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The Overly Active Corpse of *Red Lion*

By Thomas W. Hazlett,[*] Sarah Oh[**] and Drew Clark[***]

¶1 The logic of *Red Lion Broadcasting Co. v. FCC* (1969) has been widely acknowledged as fatally flawed for a generation. Yet, the verdict enjoys a rich and rewarding existence in the afterlife. In amicus briefs in *Fox Television Stations v. FCC* (2009), a case dealing with the government's ability to censor broadcast television, parties favoring greater federal control over mass media insisted that the Supreme Court leave precedent as is. "Questioning *Red Lion*, even in dicta, could upset all broadcast ownership limits, broadcast must-carry rights, spectrum build-out provisions, political content obligations, and the wide range of spectrum policy decisions," pleads one from Free Press. Conversely, advocates for free speech, including the American Civil Liberties Union, argued that *Red Lion* is ripe for reappraisal.

¶2 This Article seeks to demonstrate the constitutional imperative of the latter position. The *Red Lion* verdict, following *U.S. v. NBC* (1943), crafted two First Amendments: newspapers bask in warm, bright, sunshine, strongly protected from regulation; broadcast media lurk in the shadows of "public interest" licensing. Delivery paths delineated. Due to the "physical scarcity" of the radio signals transporting content to audiences, broadcast speech was subject to editorial controls. The scarcity the Court identified was not, after all, unique or physical, but economic and market-wide. Newspapers and radio stations all use inputs having opportunity costs.

¶3 The split regime is no longer just a curious historical artifact. Technological convergence has obliterated even misperceived lines of demarcation. The *New York Times* is a news*paper* but is delivered to readers via *electronic* data networks. If free speech rights tie to delivery path, then all media can be licensed and regulated in the Wireless Age. Yet, this has not yet obtained; indeed, the Court has held—notably in *Playboy* and *Reno*—that speech via computer networks ("spectrum in a tube") is protected via the strict scrutiny extended print media. Whatever the lines of *Red Lion*, the Court today means something quite different when looking at new media.

¶4 This is why interests desiring enhanced regulation of electronic speech zealously guard the corpse of *Red Lion*. The policy cannot be justified on a social cost-benefit

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calculus or via First Amendment jurisprudence, yet it lingers in the mist of "physical scarcity." Yet, as today's communications stream through the air, coaxial cables, copper twisted pairs, fiber optics, satellite beams, or bounce off cellular base stations, that cloud must lift for the First Amendment to assume its proper role in protecting free speech. It is time for *Red Lion* to rest in peace.

I. INTRODUCTION

> "When I die—if I die—I want to be buried in Louisiana, so I can stay active in politics."
>
> —Earl Long (1895-1960), Governor of Louisiana

¶5 *Red Lion Broadcasting Co. v. FCC*[1] authorized a bifurcated First Amendment. Because TV and radio broadcasters distributed their content using "physically scarce" airwaves, the government was empowered to license and regulate such organs of the press. This level of state control was, conversely, barred for newspapers, magazines, or book publishing—businesses using paper to communicate ideas. The Court had determined that the medium was indeed the First Amendment message.

¶6 Alas, the 1969 decision in *Red Lion* displays rampant confusion over economics[2] and radio technologies.[3] Its flawed reasoning has been widely acknowledged for a generation.[4] It has left a very messy jurisprudence covering content-based regulation of over-the-air broadcast speech.[5] Yet, almost as if enjoying a rich and rewarding existence in the afterlife, *Red Lion* not only continues to supply legal justification for ongoing regulation, but provides a path for the design of rules governing the digital future.[6]

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[1] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400–01 (1969) ("In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expressions of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.").

[2] R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959). Coase's article, debunking the flawed economic analysis of *NBC v. U.S.*, 319 U.S. 190 (1943) ("NBC"), made no impact on the *Red Lion* court, which premised its constitutional approval of content-based regulation in broadcasting on the same empty "physical scarcity" logic.

[3] Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997).

[4] *See* Laurence H. Tribe, Professor, Harvard Law School, Plenary Address: Freedom of Speech and Press in the 21st Century: New Technology Meets Old Constitutionalism at the Progress & Freedom Foundation, Aspen Summit, 14:45–18:04 (Aug. 20, 2007), *available at* http://www.tvworldwide.com/events/pff/070819/. Professor Tribe presents an articulate exposition of constitutional principles underlying this analysis, with a case study addressing risks of regulation on violent speech for the protection of children.

[5] David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 214 (1975); Bruce M. Owen, *Differing Media, Differing Treatment? Radio and Television*, *in* FREE BUT REGULATED: CONFLICTING TRADITIONS IN MEDIA LAW 35–51 (Daniel L. Brenner & William L. Rivers eds., 1982); ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1984); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING (1994).

[6] An important symposium convened on April 18, 2008 to discuss the purposes of *Red Lion* and its application to the digital media economy. The symposium agenda is available online, http://www.wcl.american.edu/secle/founders/2008/documents/01-RedLionSymposium-Agenda.pdf, with scholarly articles published as *Symposium: Does* Red Lion *Still Roar? Public Interest Media Regulation*

¶7 *Red Lion*'s continued influence is curious for multiple reasons. First, there is the dubious logic of *Red Lion*. Second, marketplace evolution is producing tumult in media business models. Whatever the Court thought it knew about communications technology in 1969 is self-evidently wrong today. As newspapers deliver content to readers via wireless connections, or broadcasters stream video to broadband subscribers via Internet connections, transmission paths—whose distinct qualities form the basis of *Red Lion*'s distinction between the two First Amendments—converge. The *print* versus *broadcast* demarcation is erased.

¶8 Third, this market evolution features a pronounced shift away from terrestrial broadcasting. In the world of 1943 to 1969, radio and then television broadcasters were perceived as powerful, perhaps dominant players in the media landscape. Today's media marketplace offers, however, quite a different picture.[7] Close to ninety percent of U.S. households subscribe to cable or satellite subscription services for the video transmissions, not local TV stations licensed by the Federal Communications Commission (FCC).[8] Radio stations are being similarly eclipsed by satellite, on the one side, and web-connected audio devices (MP3 players and cellphones, e.g.) on the other. Not only do the broadcast media appear to be just one set of rivals competing for audience share, they often use the *very same wireless* delivery systems employed by alternative media governed under *a different First Amendment*.

¶9 The lack of a proper burial for *Red Lion* is cause for alarm.[9] In amicus briefs for *Fox Television Stations v. FCC*,[10] a case where a broadcaster contested FCC fines for programs deemed "indecent," many advocacy groups insisted that the Court leave *Red Lion* undisturbed: "Questioning *Red Lion*, even in dicta, could upset all broadcast ownership limits, broadcast must-carry rights, spectrum build-out provisions, political content obligations, and the wide range of spectrum policy decisions."[11] On the opposing

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Forty Years After Red Lion Broad. Co. v. FCC, 60 ADMIN. L. REV. 767 (2008) [hereinafter Red Lion *Symposium*]. *See infra* Part II.B and accompanying text. "It is quite possible that what we should do now is nothing. It will be most intriguing to hear what the panelists have to say about ways of reviving *Red Lion's* admirable ends in a communications universe where *Red Lion's* means are most ill-suited." Cass Sunstein, *Keynote Address*, Red Lion *Symposium*, at 778. "One question is whether a great deal can be done privately, not publicly. Two little ideas with respect to private solutions might emerge spontaneously, or may be encouraged through purely moral suasion by the FCC." *Id*.

[7] Harry A. Jessell, *Hundt Comes Clean: Internet Trumps TV*, TVNEWSCHECK (Mar. 12, 2010), http://www.tvnewscheck.com/articles/2010/03/12/daily.4/ (describing former FCC Chairman Reed Hundt's remarks on the public interest in promoting the Internet over broadcast TV).

[8] Almost 87 percent of TV households, or 95.8 million TV households, subscribe to an MVPD service, consisting of 68.2 percent cable TV and 29.2 percent satellite (DBS) TV as of June 2006. *See* FCC, IN THE MATTER OF ANNUAL ASSESSMENT OF THE STATUS OF THE COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING: THIRTEENTH ANNUAL REPORT 5, MB Docket No. 06-189, FCC 07-206 (FCC Jan. 16, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.doc.

[9] Amici in the *FCC v. Fox Television Stations, Inc*. litigation emphasized the same danger posed by advocates suggesting expansion of content-based restrictions. *See, e.g*., Brief for Time Warner Inc. as Amicus Curiae Supporting Respondents at 6, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 3285395, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_RespondentAmCuTimeWarner.pdf.

[10] FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009), *remanded to* 613 F.3d 317, 334 (2d Cir. 2010) (vacating the FCC's order and indecency policy).

[11] Brief of Free Press, Consumer Federation of America, Consumers Union, New America Foundation, Participatory Culture Foundation, Cuwin Foundation, Ethos Group, Acorn Active Media Foundation, FreeNetworks.Org, Monroe Price, Susan Crawford as Amici Curiae Supporting Neither Party at 6, FCC v.

side, advocates for free speech rights, such as the Progress and Freedom Foundation,[12] former FCC members Newton Minow and Glen Robinson,[13] and the American Civil Liberties Union,[14] argued that the regulatory approach of *Red Lion* and the related *Pacifica* verdict are ripe for reappraisal.[15] This Article takes and develops the latter position. There are at least four important sets of reasons to reconsider *Red Lion's* legal rationale allowing licensing of the electronic press.

A. On the merits, it's bad law.

¶10 The Court misunderstood spectrum. Rights to use frequencies can be subdivided just as other rights and are no more "physically scarce" than paper, water, or diamonds. There is literally no limit to the number of "broadcast frequencies" given time sharing or frequency-splitting possibilities, e.g., or the creation of joint ownership interests in a

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Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 2415162, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_NeutralAmCu9OrgsPriceCrawford.pdf. The Amici Brief argued:

> I. Despite the FCC's Arguments Below, both Red Lion and Scarcity are Irrelevant to this Case; II. Revisiting Pacifica Would Affect A Limited Domain, Where Strict Scrutiny May Already Apply; III. Revisiting Red Lion Would Unpredictably Affect Numerous Foundational Laws Supporting Media Diversity and Democratic Content in Numerous Media; A. Red Lion Supports Structural Regulation for Universal Access to Diverse Information Sources; B. Red Lion Supports Political and Educational Content Ensuring an Informed Citizenry; C. Red Lion Supports Flexible and Dynamic Spectrum Policy to Further Citizen and Consumer Rights; D. Red Lion Does Not Support Content-Based or Viewpoint-Based Suppression of Disfavored Speech; IV. Under Any Scenario, Nothing Good Comes From Revisiting Red Lion, an Irrelevant Case Here; A. Under Scenario #1: Reconsidering Red Lion Results In Chaos By Rendering Unconstitutional Every Single FCC Spectrum License; B. Under Scenario #2, Reconsidering Red Lion Results in Chaos By Granting Incumbent Licensees Heightened Scrutiny and Constitutional Claims Regarding Any Advances in Spectrum Licensing.

Id. at *i*.

[12] Brief of Center for Democracy & Technology and Adam Thierer, Senior Fellow with the Progress & Freedom Foundation (PFF) and the Director of PFF's Center for Digital Media Freedom as Amici Curiae Supporting Respondents, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 3895912, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_RespondentAmCuCtrforDem&TechThiererrevised.pdf.

[13] Brief of Former FCC Commissioners and Officials as Amici Curiae Supporting Respondents, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 3539496 (signed by Mark Fowler, Jerald Fritz, Henry Geller, Newton N. Minow, James H. Quello, Glen O. Robinson, and Kenneth G. Robinson, Jr.), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_RespondentAmCuFmrFCCCommissioners&Officials.pdf. *See also* John Eggerton, *Former FCC Commissioners Weigh in on Profanity Issue*, BROADCASTING & CABLE (Sept. 18, 2009), http://www.broadcastingcable.com/article/354523-Former_FCC_Commissioners_Weigh_In_On_Profanity_Issue.php.

[14] Brief of American Civil Liberties Union, the New York Civil Liberties Union, American Booksellers Foundation for Free Expression, American Federation of Television and Radio Artists, Directors Guild of America, First Amendment Project, Minnesota Public Radio/American Public Media, National Alliance for Media Arts and Culture, National Coalition Against Censorship, National Federation of Community Broadcasters, Pen American Center, and Washington Area Lawyers for the Arts as Amici Curiae Supporting Respondent, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 3539494, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_RespondentAmCu12MediaArtsAdvocacyOrgs.pdf.

[15] *See Fox Television Stations*, 129 S. Ct. at 1821 (Thomas, J., concurring) (suggesting reversal of *Red Lion* and *Pacifica*).

license.[16] Rights to use frequencies, which the Court thought could be assigned only by "public interest" judgments, are now routinely assigned via competitive bidding.[17] That the market distributes wireless rights makes the economic organization look like other markets, including the newspaper business. And while the Court held that licensing a medium of expression could lead to an unconstitutional "chilling effect" on speech, a footnote indicated that it had found no evidence that broadcast licensing was having any such impact.[18] In stunning revelations a few years later, however, the very matter decided in *Red Lion* was shown to have originated as a strategic campaign to file FCC Fairness Doctrine challenges so as to "harass and intimidate" speakers of a particular viewpoint.[19] *Red Lion* unknowingly facilitated that strategic effort to quash free expression.

¶11 More broadly, statistical evidence gleaned from radio markets after the Fairness Doctrine was itself eliminated in 1987[20] demonstrates that a broad "chilling effect" was likely to have existed.[21] Perhaps the clearest case against *Red Lion*, however, is that the Supreme Court would not follow its logic in subsequent decisions. In extending "strict scrutiny" to regulation of cable TV or Internet speech, as in such cases as *Playboy* or *Reno*, the court makes no distinction of First Amendment rights afforded via fixed or mobile networks.[22] Were the "physical scarcity" of airwaves to require a distinct approach to free speech protections, the rulings in these cases would have differentiated cable TV from satellite TV, or the wired from the wireless Internet. To do so would have been absurd, however, and the Supreme Court did not go there.[23] The Court refused to believe in its own *Red Lion* theory.

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[16] *See* Hazlett, *Physical Scarcity, supra* note 3.

[17] The Federal government allocated rights to use radio frequencies without an auction mechanism for much of the twentieth century. Only in 1994, did the Federal Communications Commission start to offer licenses to companies or individuals who applied and made an upfront payment as a qualified bidder. *See About Auctions*, FCC (Aug. 9, 2006), http://wireless.fcc.gov/auctions/default.htm?job=about_auctions. Congress gave the Federal Communications Commission authority to conduct auctions under the 1993 Omnibus Budget Reconciliation Act, with extension and expansion of authority under the 1997 Balanced Budget Act. *Id.*

[18] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392–93 & n.19 (1969).

[19] *Id.* at 369–70 (describing the Fairness Doctrine at issue); FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT 34–49 (1976) (chronicling Fairness Doctrine enforcement by the FCC upon broadcast television organizations).

[20] The reversal of the Fairness Doctrine was reported widely in the popular press. Now online, archived video of an ABC's News Washington report by John Martin and Peter Jennings describes the FCC's vote to overturn the Fairness Doctrine. The fascinating 1:56 video clip includes video of Rev. Billy Hargis, whose speech was the subject of the *Red Lion* case, liberal author Fred Cook, as well as images of the unanimous FCC panel that voted to overturn the order and Ralph Nader in favor of retaining the Fairness Doctrine in opposition to alleged monopoly control of broadcasting outlets. *See ABC News: Fairness Doctrine Abolished* (ABC television broadcast Aug. 4, 1987), *available at* http://abcnews.go.com/US/video/aug-1987-fairness-doctrine-abolished-10541909 (The report is based on a finding that the Fairness Doctrine actually chills speech, where FCC staff said 60 broadcasters shied away from reporting).

[21] Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 279–301 (1997).

[22] United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) ("Playboy"); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997) ("Reno").

[23] Professor Tribe explains:

> Red Lion against FCC, which, for the past 38 years has perpetrated a profound fallacy about spectrum scarcity and the pervasiveness and invasiveness of the broadcast medium. The original idea in *Red Lion* was that because the broadcast spectrum, in a sense belongs to the

B. Abandoning Red Lion would not be disruptive in the marketplace.

¶12 Some legal precedents, even if incorrectly established, are risky to overturn in that important social activities have been undertaken on their basis.[24] To correct the error of *Red Lion* would impact a range of investments, yet the change would be productive rather than disruptive. That is because the system of broadcast regulation authorized under *Red Lion* has been notably ineffective in generating desired results and notably deleterious in producing rent seeking efforts that have encouraged inefficient, perverse, speech-limiting outcomes. Expert analysts see the "public interest" requirements imposed on licensed broadcasters as little enforced and markedly unsuccessful. This is the consensus of advocates of such regulation,[25] which includes former regulators,[26] economists,[27] and legal scholars.[28] Were *Red Lion* to bar such regulation, little would be lost beyond the

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> government and because the spectrum is scarce and the government must regulate it in order to make it possible for people to use it, it therefore follows somehow that the government must be able in a sense to censor it, to regulate its content, in that case by adopting so-called Fairness Doctrine. Of course, quite apart from the proposition that there are alternative platforms and that by no means is the scarcity rationale plausible, quite apart from that, it never followed logically from the fact that the government must play some role in structuring and facilitating the use of a particular medium, it never followed from that, that the role it could play was one that violated the core First Amendment principle, that it is not up to the government to decide what someone ought to say or refuse to say, over his own speech. And it seems to me that if today the Court were to revisit the *Red Lion* issue, if the FCC were again to adopt something like the Fairness Doctrine, the odds are overwhelming that the current court would recognize the illogic of *Red Lion*, especially in an environment where you can't make the argument about scarcity, where there are a multitude of alternative platforms, alternative forums, alternative ways of accessing the same material . . . . There was another wrong turn that the Supreme Court took in this field, and that was in its, I think, quite unfortunate but self-limiting decision in 1978 in the famous seven dirty words case, FCC versus Pacifica, saying the FCC could, in effect, punish fleeting expletives, and fleeting mentions of the s-word or the f-word. Today's FCC continues to sing the *Pacifica* tune, with respect to so-called fleeting indecency, but the U.S. Court of Appeals for the Second Circuit on June 4th of this year I think quite clearly got it right when it told the FCC to reconsider its abandonment of its earlier and somewhat more enlightened position on this point. In fact, the good news is that the trend in the courts generally and in the Supreme Court has been toward the vindication of basic First Amendment principles, while government, at all levels, has succumbed to the quite easy temptation to play the role of parent regardless of the communication medium involved.

Tribe, *Plenary Address*, *supra* note 4, at 14:45–18:04.

[24] This, of course, is the argument for stare decisis.

[25] NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 155 (1995).

[26] Henry Geller, *Promoting the Public Interest in the Digital Era*, 55 FED. COMM. L.J. 515 (2003); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998); ROBERT W. CRANDALL & HAROLD FURCHTGOTT-ROTH, CABLE TV: REGULATION OR COMPETITION (1996).

[27] R. H. Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 LAND ECON. 161, 161–67 (1965); HARVEY J. LEVIN, THE INVISIBLE RESOURCE 111–12 (1970); ROGER G. NOLL, MERTON J. PECK & JOHN J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973); BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT 10–12 (1975); BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (1992).

[28] LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987); KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 203; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12–22 at 699 (1978). "The clear failure of the 'technological scarcity' argument as applied to cable television amounts to an invitation to reconsider the tension between the Supreme Court's radically divergent approaches to the print and electronic media." *Id.* "Indeed, since

rent seeking that tends to restrict free speech and is socially costly in wasting economic resources.[29] Applying strict scrutiny to broadcast licensing extends the First Amendment, producing net social gains.[30]

C. Correcting Red Lion reduces censorship risk for emerging new media.

¶13 Congress has repeatedly attempted to impose content controls on new media. Yet the Supreme Court, applying strict scrutiny as the standard of review, has generally voided such rules as unconstitutional violations of free speech.[31] In one important instance, however, the Court stepped back from strict scrutiny and created an entirely new standard of review: intermediate scrutiny. In *Turner Broadcasting v. FCC*,[32] a 5-4 opinion that failed to overturn "must carry" rules from the 1992 Cable Act, the Court ruled that forcing cable TV systems to retransmit local TV stations without compensation was not a violation of the First Amendment rights of cable operators. The outcome underscores how a bifurcated First Amendment opens the door for further compromise of free speech protections. Cable TV was not identified as being subject to "physical scarcity," but it appeared to warrant a level of protection between broadcasting and print. But cable TV systems, which send edited communications to audiences via "spectrum in a tube," are themselves a platform for access to emerging media, including the Internet.

¶14 That the Court has not extended its "intermediate scrutiny" standard to other data networks is a product not of principled analysis but of a dangerously *ad hoc* approach. As the composition of the Court or the cases it sees evolve, the domain of constitutionally-protected speech could be seriously reduced. In an age when newspapers are delivered by cable or telephone wires, and wirelessly to mobile handsets, e-readers, or

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the scarcity argument made little sense as a basis distinguishing newspapers from television even in the late 1960's and early 1970's, such reconsideration seems long overdue." *Id. See generally* ROBERT CORN-REVERE, *RATIONALES & RATIONALIZATIONS* (1997).

[29] Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 82–83 (2002).

[30] *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12–22 at 697 (1978) (footnote omitted). "[E]ntrusting government with power to assure media access entails at least three dangers." *Id.* Those dangers include: "[T]he danger of deterring those items of coverage that will trigger duties of affording access at the media's expense; the danger of inviting manipulation of the media by whichever bureaucrats are entrusted to assure access; and the danger of escalating from access regulation to much more dubious exercises of government control." *Id. See also id*. at 581 ("[A]ny governmental action aimed at communicative impact is presumptively at odds with the [F]irst [A]mendment").

[31] U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803, 822 (2000); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997). In *Reno*, the Supreme Court explained:

> Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

Reno, 521 U.S. at 870.

[32] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) ("Turner II") (resulting in a 5-4 decision).

notebook computers, the predicate for content controls—a "fairness doctrine" or "must carry" regime—is already visible. Rationalizing the law by revisiting *Red Lion* avoids our current reliance on the luck of the draw.[33]

D. Regulation of the press must be achieved through constitutional means.

¶15 Those who defend the legacy of *Red Lion* express an interest in protecting broadcast ownership limits, must-carry rules, content controls, spectrum allocation policies, and other regulations administered in tandem with the "public interest" licensing of broadcast stations. The obvious objection is that, if *Red Lion* has been incorrectly decided, the regulations promulgated under its aegis are themselves worthy of reconsideration. Analysis of the actual policies in question reveals that such an exercise is not only important on constitutional grounds but also on public interest grounds. Without exception, the proffered policies have failed to achieve the objectives set forth, and the non-transparency of FCC licensing decisions aids this failure. More open and reliable avenues for constitutional regulation exist, including antitrust law, where legal standards for competition analysis would presumably upgrade the manner in which rules were crafted, implemented, and evaluated.

¶16 This is most pointedly true in the crucial area of spectrum allocation, wherein government regulators make frequency inputs—the lifeblood of the wireless economy—available for use. The regulatory bottleneck in place[34] owes much to *Red Lion*, which gives regulators wide latitude to restrict entry into markets, to impose obligations on licensees, and to assign valuable rights according to political criteria. These regulatory powers have been exercised to create and distribute rents to favored constituencies, resulting in artificial spectrum scarcity—itself a truncation of free speech[35]—as well as a policy undercutting the emergence of new mobile communications networks.[36]

¶17 This Article reviews *Red Lion* from several angles. Part II describes the digital media store of on-demand video, print, and audio that is at the center of regulatory and institutional dissonance. Part III articulates the thought leadership that expresses First Amendment values from an opposing view, a view that seeks to salvage *Red Lion* as precedent for digital media regulation. While digital media regulation is nascent, government intervention may take new forms in a digital world, with a focus on the identity and relationship of the speaker to other citizens, by way of disclosure, diversity,

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[33] The sentiment to revisit *Red Lion* for its implications on digital media is not a new talking point. In 1998, Michael K. Powell, then a Commissioner of the FCC, stated: "Digital convergence, rather than reinforcing the unique nature of broadcasting, has blurred the lines between all communications medium [sic] . . . . Even this brief overview of the marketplace makes the reasoning of *Red Lion* seem almost quaint . . . ." Michael Powell, Remarks before the Media Institute: Willful Denial and First Amendment Jurisprudence (Apr. 22, 1998) (cited by Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, *in* NEW DIRECTIONS IN COMMUNICATIONS POLICY 186 n.61 (Randolph J. May ed., 2009)).

[34] Thomas W. Hazlett, *Optimal Abolition of FCC Spectrum Allocation*, 22 J. ECON. PERSP. 103 (2008).

[35] Bazelon, *FCC Regulation*, *supra* note 5; Benjamin, *Logic of Scarcity*, *supra* note 29.

[36] Thomas W. Hazlett, *Property Rights and Wireless License Values*, 51 J.L. & ECON. 563 (2008) (emphasizing the role of policy in spectrum property rights on the value of wireless communications networks). *See also* FCC, NATIONAL BROADBAND PLAN: CONNECTING AMERICA (2010), *available at* http://www.broadband.gov/download-plan/; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009) ("Recovery Act"), *available at* http://fdsys.gpo.gov/fdsys/pkg/PLAW-111publ5/pdf/PLAW-111publ5.pdf (describing the national policy for connecting America with broadband).

neutrality, and editorial prerogative. Part IV delves deeper into the saga of *Red Lion*, reminding readers of the factual realities—including the chill of the Fairness Doctrine—and the policy at issue in the 1969 case. Part V presents the doctrinal limitations of *Red Lion*, where First Amendment law and federal content regulation interacts with much difficulty and disagreement among scholars, judges, and industry leaders. Part VI addresses the concerns swirling around disrupted media and newsgathering business models, with particular scrutiny toward regulatory patches to compensate for the pace of media innovation.

II. MASS MEDIA TO DIGITAL MEDIA

¶18 In the digital media marketplace, media is sold on-demand, packaged in discrete units of entertainment and news, and sold by commercial enterprises for a fee or cross-subsidized with advertising revenues.[37] These units of speech are stored on computer databases and transmitted to the reader in the form of audio, text message, video, digital book, digital magazine, or blog.[38] Media delivery occurs on an on-demand basis and a real-time basis depending upon broadband frequency or cable TV wire.[39] Information

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[37] *See generally* KEN AULETTA, GOOGLED: THE END OF THE WORLD AS WE KNOW IT 232 (2009) ("Twenty million unique visitors came each month in early 2008 to the . . . *New York Times* . . . . [B]ecause the online audience pays less attention to ads and spends less time with an online newspaper, advertisers only pay 5 to 10 percent of what they do for the same ad in a newspaper."). Ken Auletta explained:

> Not everyone in the newspaper business was on a starvation diet. Three wire services—the AP, Reuters, and Bloomberg—defied the industry trend . . . . The bleak economic climate for newspapers, ironically, benefited the wire services . . . . And unlike most newspapers, the wire services moved early to tap new sources of revenue . . . . Bloomberg and Reuters, for their part, were sitting on data-generating gold mines. Bloomberg, like Reuters long before it merged with Thomson, started as a collector and provider of financial data; essentially, it was in the service business, not the news business.

Id. at 233. Eric Schmidt of Google was quoted as saying, "There is a systematic change going on in how people spend their time." *Id*. at 234. Ken Auletta further explained:

> Technology was the frenemy of all traditional media businesses . . . . By providing consumers with all these choices, new technology inevitably disrupted traditional habits. The audience that had once belonged to broadcast television moved to cable, to video on demand, to DVDs, to YouTube and Facebook and Guitar Hero. TiVo and DVRs allowed viewers to become their own programmers. This was great for viewers but not so great for the television business.

Id. at 238.

[38] Scholars anticipated such offerings decades ago with the rise of cable television, computing power, and programming diversity. *See generally* UCLA COMMUNICATIONS LAW SYMPOSIUM, THE FORESEEABLE FUTURE OF TELEVISION NETWORKS: LEGAL RESOURCE MANUAL (Charles M. Firestone, Penelope Glass, & Michael Morris, eds., 1979). Les Brown of the New York Times explains:

> More channels and cheaper distribution would inevitably mean more networks, and these may be expected to cut into the audiences for ABC, CBS, and NBC, as well as the existing local television stations . . . . The marriage of two-way cable television to the computer, making it possible to charge viewers for programs they order with the press of a button, is likely to result in a wide variety of specialized programs because they would not require mass audiences. One million viewers paying $2.50 for an opera, for example, could be more than enough to justify the telecast.

Les Brown, *Cable and Pay TV on Eve of Technological Revolution*, N.Y. TIMES, July 31, 1978, at C12, *available at* http://select.nytimes.com/gst/abstract.html?res=F5091EFF3C5413728DDDA80B94DF405B888BF1D3.

[39] Citizens United v. FCC, 130 S. Ct. 876, 887 (2010) ("Citizens United") (Justice Kennedy writing for a

grazers receive social network-filtered news, cellular mobile email service, satellite TV service, and broadband triple-play with voice service. The regime of over-the-air (OTA) broadcasting with its public interest requirements of localism, avoidance of indecency, and equal time and fairness regulation is in secular decline. The courts have generally declined to extend regulations for broadcast licensees upon newer technologies, notably cable TV and the Internet.[40]

¶19 Strict scrutiny review of OTA broadcast media, including indecency regulations, would bridge the divide between the broadcast and print regimes.[41] The case law on this matter, from *Red Lion*, *Pacifica*, *Tornillo*, *Playboy*, and *Reno*, compose a matrix of precedential complexity that traces back to economic concepts underlying the regulatory theory.

A. Four Decades of Convergence in Law and Technology

¶20 The Supreme Court has been narrowing and distinguishing its holding from *Red Lion* in a string of decisions over the last twenty years. However, the decision has not yet been fully rejected.[42] In 1973, the Supreme Court made clear that broadcasters were under no obligation to sell advertising time to a particular party,[43] and in 1974, that any right of access or a right of reply by a critic was not applicable to print media.[44] In 1978, the Court noted that "it is well settled that the First Amendment has a special meaning in the broadcasting context."[45] Yet in 1984, the Court validated the broadcasters' other First Amendment protections, such as the right to editorialize, even if the stations were publicly-funded.[46] The Supreme Court then held in 1994, 1997, and 2000 that the

5-4 court explains, "Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program.").

[40] *See also* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997) ("The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition . . . we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.").

[41] S. COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 98TH CONG., 1ST SESS., PRINT AND ELECTRONIC MEDIA: THE CASE FOR FIRST AMENDMENT PARITY 81 (Comm. Print 1983); GEORGE H. SHAPIRO, ET AL., "CABLESPEECH": THE CASE FOR FIRST AMENDMENT PROTECTION xii, 20, 58, 63 (1983).

[42] *See* J. Gregory Sidak, *An Economic Theory of Censorship*, 11 SUP. CT. ECON. REV. 81, 82 n.1 (2004) ("Even Judge Douglas Ginsburg, who years before as a law professor expressed disbelief in the spectrum scarcity rationale, considered himself constrained to write for the D.C. Circuit in 2002 that, with respect to a First Amendment challenge to a particular broadcast regulation, 'this court is not in a position to reject the spectrum scarcity rationale *even if it no longer makes sense*.'") (citing Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002)); DOUGLAS H. GINSBURG, REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION, AND CABLE COMMUNICATIONS 58–61 (1979).

[43] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) ("DNC").

[44] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) ("Tornillo").

[45] FCC v. Pacifica Found., 438 U.S. 726, 741 n.17 (1978), (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978); *DNC*, 412 U.S. at 94.

[46] FCC v. League of Women Voters of California, 468 U.S. 364, 376 (1984). *See generally* Telecomm. Research and Action Ctr. v. FCC, 801 F.2d 501, 509 n.5 (D.C. Cir. 1986) (The advent of cable and satellite technologies may soon render the scarcity doctrine obsolete, but it declined to "reconsider [its] long-standing approach [to political broadcast regulation] without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.") (quoting *League of Women Voters*, 468 U.S. at 376–77 n.11).

regimes articulated for broadcast TV from *Red Lion* and *Pacifica* could neither constitutionally apply to cable TV[47] nor to the Internet.[48]

¶21 The *Fox Television Stations v. FCC* decision and remand to the U.S. Court of Appeals for the Second Circuit displays much of the tension in this area of law.[49] The litigation involves the FCC's regulation of broadcast TV programming, and the degree to which licensees have free speech rights under the First Amendment.[50] A similar case, *FCC v. CBS Corp.*, is before the U.S. Court of Appeals for the Third Circuit, which will likely craft a narrow analysis based upon the "intent" of the FCC in promulgating an order, rather than addressing the constitutional question of content-based indecency regulation of broadcast TV.[51]

¶22 Under *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), the holding of *Red Lion* was limited to over-the-air broadcasting, rather than extended to cable TV.[52] Importantly, *Turner I* did not deal with broadcasters' First Amendment rights but with cable operators' First Amendment rights.[53] The Supreme Court held that the "must-carry" provisions of the 1992 Cable Act were content-neutral structural regulation.[54] The Court then placed cable TV operators somewhere between the two models—print v. broadcast—in the 5-4 decision in *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").[55]

¶23 In *Turner II*, the Supreme Court held that the content-neutral legislation passed intermediate review.[56] This allowed Congress (and then the FCC) to impose must-carry obligations forcing cable TV systems to retransmit, without charge, local broadcast TV stations. The Government argued that the public interest in "localism" was advanced by guaranteeing that broadcast stations would be distributed, via cable systems, to households. Left to their own devices, cable operators would tend to exclude broadcast stations from their program line-ups, as TV stations compete with cable TV systems for local advertising revenues. In dissent, Justice Sandra O'Connor wrote:

¶24 But the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to freedom of

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[47] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638–39 (1994) ("Turner I"); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) ("Turner II"); U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

[48] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).

[49] Fox Television Stations, Inc., v. FCC, 613 F.3d 317 (2d Cir. 2010), *remanded from* 129 S. Ct. 1800 (2009) (holding FCC order was not arbitrary or capricious). Oral Argument, Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010) (No. 06-1760-ag), *available at* http://c-spanvideo.org/program/291305-1.

[50] *Pacifica*, 438 U.S. at 726.

[51] FCC v. CBS Corp., 129 S. Ct. 2176 (2009) (remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009)). *See* 18 U.S.C. § 1464 (2006) (providing a definition of "indecent"); 47 U.S.C. § 503(b)(1)(B) (2006) (authorizing the FCC to impose forfeitures on those who "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter," where "willful," as defined by 47 U.S.C. § 312(f), is "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate").

[52] *Turner I*, 512 U.S. at 638–39.

[53] *Id.* ("The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium.").

[54] *Id.;* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) ("Turner II").

[55] *Turner II*, 520 U.S. at 180. For a criticism of *Turner II*, see Thomas W. Hazlett, *Digitizing "Must-Carry" under* Turner Broadcasting v. FCC (1997), 8 SUP. CT. ECON. REV. 141 (2000).

[56] *Turner II*, 520 U.S. at 180.

expression; as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals.[57]

¶25 Also in 1997, the Supreme Court reviewed legislation addressing speech on the Internet. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) ("*Reno*"), the Court noted how the absence of scarcity with regard to the Internet[58] had created a "dynamic, multifaceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images . . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet."[59] Today, as Internet-based audio and video transmissions transmit over any material that is technologically feasible—whether co-axial wires, fiber-optic cables, or unlicensed radio frequencies—reconciliation seems impossible; compare *Red Lion* with *Tornillo,*[60] a case dealing with print media, let alone *Reno* and *U.S. v. Playboy Entertainment*, a major decision dealing with cable TV signal bleed.[61]

¶26 Intermediate courts, particularly the U.S. Court of Appeals for the District of Columbia Circuit, also acknowledged weaknesses of the broadcast and print distinction. Consider "teletext," a cutting-edge innovation of displaying textual news updates on the over-the-air TV unit. The new application invited litigation, where parties asked if three political broadcast laws on video programming would necessarily constrain news content delivered through teletext. In the facts of the case, *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) ("TRAC"),[62] the FCC refused to apply each of the three laws—47 U.S.C. § 312(a)(7) (1982), 47 U.S.C. § 315(a) (1982), and the Fairness Doctrine 47 C.F.R. § 73.1910 (1985)—to teletext.[63] The FCC held that the § 312(a)(7) requirements were inapplicable, since teletext was subsidiary to a candidate's access to broadcasting station video programming.[64] The FCC also held that the § 315(a) requirements were beyond the scope of teletext, when teletext does not trigger the visual appearance requirements of "use" of "personal appearance by a legally qualified candidate."[65] But most elaborately, the FCC held the Fairness Doctrine inapplicable to teletext "because . . . teletext's unique blending of the print medium with radio technology *fundamentally distinguishes it* from traditional broadcast programming."[66] Market penetration of teletext compared to print and broadcasting also

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[57] *Id. at 248* (O'Connor, J., dissenting).

[58] The Court's phraseology was that there was an absence of "the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum." Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).

[59] *Id*.

[60] "There may be ways to reconcile *Red Lion* and *Tornillo* but the 'scarcity' of broadcast frequencies does not appear capable of doing so. Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, surely by pronouncing *Tornillo* applicable to both, or announce a constitutional distinction that is more usable than the present one." *See* Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986) ("TRAC").

[61] U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

[62] *TRAC*, 801 F.2d at 501.

[63] *Id.* at 502, 503 (citing FCC, Report and Order, 53 Rad. Reg. 2d (P & F) 1309 (1983)).

[64] *Id.* at 504.

[65] *Id*. ("The Commission also reasoned that teletext differed from 'traditional broadcast programming' because it does not have the powerful audiovisual capabilities of main-channel broadcasting, and, therefore, does not pose the danger of 'abuse' of these powerful sound and image 'uses' that Congress envisioned in enacting section 315.").

[66] *Id.* (citing *Report and Order*, 53 Rad. Reg. 2d (P & F) at 1324) (emphasis added). *See also id*. at 505

justified the FCC's decision, where "teletext, as a print medium . . . would not encounter the same degree of scarcity, in the usual sense, as the sound and visual images of regular programming."[67]

¶27 On review, however, the D.C. Circuit rejected the FCC's dance between broadcasting and teletext. Judge Robert Bork held that such a maneuver could not be accomplished.[68] The D.C. Circuit criticized both grounds offered by the FCC. The FCC supported its treatment of teletext where: (1) the FCC derived an "immediacy" component, out of whole cloth without doctrinal or factual support, stating that the component was implicit in the scarcity of distribution channels for sound *and* visual images, compared to that of merely visual text, and (2) the FCC emphasized teletext's resemblance to print, where scarcity regulation does not apply.[69] First, Judge Bork rejected the combination of sound plus visual images as deserving less First Amendment protection.[70] That sound and visual images would produce a greater communicative impact did not lend itself to greater regulation; Judge Bork held skepticism that the "very effectiveness of speech" argument had legitimacy under First Amendment law.[71] He also declined to see any Supreme Court endorsement of the FCC's addition of an "immediacy" rationale underlying the scarcity doctrine.[72] Second, Judge Bork questioned the selective ignorance of the scarcity doctrine when teletext traveled over broadcast frequencies. Teletext's resemblance to print media raised an important point in the analysis: "The basic difficulty in this entire area is that the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference."[73] Constitutional principles were at stake: "Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results."[74]

(citing Memorandum Opinion and Order, 101 F.C.C. 2d 827, 833 (1985) ("Users of this medium will not be listening or viewing teletext in any traditional broadcasting sense, but instead will be *reading* it, and thus be able to skip, scan and select the desired material in ways that are incomparable to anything in the history of broadcasting and broadcast regulation.") (citations and footnote omitted; emphasis in original)).

[67] *Id*. at 504.

[68] *Id.* at 509 ("The Commission, therefore, cannot on first amendment grounds refuse to apply to teletext such regulation as is constitutionally permissible when applied to other, more traditional, broadcast media.").

[69] *Id.* at 507–08.

[70] *Id*. at 508.

[71] *Id.*

[72] *Id*.

[73] *Id.*

[74] *Id*. Citing to Ronald H. Coase's 1959 article, Judge Bork also writes:

> All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.

Id. (footnotes omitted).

B. Digital Broadcast, Digital Print, and Digital Pervasiveness

¶28 Between 1969 and 2010, the law has ricocheted from one interpretation of the First Amendment to another based on the look and feel of the content delivery mechanism. Impressionistic responses to various media drive the legal regime. Change is continually forced due to the convergence of rival platforms through device innovation. For example, take the Apple iPad, released in April 2010.[75] The device squarely combines "overlapping, archaically defined worlds where the FCC's regulatory edict still prevails."[76] The iPad does so by inviting a flood of demand for mobile data and "presag[ing] the utter obliteration of the distinction between print and electronic media."[77]

¶29 Indeed, the broadcast and print platforms are *rival* no more.[78] *The New York Times* is commonly viewed via a wireless connection—either a Wi-Fi link to a cable modem or DSL Internet connection—or a wide-area broadband transmission offered by a cell phone operator. The former sends *The New York Times* via unlicensed frequencies; the latter sends via licensed frequencies. Both means utilize the "physically scarce" airwaves that the *Red Lion* opinion finds to be the premise for diminished First Amendment protection. While the "rights of listeners"[79] mandated that FCC "fairness doctrine" rules ensure that radio stations do not broadcast biased and unbalanced programming, those same airwaves now carry *The New York Times* to millions. The print media retains First Amendment protection despite media convergence, while other forms of media struggle under increased incoherence of the law with technological development. Emerging communications networks have thus far been granted a clean slate, avoiding broadcast TV obligations; the inconsistency remains that these new networks depend upon transmission technologies that were once deserving of strict licensing and content restrictions.

¶30 The *Red Lion* and *Pacifica* rulings supply twin pillars for regulating broadcast media, including prior restraints in the form of licensing.[80] The distinction in free speech rights rides on the technical nature of the distribution platform—the manner in which electromagnetic signals travel through space versus the delivery of paper. Curiously, if fortuitously, emerging media in the late 20th and early 21st centuries—from AOL to

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[75] Press Release, Apple, Apple Sells Over 300,000 iPads First Day (Apr. 5, 2010), *available at* http://www.apple.com/pr/library/2010/04/05ipad.html; Edward C. Baig, *Verdict is in on Apple iPad: It's a Winner*, USA TODAY (Apr. 2, 2010), http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review_N.htm.

[76] Holman W. Jenkins, Jr., *End of the Net Neut Fetish?*, WALL ST. J., April 7, 2010, at A13, *available at* http://online.wsj.com/article/SB10001424052702303411604575168053474388236.html.

[77] *Id*.

[78] *See id*. ("Faster than anybody might have expected, fixed and mobile are becoming competitive substitutes for each other. Ask any iPhone user who goes back and forth between WiFi and AT&T's 3G network.").

[79] "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[80] *See generally* Matthew Bloom, Note, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 YALE J.L. & TECH. 109 (2007); Joshua B. Gordon, Note, Pacifica *is Dead, Long Live* Pacifica*: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451 (2006) (exploring the necessity of a "communitarian obligation" doctrine to justify indecency regulations for the protection of children in light of strict scrutiny review and the contours of the scarcity justification).

Facebook, MediaFlo to Google Search, and Twitter to DowJones.com—have largely escaped the broadcast regulation model. These websites are not licensed according to "public interest;"[81] have no obligations for "equal time," "fairness," or "localism;"[82] and need not disclose campaign (or other) contributions supporting programs or candidates.[83]

¶31 Internet media is not as pervasive as the FCC considered radio and television broadcasts to invade the home; this pervasiveness feature is central to the Internet media's First Amendment rights to be free from content regulation.[84] Given the nature of Internet media and the technological landscape today, the Supreme Court found "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[85] The Court's holding begs the question: how pervasive are traditional transmission conduits of AM/FM radio and OTA broadcast TV, compared to cable TV, satellite TV or Internet video?[86] Such a pervasiveness analysis relies upon control technologies, such as the V-Chip upon TV units, and rates of adoption and penetration of each form of transmission technology. As smart phones incorporate higher capacity to stream video, the penetration rates of cell phones used by teenagers necessarily become relevant as well. Facts indicate that the adoption of cellular technology is rising at a dramatic rate.[87]

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[81] In a report prepared by the FCC, the FCC established:

> [W]henever we review an application—whether to build a new station, modify or renew a license or sell a station—we must determine if its grant would serve the public interest. As discussed earlier, we expect station licensees to be aware of the important problems and issues facing their local communities and to foster public understanding by presenting programming that relates to those local issues. As discussed in this Manual, however, broadcasters—not the FCC or any other government agency—are responsible for selecting the material that they air. By operation of the First Amendment to the U.S. Constitution, and because the Communications Act expressly prohibits the Commission from censoring broadcast matter, our role in overseeing program content is very limited. We license only individual broadcast stations. We do not license TV or radio networks (such as CBS, NBC, ABC or Fox) or other organizations with which stations have relationships (such as PBS or NPR), except to the extent that those entities may also be station licensees. We also do not regulate information provided over the Internet, nor do we intervene in private disputes involving broadcast stations or their licensees. Instead, we usually defer to the parties, courts, or other agencies to resolve such disputes.

MEDIA BUREAU, FCC, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 8 (2008), *available at* http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.pdf.

[82] 47 U.S.C. § 307(b) (2006) (requiring localism); 47 U.S.C. § 315 ("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 . . . in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship . . . ."). *See also* Daniel L. Brenner, *Creating Effective Broadband Network Regulation*, 62 FED. COMM. L.J. 13, 55 (2010) (describing the political economy of the FCC and the administration of Section 315); Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579 (2003).

[83] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 237, 240–41 (2003).

[84] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997). *See generally* Jonathan D. Wallace, *The Specter of Pervasiveness:* Pacifica, *New Media, and Freedom of Speech* (Cato Institute, Briefing Paper No. 35, Feb. 12, 1998), *available at* http://www.cato.org/pubs/briefs/bp-035.html.

[85] *Reno*, 521 U.S. at 870. *See also* Robert Corn-Revere, *The First Amendment and the Electronic Media*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/speech/internet/overview.aspx (last visited Nov. 10, 2010).

[86] U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); *Reno*, 521 U.S. at 870.

[87] The Pew Internet & American Life Project recently reported that daily text messaging by teens has increased from 38% to 54% between February 2008 and September 2009. Of these teens, half send 50 or more text messages per day, and one out of three send more than 100 per day. Amanda Lenhart, Rich Ling,

¶32 The proper approach for reviewing laws that regulate fleeting expletives, violence, animal cruelty, political speech, and hate speech would be that of strict scrutiny: articulation of a compelling, narrowly tailored government interest (not merely a substantial interest)[88] for content regulation of digital media.[89] One-way mass media delivery and two-way digital speech can be harmful in degrees with bullying, shaming, anonymous threats, and opinionated political discourse, which will result in greater information age litigation.[90] Internationally, governments now spend more resources to manage the politics of data collection, as states make data requests for criminal investigations,[91] while installing sophisticated filtering technologies.[92] The question of freedom of information and government intervention has become more acute with time.

Scott Campbell & Kristen Purcell, *Teens and Mobile Phones*, PEW INTERNET & AMERICAN LIFE PROJECT (Apr. 20, 2010), http://www.pewinternet.org/Reports/2010/Teens-and-Mobile-Phones.aspx. *See generally* John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010). *See also* FCC, IN THE MATTER OF IMPLEMENTATION OF SECTION 6002(B) OF THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993: FOURTEENTH ANNUAL REPORT 107, Chart 25, WT Docket No. 09-66, FCC 10–81 (FCC May 20, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf; Dan Frommer, *25 Awesome Charts On The State of The Wireless Industry*, BUSINESS INSIDER (May 21, 2010, 11:47 AM), http://www.businessinsider.com/25-charts-on-the-state-of-the-wireless-industry-2010-5 (presenting slideshow of charts from the FCC Fourteenth Annual Report on Mobile Wireless Competition).

[88] FCC v. League of Women Voters of California, 468 U.S. 364, 380 (1984).

[89] *See* United States v. Stevens, 130 S. Ct. 1577 (2010) ("Stevens"). In *Stevens*, where defendant sold "crush videos" depicting animal cruelty, the animal cruelty criminal statute was held constitutionally overbroad by an 8-1 decision. Defendant was sentenced to five years of prison. The underlying conduct is banned in most states already. "The First Amendment itself reflects a judgment by the American people that the benefit of its restrictions on the Government outweighs the costs." *Id.* at 1585. *See also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (concerning political speech); FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (concerning indecency regulation).

[90] *See generally Citizens United*, 130 S. Ct. at 890–91. "We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Id*. (citations omitted). "It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws." *Id*. "The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Id*. (citations omitted). *See also* Bradley A. Smith, *Newsflash: First Amendment Upheld*, WALL ST. J. (Jan. 22, 2010), http://online.wsj.com/article/SB10001424052748704509704575019112172931620.html. "But the First Amendment is all about distrusting government to make those decisions about who has spoken too much. That's why Thursday's decision is such a breath of fresh air." *Id*. "The next time you download a book on Kindle, buy a Michael Moore screed at Barnes & Noble, or order up a political movie from video on demand, remember that it is the Supreme Court's decision in *Citizens United* that guarantees you the right to do so." *Id*.

[91] Jessica E. Vascellaro, *Google Discloses Government Demands for User Data*, WALL ST. J. (Apr. 20, 2010), http://online.wsj.com/article/SB10001424052748704448304575196270380066334.html ("The company's new disclosure tool shows that Brazil made the most requests for user data during the last six months of 2009, with 3,663. The U.S. was second with 3,580. Brazil also led with 291 requests for removal of content, with Germany in second place and the U.S fourth, behind India.").

[92] *See, e.g.*, Sumner Lemon, *Google Says Its Services Are Widely Blocked, Censored*, COMPUTERWORLD (Apr. 20, 2010), http://www.computerworld.com/s/article/9175827 ("Google products . . . have been blocked in 25 of the 100 countries where we offer our services."); Kevin J. O'Brien, *Saudis Relent a Bit on Shutting Down Blackberry*, N.Y. TIMES, Aug. 10, 2010, at B2, *available at* http://www.nytimes.com/2010/08/11/technology/11rim.html ("Governments in Saudi Arabia, the United Arab Emirates and India have recently expressed concern about R.I.M.'s reluctance to provide them with access to its encrypted e-mail traffic—an information flow that R.I.M. itself claims to have no way of decoding.").

¶33 In the private sector, perhaps to pre-empt government regulation, industry has advanced mechanisms designed to protect children from dubious programming.[93] The editorial standards applied to potential iPhone applications offered in the Apple Store recently received press attention when a particular Pulitzer Prize winner's political cartoon application was rejected.[94] Additionally, Apple's iPhone has a parental controls feature, but the company policy maintains a prohibition on nudity in iPhone applications.[95] In a question and answer session at an iPhone 4.0 developer preview event, Steve Jobs explained the business decision to protect children: "You know, there's a porn store for [Google] Android. You can download nothing but porn. You can download porn, your kids can download porn. That's a place we don't want to go—so we're not going to go there."[96]

¶34 The digital media model invites comparison between digital bits and speech printed on paper addressed in *Miami Herald v. Tornillo*.[97] The broadcast and print models have long been noted, compared, and contrasted since *Tornillo*.[98] The Supreme Court, for its part, has assiduously avoided such comparisons, but has nonetheless supplied the necessary documentation. In 1974, it unanimously overturned a Florida statute that gave a political candidate a right to free "equal time" to answer a hostile newspaper editorial.[99] The Court found that the First Amendment protected the discretion of the newspaper owners and editors,[100] no matter their economic power in the news market, or political influence.[101]

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[93] For a tangential, but related discussion of protecting children from violence in video games and other media, see Tribe, *Plenary Address*, *supra* note 4.

[94] Brian Stelter, *Apple Invites Pulitzer Winner to Resubmit His Rejected iPhone App*, MEDIA DECODER BLOG, N.Y. TIMES (Apr. 16, 2010, 1:19 PM), http://mediadecoder.blogs.nytimes.com/2010/04/16/apple-invites-pulitzer-winner-to-resubmit-his-iphone-app/.

[95] Brian X. Chen, *Porn-Free Playboy iPhone App Is Here, But Who Will Buy It?*, GADGET LAB, WIRED MAGAZINE (Dec. 10, 2009, 6:19 PM), http://www.wired.com/gadgetlab/2009/12/porn-free-playboy-iphone-app-is-here-but-who-will-buy-it/.

[96] Jason Kincaid, *Steve Jobs on Why the iPhone Doesn't Allow Unsigned Apps: They Don't Want A Porn Store*, TECHCRUNCH BLOG (Apr. 8, 2010), http://techcrunch.com/2010/04/08/steve-jobs-on-why-the-iphone-doesnt-allow-unsigned-apps-they-dont-want-a-porn-store/#ixzz0lg6asJwW.

[97] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

[98] *See, e.g.*, Abbott B. Lipsky, Jr., Note, *Reconciling* Red Lion *and* Tornillo*: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563 (1976).

[99] *Tornillo*, 418 U.S. 241 (1974).

[100] *Id.*

[101] *Id. See* L. A. Powe, Jr., Tornillo, 1987 SUP. CT. REV. 345, 383 (1987) ("Because editorial autonomy is indivisible, it must be absolute. It is either there or it is not. . . . Someone must say what is printed and what is not. . . . In a disputed case someone must prevail, and if it is not the editor, then we are discussing a different principle."); *id.* at 363 (describing Jerome Barron's argument for government regulation of the press and characterizing *N.Y. Times v. Sullivan* as a "missed opportunity" and that "the concentration of ownership, canned editorials, and syndicated columnists had both diminished the 'robust' debate called for by Justice Brennan's majority opinion and effectively excluded most members of the public from participation in the debate.") (footnote omitted). Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641–78 (1967) (presenting a legal argument for government regulation of press). Barron discussed "an active role of the government to remedy the defects of a concentrated market." Powe, Tornillo, *supra* note 101, at 364. "For Barron the issue was the quality of debate in the marketplace. Citizens could not hope to own presses and were excluded from the pages of papers. Yet *New York Times* took a powerful institution and gave it yet another right." *Id.* "As Mark Tushnet would later (and perhaps excessively) put it, '[T]he First Amendment, usually thought of as a vehicle by which otherwise powerless people can gain power, became another one of the assets held by the powerful.'" (footnote omitted). *Id.*

¶35 This *laissez-faire* approach, established for the most powerful media outlet in the state of Florida, stood in stark contrast to the broadcast obligation to air counter viewpoints, without charge, imposed on a tiny, daytime-only radio station in Red Lion, Pennsylvania. The government action that the Court had upheld as constitutional just five years earlier on OTA broadcast radio was rejected when applied to printed newspapers.[102] The difference between broadcasters[103] and newspapers[104] is a curiosity, as newspapers now generate and broadcast video programming.[105] As some interests push for greater government regulation and others resist such controls, courts will have to deal with doctrinal inconsistencies that have developed in the law.[106] Of course, they may embrace those conflicts with new rationales, or they may seek to rationalize the law by correcting existing errors.

III. THE *RED LION* SAGA AND PROPOSALS FOR A REMAKE

¶36 *Red Lion* has been a dangling thread on the constitutional quilt even before it was suited up for its 1969 opinion. In its original rendition, offered in the 1943 *NBC* case,[107] the Court held in a 6-3 decision that broadcast licensees did not enjoy full free speech rights under the First Amendment due to the inherent scarcity of radio licenses. Because not all who might like to own and operate a broadcast station could do so, the number of licenses had to be limited. In awarding these rights, the FCC could—so said the Court—

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[102] Powe, Tornillo, *supra* note 101, at 370 ("No matter how constitutional the Fairness Doctrine seemed in *Red Lion*, the briefs all were certain that such a regime was unthinkable and unconstitutional for newspapers."). Going in more detail, Powe writes, "[a]lthough *Red Lion* had specifically rejected finding a chilling effect from the Fairness Doctrine, the newspaper position was that the Fairness Doctrine did in fact chill and thus would result in less rather than greater debate." *Id*.

[103] CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) ("A licensed broadcaster 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.'")

[104] Powe, Tornillo, *supra* note 101, at 391 ("If this movement were not halted in one shot, then the traditional barrier would be down and the legislative experimentation might begin. . . . Whether we would still think of freedom of the press in terms of the fierce independence from government would also be open.").

[105] *See, e.g.*, *Video*, THE WALL STREET JOURNAL: THE NEWS HUB, http://online.wsj.com/public/page/the-news-hub.html (last visited Nov. 10, 2010). Mike Shield of MediaWeek explains:

> Digits follows the company's aggressive push into live content last September when it rolled out News Hub, a twice daily news series. Since then the company has taken to producing more four to five live video segments each day tied to breaking news events, as Journal audience has embrace video viewing. According to Alan Murray, deputy managing editor and executive editor, online, The Wall Street Journal Network delivered a record 5.5 million streams in January, with about a million or so views being generated by News Hub. "We're really pioneering here," said Murray. "We're doing significantly more than we have before." And while 90 percent or so of News Hubs views occur on demand, we believe that viewers are attracted to the show's live feel "That creates a certain kind of energy, a sense of immediacy."

Mike Shields, *The WSJ Digital Network Turns Up the Volume on Video*, MEDIAWEEK (Feb. 24, 2010) http://www.mediaweek.com/mw/content_display/news/digital-downloads/broadband/e3ib108b71d68d61db9b1d85d5cb2ca75f2.

[106] Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 812 (1996) (Thomas, J., dissenting) ("The text of the First Amendment makes no distinction between print, broadcast, and cable media.").

[107] NBC v. United States, 319 U.S. 190 (1943).

make various demands on editors that would be improper in the context of newspaper editors or book publishers. Radio spectrum was a medium uniquely constrained by nature, and as such demanded a different First Amendment interpretation.

¶37 The view that using spectrum as an input fundamentally lessens First Amendment protection of free speech has always been confusing.[108] As Justice William O. Douglas, who was recused in the 8-0 *Red Lion* verdict, but later wrote that he would have dissented had he not been sidelined for medical reasons, noted: "What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question."[109] He continued, "But the old-fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that Government shall keep its hands off the press."[110] Today, circumstances force policy makers to reconsider that logic. While technology obliterates old boundaries, political interests will be tempted to force extensions of speech regulation through the sort of *ad hoc* justifications embedded in *Red Lion*. We begin our inquiry underlying these deficiencies.

A. The Story of Red Lion and Its Ineffectiveness

¶38 With the birth of radio broadcasting in 1920, the first important, policy-forcing conflicts between radio spectrum users developed. The initial response of the legal system was to adopt a "priority-in-use" system enforced by the U.S. Department of Commerce under the 1912 Radio Act.[111] This statute gave the federal government the authority to issue licenses to all radio stations so as to "control interference."[112] The system worked to protect investments in stations, and over 500 such broadcasters entered the market.[113] Millions of radio sets were purchased by households, popular programs were aired, and the industry quickly developed.[114]

¶39 Calls for greater political control over the distribution of licenses were heard. These came both from policy makers, such as Secretary of Commerce Herbert Hoover, and from the major commercial broadcast stations.[115] The latter formed a trade association in 1925, the National Association of Broadcasters, which called for "public

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[108] *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 97 (1949) ("[T]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.").

[109] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 160–61 (1973) (Douglas, J., concurring) (citation omitted).

[110] *Id*. Justice Douglas continued, "That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted." *Id.* "That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of press as used in the First Amendment and therefore are entitled to live under the *laissez-faire* regime which the First Amendment sanctions." *Id*.

[111] Thomas Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990), *reprinted in* STUART M. BENJAMIN, DOUGLAS G. LICHTMAN & HOWARD A. SHELANSKI, TELECOMMUNICATIONS LAW AND POLICY (2001).

[112] *Id*. at 142 (citing Jora R. Minasian, *The Political Economy of Broadcasting in the 1920s*, 12 J.L. & ECON. 391, 391–403 (1969)).

[113] *Id*. at 140, tbl.2 (citing HIRAM L. JOME, ECONOMICS OF THE RADIO INDUSTRY 70 (1925)).

[114] *Id*. at 139.

[115] *Id*. at 152.

interest" licensing.[116] This would presumably grandfather the larger stations with substantial audiences, while blocking the emergence of upstart rivals.[117] Policy makers, including Secretary Hoover and key members of Congress, embraced licensing as a mechanism for asserting some level of control over an emerging, influential medium of public opinion.[118]

¶40 When the Department of Commerce dropped its enforcement of the "priority-in-use" system of rights, ostensibly in response to a federal court verdict in July 1926, what ensued was then called "the period of the breakdown of the law."[119] New stations began emitting without legal authorization, and many existing stations changed frequency assignments.[120] Interference between broadcasts diminished the quality of reception for many listeners. Thus, the "breakdown" increased the demand for regulation. The resulting law, the Federal Radio Act, was passed by Congress and then signed by President Calvin Coolidge on February 23, 1927.[121]

¶41 In the following decades, academics debated whether spectrum rights should be exchanged by the pricing mechanism rather than a central administrator.[122] The argument was rendered moot in 1994, when the U.S. government conducted the first U.S. wireless license auction.[123] The nature of the rights to use valuable, invisible airwaves had proven confusing to policy-makers.[124] Through the rise of radio, broadcast TV, cable TV, and

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[116] *Id*. at 152–53.

[117] *Id*. at 154, 157.

[118] *Id*. at 159.

[119] *Id*. at 148 (citing Comment, *Federal Control of Radio Broadcasting*, 39 YALE L.J. 245, 247 (1929)).

[120] *Id.*

[121] 44 Stat. § 1162 (1927), 47 U.S.C. §§ 81–119 (1928).

[122] Coase, *The Federal Communications Commission*, *supra* note 2, at 15 nn.31–32 (citing Leo Herzel, *"Public Interest" and the Market in Color Television Regulation*, 18 U. CHI. L. REV. 802, 809 (1951) (suggesting channels should be leased to the highest bidder)); Leo Herzel, *Rejoinder*, 20 U. CHI. L. REV. 106 (1952) ("Such [diverse] users, [police, commercial telegraph, and oil industry device users] compete for all other kinds of equipment or else they don't get it. I should think the more interesting question is, why is it seriously suggested that they shouldn't compete for radio frequencies?"); Dallas W. Smythe, *Facing Facts about the Broadcast Business*, 20 U. CHI. L. REV. 96 (1952) (arguing that government users of spectrum dominated commercial broadcasting, described as a minor claimant on spectrum rights).

[123] *About Auctions*, FCC (Aug. 9, 2006), http://wireless.fcc.gov/auctions/default.htm?job=about_auctions. "In 1993 Congress passed the Omnibus Budget Reconciliation Act, which gave the Commission authority to use competitive bidding to choose from among two or more mutually exclusive applications for an initial license." *Id*. "Prior to this historic legislation, the Commission mainly relied upon comparative hearings and lotteries to select a single licensee from a pool of mutually exclusive applicants for a license. The Commission has found that spectrum auctions more effectively assign licenses than either comparative hearings or lotteries." *Id*. "[B]y using auctions, the Commission has reduced the average time from initial application to license grant to less than one year, and the public is now receiving the direct financial benefit from the award of licenses." *Id. See* Omnibus Budget Reconciliation Act, Pub. L. No. 103-66, 107 Stat. 312 (1993).

[124] Professor Coase explains:

> It is not easy to understand the feeling of hostility to the idea that people should pay for the facilities they use. It is true that this attitude has been supported by the argument that it was technologically impossible to charge for the use of frequencies, but this is clearly wrong. It is difficult to avoid the conclusion that the widespread opposition to the use of the pricing system for the allocation of frequencies can be explained only by the fact that the possibility of using it has never been seriously faced.

Coase, *The Federal Communications Commission*, *supra* note 2, at 24.

Internet, courts and Congress have carved out regulations that have challenged the limits on government intervention in media content.[125]

¶42 *Red Lion* claims to protect the public interest by placing the rights of the listener as paramount.[126] This then allows the state to compromise the broadcaster's rights to speak as an organ of the press on the grounds that regulators must manage spectrum—an economic resource which would be dissipated were limits not applied to its use.[127] In essence, to avert tragedy of the commons in airwaves, the government is permitted to license firms and structure markets.[128] Because an "open access" regime would destroy the value of frequencies, the government acquires the right to bypass the First Amendment and impose content regulations on broadcasters.

¶43 The argument is a *non sequitur*. As revealed in Ronald Coase's 1959 article, *The Federal Communications Commission*,[129] essentially all economic resources rely on rules limiting access, which enable assets to be used for their highest valued employment. Airwaves can be depleted of productive utility when lack of such rules permits a "tragedy of the commons," but so can other goods lacking legal ownership rights—including ink and newsprint. Yet, the legal limits defining the rules for the use of such inputs into newspapers have created no "scarcity doctrine" allowing the state to evade the protections of the First Amendment on the grounds that they are advancing the interests of readers or advertisers rather than the publishers.[130]

¶44 The scarcity doctrine first appeared in Supreme Court case law in *NBC v. United States*, 319 U.S. 190 (1943). Justice Felix Frankfurter described the resource management chaos facts: "Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile . . . Congress acted upon the

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[125] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). *See* 47 U.S.C. § 309(a), (k)(1)(A) (2006) (concerning licenses renewed upon a finding that the "the public interest, convenience, and necessity" have been served); 47 U.S.C. § 303(r) (providing that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act].").

[126] *See* C. Edwin Baker, *Keynote Address: Three Cheers for* Red Lion, *Symposium: Does* Red Lion *Still Roar? Public Interest Media Regulation Forty Years After* Red Lion Broadcasting Co. v. FCC, 60 ADMIN. L. REV. 861, 861 (2009) ("*Red Lion* merits praise, first, for announcing the correct central constitutional principle for media policy; second, for being fundamentally a media and not merely a broadcast case; and, third, for properly understanding and explaining the economic basis of regulation."). Baker emphasized, "The Court said, 'It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.'" *Id. See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[127] Baker, *Red Lion*, *supra* note 126, at 866–68 ("*Red Lion* shows not only that intervention is proper, even inevitable in many circumstances if resources are to be usable, but *Red Lion* also gives the values—serving the audiences' democratic informational and discourse needs—that should guide these interventions in the media realm."); Mark Lloyd, Red Lion *Confusions*, *Symposium: Does* Red Lion *Still Roar? Public Interest Media Regulation Forty Years After* Red Lion Broadcasting Co. v. FCC, 60 ADMIN. L. REV. 869, 872–75 (2009) ("Coase's abstract point, that scarcity does not of itself call for government regulation, is both irrefutable and irrelevant.").

[128] *See* C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 104 (1994). "Rather than relying on an assertedly unique but ultimately incoherent notion of scarcity, the Court in *Red Lion* is better understood to have developed a more tenable general principle." *Id.* "Relying most heavily on a case coming from the print realm (*Associated Press*), the Court essentially held that the government has the power to structure the media in a manner that the government thinks will promote the best communications environment." *Id.*

[129] Coase, *The Federal Communications Commission*, *supra* note 2.

[130] NBC v. U.S., 319 U.S. 190 (1943) ("NBC").

knowledge that if the potentialities of radio were not to be wasted, regulation was essential."[131] He then developed a theory of communications policy: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."[132] Twenty-six years later, the *Red Lion* court echoed this sentiment about the limited number of licenses: "[B]ecause the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few."[133] Rather than stopping at the resource allocation measure, the *Red Lion* court took the doctrine a step farther: "It is idle to posit an unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[134]

¶45 No, it is not. Ronald Coase unveiled the scarcity fallacy embedded in *NBC* and *Red Lion* with two-fold reasoning. First, he noted that "it is a commonplace of economics that 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."[135] That land, labor, capital, and other economic resources are scarce is not a unique precondition or predicate for government regulation. It is, rather, a predicate for ownership rules.[136] Hence, the second prong of the argument: "The real cause of trouble was that no property rights were created in these scarce frequencies . . . . *There is certainly no need for the kind of regulation which we now find in the American radio and television industry*."[137]

¶46 Coase's modern view of spectrum rights was taken as a "big joke" by communications policy experts for many years.[138] Yet, Coase's view has prevailed. His analysis has become standard, not simply in explaining radio spectrum allocation, but the organization of scarce resources generally. This was acknowledged formally when he received the Nobel Prize in Economic Science in 1991. Yet, while economic theory may have moved on, the analytical errors about economic scarcity in *Red Lion* live on as the law of the land.[139]

¶47 Media economics research confirms the parallels between broadcasters and newspaper firms, which create two-sided markets of journalistic talent, distribution networks, and audiences who demand high-quality news.[140] There are no differences

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[131] *Id*. at 213 (footnote omitted).
[132] *Id*. at 226.
[133] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–89 (1969).
[134] *Id*.
[135] Coase, *The Federal Communications Commission*, *supra* note 2, at 14.
[136] *Id*.
[137] *Id*. (emphasis added).
[138] Thomas W. Hazlett, *The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's 'Big Joke': An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 340 (2001) ("Ronald Coase learned about the intensity with which regulators and their constituents defend the status quo soon after proposing bandwidth markets in 1959. Called to testify to the FCC, Commissioner Philip S. Cross opened the questioning with, '[I]s this all a big joke?'").
[139] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–89 (1969).
[140] POWE, AMERICAN BROADCASTING, *supra* note 5 (describing the "schism" between broadcast and print); KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 203; HARRY J. LEVIN, THE INVISIBLE RESOURCE, *supra* note 27, at 111–12; OWEN, ECONOMICS AND FREEDOM OF

between the two regimes that warrant regulatory exceptionalism, except one: "[W]e think there are differences."[141] As such, perception leads to the belief that regulation naturally separates the two media: "[I]t is well settled that the First Amendment has a special meaning in the broadcast context."[142] Tradition perhaps explains the discrepancy in government oversight on broadcast and print:

> Newspaper people . . . know who their ancestors are, and they wear their tradition proudly, even if they fail to live up to it. But . . . broadcasters are the 'lineal descendants of operators of music halls and peep shows.' Not a terribly complimentary characterization, but still, a case can be made for it.[143]

Today, if the technorati deliver print, audio, and video media to users over broadband, upon what doctrine does broadcast regulation stand?[144] Might the Internet, as opposed to broadcast TV, become the medium in need of regulation?[145] The Orwellian sense of an

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EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT, *supra* note 27, at 10–12.

[141] POWE, AMERICAN BROADCASTING, *supra* note 5, at 213.

[142] FCC v. Pacifica Found., 438 U.S. 726, 742 n.17 (1978). *See* KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 203–04 n.4 ("Perhaps it bears emphasis that the dichotomy reflected in present law is not between broadcasting and print. Rather, it is between broadcasting and every other medium of mass communications. The Court truly thinks (or seriously pretends) that broadcasting is *unique*.").

[143] POWE, AMERICAN BROADCASTING, *supra* note 5, at 213 (footnote omitted).

[144] Professor Angela Campbell explains:

> What do we mean by broadcasting? Is it something that uses the electromagnetic spectrum? If so, why are cell phones, which use the spectrum, not considered broadcasting? Is broadcasting the transmission of content from one to many rather than from point to point as with a telephone call? If so, why is cable television not considered broadcasting? Is broadcasting different because the public generally does not have to pay for it but does have to pay for cable?

Angela J. Campbell, *The Legacy of* Red Lion, *Symposium: Does* Red Lion *Still Roar? Public Interest Media Regulation Forty Years After* Red Lion Broadcasting Co. v. FCC, 60 ADMIN. L. REV. 783 (2009).

[145] POWE, AMERICAN BROADCASTING, *supra* note 5, at 214–15. "So too [like the printing press], I think, with American Broadcasting. It radiated fear. It was 'pervasive,' 'unique,' an 'intruder' in our lives. It was–it is–powerful; indeed, it is almost impossible to read an article on broadcasting that does not make that point . . . ." *Id.* Powe further explains:

> The *New York Times* and the *Washington Post* are powerful, too, but we don't regulate them because of that. Beyond the fact that the Constitution forbids their regulation, the reason we don't regulate is that we have grown used to them. They may be powerful, but we think we know the how and the why. With broadcasting . . . we are not as sure what the medium is doing to us, and so we attempt to regulate it to prevent it from doing what we do not know it is doing. We may not know the consequences of introducing television into our homes, but there appears to be a regulatory consensus that we don't want those consequences to get out of hand. We fear broadcasting because we don't understand it as well as we do print. The fear may be irrational, but it is there nevertheless. It does not justify regulation, but it does explain it.

Id. See also Tribe, *Plenary Address*, *supra* note 4, at 58:00—59:17:

> [A]ll of those constitutional protections should be construed as fully applicable without regard to the fears that modernity thrusts upon us. It was about seven decades ago that Franklin Roosevelt famously said 'The only thing we have to fear is fear itself.' And I think a similar point needs to be emphasized today. We need to focus not on all the scary things that could befall us, or our children, or our grandchildren, unless we give up our freedom to an all powerful government. But we need to focus on all the hopeful things that we can accomplish, if we put our minds and our energies to the task of empowering individuals and families to protect themselves and pursue their own dreams for a better life. That's why the

"intruder" and "uniquely pervasive" visitor in the home provides a possible justification for new media content regulation.[146] The American who now grazes on multiple information sources per day has adapted to a technological environment where information is delivered with algorithmic customization.[147] News, information, and entertainment rarely wait on doorsteps in the form of rolled newspapers. Modern consumers receive data at all hours of the day, in the office, car, and home.

¶48 Consider *Pacifica*, where the ability of a radio broadcast to waft into the home and be easily heard by a child, drove the Court to permit government regulation of George Carlin's "Seven Dirty Words" monologue. This was thought consistent with the First Amendment, given that *Red Lion* had already opened the door for disparate treatment of the electronic press, in that there was an "intrusion" by the wireless communication. It was there and potentially available to create problems for parents of young listeners, even if uninvited. Again, the premise for law was the nature of the technological platform. And today that wireless platform brings cellular networks and the Internet to the ears and eyes of that same young girl or boy (or their grandchild).

¶49 In *Pacifica*, the "intrusion" trumped the parent's control of the radio's on/off switch: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying the remedy for an assault is to run after the first blow."[148] But compare the treatment of censorship in print where one scholar remarks that "[the] precedential remedy for visual indecency is not state censorship, but private censorship—namely, for offended viewers to avert their eyes."[149]

¶50 If the "intrusion" doctrine falls apart on technological grounds, then *Pacifica* "becomes only a case about children and the First Amendment."[150] Indeed, the *Pacifica*

> information technology sector that you represent is so exhilarating because of what it promises, what it can do, the way it can transform the world. Sure, there are things that might be scary about it, but you got a selling job to do, you've got to convince the people with the power to make your lives difficult and the First Amendment costly, that it's really worth preserving what makes this nation special.

[146] KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 220.

[147] *See generally* Editorial, *Facebook's Wise Privacy Move*, L.A. TIMES, May 28, 2010, at A24, *available at* http://www.latimes.com/news/opinion/editorials/la-ed-0528-facebook-20100528,0,2037315.story. The editorial states:

> It's one thing for the Federal Trade Commission to hold companies to the promises they make to their users; it's another for lawmakers to try to design privacy policies for sites whose technical capabilities are constantly advancing, along with their users' demand for services and attitudes about privacy. As Zuckerberg has noted, Facebook triggered outrage when it started sending users' updates automatically to all of their friends. Now that kind of "news feed" is a central feature of just about every social network. What looks like a threat today may prove to be an asset tomorrow.

Id.

[148] FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

[149] KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 221 (citing Cohen v. California, 403 U.S. 15 (1971); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)).

[150] *Id.* at 221. Professor Tribe explains:

> Who decides? Should it be parents or should it be the government that decides what information is made available. So the broad lesson of this discussion of television violence is the centrality of the First Amendment's opposition to having government as Big Brother regulate who many provide information what information content to whom whether or not for a price . . . In a world where grownups understandably fear for themselves and their children and worry about the brave new world of online cyberreality that their kids can navigate more fluently than they can, in that kind of world, it is enormously tempting to forget or to

case has been interpreted to depend less on the broadcast distinction and more upon the narrow area of speech that is indecent to children.[151] If so, then the analysis of content-based regulations should be narrowly tailored with a compelling government interest under a strict scrutiny standard of review—generalizing the law while restoring a full First Amendment for the electronic press. If concerns arise for regulations to protect children from the brave new world of cybermedia, the broadcast exception based upon pervasiveness need not merit greater deference by the courts.[152]

B. Attempts to Reframe Red Lion for Digital Media

¶51 Since 1969, courts and litigators considered *Red Lion* limited to its facts after the reversal of the FCC's Fairness Doctrine policy in 1987. In oral arguments of *Fox Television Stations v. FCC*, on remand to the U.S. Court of Appeals for the Second Circuit, one judge described the case as a mere red herring for purposes of legal analysis.[153]

¶52 Yet, the *Red Lion* opinion remains valuable to some regulatory agendas. The precedent creates a model in which regulators can plausibly intervene when the market is found to provide too little speech of high value, such as serious, investigative journalism,[154] or too much speech of low value, such as amateur, wasteful, or harmful

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> subordinate the vital principles of Constitutional liberty, and even if after years of litigation and expenditure, the First Amendment prevails, it can be worn down dramatically by having to wage that fight over and over and over. Essentially, it's a cultural problem, it's a problem of persuading politicians and the public that the vital principles of freedom of speech do not lose their vitality, do not lose their centrality, to who we are as a nation, who we are as a people, simply because we live in a scary, brave new world.

Tribe, *Plenary Address*, *supra* note 4, at 55:00–56:00.

[151] KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 221 n.52.

[152] Content regulations outside of the broadcasting medium are scrutinized under a strict scrutiny standard requiring a compelling government interest. *See* Sable Commc'ns of Cal., Inc., v. FCC, 492 U.S. 115, 126 (1989).

[153] Oral Arguments, *America and the Courts* at 19:30, C-SPAN (Jan. 16, 2010), http://38.105.88.161/Watch/Media/2010/01/16/AC/A/28406/AC+Fox+Television+v+FCC.aspx

("Is it a red herring instead of a *Red Lion*?"). In response, Miguel Estrada said, "It is quite probably that your honor because the very most that the Commission gets out of that line of cases leading up to the *Pacifica* cases is intermediate scrutiny, and I think we can readily demonstrate that the commission's actions in these cases really flunk intermediate and strict scrutiny." *Id. See also* Marvin Ammori, *The Fairness Doctrine: A Flawed Means to Attain a Noble Goal, Symposium: Does* Red Lion *Still Roar? Public Interest Media Regulation Forty Years After* Red Lion Broadcasting Co. v. FCC, 60 ADMIN. L. REV. 881, 893 (2009) ("Debate about the Fairness Doctrine is a red herring, as the Doctrine will not and should not be reinstated. Assertions by conservatives that Democrats are attempting to reinstate the Fairness Doctrine are inaccurate. The Doctrine is easy to avoid and difficult to enforce, making reinstatement of the Doctrine ineffective at best.").

[154] *See* Federal Trade Commission, Address at From Town Criers to Bloggers: How Will Journalism Survive the Internet Age? (June 15, 2010), *available at* http://ftc.gov/opp/workshops/news/jun15/100615transcript.pdf (last visited Nov. 10, 2010). Several panelists discussed the importance of "serious journalism" or "Big J" journalism where beat reporters and foreign correspondents fulfill a valuable societal role in investigating government power. *See also* Lili Levi, *The Four Eras of FCC Public Interest Regulation, Symposium: Does* Red Lion *Still Roar? Public Interest Media Regulation Forty Years After* Red Lion Broadcasting Co. v. FCC, 60 ADMIN. L. REV. 813, 814 (2009). Professor Levi explains:

> With the advent of cable television, over-the-air broadcasters faced many new competitors able to focus on narrower audience segments. As the blogging phenomenon and websites such as YouTube have contributed to the growth of Internet media, the market has become

speech.[155] Such determinations are subject to administrative procedures set in law and cannot be "arbitrary and capricious."[156] But otherwise the finding of market failure requires simply three of five votes at the Federal Communications Commission. Even when FCC content regulation has visibly chilled free speech, as with the Fairness Doctrine,[157] or failed to promote its announced goals, as with educational programming for children,[158] the hurdle is not a high one.[159] It requires control by the proper political coalition rather than a compelling set of facts.

¶53 In today's digital world, speakers aggregate around amateur, political, corporate, and niche interests, crowding across formerly siloed distribution channels.[160] It would be

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> further fragmented. The effect is to leave broadcasters and newspapers with much smaller audiences and greater financial pressures. *While the new media environment may well provide a greater variety of viewpoints and opportunities for self expression,* it does not make up for the lost resources for traditional journalism . . . .

Id. at 815 (emphasis added).

[155] *See generally* Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience* (University of Pennsylvania Law School, Scholarship at Penn Law Research Paper No. 09-33, 2009), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1294&context=upenn_wps (discussing the inevitability of intermediation and the phenomenon of control of unwanted content and identification of good content). For popular commentary on the quality of speech on the Internet today, see, e.g., ANDREW KEEN, THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE (2007); NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS (2010).

[156] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[157] Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 279–301 (1997); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

[158] The FCC adopted "kid-vid" rules following the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000 (1990) (codified at 47 U.S.C. §§ 303a, 303b, 394 (2006)). FCC rules generally require television stations to "provide parents and consumers with advance information about core programs being aired; define the type of programs that qualify as core programs; and air at least three hours per week of core programs." *Children's Educational Television*, FCC (Sept. 22, 2010), http://www.fcc.gov/cgb/consumerfacts/childtv.html. For commentary on the efficacy and arguable failure of the kid-vid legislation, see MINOW & LAMAY, ABANDONED IN THE WASTELAND, *supra* note 25, at 105–136. *See also* Robert Corn-Revere, *Regulation in Newspeak: The FCC Children Television Rules* (Cato Institute, Policy Analysis No. 268, 1997), *available at* http://www.cato.org/pubs/pas/pa-268.html.

[159] This lends itself to the question of what constitutes an ideal speech marketplace. Note the controversy between one radio station and the FCC on "meritorious" foreign language programming and the fulfillment of adequate monitoring and logging of such time-brokered content. In *Cosmopolitan Broadcasting*, the D.C. Circuit found:

> The following is a breakdown of WHBI's weekly foreign language programming in 1969: Spanish (45.5 hours); Italian (35.5 hours); Greek (10 hours); Hungarian (4 hours); Arabic (2.5 hours); Polish (2.75 hours); Brazilian (2.05 hours); Portuguese (2 hours); Lithuanian (1 hour); Slovakian (55 minutes); Croatian (.5 hours); Albanian (.5 hours); Ukranian (.5 hours); Roumanian [sic] (.5 hours); Armenian (.5 hours); Yugoslavian (.5 hours); Bulgarian (.5 hours); Norwegian (.5 hours). Reply brief for appellant, Appendix A at Exhibit # 6. By 1972, WHBI also broadcast in Korean, Macedonian, Urdu, Hindi, Bengali, Japanese, and Russian. WHBI, Exhibit # 6, Supplemental Joint Appendix (S.J.A.) at 31–58.

Cosmopolitan Broad. Corp. v. FCC, 581 F.2d 917, 919 n.2 (D.C. Cir. 1978) (cited in Richard A. Epstein, *What Broadcast Licenses Tell Us about Net Neutrality:* Cosmopolitan Broadcasting Corporation v. FCC, in NEW DIRECTIONS IN COMMUNICATIONS POLICY 85, 96 n.21 (Randolph J. May ed., 2009)).

[160] Popular and academic analysts see the changing nature of the written word in a post-modern, media-saturated environment, and its implications on digital politics. The persuasiveness of the digital written word may depend less upon words itself, where modern culture finds itself philosophically lost between "originality" and "authenticity" of expression. *See* Andrew Keen, *Hunger Artists, in* BARNES AND NOBLE REVIEW (May 26, 2010), http://bnreview.barnesandnoble.com/t5/Public-and-Private/Hunger-Artists/ba-p/2680; ANDREW POTTER, THE AUTHENTICITY HOAX: HOW WE GET LOST FINDING OURSELVES (2010)

curious if regulators were to ignore these emerging channels of communication. Instead, one expects that they will naturally consider extending existing regimes to encompass new content, speakers, and aggregators. Ideas are already sprouting, including legal interventions to promote speaker diversity, pre-empt community echo-chambers,[161] identify and advance serious journalism, mandate transparency requirements for search engines delivering commercial or political speech, and constrain ISPs and device platforms which design features for closed networks.[162] Policy innovators have already begun to divert the *Red Lion* regulatory path toward digital media.[163]

1. Diversity of Viewpoints and Group Polarization

¶54 The policy goal of promoting diversity and civility in speech, on its face, is not generally objectionable. However, the institution of a lower level of judicial scrutiny for such rules is a detriment to the First Amendment. Such rules would not appear overtly content-specific, as obviously as the Fairness Doctrine of the 1960s and 1970s.[164] However, a greater number of harmful speech categories may emerge as targets of regulation with less scrutiny from the judicial branch and overbroad restrictions that chill otherwise protected speech. Examples of categories include hate speech, campus speech codes, and protection of children from violence.[165] Such speech may travel upon private

(exploring traditional frameworks of truth, meaning, mass culture, and modernity). In a digital media environment, content is frequently derivative upon other content, raising important copyright implications. Political or cultural digital memes can also have viral and explosive effect, with enough truth to be passed along to another. *See also* FARHAD MANJOO, TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY (2008) (exploring "truthiness," selective exposure, peripheral processing, conspiracy theories, disjunction between truth and proof).

[161] Sunstein, *Keynote*, Red Lion *Symposium*, *supra* note 6, at 771, 778 (describing echo chambers in the modern information landscape compared to the public forum values of *Red Lion*). *See also* CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2007); *id*. at 25 (discussing the nature of a "public forum" in the modern era); *id*. at 32 (discussing the limitations of the public forum doctrine subsidized by taxpayers with that of the goal of republican self-government); *id*. at 73 (comparing "second-order diversity" with diversity within a speaker group); *id*. at 206 ("'Must carry' has no legitimate role on the Internet"); *id*. at 207 (exploring concepts of access rights, must-carry rules, and advertiser access to viewer attention on the web).

[162] *See infra* notes 169–181; Ammori, *The Fairness Doctrine*, Red Lion *Symposium*, *supra* note 153, at 893; Sunstein, *Keynote*, Red Lion *Symposium*, *supra* note 6, at 778; Levi, *Four Eras*, Red Lion *Symposium*, *supra* note 154, at 815; Ronald J. Krotoszynski, Jr., *The Irrelevant Wasteland: An Exploration of Why* Red Lion *Doesn't Matter (Much) in 2008, The Crucial Importance of the Information Revolution, and the Continuing Relevance of the Public Interest Standard in Regulating Access to Spectrum, Symposium: Does* Red Lion *Still Roar? Public Interest Media Regulation Forty Years After* Red Lion Broadcasting Co. v. FCC, 60 ADMIN. L. REV. 911, 921–22, 941 (2009).

[163] Krotoszynski, *Irrelevant Wasteland*, Red Lion *Symposium*, *supra* note162, at 942 ("If *Red Lion's* embrace of the public interest concept can be redefined and redeployed to advance these objectives, perhaps the next retrospective symposium ten or twenty years from now will be able to celebrate the decision's importance in helping to realize the full possibility of the information revolution.").

[164] Ammori, *Fairness Doctrine*, Red Lion *Symposium*, *supra* note 153, at 893 ("Rather than debate a [fairness] doctrine that will not pass, Congress and the FCC should encourage diverse ownership of traditional media and open, high-speed Internet access as the most appropriate means of making diverse viewpoints available to the public.").

[165] The Future of Media inquiry by the FCC solicited comments on the changing composition of digital speech and community speech needs. Some scholars question the institutional wisdom of such an inquiry. *See* Glen O. Robinson, *The FCC's "Future of Media Project": Let Them Eat Broccoli*, PERSPECTIVES FROM FSF SCHOLARS, May 19, 2010, *available at* *http://www.freestatefoundation.org/images/Let_Them_Eat_Broccoli.pdf*. Filed comments have raised

networks, such as email listservs, which promote the halflife of particular conspiracy theories, dehumanizing speech, and anti-social incivility. Such email listservs would be read by a limited, polarized group of people, without a right of reply or neutral forum to provide fact-checking or rebuttal. For the same rationale as the Fairness Doctrine, some public interest advocates may see the need to neutralize speech deemed hyperbolic, irresponsible, or politically mischievous.

¶55 In response to this phenomenon, one scholar's group polarization theory says that increasingly customizable and "Daily Me" media delivery may lead to increased extremism among factions of citizens.[166] The strategy of *Red Lion*'s "public forum" regulation[167] is a blunt, but available, instrument in the eyes of some, that would provide limits on deemed dangerous speech if private solutions prove less than satisfactory.[168]

¶56 The regulatory failure of the Fairness Doctrine should inform this discussion. The capability of governing institutions to define, legislate, and enforce such speech restrictions weighs down the regulatory calculus significantly. The value of promoting civility and respect among citizens is undisputed; however, feasibility wanes in light of the capacity of elected and civil servants to create content-specific and content-neutral structures to manage speech around changing cultural and political norms.

¶57 Yet, policymakers may still see the threat as so great as to justify government prophylaxis or remedy. The narrative has been presented as such: digital media may enable and promote greater stratification of citizens into homogeneous communities of acutely differentiated opinions.[169] As a free-standing theory, cognitive bias in digital

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issues about variable levels of hate speech on digital media. *See* Comments of National Media Coalition ("NHMNC"), In the Matter of Future of Media and Information Needs of Communities in a Digital Age, GN Docket No. 10-25 (FCC May 7, 2010), *available at* http://www.nhmc.org/sites/default/files/NHMC%20et%20al.%20Future%20of%20Media%20Comment.pdf; Matthew Lasar, *FCC Asked to Monitor "Hate Speech," "Misinformation" Online*, ARS TECHNICA BLOG, (May 31, 2010, 8:00 PM), http://arstechnica.com/web/news/2010/05/should-the-government-keep-tabs-on-hate-speech.ars.

[166] *See also* Cass R. Sunstein, *The Daily We: Is the Internet Really a Blessing for Democracy?*, THE BOSTON REV., Summer 2001, *available at* http://bostonreview.net/BR26.3/sunstein.php; Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories* (Harvard Public Law, Working Paper No. 08-03, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084585. "Because those who hold conspiracy theories typically suffer from a 'crippled epistemology,' in accordance with which it is rational to hold such theories, the best response consists in cognitive infiltration of extremist groups. Various policy dilemmas, such as the question whether it is better for government to rebut conspiracy theories or to ignore them, are explored in this light." *Id*. *See generally* Glenn Greenwald, *Obama Confidant's Spine-Chilling Proposal*, SALON (Jan. 15, 2010, 7:16 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/01/15/sunstein/index.html.

[167] Compare the Chinese approach of Internet speech regulation for one jurisdiction's attempt to maintain law and order among a diverse population of 4 billion people. *See Chinese Government Spells Out Internet Restrictions After Google's Exit*, BLOOMBERG NEWS (June 7, 2010), http://preview.bloomberg.com/news/2010-06-08/china-spells-out-restrictions-on-speech-over-internet-after-google-s-exit.html. China's State Council Information Office said in a 31-page policy paper that no organization can spread "superstitious ideas," publish material which can disrupt "social order and stability," and "other content forbidden by laws and administrative regulations." *Id*. The report maintains that Chinese citizens "can voice their opinions in various ways on the Internet," "[w]ith their right to freedom of speech on the Internet protected by the law." *Id*.

[168] Sunstein, *Keynote*, Red Lion *Symposium*, *supra* note 6, at 778. "It is quite possible that what we should do now is nothing. It will be most intriguing to hear what the panelists have to say about ways of reviving *Red Lion*'s admirable ends in a communications universe where *Red Lion's* means are most ill-suited. One question is whether a great deal can be done privately, not publicly." *Id.*

[169] Mass media studies have addressed the "news" and "entertainment" distinction, "dissonance" theory

speech invites empirical and cultural inquiry.[170] However, the choice of how to approach such changes in digital politics depends on an affirmative or negative view of the First Amendment. An affirmative view of the First Amendment would promote greater deference and less scrutiny toward policies that actively engage in the content-specific realm.[171] On the other hand, an enumerated rights view of the First Amendment would promote more scrutiny of legislation and rulemaking.

2. Structural, Content-Neutral Regulation of Networks

¶58 Structural constraints upon corporate ownership and concentration provide another approach to promote public interest values on digital media. Such content-neutral regulation involves speech regulation in some form, as acknowledged by scholars concerned about digital speech.[172] One scholar writes:

¶59 If the most significant public interest role of radio and television today could be to provide credible journalism . . . and if . . . a market-based conception of the public interest is unlikely to promote such journalism . . . then the Commission can indirectly regulate media structure to induce more investment in such fare.[173]

¶60 The flow of content and the market structure of platforms would also bring search engines into the mix. One scholar suggests FCC power to moderate ground rules for search. This scholar writes: "If a particular search engine sells the right to rig search results, consumers should be aware of this fact. If a search engine blocks content (for whatever reason), this too should be disclosed."[174]

¶61 Justice Sandra Day O'Connor described the nature of structural content-neutral regulations in her partial dissent in *Turner II*, which approved must-carry rights of broadcasting programming onto cable TV. She specifically took issue with the

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of communication "where people tend to discount messages that are at variance with their a priori expectations," and the demand for mass media messages where "[t]he empirical work on persuasion and attitude change does suggest that it is extraordinarily difficult to make people believe things they are not already inclined to believe." BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT 10–12 (1975) (citing LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 28 (1957); MARSHALL MCLUHAN, UNDERSTANDING MEDIA 49 (1964); HAROLD A. INNIS, THE BIAS OF COMMUNICATION 39 (1951)).

[170] *See* Matthew Gentzkow & Jesse M. Shapiro, *Ideological Segregation Online and Offline* (NBER Working Paper No. 15916, 2010), *available at* http://www.nber.org/papers/w15916 ("We find that ideological segregation of online news consumption is low in absolute terms, higher than the segregation of most offline news consumption, and significantly lower than the segregation of face-to-face interactions with neighbors, co-workers, or family members. We find no evidence that the Internet is becoming more segregated over time."); David Brooks, *Riders on the Storm*, N.Y. TIMES, Apr. 19, 2010, at A21, *available at* http://www.nytimes.com/2010/04/20/opinion/20brooks.html.

[171] Sunstein, *Keynote*, Red Lion *Symposium*, *supra* note 6, at 771 ("What I'm going to try to connect this group polarization finding with is what I'm going to call the positive or affirmative side of the First Amendment. If there is any single point that comes out of this, it should be the difficulties and complexities in the system of self-sorting that *Red Lion's* demise has helped unleash on the country.").

[172] The determination of whether a regulation is a content regulation explicitly or a structural regulation that promotes and limits the freedoms of certain speakers through access requirements, must-carry, is a topic of increasingly important First Amendment discussion. *See* KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 186 (raising the analysis of Palko and footnote 4 to Carolene Products, affecting the view that the First Amendment "occupied a 'preferred position' in a constitutional hierarchy.").

[173] Levi, *Four Eras*, Red Lion *Symposium*, *supra* note 154, at 816.

[174] Krotoszynski, *Irrelevant Wasteland*, Red Lion *Symposium*, *supra* note 162, at 941.

determination that access to local content was a content-neutral regulation that did not warrant strict scrutiny review as content-specific regulation would. She wrote, "[t]his is why the Court is mistaken in concluding that the interest in diversity—in 'access to a multiplicity' of 'diverse and antagonistic sources,' is content-neutral. Indeed, the interest is not 'related to the suppression of free expression,' but that is not enough for content neutrality."[175] With the bundling of more content through the Internet, her words are more apt than ever: "The interest in giving a tax break to religious, sports, or professional magazines is not related to the suppression of speech; the interest in giving labor picketers an exemption from a general picketing ban is not related to the suppression of speech."[176] Justice O'Connor continues, "[b]ut they are both related to the content of speech—to its communicative impact. The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say."[177]

¶62 *Red Lion* as a regulatory public interest case retains relevance today among some policymakers.[178] As a refresher in a digital media world, this Article will now invite close scrutiny on the facts and doctrine of *Red Lion* from an earlier era to question the retention of such a doctrine in a digital media environment.

IV. FACTUAL LIMITS OF *RED LION*

¶63 *Red Lion*, decided on June 9, 1969, was decided on the trifecta of factual error, economic error, and technological error. First, the Court did not have a factual record to support the conclusion that the Fairness Doctrine did not actually impose self-censorship on radio and television broadcasters.[179] Second, the Court perpetuated a blunder of

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[175] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 678 (1997) (O'Connor, J.) (concurring in part, dissenting in part) (footnotes and citations omitted).

[176] *Id.*

[177] *Id.*

[178] *Red Lion* proponents have generated scholarly work recently. *See* Anthony E. Varona, *Toward A Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 103 (2009) ("Broadband can deliver the electronic free marketplace of ideas that was the elusive, and perhaps impossible, dream of the broadcast regulatory regime. But it will not be able to do so without the significant and proactive involvement of the federal government."); Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 11 COMMLAW CONSPECTUS 97, 98 (2003) ("The article concludes that public interest regulation is not in constitutional jeopardy as a result of the advent of digital technology. Broadcast licenses remain scarce, and the scarcity doctrine remains good law."); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1687 (1997) ("This Article seeks to go beyond the scarcity rationale and place broadcast regulation on firmer First Amendment footing. It finds a doctrinal basis for upholding broadcast regulation under the Court's public forum doctrine.").

[179] Speaking of the Fairness Doctrine and the appurtenant Personal Attack Rule and Political Editorial Rule, the *Red Lion* court said: "[I]f experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969). The FCC produced just such a showing in 1985. That finding was supported by the finding of post-Fairness Doctrine radio market, which empirically revealed the existence of a chilling effect. Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 301 (1997); Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35 (1998).

economic logic,[180] misperceiving the standard economic condition of scarcity as unique.[181] Third, the "physical" limits thought to reside in the special nature of radio waves were wrong. While generating greater bandwidth is generally a costly exercise, there is no set number of frequencies—or radio licenses—that can be defined in nature. The restrictions result from conflict among rival users and the legal rules for resolving such conflicts. Notwithstanding the numerous lacunae embedded in the decision, *Red Lion* remains the foundation for the reduced First Amendment rights afforded broadcasters, relative to other media, today.[182]

A. The Chill of the Fairness Doctrine

¶64 In late November 1964, Reverend John Norris, who owned the radio station WGCB in Red Lion, Pennsylvania, sold fifteen minutes of airtime to the Reverend Billy James Hargis for $7.50 for Hargis's Christian Crusade program. Reverend Hargis thus broadcasted his views on WGCB as well as 200 other stations,[183] taking two minutes during the program to criticize Fred Cook, author of "Goldwater—Extremist on the Right."[184] Cook complained to the FCC about Hargis's comments and demanded equal time to respond.[185] Norris offered him fifteen minutes for $7.50, but Cook declined, demanding free airtime under the Fairness Doctrine and the related Personal Attack Rule.[186] The FCC granted Cook the free time and Norris pressed his First Amendment rights against the order.[187] Ultimately, the Supreme Court unanimously rejected Norris's claim and sustained the doctrine on the grounds that the airwaves are scarce.[188]

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[180] The blunder is attributable to Justice Frankfurter's opinion in *NBC v. United States*, 319 U.S. 190 (1943). That decision, holding that First Amendment protections could not apply to a medium if there were not unlimited opportunities to speak, prompted economist Ronald Coase's seminal 1959 article, see Coase, *The Federal Communications Commission, supra* note 2. Coase's argument, therein, and as presented in R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), formed the basis of the citation in his Nobel Prize in Economics awarded in 1991.

[181] *NBC*, 319 U.S. at 190.

[182] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, (1978); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); CBS, Inc. v. FCC, 453 U.S. 367 (1981); FCC v. League of Women Voters of California, 468 U.S. 364, 376 (1984); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638–39 (1994).

[183] *Red Lion*, 395 U.S. at 371. *See* FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT, *supra* note 19.

[184] *Red Lion*, 395 U.S. at 371, 372 n.2.

[185] *Id*. at 371–72. For more context on the Cook-Hargis dispute, see generally, Fred J. Cook, *Radio Right: Hate Clubs of the Air*, THE NATION, May 25, 1964, *available at* http://live.thenation.com/archive/detail/13231256. "Right-wing fanatics, casting doubt on the loyalty of every President of the United States since Herbert Hoover, are pounding the U.S. people, this Presidential election year, with an unprecedented flood of radio and television propaganda." *Id*. "The hate clubs of the air are spewing out a minimum of 6,600 broadcasts a week, carried by more than 1,300 radio and television stations-nearly one out of every five in the nation-in a blitz that saturates every one of the fifty states with the exception of Maine." *Id*. KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 190 n.60. *See* ABC News, *Fairness Doctrine Abolished*, *supra* note 20 (providing archived video of an ABC's News Washington report on the FCC's vote to overturn the Fairness Doctrine).

[186] Cook, *supra* note 185.

[187] *Red Lion*, 395 U.S. at 372.

[188] *Id*. at 367. The vote in *Red Lion* was 8-0, with Justice William O. Douglas recused. He later wrote that he would have dissented had he been available to hear the case. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (1973) (Douglas, J., concurring) ("I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First

¶65 Key facts omitted in the record are these: the challenge by Cook to Norris's editorial policy was part and parcel of a campaign to create a chilling effect via requests for equal time.[189] The WGCB broadcast was not heard by Fred Cook himself, but was monitored by an extensive operation established by the Democratic National Committee (DNC) for the purpose of filing Fairness Doctrine challenges against right-wing broadcasters.[190] This group of DNC-funded media monitors was formed after President John F. Kennedy's experience with conservative radio shows during the 1962 campaign to gain passage of the Nuclear Test Ban Treaty.[191]

¶66 Political operative Wayne Phillips had been chosen to head the radio watchdog effort. He wrote: "Even more important than the free radio time was the effectiveness of this operation in inhibiting the political activity of these right-wing broadcasts."[192] One of Phillips's assistants, Martin Firestone, a former FCC lawyer, wrote in a memo that the DNC's efforts were paying dividends in that they "may have inhibited the stations in their broadcast of more radical and politically partisan programs."[193] The large broadcasters and mainstream viewpoints were not at risk of being hurt according to Firestone:

> The right-wingers operate on a strictly cash basis and it is for this reason that they are carried by so many small stations. Were our efforts to be continued on a year-round basis, we would find that many of these stations would consider the broadcasts of these programs bothersome and burdensome (especially if they are ultimately required to give us free time) and would start dropping the programs from their broadcast schedule.[194]

Bill Ruder, another operative of the effort and an assistant secretary of commerce in the Kennedy administration, also later testified: "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."[195]

¶67 The Supreme Court's holding depended upon the presumption that broadcasters were not "irresistibly forced to self-censorship."[196] For this point, the *Red Lion* decision cited a statement by Frank Stanton, president of CBS, at the Sigma Delta Chi National Convention from November 21, 1968. Stanton stated, "[W]e are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation."[197]

¶68 Privately, Stanton was apparently not so outspoken about broadcasters' independence when privately confronted by federal regulators. In an internal White

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Amendment regime.").

[189] Hazlett, *Physical Scarcity*, *supra* note 3, at 933–34.

[190] FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT, *supra* note 19, at 34–49.

[191] *Id*.

[192] *Id*. at 41 (quoting Wayne Phillips).

[193] *Id*. at 41–42 (quoting Martin Firestone).

[194] *Id.* at 42 (quoting Martin Firestone).

[195] POWE, AMERICAN BROADCASTING, *supra* note 5, at 115, 197–212 (quoting Bill Ruder).

[196] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969).

[197] *Id*. at 393 n.19 (quoting Frank Stanton, President, Columbia Broadcasting System, Keynote Address at Sigma Delta Chi National Convention (Nov. 21, 1968)).

House memorandum dated September 25, 1970 that was made public during the Watergate investigation, Nixon administration attorney Charles W. Colson described his efforts to "inhibit . . . the networks" and "eliminate once and for all loyal opposition type programs."[198] He detailed his meetings with three network chief executives regarding President Nixon's views of their news reporting.[199] He boastfully indicated the pressure of self-censorship:

> The networks are terribly nervous over the uncertain state of the law, i.e., the recent FCC decisions and the pressures to grant Congress access to TV. They are also apprehensive about us . . . . The harder I pressed them [CBS and NBC] the more accommodating, cordial, and almost apologetic they became . . . . There was unanimous agreement that the President's right of access to TV should in no way be restrained. Both CBS and ABC agreed with me that on most occasions the President speaks as President and there is no obligation for presenting a contrasting view under the Fairness Doctrine. (This, by the way is not the law. The FCC has always ruled that the Fairness Doctrine always applies and either they don't know that or they are willing to concede us that point.) . . . . NBC, on the other hand, argues that the Fairness test must be applied to every speech but [Julian] Goodman [president of NBC] is also quick to agree that there are probably instances in which Presidential addresses are not controversial . . . . To my surprise, CBS did not deny that the news had been slanted against us. [CBS Chairman William] Paley merely said that every Administration has felt the same way and that we have been slower in coming to them to complain than our predecessors. He, however, ordered Stanton in my presence to review the analysis with me and if the news has been slanted to see that the situation is immediately corrected . . . . CBS does not defend the O'Brien appearance. Paley wanted to make it very clear it would not happen again and that they would not permit partisan attacks on the President. They are doggedly determined to win their FCC case, however, as a matter of principle; even though they recognize they made a mistake, they don't want the FCC in the business of correcting their mistakes.[200]

The implications of the Colson memos are clear: When the government exercises discretion that controls the financial fortunes of a broadcast licensee, nervousness of the broadcast licensee is entirely predictable. Indeed, the government leverages this nervousness.[201] The privately reported beliefs of the president of CBS on the relationship between broadcasters and the state show that "the chilling effect is found to be alive and frigid."[202] Stanton's testimony on the chilling effect, relied on by the Supreme Court to suggest that none was in evidence, cannot be taken at face value. Intimidation via licensing shows up in regulation by a "raised eyebrow,"[203] not in public complaints that

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[198] FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT, *supra* note 19, at 131.

[199] Bazelon, *FCC Regulation*, *supra* note 5, at 214.

[200] FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT, *supra* note 19, at 131–32; Bazelon, *FCC Regulation*, *supra* note 5, at 214 (quoting report by Charles W. Colson).

[201] Hazlett, *Physical Scarcity*, *supra* note 3, at 937.

[202] *Id.*

[203] Ill. Citizens Comm. for Broad. v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (per curiam).

risk regulatory sanction. In practice, the Fairness Doctrine did, indeed, chill TV broadcasters.

B. Stronger First Amendment Rights for Spectrum Licensees

¶69 The solution, then, to the self-censorship and chilling effects from greater content regulation is to vest current licensees with greater First Amendment rights. This adjustment to the regulatory regime would not be a radical departure from the current licensing regime. In fact, the rules on public interest obligations have been relaxed and no harm has followed.[204]

¶70 If there is a public interest rationale for subsidizing localism, diversity of viewpoints, or kid-vid rules, then this should be done transparently through licenses dedicated to public broadcasting. That has been the "good government" reform for four decades. In the late 1970s, Congressman Lionel Van Deerlin (D-CA), head of the House Telecom Subcommittee, proposed dropping "public interest" obligations like the Fairness Doctrine, which he found did not work. He proposed imposing a 2% tax on broadcasters' gross receipt.[205] The money was to endow public broadcasting, allowing it to receive funding without political jockeying in each year's budget process, although some questioned the management of such a fund for independent public broadcasting.[206] In

[204] Howard A. Shelanski & Peter W. Huber, *Administrative Creation of Property Rights to Radio Spectrum*, 41 J.L. & ECON. 581, 588–89 (1998) (describing the FCC's gradual and productive deregulation of public interest requirements and renewal expectancies, resulting in strengthened property rights for licensees and increased value, investment incentives, and likelihood of amortization and recoupment). Shelanski and Huber note the FCC's movement away from "government determination of how private licensees use spectrum." *Id*. at 606. They chronicle a long established deregulatory path which did not result in chaotic disruption of the spectrum market. Relaxed rules administered upon licensees are described in their article under the subheadings of: renewal and revocation, *id*. at 585, transfer and trafficking, *id*. at 589, usage rights as the freedom to occupy and subdivide, *id*. at 592, usage flexibility, *id*. at 595, the right to choose who gets access, *id*. at 597, and, closing the conduit: exclusion of receivers, *id*. at 600. *See also* Howard A. Shelanski, *The Bending Line between Conventional "Broadcast" and Wireless "Carriage,"* 97 COLUM. L. REV. 1048, 1049 (1997) (describing FCC deregulation of licensee requirements upon direct broadcast satellite (DBS) spectrum compared to traditional "public interest" regulation of broadcast spectrum, reducing "the potential role and effect of conventional 'broadcast' regulation"). For a comprehensive review of the origins of spectrum regulation and the "broadcasting" category, see *id.* at 1050–62.

[205] *See* Mark Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 248 n.172 (1982) ("The fee would have been based on the costs of processing the license and the value of the spectrum and would have gone to a 'telecommunications fund' to support federal regulation, public broadcasting, minority ownership of stations, and rural telecommunications. H.R. 13,015, 95th Cong., 2d Sess. § 413 (1978)."); Note, *A Regulatory Approach to Diversifying Commercial Television Entertainment*, 89 YALE L.J. 694, 712–13 (1980) (footnotes omitted). "The 1979 proposal—the most recent draft of what is known as the Van Deerlin Bill—did not purport to convey inalienable property rights, but did declare that economic forces—not government regulation—are the best device for public control of the airwaves." *Id*. "Its most controversial feature, the annual spectrum resource fee, would have required broadcasters to pay back some of their profits for the privilege of their licenses, but the legislation would have abolished any vestige of public interest control over the mass-audience economics of entertainment programming." *Id*. at 712–13. "The Van Deerlin Bill was withdrawn after receiving unfavorable comments from broadcasters and audience-representatives alike." *Id*. at 713.

[206] Note, *A Regulatory Approach to Diversifying Commercial Television Entertainment*, 89 YALE L.J. 694, 713 n.129 (1980) (noting a recommendation by the Carnegie Commission on the Future of Public Broadcasting for $590 million in federal funding for independent public broadcasting, skeptical of the efficacy of a proposed spectrum fee deregulated from public interest control of private mass-audience programming).

1998, Henry Geller told the Gore Commission on the Public Interest Obligations of Digital TV Broadcasters that requiring such licensees to provide time for educational programs for children and free airtime for candidates for public office was a proven failure.[207] He also advocated a tax on broadcast licenses for the use of public broadcasters.[208] The Commission rejected his suggestions, but at least two members—Gigi Sohn of Public Knowledge and co-chair Norman Ornstein of the American Enterprise Institute—have come to embrace them.[209] In 2008, seeing the neglect of the obligations that Geller had predicted ten years previously, these policy analysts reversed course to concede that the only effective way to promote the announced goals was directly through subsidies.[210]

¶71 There is a counterargument: subsidies for one set of programmers carry their own First Amendment risks. In addition, budget allocation issues encroach. What this argument does establish, however, is that the mechanism for eliminating the regulatory requirements associated with public interest licensing is easily established. Indeed, it is commonly advanced as the "good government" alternative to the failed system of "quid pro quo" regulation which—under *Red Lion*—allegedly seeks to repair market failure by supporting the provision of public goods. This process played out visibly in 1987, when the Fairness Doctrine was abolished. No disruption occurred in the marketplace. Indeed, AM radio underwent a resurgence, as "news," "talk," and "news/talk" formats flourished. The next step, authorizing more liberal rights to use the broadcast bands in radio and especially television, would unleash even more competition.

¶72 Indeed, the liberalization of use of the TV bands would enable advanced mobile broadband, extending Internet access much further, and with greater capacity—helping to give both Internet "speakers" and "listeners" far greater ability to communicate. These gains are estimated, in economic terms, to total over $1 trillion.[211] Far from disrupting the marketplace, pushing broadcast airwaves into a more competitive mode in which airwaves could be used for their most popular employments would spur tremendous innovation and consumer welfare.

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[207] Henry Geller, *Public Interest Regulation in the Digital Era*, 16 CARDOZO ARTS & ENT. L.J. 341 (1998).

[208] Henry Geller explains:

> The new approach would substitute a modest spectrum usage fee for the public fiduciary obligation. Congress could reasonably establish such a fee based on a percentage of gross advertising revenues, (e.g., 1% for radio and 3% for television). This fee might then be set in a long term contract, for example, fifteen years, between the FCC and the broadcaster, so that it would be exempt from the effects of government policy changes toward the media. The sums so garnered would go into a trust fund for public telecommunications. For the first time, we would have a policy working for the achievement of public service goals.

Id. at 362 (footnotes omitted).

[209] Information Economy Project at George Mason University School of Law, *The Gore Commission, 10 Years Later: The Public Interest of Digital TV Broadcasters in Perfect Hindsight*, GEORGE MASON UNIVERSITY SCHOOL OF LAW (Oct. 3, 2008), http://iep.gmu.edu/gorecommission.

[210] *Id*.

[211] Richard H. Thaler, *The Buried Treasure in Your TV Dial*, N.Y. TIMES, Feb. 27, 2010, at BU7, *available at* http://www.nytimes.com/2010/02/28/business/economy/28view.html.

V. DOCTRINAL LIMITS OF *RED LION*

¶73 In a 1974 law review article, the late D.C. Circuit Chief Judge David Bazelon artfully clarified the role of FCC regulation of broadcast spectrum in light of First Amendment principles.[212] He began by refuting the scarcity doctrine on several fronts: (1) by criticizing the scarcity of frequencies argument; (2) by drawing attention to the true scarcity of investment capital; (3) by questioning the means to the end of content controls; and (4) by drawing implications of doctrine to governmental regulation.[213] This reasoning appeared in a subsequent D.C. Circuit decision.[214]

A. Scarcity of Licenses

¶74 Judge Bazelon critiqued the presumption of scarcity that arose from a limited number of frequencies. He doubted whether there was such channel scarcity, at least in any sense relevant to First Amendment jurisprudence.[215] He wrote:

¶75 The figures discussed in *Red Lion* . . . demonstrate a confusion inherent in discussions of scarcity. The only conclusion . . . is that the VHF television channels with high market penetration are completely filled. Thus the scarcity lies in this—there are very few VHF television channels linked to a nationwide network with good market penetration.[216]

¶76 The type of scarcity noted in *Red Lion* was not from a limited number of frequencies available in nature, but rather from a combination of regulatory restrictions and market conditions.[217] Second, a limit on the number of channels is both technically

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[212] Bazelon, *FCC Regulation*, *supra* note 5, at 214.

[213] *See also* Daniel L. Brenner, *Toward a True Marketplace for the Marketplace of Ideas*, *in* FREE BUT REGULATED, CONFLICTING TRADITIONS IN MEDIA LAW 272, 275 (Daniel L. Brenner & William L. Rivers eds., 1982). "Speaking in 1981 to the Telecommunications Policy Research Conference—an annual law/economics meeting held for the benefit of communications policymakers—Senior Judge David L. Bazelon reminded listeners to distinguish between market power used to gain an oligopoly in the production of news and entertainment and the *Pacifica*-like power inherent in a medium." *Id.* "He urged policymakers to confront economic power on its own turf, not chase the issue into 'the hoary swamps of government regulation of speech.'" *Id*.

[214] Ill. Citizens Comm. for Broad. v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

[215] Bazelon, *FCC Regulation*, *supra* note 5, at 223 n.30 (citing Letter from Elie Able, Dean, Columbia University School of Journalism (Feb. 27, 1975)) ("In New York City, for example, there are thirty-seven radio (AM) and television (VHF) stations as compared to three newspapers of general circulation.").

[216] *Id*. at 223.

[217] *Post hoc ergo propter hoc*. *See also* Silicon Flatirons, *Wireless Broadband: Markets, Models and Spectrum*, UNIVERSITY OF COLORADO (Sept. 8, 2010), http://www.silicon-flatirons.org/events.php?id=831 (concerning a Disruptive Innovation and a Changing Technological Environment panel) (notes on file with the authors). Panelists were asked a question on what is "scarce" regarding spectrum today. The panelists acknowledged the physical nature of electromagnetic spectrum frequency table as one that does not deplete, and instead named other "scarce" elements that prohibited innovation. The resources that are indeed "scarce" today when dealing with radio frequencies are: (a) more licenses, (b) advanced antennas, (c) ability to make efficient the resource available, (d) capacity upon existing channels, (e) well-defined rights for users of frequencies, and (f) proper incentives to promote higher-valued uses of frequencies. *Id.* Transmissions that depend upon a certain frequency wavelength can start and stop based on the economic viability of the broadcaster. The success of business models upon each wavelength depend on legal, economic, and engineering constraints, rather than the ether itself. *See generally* Coase, *The Federal Communications Commission*, *supra* note 2, at 27 ("It is sometimes implied that the aim of regulation in the radio industry should be to minimize interference. But this would be wrong. The aim should be to maximize output.").

and artificially created by rationing of licenses, not as a function of economic possibility. Along with the limited number of channels, the FCC attached responsibilities along with the right to transmit: the "public trustee" duties of a licensed broadcaster were imposed without a consideration for the unintended consequences of the degree to which such licensing policies would reduce economic rivalry and entrench incumbent interests, thereby *creating* scarcity.

¶77 Conflicting majority opinions between Chief Justice Warren Burger and Justice William O. Douglas in *CBS et al. v. DNC* display the core of this distinction. Chief Justice Warren Burger differentiated "privately owned newspapers and publicly regulated broadcast stations."[218] He stated:

> [T]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom *but not as large as that exercised by a newspaper* [emphasis added]. A licensee must balance what it might prefer to do as a private entrepreneur with what is required to do as a "public trustee." To perform its statutory duties, the Commission must oversee without censoring . . . .[219]

Justice Douglas disagreed. He saw the regulator using the spectrum allocation system to generate what economists call "excess demand" for licenses, and then leveraging the competition for rights to place "public trustee" obligations on the licensed media outlet. This end-run on the First Amendment was not due to atmospheric conditions concerning radio frequencies, but was a creation of policy makers to do what the Constitution prohibited. He explained:

> My conclusion is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other publications. That fear was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people.[220]

Fred W. Friendly noted a curious political breakdown in the "shades of opinion"[221]: "[T]he conservative chief of the Court was relying on the Fairness Doctrine as a shield to

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[218] FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT, *supra* note 19, at 138.

[219] *Id*. (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).

[220] *Id*. (quoting *DNC*, 412 U.S. at 94). Justice Douglas also remarked, "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends." *DNC*, 412 U.S. at 154.

[221] FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT, supra note 19, at 141. "The many shades of opinion in *CBS et al. v. DNC* are confusing, not only because of their conclusions but because of who stated them. Douglas is at least consistent; he will not rest as long as the Fairness Doctrine lives." *Id.* "But White, who wrote the *Red Lion* decision, and Burger, who ordered the removal of a license for WLBT in *Lamar Life*, used the Fairness Doctrine as a shield to protect radio and television from

save broadcasting from the right of access, while the majority's most liberal member was condemning the Doctrine as an affront to the First Amendment."[222]

B. Scarcity of Investment Capital

¶78 Judge Bazelon refuted another twist of the scarcity argument. He noted the concern that a scarcity of diverse sources of investment capital would result in fewer television stations dedicated to diverse programming content.[223] At one point, an FCC Commissioner commissioner argued that the allocation of only two VHS licenses in Jackson, Mississippi would result in racist broadcast programming.[224] Judge Bazelon redirected the analysis that one must not look solely to the two channels, but to substitutes in radio and network news: "It is noteworthy that Mr. Geller does not mention radio, nor the fact that the stations broadcast network news . . . another omission from his analysis is whether there are other available TV frequencies, cable, UHF or VHF, which are open to potential broadcasters in Jackson."[225]

¶79 At bottom, Judge Bazelon revealed that the scarcity of licenses was not a natural phenomenon but a social artifact. As Coase had articulated, it was the choice by policy makers, first, to restrict broadcast opportunities to a small number of channels (compared to what was possible), and, second, to assign valuable rights by fiat, rather than sell them for their market price, that produced excess demand.[226] The resulting market outcome then supplied a defense of regulation: not all who sought to broadcast could be licensed. This, according to the Government (in a rationale that the courts in *NBC* and then *Red Lion* accepted), forced the Government to choose. It was the allegedly necessary process of selecting licensees by examining their broadcast programming that permitted regulators to use "public interest" criteria. Coase, and later Bazelon, saw the construction of this self-fulfilling policy circle.

¶80 The analytical weakness of the approach is clearly visible when newspapers are compared to broadcasters: "This 'scarcity,' if it may be so called, is not a result of a limited number of frequencies and is indeed no different than that associated with newspapers. Scarcity of investment capital in the broadcasting industry seems hardly meet as a justification for a different First Amendment regime for TV alone."[227]

¶81 Judge Bazelon noted that major markets have "sixty or more radio stations and six TV stations," which would render the scarcity of investment argument moot.[228] He cited the Coase paper: "[A]ll economic resources are scarce. When we say there is a scarcity of frequencies, to what are we comparing this scarcity? In other words, what is the

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access by political advertisers, while maintaining it as a sword to prevent broadcasters from engaging in one-sided presentations on public issues." *Id*. "Brennan and Marshall, on the other hand, were unwilling to protect broadcasters from the access of partisan advertisers with the financial resources to buy their way onto the air." *Id*.

[222] *Id*. at 139.

[223] Bazelon, *FCC Regulation*, *supra* note 5, at 224 (discussing Henry Geller, *Communications Law*, 63 GEO. L.J. 39, 46 (1974)).

[224] *Id.*

[225] *Id*.

[226] Coase, *The Federal Communications Commission*, *supra* note 2, at 13–19.

[227] *Bazelon*, *supra* note 5, at 224.

[228] *Id*.

contrasting 'multitude' that is the implicit premise of discussions of scarcity? Broadcast frequencies are scarce in relation to what?"[229]

¶82 This economic analysis also extends to the cable TV market. Judge J. Skelly Wright emphasized in *Quincy Cable TV*: "[W]hatever the outcome of the debate over the monopolistic characteristics of cable, the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights, *Miami Herald Publishing Co. v. Tornillo.*"[230] Judge Bazelon recognized the real impetus for regulation facing broadcasting as "simple, old-fashioned concentration of economic power and ownership."[231]

C. Diversity and Fairness

¶83 Judge Bazelon also addressed the concerns of content regulation proponents that programming would lack diversity without governmental intervention. He acknowledged that the "key to the scarcity argument is that TV produces greater access to an audience than other modes of communication, and thus can be regulated to ensure a diversity of ideas in that medium alone."[232] With a strong correction, he said, "But this argument is seemingly rejected by the promulgation of the First Amendment . . . ."[233]

¶84 First Amendment protections for an independent press conflict frontally with regulatory oversight that imposes "fairness" or other content controls on speakers. Indeed, the "freedom of speech . . . or of the press" stricture would seem to block any concern with the editorial approach of one outlet of expression, trusting diversity across outlets to inform the public. Just as a "liberal" or "conservative" news magazine legitimately advances free speech by contributing viewpoints to public debate, so does a wireless media provider. This approach has the added attraction, in addition to extending constitutional rights, that it offers a safeguard to Nixonian approaches to license renewals. The Colson Memoranda illustrated those risks.[234]

¶85 The First Amendment prevents government from deciding what is "fair" and "balanced."[235] An independent press is "absolutely essential to self-government, to democracy,"[236] especially when "[t]ruth and fairness have a too uncertain quality to permit the government to define them."[237] In *Associated Press*, the court identified diversity as a core value of the First Amendment.[238] Yet, government actors and

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[229] *Id*. at 224 n.36 ("Of course, the scarcity of investment capital in the telecommunications industry for UHF and cable development is a result partly of government controls and not solely the product of a free market."); Coase, *The Federal Communications Commission*, *supra* note 2, at 13–19.

[230] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985) (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247–56 (1974)); JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 257 n.42 (1991).

[231] Bazelon, *FCC Regulation*, *supra* note 5, at 238.

[232] *Id*.

[233] *Id*.

[234] *Id.* at 235.

[235] *Id*. at 236.

[236] *Id.* at 236 (citing Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961)).

[237] *Id*. (citing Multiple Ownership of Standard, FM and Broadcast Stations, 32 Radio Reg. 2d (P & F) 954, 1015–17 (1975) (Robinson, Comm'r, concurring in part, dissenting in part)).

[238] United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943) (Hand, Learned, J.) (quoted in

institutional power do not necessarily lead to socially reflected values on "what amount and kind of diversity would be best."[239] The First Amendment "does not require any set amount of diversity in the marketplace."[240]

¶86 Former FCC Chairman Reed Hundt recently reinforced the view that diverse speech and viewpoints are not in short supply on the Internet. In a speech at Columbia University, Hundt noted the explosion in diverse perspectives, access, viewpoints, and communications by "every language" and "every race" with the emergence of a "disintermediating medium as opposed to broadcast that created intermediaries."[241] In more detail, he remarked:

¶87 [The Internet was] certain to be diverse in every conceivable respect *and not by dint of regulation*—diverse, meaning it would be in every language and every race would be welcome and the content would be . . . generated by people who . . . would choose any points of view; and any kind of ownership of the content would be admissible and any form of the content would be possible.[242]

¶88 Rather than requiring a government regulatory agency to license and predetermine diversity with representative access for speakers to speak, the Internet allows creative and expressive individuals to enter the marketplace of ideas, find audiences, and win influence based upon the merits of their content and business savvy.[243] If particular speakers are being heard or distributed by shrinking audiences, notably traditional journalists, it is because users have freedom to select among a wider marketplace of speech.[244]

Daniel L. Brenner, *Toward a True Marketplace for the Marketplace of Ideas*, *in* FREE BUT REGULATED, CONFLICTING TRADITIONS IN MEDIA LAW 272, 276 (Daniel L. Brenner & William L. Rivers eds., 1982)).

[239] EMORD, *supra* note 230, at 219, 228 (exploring structural regulation starting with the *Associated Press* case, and the never-ending quest for diversity).

[240] *Id*.

[241] Reed Hundt, Chairman, FCC, Speech at Columbia Business School: The End of Broadcasting (Mar. 11, 2010), http://www.youtube.com/watch?v=JqgDEbPe9CI. *See also CBS Media Player*, COLUMBIA BUSINESS SCHOOL, http://www2.gsb.columbia.edu/flash/CBSPlay-append.html?video1=centers/CITI/lunch-speaker_3-11-2010.flv.

[242] *See generally* Harry A. Jessell, *Hundt Comes Clean: Internet Trumps TV*, TVNEWSCHECK (Mar. 12, 2010), http://www.tvnewscheck.com/articles/2010/03/12/daily.4/. (emphasis added).

[243] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."). Learned Hand remarked:

> [Disseminating news from different sources] is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes the 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.

Associated Press, 52 F. Supp. at 372 (Hand, Learned, J.).

[244] Krattenmaker and Powe explain:

> Even if the governmental policy is designed to and does promote diversity, the government may not coerce publication of information. People may read what they choose and believe what they choose, and government's duty is simply to leave those choices in private hands. Because people are free to choose, competition arises for their choices. The array of available options—from mainstream to counter-cultural newspapers, magazines, books, or film—reflect the well-understood fact that speakers must actively compete for an audience. Society's goal is to have a well-functioning market or forum of ideas, information, and entertainment, not to have each speaker within the forum perform as a microcosm of the whole (even if the speaker were capable of doing so).

KRATTENMAKER & POWE, REGULATING BROADCAST PROGRAMMING, *supra* note 5, at 177.

¶89 And whether the diet of information and journalist consumption of a citizen is healthy is not an area that lends itself neatly to regulatory influence.[245] Lucas Powe describes the principle: "Indeed, our traditions are clear. A fair press, as determined by a government mechanism, is not a free press."[246] Professor Powe continues, "[a] free press may be fair; we hope it will not be irresponsible; but . . . for the press to serve as a check on the government it must be free to gather and report information about government and those who do or would govern."[247] A clerk for Justice Douglas, Professor Powe remarked, "[t]hat fairness would not have a First Amendment pedigree is not surprising."[248]

D. Raised Eyebrow Enforcement

¶90 The year following his seminal journal article, Judge Bazelon continued his critique in a *per curiam* opinion that addressed the "*sub rosa* bureaucratic hassling"[249] and "denouement"[250] that arose from "raised eyebrow" enforcement at the FCC.[251] In *Illinois Citizens Committee*, a radio broadcaster challenged an FCC fine against radio broadcasts that expanded traditional telephone talk shows to cover discussions on sexual relations.[252] In 1973, the FCC decided to censor the content through a closed notice of inquiry into allegations of obscene or indecent material.[253] However, the timing of events indicated that a critical speech made by the Commission Chairman at a National Association of Broadcasters convention was meant to render the formal action moot by "raising an eyebrow" in order for the broadcasters to voluntarily comply.[254]

¶91 Judge Bazelon refers to this sentiment as "denouement," quoting an anonymous broadcaster: "You have to understand, . . . [we] are a member of a group that operates a number of stations and are going to cable TV, and our growth depends on F.C.C. approval. We live or die still by the F.C.C. gun."[255] Judge Bazelon noted the "pervasive regulatory scheme" under which the FCC administered "raised eyebrow" enforcement.[256]

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[245] Robinson, *Let Them Eat Broccoli*, *supra* note 165.

[246] Powe, Tornillo, *supra* note 101, at 384.

[247] *Id.*

[248] *Id. See also id*. at 387 ("Tribe rightly warns that access regulation in the print media would be seen as a 'profound break' with tradition, transforming 'the boundaries of the legally thinkable and [creating] a corresponding increase in pressure to regulate still more deeply.'") (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 700 (1978)); Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 31 (1976) ("[A] vigorously enforced fairness doctrine, may lead to utter blandness of content and in this way may permit official manipulation of the news.").

[249] Ill. Citizens Comm. for Broad. v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975).

[250] *Id.*

[251] *Id.* "The heart of the case lies in the realities of the relationship between the Federal Communications Commission and radio licensees." *Id.* "One first notes a pervasive regulatory scheme in which the licensees are dependent on the FCC and the government for their economic well-being." *Id.* "The main threat is, of course, that the government can put a licensee out of business but I suppose that the more pervasive threat lies in the sub rosa bureaucratic hassling which the Commission can impose on the licensee . . . ." *Id.*

[252] *Id.*

[253] *Id.* at 408.

[254] *Id.*

[255] *Id.* at 409

[256] *Id.* at 425.

¶92 The raised eyebrow constitutes a signaling mechanism that is designed to be non-transparent. This is itself hostile to the public interest. The process rests on the fact that the regulator has the power to deny license renewals based on vague standards, namely the Commission's interpretation of what the public interest is. The agency rarely denies license renewals, owing to the fact that the sanction is so draconian—literally, the death penalty for a broadcast station—that it need only be threatened. Agency officials are able to express their demands on station owners without making public statements specifying the actual rules. Licensees are keen to meet such demands so as to avoid not only possible license non-renewal but also the high costs of hearings and a legal defense should the process drag on past *pro forma* renewal. Hence, the system constitutes a devil's playground—run by lobbyists, interested parties, and policy insiders, invisible to courts, the press, or the voting public.

¶93 While recognizing the existence of "innuendo," Bazelon called for the courts to be more demanding in their analysis and principled in their judicial review, avoiding the proverbial slippery slope.[257] Courts have a unique role in moderating this area of regulation, given the licensing regime in place:

> And it might well be that the root problem is . . . the very existence of a comprehensive scheme for the licensing of speakers . . . . [S]ince it is impossible to sweep away the licensing scheme and its predicate of scarcity without Congressional action, the task of the courts must be to vigilantly oversee FCC administration of the regulatory scheme to eliminate the various "chilling effects" of that scheme, no matter how difficult the role of overseer may be.[258]

The threat of regulation is a subtle strain on freedom from regulatory coercion, even if blatant censorship remains distasteful. "Obvious censorship still retains a bad name in our society. If we are to have government censorship, it must not be aboveboard: it's got to be out of sight. That is how we accommodate our traditions."[259] In a political environment, "[t]hat is how *Mayflower* and *Red Lion* work: not by Commission action or judicial review, but by threat, pure and simple. [President] Nixon's head of the Office of Telecommunications Policy, T. Clay Whitehead, put it best: '*The value of the sword of Damocles is that it hangs, not falls.*'"[260]

¶94 Although the Nixon administration and its complicated relationship with the press is largely relegated to historical inquiry,[261] the structures that allow for such chilling effects are still in place today. In January 2010, a judge on the Second Circuit recently remarked in oral argument that under current policy, the FCC would amount to a "roving band of censors" without the ability to give prescriptive guidance on what would or would not be suitable content under a fleeting expletives indecency rule.[262]

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[257] *Id.*

[258] *Id.*

[259] POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT, *supra* note 5, at 120.

[260] *Id.* (emphasis added).

[261] *Id.* at 121 (describing the Nixon assault on the networks, particularly the administration's campaign against "liberal eastern" media, network television, and *The Washington Post's* broadcast holdings).

[262] Oral Argument, Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010) (06-1760-ag). *See* Mark Hamblett, *2nd Circuit Judges Challenge FCC Policy on Penalizing 'Fleeting Expletives' on TV*, N.Y.L.J. (Jan. 14, 2010), http://www.law.com/jsp/article.jsp?id=1202437948633&rss=newswire.

VI. DIGITAL MEDIA AND THE PRESS

¶95 During the *Red Lion* era, the Nixon administration, the Democratic National Committee, and the small, regional radio station of Red Lion, Pennsylvania, tested the limits of the First Amendment. Much in the same way, the political and media landscape of 2010 invites new intersections of political advocacy, digital speech, and freedom.

¶96 Over the last few terms, the Supreme Court has taken note of critical junctures in our democracy where technology and the First Amendment meet.[263] In a concurrence in *Fox Television*, Justice Thomas aptly juxtaposed over-the-air broadcasting speech with "telephone dial-in services . . . cable television programming . . . and the Internet."[264] He quoted former FCC Commissioner Harold Furchtgott-Roth: "It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection than would the same exact content broadcast over-the-air."[265]

¶97 Digital diversity has proliferated since the Commissioner's statement.[266] Evolving media platforms are pulling whole sectors of news and information into their gravitational orbit. The central role of journalism combines free speech[267] with the daily reality that business models must realign to form new distribution platforms.[268] The Pew Research Center's Center for Excellence in Journalism notes the change in the media landscape. Six out of ten executives feel the Internet is "changing the fundamental values

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[263] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (concerning an on-demand political movie); United States v. Stevens, 130 S. Ct. 1577 (2010) (concerning animal cruelty, crush videos); FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (concerning indecency on Super Bowl); City of Ontario v. Quon, 130 S. Ct. 1011 (2009) (concerning text messages on an employee's telephone).

[264] *Fox Television*, 129 S. Ct. at 1821.

[265] *Id.*

[266] The online video ranking provider, comScore, found:

> More than 180 million viewers watched an average of 173 videos per viewer during the month of March. Google Sites attracted 136.0 million unique viewers during the month (96.0 videos per viewer), followed by Yahoo! Sites with 56.2 million viewers (8.5 videos per viewer) and CBS Interactive with 46.7 million viewers (9.8 videos per viewer). . . . 84.8 percent of the total U.S. Internet audience viewed online video. . . . The duration of the average online video was 4.3 minutes.

Press Release, comScore, March 2010 U.S. Online Video Rankings (April 29, 2010), *available at* http://www.comscore.com/Press_Events/Press_Releases/2010/4/comScore_Releases_March_2010_U.S._Online_Video_Rankings. BusinessWeek also explained:

> Advertisers say Google TV will let them reach TV viewers faster, more cheaply, and more effectively than via traditional TV spots. With Google, advertisers will know exactly who viewed their ad, how many people clicked on it, and how many people chose to use a "click-to-call" feature to contact advertisers immediately.

Olga Kharif, *Advertisers Give Google TV a Warm Reception*, BLOOMBERG BUSINESSWEEK (May 24, 2010), http://www.businessweek.com/technology/content/may2010/tc20100523_438614.htm.

[267] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, xix (1993) ("[T]he possibility that government controls on the broadcast media, designed to ensure diversity of view and attention to public affairs, would help the system of free expression."). For a critique of this view, see Thomas Hazlett, *The Dual Role of Property Rights in Protecting Broadcast Speech*, *in* PROBLEMS OF MARKET LIBERALISM 176, 177 (Ellen Frankel Paul et al. eds., 1998).

[268] Kurt Wimmer, *Digital Journalism: The Audience Is Here. But Who's Monetizing the Content, Policy Views*, THE MEDIA INSTITUTE, June 2010, *available at* http://www.mediainstitute.org/new_site/PDFs/Policy-Views-5-Wimmer-6-8-10.pdf.

of journalism," where "their biggest concern is loosening standards of accuracy and verification, much of it tied to the immediacy of the Web."[269]

¶98 News executives, however, are "overwhelmingly skeptical about the prospect of government financing."[270] Furthermore, one broadcast news executive remarked, "[o]utside funding options are a bad idea overall . . . . They are being used to 'save' old models of journalism that are no longer economically viable and will die out over time no matter what."[271] Despite reservations about the state of journalism today, the spirit of a free press resides in fierce independence from government involvement, whether benevolent, neutral, or malevolent. The report notes: "Fully 75% of news executives have serious reservations about receiving government subsidies, and 78% have significant resistance to financing from interest groups. Roughly half have significant worries about funds from government tax credits and more than a third have significant doubts about private donations."[272]

¶99 The press, as the storyteller of government activity, citizen involvement, and as a commentator for the public interest, operates to provide higher quality content. One scholar notes this reality: "A concentrated, homogenized press will over report some stories and underreport (or ignore) others to the detriment of us all."[273] Doctrinal bright lines organize the freedoms of speakers, in light of their relationship to the government, other journalistic ventures, and changing distribution networks.[274] The Court required strict scrutiny upon government involvement by drawing a bright line in *Tornillo*, which retains ever-important significance today.[275]

VII. CONCLUSION

¶100 Content regulation, archaic as the concept may seem in an Internet age of abundant speech, remains subject to resurrection through *Red Lion*. The logic behind the scarcity doctrine was never valid and was merely a thinly veiled political excuse to regulate communications while skirting the First Amendment. There is no basis for distinguishing media content by the roads it travels. Today that exercise has become a fool's errand. Is the *New York Times* transmitted via a Sprint 3G network to a Kindle deserving of the newspaper freedoms, or is the public interest dictated by frequency scarcity? The

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[269] Pew Research Center's Project for Excellence in Journalism, *News Executives, Skeptical of Government Subsidies, See Opportunity in Technology but Are Unsure About Revenue and the Future*, JOURNILISM.ORG (Apr. 12, 2010), http://www.journalism.org/analysis_report/news_leaders_and_future.

[270] *Id*.

[271] *Id.*

[272] *Id*.

[273] Powe, Tornillo, *supra* note 101, at 394.

[274] *See* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS (7th ed. 2007). Newspaper firms used to be the hub to the spokes of social chatter, but today, social networks are at that intersection. The newspaper business model is less about journalism and more about the cross-subsidy of content, distribution, and advertising. Where the audiences move from paper to Internet, the structure of resource allocation at newspaper organizations must adapt to competing platforms for information delivery and advertising exchange.

[275] In one commentator's perspective, "[h]ad the right of reply been sustained [in *Tornillo*], the psychological barrier of no interference with newspapers would have been broken. Legislators and judges would deal more frequently with appropriate limits on the press." Powe, Tornillo, *supra* note 101, at 347.

convergence of print and wireless makes the emptiness of the scarcity doctrine emptiness-squared.

¶101 The Supreme Court and FCC should leap at the opportunity to straighten out the law. Logical contradictions are myriad when modern issues arise. If the *Red Lion* reasoning enables content regulation for some speech, we are caught in a dangerous game of impressionistic case-by-case determinations on which platforms are protected with full "free speech" and which are not. It is perverse that as information flow dramatically expands, "scarcity" rationales might grow and grow right alongside. But that is the problem with the central premise on which *Red Lion* resides.