, of such a change must be analyzed to sustain the FCC's elimination of the Doctrine.

It is argued that new technologies increase the number of potential outlets for speech. FCC Counsel Diane Killory, in announcing the decision to snuff out the Fairness Doctrine,

stated, “The FCC report found that there were now a multiplicity of broadcast voices available to the public... It therefore found the scarcity rationale no longer valid.”²⁷

The FCC’s Notice of Inquiry announcing a study as to the continuing validity of the Doctrine states, “Although it is quite clear that a technological scarcity still exists in our society that precludes the right of every individual to broadcast... the enormous increase in sources of information suggests that there may no longer be a scarcity of voices and views available to the public to justify the abridgement of broadcast expression.”²⁸ This view was restated in the final version of the 1974 Fairness Report.²⁹

In effect, the basis for a finding of the existence of scarcity had changed from the days of Red Lion to the days of the Fairness Report. The statement in the NOI suggests the transition in the scarcity definition. The definition of scarcity had changed from the question of facilitating the ability of all voices to be heard to an analysis of the sheer number of outlets available. Scarcity, as currently defined, no longer exists if a significant number of voices are available to the public somewhere within the broadcast media or via alternative technologies.

While the former definition of scarcity was utilized to justify the Doctrine, a different definition of scarcity was utilized to justify its elimination. The existence of the Doctrine seems to rest on which definition of scarcity is used.

In 1985, the continued value of the Doctrine was clearly questioned when the FCC stated, “In light of the explosive growth in the number and types of information sources, the Commission found that the fairness doctrine is not needed to assure that the public has access to the marketplace of ideas. As a consequence, the Commission concluded that the fairness doctrine as a matter of policy disserves the public interest.”³⁰

That same report offers in note 35 that, “The prevailing rationale for broadcast regulation based upon spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete.”³¹

In its adjudication ruling in Syracuse Peace Council, the FCC stated that indeed, “the... Commission determined that there is no longer scarcity in the number of broadcast media outlets available to the public that could justify a difference in treatment between the printed and electronic press. In fact, the Commission noted that the number of broadcast outlets is far in

excess of the number of daily newspapers.”³² (Recall that in the 1974 Fairness Report, the FCC concluded that a finding of scarcity is, “not predicated upon a comparison between the number of broadcast stations and the number of daily newspapers in a given market.”)

Such a conclusion from the FCC was not surprising, according to Conrad who noted in the Federal Communications Law Journal that, “Since 1981, the FCC, led by Reagan Administration appointees has adopted a laissez faire, ‘survival of the fittest’ strategy in order to promote business interests.”³³ A trend toward deregulation was well under way with a similar attitude taken toward the radio and television industries as a whole and the limitations of standards for children’s television.³⁴

Indeed, in 1990, FCC commissioner Furchgott-Roth suggested that deregulation be further extended stating that *all* broadcast content regulation should be stopped due to the lack of a justifiable scarcity rationale:

If rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past. As the Commission has long recognized, the facts underlying this justification are no longer true. Today, the video marketplace is rife with an abundance of programming, distributed by several types of content providers. A competitive radio marketplace is evolving as well, with dynamic new outlets for speech on the horizon. Because of these market transformations, the ability of the broadcast industry to corral content and control information flow has greatly diminished. In my judgment, as alternative sources of programming and distribution increase, broadcast content restrictions must be eliminated.³⁵

While the FCC may certainly rule that the Fairness Doctrine is no longer good policy, the ability of a government institution to change the definitions of terms to justify such decisions has been discussed in case law and regulation.

Indeed, in *Niemotko v. Maryland*,³⁶ the Supreme Court warns against arbitrary definitions used to justify First Amendment regulation, “Administrative controls over the right to speak must be based on appropriate standards... The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance, an action appears not arbitrary does not save the validity of the authority under which the action was taken.”³⁷

According to the 1988 Administrative Procedures Act³⁸ any agency action, finding or conclusion that is found to be arbitrary and capricious will be unlawful. This view is reaffirmed in *NCTA v. Brand X Internet Services*³⁹ which suggested that “Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious act under the Administrative Procedure Act.”⁴⁰ “Arbitrary and capricious” is defined in *Natural Resources v. U.S.* as the “absence of a rational connection between the facts found and the choices made.”⁴¹

While the FCC is given significant leeway in interpreting the status of the telecommunications industry, the courts may still analyze the reasoning of the Commission. The Supreme Court in *Morton v. Ruiz* stated that the weight given by the court to an administrative agency’s rulings will depend on the agency’s consistency with earlier and later pronouncements.⁴²

Does scarcity exist? Under the original definition it seems certain that not all that wish to speak may speak. Under the second definition, it is irrelevant if all can speak as long as there are a large number of outlets for speakers to utilize. The Commission has never shown a justification for their change in the definition of scarcity. A deregulatory trend, such as was occurring in the 1980’s, would not seem an adequate justification for a redefinition of a term so pivotal towards judging the necessity of a governmental policy.

Though the definition of scarcity had changed, one thing had not changed on the day that the doctrine was found to be no longer needed. Not all that wish to broadcast in 1987 were able to broadcast. Indeed, there was an increase of broadcasters and new media were being developed. However, sheer number of available outlets was not the accepted criterion for defining scarcity.

If the second criterion of O’Brien is to be satisfied, the original definition of scarcity must be accepted. The Commission has never explained the change in definition utilized to justify scrapping the Doctrine. If a court ruled such arbitrary redefinition occurred, then the whole rationale for losing the Fairness Doctrine might be overturned.

The Commission concluded in its 1989 Syracuse Peace Council decision that the Doctrine does not serve a substantial government interest.⁴³ Would the Doctrine serve a substantial government interest if the standard used was whether all that wish to speak had the opportunity?

Given the original definition of scarcity, there is reason to accept that the Fairness Doctrine would pass the second criterion of O'Brien.

FCC Commissioner Tristani suggests that the finding of scarcity being necessary to justify the Fairness Doctrine is a "red herring."⁴⁴ Tristani states that, "There are other grounds that I believe need to be explored. One idea rests with the public forum doctrine. The basic argument is that broadcasters have been given the exclusive use of a valuable piece of public property—spectrum—including billions of dollars worth of additional spectrum to convert to digital. Under this theory (public forum), the government would be permitted to impose certain restrictions on broadcasters as long as they are reasonable and viewpoint neutral."⁴⁵ This seems similar to the public service doctrine proposed by Chafee and accepted by the Supreme Court in *Associated Press*.⁴⁶

The third criterion asks if the government interest is unrelated to the suppression of free expression. This goes to the issue of whether the regulation is intended for the purpose of suppressing speech. As the FCC stated in its 1974 Fairness Report, "The principle function of the First Amendment has been to protect the free marketplace of ideas by precluding governmental intrusion."⁴⁷ The Doctrine was not perceived as much as governmental intrusion as an *affirmative approach* to stimulating the marketplace of ideas.

While the intent was for the Doctrine to be a positive force in promoting diversity of viewpoints, many have argued that a chilling effect was a consequence of the policy. Though a chilling effect has been named as an alleged result of the Fairness Doctrine it was clearly not the intent. Thus any such chilling effect would not seem relevant to consideration of the third criterion. However, a discussion of such an effect would certainly be involved in any challenge to the Doctrine.

Tedford defines a chilling effect as "a threat imposed upon some communicators by some laws, regulations or court actions that, because they are unclear, difficult to obey, or impose unusually strict punishments, have a chilling effect upon one's willingness to speak."⁴⁸

The FCC's 1985 Fairness Report gives many pages of examples of an alleged chilling effect. For example, the President and General Manager of Lebanon-Springfield Broadcasting Company stated at he was afraid to editorialize for fear of the expense of a Fairness Doctrine complaint.⁴⁹ The Station Manager of Cornhusker Television Corporation cancelled a series of public announcements regarding inflation so as not to have to present the other side of the issue,

as he might have to do.⁵⁰ If the Fairness Doctrine led to such timidity, then the demise of the Doctrine would presumably lead to an increase of editorializing.

David Spiceland's 1992 study found that of the 306 stations that responded to his survey, 77% opposed the Doctrine and 57.8% perceived a chilling effect. However, after the demise of the Doctrine, only 7.5% began editorializing while an almost equal percentage stopped editorializing. Those that stopped editorializing did not do so due to the repeal.⁵¹

While the amount of editorializing stayed essentially the same with or without the Doctrine, the amount of "opinion-oriented programming exploded over the ensuing six years" following the end of the Doctrine. By "opinion oriented programming" Cronauer refers to talk radio.⁵² Without the need to present both sides of an issue fairly, talk-radio did indeed see a significant boom. Dreher notes that these same mostly conservative talk show hosts "lobbied aggressively" against attempts to resurrect the Fairness Doctrine.⁵³ Rush Limbaugh sold his listeners on the idea that the resurrection of the Fairness Doctrine was primarily motivated at silencing the conservative critics who often hosted talk radio.⁵⁴

The third criterion essentially asks if the Fairness Doctrine "inhibits the presentation of controversial issues of public importance" as suggested by the 1985 Fairness Report.⁵⁵

The intent was not to inhibit. Evidence suggests that editorializing does not seem to depend on the presence or absence of the Doctrine. The Doctrine would not seem to preclude the continuance of talk-radio. As stated by Black Citizens for a Fair Media, in their response to alleged instances of a chilling effect noted in the 1985 Fairness Report, those that make editorial decisions for a station might confuse the dictates of the Fairness Doctrine with the dictates of Section 315 of the Communication Act which involved equal time requirements.⁵⁶ Such confusion would not be the fault of the Doctrine.

The Fairness Doctrine does support fair presentation of both sides of an issue. In *Turner Broadcasting v. FCC*, the Supreme Court stated, "promoting the widespread dissemination of information from a multiplicity of sources" is of the highest priority and is unrelated to the suppression of free speech.⁵⁷ Thus the intent of the Fairness Doctrine does not offend the third criterion as it is not related to the suppression of free speech..

While the Fairness Doctrine was never intended to suppress speech, the final criterion asks if the Doctrine's "incidental restriction of alleged First Amendment freedom is no greater than is essential to the furtherance of that effort."⁵⁸

Is the Fairness Doctrine the least obtrusive means by which to secure diversity of viewpoint? For example, would the marketplace provide the same diversity of viewpoint more efficiently and with less infringement upon the First Amendment than the Fairness Doctrine?

In its analysis of whether broadcast cross-ownership rules should be amended, the Commission states that viewpoint diversity is of great significance.⁵⁹ Indeed, the Commission acknowledges that media outlet owners “clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs.”⁶⁰ Even if the broadcasters exhibited “no apparent slant” in their news coverage, “media outlets possess significant potential power in our system of government. The commission believes sound public policy requires it to assume that power is being, or could be, exercised.”⁶¹

It has been argued that the media marketplace has changed since *Red Lion*. The argument is that there are so many outlets of speech that even if the owner exhibited such power to limit certain viewpoints that there would be a voice to counter the viewpoint of the broadcast owner. The increased multiplicity of voices in the marketplace would provide alternative voices.

The commission came to this conclusion in 1985 stating, “We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the doctrine unnecessarily restricts the journalistic freedom of broadcasters.”⁶²

In analyzing this argument, the “marketplace” needs to be defined. CBS proposed a definition of the marketplace which would involve “all reasonably interchangeable entertainment/information products and services that strive for a fraction of consumer time.” ABC added that electronic publishing and fixed microwave service should also be included. NAB suggested a definition that the “telecommunications marketplace... consists of all electronic media including radio and the new technologies.”⁶³

In 1984 FCC hearings, several parties suggested that a definition of the marketplace be limited to the television broadcast market. TRAC (The Telecommunications Research & Action Center) justified a more limiting definition by explaining that “television programming is a ‘free’ public good and not susceptible to substitution by other pay media.”⁶⁴ The definition offered by TRAC considers the fact that the diversity of viewpoints that may be theoretically offered by the new technologies should not be limited to those that can afford the additional costs of the alternative media. In *CBS v. DNC*, the courts specifically stated that access to the media should

not be limited to those with economic means to do so.⁶⁵ The National Telecommunications and Information Association (NTIA) labeled the schism between the technology have and have-nots as the “digital divide.”⁶⁶ The Benton Foundation has noted that the existence of this digital divide hampers economic and community development.⁶⁷

Thus, a less intrusive means of providing diversity of viewpoint—letting the marketplace provide—depends on the definition of the marketplace. If the marketplace is defined as including media other than broadcast, the question remains of whether the target audience that the government seeks to serve with its regulations includes those without the economic means to access alternate media. *Red Lion* states that the needs of the listener and viewer are paramount over the needs of the broadcaster. A definition of the viewer and listener would not seem to exclude those that lack the economic means to access the internet, cable, satellite television and radio or other media. Further, the original definition of scarcity asks if there is a microphone for all those that wish to speak. By this definition of scarcity, does the entirety of the viewer/listener population have access to the voices of all those that have the ability to speak? The Commission listed alternatives and modifications to the Fairness Doctrine in its 1985 report.⁶⁸ None of the ideas were tested as to their constitutionality or implemented. The Doctrine died.

Conclusion

In its summary of the 1985 report, the Commission questioned the continued constitutionality of the Fairness Doctrine. The report notes that a less exacting level of scrutiny was used in *Red Lion* and compares the levels of protection accorded print media in *Tornillo* with the levels of protection given broadcasters in *Red Lion*. The commission argued in its analysis on Fairness Doctrine obligations of licensees that, “...had the *Red Lion* court required of the Commission a showing of compelling state interest, as it required of the state of Florida in *Miami Herald*, it is doubtful that the fairness doctrine would have survived.”⁶⁹

Despite the doubts of the commission, there has been continued support of the Fairness Doctrine. In 1987, a bill to codify the Doctrine passed the House by a three to one margin and the Senate by a two to one margin. President Reagan’s veto killed that attempt. In 1991, hearings to bring back the doctrine proved fruitless due to a veto threat by the first President Bush.⁷⁰

In 2005, Representatives Louise Slaughter (D-NY) and Maurice Hinchey (D-NY) each proposed separate legislation that would bring back the Doctrine. As stated, both are currently mired in different committees.^{71, 72}

Repeated attempts at reinstating the Doctrine can only succeed if there is the right combination of congressional will and presidential willingness. Should the day come soon that the Fairness Doctrine is reconsidered by the courts, there will certainly be discussion of the increase in sheer number of media outlets. There will also be discussion of the concomitant increase in the concentration of media ownership. Another related issue, that is philosophical more than legal that must be considered, is that of the internet. If the internet is considered among the vast increase in media sources available to the public, then there must also be consideration of the potential schism between the technology haves and have-nots. Research confirms the existence of this schism. It is worth considering whether the Fairness Doctrine could serve to partially bridge the schism by facilitating access to a wide range of viewpoints on various issues for those without access to many of the new technologies.

A bottom line, no doubt, will be the level of First Amendment scrutiny that broadcasters should be held to. This study chose the more exacting criteria put forth in *U.S. v. O'Brien*. The commission believed, without actually testing their hypothesis, that the doctrine would fail the *O'Brien* standards. This study suggests that given the original definition of scarcity, the doctrine would indeed have survived *O'Brien*.

This study suggests that the FCC arbitrarily changed its operational definition of scarcity to meet its arguments. Should congress succeed in its attempts to resurrect the Doctrine, the results of the inevitable court challenge may well rest on the level of First Amendment scrutiny which is utilized as well as which definition of scarcity is brought to the argument.

Notes

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5. *United States v. O'Brien*, 395 U.S. 367 (S. Ct. 1968).
6. Lexis-Nexis shepherdizing (April 22, 2006).
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25. Federal Communications Commission. 1974 Fairness Report, 39 FR 26372 (1974): 26373.
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