SYMPOSIUM

DOES *RED LION* STILL ROAR? KEYNOTE ADDRESS

CASS R. SUNSTEIN*

Wow, look at how many people are here. I'm very grateful to be here. I read the *Administrative Law Review* with too much obsessiveness. I'm a little worried about myself. Especially when I'm teaching administrative law, my printer is printing out articles from the *Administrative Law Review* at such a rapid rate that the computer people have to come fix my computer. It's a fantastic journal. It is fantastic to be here and, wow, what a topic you have. And what a time to have this topic.

I have a few epigraphs for you, if you'll permit. The first is from Google: "No one can read all the news that's published every day, so why not set up your page to show you the stories that best represent your interests?"[1] So says Google.

The second is from philosopher and educator John Dewey:

> Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. . . . The important consideration is that opportunity be given that idea to spread and to become the possession of the multitude. . . . The essential need . . . is the improvement of the methods and conditions of debate, discussion and persuasion. That is *the* problem of the public.[2]

The third of my four epigraphs is my favorite, I confess. It's from philosopher Immanuel Kant. Kant writes: "One must take men as they are, they tell us, and not as the world's uninformed pedants or good-natured dreamers fancy that they ought to be. But 'as they are' ought to read, 'as

* Felix Frankfurter Professor of Law, Harvard University.

1. About Google News, http://news.google.com/intl/en_us/about_google_news.html (last visited Oct. 10, 2008).

2. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 207–08 (The Swallow Press Inc. 1954) (1927).

we have *made them*' . . . . In this way, the prophecy of the supposedly clever statesmen is fulfilled."[3] I'm going to try to bring Kant's statement to bear on *Red Lion* today.[4]

The last epigraph of the four is from *Red Lion*:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[5]

To get at this topic, at Google's plea for the news that best represents your interests, and at the tension between that and Kant's suggestion—that men "as they are" is men as social practices make them—I want to tell you about two empirical studies with which I have recently been involved.

One came from Colorado.[6] We asked people from Boulder, Colorado, together (about thirty of them) to talk about three of the great issues of the day: climate change, affirmative action policies, and same-sex civil unions. We chose Boulder on purpose—it's a liberal place. We wanted to get liberals talking to liberals; we had a little filter to make sure that we got liberals. We expected we would do that just by geography, but we asked the people a few questions, one of which was, "What do you think of Vice President Cheney?" If the people in Boulder said "he's great," they were cordially excused from the experiment. We asked the people in Boulder to record their views on these three issues privately and anonymously, then to speak together for about fifteen minutes. Then, if they could, we asked them to reach a verdict in groups of five or six, and then, after they had spoken together as a little group, to record their views privately and anonymously.

Unbeknownst to the people in Boulder, we were doing, at the same time, the exact same experiment in Colorado Springs. Most Coloradans probably know that Colorado Springs is Republican territory, with an overwhelming pro-Bush vote. We similarly asked the Colorado Springs people if they liked Vice President Cheney, and they almost all said yes. One or two said "I'm not so sure," and they were excused from the experiment. So we had conservatives in Colorado Springs, and we did the exact same thing. We had the same three stages: private anonymous statements of view; public deliberation to reach a verdict, if they could; and then private anonymous postdeliberation statements of view.

---

3. IMMANUEL KANT, *The Contest of Faculties*, *in* POLITICAL WRITINGS 176, 178 (Hans Reiss ed., H. B. Nisbet trans., 2d ed., Cambridge Univ. Press 1991).

4. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

5. *Id.* at 390.

6. To read the study in its entirety, see David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915 (2007).

We were interested in seeing what happens if like-minded people talk to one another. What are the effects of a period of discussion on private anonymous statements of view? That was our question.

Here's what we got: three things happened. First, the people in Boulder liked an international climate change agreement before they talked with one another. After they talked with one another, they *adored* an international agreement to control climate change. Before they talked to each other, most people in Colorado Springs didn't much like affirmative action. After they talked to each other, the people in Colorado Springs *despised* affirmative action programs (and if not, they thought they should be eliminated immediately). For just about all three of our issues, that is, six issue discussions, the conservatives in Colorado Springs became more extreme in their private anonymous statements of view; the liberals in Boulder got more extreme also. Extremism was our first finding.

The second finding was that, while all of the Boulder people were liberal, they had diversity of view on these three issues. Some of the people in Boulder thought climate change was speculative and that maybe we shouldn't spend the resources to have an international agreement. Some of the people in Colorado Springs—and I have seen the tapes, they're intriguing, as I'm sure you can imagine—thought that same-sex civil unions are fine and are part of what freedom permits. They struggled with their fellow Cheney supporters on exactly that issue.

After fifteen minutes of deliberation, the diversity in the private anonymous statements of view within Boulder was squelched. The participants came in line with one another, both in Boulder and Colorado Springs. They came in line, not in their public statements, I'm emphasizing, but in their private anonymous statements of view. Thus, sorting people into like-minded groups squelched internal diversity in both places. As a result of the increase in extremism, the diversity was squelched. Initially, the people in Boulder were more than a little to the left, as it happens, and the people in Colorado Springs were more than a little to the right, as it happens. But as they talked, the gap widened. They started to operate in something like different political universes.

That is the first of the two sets of studies I want to tell you about. This is an experiment I've just described involving ordinary citizens. The second study addresses the second question: Does this apply in the real world?

Well, for the past few years, I have been involved in creating a study of real-world behavior of the equivalent of Boulder and Colorado Springs in a very unlikely place: the federal Judiciary.[7] What we've done is collected

7. CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

about 30,000 federal judicial votes. So if you see University of Chicago Law School graduates walking around Washington with glazed eyes, it's because they have been reading thousands of courts of appeals opinions, and have been coding them for liberalness or conservativeness. What has happened for many, many decades is the United States has conducted a tremendous natural experiment which is not so unlike the artificial one in Colorado. We have on our courts of appeals many panels that consist of Clinton–Clinton–Clinton appointees (D–D–D panels). We also have panels that are Bush–Reagan–Reagan panels. Because those panels are complemented by more mixed panels, such as Bush–Clinton–Clinton or Reagan–Reagan–Carter, we can see with the sheer number of decisions how judges vote, in terms of liberalness or conservativeness, depending on how many fellow Republican or fellow Democratic appointees are on the panel. We have done this coding in a ton of administrative law cases, as well as in many cases involving abortion, affirmative action, sex discrimination, campaign finance, and environmental law—a very long list.

Here is the finding I want to emphasize: There is a statistically significant difference between the overall liberal voting rate of Democratic and Republican appointees. It's about 12%. Democratic appointees in ideologically contested cases vote liberal 52% of the time. Republican appointees vote liberal about 40% of the time. That 12% difference is significant, but not massive. It approximately doubles when we compare Democratic liberal voting on D–D–D panels to Republican conservative voting on R–R–R panels. So the ideological differences on mixed panels explode once we look at how federal judges vote on R–R–R panels or D–D–D panels.

The Colorado study and the judges study are studies in group polarization, where the group polarization phenomenon—bearing, I'm going to try to suggest, on the Fairness Doctrine—suggests that if you sort like-minded people, or if they sort themselves, into groups that are limited to themselves, they will typically end up in a more extreme position in line with their predeliberation tendencies. We know, for example, that if people in France are skeptical of the United States and its intentions, after they talk to one another, boy, are they going to be negative about the United States and its intentions with respect to foreign aid. We have every reason to believe that different positions on the Iraq war will polarize, just as the climate change positions do. If you have a bunch of McCain people thinking the surge is working, after talking together, gosh, is the surge working. If you have a bunch of Obama people skeptical of the success of recent developments, after they talk with one another, they think it is getting more and more disastrous.

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. That is, there is a relationship between self-sorting on the one hand, and the positive conception of the First Amendment from which you can link in a kind of straight line: James Madison, Louis Brandeis, *Red Lion*, and Justice Breyer. This kind of straight line links those four points to what I'm calling the positive side of the First Amendment.

The two things that the positive side of the First Amendment celebrates are, first, the value of unchosen, unanticipated encounter with ideas and experiences that you would never have selected in advance, and, second, the value of shared experiences, especially in a society with our level of diversity. As I look around the room, you know, there is a great deal of diversity here. And if you magnify this level of diversity to the United States, it is overwhelming. That is one of our glories, really. And there is a lot of importance in a heterogeneous society of having shared experiences rather than uniquely held experiences sorted by different social groups. So the two themes are the unchosen, unanticipated encounter—serendipity—and the shared experience.

I want to bring those *Red Lion* or Madisonian values in great tension with what is being celebrated today, in the post-*Red Lion* era, namely the ability to create an informational or communication universe of your own choosing, sometimes described as the "Daily Me." The idea is that each of us can construct—many of us do construct, with the help of the Internet or with the sheer number of other options—a political universe that is limited to topics and ideas that please or interest us. That, I'm saying, is a *problem* from the standpoint of the First Amendment and not a solution. And *Red Lion* points the way toward recognizing why exactly it is a problem.

Red Lion is a culmination of a tradition which I suggest is best and most early located (in terms of constitutional doctrine) in the public forum doctrine. Every tyrant knows that an important way to self-insulate from challenge is not merely to censor disagreeable opinions, but also to close off those arenas in which political expression typically occurs. Accordingly, streets and parks in Cuba, China, and the former Soviet Union were not domains for expressive activity. Instead they were sharply controlled. In a very early case inaugurating the tradition of which I'm speaking in constitutional doctrine, the Court said, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[8]

Now, let's pause for a little bit over what the public forum doctrine is doing exactly. For one thing, it seems to be imposing on taxpayers an obligation to provide some sort of economic support. In that sense it is a positive right, rather than a right against censorship. At the same time, the public forum doctrine seems to serve three functions. First, it allows a protestor who has a beef against, let's say, the government, an educational institution, or a company, to get some kind of access to the institution against which the protest is being made. It is very difficult, so long as the streets and parks are open, for the object of the protest to self-segregate against the protestor—just because of the importance and salience of streets and parks in American society, traditionally.

The second thing the public forum doctrine does is to allow protestors to get access, not just to the object of their protest, but also to a heterogeneous public, some members of which will see the protest while they walk down the street. So for those who live where I lived in Chicago, at least at some points over the last few years, using the streets ensures encounters with someone who has an objection to something. And this means that the objector has access to a group of people who can potentially be in the protest movement if they can see a situation that may trigger interest.

The third thing the public forum doctrine does, I think, is the most interesting. It imposes on each of us, not exactly a legal responsibility, but something like a civic responsibility to see our fellow citizens when they are disturbed or suffering and different from us, even if we would (in our desire for comfort and peace) want not to be exposed to that. So the street or the park, so long as it is public and so long as we are going to use it, ensures that each of us would have something like a legally unenforced duty to encounter diverse and concerned others.

Look at the nineteenth century and the three social functions I've described: the ability to get at an object of protest; the ability to reach a diverse public; and the legally unenforced responsibility. These functions were carried over in the twentieth century both by broadcasters, and to some extent, by newspapers and magazines. The broadcasters were operating under the pressure of the Fairness Doctrine; the newspapers and magazines were operating under a sense of what their democratic obligation was.

Here is what I have in mind: For most of the twentieth century, if you were watching television, and you attended to the evening news, you were going to see some topics and points of view that you would not have put in

8. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

your "Daily Me." The news might have involved, say, an earthquake in India or a genocide in Darfur. And that would have grabbed your attention, possibly even changed your life, though you never would have chosen it and selected it in advance.

At the same time, under the pressure of the Fairness Doctrine and civic norms for magazines and newspapers, there are going to be shared communications experiences. The headlines on the local newspaper, or the lead story in *Time* or *Newsweek,* will create something salient to so many of us at the same time. Why is this important? Well it works *against* the kinds of fragmentation that we created artificially in Colorado and that the federal Judiciary has created to some extent, just by the lottery-like nature of the composition of appellate panels.

This means that under the twentieth century general interest intermediaries—when they are working well—all of us will occasionally have access to points of view that we despise and abhor (or so we thought) and to topics that we thought didn't interest us. Broadcasters, partly under the pressure of law, partly under the pressure of the norm, have, within a few decades past, thought that this was part of their civic responsibility. Mark Fowler, President Reagan's head of the FCC, the one that helped kill the Fairness Doctrine, said television is just another appliance; it's a "toaster with pictures."[9] That's a colorful statement but one that disregards the historic free-speech-related purposes of television.

Now, what I want to do is suggest a close link between the public forum doctrine and its aspirations. And that conception of the First Amendment has these four historical pointers: Madison, Brandeis, *Red Lion*, and Breyer. When Madison spoke in terms of the First Amendment, he saw the basic idea in terms of democratic self-government. What made the Alien and Sedition Acts[10] intolerable to him was the requirement that people had to get permission from authority to get together collectively and deliberate about what their governors were doing.[11] This notion of a civic check on government was closely connected with the notion that a heterogeneous people would get together in their deliberative process.

Brandeis, with a very different vision of the First Amendment from his apparent jurisprudential sibling Holmes, spoke not in terms of free trade in ideas but of republican self-government, insisting that the greatest menace to liberty is an inert people.[12] In that statement, Brandeis suggested the

9. Peter J. Boyer, *Under Fowler, FCC Treated TV as Commerce*, N.Y. TIMES, Jan. 19, 1987, at C15.

10. An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798).

11. *See id.* (establishing punishments for persons who conspire against the U.S. government).

12. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 79 nn.115–16 (1996)

positive side of the First Amendment. *Red Lion*, with its emphasis on the rights of the public—the listeners—being preeminent, not the rights of producers, signals also the importance of diversity of ideas and information.

Breyer, I think, is the only prominent spokesperson for this view on the current Court. He's right on the ball, invoking the democratic purposes of the First Amendment and noting, in his concurrence in the *Turner Broadcasting* cases from a few years back, the democratic functions of the First Amendment and how they may sometimes argue in favor of, rather than against, regulation.[13]

I said something about group polarization. Let's just notice the relationship between that phenomenon and the emerging communications market, and then try to understand the phenomenon a little bit better. A very recent study of the blogosphere finds that the overwhelming percentage of users of the blogosphere self-sort exactly along the lines specified in the Colorado experiment. Most conservative readers read only conservative blogs; most liberal readers read only liberal blogs. That kind of self-sorting is happening every day. We know also that, in terms of linking behavior from one blog to another, there is a degree of cross-linking from liberal to conservative and vice versa. It is far less than statistical randomness would suggest. It's not a high amount, but it's there. And of the cross-linking that occurs, a very significant percentage consists of links saying "look how contemptible and ridiculous the other side is." We saw that a little bit in the exchanges in Colorado Springs and Boulder where references were made to the view of the opposing side, not in the way of "maybe we can learn something," but in the way of further discrediting the opposing view in question.

We also know that conservatives are more likely to see something if it's on Fox News, and liberals are more likely to see something if it's not. We do know that Fox News beat the networks—and I was intrigued about it—during the last Republican Convention. I, personally, would have been

(indicating that while Justice Holmes believed that the ability of thoughts to permeate a market tests the truth of those thoughts, Justice Brandeis believed that free speech was as essential to republican government because "public discussion is a political duty").

13. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (holding that the appropriate standard by which to evaluate the constitutionality of the must-carry provisions under the Cable Television Consumer Protection and Competition Act of 1992 is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 225–29 (1997) (Breyer, J., concurring in part) (concluding that Congress could reasonably believe that the Cable Television Consumer Protection and Competition Act of 1992 "will help the typical over-the-air viewer . . . more than it will hurt the typical cable subscriber" and that Justice Breyer did not "believe the First Amendment dictates a result that favors the cable viewers' interests").

more excited if Fox News had beaten the networks with respect to the Democratic Convention. The fact that they were following the Republican Convention shows the self-sorting that is the concern here from the *Red Lion* point of view.

Group polarization is an extremely robust phenomenon. It has been found in over a dozen nations. White people, who are inclined to show prejudice a fair bit (significantly, but not hugely), are inclined to show a fair bit more racial prejudice after they talk to one another. If you get white people with a degree of racism together in a small deliberating group, the racism starts to jump. If you get white people who are inclined to show only a tiny bit of racism talking to one another during a period of deliberation, the racism is squashed. It disappears because people think it is stupid, or it disappears because people think, even if they have slight racist inclinations, it is unacceptable.

This development in points of view along political lines can be found in almost every domain. If you have people who are starting to protest what they perceive as unfairness but are quiescent and skeptical about the desirability and efficacy of protest, they are like one of the Colorado groups: protest starts to dissipate as an appropriate response. If you have people who are charged up about something, a little outraged, and they think maybe something ought to be done, after they talk to one another, they are very concerned and extremely eager to do something.

Why does this happen? Why do we observe this phenomenon in so many social domains? Why is it making discussion across ideological lines in the United States occasionally difficult? There are two explanations. One you can just see physically by looking at the Colorado experiment. When the Colorado Springs people talked together about climate change, a number of arguments emerged that suggested the problem is small, China is mostly responsible for it, a little heat never hurt anybody, etc. You get a small percentage of arguments in Colorado Springs suggesting that climate change might actually hurt us and that maybe we can approach it in a way that is not economically damaging. The arguments emerged just because the group has a predisposed inclination not to worry. And if people were listening to one another, their views would shift. So information is playing a large role in the changes we observe.

But it is not only that. When I started to get my results in Colorado Springs and Boulder, I talked to a philosopher who works on animal rights about this finding. And his response was

> You know, when we animal rights people get together on a Friday for a three-day meeting, we are very sensible. But by Sunday, we've lost our minds. On the Sunday of a three-day meeting, we start saying such things as, "no scientific experiment on animals ever produced useful knowledge for

> human beings." We say it's never acceptable to eat animals, even if animals lived a very naturally long life and died a painless death. We start losing our perspective.

His account was not that information was exchanged within the group, as in the account I've given of Colorado Springs. It was instead something about the way people liked to present themselves and perceive themselves in groups. What he said was, "Animal rights types like to think of themselves as animal rights types." Once they find themselves surrounded by a group of people who are animal rights types, they think, "Oh, I'm a centrist." They don't like that. They move a little bit.

I can say I have seen this in the law world both at the Federalist Society and at the American Constitution Society. When you get the ACS people together, because their self-understanding is left of center, there is a little movement when they find themselves among similarly left-of-center types. And at the Federalist Society, the same thing occurs.

The two ideas, then, have to do with the exchange of information and the reputational pressure that is placed by finding yourself in a group of like-minded people. The *Red Lion* vision of the Constitution, the mixing that some federal courts of appeals panels have, works against this. It ensures a better distribution of information internally within each group so that there isn't the skewing that inclines each group to one or the other direction. It also weakens the reputational pressure that would occur, for example, when someone you know or someone in the media is interested in a point of view that is different from your own, and the person seems sane and respectable.

With respect to common experiences, I've noted that in a society as diverse as ours, it is crucial to create at least some domains in which we experience the same thing, or read the same thing, or have something like a shared narrative. This is important partly because it gives us a sense that we're engaged in a common enterprise, which many people like to have; they think it is intrinsically good. But it is also a key to helping behavior—to ensuring that when one of us is in trouble, in terms of economic disaster or something, strangers will help. I'm wondering how many of you have had a time in the last ten years where there was trouble, and a stranger showed you surprising generosity. I'm thinking of one myself. But the likelihood that that will occur jumps if people feel across lines of division that we are in it together. National holidays serve that function, at least when there is substance behind them. Martin Luther King Day has that substance still, I think. July Fourth did after 9/11. Probably it still does for most of us; the sense of history and the echo of 9/11 is probably strong enough so that July Fourth still has that sense. But shared communications experiences can do the same thing.

Here is a more particular point, a bit of data. It may be the most

memorable point of data I'm going to tell you, which is that no famine in the history of the world has ever occurred in a nation with democratic elections and a free press. In this history of the world, no nation that has freedom of the press and free elections has ever experienced a famine. Amartya Sen won the Nobel Prize in large part for that empirical finding, which has stood up over time.[14] It's a very counterintuitive finding because we think of famines as a matter of food shortage. Sen shows that this is true in a sense. But whether food is short, and the extent of the shortage, depends on what kind of social pressures there are to make food available. If there are democratic elections and a free press, when food shortages that are going to become famines are on the horizon, government hops to it. Something is done, either domestically or with a plea for international help. The suggestion is that whether people have food depends on what the legal system is doing. And the legal system will anticipate more and do more, so long as there is freedom.

I want to suggest that Sen's finding is a metaphor for the immense value of shared communications experiences in view of the fact that information travels. Each of us is less vulnerable than we would be, not to famine, but to a wide assortment of social ills through mechanisms that are similar to those traced by Sen. If it is the case that the *Red Lion* vision of the First Amendment disintegrates into, let's say, a fully laissez-faire conception of the First Amendment, then that shared communications experience will be endangered.

Many of those who celebrate *Red Lion*'s demise note, empirically, that in a sense *Red Lion*, in its demise, has produced exactly what its critics hoped for. There is a flowering, in some ways, of substantive discussion on the airwaves. A reason is that the chilling effect of the obligation to have the dissenting view has reduced to the extent that we have more substantive discussion than we otherwise would. But notice that what *Red Lion* has unleashed is a kind of Balkanized speech market, in a way that replicates the Colorado experiment. So we know that on the blogosphere every day, every hour, something like the Colorado experiment is occurring; it is occurring in the media in the same general way, although in less dramatic fashion.

What should we do about the increasingly Balkanized speech market? We now have something like an assortment of "Daily Mes."[15] And what should we do about the rise in information cocoons or echo chambers?

---

14. Press Release, Nobel Foundation, The Prize in Economics 1998 (Oct. 14, 1998) http://nobelprize.org/nobel_prizes/economics/laureates/1998/press.html.

15. I looked up, by the way, on Google, the "Daily Me," and I found out there is a *Daily ME*. There is actually a *Daily ME*. But it's a little newspaper in Maine. THE DAILY ME.COM, http://www.thedailyme.com/.

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. Two little ideas with respect to private solutions might emerge spontaneously, or may be encouraged through purely moral suasion by the FCC. They are, first, more and better linking behavior; and, second, deliberative fora. The first idea is that those of us who are engaged in producing material on blogs, or anywhere else, ought to use links much more aggressively as a way of giving kind of a tip-of-the-hat or nod in the direction of those who have reasonable dissenting views. If we find ourselves expressing contempt at those who disagree with us, we should rethink. Links can be used much more respectfully and creatively as a way of creating something like street corners on the Internet. CNN, Fox, and other providers of news can do the same thing.

The second point is that the *Red Lion* vision of something like deliberative democracy could be promoted through public spaces on the Internet and through the media much more effectively than our current practice. Deliberative fora can be created in an instant. There are fascinating experiments starting in this vein, in which we create something like a public space in which lots of points of view are expressed on lots of topics. There is a lot of work to be done by lawyers, people who know how to create websites, and political theorists that would create for our era something like what *Red Lion* was trying to approve for its era.

I am just about done. I have a story for you and then one last quotation. Here's the story: There is a terrific political scientist at Stanford named James Fishkin, who has been interested for many years in the discussion of undiverse people. What Fishkin is trying to create is something that mixes Boulder and Colorado Springs, but much more ambitiously than just Boulder and Colorado Springs. He gets people together who are very diverse and brings them physically into the same space to talk about issues. And he sees what happens.[16]

What Fishkin did a few years ago was to get a group of people into Texas to talk about a number of issues, one of which was welfare policy. In one of the small groups there was an African-American woman from New York who was talking about her family and its needs. She was a single mother with kids. And she was talking about the economic difficulty and what was necessary to help her kids eat and have clothing and such.

16. For a detailed view of Professor Fishkin's research, see generally JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY (1995), which discusses how public opinion comes about and its consequences.

There was also a farmer from Oklahoma who was in this small group of four or five people who was getting increasingly agitated as she was speaking. Finally he exploded and said to her, roughly, "You know, in the United States, the country where I live, a family means a father, a mother, and at least one child. You keep using the word family, but you don't have a family. Don't you dare use the word 'family' in my presence." She was silenced for a while, but they were in that group for a few days. They didn't exchange any words, one to the other. There was discussion from her to other people in the group and from him to other people in the group, but it was frozen—worse than icy. As the woman left on Sunday to go home, to leave for the plane, someone tapped her on the shoulder. And she looked up, and there was the Oklahoma farmer staring down at her. She said, quietly but uneasily, "Yes?" And he said to her with some sternness, "What are the three most important words in the English language?" And she said with some trepidation, "I don't know." He said, "I was wrong."

The quotation is from John Stuart Mill:

> It is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar . . . . Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress.[17]

Thank you.

QUESTION–ANSWER SESSION

Professor C. Edwin Baker:

I always find you persuasive, but I like to needle you every chance I get. When you use the Sen example, it occurs to me that, though everything you said about his report is accurate, when he said we need a free press, it is not at all obvious that there was a free press that met fairness obligations, balance obligations. Certainly the idea of a free press did not imply an administrative state breathing down the neck of the media. So what I wonder is whether or not what was important for his discussion was a press that could take a variety of forms and that *anything* would have been inclined against the type of press that *Red Lion* seemed to be calling for. In the context of that, it also occurs to me that the protestors (who, I agree with you, perform an absolutely vital role in a democracy and that we have to have spaces for) in no way have to be balanced or objective. In fact, to the extent that they are, they may be undercutting what they're trying to

17. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 581 (Sir William Ashley ed., Augustus M. Kelley Publishers 1987) (1848).

accomplish. And then the final point is—and I think you probably would agree with this, but I think it needs to be noted—that though we may need some in media that talk about common problems that are at least interesting to everybody, it is not at all clear that we don't equally need media that grab up countervailing views. In fact, one might imagine two different candidates for the Democratic nomination: one that thinks that what we need is to highlight class division (he fell by the wayside); and another that wants to transcend the differences. I suspect there's room for both of them. However, if one doesn't make some room for the "Daily Me" or for the people in Boulder to talk to the people in Boulder and the people in Colorado Springs to talk to the people in Colorado Springs, we might not have critique in society. We might just have a "blah," centrist type of democracy.

Sunstein:

Thank you. Professor Baker is maybe the world's best analyst of these questions. I answer him with some self-doubt, but let me give it a try. I used the Sen example of famines to discuss the importance of sharing communications experiences so that information travels. The fear was that if we have a Balkanized speech universe in which a bunch of people are reading about *X*, *Y*, and *Z* and others are reading about *A*, *B*, and *C*, and there's some self-sealing in terms of the narratives and concerns, then the safeguards that Sen's example is a metaphor for will not be forthcoming. Maybe one way to put this is, suppose you have a group of people who are really worried about some natural disaster, like whether there is going to be a hurricane, and that we ought to evaluate whether to exit New Orleans. And suppose we have another group of people who are in a social network that says that we have heard these warnings a million times; we don't have to be concerned about this; the government is always blowing smoke; let's stay here, we'll be fine. Then the first group is going to live and the second group is going to die. You know that I didn't make that up. So Professor Baker is right. The notion of shared communications experiences is not a plea for an administrative state, but it is a plea for a kind of social architecture such that the information travels. If the *Red Lion* apparatus doesn't do that, then we had better think of mechanisms that will.

On the protestors' not being balanced, you could imagine a *Red Lion* vision of the communications of radio and TV in which the particular people who are on are not, themselves, balanced; but they are not going to be the only people who are on. If you listen to Rush Limbaugh, as I do, the fact that he's not all that balanced needn't be alarming. But what might be alarming is if people listen *only* to him and do not listen to other people

with diverging viewpoints who are also unbalanced. A good communications universe, I suggest, includes people who have extreme positions of multiple sorts. The danger occurs (and this is already occurring in the blogosphere) where lots of people self-sort so that they think climate change is a hoax, believed by dupes, and ridiculous fake science. And millions of Americans do believe that in a way that has political consequences. You can think of your own favorite examples. So I agree with you entirely that the protestors needn't be balanced. But we want to create an architecture of free speech for whatever mechanisms are consistent with the best arguments that we like about *Red Lion* and that promote the serendipity and unanticipated exposures on the one hand, and an array of shared experiences on the other.

Your third point is the deepest, I think, which is that we do want some places where people are revved up. That is crucial. I have a friend who played a role in breaking down the Soviet Union. He said what made the breakdown possible was that we anti-Communist types banded together a little bit and charged ourselves up. If we didn't have a little information network that had some self-enclosure, that never could have happened. So surely, those who like *Red Lion* in some ways—or at least its vision—should agree that there is room for associational liberty in which people in Boulder do get charged up and people in Colorado Springs also get charged up.

Law professor Heather Gerken calls this "second-order diversity."[18] I have been speaking of diversity *within* institutions, and what she is speaking of is diversity *across* institutions. So you could have Massachusetts, which is sometimes a little liberal polarization machine, and you could have Utah, which is sometimes a conservative polarization machine, and then we all benefit from having Utah and Massachusetts. That's true. The only qualification is that it is very good if, at some time, the people from Massachusetts hear what the people from Utah think, and don't just think of them as enemies or foreigners, or as stupid, and vice versa. If this self-sorting occurs, then I would hope that our *Red Lion*—maybe that can be a project of our Symposium, to think of what our *Red Lion* would look like—our *Red Lion* would honor those niches. We want people to come out of their niches once in a while to listen to other niches.

Question:

There's a lawsuit brought by Yale against John Yoo, a law professor in

18. *See* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1108 (2005) (defining "second-order diversity" as seeking variation "*among* decisionmaking bodies, not *within* them").

California.[19] He is also considered a law professor who is on the right, a conservative law professor—one of the few. I would just like to know what your thoughts are on stifling real free speech with a lawsuit like that.

Sunstein:

There is a lot there in that short question, so I thank you.

I do agree that the world of law professors is dominated, to the detriment of the profession, by liberals. I don't believe that John Yoo, who is a friend of mine, is one of the *few* conservative law professors. Maybe it is because I have spent so many years at the University of Chicago that I know a lot of conservative law professors. While the percentages are on the liberal side, it is not accurate to say there are only "a few" conservative law professors. Thank goodness there are a lot of them! In terms of suing John Yoo, the question is what cause of action there is against John Yoo. No one is above the law, but I don't like any lawsuits against John Yoo unless he failed to pay his property bill or something.

Question:

One of the things the lawsuit has done is have an effect on a young law professor who didn't want to take a conservative stance. Because who wants come forward if they think they are going to be sued like John Yoo? I think that is frightening for our profession.

Sunstein:

I guess I would say that in terms of social pressures, political correctness in any form is most unfortunate. I agree with that. I don't think that conservative law professors are at risk of being sued. I recently cowrote a paper—some of my best friends hate it, maybe John Yoo likes it—in the direction of being favorable to capital punishment on deterrence grounds. My coauthor and I don't worry about being sued. Basically I'm with you on the principle, very strongly, that pressure to sue people because of their political convictions is intolerable. I also agree that some people in some places, even in the law world, are under pressure not to voice conservative views. But I don't worry that law professors who express conservative views frequently are risking a lawsuit.

---

19. *See* Adam Liptak, *Padilla Sues U.S. Lawyer over Detention*, N.Y. TIMES, Jan. 5, 2008, at A9; Emily Bazelon, *If the Yoo Fits: Why Shouldn't Jose Padilla Sue John Yoo*?, SLATE, Jan. 16, 2008, http://www.slate.com/id/2182262/ (describing the lawsuit brought against John Yoo for writing torture memos that justified detainee mistreatment and for shaping detention and interrogation policy).

THE LEGACY OF *RED LION*

ANGELA J. CAMPBELL*

As *Red Lion Broadcasting Co. v. FCC*[1] nears its fortieth anniversary, another Supreme Court case involving broadcast regulation, *FCC v. Pacifica Foundation*,[2] turns thirty. In both cases, instead of applying the "traditional approach" to analyzing First Amendment claims, the Court took a different approach on the grounds that broadcasting was unique in certain ways. I argue that subsequent developments demonstrate the need for a new approach for analyzing the constitutionality of media regulation that neither turns on the type of media involved nor mechanically applies the traditional approach.

Under the traditional approach, courts first determine the appropriate standard of review by asking whether the regulation is content-based or content-neutral. If it is content-based, courts apply strict scrutiny. In applying strict scrutiny, the courts ask if the regulation is the least restrictive means of serving a compelling governmental interest. In practice, regulations rarely meet the test for strict scrutiny. If a regulation is content-neutral, courts apply intermediate scrutiny. For this level of scrutiny, the courts consider whether the regulation is narrowly tailored to serve a substantial governmental interest. Outcomes under this standard vary.

In *Red Lion*, the Court never discussed the appropriate standard of review. Instead, it observed that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[3] The Court explained that, because chaos had ensued in the early days of radio, the government took control of the spectrum, allocated the spectrum for different categories of uses, and awarded licenses to use

* Professor, Georgetown Law, and Director, Institute for Public Representation. J.D., UCLA School of Law; LL.M., Georgetown Law. I wish to thank Matthew Scutari for providing excellent research assistance.

1. 395 U.S. 367 (1969).
2. 438 U.S. 726 (1978).
3. *Red Lion*, 395 U.S. at 386.

specific frequencies within those categories.[4] Because the Court viewed licensing as essential to the productive use of the spectrum, it concluded that licensing some while denying others did not violate the First Amendment.[5]

Next the Court reasoned that nothing in the First Amendment prevented the government from requiring a licensee to share the frequency or "to conduct himself as a proxy or fiduciary with obligations" to present the views of others in the community.[6] It added that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[7]

The Court thus found that the FCC regulations at issue, which required broadcasters to present opposing views on public issues and afford response time to candidates who were editorialized against, did not violate the First Amendment.[8] Indeed, the regulations were consistent with the First Amendment goal of producing an informed electorate.[9] While the Court did not discuss the standard of review, I think it can be best described as rational basis.

Similarly, in *Pacifica*, the Court did not explicitly identify the appropriate standard of review. Rather, it started with the observation that "each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[10]

Although the Court upheld the FCC prohibition on broadcasting indecent language at times when children were likely to hear it, it did not do so on the basis of spectrum scarcity. Instead, it found that broadcasting is "a uniquely pervasive presence in the lives of all Americans" and that broadcast indecency "confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First

4. *See id*. at 388–89 (explaining that the ability of any person to use any frequency at any power level created congestion of the radio spectrum which necessitated government regulation).

5. *See id*. (reasoning that, because the intention of the First Amendment is to protect and further communications, Congress has the unquestionable power to grant and deny licenses in order to promote "effective communication").

6. *Id*. at 389.

7. *Id*. at 390.

8. *See id*. at 396 (articulating that, while the Court did not intend to ratify every past and future programming decision of the Federal Communications Commission (FCC), the government's broadcasting requirements regarding personal attacks were constitutional).

9. *See id*. at 392 (recognizing that without requiring broadcasters to permit opponents to answer personal attacks, station owners would make their time available "to the highest bidders" and the public would only hear one-sided views of controversial public issues).

10. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (citation omitted).

Amendment rights of an intruder."[11] In addition, "broadcasting is uniquely accessible to children, even those too young to read."[12]

In both *Red Lion* and *Pacifica*, the Court upheld regulations that would have been found unconstitutional if applied to other media. With the deployment of new communications technologies over the past forty years—including cable television, satellite broadcasting, and the Internet—some have questioned whether *Red Lion* and *Pacifica* remain good law. They argue that the premises for subjecting broadcasting to less protection under the First Amendment are no longer true, and therefore, broadcast regulation should be assessed under the traditional First Amendment approach.

The Supreme Court may consider how the constitutionality of broadcast regulations should be analyzed in a case this term. The Court granted the FCC's petition for certiorari in *FCC v. Fox Television Stations, Inc.*[13] and scheduled oral arguments for November 2008. In this case, the Second Circuit overturned the FCC's finding that Fox violated the same law at issue in *Pacifica* by broadcasting certain four-letter words.[14] While not deciding whether the FCC's action violated the First Amendment, the Second Circuit observed "that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television."[15] If the Court considers the constitutionality of the FCC's actions as some parties have requested,[16] should the Court continue to analyze the constitutionality of broadcast regulation in a different manner? Or put differently, are *Red Lion* and *Pacifica* still good law?

Typically, two basic arguments are made as to why *Red Lion* is no longer good law and should be overturned.[17] The first is that sources of video and audio programming are no longer scarce. While true, this argument misapprehends what the Court meant by scarcity. The Court was not referring to the scarcity of broadcast stations, but rather to the scarcity

11. *Id.*
12. *Id.* at 749.
13. 128 S. Ct. 1647 (2008).
14. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 446–47 (2d Cir. 2007).
15. *Id.* at 465.
16. *See, e.g.*, Brief of Respondents NBC Universal, Inc. at 38, FCC v. Fox Television Stations, Inc., No. 07-582 (U.S. Aug. 1, 2008) (arguing that the Court should apply strict scrutiny and find that the regulations fail to pass this level of scrutiny because spectrum scarcity and the notion that broadcasting is pervasive are outdated).
17. For a summary of such arguments, see JOHN W. BERRESFORD, FCC MEDIA BUREAU STAFF RESEARCH PAPER, THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING: AN IDEA WHOSE TIME HAS PASSED (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf.

of the spectrum, and the fact that more people wanted to use it than could be accommodated. Although government licensing of speakers in most other contexts is unconstitutional, here, the Court saw licensing as necessary because of spectrum scarcity.

The other argument for overturning *Red Lion* comes in several versions. Some argue that all economic goods are scarce and the electromagnetic spectrum is no different than ink and paper. Others argue that even if spectrum was once scarce, it no longer is because technological advances allow the more efficient use of spectrum.

In theory, the government could decide to get out of the business of licensing spectrum and leave disputes over spectrum use to be resolved by other means. However, I think that this scenario is extremely unlikely. There still are more people who would like to use the spectrum than can be accommodated. That the FCC's recent auction of spectrum brought in over nineteen billion dollars suggests that demand far exceeds the supply of spectrum.[18] And even as spectrum usage has become more efficient, we continue to find new and expanded uses for it.

Because the government can be expected to continue licensing spectrum, it must have the ability to ensure that people use the spectrum for the particular purpose for which it was licensed. The Children's Television Act of 1990,[19] which requires that television stations provide some programming specifically designed to educate and inform children, is an example of this type of regulation. Even though the implementation of the Act necessitates that the FCC make some content-based determinations, I think that it is clearly constitutional under *Red Lion*.

Red Lion does not, however, justify regulation intended to restrict public access to content because of the nature of that content. Although the FCC originally defended its action in *Pacifica* in part on spectrum scarcity, the Court rightly rejected that ground and, instead, based its decision on the pervasiveness and unique accessibility to children.[20]

Today, media is even more pervasive and children have easy access to it. Approximately eighty-five percent of households receive their broadcast television (along with other video programs) by subscribing to a cable or satellite service.[21] Children—indeed, most adults—make no distinction

18. Auction of 700 MHz Band Licenses Closes, 23 F.C.C.R. 4572 (2008) (reporting that the 2008 auction concluded with 1,090 provisionally winning bids totaling approximately $19.6 billion).

19. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified as amended at 47 U.S.C. § 303(a)–(b) (2000)).

20. *See* FCC v. Pacifica Found., 438 U.S. 726, 770 n.4 (Brennan, J., dissenting) (noting that the majority rightly refrained from relying on the notion of spectrum scarcity).

21. *See* News, Fed. Commc'ns Comm'n, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report, at 3 (Nov. 27,

between the local NBC affiliate, which is a broadcast station, and the USA Network, which is a cable network. They are just different channels on the cable box. Indeed, they often run the same programs. Children and adolescents are also huge users of the Internet and mobile phones,[22] both of which are increasingly being used for watching video.[23]

The pervasiveness and accessibility of these new distribution technologies can cut both ways. Some argue that because there is a compelling governmental interest in restricting children's access to certain content—say, cigarette advertising, excessively violent video games, or pornography—it makes no sense to restrict access only to some types of media and not others that are equally accessible to children. Others argue that, since broadcasting is no longer uniquely pervasive, the traditional First Amendment approach should apply to it as well.

I find that having the level of constitutional scrutiny turn on whether the medium at issue is or is not "like broadcasting" is troubling. 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? While both broadcast and cable require consumers to purchase a television set, it is argued that those who also pay a monthly subscription fee have invited such programming into their homes. But since most households now subscribe to cable or satellite service, is it realistic to infer that subscribers necessarily want all of the programming that is packaged together? And with even more channels on cable from which to tune in and out, if anything, consumers are more likely to come

---

2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf (citing a Nielsen Company estimate that only "about 14 percent of all television households rely on over-the-air television broadcasts for video programming").

22. According to a recent Nielsen survey, 81% of teens (ages 13–17) and 52% of tweens (ages 8–12) spend at least an hour online daily. The survey also found that 77% of teens and 40% of tweens own mobile phones. NIELSEN MEDIA RESEARCH, *Kids on the Go: Mobile Usage by US Teens and Tweens (Results from the 3Q 2007 Study)*, at 5–6, 18, April 15, 2008, *available at* http://s3.amazonaws.com/thearf-org-aux-assets/downloads/cnc/youth/2008-04-15_ARF_Youth_Resnick.pdf.

23. Another recent Nielsen report found that "[w]atching video on the Internet is no longer a novelty; nearly 119 million unique viewers viewed 7.5 billion video streams in May 2008. The average viewer spent 2 hours and 19 minutes in May streaming video online." This report also found that 91 million, or 36%, of U.S. mobile phone subscribers owned a video-capable phone, and that 4.4 million persons reported watching mobile video. NIELSEN MEDIA RESEARCH, NIELSEN'S THREE SCREEN REPORT: TELEVISION, INTERNET AND MOBILE USAGE IN THE U.S. (May 2008), at 4, *available at* http://www.nielsen.com/pdf/3_Screen_Report_May08_FINAL.pdf.

across undesired content on cable than on broadcasting.

Whether a medium is analogous to broadcasting is subjective and may change over time. For example, in *Reno v. ACLU*,[24] the Court rejected the claim that the Internet was like broadcasting because it was not as invasive. At the time the Court decided *Reno*, most people accessed the Internet through dial-up and used it for e-mail and viewing websites. Today, most people have broadband connections and use the Internet for many different reasons, including watching programs that are shown on broadcast television.

I do not think it makes sense to apply different First Amendment tests to the same program depending on whether it comes into a home by broadcast, cable, or Internet. At the same time, I do not think that the traditional First Amendment approach should necessarily apply to all media because the traditional approach often fails to take into account all of the relevant interests.

The traditional approach only balances the government interests served by the regulation against the free speech interests of the regulated party. However, in most, if not all, cases involving communications media, the regulated party is not the only one with an interest in creating and disseminating content. For example, program producers want to create and distribute programming, advertisers want to create and disseminate advertisements, and many regular people want to express their views and share their ideas and creations. Additionally, viewers and listeners have a First Amendment interest in receiving access to diverse ideas and information. Indeed, in *Red Lion*, the Supreme Court found that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[25]

But viewers and listeners can have divergent interests. Many communications cases involve conflicts between the interests of children and adults. In *Pacifica*, for example, it was important to the concurring Justices that adults had access to the George Carlin monologue by other means.[26] But in many later cases, including those in the lower courts, adults' interests have been prioritized over children's interests with such statements as "the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"[27]

---

24. 521 U.S. 844 (1997).

25. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

26. *See* FCC v. Pacifica Found., 438 U.S. 726, 760 (1978) (Powell, J., concurring) (noting that the FCC holding did not "prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion").

27. Reno v. ACLU, 521 U.S. at 875 (quoting Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996)).

In addition to failing to take into account all of the relevant interests, the traditional approach is subject to manipulation. It is often difficult to predict whether a proposed regulation will be found constitutional. Take, for example, what constitutes a compelling or substantial government interest. How can judges determine whether the regulator's stated interest is the actual interest? How can it assess whether the problem to be addressed is real or imagined? Should a court require that there be a factual basis to support the interest? If so, how much empirical support is needed? How should courts deal with conflicting evidence?

Courts have been inconsistent in demanding evidence to support alleged compelling governmental interests. Generally, courts have accepted that the government has a compelling interest in protecting children from the harm of indecency without any empirical or anecdotal support.[28] On the other hand, courts have recently struck down laws limiting the sale of extremely violent video games to minors, rejecting studies suggesting a link between playing violent video games and aggressive behavior as insufficient evidence of harm.[29]

Although most would agree that limitations on speech should not be upheld unless they address real harms, it is often expensive and difficult to prove harm. This is a particular problem with regard to children because funding for research on the effects of media on children is limited and some types of research cannot be done because of ethical issues. It is also difficult for research to keep up with rapid technological changes.

Even when courts find that a regulation serves a compelling or substantial interest, the determination of whether it is sufficiently tailored can be quite subjective. The distinction between the least restrictive means of addressing a problem and sufficiently narrowly tailored means is somewhat muddled. Some factors employed seem to point in opposite directions. For example, sometimes courts find that a regulation is too broad because it does not leave open alternative means of expression. But

28. *See, e.g.*, Action for Children's Television v. FCC, 58 F.3d 654, 661–62 (D.C. Cir. 1995) (en banc) (finding that the protection of children from indecent programming a compelling governmental interest and asserting that the Court has never required a "scientific demonstration of psychological harm").

29. *See, e.g.*, Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 958–59 (8th Cir. 2003) (nullifying a county ordinance that restricts access to violent video games because the county failed to provide the court with empirical evidence to prove that the games cause harm to minors); Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065, 1069–70 (D. Minn. 2006) (reasoning that a law restricting minors' access to violent video games was unconstitutional because the government could not prove a causal link between violent video games and a deleterious effect on minors); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 652–54 (E.D. Mich. 2006) (declaring that Michigan's evidence about video game violence falls far short of the "substantive evidence" requirement to restrict free speech).

when a regulation does leave open alternative means, courts may find that the regulation does not provide a good fit because it does not prevent children from obtaining the harmful content by other means.[30]

Another problem is that the mere fact that one can identify a possible alternative that would be less restrictive does not mean that such an alternative is actually available—or even if available, effective.[31] Courts are not necessarily in a good position to compare the effectiveness of different approaches. And why should the government be limited to one approach when multiple approaches to a problem may be required or desirable?

In conclusion, I believe that regulations designed to assure that the public airwaves be used for their intended purpose should continue to be assessed using the relaxed standard employed in *Red Lion*. While closer

30. For example, in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the Court found that Massachusetts's outdoor advertising regulations prohibiting advertising for smokeless tobacco or cigars within 1,000 feet of a school or playground violated the First Amendment. Even though the Court concluded that the regulations directly furthered a compelling governmental interest in preventing underage tobacco use, it found that the broad sweep of the regulation demonstrated a lack of tailoring and unduly impinged the speech rights of tobacco companies to communicate with adults. In contrast, in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court upheld the grant of a preliminary injunction against the Child Online Protection Act (COPA), the law passed by Congress after the Court found the Communications Decency Act of 1996 (CDA) unconstitutional in *Reno v. ACLU*, 521 U.S. at 844. Although the COPA was more narrowly drawn than the CDA, the Court nonetheless concluded that the government failed to meet its burden of demonstrating that the regulation was the least restrictive means among available effective remedies. In so doing, it pointed out that the COPA did not prevent minors' access to harmful material that came from overseas or Internet communications, such as e-mail. *Id*. at 666–67.

31. For a good illustration of this problem, see United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000). In that case, Justice Kennedy, writing for five Justices, found unconstitutional § 505 of the Telecommunications Act, which required cable operators to fully scramble sexually oriented programming or limit such programming to the hours of 10 p.m. to 6 a.m. because of "signal bleed" problems that sometimes made sexually explicit programming available even to households that did not subscribe to the programming. The majority found that the law was not narrowly tailored because the government had failed to meet its burden of showing that the less restrictive alternative of targeted blocking was not effective. Although the government presented evidence showing that few subscribers requested blocking, the Court found that it was unclear from the record whether this alternative had been adequately promoted, and there was "no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed . . . and about their rights to have the bleed blocked . . . ." *Id*. at 823. Justice Breyer, writing for the four dissenting Justices, found the government's showing sufficient. The dissent noted that any less restrictive alternative must be at least as effective in achieving the legitimate purpose and that judges must give legislatures some leeway. Otherwise, the "undoubted ability of lawyers and judges to imagine *some* kind of slightly less drastic or restrictive . . . approach would make it impossible to write laws that deal with the harm . . . ." *Id*. at 841 (Breyer, J., dissenting). In this case, they believed that voluntary blocking was not a similarly effective alternative because it required parents both to know of their right to request blocking and to take multiple steps to exercise that right. *Id*. at 841–43. In addition, they found that "better notice" would not likely be effective and presented numerous difficulties. *Id*. at 843–45.

scrutiny seems appropriate for assessing regulations that restrict the distribution of content because of the allegedly harmful or undesirable nature of the content, we are not well-served by the mechanical application of the traditional approach to broadcast media, or to any media. It is time to devise a new and better test that takes into account the interests of children as well as adults, content providers, content transmitters, and content receivers—one that is more realistic in assessing the factual premises and available alternatives.

* * *

FROM *RED LION* TO RED LIST: THE DOMINANCE AND DECLINE OF THE BROADCAST MEDIUM

JIM CHEN*

Ecology knows no word such as *forever*, and neither does the law. Dominant species are among the least resilient, most vulnerable members of an ecosystem being subjected to extreme stress (as in habitat destruction).[1] This pitfall of dominance in ecology[2] applies with equal force to economics.[3]

In this spirit, I propose a little legal housecleaning. The 1969 case of *Red Lion Broadcasting Co. v. FCC*,[4] the very subject of this Symposium, deserves to be transferred, in its entirety, from the realm of doctrine to that of history. In previous scholarship, I have urged the law to "bid farewell" to this "flawed but faithful servant of the law"[5] and, indeed, to the entire body of First Amendment jurisprudence embracing *Red Lion*'s conception of conduit-based regulation.[6] Those calls to abjure *Red Lion* have rested on the decision's doctrinal obsolescence.

---

* Dean and Professor of Law, University of Louisville.

1. *See, e.g.*, David Tilman et al., *Habitat Destruction and the Extinction Debt*, NATURE, Sept. 1, 1994, at 65.

2. The relative inability of dominant competitors to colonize anew after losing habitat illustrates the broader dynamics of highly optimized tolerance (HOT) and constrained optimization with limited deviations (COLD) ecological systems. *See* Jim Chen, *Webs of Life: Biodiversity Conservation as a Species of Information Policy*, 89 IOWA L. REV. 495, 550–51 (2004) (citing sources).

3. *Cf*, STEPHEN JAY GOULD, ONTOGENY AND PHYLOGENY 76 n.* (1977) (tracing the etymology of "biogenetic law" to nineteenth-century biologist Ernst Haeckel); Gary W. Barrett & Almo Farina, *Integrating Ecology and Economics*, 50 BIOSCIENCE 311, 311 (2000) (tracing the terms *ecology* and *economics* to Ernst Haeckel, who derived both terms from *οικος*, the ancient Greek word for "house").

4. 395 U.S. 367 (1969).

5. Jim Chen, *Liberating* Red Lion *from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. ON TELECOMM. & HIGH TECH. L. 293, 307 (2002).

6. *See* Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1456 (2005) ("A separate First Amendment jurisprudence on conduit-based regulation deserves to wither away.").

This Essay adds a brief note of economic and technological pragmatism to that line of legal analysis. A decade ago, in the immediate aftermath of the epochal Telecommunications Act of 1996,[7] *Red Lion* and the entire First Amendment jurisprudence of broadcasting that it inspired already exuded "a musty odor."[8] Subsequent developments—in laboratories and markets as well as in Congress, the Federal Communications Commission (FCC), and the courts—have all but extinguished *Red Lion*'s relevance. Despite the decision's considerable symbolic significance, *Red Lion* has moved onto the law's equivalent of conservation biology's Red List—the globally recognized list of organisms at greatest risk of imminent extinction.[9]

Let us continue to speak of the law in ecological terms. *Red Lion* long ago lost its doctrinal niche. The FCC abandoned the Fairness Doctrine in 1987,[10] and the D.C. Circuit in 2000 throttled the related personal-attack and political-editorializing rules that had been at issue in *Red Lion*.[11] *Red Lion* does not support a general right of access to speech platforms, not even in terrestrial broadcasting,[12] and certainly not in the conventional press:[13] "[S]carcity of air time does not justify viewpoint-based exclusion . . . ."[14] Even the most aggressive application of *Red Lion*, a broad endorsement of structural regulation putatively designed to patrol ownership and affiliation decisions in mass communications industries, would find legal support in the absence of *Red Lion*.[15]

---

7. Pub. L. No. 104-104, 110 Stat. 56 (1996).

8. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 903 (1998).

9. *See* International Union for Conservation of Nature and Natural Resources, IUCN 2008 Red List of Threatened Species, http://www.iucnredlist.org (last visited Oct. 28, 2008).

10. *See* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043, 5052 (1987) (holding that "the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest"), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

11. *See* Radio–Television News Directors Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (issuing a writ of mandamus that ordered the FCC to repeal those rules).

12. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969) ("[I]t is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); *see also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 132 (1973) (restoring an FCC ruling that declined to require broadcasters to accept paid editorial advertisements); *cf.* FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (invalidating a rule that conditioned federal funding of public broadcasting on funded speakers' agreement not to engage in political editorializing).

13. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion) (describing legally "forced response[s]" as "antithetical to the free discussion that the First Amendment seeks to foster"); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (rejecting a state right-of-reply law as an unconstitutional infringement of a newspaper's "exercise of editorial control and judgment").

14. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 615 (1998) (Souter, J., dissenting) (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676 (1998)).

15. *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978) ("It was

What *Red Lion* lacks in material doctrinal significance, however, is readily offset by the symbolic weight that the decision carries. Wholly independent of its actual value in informing FCC policy or guiding judicial review of those decisions, *Red Lion* symbolizes two simultaneous, but inherently contradictory, values that lie outside a strictly market-based conception of free speech. The legally privileged market for broadcast speech that *Red Lion* and its defenders contemplate is at once public-minded and passive.

The "public-minded" portion of this formula is easier to defend and probably enjoys the deepest academic support. Unfettered media markets, according to this brand of received wisdom, are inherently skewed and distorted by the power of those with the wealth and political influence to commandeer the airwaves.[16] Profit motive corrupts;[17] new technology corrupts completely.[18] This romanticized view of public discourse sharply distinguishes between "information and news," the presumed domain of communications regulation in the public interest, and mere "entertainment," which merits the legal status of "lipstick."[19] In broadcasting, or, more to the point, in superior technological settings that power "the Internet and the digitally networked environment," the appropriate regulatory prize is "not the Great Shopping Mall in Cyberspace," but rather "the Great Agora—the unmediated conversation of the many with the many."[20]

We may forgive the incoherence of this preference for "public discourse" over the "marketplace of ideas" (η αρχαιη αγορα, after all, is merely what modern Greeks call the "ancient market" in Athens) as an expression of law's very raison d'être. Entire bodies of law are devoted to

---

not inconsistent with the statutory scheme . . . for the Commission to conclude that the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole."); NBC, Inc. v. United States, 319 U.S. 190, 217 (1943) (describing the FCC's broad mandate to regulate broadcast media in the public interest).

16. *See, e.g.*, Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1197 (1993) ("[A]nticompetitive behavior and private concentrations of media power can injure the media marketplace.").

17. *See, e.g.*, LEE C. BOLLINGER, IMAGES OF A FREE PRESS 139 (1991); Geoffrey R. Stone, *Imagining a Free Press*, 90 MICH. L. REV. 1246, 1261 (1992) (reviewing Bollinger's IMAGES OF A FREE PRESS).

18. *See, e.g.*, RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 3–4 (1996) (alleging that the acceleration of "the age-old human drive for self-gratification" through "highly advanced electronic technology" will "trivialize public expression and . . . undermine the traditional aims of the First Amendment").

19. *See* CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK 145 (2000).

20. Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 565 (2000).

disciplining markets where competition cannot be accorded any presumptive value, if only because the law itself has rendered the industry at issue "so regulated and so largely closed" to market forces.[21] Rather, an even larger source of tension looms in the trait that most strikingly distinguishes conventional broadcasting from other communications media: its passivity.

What defenders of *Red Lion*, conventional broadcast regulation, and the discourse-based model of free speech jurisprudence truly want, even if their vision of active self-governance by informed citizens is at war with this goal, is at least one place in democratic spaces for speech where the public at large does absolutely nothing besides watch or listen. Appeals to civic republicanism and other lofty ideals notwithstanding, what *Red Lion* symbolizes and privileges above all else is sloth, the idea that there should be one form of mass communication that all citizens, no matter their age, wealth, or social status, can access solely by virtue of buying a receiving device and turning it on.

The greatest boundary in communications and in the law that governs it is the line between "push" and "pull," between media that deliver information passively and those that require active user intervention.[22] The distinction warrants a simple quantitative metric: communications law sharply distinguishes between information viewed at twenty inches (typically from a computer screen) and information viewed at twenty feet (typically from a television screen). The conventional wireline telephone, as illustrated by the "dial-a-porn" controversy in *Sable Communications of California, Inc. v. FCC*,[23] is the consummate "pull" technology. Congress expresses its commitment to preventing the use of telephones as a "push" medium by restricting unwanted faxes[24] and sales calls.[25] So far, the Supreme Court has treated the Internet as a pull medium, presumably because "the receipt of [online] information . . . requires a series of

21. *See* FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 97 (1953) (requiring that the FCC offer more than mere assumptions that competition will be beneficial to the public interest); *accord, e.g.*, Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974) (dismissing the assumption that competition is likely to be advantageous without further evidence).

22. *See generally* ETHAN CERAMI, DELIVERING PUSH (1998); Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage*,*"* 97 COLUM. L. REV. 1048 (1997) (discussing the distinctions between broadcasters and carriers and concluding that the government should rethink regulations that separate the two categories).

23. *See* 492 U.S. 115, 131 (1989) (holding that FCC's regulations to screen underaged callers from obscene interstate commercial telephone messages are not constitutional).

24. Telephone Consumer Protection Act, 47 U.S.C. § 227 (2000); *see also* Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 56 (9th Cir. 1994) (holding that the Telephone Consumer Protection Act is not unconstitutional merely because it limits its regulation to advertisements delivered by fax).

25. Telemarketing and Consumer Fraud and Abuse Prevention Act, 7 U.S.C. § 9b (2000); 15 U.S.C. §§ 6101–6108 (2000).

affirmative steps more deliberate and directed than merely turning a dial."[26]

At the other extreme lies broadcasting. Terrestrial radio and over-the-air, nonsubscription television comprise a legally distinct class of "uniquely pervasive" media that can shatter privacy even at home and are "uniquely accessible to children, even those too young to read."[27] This pervasiveness rationale, wholly separate from the scarcity rationale traditionally associated with *Red Lion*,[28] is powerful enough to defeat the usual judicial admonition for listeners, readers, and viewers whose sensibilities are offended by unwanted speech. Whereas nonbroadcast audiences are invited to avert their eyes[29] or to escort junk on its "short, though regular, journey from mail box to trash can,"[30] the Supreme Court has emphatically refused to ask aggrieved listeners to "avoid further offense by turning off the radio," as if the Justices had been asked to excuse assault whenever victims can "run away after the first blow."[31] The Supreme Court's refusal to endorse a form of self-help that governs every other communicative setting,[32] testifies (as perhaps no other evidence could) to the privileged status of broadcasting as this society's default push medium.

---

26. Reno v. ACLU, 521 U.S. 844, 854 (1997) (internal quotation omitted); *accord* Ashcroft v. ACLU, 535 U.S. 564, 604–05 n.1 (2002) (Stevens, J., dissenting) (distinguishing laws that require stores to shield minors from pornographic magazines from laws that regulate Internet speech).

27. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978); *accord* Reno v. ACLU, 521 U.S. at 866–67 (noting that indecent broadcasts require "special treatment"); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (plurality opinion) (comparing the government's regulation of indecent material via cable to the regulations the Court upheld in *Pacifica* and noting that cable television broadcasts are at least as accessible to children as over-the-air broadcasting); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (distinguishing telephone communications from cable and over-the-air broadcasting); *cf.* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (recognizing that outside the broadcast medium "the governmental interest in protecting children from harmful materials" should not be used to "justify an unnecessarily broad suppression of speech addressed to adults" (quoting Reno v. ACLU, 521 U.S. at 875)).

28. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting) (noting that scarcity does not justify censorship).

29. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) (stating that the individual, rather than the government, must take action to avoid further exposure to speech that is offensive but otherwise protected); Cohen v. California, 403 U.S. 15, 21 (1971) (limiting the government's authority to regulate discourse to those situations where the discourse violates "privacy interests . . . in an essentially intolerable manner"); *cf.* Lehman v. City of Shaker Heights, 418 U.S. 298, 308 (1974) (Douglas, J., concurring) (acknowledging the possibility that "captive audiences" might be worth protecting from "offensive and intrusive" messages).

30. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)). *But cf.* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970) (upholding a statute authorizing a resident to bar mailings from a particular sender).

31. *Pacifica*, 438 U.S. at 748–49.

32. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 294 (1981) ("Turning off a radio is much easier than averting your eyes from someone who is in the same room. Just try it sometime.").

That status, however, hinges on the thinnest of technological and legal reeds. Communications industries have always operated under the most contingent and volatile conditions. Guglielmo Marconi's "wireless telegraph,"[33] an ethereal variant of an older pull technology, gave rise to radio's empire of the air.[34] Multichannel video programming, whatever its technological pathway to the home, has become a pull technology to the extent that viewers can order specific shows on demand.[35]

Indeed, the transformation of television into the delivery of multichannel video programming describes the technological, economic, and ultimately legal quandary that has consigned *Red Lion* to the Red List of modern communications law. One year before *Red Lion*, the Supreme Court upheld the FCC's broad claim of jurisdiction to regulate cable television, on the overt rationale that the Commission had a mandate to protect ultrahigh frequency (UHF) and educational stations as the foundations of "an appropriate system of local broadcasting."[36] This decision, and not *Red Lion*, represents the true high-water mark of public interest broadcast regulation in a technologically volatile society. Various mandatory carriage schemes for cable and its satellite-based substitute[37] all trace their legal roots to *United States v. Southwestern Cable Co*.[38] From the landmark *Turner* cases of the mid-1990s,[39] which upheld a must-carry scheme for broadcast channels on cable systems, to more recent decisions upholding "carry one, carry all" rules for direct broadcast satellite systems,[40] courts have consistently endorsed the power of Congress and the FCC to craft elaborate bodies of law dedicated to preserving space on multichannel video program delivery systems for the benefit of conventional broadcasters.

---

33. *See* EDWARD A. DOERING, FEDERAL CONTROL OF BROADCASTING VERSUS FREEDOM OF THE AIR 4 (1939) (describing how radio was first used as a system for shore-to-ship communication).

34. *See generally* THOMAS S.W. LEWIS, THE EMPIRE OF THE AIR: THE MEN WHO MADE RADIO (1991).

35. *See* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 305 (2003) (describing video-on-demand services).

36. *See* United States v. Sw. Cable Co., 392 U.S. 157, 174 (1968) (explaining the policy decision that local broadcast stations should exist for each community).

37. Differences in regulatory treatment cannot obscure the fundamental economic and technological reality: direct broadcast satellite's (DBS) greater channel capacity and nationwide geographic footprint makes DBS the first and perhaps best technological basis for multichannel video program delivery beyond cable. Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 901 & n.37 (2003); Yoo, *supra* note 35, at 343.

38. 392 U.S. 157 (1968).

39. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

40. Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337 (4th Cir. 2001); Time Warner Entm't Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996).

These decisions carry a double irony. As a matter of legal doctrine, they have consigned the deferential standard of review associated with *Red Lion*, *NBC, Inc. v. United States*, and *FCC v. National Citizens Committee for Broadcasting* to a narrowly defined zone of structural regulations affecting conventional broadcasters.[41] Even more important, cable's must-carry and digital broadcast satellites' "carry one, carry all" decisions testify to the economic dependence of conventional broadcasting, especially UHF, on analog and (eventually) digital transmission technologies for the stream of viewers that can deliver the eyeballs and advertising revenues that are broadcasting's traditional crutch.[42] The very pervasiveness of these new forms of carriage—after all, even cable, DSL, and other forms of broadband Internet delivery are described as *always on*[43]—have guaranteed that the only way broadcast can retain its traditional pervasiveness is the creation and maintenance of a Byzantine system of communications regulation dedicated precisely to that ideal.

And that bootstrap is by far the longest in a body of law whose illogic depends on the convergence of legal regulation with the very rationale that justifies it.[44] Simply put, because contemporary mass communications have no use for conventional broadcasting, the law regulating this industry no longer needs *Red Lion*. The FCC's approval of the merger of the country's only two carriers of satellite radio,[45] an otherwise fearful decision to endorse a merger between communications titans,[46] is tempered by

41. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (invalidating horizontal and vertical limits on cable ownership and programmer affiliation); Horton v. City of Houston, 179 F.3d 188, 194–95 (5th Cir. 1999) (applying the *Turner* decisions' form of intermediate scrutiny in reversing a lower court summary judgment ruling that allowed a municipal fee to be charged for nonlocally produced programming on a public/educational/governmental cable channel); Chen, *supra* note 6, at 1424–25, 1447–48.

42. *See, e.g.*, 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, 419–20 (2001) (describing FCC rulemakings that protect broadcasters from losing their audiences to cable television); Spulber & Yoo, *supra* note 37, at 901; Yoo *supra* note 35, at 278.

43. *See* Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, 14 F.C.C.R. 2398, 2406–08 (1999) (distinguishing broadband from narrowband both in terms of transmission speed and in terms of broadband's ability to remain *always on*).

44. *See* Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 51 (2002) ("Government control is not a justification for government control . . . ."); William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539, 548 (1978).

45. Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, 73 Fed. Reg. 52,046 (Fed. Commc'ns Comm'n July 25, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.pdf (approval of merger).

46. *See generally* Jim Chen, *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUS. L. REV. 1311 (2007).

technological reality. The emergence of 3G handheld devices capable of receiving Internet radio[47] minimizes the regulatory harm that might otherwise emerge from permitting a monopoly over satellite radio. So sets the sun on terrestrial radio's empire of the air.

As for broadcast television, a February 17, 2009 deadline looms for extinguishing all analog television signals.[48] Government coupons seeking to soften the financial blow to Americans who have not yet converted their television sets are emphatically limited to over-the-air receivers and converter boxes and may not be used to pay for subscription-based systems of digital programming delivery by cable or satellite. Conventional broadcasting, more in its death than its final years of decline, depends entirely on a system of public subsidization starkly more transparent than the regulatory system that first emerged with the whisper of the word *localism* on the lips of the FCC.

No system of communications can be "pervasive" whose technological basis has evaporated and whose commercial viability depends entirely on a law designed to preserve its economic habitat. *Red Lion*, former king of First Amendment beasts, now rides on the Red List of endangered decisions in communications law. The only remaining question is whether to allow this creature to become altogether extinct.

47. *See, e.g.*, FlyCast, http://www.flytunes.fm (last visited Oct. 28, 2008).
48. *See generally* Consumer Elec. Ass'n v. FCC, 347 F.3d 291 (D.C. Cir. 2003).

PARADOXES OF MEDIA POLICY ANALYSIS: IMPLICATIONS FOR PUBLIC INTEREST MEDIA REGULATION

PHILIP M. NAPOLI, PH.D.*

TABLE OF CONTENTS

INTRODUCTION

When the Federal Communications Commission (FCC or Commission) decided in 1987 to eliminate the Fairness Doctrine, the decision arose from the judgment that the Fairness Doctrine was no longer necessary given the changes that had taken place in the media environment and, more importantly, that the Fairness Doctrine undermined, rather than achieved, its primary policy goal of increasing the extent to which broadcasters provided citizens with coverage of controversial issues of public importance.[1] This determination was made in the wake of what the FCC described as a "detailed evaluation as to whether or not the Fairness

* Director, Donald McGannon Communication Research Center and Associate Professor at the Graduate School of Business, Fordham University.

1. Syracuse Peace Council, 2 F.C.C.R. 5043, 5052 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) ("[W]e concluded that, in operation, the fairness doctrine actually thwarts the purpose which it is designed to achieve. We found that the doctrine inhibits broadcasters, on balance, from covering controversial issues of public importance. As a result, instead of promoting access to diverse opinions on controversial issues of public importance, the actual effect of the doctrine is to 'overall lessen the flow of diverse viewpoints to the public.'" (citation omitted)).

Doctrine in operation, enhances or inhibits the presentation of diverse views on public issues."[2] This detailed evaluation was the well known 1985 Fairness Report.[3] According to the Commission, prior to the 1985 Fairness Report, the FCC had "never specifically made an empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas,"[4] a fact that was crucial to the Supreme Court's review of *Red Lion Broadcasting Co. v. FCC* in 1969.[5]

The 1985 Fairness Report served as the primary evidentiary source for the FCC in its decision to eliminate the Fairness Doctrine two years later.[6] The report emerged from a proceeding in which over one hundred parties submitted comments.[7] It was these comments (particularly those of the National Association of Broadcasters, Meredith Broadcasting, and Sinclair Broadcasting) upon which the report relied to conclude that the Fairness Doctrine was not serving the public interest. This analytical approach was controversial at the time, with some critics emphasizing that the FCC's decision lacked any systematic statistical analysis and relied too heavily on anecdotal examples by broadcasters.[8] Nonetheless, the Commission's decision to eliminate the Fairness Doctrine was upheld by the D.C.

2. Inquiry into Sec. 73.1910 of the Commc'ns Rules & Regulations, 102 F.C.C.2d 145, 158 (1985) (report).

3. *See id*. at 145–46 (describing the Commission's inquiries contained in the report).

4. *Id*. at 158.

5. 395 U.S. 367, 392–93 (1969) (assessing the constitutionality of the Fairness Doctrine and describing the possibility that broadcasters would eliminate controversial programming in order to circumvent the doctrine as "at best speculative").

6. *See Syracuse Peace Council*, 2 F.C.C.R. at 5049–52 (discussing the Federal Communication Commission's (FCC or Commission) creation of the 1985 Fairness Report and its subsequent findings).

7. Inquiry into Sec. 73.1910 of the Commc'ns Rules & Regulations, 102 F.C.C.2d at 146 ("More than one hundred parties submitted formal comments and reply comments in this proceeding. Many other persons participated in this proceeding through the submission of informal comments." (citation omitted)).

8. *See, e.g.*, Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 299–300 (1997) ("Within the legislative policy debate, the FCC has been criticized by Congress for its 1985 finding that the [Fairness Doctrine] 'chilled' free speech, precisely on the grounds that it reached such a conclusion lacking any factual or 'statistical' basis." (citation omitted)); Inquiry into Sec. 73.1910 of the Commc'ns Rules & Regulations, 102 F.C.C.2d at 180, 185 ("A number of parties characterize the statements made by broadcasters that document the existence of 'chilling effect' as mere 'self-serving' utterances to which the Commission should accord little probative value. . . . In addition, several supporters of the retention of the fairness doctrine argue that the record in this proceeding provides inadequate support of a 'chilling effect' on the grounds that the NAB, in the appendix to its comments, 'merely' provided 45 examples of the way in which the fairness doctrine chills broadcasters' speech." (citation omitted)); Syracuse Peace Council v. FCC, 867 F.2d 654, 662 (D.C. Cir. 1989) ("Several parties, however, have attacked the evidence of broadcaster chill and what they contend is the Commission's failure to respond adequately to the attacks.").

Circuit,[9] with the court endorsing the rigor of the Commission's analytical process[10] while also granting substantial deference to the Commission's expert judgment on the matter.[11] Importantly, the court upheld the FCC's decision purely on policy grounds, declining to consider the constitutional issues raised by the Fairness Doctrine.[12]

Assessments of media regulation in the name of the public interest, based on policy rather than constitutional grounds, as well as the analytical tools and processes employed by policymakers to do so, will be the focus of this discussion. Specifically, the analytical dynamics surrounding the elimination of the Fairness Doctrine shed light on current analyses of public interest media regulation. It is the contention of this Article that the promotion of a robust information environment—in which the objective data necessary to guide well-informed policymaking are gathered and made widely available—is a crucial element of public interest media policymaking.

When we look back at the FCC's inquiry into the efficacy of the Fairness Doctrine, the differences between it and contemporary media policy analysis are striking. Today, the analytical environment is much different. The demand for rigorous, defensible empirical analyses of FCC policies has become more pronounced in virtually all quarters.[13] The courts, in particular, have become increasingly demanding, exhibiting a decreasing willingness to defer to the Commission's expert judgment.[14] Congress, through legislation such as the Data Quality Act,[15] has increased the analytical burden on the FCC. Yet at the same time, the quality, scope, and accessibility of the data necessary to engage in such analyses are declining,[16] and the policymaking process itself seems to be increasingly

9. *See* Syracuse Peace Council v. FCC, 867 F.2d at 669 ("We conclude that the FCC's decision that the fairness doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion . . . .").

10. *See id.* at 660–66 (analyzing and upholding the evidentiary sources the Commission relied upon in the 1985 Fairness Report).

11. *See id*. at 660 ("The FCC's decision that the fairness doctrine no longer serves the public interest is a policy judgment. . . . In this situation, we owe great deference to the Commission's judgment.").

12. *Id*. at 669.

13. *See* Robert Corn-Revere, *Economics and Media Regulation*, *in* MEDIA ECONOMICS: THEORY AND PRACTICE 71, 83 (Alison Alexander et al. eds., 1993) (describing the FCC's move away from an "intuitive model" of policymaking and the agency's "newly discovered interest in 'the collection of economic data and analysis'. . . ." (citation omitted)); Philip M. Napoli, *The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis*, 43 J. BROAD. & ELEC. MEDIA 565, 576–77 (1999) (discussing the implications of this trend for communications policymaking).

14. *See* Napoli, *supra* note 13, at 571–73 (discussing decisions made in the D.C. and Seventh Circuits).

15. Data Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 (2000).

16. *See infra* notes 21–38 and accompanying text.

politicized.[17] These fundamental paradoxes and their implications for the future of public interest media regulation are discussed below.

I. PARADOX ONE: EVIDENCE-DRIVEN POLICYMAKING MEETS INFORMATION VACUUMS

It is well-documented that the past forty years have seen a strong turn toward evidence-driven policymaking.[18] This tendency has been particularly pronounced for media policy, where empirical analysis has increasingly been used to support decisionmaking and the courts demand rigorous empirical analyses to support policy decisions.[19]

What has received far less attention, however, is how the information environment has evolved during this transition. It would seem logical to presume that the increasing move toward evidence-driven policymaking would be accompanied by substantial efforts to increase the analytical resources available. In the realm of media policymaking, this has not been the case. At best, the information environment has failed to keep pace with the increased demands placed on the FCC. At worst, the information environment is degrading while the demands being placed on the Commission are increasing.

One problem area has involved the scaling back of data-gathering activities in a wide range of areas. Over the past three decades, the FCC has halted gathering financial statements from broadcasters,[20] ceased gathering cable system subscriber data,[21] and reduced requirements for

17. *See infra* notes 39–53 and accompanying text.

18. *See* DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 6–7 (1997) (describing the "rationality project" that she sees as "a core part of American political culture almost since the beginning"); *see also* BRUCE BIMBER, THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT xi (1996) (noting that the "possibility of isolating objective truths from human values, and the ability to capture what is most important about public life with science, shapes both experts' attempts to inform policymaking and scholars' struggles to define methodology for understanding political action"); Kurt Finsterbusch & Mary R. Hamilton, *The Rationalization of Social Science Research in Policy Studies*, 19 INT'L J. COMP. SOC. 88, 88 (1978) ("Social scientists are becoming increasingly involved in policy research."). *See generally* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).

19. *See supra* notes 13 & 14.

20. *See* James G. Webster, *The Role of Audience Ratings in Communications Policy*, 12 COMM. & L. 59, 63 (1990) ("[T]he FCC stopped collecting financial statements from broadcasters several years ago.").

21. *See* John Dunbar, *A Penchant for Secrecy: Why Is the FCC So Determined to Keep Key Data from the Public?*, THE CENTER FOR PUBLIC INTEGRITY, May 22, 2003, http://projects.publicintegrity.org/telecom/report.aspx?aid=18 (noting that incomplete cable system subscriber data were found in the FCC's Cable Operations and Licensing System database due to the fact that "the FCC stopped collecting it after 'deregulation' of the industry in 1994").

broadcaster performance data in connection with the license renewal process.[22] Such scaling back often has been associated with the general deregulatory trend and efforts to alleviate reporting burdens on the regulated industries. Of course, the larger effect (be it intentional or unintentional) is to create information vacuums that hamper the kinds of analyses that have become an increasingly prominent part of contemporary media policymaking.

This paradox was well-illustrated in a speech given by FCC Commissioner Robert McDowell[23] in which he expressed opposition to a recent decision by the Commission to reverse the decades-long trend of reducing the amount of information gathered from broadcast licensees by increasing licensee reporting requirements.[24] Under its new rules, the Commission would require licensees to provide information on a quarterly basis regarding a range of programming categories that historically have been linked with serving the public interest. Commissioner McDowell questioned why the Commission would want such information, suggesting that it would most likely open the door to increased content regulation.[25] An alternative answer as to why the Commission would want such information can be found in the FCC's 2002 and 2007 media ownership studies.[26] The Commission's studies include detailed evaluations of the relationship between media ownership and market characteristics. In addition, the Commission analyzed the provision of the kinds

22. *See* Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, 49 Rad. Reg. 2d (P&F) 740, 741 (1981) (adopting a simplified application as the standard for license renewal).

23. Robert M. McDowell, Comm'r, Fed. Commc'ns Comm'n, Keynote Address at the 2008 Quello Communications Law and Policy Symposium 4–5 (Apr. 23, 2008) [hereinafter McDowell Address], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf.

24. *See id.* at 4 ("I cast a dissenting vote against this new form . . . ."). *See generally* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 23 F.C.C.R. 1274 (2008).

25. Commissioner McDowell said the following:

> Although the Commission has not mandated certain types of programming, we are regulating with a wink and a nod by requiring lists of such programs. Why does the FCC need a list of the religious programming aired on a station? Why do we require a list of all local civic affairs programming? Why do we need to know whether it was locally produced or part of a regularly scheduled program?

McDowell Address, *supra* note 23, at 5.

26. THOMAS C. SPAVINS ET AL., THE MEASUREMENT OF LOCAL TELEVISION NEWS AND PUBLIC AFFAIRS PROGRAMS, FCC MEDIA BUREAU STAFF RESEARCH PAPER 2002-7 (2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf; GREGORY S. CRAWFORD, TELEVISION STATION OWNERSHIP STRUCTURE AND THE QUANTITY AND QUALITY OF TV PROGRAMMING: FCC MEDIA OWNERSHIP STUDY #3 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A4.pdf; Daniel SHIMAN ET AL., FCC MEDIA STUDY #4: NEWS OPERATIONS (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A5.pdf.

of programming categories articulated in the new reporting requirements.[27] And because broadcast licensees have not been required to report such information until very recently, inadequate data crippled the Commission's studies.[28] The Commission engages in studies of this type to meet the analytical standards that Congress and the courts have placed on the FCC. To refrain from gathering the type of data necessary to meet this analytical standard is paradoxical, to say the least.

A second problem that, in many ways, arises from the first, involves policymakers' increased reliance on commercial data sources. Essentially, various areas of data gathering have been "outsourced" to commercial firms.[29] Two policy-specific issues arise from this: (1) the access terms and provisions associated with commercial databases often are too restrictive to facilitate an open and transparent policymaking process; and (2) the data are often gathered with the needs of commercial clients, rather than with the needs of policymakers and policy researchers, in mind.

Regarding the first issue, there have been a number of recent controversies surrounding the accessibility of data underlying a wide range of media policy decisions. While it would seem axiomatic that public policy should be made with publicly available data, the restrictive access terms associated with most commercial databases mean that public access to the data guiding policymaking is often severely limited.[30] Most recently, Georgetown University's Institute for Public Representation has been struggling to gain public access to a wide range of commercial data sources used in FCC analyses relating to the Commission's localism proceeding.[31] Even access to data gathered by the FCC itself has proven difficult. The Commission has restricted access to broadband penetration data on the grounds that it may divulge trade secrets.[32] With the second issue, the key

27. *See* Spavins, *supra* note 26, at pts. I, III (analyzing the relationship between ownership and the quality and quantity of local news programming); *see also* Crawford, *supra* note 26, at 3–4 (examining the relationship between ownership structure and the provision of news and public affairs programming); Shiman, *supra* note 26, at IV-4 to IV-5 (examining the relationship between television and radio station ownership, market structures, and the provision of news and public affairs programming).

28. *See* Philip M. Napoli & Joe Karaganis, *Toward a Federal Data Agenda for Communications Policymaking*, 16 COMMLAW CONSPECTUS 53, 72–75 (2007) (reviewing the shortcomings of the FCC's media ownership studies).

29. *See generally* Philip M. Napoli & Michelle Seaton, *Necessary Knowledge for Communications Policy: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process*, 59 FED. COMM. L.J. 295 (2007) (reviewing communications policymakers' increased reliance on commercial data sources).

30. *See id*. at 309 ("As the data move to private hands, researchers increasingly find themselves at the mercy of the often prohibitive pricing platforms and often very restrictive licensing conditions of the commercial data providers." (citation omitted)).

31. Complaint, Inst. for Pub. Representation v. FCC, No. 07CV02092 (D.D.C. 2007), *dismissed*, 2007 WL 2900431 (D.D.C. July 9, 2008).

32. *See generally* Benjamin W. Cramer, Paper, "The Nation's Broadband Success

concern is that data gathered for the commercial market are not necessarily gathered or organized in ways that best meet the needs of policymakers and policy researchers. For instance, many commercial data sources have gaps in their coverage of media markets or media outlets that are particularly pronounced in relation to minority-owned or targeted media outlets or minority audiences.[33]

This issue rose to prominence within the context of the FCC's efforts to determine the extent of cable penetration in the United States in conjunction with its annual report on competition in the video programming market. An early draft of the competition report was said to rely on data from Warren Communications (a commercial publisher of media industry data)[34] in determining that national cable penetration met the 70% threshold that triggers greater FCC regulatory authority over the industry.[35] These data contradicted other commercial data sources, demonstrating that penetration levels were in the 60% range.[36] More importantly, Warren Communications conceded that its data were not well-suited to determining whether the threshold had been met.[37] The issue has triggered a debate over the current state of cable penetration in the United States and the validity of the different commercial data sources available for making such a determination.[38] As a result, the validity of the

Story": The Secrecy of FCC Broadband Infrastructure Statistics (Sept. 28, 2008), http://tprcweb.com/files/BCramer%20TPRC%20FINAL_Broadband%20Stats.pdf (presented at the Telecommunications Policy Research Conference).

33. *See* Napoli & Seaton, *supra* note 29, at 325 (discussing gaps in BIA Media Access Pro and Arbitron data in relation to minority media markets and foreign language media outlets).

34. Jonathan Make, *November FCC Meeting to Focus on Cable Industry*, COMM. DAILY, Nov. 14, 2007.

35. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 612(g), 98 Stat. 2779, 2784–85 (codified at 47 U.S.C. § 532). The "70/70 rule" states that if the Commission finds that cable service is available to 70% of households and 70% of those homes subscribe, then the FCC can "promulgate any additional rules necessary to provide diversity of information sources." *Id.*

36. Letter from Kyle E. McSlarrow, President & CEO, Nat'l Cable & Telecomms. Ass'n, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n and Comm'rs (Nov. 14, 2007), *available at* http://www.ncta.com/DocumentBinary.aspx?id=648 (noting cable penetration of 58.1% according to SNL Kagan data and cable penetration of 61.1% according to Nielsen Media Research).

37. Make, *supra* note 34.

38. *See, e.g.*, Letter from Harold Feld & Andrew Jay Schwartzman, Media Access Project, to Robert M. McDowell & Deborah Taylor Tate, Comm'rs, Fed. Commc'ns Comm'n (Nov. 16, 2007) (on file with author) (arguing on behalf of the accuracy of the Warren data); Michael G. Baumann, *Cable Penetration Rate: A Review of the Warren Communications News Data*, attachment to Letter from Daniel L. Brenner et al., Nat'l Cable & Telecomms. Ass'n, to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n (Nov. 20, 2007) (on file with author) (arguing against the accuracy of the Warren data); Letter from Craig E. Moffett, Vice President, Sanford C. Bernstein & Co., LLC, to Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n (Nov. 21, 2007) (arguing against the accuracy

competition report remains uncertain.[39]

It is important to emphasize the wide range of reasons behind this overall degradation of the information environment—at least in relation to the nature of the analytical demands increasingly placed on policymakers. In some instances, the explanation involves the implementation of a deregulatory philosophy and the inclusion of data-gathering and reporting activities within the overall deregulatory agenda. In other cases, the situation is perhaps best seen as an issue of resources, as the FCC most likely lacks the resources necessary to engage in the full range of data-gathering activities needed to inform its policymaking. Hence, the FCC neglects certain data-gathering activities and comes to rely increasingly on third-party data providers. The bottom line is that the information environment is not sufficiently reconfigured to reflect the analytical environment in which media policymakers must operate.

Given that public interest regulations in a predominantly deregulatory policy environment must have their benefits demonstrably outweigh their costs in order to survive, an information environment with substantial data gaps—like those described above—represents a particular danger for the future of public interest media regulation. Were the Supreme Court to consider the Fairness Doctrine today, the Court would likely demand rigorous evidence that the Fairness Doctrine provides the benefits ascribed to it. Unfortunately, the raw data necessary to make such a determination would most likely not be available.

II. PARADOX TWO: EVIDENCE-DRIVEN POLICYMAKING MEETS THE POLITICIZATION OF POLICY RESEARCH

The trend toward evidence-driven policymaking provides a starting point for the second key paradox of contemporary media policymaking, where the trend conflicts with an increasingly politicized policy environment. This is not to say that media policymaking has not always been a fundamentally political process. It most definitely has.[40] Rather, the point here is that there have been changes to the dynamics of media policymaking that have exacerbated this situation. The first change involves the increased growth, diversification, and economic significance of the media and communications sector in the United States. Simply put, the stakes are higher today than they were in the past, with a broader range

of the Warren data).

39. Barbara Esbin & Adam Thierer, *Where Is the FCC's* Annual *Competition Report?*, THE PROGRESS AND FREEDOM FOUNDATION, PROGRESS SNAPSHOT 4.11 (May 2008), http://pff.org/issues-pubs/ps/2008/ps4.11whereisFCCvidcompreport.html.

40. *See generally* ERWIN G. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION (3d ed. 1982).

of stakeholders having an interest in decision outcomes. The second change (and this is related to some degree to the first) is the greater public attention to media policy issues. As media and communications technologies have become a more integral part of citizens' lives, media policy issues are mobilizing both citizens and public interest groups to an unprecedented degree.[41] This also contributes to the highly politicized policymaking environment, since what interests the citizenry inevitably attracts more attention from Congress.

The pressures on media policymakers are therefore greater and more varied today. And as a result, we are seeing political strategies that increasingly manifest themselves in the information environment that steers media policymaking. The key concern here is that the analytical process becomes results-driven while maintaining the appearance of being evidence-driven.

Perhaps the most prominent manifestations of this paradox involve recent incidents in which the FCC was accused of selectively withholding relevant research or data. For instance, in the fall of 2006, two unreleased FCC studies pertaining to the Commission's media ownership and localism proceedings—both of which contained conclusions that raised questions about the appropriateness of relaxing media ownership regulations—were leaked to Senator Barbara Boxer.[42] This led to widespread speculation that the FCC was attempting to manipulate the analytical process in favor of deregulation. This controversy served as the catalyst for an internal investigation into the FCC's analytical process by the FCC's Inspector General[43] and the ultimate release of the studies to the public.[44]

Such criticisms intensified upon the subsequent release of a paper authored by the FCC's then-Chief Economist that she described as "an attempt to share some thoughts and ideas I have about how the FCC can approach relaxing newspaper–broadcast cross-ownership restrictions."[45] In

41. *See generally* Philip M. Napoli, *Public Interest Media Advocacy and Activism as a Social Movement*, *in* 33 COMM. YEARBOOK (forthcoming).

42. Letter from Barbara Boxer, Senator, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n (Sept. 18, 2006) (on file with author) ("[T]his is the second report in a week that I have received that appears to have been shelved by officials within the FCC and I am growing more and more concerned at these developments.").

43. OFFICE OF INSPECTOR GENERAL, FED. COMMC'NS COMM'N, REPORT OF INVESTIGATION INTO ALLEGATIONS THAT SENIOR MANAGEMENT ORDERED RESEARCH SUPPRESSED OR DESTROYED (2007).

44. *See, e.g.*, FED. COMMC'NS COMM'N, DO LOCAL OWNERS DELIVER MORE LOCALISM?: SOME EVIDENCE FROM LOCAL BROADCAST NEWS (July 2004); FED. COMMC'NS COMM'N, REVIEW OF THE RADIO INDUSTRY, 2003 (Sept. 2003), *available at* http://www.fcc.gov/ownership/additional.html.

45. LESLIE M. MARX, SUMMARY OF IDEAS ON NEWSPAPER–BROADCAST CROSS-OWNERSHIP 3 (2006), *available at* http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf.

terms of relevant research, the paper outlines "some studies that might provide valuable inputs to support a relaxation of newspaper–broadcast cross-ownership limits."[46] Statements such as these raise concerns that the FCC is conducting results-driven research under the guise of an evidence-driven analytical process.

More recently, in a rulemaking decision involving possible broadcast signal interference arising from the operation of a new "broadband over power line" service,[47] the Commission initially refused to release five studies that it relied upon in reaching its conclusions. Only after two FOIA requests did the Comission release the studies—with substantial portions redacted.[48] The D.C. Circuit found these actions central in its decision to remand the issue back to the Commission, requiring it to make the studies available in unredacted form.[49] In issuing this decision, the court noted that "[i]t would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."[50]

The process through which research occurs is also increasingly called into question. For instance, the FCC's selection of researchers for its most recent media ownership studies, as well as the solicitation and incorporation of external peer reviews, has been the subject of congressional inquiry.[51] A number of academic and public interest organization analyses of these processes have been similarly critical.[52]

---

46. *Id*. at 14.

47. *See* Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, 19 F.C.C.R. 21,265, 21,266 (2004).

48. *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 232–33 (D.C. Cir. 2008) ("When the League filed a second FOIA request . . . the Commission released five studies in redacted form and made them part of the record . . . .").

49. *See id*. at 240 ("On remand, the Commission shall make available for notice and comment the unredacted 'technical studies and data that it has employed in reaching its decisions' . . . and shall make them part of the rulemaking record.") (citation omitted).

50. *Id.* at 237.

51. *See* Letter from Maurice D. Hinchey, Bart Stupak, Tammy Baldwin, Louise M. Slaughter & David Price, Representatives, U.S. Congress, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n (Sept. 14, 2007) (on file with author) (expressing concern that the FCC did not reveal how it recruited individuals to conduct its media ownership studies, how peer reviewers were selected, and why peer reviews were not solicited before the publication of the studies).

52. *See generally* MARK COOPER, CONSUMER FEDERATION OF AMERICA, BIASED QUESTIONS YIELD BIASED ANSWERS: HOW THE FCC LOADED THE DICE IN SETTING ITS MEDIA OWNERSHIP RESEARCH AGENDA (2007); Mark N. Cooper, Paper, *Junk Science and Administrative Abuse in the Effort of the FCC to Eliminate Limits on Media Concentration* (May 23, 2008) (presented at the Annual Meeting of the International Communication Association) (on file with author); Colleen Mihal, Paper, *Research as Alibi: Analysis of the FCC's 2006–2007 Media Ownership Studies* (June 5, 2008) (presented at the academic pre-

Industry stakeholders also have taken note of a potentially results-driven approach to policy research within the FCC. The National Cable and Telecommunications Association, for instance, issued a highly critical report of the contradictory policy recommendations contained within two FCC studies of the cable industry's à la carte issue.[53] The report obliquely suggested that the second report (which supported à la carte) was a purely results-driven effort by the Kevin Martin-led FCC to reverse the policy course undertaken by Martin's predecessor, Michael Powell.[54]

It is, of course, naïve to assume that policy research is ever conducted in a purely objective manner and devoid of broader political considerations. However, should the credibility of the policy research and policymaking relationship suffer too many hits, the notion that policymaking has evolved from the more intuitive approach of the past to a more objective, evidence-driven approach becomes nothing less than a farce. We are now in danger of this being the case in the realm of media policymaking. When this state of affairs is combined with the strong deregulatory bent that has characterized the past thirty years of media policymaking, the analytical playing field becomes heavily tilted against any public-interest-oriented media regulations, with the result that such regulations will not receive the fair and objective assessment to which they are entitled.

CONCLUSION

Public interest media regulation must withstand a challenging policymaking environment—one in which the benefits of such regulations must be convincingly and empirically demonstrated, but also one in which the data necessary to make such a demonstration are increasingly difficult to obtain. Furthermore, the integrity of the analytical processes associated with making such a demonstration are increasingly being called into question. It is encouraging to note that there have been some recent improvements to this situation. As discussed previously, the FCC adopted enhanced disclosure requirements for broadcast licensees, as well as a requirement that broadcasters' public-inspection files be made available

conference for the National Conference for Media Reform) (on file with author).

53. *See* FED. COMMC'NS COMM'N, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 3 (2006), 2006 WL 305873; FED. COMMC'NS COMM'N, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 3–5 (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf.

54. STEVEN S. WILDMAN, NAT'L CABLE AND TELECOMMS. ASS'N, A CASE FOR À LA CARTE AND "INCREASED CHOICE"?: AN ECONOMIC ASSESSMENT OF THE FCC'S FURTHER REPORT 1 (2006), http://www.ncta.com/PublicationType/ExpertStudy/2821.aspx ("It is rare to see an expert agency completely reverse its own study-based findings over a period of less than 15 months, and it is even rarer to see an agency publicly go to such lengths as the Further Report to discredit the work that supported its own recently articulated position.").

online.[55] Such requirements, should they withstand broadcast-industry resistance,[56] have the potential to dramatically improve both data availability and quality in this area. In addition, the Commission recently overhauled its broadband penetration data-gathering practices in an effort to improve its accuracy.[57]

There is, however, certainly more that can be done. Possible avenues to consider include requiring systematic archiving of representative samples of media content to facilitate robust analyses across markets and outlets over time; mandating institutional separation of data-gathering and analytical functions from policymaking functions; enacting legislative measures to enhance the accessibility to commercial data sources used in policymaking in ways that do not undermine the business models of commercial data providers; and, finally, increasing federal resources devoted to systematic data gathering.[58] In the end, as we consider the legacy of *Red Lion* and the future of public service media regulation, it is essential that we consider not only constitutional and public interest issues but also the information environment that guides policy decisionmaking in this area.

55. *See* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *supra* note 24, at 1275, 1296.

56. *See* Petition for Review, Nat'l Ass'n of Broadcasters v. FCC, No. 08-1135 (D.C. Cir. Mar. 27, 2008), *available at* http://www.nab.org/AM/Template.cfm?Section=Filings1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=12278 (challenging enhanced disclosure requirements).

57. *See generally* Development of Nationwide Broadband Data, 23 F.C.C.R. 9691, 9692 (2008) (report and order and notice of further rulemaking).

58. *See generally* Napoli & Karaganis, *supra* note 28.

THE FOUR ERAS OF FCC PUBLIC INTEREST REGULATION

LILI LEVI*

TABLE OF CONTENTS

INTRODUCTION

The Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*[1] has been both valorized and demonized as representing a turn to a positive, democracy-based theory of the First Amendment. Instead, this Essay looks at *Red Lion* principally as a case demonstrating judicial deference to Congress and to the Federal Communications Commission's (FCC or Commission) decisions in regulating the spectrum commons. The inquiry takes a granular look at what the FCC has done with public interest content regulation since the inception of radio. That look reveals administrative experiments with a variety of public interest interpretations. Specifically,

* Professor of Law, University of Miami School of Law. Many thanks are due to Mary Coombs, Bernie Oxman, Steve Schnably, and Ralph Shalom for their comments. This Essay is based on remarks originally presented at the Symposium "Does *Red Lion* Still Roar?", on April 18, 2008, at American University–Washington College of Law. All errors are mine.

1. 395 U.S. 367 (1969).

the FCC's experiments reflect four regulatory periods: (1) the "melting pot" approach; (2) the community representation approach; (3) the deregulatory, market approach; and (4) the targeted reregulatory approach principally geared to the protection and education of children.

Through the years, the focus of the interest being protected by FCC regulation has narrowed considerably. In the melting pot era, the interest lay in encouraging homogeneous media that served to provide American society with a single assimilative voice. In the community representation period, the FCC shifted from trying to encourage a single voice to trying to preserve the voices of smaller communities within the broader society. During these first two regulatory eras, the Commission equated the public interest with community identity, although it defined the notion of community differently. In the market era, the agency abandoned efforts to encourage any particular voice and allowed broadcasters more flexibility in the expectation that the market would prompt stations to provide the programming desired by the public. That marked a shift in the focus of regulation from the community to the individual broadcast consumer.

The most recent period of hybrid reregulation is more ambiguous. On the one hand, the Commission's actions suggest that it has limited its regulatory focus to the needs of a single constituency—children—and narrowed its definition of the public interest even beyond the individual television viewer. The FCC has simultaneously articulated a consumerist, market approach and exacted what it has claimed to be a limited and targeted child-related quid pro quo from broadcasters. Looked at differently, however, the current FCC has used child protection as an umbrella rationalization for setting the contours of general public discourse. And it has done so apparently at the behest of conservative advocacy groups while claiming to have been drafted to regulate by a general public disgusted with coarse television fare.

The shift in the FCC's focus has been accompanied by technical and economic developments that have fragmented the market for media services generally. 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 further fragmented. The effect is to leave broadcasters and newspapers with much smaller audiences and greater financial pressures.[2] The fragmentation of media markets has forced broadcasters (as well as

2. *See generally* PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2008 (2008), http://www.stateofthenewsmedia.com/2008 (reporting that broadcasters are experiencing diminishing audiences while print media outlets are collecting less classified ad revenue).

newspapers) to scale back their investments in journalistic resources substantially.[3] Product placement now occurs even on news shows.[4] Broadcasters are limiting their focus on investigative journalism[5] and cable's conception of journalism is far closer to what has been called the "argument culture" than a rich and nuanced notion of journalism.[6] Corporate consolidation, public ownership, and Wall Street's focus on share prices have created further challenges to journalistic norms and editorial independence.

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. Even while the market for broadcast media has shrunk, broadcast still has the broadest reach and the greatest opportunity to create a national dialogue on matters of public interest.[7] This Essay suggests that the public interest currently (and most sorely) needs a reinvigoration of traditional, searching journalism in the electronic media. In 1941, the FCC said that "[r]adio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented."[8] Broadcasting can still serve today as such an instrument of democracy, but only if it pursues serious, independent journalism (whether or not "objectively presented"). The enhancement both of the journalistic focus

---

3. *See* Lili Levi, *A New Model for Media Criticism: Lessons from the* Schiavo *Coverage*, 61 U. MIAMI L. REV. 665, 683–84 (2007) [hereinafter Levi, *A New Model*] and sources cited therein (listing reductions in news organizations' resources for investigative reporting, research, verification, fact checking, staff, and foreign news bureaus).

4. Stephanie Clifford, *A Product's Place Is on the Set*, N.Y. TIMES, July 22, 2008, at C1 (describing McDonald's coffee cups on morning news anchors' desks).

5. *See, e.g.*, Marisa Guthrie, *Investigative Journalism Under Fire*, BROADCASTING & CABLE, June 23, 2008, http://www.broadcastingcable.com/article/CA6572223.html (citing conflicts of interest with parent corporations and the growing potential for expensive lawsuits as economic concerns that limit investigative reporting); *Investigative Reporters Face Time Crunch*, BROADCASTING & CABLE, July 2, 2008, http://www.broadcastingcable.com/article/CA6575088.html (citing budget cuts and shorter viewer attention spans as reasons for spare and shallow investigative reports).

6. *See, e.g.*, BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 139–43 (1st rev. ed. 2007) (noting that one of the driving forces behind the "argument culture" is that it is less expensive to produce a talk show than it is to do investigative reporting and deliver news); DEBORAH TANNEN, THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE (1998); Levi, *A New Model*, *supra* note 3, at 688, 694–96 (listing eight economic and structural factors that have contributed to "blurring of the distinctions between news and opinion and between news and entertainment").

7. *See, e.g.*, Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 153 (2006) [hereinafter Varona, *Out of Thin Air*] (stating that free broadcast television is still "the *only* conduit to regular news, political information, cultural enrichment, education, and democratic engagement" for many Americans).

8. Mayflower Broad. Corp., 8 F.C.C. 333, 340 (1941).

and the credibility of mass electronic media should be the current goal of media policy. This Essay urges the Commission to explore the ways, if any, in which it can help the electronic mass media develop into credible journalistic resources.

Yet it is also clear that such a goal cannot be accomplished through the simple readoption of content controls such as the Fairness Doctrine, for reasons that have been powerfully articulated in prior scholarship.[9] The question, then, is what the Commission can do—short of traditional command-and-control interventions—to promote the goal of a strong and credible electronic press. If the most significant public interest role of radio and television today could be to provide credible journalism for vast populations, and if it is true that a market-based conception of the public interest is unlikely to promote such journalism in today's media environment, then the Commission can indirectly regulate media structure to induce more investment in such fare.[10] In addition, the Commission could investigate incentive-based regulation[11] or expenditure requirements designed to promote broadcaster investment in news.[12]

---

9. The Fairness Doctrine was officially adopted by the Federal Communications Commission in 1949. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257–58 (1949) (Report of the Commission). For a recent history of the Fairness Doctrine, see Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 18–26 (2004) [hereinafter Varona, *Changing Channels*]. *See also* Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After* CBS*?*, 122 U. PA. L. REV. 1283, 1284–86 (1974) (discussing the operation of the Fairness Doctrine). For sources criticizing the Fairness Doctrine, see *infra* note 140.

10. For others who suggest structural regulation to enhance news and journalism, see C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007); and Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547 (2008).

11. For a discussion of the benefits of subsidy-based media regulation, see, for example, Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389 (2004), and Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. L. 217 (2002). *But see* Candeub, *supra* note 10, at 1554 (expressing doubts about the wisdom of government speech subsidies).

12. *See, e.g.*, Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321 (2007) (proposing regulations that require broadcasters to spend a certain percentage of advertising revenue on "public affairs production and programming"). This is not an argument that the First Amendment requires the government to improve the speech marketplace. Nor is it to say that journalistic values are clear and uncontroverted, or that we can be certain about what particular regulations are likely to enhance the journalistic enterprise, or that it would be easy to determine whether the Commission's interventions have been successful, or even that indirect, incentive-based regulations don't raise troublesome questions about government-pressured speech. *See, e.g.*, Levi, *A New Model*, *supra* note 3, at 677–80 (discussing internal limits on journalistic standards); *see also* Candeub, *supra* note 10 (expressing doubts about nonstructural content regulation).

Thus, this Essay argues that instead of completely abandoning public interest regulation or simply limiting it to purportedly child-protective interventions, it is now an opportune moment for the FCC to investigate a reframed return to the early, community-building conception of the public interest—but with a very different regulatory focus and alternative regulatory methods.[13] This inquiry would be useful, even considering prior agency failures to preserve the public interest and concerns admitted below about the apparent politicization of the Commission today.[14] Numerous critics flatly reject the viability of public interest broadcast regulation.[15] However, a Commission inquiry could be a catalyst to public debate. Such a debate could be useful in itself. And it might have some impact on the Commission.[16] Moreover, the discussion might engage more than media activists. Depending on the nature of the proposed regulations, broadcasters would not necessarily oppose them. Their position would likely depend on a number of factors that cannot be analyzed in advance and in the abstract. Issues such as their perception of other regulatory needs at the time and whether they think they can benefit from the proposed rules are likely to be significant factors.[17] All this is to say that

13. Of course, any product of Commission rulemaking following an inquiry would likely be challenged in court. While some D.C. Circuit panels have been skeptical even of structural media regulation in recent years, there are reasons to think that at least some regulations might survive scrutiny: *Red Lion* still remains; some on the Supreme Court continue to be swayed by historical arguments for regulation in the broadcast context; the D.C. Circuit's interest in empirical evidence of problems and metrics to judge the adequacy of regulatory responses can be satisfied; and content-neutral spectrum fee-type suggestions to promote journalism would not necessarily be inconsistent even with the D.C. Circuit's purportedly new approach to Federal Communications Commission (FCC or Commission) review.

14. *See infra* note 43 and accompanying text.

15. *See infra* note 42 and accompanying text.

16. An inquiry can serve as a salutary invitation to public engagement. If a Commission inquiry is taken seriously by the public and engages people interested in media policy, the Commission will be faced both with much to think about in the responses generated by its inquiry and with the public pressure generated by the responses. Admittedly, critics have complained that the Commission does not seriously entertain public comment on its regulatory initiatives. *E.g.*, Mary M. Underwood, Comment, *On Media Consolidation, the Public Interest, and Notice and Agency Consideration of Comments*, 60 ADMIN. L. REV. 185, 200–06 (2008); *cf.* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 125–33 (2008). However, "few agency decisions with significant stakes escape public attention or participation completely." CROLEY, *supra*, at 292. One example—the public response to the agency's 2003 ownership deregulation proposals—has clearly been noticed by the Commission. For a description of the grassroots movement to reform modern media in the context of the battle over the FCC's attempt to roll back some of its media ownership rules in 2003, see, for example, THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY (Robert McChesney et al. eds., 2005).

17. If, for example, some important broadcasters think that a reputation as an excellent and credible news source is valuable as part of their branding, but if that reputation is not

we cannot necessarily assume that the political context today will lead to the same results as in the market era. Perhaps it is time to revive and rethink the public interest for radio and television.

I. READING *RED LION*

Red Lion is the Supreme Court's most famous and most controversial statement of the FCC's role in public interest regulation.[18] Many scholarly admirers of *Miami Herald Publishing Co. v. Tornillo*[19] have rejected the First Amendment exceptionalism with which the *Red Lion* Court appeared to treat broadcast content regulation.[20] They focus on the failure of the scarcity rationale to justify content-based regulation of speech.[21]

Yet scarcity in the obvious sense of a limited physical resource does not

---

worth a financial investment much larger than that made by competitors, then the imposition of requirements that would place all broadcasters on an equal footing might reduce the comparative disparity in losses.

18. *See, e.g.*, C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 955 (2007) (describing *Red Lion* as probably the Court's "most famous broadcasting case").

19. 418 U.S. 241, 258 (1974) (finding that a state's right-of-reply statute for newspapers violated the First Amendment).

20. For discussions of broadcast exceptionalism, see, for example, LEE C. BOLLINGER, IMAGES OF A FREE PRESS 85–90 (1991); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 262–63 (1994); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197–209 (1987); ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983); MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST 7–18 (1986); Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005); 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 (1976); Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1403 & n.310 (2005); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 908, 926–30 (1997) [hereinafter Hazlett, *Physical Scarcity*]; Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998); Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349 (1985); Varona, *Changing Channels*, *supra* note 9; Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1106 (1993); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003); *see also* William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539, 574 (1978) (arguing that even if the *Red Lion* result is constitutionally defensible, it may still have been "a [F]irst [A]mendment misfortune").

21. For the seminal attack on broadcast scarcity as a justification for differential regulation, see R. H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1, 12–17 (1959). As Dean Jim Chen has characterized the critics, "Dissatisfaction with *Red Lion* has spawned an academic cottage industry." Chen, *supra* note 20, at 1403 & n.310 ("No one besides the Supreme Court actually believes the scarcity rationale.") and sources cited therein; *see also* Yoo, *supra* note 20, at 267–69 (explaining the "Analytical Emptiness of Scarcity").

capture the core of *Red Lion*.[22] *Red Lion* is most usefully understood as a case of deference to Congress and expert agencies in addressing the allocation of rights in a commons.[23] As Professor C. Edwin Baker has

22. *See, e.g.*, Jim Chen, *Liberating* Red Lion *from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. TELECOMM. & HIGH TECH. L. 293, 299 (2002) ("Careful examination of *Red Lion* . . . reveals no fewer than three distinct justifications for tailoring [F]irst [A]mendment protection according to the characteristics of a specific conduit."); Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211, 1226 (2007) ("*Red Lion*'s analysis obscured the importance of market structure to the analysis by relying on the poorly conceived spectrum scarcity rationale."); Richard E. Labunski, *May It Rest in Peace: Public Interest and Public Access in the Post-Fairness Doctrine Era*, 11 HASTINGS COMM. & ENT. L.J. 219, 268–69 (1989) (reading *Red Lion* as "based on the principle that restricted *access* entitles the government to regulate"); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1659–60 (1998) (describing—albeit questioning—*Red Lion* as an example of "the Supreme Court's deference to regulations that it can characterize as market-structuring rather than ideological").

Some ground public interest regulation of broadcast content on notions of public property. *Spectrum Management Policy: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 37, 46 (1997) (statement of Reed Hundt, Chairman, Fed. Commc'ns Comm'n) (testifying that public ownership justifies public interest obligations for broadcasters); *see also* Robinson, *supra* note 20, at 911–12 (discussing the public property argument). Yet others link *Red Lion* to the doctrine of public fora. *See, e.g.*, Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1708 (1997); Varona, *supra* note 7. Still others rely on a quid pro quo argument to justify regulation. *See, e.g.*, Michael M. Epstein, *Broadcast Technology as Diversity Opportunity: Exchanging Market Power for Multiplexed Signal Set-Asides*, 59 FED. COMM. L.J. 1, 3 (2006). Professor Monroe Price, in describing the perspectives of early radio policymakers (such as Herbert Hoover), points to the following view:

> Here, the scarce commodity is not spectrum, but rather information and culture; its supply should not be controlled in ways that might be abusive, and access to it should be rendered in ways that are just. . . . Much of the early rhetoric . . . reflected a patrician sense of national purpose and national propriety. . . .
>
> For [Hoover] and his colleagues, it was the power of radio, not just the scarcity of spectrum, that motivated concern for the new technology's relationship to American democracy. The right of an individual to use the ether was a privileged access to a kind of public magic, conferred upon condition.

MONROE E. PRICE, TELEVISION, THE PUBLIC SPHERE, AND NATIONAL IDENTITY 161–62 (1995).

23. The need to regulate to stave off commons problems is not unique to broadcasting. For the classic description of the tragedy of an unregulated commons, see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). We have a tradition of the Public Trust Doctrine in aspects of property law. For a seminal article on the Public Trust Doctrine in the environmental context, see, for example, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Long-established precedents permit price regulation of businesses affected with a public interest. *E.g.*, Munn v. Illinois, 94 U.S. 113 (1877). Professor Carol Rose has also written about the seeds in common law of protection for "inherently public property." Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 721–23 (1986). Some have argued for expanding the Public Trust Doctrine to the electromagnetic spectrum. *E.g.*, Patrick S. Ryan, *Application of the Public-*

explained, broadcast frequencies present the problem of the commons: "[T]he limited availability of a valuable resource (scarcity of land or broadcast frequencies), combined with the absence of some form of governmental (or social) allocation of usage rights, results in overuse, making the resource worthless to everyone."[24] The *Red Lion* Court recognized that when the government is faced with the possibility of a tragedy of the commons, it has the obligation to regulate.[25] Under those circumstances, the Constitution allows broad deference to both congressional and administrative decisions about the way to do so. The *Red Lion* Court read the First Amendment as allowing a significant amount

---

Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum, 10 MICH. TELECOMM. TECH. L. REV. 285 (2004). *See also* Thomas B. Nachbar, *The Public Network*, 22 COMMLAW CONSPECTUS (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009641 (arguing that the Public Trust Doctrine could be a useful analytic approach to deal with issues of net neutrality).

The question, of course, is whether the legal categories used in other contexts implicating commons problems can simply be translated into the context of content regulation in communications. In 1929, for example, an article in the *Yale Law Journal* discussed the possibility that Federal Radio Commission regulatory power could be grounded on the doctrine of businesses affected with a public interest:

> Broadcasting possesses enough of the elements commonly required so that the courts may label it as such if they so desire. It is a business of greatest importance to the public; it is not one where competition will protect the public interest; it may even be said that it has been "granted" or "devoted" to the use of the public. . . . Yet . . . they [the courts] do not appear ever to have used the doctrine to justify such a strict regulation as the requirements of radio would seem to demand. The device was used originally for fixing rates. . . . And the regulation permitted under it has never proceeded much beyond this . . . .

Julius Henry Cohen et al., Comment, *Federal Control of Radio Broadcasting*, 39 YALE L.J. 245, 254 n.46 (1929). This doctrinal reading may have continued, but it is also useful to observe along with Eben Moglen, that broadcasters have been thought to be businesses affected with a public interest "because they have become essential social facilities. As far as broadcasters are concerned, the public interest is that they are the primary news distribution system for all but a few." Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 951 (1997).

24. C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 102 (1994). Additionally, Professor Baker notes that

> [t]his chaos/commons quality arguably provides the best understanding both of federal intervention in broadcasting and of the Court's opinions in crucial cases such as [*Red Lion*]. The standard view—which may be more easily described, but which is also more vulnerable to savage and effective critique—is that an inherent scarcity of broadcast frequencies justified government regulation.

C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 861 n.114 (2002) [hereinafter Baker, *Media Concentration*].

25. Justice Frankfurter recognized that need to regulate in another seminal early broadcasting case as well. NBC, Inc. v. United States, 319 U.S. 190, 226 (1943) ("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.").

of leeway for congressional and administrative interpretations of the First Amendment in circumstances in which there is no choice but to regulate. While a licensing regime is not the only permissible regulatory solution,[26] Congress is not precluded from choosing such a regime.[27] And when it does so, it is not precluded from choosing to make allocations reflect more than mere purchasing power.[28] As the Court put it in *Red Lion*, "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[29] The *Red Lion* Court's assertion that "[i]t is

---

26. Van Alstyne, *supra* note 20, at 561–65. The Court later said in *CBS, Inc. v. Democratic National Committee* that "once it was accepted that broadcasting was subject to regulation, Congress was confronted with a major dilemma: how to strike a proper balance between private and public control." 412 U.S. 94, 104 (1973). Some have argued that a property rights solution would have been preferable. *E.g.*, Thomas W. Hazlett, *A Law & Economics Approach to Spectrum Property Rights: A Response to Weiser and Hatfield*, 15 GEO. MASON L. REV. 975 (2008); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990). *But see* Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549 (2008). The Court in *Red Lion* stated that

> [t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

395 U.S. 367, 389 (1969). *See also* Henry Geller, Turner Broadcasting*, The First Amendment, and the New Electronic Delivery Systems*, 1 MICH. TELECOMM. & TECH. L. REV. 1, 4–5 (1995), *available at* http://www.mttlr.org/volone/geller.pdf.

27. *See* Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2621 (2007) ("[W]hat is perhaps most important in the context of broadcasting cases is the recognition that the First Amendment can protect speakers from being drowned out by other non-state speakers.").

28. As the Court explained in *Red Lion*,

> Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

395 U.S. at 392 (citation omitted).

29. *Id.* at 387. As the Court further said,

> No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who

the right of the viewers and listeners, not the right of the broadcasters, which is paramount"[30] follows in situations where the public, for noneconomic reasons, does not have access to the means of communication.[31]

The deference granted by the *Red Lion* Court gives the political branches the space to work out regulatory schemes in evolving industries within boundaries established by the Court.[32] This is not to say, however, that the Court's recognition of the need for government regulation in an evolving industry that precludes open access necessarily implies judicial acceptance of regulatory carte blanche. Even when the Court recognized the need for FCC regulation in *NBC, Inc. v. United States*, it nevertheless cautioned that Commission license-allocation decisions grounded on particular viewpoints were impermissible.[33] Since 1927, the Communications Act has precluded administrative agency "censorship" (admittedly without defining the term).[34] The Supreme Court has recognized that the Commission and

---

> holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

Id. at 389–90.

30. *Id.* at 390.

31. Thus, *Red Lion* need not be read as the Supreme Court's announcement of a fundamental turn from an autonomy-based interpretation of the First Amendment.

32. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 48 n.88 (1994) (characterizing the reasoning of *Red Lion*, *Turner Broadcasting Co. v. FCC*, and *Tornillo* as "makeweight" and suggesting that the decisions "can best be reconciled by reference to the 'paramount importance' to the Court 'of according substantial deference to the predictive judgments of Congress'") (citation omitted). The Eskridge and Frickey article describes law as the product of "a balance of competing institutional pressures" that produces a "stable equilibrium when no implementing institution is able to interpose a new view without being overridden by another institution." *Id.* at 32. Thus, the Court's deference to Congress in the broadcast context, by contrast to its lack of deference to state legislatures in the print context, may be explained by the nature of the interdependent institutional relationships rather than in purely doctrinal or even policy terms.

33. The Court stated that

> Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.

NBC, Inc. v. United States, 319 U.S. 190, 226 (1943).

34. *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1091 (1934) (codified as amended at 47 U.S.C. § 326 (2000)) ("Nothing in this Act shall be understood

broadcasters walk a "tightrope"[35] in attempting both to maintain the Commission's role as regulator in the public interest and the licensee's journalistic freedom. The agency views itself as following this articulated path.[36] The bounded deference granted to the FCC is reflected in the less-than-strict degree of scrutiny applied by the Court in its constitutional review of broadcast cases.

Why focus on *Red Lion* principally as a deference case in the mold of other post-New Deal judicial-deference cases[37] rather than as the avatar of a new direction in First Amendment interpretation generally?[38] Principally

---

or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station."); Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162 1172–73 (1927) (repealed 1934); *see also* Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 37 (1967). Professor Kalven recognizes that physical signal interference requires broadcast licensing, but asks what the implications are.

> The fact is obvious but the crucial question is: What exactly follows from it? Does a rational licensing policy require that the Commission to some extent consider the service, that is, the kind and quality of the communications furnished? Does it therefore follow . . . that because of the brute fact of licensing, the traditions of the First Amendment cannot help the broadcaster?
>
> If this were true, there would be no regulation of content which would not be within the Commission's powers so long as it was not grossly arbitrary and capricious. And interestingly enough the Commission itself has never claimed this degree of jurisdiction. It has always publicly embraced a position against "censorship." Further, Section 326 prohibiting censorship must refer to something; that is, there must be some regulation which the Commission might try that would defeat the intention of Congress.
>
> My thesis is that the traditions of the First Amendment do not evaporate because there is licensing.

Id.

35. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (indicating that the "role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing" and requires "both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act").

36. *See* Commission Programing [sic] Inquiry, 44 F.C.C. 2303, 2313 (1960) (Report and Statement of Policy) (en banc) (explaining that the Commission sought to "chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States . . . on the other").

37. Recent accounts of administrative law describe the post-New Deal deference of courts to administrative agencies as part of a belief in expertise-based governance models. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007). Even for later courts skeptical of the ability of expertise as such to solve social problems, there has been a tendency to defer to congressional decisions to act through administrative agencies especially in situations where the necessity of regulation is clear. For another recent article describing the Supreme Court's broadcasting cases in terms of deference, see Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 202 (2007).

38. For examples of constitutional theorists who have argued that the First Amendment permits government intervention to enhance speech markets, see BAKER, *supra* note 10, at

because it is an enabling decision—it does not tell the FCC what to do by way of public interest regulation. The Court does not say that the Fairness Doctrine is constitutionally mandated. It even admits the possibility that the passage of time, changed technology, or better evidence of a chilling effect of regulation on licensee speech might lead to a contrary result.[39] Nor does the case mandate a new and listener-focused view of the First Amendment.[40] Instead, it defers to administrative choices made to counteract monopoly when the access to speakers that would ordinarily be expected from a communicative medium is foreclosed for reasons other than the speakers' inability to pay. It allows a government regulatory agency to remain neutral with regard to speech content even after it has chosen speakers to license.[41] This reading of *Red Lion* maintains the decision's vitality and ensures that the FCC has regulatory flexibility to identify and respond to the right objects of media policy today.

124–62; OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 384 (1999); and Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987).

39. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969); *see also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 378–79 n.12 (1984) ("[W]ere it to be shown by the Commission that the Fairness Doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]." (second alteration in original) (citation omitted)).

40. The Court in *Red Lion* said that

> [b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

395 U.S. at 390 (citations omitted).

41. Another way of looking at *Red Lion* is to say that it is a case in which the Court finds that the Constitution does not stop Congress and its agency from deciding to legislate governmental neutrality among ideas. In other words, having selected one applicant for the license could be perceived as the government's authorizing or standing behind or associating itself with the licensee's viewpoints or editorial choices. By requiring something like the Fairness Doctrine, and perhaps even a right of access, the government would be untangling itself from the promotion of a particular licensee's editorial choices or viewpoints. It would effectively be trying to establish a neutral governmental association as between different views. Having made the quality judgments in the initial licensing process, the Commission is permitted (by the Court's reading of the First Amendment in *Red Lion*) to distance itself to some degree from its chosen licensees by imposing a version of an access regime based on proxy or trustee notions.

II. A GRANULAR APPROACH TO THE HISTORY OF PUBLIC INTEREST BROADCAST CONTENT REGULATION

Much of the literature addressing FCC content management in the public interest is very critical. For a variety of reasons, FCC critics have proclaimed that public interest regulation has been—and perhaps would inevitably be—a "dismal failure."[42] Critics challenge public interest regulation as such because of the breadth and vagueness of the concept; the wide discretion it grants the FCC; its fundamentally political character; its prior failures; and the constitutional tension it implicates.[43] But what else can be learned from how the agency has interpreted its mandate?[44] What is the metastory of public interest content regulation by the FCC since the 1920s?

History shows that the FCC's public interest regulation has been far

---

42. *See, e.g.*, Varona, *Out of Thin Air*, *supra* note 7, at 149, 163 (noting the FCC's failure to enforce public interest programming requirements); Varona, *Changing Channels*, *supra* note 9, at 52–89 (assessing the FCC's failure to define the public interest standard); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2102 (1997); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 193–96 (1978); Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233 (2004) [hereinafter Hazlett, *All Broadcast Regulation Politics Are Local*]. *See also* Hazlett, *Physical Scarcity*, *supra* note 20, at 944 (1997) (describing broadcast regulation not as an effective response to market failure, but "driven by the rents available to licensees on the one side, and the gains available to political actors from the influence over a medium of pervasive social importance on the other").

43. *See infra*, notes 140–46 and accompanying text. As early as 1928, for example, the FRC noted that its delegated power to regulate in the public interest, convenience, and necessity was subject to critique. 2 FRC ANN. REP. 166 (1928), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 127, 129 (2d. ed. Frank J. Kahn ed., 1973) [hereinafter DOCUMENTS]. One of the critiques was that the standard was too broad and gave too much discretion to the Commission. *Id. See also* Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295 (1930), *cited in* HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW 116, 116 n.9 (1999). Scholarship that focuses on the political aspects and explanations for what the Commission has done in the name of the public interest include SUSAN L. BRINSON, THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960 (Praeger 2004); and ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, THE POLITICS OF BROADCAST REGULATION (1973). *See also* ZUCKMAN ET AL., *supra*, at 117 ("The nature of the public interest has fluctuated in part because of the political outlook of those who administer the law. . . . As former FCC Commissioner Ervin Duggan put it, 'successive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it.'"). Monroe Price has described the "laborious, inconsistent work" of developing a meaning of the public interest standard as "a product of interactions between the Commission, the industry it regulated, Congress, the courts, and the White House." PRICE, *supra* note 22, at 163.

44. According to a major communications law hornbook, "[o]ne thing that all [conservative and liberal critics] can agree on . . . is that the meaning of the 'public interest' has changed over time." ZUCKMAN ET AL., *supra* note 43, at 117.

from unitary. In fact, the idea of "public interest" or "public trustee" regulation of the media (particularly in the context of programming) has undergone a series of four transformations—at least in the Commission's rhetoric—since the birth of radio. The FCC's decisions about broadcast programming reflects four approaches: (1) the melting pot approach; (2) the community representation approach; (3) the market approach; and (4) the targeted, hybrid regulatory approach.[45]

A. The "Melting Pot" Approach

Although the Commission's statutory invitation to regulate in the "public interest, convenience and necessity" has never been statutorily defined,[46] the Federal Radio Commission (FRC) and the FCC began their regulatory interventions assuming a substantive vision of the public interest grounded on a particular view of the social and political role of radio.[47] A review of both the programming rules and the rhetoric of this early period shows that the FRC and FCC saw radio as appealing to a broad audience and promoting a common culture to serve a homogenizing and unifying social role; providing programming that would take advantage of the ability of radio to create mass access and a mass audience; serving, not as an opinionated speaker itself, but as the conduit for speech and entertainment geared to the mass audience; and responsible for the public interest station by station, not market by market. The early regulators saw radio as the basis of a shared national culture—a way of establishing national narratives.[48] They had a conception of "a public, separated from the government, separated from specific persons, that has the right of

45. For an account that categorizes the history of public interest regulation as dividing along a democracy model and an efficiency model, see Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 387–89 (2006).

46. Early on, the public interest standard was described as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).

47. It is true, however, that there was a significant shift in the early days of radio regarding how best to effectuate that vision of the public interest. Specifically, American radio began with an adamant prohibition of advertising. PAUL STARR, THE CREATION OF THE MEDIA 338 (2004). Within a short period of time, advertising-supported commercial radio was touted as the best way of accomplishing the public interest goals of benefiting the listening public. *Id.* at 338–39, 354–57. This is not inconsistent with the notion that the Commission sought to promote a particular goal, however. Rather, it represents a shift in attitude and prediction about what methods would likely best promote the goal.

48. PRICE, *supra* note 22, at 10, 19, 158, 160, 163. Professor Price has concluded that "[w]ithout hyperbole, it could be said that the history of [U.S.] broadcasting involved the creation of a more homogeneous United States out of its culturally dissimilar and previously antagonistic parts." *Id.* at 19.

expression."[49] The development of radio as a commercial, nation-building instrument was not, however, a "natural," uncontested result of legislative and public consensus. Rather, it flowed from legislative and administrative choices rejecting a noncommercial communications regime advocated in the early 1920s.[50]

What demonstrates this? In its 1929 *Third Annual Report*, the FRC, predecessor of the FCC, took the position that "the public interest dictated a preference for stations serving the general public rather than stations serving 'private or selfish interests.'"[51] The agency said so, at least in part, to justify its spectrum-allocation decisions that effectively favored commercial broadcasters over stations with educational, religious, or civic missions.[52] The interests of the listening public would be promoted by commercial stations because such stations, "were interested in obtaining the largest possible audience, while nonprofit stations served only particular groups such as students or members of a church. A commercial station would present alternative views on a subject, while a nonprofit would naturally tend only to present its own perspective."[53]

The Commission during those years characterized commercial, advertising-supported stations as "general public service stations."[54] It stated that licensees serving the public interest were stations seeking to serve "the entire listening public within the listening area of the station."[55]

---

49. *Id.* at 164.

50. *See generally* ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935, at 5 (1993) (providing "a revisionist interpretation of American broadcasting history, one that regards the emerging status quo [of corporate, commercial, advertiser-supported radio] as the product of an intense and multifaceted political fight with obvious winners and losers, not as the 'natural' American system or as the product of consensus").

51. STARR, *supra* note 47, at 351; *see also* 3 FRC ANN. REP. (1929), *reprinted in* DOCUMENTS, *supra* note 43, at 136 [hereinafter FRC 1929 ANNUAL REPORT]. This position echoed the statements by then-Secretary of Commerce Herbert Hoover at the Fourth National Radio Conference in 1925: "The ether is a public medium and its use must be for public benefit. . . . The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution." Herbert Hoover, Sec'y, Dep't of Commerce, Opening Address Before the Fourth National Radio Conference (Nov. 9–11, 1925), *in* PROCEEDINGS OF THE FOURTH NATIONAL RADIO CONFERENCE AND RECOMMENDATIONS FOR REGULATION OF RADIO 7 (1926), *available at* http://earlyradiohistory.us/1925conf.htm.

52. *See* STARR, *supra* note 47, at 351 (discussing spectrum allocation); *and* MCCHESNEY, *supra* note 50, at 26–27 (noting that the *Third Annual Report* departs from the previous *1928 Annual Report*, inter alia, by distancing itself from the prior report's antipathy toward advertising).

53. STARR, *supra* note 47, at 352.

54. *Id*.

55. FRC 1929 ANNUAL REPORT, *supra* note 51, at 34, *reprinted in* DOCUMENTS, *supra* note 43, at 136; MCCHESNEY, *supra* note 50, at 27.

The FRC called for each licensed station to air a balanced or "well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place."[56]

---

56. Great Lakes Broad. Co., FRC ANN. REP. 32 (1929), *aff'd in part and rev'd in part*, Great Lakes Broad. v. FRC, 37 F.2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930), *reprinted in* DOCUMENTS, *supra* note 43, at 136.

> [T]he emphasis is on the listening public, not on the sender of the message. It would not be fair, indeed it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the [C]ommission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public.

Great Lakes Broad. Co., 3 FRC ANN. REP. at 33. *See also* DOCUMENTS, *supra* note 43, at 139 (rearticulating the goal of a "well-rounded program best calculated to serve the greatest portion of the population in the region to be served"); FRC 1929 ANNUAL REPORT, *supra* note 51, at 32–35.

There would subsequently be some variations in the way in which the Commission would characterize and measure such service, but one key element remained constant. The FRC originally said that it did not "propose to erect a rigid schedule" for various types of programming and articulated its "confidence in the sound judgment of the listening public . . . as to what type of programs are in its own best interest" in 1929. *Id*. at 34–35; DOCUMENTS, *supra* note 43, at 136. At other points, the agency became a bit more specific, providing lists of programming categories deemed likely to serve the public interest—thereby suggesting the appropriateness of some level of programming macromanagement by the key commonality remained the Commission's belief that the public would benefit from general public service stations rather than stations advancing any particular points of view.

The agency staff prepared what came to be called the Blue Book in 1946. The Blue Book called for licensees to devote an adequate amount of time to issues of public concern, to air a reasonable number of sustaining rather than sponsored programs (meaning programs paid for by the station rather than an advertising sponsor), and to identify the programming they aired in six identified categories. FED. COMMC'NS COMM'N, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 12–39 (Mar. 7, 1946) [hereinafter Blue Book]. The Blue Book was occasioned by FCC Chairman Paul Porter's recognition that the FCC had been issuing license renewals for stations "even in cases where there [was] a vast difference between promises [about programming] and performance." Harry Cole & Patrick Murck, *The Myth of the Localism Mandate: A Historical Survey of How the FCC's Actions Belie the Existence of a Governmental Obligation to Provide Local Programming*, 15 COMMLAW CONSPECTUS 339, 350 (2007) (quoting Porter speech to National Association of Broadcasters in 1945). While the Blue Book began from the proposition that "[p]rimary responsibility for the American system of broadcasting" is left to the licensees and networks, it nevertheless sketched out a rather detailed vision of appropriate programming. Blue Book, *supra*, at 54; *see also* Varona, *Changing Channels*, *supra* note 9, at 21 and sources cited therein. The industry reaction to the Blue Book was at best mixed, and the Commission itself neither adopted the report nor repudiated it. DONALD M. GILLMOR ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 739 (5th ed. 1990).

The next FCC attempt to address programming was the Commission's 1960 *En Banc Programing Inquiry Statement*—probably the most detailed of the Commission's instructions to broadcasters about their content obligations. Commission Programing Inquiry, 44 F.C.C. 2303 (1960) (Report and Statement of Policy) (en banc). *See also*

The Commission's substantive vision of the public interest at least implicitly rested on a belief that radio should not cater to the values of fragmented audiences with potentially conflicting interests but rather should serve as a homogenizing and unifying creator of shared values.[57] Thus, it prohibited "propaganda stations"—those geared toward sub-communities of interest (such as labor) or groups with particular points of view.[58] As the agency put it in 1929,

---

Robinson, *supra* note 20, at 912 ("The most detailed instructions were contained in the so-called *En Banc Programming* [sic] *Statement*."). In the *En Banc Programing Inquiry Statement*, the agency listed fourteen categories of programs generally considered necessary to serve the public interest:

> (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, [(10)] news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.

44 F.C.C. at 2314 (1960). *See also* Varona, *Changing Channels*, *supra* note 9, at 22–23.

57. In *Great Lakes Broadcasting*, for example, the Commission stated that "[b]roadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals." Great Lakes Broad. Co., 3 FRC ANN. REP. 32, *reprinted in* DOCUMENTS, *supra* note 43, at 133. *See also* MICHELE HILMES, RADIO VOICES: AMERICAN BROADCASTING, 1922–1952 (1997) (focusing on entertainment programming and discussing the national narratives fostered by radio in its early years); Cole & Murck, *supra* note 56, at 339 (arguing, inter alia, that the FRC did not impose obligations to provide locally oriented programming in the 1920s); STARR, *supra* note 47, at 367 (describing the shift from stations with local orientation to stations with standardized mass entertainment orientation).

58. FRC 1929 ANNUAL REPORT, *supra* note 51, at 34 (This language can also be found in DOCUMENTS, *supra* note 43, at 137.). The Commission also stated that because "[t]here is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether," FRC 1929 ANNUAL REPORT, *supra* note 51, at 34, it would not license stations focusing on particular audiences or viewpoints. *See* MCCHESNEY, *supra* note 50, at 28, 66–67, 70 (describing the FRC's refusal to extend hours of operation for nonprofit "Voice of Labor" WCFL on the ground that numerous groups—such as Masons or Odd Fellows—might also "demand the exclusive use of a frequency for their benefit"); *and* LOUISE M. BENJAMIN, FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935, at 183–84, 185–89 (2001) (describing license renewal fights over WEVD, a "nonconformist" station providing "service to labor and other minorities ignored by mainstream stations"). In Professor McChesney's view, the Commission's prohibition of propaganda stations meant that

> ownership by any group not primarily motivated by profit automatically earmarked a station to the FRC as one with propaganda inclinations. . . .
>
> This interpretation of the public interest, convenience or necessity was a clear endorsement of the private commercial development of the airwaves. . . . Even if propaganda stations attempted to "accompany their messages with entertainment and other program features of interest to the public," the FRC asserted they did not merit the same treatment as general public service stations that did the same things since, among other things, the propaganda stations would be "constantly subject to the very human temptation not to be fair to opposing schools of thought."

MCCHESNEY, *supra* note 50, at 27–28 (citation omitted). *See also* DOCUMENTS, *supra* note

> There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece of the ether. . . . Propaganda stations (a term which is here used for the sake of convenience and not in a derogatory sense) are not consistent with the most beneficial sort of discussion of public questions.[59]

The Commission also signaled its views that some kinds of broadcast content were inconsistent with the public interest. For a number of years, it prohibited editorializing by station licensees.[60] The Commission warned against stations "who consume much of the valuable time allotted to them" for "matters of a distinctly private nature."[61] It refused to renew licenses if the radio operator was principally using the license as a way to enhance private nonbroadcast income, challenge mainstream social authority, or articulate extreme points of view.[62] The agency frowned on the airing of

---

43, at 137.

59. DOCUMENTS, *supra* note 43, at 136–37 (explaining its reasoning as follows: "If franchises are extended to some it gives them an unfair advantage over others, and results in a corresponding cutting down of general public service stations. It favors the interests and desires of a portion of the listening public at the expense of the rest."). *See also* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 614 (1998) (describing how the Commission "used its programming regulatory powers cautiously during the 1930s and early 1940s, with the exception of forcing most of the remaining propaganda stations off the air").

60. In 1941, the Commission explicitly stated in a license renewal decision that "the broadcaster cannot be an advocate" and that radio stations should not air their own editorials. Mayflower Broad. Corp., 8 F.C.C. 333, 340 (1941). It was almost a decade later, in 1949, that the Commission eliminated its rule prohibiting editorializing on the air and adopted the Fairness Doctrine. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253 (1949) (Report of the Commission). The reversal of the anti-editorializing rule was apparently opposed by the ACLU, which doubted that the Fairness Doctrine alone would suffice to check station propaganda. *See* Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 772 n.14 (1972).

61. Statement Made by the Commission on August 23, 1928, Relative to Public Interest, Convenience, or Necessity, 2 FRC ANN. REP. 166, 169 (1928), *reprinted in* DOCUMENTS, *supra* note 43, at 132; STARR, *supra* note 47, at 365.

62. *See, e.g.*, KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 670–71 (D.C. Cir. 1931) (affirming the FRC's denial of renewal to station operated by quack Dr. John Brinkley to promote his pharmaceutical products and supposedly virility-enhancing operation of transplanting goat glands into men with sexual problems); Trinity Methodist Church, S. v. FRC, 62 F.2d 850, 854 (D.C. Cir. 1932), (affirming the FRC's decision not to renew the license of Los Angeles station KGEF, owned by Reverend "Fighting Bob" Schuler, who aired diatribes against local politicians, judges, Jews, and Catholics); BENJAMIN, *supra* note 58, at 89–107 (2001). In both the *Brinkley* and *Schuler* cases, the reviewing courts rejected the licensees' contentions that the FRC's actions amounted to censorship prohibited under the Communications Act. A listeners' poll in 1929 indicated that Brinkley's station was America's most popular station. STARR, *supra* note 47, at 365. Nevertheless, the Commission found that it was operated principally in Brinkley's "personal interest" and that Brinkley had failed to meet his burden that he was operating in the public interest. The medical establishment at the time doubtless disapproved of Brinkley. BENJAMIN, *supra* note 58, at 90, 92. The FRC's articulated concern in the case that Brinkley

phonograph records rather than live music.[63] Lotteries and fortune-telling were also discouraged.[64] Thus, early public interest radio regulation demonstrated particular assumptions about audiences, communities, the role and possible impact of radio, and the appropriate degree of government involvement in shaping public discourse.

The Commission's vision was also reflected in the voluntary choices of broadcasters: "While federal law constrained the diversity of broadcasting in one way, the ascendancy of the networks curtailed it in another."[65] The development of radio networks during the early period led to the increasing airing of national fare.[66]

---

was practicing medicine during programs in which he prescribed his patent medicines for ailments described in listeners' letters may reflect that view. The *Schuler* case as well involved nonmainstream programming. The Reverend Shuler defamed public officials challenging, de facto, local government; his anti-Semitic and anti-Catholic diatribes were divisive and potentially inflammatory—results at odds with the notion of radio providing a common culture and national stability. *Id.* at 107; J. Roger Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience, and Necessity," in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 61 (Max D. Paglin ed., 1989).

63. 2 FRC ANN. REP. 166, 168 (1928), *reprinted in* DOCUMENTS, *supra* note 43, at 130–31. In prohibiting excessive phonograph music, the FRC presumably was trying to imagine what kinds of new uses the innovative medium could provide for the mass public that the audience could not find elsewhere. In a statement made in 1928, the FRC said that

> the limited facilities for broadcasting should not be shared with stations which give the sort of service which is readily available to the public in another form. For example, the public in large cities can easily purchase and use phonograph records of the ordinary commercial type. A station which devotes the main portion of its hours of operation to broadcasting such phonograph records is not giving the public anything which it cannot readily have without such a station. . . . The [C]ommission can not close its eyes to the fact that the real purpose of the use of phonograph records in most communities is to provide a cheaper method of advertising for advertisers who are thereby saved the expense of providing an original program.

Statement Made by the Commission on August 23, 1928, *supra* note 61, at 168 (1928), *reprinted in* DOCUMENTS, *supra* note 43, at 127, 130–31.

64. *See* STARR, *supra* note 47, at 365.

65. *Id.* at 367. Those networks were, in themselves, enabled in part as a result of the spectrum allocation rules adopted by the FRC. *Id.* at 349, 352–54. This is not to say that the networks were allowed to develop without any regulation. Rather, structural regulations designed to curb the power of networks were justified on the ground that excessive network control of programming would shortchange licensee's ability to transmit local programming. NBC, Inc. v. United States, 319 U.S. 190, 226 (1943).

66. Before the late 1920s, there was a profusion of stations with a local orientation. . . . Rather than being melded into a mass culture, Americans listening to radio in the 1920s were able to sustain their varied cultural and class identities. The rise of the networks brought a shift to entertainment created for a national audience: comedy and variety shows with national celebrities, soap operas, westerns and detective shows, and sports programs . . . . Like television in the 1950s, AM network radio in the 1930s (and after) avoided programming that appealed only to particular cultural groups.

STARR, *supra* note 47, at 367. *See also* LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO 1919–1939 (1990), *cited in* STARR, *supra* note 47, at 466 n.26.

This approach to the public interest is consistent with the context in which radio broadcasting was developing at that time. Paul Starr argues that in the period after World War I, American society was both more diverse—with increases in immigration from abroad and migration of African-Americans to the north—and more reflective of nationalist and nativist sentiment from those resisting the diversification of the country.[67] National programming that would promote assimilation rather than fragmentation could be a useful response at a time when the homogeneity of the country was breaking down.

Everyone in the early days sounded a common theme about the power of radio. Then-Secretary of Commerce Herbert Hoover set the tone in his early remarks at the Third National Radio Conference:

> Radio has passed from the field of an adventure to that of a public utility. Nor among the utilities is there one whose activities may yet come more closely to the life of each and every one of our citizens, nor which holds out greater possibilities of future influence, nor which is of more potential public concern. . . .
>
> Radio must now be considered as a great agency of public service . . . .[68]

Thus, he argued that radio was "a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our other public utilities."[69] At the same time that regulators saw radio's extraordinary potential, they also feared its potential ill effects.[70] After all,

---

67. STARR, *supra* note 47, at 233–35.

68. Herbert Hoover, Sec'y, Dep't of Commerce, Opening Address Before the Third National Radio Conference (Oct. 6–10, 1924), *in* RECOMMENDATIONS FOR REGULATION OF RADIO ADOPTED BY THE THIRD NATIONAL RADIO CONFERENCE 2 (1924). *See also* Hazlett, *Physical Scarcity*, *supra* note 20, at 920 (describing recognition of radio's importance in the 1920s).

69. PRICE, *supra* note 22, at 160 (quoting Hoover in a 1924 address before Congress). Professor Price sees the language of the public sphere entering the early conception of the public airwaves: "for some visionaries, radio was conceived not as a mere medium of entertainment, not even as a linear extension of the newspaper, but as something wholly new, a major mechanism for improving the nature of American democracy." *Id.* According to Paul Starr, broadcasting "promised to change society. The promise of broadcasting, even more than earlier media, was to make culture accessible to all, to enable the electorate to become better informed, to put people instantaneously in touch with the news of the world." STARR, *supra* note 47, at 347.

70. In 1926 a congressman stated,

> There is no agency so fraught with possibilities for service of good or evil to the American people as the radio . . . . [Broadcasting stations] can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and politics will be largely at the mercy of those who operate these stations.

PRICE, *supra* note 22, at 161. *See also* STARR, *supra* note 47, at 348 (noting that between 1927 and World War II, "radio threatened to distort [democracy]" because "there developed

radio propaganda was instrumental in the war in Europe.[71] Democratic and progressive legislators, who were critical of the largely conservative ownership of daily newspapers at the time, feared one-sided radio representing the conservative views of its owners.[72] Programming "invaded the sanctity of the home."[73] There was debate about whether radio should become largely a mainstream commercial medium and whether advertising would harm the resource.[74] The radio operators were not seen at the time as speakers in their own right. The notion that there were more potential speakers than stations justified the view that the licensees—while not common carriers—should program for the public at large rather than as purveyors of their own views or those of narrower publics.[75]

The Judiciary at the time was extremely deferential to the Commission's decisions.[76] After a difficult first year, in which the agency attempted to operate without a budget and when two of the original Commissioners died, the FRC began to make "constitutive" allocation and assignment decisions that aligned the agency's interest with increasingly powerful and moneyed commercial broadcasters.[77] In exchange for the allocation of

---

an interdependence between those who held political power . . . and those who controlled radio").

71. *See* NBC, Inc. v. United States, 319 U.S. 190, 228 (1943) (Murphy, J., dissenting) ("Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression."); *see also* STARR, *supra* note 47, at 342 (noting that the Nazis "centralized [broadcasting] control under their Ministry of Propaganda" and that during the 1930s "[t]hroughout continental Europe, governmental supervision of broadcasting became the rule, even where the stations were normally in the hands of private corporations").

72. *See* STARR, *supra* note 47, at 350 (discussing southern and western congressmen's perception of networks as "a new form of northeastern cultural domination"); *cf.* Colin Vandell, *Words Signifying Nothing? The Evolution of § 315(a) in an Age of Deregulation and Its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT. L.J. 443, 446 (2005) (explaining that "[t]he impetus for campaign coverage regulation provisions . . . came from emerging fears in Congress during the 1920s that radio networks had too much unilateral influence over national elections").

73. STARR, *supra* note 47, at 364.

74. *Id.* at 338, 353–56, 363. *See generally* THE FUTURE OF MEDIA, *supra* note 16.

75. Professor Price has suggested that this kind of perspective reflected seeds of a Habermasian conception of the public sphere in the early regulatory environment. *See generally* PRICE, *supra* note 22.

76. *See, e.g.*, Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850, 851 (D.C. Cir. 1932) (affirming the FRC's refusal to renew appellant's license "[on] the ground that the public interest, convenience, and/or necessity would not be served by the granting of the application"); KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931) (affirming the FRC's refusal to renew physician's broadcasting license on the finding that his broadcasts were not in the public interest and noting that "we do not think that it was the intent of Congress that we should disturb the action of the [C]ommission in a case like the present").

77. STARR, *supra* note 47, at 350.

spectrum, these broadcasters promised to operate in the general public interest.[78] This convenient quid pro quo protected both the large commercial broadcasters from the potential competition from other entrants, and the Commission, whose view of the public interest coincided with the provision of mainstream fare at the highest available level of broadcast quality for the listening audience. Although the Commission's specific programming pronouncements during this period may not in fact have been the most significant determinants of broadcast programming,[79] the media structure that the government chose and the Commission's rhetorical directive to commercial broadcasters were most consistent with audience aggregation, whether at the local or national level.

B. The Community Representation Approach

Starting in the 1960s and peaking in the 1970s, the FCC changed its articulation of how licensees should satisfy their public interest programming obligations, although the agency showed some ambivalence about its role in policing the public interest.[80] During this period, the Commission began to articulate the public interest as more clearly a representational notion rather than a category to be defined either by the FCC or by broadcasters in tandem with advertisers seeking to please the tastes of the general audience. Rather, the Commission emphasized the broadcaster's obligation to ascertain the needs of its audience—including subaudiences—and to program responsively.[81] This suggests recognition

78. *See, e.g.*, MCCHESNEY, *supra* note 50, at 18–29 (discussing the FRC's 1928 "reallocation of the airwaves" and its interpretation of public interest, convenience, or necessity); Hazlett, *Physical Scarcity*, *supra* note 20, at 931 ("[T]he objective of broadcasters in lobbying for licensing legislation was to exclude new entrants while maintaining existing frequency rights. . . . It was correctly augured that the public interest standard would create a constitutional basis for legally denying such entry.").

79. For example, Former Commissioner Glen Robinson articulates a skeptical view of the Commission's commitment to the program standards it adopted in the 1960 *En Banc Programing Inquiry Statement*:

> The list [of desired programming] is remarkable for its comprehensiveness, but more so for its irrelevance, for it was never meaningfully enforced. Though the 1960 *En Banc Programming* [sic] *Statement* remains the official statement of programming policy, the Commission has never bothered to bring it up to date, probably because it recognizes that it never was in touch with reality.

Robinson, *supra* note 20, at 913.

80. I take the Commission's failure to enforce program standards during this period, *see id.*, as evidence of regulatory ambivalence. For a more detailed discussion of this point, see *infra* note 86.

81. As the D.C. Circuit Court of Appeals later described it,

> Over the years, the Commission had developed detailed procedures for licensees to follow in order to determine the needs and interests of the communities served and so to provide responsive programming. The requirements included compiling

by the Commission—at least in its rhetoric—both of the diversity of broadcast audiences and the notion that their interests should be served even if the unregulated, advertising-driven broadcast market would not independently generate responsive programming. The Commission's rules also began to focus more on the process by which public affairs programming would be created than the overall programming mix—both entertainment and nonentertainment—that the Commission thought would lead to overall broadcasting in the public interest. Moreover, the rhetoric was local.[82]

A central piece of evidence suggesting this development is that the agency moved away from program categories to issue-responsive programming.[83] It adopted extremely detailed rules for licensees to be able to determine community needs and problems via formal and informal ascertainment rules.[84] These ascertainment rules required licensees to

---

demographic data, conducting public opinion polls, interviewing community leaders, and developing lists of problems and issues facing the community. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971), *amended* 33 F.C.C.2d 394 (1972) [hereinafter Ascertainment Primer].

Office of Commc'n of the United Church of Christ v. FCC (*UCC III*), 707 F.2d 1413, 1421 (D.C. Cir. 1983).

Hints of this representational approach were evident even in the 1960 *En Banc Programing Inquiry Statement*—which succeeded the Blue Book as the Commission's next significant review of the programming obligations of licensees. Comm'n Programing Inquiry, 44 F.C.C. 2303 (1960) (Report and Statement of Policy) (en banc). There, the Commission proposed a process of "assiduous planning and consultation" by stations, including "canvass[ing] the listening public" and a broad variety of community leaders in order to inform itself of the needs and interests of their licensing communities. *Id.* at 2316. Although Commission rhetoric had previously imposed on licensees a general (and vague) obligation to program in the public interest, the *En Banc Programing Inquiry Statement* clearly tied this obligation to programming responsive to ascertained community needs and interests. The *En Banc Programing Inquiry Statement* also for the first time explicitly tied broadcasters' economic interests with the provision of programming desired by the community—creating a link between programming choices and the market that would later come to dominate communications policy in the 1980s. *Id.*

82. *See, e.g.*, PRICE, *supra* note 22, at 164 (describing the Commission's 1960 report as emphasizing broadcasters' obligation to identify "the needs of their community" and suggesting that the report served to create "a false image of the United States as a congregation of local communities").

83. *UCC III*, 707 F.2d at 1427, 1430–31. In this review of the Commission's deregulation of radio, the D.C. Circuit Court of Appeals recognized the Commission's reorientation from program categories to the notion of issue-responsive programming—programming responsive to community issues—and approved the shift as a reasonable reinterpretation of the public interest standard at least in part because programming meeting the former categories of public interest programming could likely be used to satisfy issue-responsive programming obligations as well. The court concluded as follows: "In short, then, while the Commission has clearly reoriented its public interest inquiry away from categories, the extent and foreseeable consequences of that policy shift should not be overestimated." *Id.* at 1431.

84. *See* Ascertainment Primer, *supra* note 81, *reprinted in* DOCUMENTS, *supra* note 43,

identify and poll the views of significant groups in the licensees' broadcast areas.[85] The licensees would then have to demonstrate that they aired programming responsive to such identified community problems and needs. The goal of the ascertainment rules was presumably to displace not only market-driven licensees, but also the government in the determination of appropriate programming goals.

With respect to license renewals, the standard appeared to rest on whether the licensees had satisfied their promises by their performance during the prior license term. The promise–performance model was presumably intended to be an accountability mechanism measurable by objective criteria. It certainly obviated substantive government second-guessing about programming choices made by the broadcast licensees.

Developments at the agency did not follow a perfectly linear path in one direction, however. The agency did not enforce either its ascertainment rules or its license renewal standards very stringently.[86] It also showed

---

at 316 (setting forth a series of questions and answers "to clarify and provide guidelines as to Commission policies and requirements"). The D.C. Circuit has explained that the formal ascertainment rules "were the end-product of many years of policy experimentation by the Commission. The basic principle underlying ascertainment is clear: For a radio licensee to provide programming responsive to the issues facing the community, it must first ascertain just what those issues are." *UCC III*, 707 F.2d at 1435. At first, in 1960, the FCC "simply required the broadcaster to provide a statement describing the measures taken and efforts made 'to discover and fulfill the tastes, needs, and desires of his community or service area.'" *Id.* at 1435–36 (citing Deregulation of Radio, 84 F.C.C.2d 968, 1073 (1981) (Report and Order)). Thereafter, the Commission "continued to clarify and refine this requirement" and ultimately issued the 1971 Ascertainment Primer discussed above. *UCC III*, 707 F.2d at 1436.

85. According to the D.C. Circuit, the Ascertainment Primer

> set out the procedures to be followed in determining the demographic composition of the service area: consulting with community leaders in 19 categories (e.g., business, minority groups, women's organizations, environmental and consumer groups, etc.); conducting general public opinion surveys; and then developing a list of community problems and needs to serve with responsive programming.

Id. at 1436. Former Commissioner Glen Robinson has characterized the ascertainment approach as follows: "Perhaps the most obviously silly [FCC] endeavor was its erstwhile policy of requiring licensees to engage in a process known as 'ascertainment of local needs'—a largely ritualistic exercise the sole redeeming benefit of which was to give the agency an excuse for not looking at licensees' actual programming." Robinson, *supra* note 20, at 939 n.158.

86. *See* Cole & Murck, *supra* note 56, at 360–61 (describing extensive numbers of license renewals despite questions regarding the stations' programming in the public interest). In what may be the most obvious of these cases, the Commission initially permitted the 1964 renewal of WLBT, a television station in Mississippi, despite clear evidence of racism in programming, refusals to program for the station's African-American viewing population, and refusals to provide time for African-American groups to reply to station editorials. For a description of the events and the Commission's actions, see Office of Commc'n of the United Church of Christ v. FCC (*UCC I*), 359 F.2d 994 (D.C. Cir. 1966) and Office of Commc'ns of the United Church of Christ v. FCC (*UCC II*), 425 F.2d 543 (D.C. Cir. 1969). Ultimately, after sixteen years of litigation, the Commission did not renew

some ambivalence about the Fairness Doctrine.[87] Nevertheless, even if the

---

the license. *See also* Sidney A. Shapiro, United Church of Christ v. FCC*: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939, 946 (2006) (noting that the FCC's refusal to renew the station's license marked the station as "one of the very few broadcast licensees ever to lose a license renewal proceeding").

Even though WLBT shows that (in the absence of judicial review) the Commission tended to renew licenses despite plausible claims that the stations were not programming in the public interest, it does not undermine the claim in text that the 1960s and 1970s were a period in which the agency developed the notion of the public interest as community-group representation. It is important to remember that the WLBT case began in the early 1960s, that it involved the possibility of license nonrenewal (which the Commission recognized as a "death sentence" rather than mere punishment), that the Commission did reduce the duration of the license renewal at one point, that the agency claimed (in what was a "makeweight" argument, according to Professor Shapiro, *id.* at 959), that service would have been lost if the license had not been renewed, and that much of the issue revolved around standing. In addition to these distinctions, it might well have been the case that the later shift in the Commission's conception of the public interest was influenced by the lengthy WLBT saga. *Cf.* Cole & Murck, *supra* note 56, at 357–58 (characterizing the Commission during this period as "an ambivalent, if not contradictory, agency" because of its willingness to impose local programming obligations on licensees while simultaneously disclaiming authority to involve itself in defining such programming because of concerns about freedom of speech).

87. On the one hand, the Commission retained the Fairness Doctrine and continued to employ the rhetoric of balance. There were some highly publicized Fairness Doctrine cases. On the other hand, the Commission only once attempted to enforce the first prong of the Fairness Doctrine against a licensee. Patsy Mink, 59 F.C.C.2d 987 (1976).

Moreover, its implementation of the Fairness Doctrine's second prong was limited as well. For example, the Commission's requirements for a complainant's prima facie case of Fairness Doctrine violations were procedurally onerous. It did not monitor programming itself and relied solely on complaints. The agency also used a "good faith" standard regarding broadcaster showings and required licensees to air balanced viewpoints in their overall programming rather than within single programs. Indeed, these are some of the reasons which led critics to conclude that the Fairness Doctrine as enforced could not accomplish its goals. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 20, at 262–63.

Finally, the agency rejected attempts to expand the scope of the doctrine. For example, cases attempting to use the Fairness Doctrine broadly to go after what groups perceived as "overall media bias" were unsuccessful because of the Commission's narrow and licensee-protective interpretations of what constituted a controversial issue of public importance and what would be deemed to constitute balance. *See* Am. Sec. Council Educ. Found. v. CBS, Inc., 63 F.C.C.2d 366 (1977), *aff'd on reh'g en banc sub nom.* Am. Sec. Council Educ. Found. v. FCC, 607 F.2d 438 (D.C. Cir. 1979); Thomas J. Krattenmaker & L.A. Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 169–70.

Similarly, when the FCC decided that the Fairness Doctrine would not be applied to product advertising as such, it limited the degree to which regulation would be used to challenge the dominance of consumerism on radio and television. *See* Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 48 F.C.C.2d 1, 12, 21–25 (1974) (Fairness Report), *aff'd sub nom.* Nat'l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095, 1116 (D.C. Cir. 1977) [hereinafter Fairness Report]. Earlier, the Commission had applied the Fairness Doctrine to cigarette advertising. *See* WCBS-TV, 8 F.C.C.2d 381 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082, 1098–99 (D.C. Cir. 1968). Thereafter, the Commission faced complaints about viewpoints implied in entertainment programs and advertising for products other than cigarettes. *See, e.g.*, Friends of the Earth v. FCC, 449 F.2d 1164, 1170–71 (D.C. Cir. 1971) (applying the Fairness Doctrine to advertising of high-powered cars). Faced with a potentially daunting

Commission did not consistently enforce its rules, the Commission's rhetoric suggests that it had revised its notion of community from a hypothetical "average" audience connected as a national community by radio and television networks to a more fragmented alternative whose interests would have to be addressed were the medium to fulfill its mission.

Why did the Commission move in the direction of community responsiveness?[88] One explanation is that the Commission became more concerned about the potential constitutional conflict that its own direct intervention in programming might cause. Many of the administrative and judicial rulings during this period emphasize the importance of broadcasters' expressive freedom.[89] Thus, the highly micromanaging ascertainment rules could be seen as a proxy for more direct FCC content regulation. In other words, the agency instead sought to engage in "architectural censorship"—namely, regulating content indirectly by requiring stations to meet procedural ascertainment requirements which the agency believed would likely lead to sufficient public interest programming.[90] At a minimum, using structural regulations and procedural requirements as proxies for more direct content regulation would likely reduce the First Amendment scrutiny to which the Commission's rules would be subjected.[91] In addition, more objective criteria for assessing

---

task of applying the doctrine to all product advertisements—because implicit viewpoint claims could be made about many—the Commission stated that entertainment programming and commercials would be generally exempt from the Fairness Doctrine unless they explicitly and intentionally sought to express viewpoints on controversial issues of public importance. *See* Fairness Report, *supra*, at 12, 21–25.

Whether it believed that programming responsive to the issues and concerns of particular community groups would be likely to lead to overall programming balance on controversial issues, whether it began to harbor doubts about the community-creating effects of balanced programming, or whether it began to look at the overall market, the FCC's ambivalence toward the Fairness Doctrine at this time is consistent with a move away from the undifferentiated general audience to a recognition of multiple communities with potentially different and conflicting interests.

88. There have been several very useful accounts of FCC regulation that have focused on political accounts of FCC behavior. *See, e.g.*, KRASNOW & LONGLEY, *supra* note 43. The account presented in this Essay does not reject the political story. It simply chooses a different focus.

89. *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973) ("Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new."); *see also* Comm'n Programing Inquiry, 44 F.C.C. 2303, 2306 (1960) (Report and Statement of Policy) (en banc) ("The communication of ideas by means of radio and television is a form of expression entitled to protection against abridgement by the First Amendment to the Constitution.").

90. *See* Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669 (2005) [hereinafter Yoo, *Architectural Censorship*]. *See also* Cole & Murck, *supra* note 56, at 358 (contending that the FCC wished to create a regulatory regime "which, if complied with, would effectively (but indirectly) compel broadcasters to do something which the FCC could not obligate them to do").

91. *See* Yoo, *Architectural Censorship*, *supra* note 90, at 715–23 (arguing that under

broadcasters' compliance with their public interest mandates could also silence criticisms about the vagueness and inconsistency of the Commission's public interest programming decisions. After all, observers note that "[b]eginning in the early 1960s, federal administrative agencies were under attack from a wide variety of critics."[92] Finally, procedurally grounded objective standards could in principle create broadcasters' accountability to the community itself.[93]

Another consistent explanation for the Commission's switch to process and representation focuses on the increasing visibility of issue-oriented community groups during this period.[94] In addition to the judicial invitation given to private attorneys general by the D.C. Circuit's decision in *United Church of Christ*,[95] the skirmish over renewal standards in Congress in the 1970s[96] as well as increasing social sensitivity to issues facing minorities would doubtless have sensitized the Commission to the existence of different perspectives on social issues held by different community groups. It would have been difficult for the Commission to be blind to the ways in which the decade of the 1970s challenged (as well as reinforced) national narratives. Yet, just as the challenges posed by

current precedent, proxy content regulation would be unlikely to be subjected to strict constitutional scrutiny, but contending that it should be).

92. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1149 (2001).

93. An alternative explanation is that the FCC, captured by the broadcast industry, changed its rules and adopted a highly proceduralist approach in order to make it easier for broadcast licensees to meet their obligations. The ascertainment rules were quite clear, after all, as opposed to general statements about programming obligations in prior Commission guidelines, and would therefore be easy to comply with, at least formally. Arguably, if the ascertainment rules were seen as purely formal and not ever taken seriously by the agency, then broadcasters would not have taken them seriously either in deciding upon their public interest programming. On the other hand, Commission inaction could not be guaranteed and potential sanctions were fearsome. Moreover, broadcasters' complaints about the onerous burdens imposed on the industry by the ascertainment rules suggest that stations in fact expended resources on the ascertainment process and perhaps even took it seriously.

94. *See* KRASNOW & LONGLEY, *supra* note 43, at 36–41 (discussing examples of community groups which successfully negotiated for "stronger representation in broadcasting" for various ethnic and racial groups, better program balance in advertising, certain amounts of ad-free children's programming, and other community interests) (internal quotation marks omitted).

95. Office of Commc'n of the United Church of Christ v. FCC (*UCC III*), 707 F.2d 1413 (D.C. Cir. 1983); *see also* PRICE, *supra* note 22, at 165–66 (discussing the public interest movement); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389 (2000) [hereinafter Schiller, *Enlarging the Administrative Policy*] (describing the move from interest group pluralism to participatory administration).

96. In 1969, public outrage and claims of racism derailed a bill providing that the FCC could not consider competing applications for broadcast licenses unless it first found that renewal of the incumbent's license would not be in the public interest. *See* KRASNOW & LONGLEY, *supra* note 43, at 114–19.

immigration in the 1920s led to the adoption of national narratives of assimilation, the social developments of the 1970s required some recognition of diversity. Nevertheless, while the Commission appeared to recognize the conflicting views and interests of various groups during this time, it nevertheless sought to use the media as educative tools that would promote unity in a diverse community.[97] A process-oriented regulatory regime that required broadcasters to hear the different voices of their communities is reminiscent of the "safety valve" theory of the First Amendment: social fragmentation can be avoided if different voices are heard and responded to by mainstream institutions.[98]

The effect of this shift in its public interest orientation was to reduce direct control by the FCC in broadcasters' content choices. While the Commission still purported to obligate licensees to program in the public interest, broadcasters were put in the position of having to negotiate programming with community groups if they were to comply with the agency's procedural rules. It is true that because of the Commission's timid record on performance assessments during this period, its apparent ambivalence about involvement in broadcast content, and perhaps its capture by the regulated broadcast industry,[99] broadcasters were not often held accountable to the FCC. Judicial intervention took up some of the regulatory slack, however: it was principally through judicial intervention that public interest programming purportedly responsive to community issues was promoted. With the D.C. Circuit's recognizing for the first time the right of interest groups to challenge FCC action[100] and articulating a doctrine of "hard look" review for administrative decisions,[101] the Judiciary

97. *See generally* Ascertainment Primer, *supra* note 81.

98. For sources discussing the safety valve rationale for First Amendment protection, see, for example, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884–86 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). *See also* Whitney v. California, 274 U.S. 357, 375 (1927).

99. Many have accused the FCC of having been captured by broadcasters. *E.g.*, KRASNOW & LONGLEY, *supra* note 43, at 23, 31–35; *and* Varona, *Changing Channels*, *supra* note 9, at 78–85, and sources cited therein. For the classic explication of agency capture, see MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 79–82, 86–97 (1955).

100. *See, e.g.*, Office of Commc'n of the United Church of Christ v. FCC (*UCC I*), 359 F. 2d 994 (D.C. Cir. 1966); *and* Office of Commc'n of the United Church of Christ v. FCC (*UCC II*), 425 F.2d 543 (D.C. Cir. 1969).

101. *See, e.g.*, Citizens Commc'ns Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971). For a description of the D.C. Circuit's "hard look" review, see, for example, Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) (Leventhal, J.) (stating that a reviewing court should "intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems"). For more on hard look review, see Schiller, *Rulemaking's Promise*, *supra* note 92; Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of Hard Look*

attempted to infuse more transparency into the administrative process[102] and created the possibility of judicialized interest-group pressure on the Commission and broadcasters.

C. The Market Approach

As has been extensively described by others, the FCC's vision in the 1980s turned deregulatory,[103] pursuant to the views of Chairman Mark Fowler and the Reagan Administration ideology.[104] During this period, the FCC eliminated the detailed ascertainment rules,[105] the Fairness Doctrine,[106] many license-renewal requirements,[107] and structural regulations designed to promote diversity of programming.[108] The Commission ceded control of broadcast programming formats to the market.[109] The agency also clarified that it no longer required licensees "to

---

Doctrine in the D.C. Circuit, 90 GEO. L.J. 2599 (2002).

102. *See generally* Reuel E. Schiller, *Enlarging the Administrative Polity*, *supra* note 95 (showing connections between regulatory agencies, the courts, and pluralist theories of politics in the mid-twentieth century).

103. *See, e.g.*, Varona, *Out of Thin Air*, *supra* note 7, at 158–59.

104. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); *see also* PRICE, *supra* note 22, at 167 ("The economic metaphor of the market-place gained immense power, such power that the former construct (ascertainment, content requirements, and fairness) virtually became an object of ridicule.").

105. *See* Deregulation of Radio, 84 F.C.C.2d 968 (1981), *aff'd in part and remanded in part*, Office of Commc'n of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) [hereinafter Radio Deregulation Order]; Deregulation of Radio, 96 F.C.C.2d 930 (1984) (Second Report and Order); Office of Commc'n of the United Church of Christ v. FCC, 779 F.2d 702 (D.C. Cir. 1985); Deregulation of Radio, 104 F.C.C.2d 505 (1986); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984), *recon. denied*, 104 F.C.C.2d 358 (1986), *aff'd in part and remanded in part sub nom*. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987) (eliminating formal requirements for the ascertainment of community needs and obligations to maintain program logs).

106. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5049–50 (1987), *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

107. The Commission simplified the renewal process during this period, including elimination of program-related questions that had been part of the prior process. *See* ZUCKMAN ET AL., *supra* note 43, at 117, and sources cited therein. In fact, the Commission adopted a "postcard renewal" system during this period. *See* Radio Broadcast Services; Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, 46 Fed. Reg. 26,236 (May 11, 1981) (Report and Order); *see also* Varona, *Changing Channels*, *supra* note 9, at 27–28 (describing deregulation).

108. *See, e.g.*, Amendment of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 49 Fed. Reg. 31,877, 31,887 (Aug. 9, 1984) (eliminating the "seven station" rule—which had prohibited any person from holding interests in more than seven stations in the same broadcast service).

109. The Commission decided to leave entertainment program format choices—classical or rock, for example—to the licensees, even if a licensee's proposed format change would

be responsive to issues facing the entire community or facing every significant group in the community; instead, the broadcasters may focus on the needs of their own audiences if they can show that other stations are providing adequate service for the other groups."[110] The by-then-traditional notion that each station had public interest obligations to all the groups in its license area was superseded by an approach that looked at the availability of issue-oriented programming across an entire market.

This is the era of communications policy during which the market was to replace both the FCC and political groups as the determinant of the public interest. The Commission began explicitly to think of the broadcast audience as consumer rather than citizen. This market focus shifted the meaning of the public interest to what the public found interesting—clearly a shift to the preferences of individual viewers or listeners instead of some notion of programming for community needs. Although the Commission still purportedly used "community responsiveness" as its metric for licensee performance, the notion of responsiveness—or at least the ways in which responsiveness would be measured—had changed. Such responsiveness was to be measured by general market acceptance rather than programming to respond to the subcommunity interests identified by polling community groups. Consumer satisfaction would be more accurately measured by objective market metrics than FCC assumptions. The shift from ascertained community needs to Nielsen ratings as determinants of the public interest focuses less on the concerns of identity and community groups than on the media-content preferences of individuals within consumption-related demographic categories.[111] In a world in which broadcasting still represented the mass media and programmed for the common denominator, and in which networks were still powerful, broadcasters' programming choices would generate majority-preferred programming rather than satisfy the interests of the

---

eliminate a unique format in the market. On appeal, the D.C. Circuit held instead that the Commission should, in certain circumstances, hold hearings to inquire whether continuation of the old formats would serve the public interest. *See* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 250 (D.C. Cir. 1973); Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 929 (D.C. Cir. 1973); Citizens Comm. to Preserve the Present Programming of the "Voice of the Arts in Atlanta on WGKA-AM and FM" v. FCC, 436 F.2d 263, 272 (D.C. Cir. 1970). The Supreme Court affirmed the agency's decision, holding that the agency's policy was consistent with the Communications Act and that at least in the area of entertainment programming, the Commission could reasonably conclude that the market was a better measure of the public interest than FCC regulation. FCC v. WNCN Listeners Guild, 450 U.S. 582, 604 (1981).

110. *UCC III*, 707 F.2d at 1421.

111. *Cf.* Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 513 (2000) ("[T]he idea that broadcasters show 'what viewers want' is a quite inadequate response to the argument for public interest obligations.").

minority of viewers and listeners or those of underserved identity groups.[112]

The FCC justified its deregulatory turn by relying on the failure of the old public interest regulatory approach to achieve its aims, the need to reduce the power of government, concerns about the First Amendment rights of broadcasters, the enhanced availability of media other than broadcasting, the end of spectrum scarcity, and the failure of regulatory arguments grounded on broadcast exceptionalism.[113] Broadcasters took up the mantle of the First Amendment in litigation, pointed to the extraordinary efflorescence of other media, and sought to portray themselves as classic speakers akin to newspapers.[114]

The deregulatory "purge of the 1980s left commercial broadcasters with very few tangible public interest programming obligations."[115] The narrowing focus on the individual media consumer as the object of regulation meant the Commission was reluctant to exercise the regulatory discretion permitted by *Red Lion* to promote certain types of content to satisfy community needs. During this period, most of the Commission's deregulatory decisions met with judicial approval. In the 1990s, the courts, which appeared increasingly to doubt the scarcity argument for exceptional regulation of broadcasting, began to subject even structural regulation to significantly more stringent constitutional scrutiny.[116] There were even calls for the termination of the FCC.[117] This was a far cry from the early days of radio in which there was unanimous agreement that the new technology needed to be regulated with respect to content and quality in order to meet its obligations to the audience.

---

112. *See id.* at 515–16 (describing informational cascades that can mistakenly lead to broadcaster homogeneity even with respect to majority audiences).

113. In a statement emblematic of these attitudes, then-Chairman Mark Fowler described television as nothing more than "a toaster with pictures." Bernard D. Nossiter, *Licenses to Coin Money: The F.C.C.'s Big Giveaway Show*, 241 NATION 402, 402 (Oct. 26, 1985) (quoting Fowler's comment). These were also some of the arguments used by the Commission in its decisions to eliminate the Fairness Doctrine and deregulate radio. *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5049–50 (1987), *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

114. For an important early description of the "ideological drift" of the First Amendment during this period, see J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 873–74 (1993).

115. Varona, *Out of Thin Air*, *supra* note 7, at 159.

116. For a description and critique of this development, see BAKER, *supra* note 10, at 124–62.

117. *See, e.g.*, PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 4 (1997) ("It is time for fundamental change. It is time for the Federal Communications Commission to go.").

D. The Targeted Return to Public Interest Regulation

The FCC's regulatory approach to content regulation began to change in the 1990s and 2000s. Specifically, the Commission commenced a limited return to public interest programming requirements, increased its focus on enforcement, adopted disclosure requirements about programming, and experimented (quietly) with mixed regulatory models.[118] Simultaneously with its increased regulatory interventions, however, the Commission continued, and even expanded, deregulation in the media structure context.[119]

Substantively, the agency's regulatory focus narrowed to the needs of a single constituency: content regulation targeted the protection of children.[120] The Commission focused its attention on child-centered programming regulation such as children's educational television requirements[121] and limits on broadcast indecency.[122] While the public

118. The rationales for and limits to a return to a more regulatory model during this period were articulated in law review articles by then-Chairman Reed Hundt. *See, e.g.*, Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089 (1996) [hereinafter Hundt, *The Public's Airwaves*] (arguing for clear, limited and well-enforced public interest obligations).

119. *See, e.g.*, Candeub, *supra* note 10, at 1555–62 (describing the history of FCC media ownership rules).

120. Indeed, a more politically focused account would suggest that the FCC's regulatory focus on children occurred at the behest of a constituency of social conservatives seeking to use the trope of child protection to achieve certain broader social aims. A clear example of regulation responsive to such interest group pressure is the current FCC's enhanced indecency regime. Lili Levi, *The FCC's Regulation of Indecency*, 7 FIRST REPORTS 1 (2008), *available at* http://www.firstamendmentcenter.com/about.aspx?id=19102.

121. In 1996, the Commission adopted guidelines for children's educational television that defined such programming for the first time and that allowed broadcasters who aired three hours of such programming per week to receive expedited staff-level approval of their license renewal applications with respect to compliance with the Children's Television Act. *See* Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,662 (1996). This educational "kid-vid" requirement was extended to digital broadcasters thereafter. *See* Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943 (2004).

Accounts of what led to the adoption of the children's education processing guidelines differ. For example, former FCC Chairman Reed Hundt focuses on congressional concern about children's educational programming to justify the requirements. *See, e.g.*, Reed E. Hundt, Keynote Address, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 539–47 (1996) [hereinafter Hundt, Keynote Address]; Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 17, 22–23 (1996). Former Commissioner Glen Robinson, on the other hand, recounts a more political story:

> The FCC's chairman sought to mollify critics of this "giveaway" [of a second television channel to incumbent broadcasters in order to facilitate the digital conversion] by insisting that the broadcasters ought to give something in return for the new channel—specifically, educational children's television and free air time for political candidates. The first was forthcoming. Faced with the possibility of having to buy the second channel, the major networks agreed to provide at least three hours

interest regulation at issue in *Red Lion* was regulation intended to enhance mainstream public discourse, the new initiatives in public interest content regulation today are more focused on cultural rather than political space.[123] Recently, the Commission also adopted a requirement of a quarterly filing in which "television broadcasters must provide more information on the local programming they are broadcasting and facilitate the public's access to that information."[124] While the requirement is simply a disclosure rule, the structure of the required form can easily be read as an implicit return to content suggestions by the FCC.

The agency procedurally increased its focus on the effectiveness of its executive role by selective increases in the enforcement of its rules, particularly in the area of indecency.[125] The Commission also experimented with a "play or pay" regulatory regime in the context of children's educational television.[126] Finally, the agency has engaged in

---

per week of children's educational programs.

Robinson, *supra* note 20, at 918–19. Professor Robinson also concludes that "[t]he new children's television rules are not really predicated on scarcity; they are the product of a deal between the broadcasters and the FCC in which three hours of children's television is exchanged for an exemption from the emerging movement for selling radio spectrum." *Id.* at 930.

For histories of the Commission's approach to children's television, see, for example, NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 17–57 (1995); Angela J. Campbell, *Lessons from Oz: Quantitative Guidelines for Children's Educational Television*, 20 HASTINGS COMM. & ENT L.J. 119, 137–49 (1997); James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMMLAW CONSPECTUS 1, 2–8 (1997).

122. *See, e.g.*, Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4982 (2004) (holding that NBC's airing of an expletive during the awards show violated federal law, and notifying broadcasters that future airings of the same word could result in enforcement action). *See generally* LEVI, *supra* note 120 (providing an overview of the FCC's regulation of indecency).

123. Of course, § 315 of the Communications Act of 1934 still imposes on broadcasters the obligation to provide "equal opportunities" to political candidates in the purchase of political advertising time, and § 312(a)(7) provides federal political candidates a right of "reasonable access" to purchase advertising time.

124. News Release, Fed. Commc'ns Comm'n, FCC Requires Television Broadcasters to Provide More Local Programming Information to the Public (Nov. 27, 2007), http://www.fcc.gov/headlines.html; *see also* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 23 F.C.C.R. 1274 (2008) (Report and Order) (noting the adoption of new reporting requirements).

125. *See generally* LEVI, *supra* note 120 (describing FCC's indecency regulation regime).

126. *See* Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1339–42 (2007) (describing children's educational television rules, which permit broadcasters to pay for educational programming to air on other stations in the market under certain circumstances). The FCC's website does not disclose instances of broadcasters taking advantage of the pay-or-play option for children's educational programming, however, so little can be said about the design or specifics of the model.

indirect public interest regulation via merger conditions or settlement agreements.[127]

One plausible explanation for this regulatory shift is that the 1980s and 1990s reflect the different economic and social faces of the political right during that time. Conservatives in favor of economic deregulation often also favored social regulation to promote family values. But these regulatory initiatives were embraced during both Democratic and Republican administrations. Another possible explanation is that, while the majority of the Commission still hews to a market-based regulatory approach, both Democratic and Republican appointees have become convinced that the market does not adequately represent the needs and preferences of children in broadcasting and thus that this segment of the audience has to be the focus of its regulatory attention.

There are two ways to characterize today's targeted regulatory era. On the one hand, the narrowness of the Commission's regulatory focus differentiates it from the melting pot era. Children have become the principal protected constituency for the Commission. The regulations are targeted and not focused on programming as a whole. The Commission does not justify its involvement by referring to the general listening public or its need for radio as an instrument of democracy. Also, the Commission has insisted since the mid-1990s that its substantive definition of the public interest is not based on its own choices or expertise, but on decisions made by Congress and the American public.[128]

Despite these apparent differences, however, there is a second way to characterize the FCC's current regulatory approach—as a sub rosa revival of the melting pot era during which the Commission sought to promote a certain type of community identity. In other words, a narrow, targeted set of regulations can be Trojan horses for enhanced government control over expressive boundaries more generally. For example, indecency regulation has shown that it is precisely the Commission, using its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium," that determines whether the "average broadcast viewer

127. On settlements in the indecency context, see LEVI, *supra* note 120, at 19–21.

128. For such a position with respect to children's educational programming, see generally Hundt, *The Public's Airwaves*, *supra* note 118; Hundt, Keynote Address, *supra* note 121. As for indecency, the current Commission has sought to characterize itself as a reluctant regulator drafted by Congress and the public. *See* Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power*, 60 FED. COMM. L.J. 19 (2007) [hereinafter Levi, Chairman Kevin Martin on Indecency], *available at* http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi_Forum_Final.pdf.

or listener" would find broadcast material indecent.[129] Thus, the divination of the American public's views is left to the discretion of the Commission. It is the Commission that determines whether a particular depiction or description of a sexual activity is either necessary to the program or gratuitous and pandering, thereby putting the government in the position of second-guessing the producers' editorial judgments.[130] Moreover, the current indecency regime demonstrates excessive responsiveness to the complaints of the Parents Television Council, a particular decency advocacy group.[131] Thus, the market of the 1980s has been supplanted in some content areas with the views of organized issue advocacy groups.

This differs not only from the deregulatory market era, but from the earlier community representation era, during which the broadcasters' public interest programming was likely to have been negotiated to some degree with community groups representing local communities and subcommunities. Now, those organic communities' views and interests are replaced by the pressure brought to bear on the FCC by specific issue advocacy groups. Hand in hand with such advocacy groups and under the guise of the protection of children, the Commission can attempt to define the boundaries of expressive culture on a national basis. In doing so, it is returning to the earliest regulatory era, in which the Commission regulated pursuant to a substantive vision of the public interest. At that time, the FRC believed that the public interest was an interest in public cohesion through the medium of radio and that dissenting voices or those too identified with particular groups would undermine the assimilationist project. Now, the FCC is seeking to police the boundaries of what expression is properly public while deflecting criticism by relying on the uncontroversial slogan that we need to protect our children.[132]

---

129. Infinity Radio License, Inc., 19 F.C.C.R. 5022, 5026 (2004).

130. LEVI, *supra* note 120, at 44.

131. *See id.* at 36 & n.215 (asserting that certain interest groups have "dominat[ed] indecency enforcement").

132. Is this criticism mooted by the recent judicial rejections of aspects of the Commission's new indecency regime? The government has been granted certiorari in a case about the propriety of the agency's decision to find a violation of its indecency rules on the basis of a fleeting expletive uttered outside the indecency safe harbor period. Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); *see also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008) (vacating and remanding FCC indecency sanctions). It is possible that the Court may revert to the deferential approach of prior broadcasting cases. In addition, there are aspects of the Commission's current regulatory approach that have not been—and are unlikely to be—tested in court. Judicial review has largely been avoided by negotiated resolutions between the Commission and the affected broadcast parties. This is true not only in the context of indecency but also of children's educational programming. Arguably this is not a major problem because the rules would likely pass First Amendment muster anyway, even if they had been subjected to judicial review. Indeed, it may be that the final rules were structured as they were precisely in order to withstand constitutional review. Nevertheless, the Commission's penchant both

III. READING THE HISTORY

What lessons do the different regulatory experiments of the four eras teach us?[133] The first era, the melting pot approach, led to FCC decisions designed to promote a national narrative. It was an approach consistent with what were viewed as the assimilationist needs of its time. It valorized the FCC's expertise, overly involved the government in broadcast content, sought to minimize audience diversity, led to an excessive reliance on commercial national network programming, maintained an illusion of a homogeneous, melting pot culture, and led to structural decisions that would undermine a noncommercial broadcasting model. In seeking to promote a shared national culture, the melting pot approach made constitutive normative choices.

The second era, community representation, seemed to reflect the recognition that diversity narratives were necessary if electronic mass media were to remain socially relevant and influential during this period of social ferment. Yet this era too reflected ambivalence on the part of the Commission. Its recognition of diversity to some degree conflicted with its commitment to balanced presentation as the ideal form of electronic public discourse. In any event, its rules in fact gave too much leeway to broadcasters' claims that they had in fact programmed for the community interests they had identified. The Commission's approach may have often led to the illusion of representation rather than true community participation. The Commission's unwillingness to look closely at the broadcasters' claims that their performance met their promises surely undermined the effectiveness of this kind of more localized community model. Even had it been effective, however, such a community representation model would have raised broader questions about whose views and interests were represented and how to determine the right balance between focused and generalized public interest programming.

In shifting its understanding of the public interest from the community's concerns to the individual consumer's preferences, the third, "market" era overly mythologized and valorized the market, did not pay adequate attention to the negative externalities of broadcaster choices designed to satisfy majority audience preferences, and often erred in its definitions and measurements of the markets. One external critique of the market focus is that the market neither adequately represented the nonmercantile interests

---

in the 1990s and now to regulate by agreement and avoid judicial review is troubling.

133. The discussion in text focuses on interpreting the goals and identifying the weaknesses of the FCC's doctrinal developments during the period broadly surveyed. Other approaches as well, such as more explicitly political explanations, could enrich the analysis, but do not eliminate the usefulness of looking at shifts in doctrinal trends. *E.g.*, Commission Programing Inquiry, 44 F.C.C. 2303, 2313 (1960) (en banc).

implicated in the public interest nor the exogenous character of consumer preferences.[134] But even if one were to accept the 1980 FCC's belief in the market as the right standard for the public interest, one could still engage in an internal critique: the Commission's market rhetoric was suspect because the agency did not admit the degree to which the agency's market-structuring decisions affected what was otherwise touted as an apolitical metric and because it refused to address assertions of market failure.

Finally, however it is defined, the new era of targeted regulation is extremely problematic as well. It is either a period in which the Commission is narrowly focusing on a single constituency for defining the public interest, or one in which FCC power is enhanced at the behest of particular advocacy groups while the agency disclaims any affirmative role other than representative of the public.[135] The Commission ironically accompanied its renewed regulatory vigor in "cultural" contexts by deregulation in the context of market structure. The shift from an attempt to enhance the public sphere to a focus on the protection of the private realm transforms the agency from an enabler of public discourse to an enforcer of conservative social norms and word taboos.[136] The children's educational television requirements are also subject to critique.[137] In

134. *See* C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997). In Professor Sunstein's words,

> There is a large difference between the public interest and what interests the public. This is so especially in light of the character and consequences of the communications market. One of the central goals of the system of broadcasting, private as well as public, should be to promote the American aspiration to deliberative democracy.

Sunstein, *supra* note 111, at 501.

135. Levi, *Chairman Kevin Martin on Indecency*, *supra* note 128; Levi, *supra* note 120, at 36 & n.215.

136. Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711 (2007) (explaining FCC's fleeting expletive prohibition as acquiescence in a word taboo).

That courts have recently struck down some of the most excessive applications of the Commission's indecency regime is not to the contrary. After all, there is much still left to the agency's indecency regulatory regime beyond what has been struck down, and the courts have relied principally on administrative process to ground their reversals. *See CBS Corp.*, 535 F.3d at 167.

137. Some say that the rules impose a minimal obligation, that licensee compliance is spotty, that the programs identified as educational do not in fact warrant the characterization, that parents do not understand the identifying icons for children's educational television, and that stations excessively preempt such programming in order to air other, more profitable, fare. *E.g.*, AMY B. JORDAN, IS THE THREE-HOUR RULE LIVING UP TO ITS POTENTIAL? AN ANALYSIS OF EDUCATIONAL TELEVISION FOR CHILDREN IN THE 1999/2000 BROADCAST SEASON (2000); Amy B. Jordan & Emory H. Woodard IV, *Growing Pains: Children's Television in the New Regulatory Environment*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 83, 89 (1998); Amy B. Jordan, *Public Policy and Private Practice: Government Regulations and Parental Control of Children's Television Use in the Home*, *in* HANDBOOK OF CHILDREN & THE MEDIA 651 (Dorothy G. Singer & Jerome L. Singer eds. 2002); KELLY L. SCHMITT, ANNENBERG PUBLIC POLICY CENTER, REPORT NO. 35, PUBLIC POLICY, FAMILY RULES AND CHILDREN'S MEDIA USE IN THE HOME 10–11 (2000); EMORY H.

addition, the Commission's recent endorsement of disclosure-based regulation is a double-edged sword in light of the increasing use of information by well-organized interest groups to press their own particular visions of the public interest.[138] If the Commission really has narrowed its regulatory interests to children, then its regulatory choices are suspect as ineffective. If, on the other hand, the Commission is trying to engage in broad-based social regulation under the innocent guise of child protection, then the current regulatory era is even more dangerous than the first.

Some say that enhanced regulation is the answer to perceived problems with the media. There have been recent calls for the return of the Fairness Doctrine.[139] By contrast, others say that the Fairness Doctrine was a failed attempt to enhance public discourse[140] and that the FCC should retire from active content regulation in the public interest.[141] Critics have even gone so

---

WOODARD IV & NATALIA GRIDINA, ANNENBERG PUBLIC POLICY CENTER, SURVEY SERIES NO. 7, MEDIA IN THE HOME 2000: THE FIFTH ANNUAL SURVEY OF PARENTS AND CHILDREN 32–38 (2000). Moreover, little empirical work has been done to answer the question of whether children's educational programming rules are truly necessary for over-the-air broadcasters in today's media environment—in which both PBS and cable provide a plethora of excellent children's programming.

138. *See supra* note 131 and accompanying text.

139. Despite criticism, bills to revive the Fairness Doctrine are often introduced in Congress. *E.g.*, Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. (2005); Meaningful Expression of Democracy in America Act, H.R. 4710, 108th Cong. (2004). There is a current legislative debate as to the reintroduction of the Fairness Doctrine. *See* John Eggerton, *McCain Backs Bill to Block Fairness Doctrine*, BROADCASTING & CABLE, June 29, 2007, http://www.broadcastingcable.com/article/CA6456710.html (describing legislative developments related to reintroduction of the Fairness Doctrine); *see also* Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 845 (2008) (calling for the adoption of a new Fairness Doctrine).

140. For important critiques of the Fairness Doctrine, see, for example, BAKER, *supra* note 10, at 195–97; KRATTENMAKER & POWE, *supra* note 20, at 237–75; LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 108–20 (1987); Henry Geller, *Broadcasting and the Public Trustee Notion: A Failed Promise*, 10 HARV. J.L. & PUB. POL'Y 87 (1987); Thomas W. Hazlett, *Physical Scarcity*, *supra* note 20, at 933–39; Krattenmaker & Powe, *The Fairness Doctrine Today*, *supra* note 87, at 151–52; Yoo, *supra* note 20; *see also* Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (assessing the effects of the abolition of the Fairness Doctrine). *But see* Patricia Aufderheide, *After the Fairness Doctrine: Controversial Broadcast Programming and the Public Interest*, 40 J. COMM. 47, 68 (1990) (finding that the Fairness Doctrine did not cause a chilling effect and that broadcasters during the Fairness Doctrine years provided more balanced commentary than after the Fairness Doctrine's demise).

141. *E.g.*, THE MEDIA INSTITUTE, RATIONALES AND RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed. 1997); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 48 (abr. student ed. 1965); KRATTENMAKER & POWE, *supra* note 20; BERNARD SCHWARTZ, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY Vol. 4, 2374 (1973); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcasting Must Fail*, 95 MICH. L. REV. 2101 (1997); Robinson, *supra* note 20; Varona, *Changing Channels*, *supra* note 9, at 18–26. *See generally* Hazlett, *Physical Scarcity*, *supra* note 20, at 991; Hazlett, *All Broadcast Regulation Politics Are Local*, *supra* note 42.

far as to express doubt about whether the FCC could *ever* effectively regulate in the public interest.[142]

This Essay does not propose a defense of the FCC's attempts to regulate broadcast content in the past: "The rules struck down or diminished had hardly been a model of the public sphere."[143] Critics are doubtless right that the Commission's historical reluctance to enforce its program rules has robbed the rules of their maximal power. They are also doubtless right that when the Commission does decide to step up its enforcement, as is evident in its current indecency initiatives, it can do so with disproportionate stringency. Certainly, much of the literature that criticizes the agency for its "revolving door" relationship with its regulated industries, for its party-line decisions, for its responsiveness to political pressure (from the Executive, Congress, and private lobbying groups), and for its timorousness in promoting innovation raises important questions about the wisdom of proposing a return to public interest content regulation.[144] So do the arguments that characterize the Commission as structurally, politically, and ideologically limited, inclined toward the mainstream, and hostile to more radical challenges.[145]

Despite the persuasiveness of these complaints, however, it is not clear that the Commission would inevitably fail if it experimented with different public interest goals and regulatory methods.[146] In any event, objections based on regulatory failure "presuppose elusive criteria [to assess performance], and the baseline question remains: Compared to what?"[147] Moreover, there remains the question of available choices. Promises that new technology—and the Internet in particular—will make extinct the need

142. As Henry Geller, media theorist and former FCC General Counsel, has recently put it, "[t]he lesson to be drawn from this [FCC] history is that behavioral content regulation is simply unworkable in this sensitive First Amendment area." Henry Geller, *Carl Ramey's* Mass Media Unleashed, 60 FED. COMM. L.J. 391, 392 (2008) (reviewing CARL R. RAMEY, MASS MEDIA UNLEASHED: HOW WASHINGTON POLICYMAKERS SHORTCHANGED THE AMERICAN PUBLIC (2007)). Similarly, Professor Varona, a speaker at this Symposium, has argued that there are three fundamental obstacles to effective FCC content regulation. *See* Varona, *Out of Thin Air*, *supra* note 7, at 163–72; *see also* Varona, *Changing Channels*, *supra* note 9, at 53–89.

143. PRICE, *supra* note 22, at 167. The agency's principles "were often meaningless and harassing, and enforcement was haphazard." *Id.*

144. *But see* CROLEY, *supra* note 16 (critiquing a public choice approach to the regulatory state).

145. BAKER, *supra* note 10, at 196–97; KRATTENMAKER, *supra* note 20.

146. *See, e.g.*, Candeub, *supra* note 10, at 1611 (explaining weaknesses of the FCC's justifications of the media ownership rule and calling for regulations to enhance news production); Sunstein, *supra* note 111. For a recent criticism of libertarian arguments against FCC public interest regulation, see, for example, Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007).

147. CROLEY, *supra* note 16, at 297.

for public interest regulation to promote the public sphere are overstated.[148] The plethora of communicative conduits available today has not in fact led to a flourishing of traditional professional journalism. If technology does not erase the need for attention to the public sphere, and if market structure often leads to an underproduction of serious news programming, then is it wise to reject from the outset an experiment with a different type of regulatory regime in the public interest attuned to those concerns?[149]

A final observation about where we find ourselves. Administrative agencies have predictable incentives to maintain and even increase power. The past several years of FCC activity have shown that both Congress and the Commission understandably seem reluctant to give up the discretion granted the agency by the public interest standard in the communications acts. It may be that the Commission is now politicized to such a degree that it would reverse its regulatory stance if the object of regulation were to be switched to something other than the child protection initiatives favored by social conservatives. On the other hand, the agency's regulatory direction could presumably be influenced by other constituencies as well. Just as the early broadcasters asked to be subject to government regulation in order to protect themselves from ruinous interference,[150] industry views on the kinds of regulation proposed in this Essay are likely to influence the Commission's direction. Moreover, at least some members of the Commission have sought to expand the agency's regulatory footprint in order to promote diversity of viewpoints.[151] A change in presidential

148. *See, e.g.*, BAKER, *supra* note 10, at 88–123. For another dystopian view of the impact of the Internet on community, see CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2007)

149. I admit to a number of contestable assumptions imbedded in and questions raised by this proposition. For example, what constitutes "serious" journalism? How do we know that there has been an "underproduction" of such journalism in the mainstream electronic media? Is it not true that regulatory "experiments" often serve either as opportunities for the exercise of discretionary government power against preferred targets or threats in regulatory negotiations?

In addition, theorists have argued that alternatives exist to content regulation in the public interest by the FCC. *See, e.g.*, Hazlett, *Physical Scarcity*, *supra* note 20. Some who do not call for spectrum propertization suggest abandoning FCC content regulation of commercial broadcasters and replacing current regulation with various subsidy proposals whereby commercial broadcasters would be assessed spectrum usage fees or otherwise fund public broadcasting or Internet access. *See, e.g.*, Henry Geller, *Promoting the Public Interest in the Digital Era*, 55 FED. COMM. L.J. 515 (2003); Varona, *Out of Thin Air*, *supra* note 7, at 186–90. This Essay does not address those options, except to note that public broadcasting itself would not resolve the problems identified above and that the inquiry proposed here is not inconsistent with funding-based attempts to enhance public broadcasting and Internet access. So long as the mass electronic media are still most people's preferred media for news, I believe it is worthwhile to explore whether the Commission can help promote journalistic activities and news and public affairs programming by broadcast outlets.

150. Hazlett, *Physical Scarcity*, *supra* note 20, at 931.

151. Commissioners Copps and Adelstein, for example, have argued in favor of more

administration could also influence the Commission's commitments.[152] At least in one reading of broadcast history, the current Commission is engaging in aggressive attempts to structure both an economically deregulated marketplace and a speech environment whose boundaries are set by an agency representing the views of only one segment of the public while purporting to do nothing more than protect children. We are currently in uncertain times with respect to media policy, but the Commission is unlikely to fold its regulatory tent in the near future.

IV. A PROPOSED DIRECTION FOR FUTURE PUBLIC INTEREST PROGRAMMING: PROMOTING JOURNALISM

Assuming that the Commission's regulatory bent will continue at least for the near term, and keeping in mind the critiques catalogued above of current regulatory targets, it is useful to address whether the history of broadcast regulation suggests seeds of a different way to look at the public interest today.[153] This Essay proposes that if the Commission is to continue attempting to regulate in the public interest, it should redirect its attention in two ways.

First, the agency should shift its content focus from indecency and children's programming back to the broader issue of the public sphere. Specifically, the Commission should turn its attention to the need to shore up journalistic values in the electronic press today, as this is a crucial problem besetting the public sphere.[154] We currently face far greater

---

stringent regulation in the public interest. *See, e.g.*, Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n, Stuck in the Mud: Time to Move an Agenda to Protect America's Children, Remarks Before the Media Institute 1 (June 11, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282885A1.pdf (arguing that the FCC needs to play a more effective and productive role to help parents insulate their children from indecent and profane programming); Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n, Remarks at National Conference on Media Reform 1 (June 8, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282800A1.pdf (discussing the problems of unregulated media); Michael J. Copps, Comm'r, Fed. Commc'ns Comm'n, Remarks at National Conference on Media Reform 1 (June 7, 2008) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282821A1.pdf (charging that it is time to put the FCC "back on the beat").

152. Ira Teinowitz, *Candidates' Differences on Media Outlined*, TV WEEK, July 23, 2008, *available at* http://www.tvweek.com/news/2008/07/candidates_differences_on_medi.php (discussing potential policy changes that may result from the election of either Barack Obama or John McCain as President).

153. This discussion does not address those critiques of public interest regulation that would dispense with it entirely. Rather, it deals with what we currently have in place and whether a change in focus would be desirable. It is beyond the scope of this Essay to suggest and evaluate particular initiatives.

154. Other scholars as well have discussed the importance of promoting independent journalism. *See, e.g.*, BAKER, *supra* note 10, at 33–48; Candeub, *supra* note 10, at 1551 (focusing on amount of news produced); Magarian, *supra* note 139; *see also* Sullivan, *supra*

challenges with respect to journalistic commitments and professionalism in the electronic media than the social concerns posed by fleeting expletives on the air or the fact that more children's educational television can be found on public broadcasting and cable than on the networks.

Second, the Commission should reject direct content prohibitions for all the reasons that have been amply ventilated in the Fairness Doctrine and indecency debates, and instead look to more elastic, regulatorily flexible ways of promoting its desired outcomes. In other words, it should focus on the possibilities of fee- or incentive-based regulation[155]—the carrot rather than the stick—and structure[156] rather than content as regulatory approaches.[157]

---

note 22, at 1664–66 (discussing the assumptions about journalistic professional judgments that might underlie First Amendment rights granted by the Court to speech intermediaries).

155. For a discussion of incentive-based communications regulation for the production of programming likely to be underproduced by the market, see Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1391–92, 1461–65 (2004) ("The use of subsidies, in the form of cash or non-cash incentives, permits government to pursue media political goals across all media and with far less formidable First Amendment constraints."). Others have suggested that the Commission impose spectrum fees on broadcasters and use such fees to promote, *inter alia*, public broadcasting. *E.g.*, Henry Geller, *Promoting the Public Interest*, *supra* note 149, at 518. I too have argued for an indirect regulatory approach in a prior article, proposing

> (1) structural regulations designed to promote journalistic values; (2) a requirement that broadcasters spend a certain percentage of their gross advertising revenues on news and public affairs production and programming; (3) different options for constructing a requirement that broadcasters devote a percentage of their advertising time to advocacy advertising, for which they would be allowed to be paid a premium over their ordinary commercial rates; and (4) audience empowerment, including disclosure-oriented requirements designed to foster audience activism and strategies to engage an audience whose attention is claimed by an unprecedented abundance of content.

Levi, *supra* note 12, at 1324; *see also id.* at 1370–71.

156. On the connection between journalism and media concentration, see BAKER, *supra* note 10. The overarching argument of *Media Concentration and Democracy* is roughly that deconcentration of ownership promotes democracy not only in itself, but also to the extent that it minimizes the possibility of demagogic power and enhances the likelihood of resources' being devoted to improved journalism and the press's watchdog role.

157. There are various stories, with different emphases, that can be told about the history of the FCC's past regulation of programming in the public interest. One is the story of the political developments underlying agency action. *See supra* note 88 and accompanying text. Another is the administrative state story, which focuses on the relationship between regulatory agency, regulated industries, and the courts, and which reads administrative law as developing from shifts in the courts' visions of the legitimacy of pluralist accounts of politics. *See, e.g.*, Schiller, *Enlarging the Administrative Polity*, *supra* note 95. Yet another is the regulatory approach story, about command-and-control regulation and its alternatives as possible approaches to effective regulation. From explorations of public–private governance models to models of responsive regulation and the "co-regulatory" media initiatives of the EU, scholarly, legislative, and institutional imaginations have been captured by alternatives to "command-and-control" regulation. Outside the media area, the past decade has seen a profusion of "third way" literature that touts public–private regulatory modalities as viable alternatives to traditional command-and-

If we believe that good, serious, professional, independent journalism is an important component of working democracy, it is important to continually measure how well journalistic organs are fulfilling their democracy-enhancing roles.[158] Evidence today casts doubt on both the effectiveness and the credibility of current news purveyors.[159] Modern journalism takes place in an environment of consolidation, hypercommercialization, personalized and targeted advertising (and attendant programming), a polarized, entertainment-driven modern news culture, and attention scarcity. Journalists work in consolidated corporate environments in which media interests are only one slice of the ownership pie, in which shareholder profits are increasingly fetishized, in which advertising is increasingly personalized and targeted, and in which discourse is defined by entertaining extremes.[160] Despite utopian expectations, the alternative media—noncommercial news sources, blogs,

control regulation. *E.g.*, ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY (1998); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547–49 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371–404 (2004); Cass R. Sunstein, *A New Progressivism*, 17 STAN. L. & POL'Y REV. 197, 199–200 (2006). The FCC, in adopting its children's educational television rules in 1996, could be said to have quietly flirted with a fledgling experiment in "third way" public–private governance. Levi, *supra* note 12, at 1338–42. Previously, the agency's reliance on broadcaster self-regulation can be interpreted as an underanalyzed version of the same. It may be that the Commission's history of command without control and the unnoticed passing of its flirtation with a "pay or play" children's television regulatory model suggest that such experiments are unlikely to be successful, and that politics will derail alternatives to classic regulation in media, as some critics would argue. Surely agency capture is a more complex phenomenon when an agency regulates numerous different and competing industries. Politics too is more complex when many powerful parties are involved, creating counterweights to one another. Well-crafted structural regulations and incentive-based rule options are also less likely to trigger judicial concern than did the closed and incumbent-favoring processes of the 1970s FCC.

158. There are of course different views of what constitutes "good" and even "independent" journalism. Different views of journalism can also be matched with different theories of democracy, and therefore one's view of the right social order will influence the types of journalistic norms one promotes. *See* C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 320–48 (1998) (describing the elitist, liberal pluralist, and republican forms of democracy, and associated media). I do not mean to engage those questions in this Essay, however. My principal points are that (1) at the very moment that the FCC is busy stamping out fleeting expletives on broadcast channels during the day, *any* view of democracy-enhancing journalism is being challenged by economic and social developments; (2) one must be vigilant in assessing journalism on an ongoing basis; and (3) it is conceivable (although, of course, far from certain given its history) that the FCC could help the journalistic efforts of the electronic mass media. For a similar view that the FCC can properly regulate to increase news, see Candeub, *supra* note 10.

159. PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 2.

160. *See* Levi, *A New Model*, *supra* note 3 and sources cited therein. *See generally* PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 2 (discussing the challenges of developing a new business model for news media).

and citizen journalists—do not displace the traditional mass media.[161] There is much to be said for a credible mainstream in electronic media journalism.[162] Therefore, it is critical to incubate counterforces to the developments that are undermining conventional professional press norms.[163]

The proposed shift of the FCC's attention to the broadcaster's press responsibilities is responsive to modern concerns about the preconditions for democracy and consistent with the Supreme Court's recognition of broadcast licensees as journalists. It is true that the Court in *Red Lion* did not particularly focus on broadcasters as members of the press engaging in journalistic activity.[164] However, despite the *Red Lion* Court's explicit rhetoric about broadcasters as licensees rather than journalists, its assertion that Congress could limit licensees' freedom to engage in purely commercial behavior is consistent with (and perhaps an invitation to) a view of stations as engaging in journalism. After all, the Fairness Doctrine

---

161. *See* PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 2.

162. Historically, CBS distinguished itself from its competitors ABC and NBC by establishing a reputation as the Tiffany network. *See* Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More Than Three Decades After Tornillo*, 4 FIRST AMEND. L. REV. 9, 16 (2005). All three networks had news divisions; however,

> Broadcasters through most of the period since 1934 responded to this perception of a public interest affecting their business by occasionally trying to act like journalists. The presence of a money-losing news department dignified a television network. It was taken to constitute some sort of guarantee that the network understood its own importance, and intended to respond benevolently to those who were dependent on it. Privilege began *noblesse oblige*.

Moglen, *supra* note 23, at 951 (citation omitted). Although the current mass television media environment is far different from the oligopolistic universe of the big three television networks, query whether the profusion of possible options to capture the audience's attention could not generate a renewed effort for brand identity. If so, then is there any way the FCC can help promote a "market for credibility" within the mass media so that at least some of the corporate media outlets perceive credible journalism as an economic plus and seek to brand themselves as the reliable news source?

163. *Cf.* Magarian, *supra* note 139 (arguing for a revival of a new version of the Fairness Doctrine and calling for FCC rules "that would fortify journalistic ethical norms of public service against interference by media owners and advertisers"). Professor Candeub has argued in a parallel vein that the Commission should use the regulation of market structure to enhance the amount of news produced and thereby aid the public in monitoring its government. *See generally* Candeub, *supra* note 10.

164. In 1967, Professor Harry Kalven, Jr. opined that "[o]ne of the genuinely interesting issues raised when we attempt to apply a First Amendment analysis to broadcasting is what difference it makes that broadcasting has been essentially an entertainment medium." Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J. L. & ECON. 15, 28 (1967). Perhaps the *Red Lion* Court too was captured by that view of broadcasters—they were not principally speakers, but conduits for entertainment and others' speech. *See also* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 72–73 (1991) (noting *Red Lion*'s description of broadcasters as licensees and monopolies rather than as journalists or press organs).

was intended to induce coverage of public issues and to promote norms of balance—and perhaps even "objective journalism" in the electronic medium.[165] The contrast highlighted in *Red Lion* was the right of the public to hear and the right of the licensee to speak its personal economic interest. But the right of the listener can be exercised both with access systems and with the professional norms of journalism. The Court's constitutional acceptance of the Fairness Doctrine is not inconsistent with different available views of broadcasters, including the journalistic view, if that is the rule adopted by the FCC.

Moreover, cases after *Red Lion* have emphasized the broadcaster's role as press—even when, as in *Arkansas Educational Television Network v. Forbes*, the licensee was a government rather than private speaker, the Court upheld the station's editorial discretion to exclude a candidate from a televised debate.[166] In *CBS, Inc. v. Democratic National Committee*[167] (which rejected a general First Amendment right of access to the air for editorial advertising) we can discern the Court's interest in promoting the journalistic role of the broadcast licensee. There, the Court said the following:

> [I]t seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.[168]

---

165. One could argue that the reading in text conflicts with the Supreme Court's interpretation of what the First Amendment protects in the press in *Miami Herald Publishing Co. v. Tornillo*, which struck down a right-of-reply statute for newspapers. 418 U.S. 241 (1974). After all, the *Tornillo* Court emphasized editorial freedom, and the Fairness Doctrine enabled by the *Red Lion* Court seems to co-opt that editorial discretion. The two cases do appear to take different positions on the balance of First Amendment interests and differ in their degree of deference to the legislature. But first there are those who would argue for a broadly interpreted *Red Lion* as the right approach to the First Amendment, rather than the excessively autonomy-focused *Tornillo*. *E.g.*, Baker, Turner Broadcasting, *supra* note 24. Moreover, Professor Baker has characterized *Tornillo* as a classic case in which the First Amendment precluded punishment for choosing to speak, rather than as an acontextual adoption of absolute editorial autonomy as the key theme of the First Amendment. *See* Baker, *Media Concentration*, *supra* note 24, at 852 n.81; Baker, *The Media That Citizens Need*, *supra* note 158 at 399; Baker, Turner Broadcasting, *supra* note 24, at 111–14. In addition, there is arguably a fundamental difference between the access available to speakers in the print as opposed to the broadcast context. In *Tornillo*, the Court could reasonably emphasize the editorial freedom of newspapers as the fundamental First Amendment value because there was still generalized, unlicensed access to newsprint and the public streets. Broadcasting, by contrast, created monopoly licensees selected by the government and precluded generalized access for fear of chaos.

166. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

167. 412 U.S. 94 (1973).

168. *Id.* at 110. While *Red Lion* found the Fairness Doctrine to be constitutionally permissible, *CBS, Inc. v. Democratic National Committee* held that the First Amendment did not mandate a general right of access to the electronic press. Rather, the majority relied

In *CBS, Inc. v. FCC*, even though the Court affirmed the constitutionality of a limited right of access to broadcasters for federal political candidates, the Court reaffirmed that Congress had conferred on broadcasters "the widest journalistic freedom consistent with their public duties."[169]

This raises the following question: what, if anything, could the Commission do to promote increases in the amount and quality of journalistic programming on radio and television?[170] This Essay does not seek to make specific suggestions. It does warn against an automatic continuation of historical forms of command-and-control content regulation (such as the Fairness Doctrine)—not only because of free expression concerns, but also because the history of such FCC regulation is best described as command-without-control. Modestly, it suggests an inquiry on the part of the Commission into how a regulatory approach that promotes electronic journalism can be designed most consistently with even a libertarian view of First Amendment doctrine. The inquiry could be a springboard to a broad debate about our vision of the best use of mass media today.

---

on the Fairness Doctrine to ensure sufficient balance in programming, and although the Court in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), found permissible the statutory right of access granted to federal candidates for political advertising under § 312(a)(7), such access rights were limited to a particular context and did not undermine the general role of the licensee as a press organ. The access rights were for federal candidates to buy advertising time, and did not hinge on any speech decision by the broadcaster. Moreover, the majority in *CBS, Inc. v. FCC* made clear that the right of access would be interpreted by the FCC primarily as an injunction against blanket prohibitions of time sales to federal candidates and a requirement of individual negotiation. *Id.* at 388–89, 396–97.

169. CBS, Inc. FCC, 453 U.S., at 395 (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (characterizing the Communications Act as recognizing journalistic discretion).

170. For a similar suggestion in a broader discussion of media reform, see Levi, *In Search of Regulatory Equilibrium*, *supra* note 12. It is not the purpose of this Essay to make microregulatory suggestions about future public interest regulation by the Commission. In a thoughtful recent article, Professor Candeub articulates a similar point:

> Rather than protect the number of "media voices," the FCC should protect the essential function the media serves in a democracy—to minimize the difficulties citizens face in monitoring government. . . . Media regulation should create ownership structures that maximize the amount of political news, making it easier for citizens to monitor government. . . . Media regulation must encourage industry structures that maximize news output. Research about the effects of industry ownership and geographic structure on the content of political news and political activity could guide this regulation. Setting media structure to maximize news output creates private incentive for certain types of media production but avoids government's direct involvement in content decisions. Even as current media structures shift, however, this Article argues the goal of maximizing political news output with minimal government oversight must guide regulation. With changing media industry structures, this maximization may involve using the tax exemption to encourage political reporting.

Candeub, *supra* note 10, at 1551, 1611.

CONCLUSION

This Essay has argued that the most useful lesson of *Red Lion* and subsequent Supreme Court cases about broadcast content regulation is that the Court is willing to defer to congressional and FCC decisions in the context of regulating the communications commons. In turn, the exercise of the Commission's discretion to regulate in the public interest has reflected several different views of the regulator's role. At one end of the regulatory spectrum, the Commission attempted to regulate content in order to create and cement a homogeneous national narrative. At the other extreme, the agency jettisoned community-building in favor of market-supportive attention to individual viewers' tastes. Currently, we live in an epoch of revived, targeted, but potentially expansive FCC regulatory activity regarding content. This Essay proposes that the Commission shift its focus from the purported protection of children to the protection of the public sphere—a goal it has recognized as central to democracy since the inception of radio regulation.

The protection of the public sphere is a tall order, however. When the Commission has set itself the task of promoting a rich public sphere via command-and-control content regulations, its work has been roundly criticized as an abject failure by First Amendment analysts of all theoretical schools. One option that has garnered praise is for the Commission to retire from the business of regulating to promote the public interest in any sense beyond the technical. The contrary possibility is that the agency should revive its traditional content regulations such as the Fairness Doctrine in order to improve public debate. A third alternative—proposed in this Essay—is for the agency to reframe its understanding of public interest regulation. Such reframing would entail exploration of possible structural regulations to promote independent journalism, and investigations of incentive- or fee-based content regulations to support that goal. In view of the critical reduction of resources committed to professional journalism in today's mass media, the extraordinary fragmentation of audience attention enabled by current technology, and the still-unique ability of "old" electronic media to serve as a universal conduit of information and news for the entire public, modern media policy would be well served if the FCC commenced a serious inquiry into the viability of FCC interventions to enhance the journalistic activities of the electronic media.

* * *

KEYNOTE ADDRESS: THREE CHEERS FOR *RED LION*

C. EDWIN BAKER*

Thank you. It is a distinct pleasure to be back in D.C. at a great school to talk about a great Supreme Court decision. I apologize for my comments' amounting to merely a case comment—my general view is that media policy should be examined from the perspective of democratic and economic theory. The occasion of this conference, however, calls for some more specific remarks about *Red Lion*.[1]

My title "Three Cheers for *Red Lion*," however, requires comment. The last time I was in D.C., I was at a conference honoring Jerome Barron,[2] possibly the greatest scholar in this area over the last fifty years. There, I criticized the Fairness Doctrine, for which *Red Lion* is most known, as a disaster for progressive media law—as an ideologically biased, centrist, ineffectual, censorious policy.[3] That critique leaves the question: Why the title of this talk, "Three Cheers for *Red Lion*"?[4]

My claim is that Justice White's opinion in *Red Lion* merits great respect for making three absolutely essential points (hence three cheers) that are regularly ignored by legal commentators and often even by the Court. Namely, *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.

Preliminarily, however, a point that *Red Lion* has in common with most

* Nicholas F. Gallicchio Professor of Law, University of Pennsylvania.

1. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

2. *Access to the Media—1967 to 2007 and Beyond: A Symposium Honoring Jerome A. Barron's Path-Breaking Article, Introductory Remarks by the Honorable Stephen G. Breyer*, 76 GEO. WASH. L. REV. 819 (2008).

3. *See* C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 195–97 (2007) (detailing a version of these criticisms).

4. *See generally* C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (elaborating more fully and contextualizing the themes discussed in this talk).

great First Amendment cases merits notice. *Red Lion* did not apply strict scrutiny. In fact, it did not apply any announced level of scrutiny to evaluate the government action at issue. But contrary to common modern misreadings, the same is true of the great cases in the First Amendment canon: for example, *West Virginia Board of Education v. Barnette*,[5] *Brandenburg v. Ohio*,[6] *New York Times Co. v. Sullivan*,[7] as well as other landmark cases such as *Miami Herald Publishing Co. v. Tornillo*,[8] *Roth v. United States*,[9] *Hustler Magazine, Inc. v. Falwell*,[10] and more.[11] In these cases, the Court did not—as required by scrutiny review—evaluate the importance of the state interest supporting the regulation and then check whether the regulation was necessary for (or even related to) achieving that interest. Such an analysis would in many of the cases—surely in *Brandenburg* and *New York Times Co. v. Sullivan*—have led to upholding the law and diminishing the First Amendment. Rather, the Court's reasoning aimed to determine whether the rationale of the First Amendment covered the speech at issue. Depending *only* on its answer to this question, the Court did or did not affirm or reject the First Amendment claim.[12] This is precisely the style of reasoning that the Court properly employed in *Red Lion.*

Now to the three cheers. The first is for correctly identifying the properly central constitutional principle for media law. The Court said, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[13]

Let us pause over this first cheer. Justice White here highlights the value at the heart of the constitutionally proper difference between the Press and the Speech Clauses of the First Amendment. As for speech, an individual's freedom of expression should be, as Brennan says, virtually "inviolate."[14]

---

5. 319 U.S. 624 (1943).
6. 395 U.S. 444 (1969).
7. 376 U.S. 254 (1964).
8. 418 U.S. 241 (1974).
9. 354 U.S. 476 (1957).
10. 485 U.S. 46 (1988).
11. *See generally* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979 (1997) (developing this point further).
12. When Justice Brennan eventually changed his view about whether obscenity could be limited under the First Amendment, he also changed from subscribing to the marketplace of ideas rationale that he invoked in *Roth* to a liberty and autonomy view in *Paris Adult*. *Compare Roth*, 354 U.S. at 484–85 (protecting "all ideas," even "hateful" ideas "to assure unfettered interchange of ideas," presumably as a "step to truth") (citation omitted), *with* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 85–86 n.9 (1973) (Brennan, J., dissenting) (recognizing an autonomy or liberty basis to receive obscenity).
13. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).
14. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585 (1980) (Brennan, J., concurring). The often-quoted language about "the need to preserve inviolate the constitutional rights" originated in *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). This

The idea of an inviolate freedom cannot apply to a corporate or institutional entity, which provides the most common form of the "press." Should corporate law take one or another form by creating one or another type of entity? When in conflict, is it the editor, journalist, or owner whose speech choice should prevail—should be inviolate? In the context of *Tornillo*, the Court suggested it may be the editor's—but more fundamentally, that conclusion and many others about the organization, structure, and authority of these institutions can only be determined by positive law, not by a simple invocation of inviolate liberty.[15] More importantly, the constitutional role of the press is different from the Speech Clause's proper recognition that the legitimacy of a constitutional democracy depends on not abridging individual liberty. Rather, like any institution, the press should be valued only instrumentally for its possible service to human interests. It became the one business to receive constitutional protection because of the ways that press freedom serves the public generally and democracy in particular. Thus, in *Red Lion*, Justice White appropriately says, "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[16]

Now for the second cheer. Though controversial, I believe a careful examination shows that *Red Lion* is fundamentally a general media law case—*a press case*, not a broadcast case. My evidence here is variable and may be weaker, but I believe it is clear. Prominently, Justice White relied most heavily for the Court's holding in *Red Lion* on a principle from a case (cited three times) involving newspapers, namely *Associated Press v. United States*.[17] In *Red Lion*, the FCC limited the speech power of one private actor, the broadcaster, in favor of other voices. Doing this is exactly what *Associated Press* says can serve the First Amendment and should be upheld when done. Thus, according to Justice White, "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."[18] And for this proposition, he cites identical reasoning in *Associated Press*. Justice White then again cites and now paraphrases *Associated Press*, saying, "It is the purpose of the First Amendment to preserve an

language is often used to distinguish between overt limitations on speech (or the right to assembly) and laws that in some way burden or make less effective these rights.

15. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment.").

16. *Red Lion*, 395 U.S. at 390.

17. 326 U.S. 1 (1945).

18. *Red Lion*, 395 U.S. at 387.

uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[19] Finally, he later directly quotes *Associated Press*: "'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'"[20]

The point is that these two cases, the first from the print arena and the second from the broadcast arena, present the same problem: the power of corporate media to restrict other voices. And the Court reached the same result: it upheld the government policy response that favored other voices, the weaker voice, and that limited corporate media control. Most important for the current discussion, the second case—the broadcast case—relied on already-established analysis from a print media case for both its First Amendment reasoning and its holding. That is, *Red Lion* is, at its core, a media law—not broadcast law—case.

Again, let us pause over this second cheer. I believe these aspects show that *Red Lion* represents not a secondary press law tradition properly limited to broadcasting but is central to the proper meaning of the Press Clause. What the case did so importantly was to recognize the government's power to engage in structural regulation of the media. The Court recognized the government's authority to allocate expressive opportunities to better serve the government's (reasonable) vision of a free and open democratic communications order.

I *challenge you* to identify any Supreme Court precedent that limits this power to engage in structural regulation of the media. Often cited is *Miami Herald Publishing Co. v. Tornillo*—but that assertion can no longer be sustained. The Court there offered two theories of what was wrong with the right-to-reply law: that it interfered with editorial autonomy or amounted to a penalty on—or deterrence of—the paper's speech criticizing a candidate. The first objective is to protect editorial autonomy, the second to protect against content-based censorship. In *Turner Broadcasting System, Inc. v. FCC*,[21] the must-carry rules interfered with the editorial discretion of the cable operators and, therefore, would be clearly invalid if *Tornillo*'s first rationale applied. You might reasonably reject this application if you deny that cable operators merit the journalistic title of editors. But the Court took a different route—namely, it accepted cable as part of the press, but it read *Tornillo* as not protecting editorial control but only as involving the problem of being a content-based penalty on speech

19. *Id.* at 390 (citations omitted).
20. *Id.* at 392 (quoting *Associated Press*, 326 U.S. at 20).
21. 512 U.S. 622 (1994).

criticizing candidates.[22] Thus, the Court explained,

> [t]he right-of-reply statute at issue in *Tornillo* . . . imposed an impermissible content-based burden on newspaper speech. Because the right of access at issue in *Tornillo* was triggered only when a newspaper elected to print matter critical of political candidates, it "exact[ed] a penalty on the basis of . . . content.[23]

The Court went on to say that "*Tornillo* . . . do[es] not control this case for the following reasons. First, unlike the access rules struck down in those cases, the must-carry rules are content-neutral in application. They are not activated by any particular message spoken by cable operators and thus exact no content-based penalty."[24] Thus, as limited under current law, especially by *Turner*, *Tornillo* involves impermissible censorship—punishing content—not permissible structural regulation to favor a wider distribution of speech opportunities.

The only tension between the results in *Tornillo* and *Red Lion* is whether the impermissible penalty or deterrence should be identified abstractly or empirically. Justice White in *Red Lion* agreed that, if facts show the deterrence that the Court predicted in *Tornillo*, the Fairness Doctrine could be reconsidered and might be impermissible. On this empirical issue, other democratic countries in Europe have apparently found that right-of-reply requirements do not significantly impede press performance. In my view, given the business need of papers to continue to provide news and their capacity to benefit from controversy in contrast to broadcasters, which, as largely entertainment media, desire to avoid outsider interference with scheduling flows, the obvious prediction is the reverse of the Court's: deterrence would more likely be a problem in broadcasting than print. But I put aside this empirical question that has little implication for structural regulation as opposed to whether right-to-reply laws deter critical

---

22. The Court actually gave multiple grounds for its distinction, including an ill-advised (because it is subject to technological reevaluation) argument based on the cable system's bottleneck control over access to television programming. *See id.* at 656.

23. *Id*. at 653 (citation omitted). The Court made the point repeatedly within the opinion, maybe out of fear that the point would not be clear. For example, about *Tornillo*, the Court said,

> We explained that, in practical effect, Florida's right-of-reply statute would deter newspapers from speaking in unfavorable terms about political candidates: "Faced with the penalties . . . editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced."

Id. (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974). The Court also relied on its paraphrase of *Associated Press* to justify structural regulation: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner*, 512 U.S. at 657 (citing *Associated Press*, 326 U.S. at 20 (1945)).

24. *Turner*, 512 U.S. at 655 (citation omitted).

commentary.

Still, this second cheer for *Red Lion* is dampened slightly by what I consider Justice White's one unfortunate misstep. He paraphrased *Joseph Burstyn, Inc. v. Wilson*,[25] a 1952 case involving motion pictures, to say: "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."[26] The problem is that White did not continue with the next sentence from *Burstyn*: "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."[27] If he had added this point, he would have made clear that, though the government in its regulatory activities can distinguish different media,[28] the principles—for example, the principles involved in *Red Lion*—apply to all media.[29]

The third cheer for White's opinion is that he developed an economically sophisticated justification for regulation that, at bottom, applies to all media, rather than the economically dumb point about scarcity that his critics often attribute to him. When asked the basis of *Red Lion*, the invariable reply is "scarcity"—and, given this reply, the opinion is then ridiculed, especially by economists. Most goods are scarce, these economists assert, if offered for free. There are not enough BMWs to supply demand if both the car (and now the gasoline needed to drive one) were given away free. I might even want several. Markets eliminate this scarcity, however, by creating an approximate balance between supply and demand at the market clearing price.

An unexamined scarcity is not, however, the story that *Red Lion* told. Admittedly, the decision does contain considerable language suggesting this possible characterization—and even the Court has subsequently run with it. But in fact the key word in the analysis was "chaos" and the story White told to justify regulation was a version of the more sophisticated image of the tragedy of the commons[30]—an argument that applies equally

25. 343 U.S. 495, 503 (1952).

26. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

27. *Burstyn*, 343 U.S. at 503.

28. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439, 453 (1991) (holding that different taxes can apply even to different entities in the same media category "unless the tax is directed at, or presents the danger of suppressing, particular ideas").

29. Clearly, this point applies to the need to use different techniques in different media to protect against exposure of children despite the constancy of the *Butler v. Michigan* principle that regulation on behalf of protecting children can never justify significant limits on adults' access to protected speech. *Compare* Butler v. Michigan, 352 U.S. 380, 383 (1957) (rejecting legislation that would effectively "reduce the adult population of Michigan to reading only what is fit for children"), *with* FCC v. Pacifica Found., 438 U.S. 726, 750 n.28 (1978) (declaring that the FCC did not violate the *Butler* principle by barring Carlin's indecent language during daytime radio shows).

30. *See* Garrett Hardin, The Tragedy of the Commons, 62 SCIENCE 1243 (1968) (discussing how the destruction of shared resources can occur when individuals act in their

to grazing land in the traditional account, or to the spectrum relied on by broadcasters, or even to the office space and printing presses and wood pulp relied on by print media. Thus, when White started his historical account, he wrote, "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos."[31] He observed that it was because of this "chaos" that the National Radio Conferences recommended adoption of a federal law to deal with the broadcast spectrum.[32]

What precisely is the chaos problem? White explained it in terms that are now familiar to us as a description of the tragedy of the commons. He observed, "[O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had . . . ."[33] And he continued, "It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934 . . . ."[34]

Of course, this is the same problem of grazing cattle in any tragedy-of-the-commons dilemma. A solution requires government action:[35] "[W]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."[36]

So what is the proper response to a tragedy of the commons? An ideologically driven or simply unsophisticated economist is likely to say "private property." *Wrong!* What is needed is government intervention. The intervention can take various forms of which private property is only one. Public ownership combined with public administration, queuing with time limits for each user, various sorts of rules of the road, and licensing to private users just begin a list of alternative devices that are sometimes used to handle the problem of the commons. Thus, unlike my imagined economist, Justice White noted various alternatives including giving a small time slot on a spectrum to anyone who wanted it. But some choice among alternatives must be made. As White clearly recognized, there ought to be policymaking discretion in making the choice.

Let us pause for a final time. Discretion is required in response to a

---

own self-interest).

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

32. *Id.* at 388.

33. *Id.*

34. *Id.* (citation omitted).

35. Under some circumstances, voluntary acceptance of custom can substitute for law to handle the problem. Justice White noted that this had been tried but had not worked in respect to broadcasting—rather the result had been "chaos." *Id.*

36. *Red Lion*, 395 U.S. at 376.

tragedy of the commons, but how should that discretion be exercised? In the end, it can only properly be made on the basis of values that government should try to serve. Here again, Justice White was at the top of his game. Rather than referring simply to something like efficiency that might be invoked today, White saw something more was at stake—the role of press in serving the interests of listeners and viewers, whose rights are paramount. White accepted the obvious propriety of the government's relying on this standard in formulating its response.

Thus, we should take note of the following: First, the tragedy of the commons applies more generally to justify government intervention whether it takes the form of licenses, private property, contract, or corporate law. That is, the government always intervenes structurally in the media context and all media depend on these interventions. Second, *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. Third, the best intervention can hardly be determined abstractly and will inevitably be controversial. Thus, Justice White was wise enough to recognize that the government should have a choice as to the solution—any reasonable policy choice in allocating the means for effective communication among private parties should be acceptable if guided by appropriate values.

RED LION CONFUSIONS

MARK LLOYD*

TABLE OF CONTENTS

INTRODUCTION

On June 9, 1969, the Supreme Court decided *Red Lion Broadcasting Co. v. FCC*.[1] The Court's ruling upheld the decision of the United States Court of Appeals for the District of Columbia Circuit, that affirmed a Federal Communications Commission (FCC) order that required a Pennsylvania radio station to provide time for Fred J. Cook to respond to a personal attack. It also reversed an order of the Court of Appeals for the Seventh Circuit, that affirmed the FCC's promulgation of regulations under the Fairness Doctrine. Associate Justice Byron White wrote the unanimous decision, which contained no concurring opinions. In an era where bare majorities seem to be the norm for Supreme Court rulings and all Justices need to have their say, it may be difficult to understand how a unanimous and generally well-written decision could become so disputed.

The core holding of *Red Lion* is hardly controversial. Restated simply, the First Amendment requires a balancing of the rights of the private speaker with the rights of the public listener, and when government

* Mark Lloyd is an affiliate professor of public policy at Georgetown University. An Emmy Award-winning broadcaster and communications attorney, he is the author of PROLOGUE TO A FARCE: COMMUNICATION AND DEMOCRACY IN AMERICA (2007). He is a graduate of the University of Michigan and the Georgetown University Law Center.

1. 395 U.S. 367 (1969).

licensing of public property to speak is at issue, the rights of the public are paramount.[2]

The mess the broadcasting lobby made of this fairly straightforward proposition demonstrates the ability of broadcasters to warp the public debate. There are now at least three confusions surrounding *Red Lion*.

The first confusion is in the belief that *Red Lion* represented a stark break in First Amendment jurisprudence—that the Supreme Court of Earl Warren foisted a radically warped interpretation of free-speech rights upon the country, thereby sullying the place of honor accorded to the First Amendment as the very first item listed in the Bill of Rights.[3] The second confusion is that the Supreme Court in *Red Lion* approved FCC oversight over licensees because of a misunderstanding of the physical nature of the spectrum or because of a warped view of economics.[4] The third misunderstanding regarding *Red Lion* is that it unleashed the FCC to overburden poor, struggling broadcasters with unnecessary regulation—particularly the supposedly onerous Fairness Doctrine.[5] These arguments about *Red Lion* are nonsensical and ahistoric. They can be advanced only by ignoring the clear language of the case, the history of broadcast regulation, and the rather ignoble record of First Amendment jurisprudence.

I. CONFUSION ONE: *RED LION* VIOLATES THE FIRST AMENDMENT

The first confusion—that the decision in *Red Lion* departs from the First Amendment protection against government abridgement of speech—is less about an actual misunderstanding of *Red Lion* and more about a too-rosy view of free speech jurisprudence.

The modern notions of a right to free speech and free press were not established until the beginning of the twentieth century; even then, early First Amendment jurisprudence was discouraging for advocates of free

2. *Id.* at 390.

3. *See generally* Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15 (1967) (providing an overview of the interrelationship between the traditions of the First Amendment and broadcasting).

4. *See generally* JOHN W. BERRESFORD, FED. COMMC'NS COMM'N, MEDIA BUREAU STAFF RESEARCH PAPER NO. 2005-2, THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING: AN IDEA WHOSE TIME HAS PASSED (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf [hereinafter BERRESFORD] (stating that the Court reaffirmed *Red Lion* because it believed there was a limited number of frequencies).

5. *See generally* James Gattuso, *Back to Muzak? Congress and the Un-Fairness Doctrine*, THE HERITAGE FOUNDATION WEBMEMO NO. 1472, 1–2 (May 23, 2007), http://www.heritage.org/research/regulation/upload/wm_1472.pdf (describing how broadcasters and station managers faced Fairness Doctrine challenges, which were costly even if the challenges failed in the end).

speech. For example, Thomas Patterson, a United States Senator and newspaper publisher in Colorado, was charged with criminal contempt for criticizing a court decision that reversed a Denver election. In *Patterson v. Colorado*,[6] the Supreme Court upheld the state court's ruling against Patterson. Writing for the majority, Oliver Wendell Holmes ruled that the First Amendment does not limit punishment to only false speech.[7]

In a later Holmes opinion, *Fox v. Washington*,[8] the Court upheld the conviction of a writer who had endorsed a boycott of opponents of nude bathing. Again in 1919, Holmes wrote for a unanimous Court in *Schenck v. United States*,[9] ruling that it was illegal to distribute fliers opposing the draft during World War I because, as Holmes put it, Charles Schenck's leaflet was akin to "falsely shouting fire in a theatre and causing a panic" and was thus "a clear and present danger" to the public.[10] As a number of scholars have noted, Holmes's analogy was dramatic but misleading because Schenck's speech was more like telling people outside the theatre not to go in because there was a fire inside.[11]

Yet, the same year he decided *Schenck*, Holmes also issued his famous dissent that many consider the birth of modern free speech jurisprudence. In *Abrams v. United States*,[12] the Court held that the First Amendment did not protect criticism of U.S. involvement in World War I because the leaflet at issue advocated a strike of weapons production and the violent overthrow of the government.[13] Holmes dissented and argued that the "surreptitious publishing of a silly leaflet by an unknown man," did not present a clear and present danger.[14] However, the Supreme Court, along with other branches of the federal government, would not embrace Holmes's newfound recognition of the value in a "free trade in ideas" for

6. 205 U.S. 454 (1907).

7. *See id.* at 461–63 (reasoning that since freedom of speech extends to true and false speech, punishment may also extend to true and false speech).

8. 236 U.S. 273 (1915).

9. 249 U.S. 47 (1919).

10. *Id.* at 52 (emphasizing the importance of the speech's context by stating that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort . . . that no Court could regard them as protected by any constitutional right").

11. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 366 (20th Anniv. Ed. 1999) (providing a more appropriate analogy because Holmes' analogy, while "clever and attractive," did not fit the criticism of the war); *see also* Alan M. Dershowitz, *Shouting "Fire!"*, ATLANTIC MONTHLY, Jan. 1989, at 72, 73, *available at* http://www.theatlantic.com/issues/89jan/dershowitz.htm (arguing that Holmes's analogy was not realistic because "[m]ost Americans do not respond to political rhetoric with the same kind of automatic acceptance expected of schoolchildren responding to a fire drill").

12. 250 U.S. 616 (1919).

13. *Id.* at 624.

14. *See id*. at 628 (asserting that the pamphlet would not obstruct the government's military operations).

many years.[15] For example, the U.S. Postal Service would continue to regularly confiscate mail it deemed objectionable from pacifists, suspected communists, birth control advocates, and the NAACP.[16]

There was, in short, nothing unusual about state or federal governments' limiting the speech of citizens, particularly around the dawn of broadcast regulation. This may not be entirely consistent with our modern understanding of what the Founders meant by stating that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[17] But the same collection of men who promoted the First Amendment also passed the Sedition Act of 1798, which limited criticism of government officials.[18] The First Amendment was never quite as inviolate as its defenders like to suggest. The distributors of antiwar leaflets[19] or articles on contraceptives[20] or proponents of "bong hits for Jesus"[21] are somehow never as protected or as free as Rupert Murdoch's News Corporation or General Electric's NBC.

II. CONFUSION TWO: *RED LION* IS WRONG ABOUT SPECTRUM SCARCITY

The second confusion is in the belief that the Court did not properly understand either the physical nature of the electromagnetic spectrum or the economic concept of scarcity. There is a related confusion that the Court did not adequately anticipate new communications technologies such as cable and the Internet. This confusion about scarcity is the most persistent.

In *Red Lion*, the Court relied on (and restated nearly verbatim) the language of *NBC, Inc. v. United States*,[22] regarding the limited availability

15. *Id.* at 630.

16. *See* Edward de Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 LAW & CONTEMP. PROBS. 608, 608 (1955) (describing how the United States Post Office Department's monopoly over the mail, which allows it to determine which newspapers, magazines, and book publishers may distribute, has led the Post Office to become the only governmental agency that has the authority to censor obscene literature and art).

17. U.S. CONST. amend. I.

18. *See* Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596 (1798) (punishing individuals who "combine or conspire" together to oppose government regulations).

19. *See* Schenck v. United States, 249 U.S. 47 (1919) (upholding Schenck's conviction for distributing a leaflet during wartime because the leaflet presented a "clear and present danger" to military operations).

20. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding Health and Human Services' interpretation of Title X, which prohibited fund recipients from disseminating articles about abortion as a form of contraception).

21. Morse v. Frederick, 127 S. Ct. 2618 (2007) (reversing the Ninth Circuit's decision that a school violated a student's free speech right to display a banner at a nonschool event that took place during school hours).

22. 319 U.S. 190, 194 (1943) (finding that the Communication Act of 1934's selective

of broadcast licenses. The focus of the opinion was not on whether there might be a more efficient use of the spectrum, whether Congress had determined the best way to use the public resource, or whether there were alternative channels of communication. Despite dictum that suggests the Court was aware of the spectrum as a public resource, the opinion was about the constitutionality of FCC authority over broadcast licensees.[23]

As the Court in *Red Lion* made relatively clear, broadcast regulation and FCC authority were born as an attempt to establish order out of the chaos of early radio broadcasting. Up until 1927, the federal government had no authority to limit anyone from using any "frequency at whatever power level he wished."[24]

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.[25]

This has been the consistent view of the Court.

The Court's determination that there was a "scarcity of broadcast frequencies" did not result from an engineering analysis or an economic analysis, but was the result of a legal analysis based on precedent and the record that centered on previous challenges to FCC authority.[26] The confusion arises through the creation of a concept dislodged from the question before the Court—the invention of a "Scarcity Rationale." As FCC researcher John Berresford wrote,

> The Scarcity Rationale appears to assume that there is a physical thing, like land and water, of which there is a scarce amount. What is commonly called "the radio frequency spectrum," however, has no discrete physical existence. . . .
>
> . . . .
>
> The Scarcity Rationale thus appears to be based on fundamental

station licensing scheme, which was based on "public interest, convenience, or necessity," was constitutional).

23. *See id.* at 224 (concluding that "the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting").

24. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969).

25. *Id.* at 388–89.

26. *Id.* at 400.

misunderstandings of physics.[27]

The key word here is *appears*. Berresford's concern does not seem to be *Red Lion*, but a straw man: a bogey concept called the Scarcity Rationale. Berresford relies on an argument of the economist Ronald Coase to conclude that the Scarcity Rationale is also wrong as a matter of economics.[28] In 1959, Coase wrote,

> [I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation.[29]

Coase's argument has nothing to do with whether the FCC has the authority to enforce the personal attack rule or to promulgate a Fairness Doctrine. Coase's abstract point, that scarcity does not of itself call for government regulation, is both irrefutable and irrelevant.

A third argument that Berresford raises is that "[t]he Scarcity Rationale, based on the scarcity of channels, has been severely undermined by plentiful channels."[30] Berresford goes on to marvel at one recent example: blogs.[31] This is another persistent confusion. The scarcity in question in *Red Lion* was not the scarcity of channels, but the scarcity of government broadcast licenses. The question was not whether Mr. Cook had access to other means of communication to respond to personal attacks—he most certainly did. Rather, the question was this: What is the responsibility of the federal licensee, and does the FCC have authority to enforce that responsibility?

After smashing his straw man, Berresford acknowledges that "'scarcity' is largely the result of decisions by government, not an unavoidable fact of nature."[32] Berresford has finally come around to *Red Lion*.

The Court clearly understood scarcity to be the result of decisions by government. *Red Lion* makes clear that the Court understood that Congress created the FCC to license broadcast frequencies and that there were more people who wanted federal licenses to broadcast on protected frequencies than the federal government would distribute. The Court was not wrong about the physical nature of the spectrum. It was not wrong about the

---

27. BERRESFORD, *supra* note 4, at 8–9.

28. *See id.* at 10 (arguing that the Scarcity Rationale has a weak foundation because, unlike natural resources, spectrum use is potentially limitless).

29. *See* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) (countering Justice Frankfurter's argument that federal regulation is needed for radio frequencies).

30. BERRESFORD, *supra* note 4, at 11.

31. *See id*. at 16–18 (arguing that channels for broadcasting are no longer scarce, as evidenced by the billions of web pages and millions of blogs currently on the Internet).

32. *Id.* at 11.

proper economic response to scarcity. It was not wrong about the availability of other means of communication. It could not be wrong because it did not address these obfuscations.

III. CONFUSION THREE: THE FAIRNESS DOCTRINE IS BURDENSOME TO BROADCASTERS

The third confusion is that *Red Lion* justified the great burden of the Fairness Doctrine. This is a confusion because critics have greatly exaggerated the Doctrine's burden.

The history of the Fairness Doctrine actually sheds some light on why it was not much of a burden. The Fairness Doctrine was not an invention of eager regulators unmindful of the tribulations that brave broadcasters faced. Rather, the Fairness Doctrine grew from a pre-New Deal notion that broadcasters suggested to advance their own commercial interests. The Court in *Red Lion* avoids mentioning that the so-called public trustee concept was a regulatory scheme that commercial broadcasters instigated to take control of the spectrum in the early 1920s.

Serving under Presidents Harding and Coolidge, Secretary of Commerce Hebert Hoover presided over the creation of broadcast scarcity and its twin, the public trustee model. It was a time when what was good for business was presumed good for America. The military and business combination called the Radio Corporation of America—and other commercial operators—were eager to get the interfering public off of what was then called "the ether." They petitioned Secretary Hoover and Congress, successfully establishing the Federal Radio Commission (FRC) in 1927. Shortly thereafter, the FRC issued General Order 40, creating forty clear channels and thirty-four regional channels—all reserved for commercial operators. With General Order 40, the FRC deemed commercial operators deserving of preferential treatment because they served the general interests of the public. According to General Order 40, "[t]here is not room in the broadcast band for every school of thought" and so most nonprofit organizations were forced off the air.[33]

As a careful reading of *Red Lion* makes apparent, the first clear articulation of the Fairness Doctrine was from the FRC in the 1929 case *Great Lakes Broadcasting Co. v. Federal Radio Commission*[34] Operating

33. *See* ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY 27–28 (1993) (observing that the Federal Radio Commission (FRC) disfavored stations whose broadcasters spread a particular viewpoint, thus resulting in many nonprofits losing air time).

34. 3 FRC ANN. REP. 32 (1929), *rev'd on other grounds*, Great Lakes Broad. Co. v. Fed. Radio Comm'n, 37 F.2d 993 (D.C. Cir. 1930). While 1949 is often given as the date of the beginning of the Fairness Doctrine, *Red Lion* makes clear that the Report on

in the public interest would mean that radio licensees were required to air opposing views on public issues. *Great Lakes* made clear that private commercial stations serving the general public would receive preferential treatment over the "propaganda stations" operated by labor, educational, and religious institutions.[35]

By early 1935, the *Harvard Business Review* wrote,

> [T]he point seems clear that the Federal Radio Commission has interpreted the concept of public interest so as to favor in actual practice one particular group. While talking in terms of the public interest, convenience and necessity the commission actually chose to further the ends of the commercial broadcasters.[36]

Schaeffer Radio Co. v. Federal Radio Commission, an unpublished 1930 decision by the FRC, rearticulated the Fairness Doctrine.[37] The Schaeffer Radio Company sold its interest in the radio station KVEP after going bankrupt during the Depression of 1929. Control of the license was transferred to Robert Gordon Duncan. Mr. Duncan announced himself to be "The Oregon Wildcat" and used profane language attacking Sears & Roebuck and other chain stores, along with "Merrill-Lynch and the rest of the banking gang."[38] In addition to his profanity-laced broadcasts, Duncan refused to honor the FRC-ordered time division with other area broadcasters. Letters of complaint, no doubt including some from Sears and Merrill-Lynch, flooded the FRC. In late 1930, the FRC denied KVEP's license renewal. As the Commission wrote,

> [Although t]he conscience and judgment of a station's management are necessarily personal, . . . the station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: "Manage this station in our interest." . . . The standing of every station is determined by that conception.[39]

Not long after *Schaeffer Radio Co.*, the National Association of

---

Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949), was a summation and clarification of earlier Fairness Doctrine rules dating back to the Federal Radio Commission. *Red Lion*, 395 U.S. at 377–78.

35. *See* FRC ANN. REP., *supra* note 34, at 33–34 (articulating that "public interest" means that there must be "free and fair competition of opposing views" for broadcasting political issues and all "issues of importance to the public").

36. ERIK BARNOUW, A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES 219 (1966).

37. *See* Comment, *Indirect Censorship of Radio Programs*, 40 YALE L.J. 967, 969 (Apr. 1931) (citing Schaeffer Radio Co. v. Fed. Radio Comm'n, No. 5228 (1930)).

38. *See* Posting of Craigadams to The Portland Radio Message Board, http://feedback.pdxradio.com/messages/995/990.html?1001912159 (Sept. 29, 2001, 08:13PST).

39. John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B.J. 5, 14 (1950) (reprinting large portions of the FRC's decision in *Great Lakes*).

Broadcasters (NAB) adopted much of the supposedly burdensome Fairness Doctrine language in their "1938 Code."[40] Among other things, the 1938 Code pledged that broadcasters would "allot time fairly for the discussion of controversial views" and provide "fair and accurate" news programs.[41] One reason the Fairness Doctrine might have been so popular with broadcasters was that the public was largely powerless to complain to the FCC about how the broadcast licensees were serving them. It was, in other words, no burden at all.

Then, in 1966, the burden of being accountable to the public to operate in the public interest was established after the United Church of Christ and a Jackson, Mississippi chapter of the NAACP brought a lawsuit against the FCC over licensing a racist television operation. The case established that listeners and viewers had standing before the FCC. Writing for the United States Court of Appeals for the District of Columbia Circuit in *Office of Communication of the United Church of Christ v. FCC* (*UCC*),[42] the moderate-Republican judge Warren Burger shook the broadcasting industry by saying, "In order to safeguard the public interest in broadcasting, . . . we hold that some 'audience participation' must be allowed in license renewal proceedings."[43] Burger delayed his ascension to the Supreme Court in 1969 to admonish the FCC and take away WLBT's license, in part because of the station's violation of the Fairness Doctrine.

Around the time of the *Red Lion* and *UCC* cases, the nation was also in the throes of dramatic social changes. Annual riots and unrest throughout the country accompanied these social changes. President Johnson formed the Kerner Commission to study the unrest. His specific question was this: "What effect do the mass media have on the riots?"[44]

The Kerner Commission's findings suggested that broadcasters had failed to cover controversial issues fairly.

> Important segments of the media failed to report adequately on the causes and consequences of civil disorders and on the underlying problems of race relations. They have not communicated to the majority of their audience—which is white—a sense of the degradation, misery and hopelessness of life in the ghetto.[45]

The Kerner Commission recommended expanded coverage of the black

40. *See* Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 CARDOZO ARTS & ENT. L.J. 667, 672–73 (1995) (describing early self-regulation attempts by radio broadcasters).

41. *Id.* at 672.

42. 359 F.2d 994 (D.C. Cir. 1966).

43. *Id.* at 1005.

44. U.S. KERNER COMMISSION REPORT: REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 201–12 (1968).

45. *Id*. at 10.

community, integration of news staff, and training and recruitment of black journalists.[46]

The combined effect of the Kerner Commission's findings, the *UCC* decision, increased civil activism, and greater social acknowledgement of the challenges facing women and minorities led to many changes in the operation of the FCC. Public interest lawyers and community groups became more vocal in the comparative hearings process.[47] The FCC adopted both equal employment opportunity rules and a requirement to ensure that broadcasters actively ascertain and report on how they address local interests.[48] All this, plus limited license terms and the old NAB Code of Conduct, worked to keep licensees aware of their public interest duties.

While the Fairness Doctrine was a highly visible touchstone for the public regarding the duties of licensees, it rarely resulted in license revocation. Between 1973 and 1976, the FCC received a total of 49,801 Fairness Doctrine complaints.[49] The FCC rejected the overwhelming majority of them for failing to meet various filing requirements. Only 244 complaints resulted in FCC inquiries into station practices; of those, only 16 ended with adverse rulings because of Fairness Doctrine violations.[50] Only 1 resulted in a loss of license.

In July 1973, the FCC refused to renew Brandywine-Main Line Radio, Inc.'s license for radio station WXUR-AM-FM in Media, Pennsylvania, after nineteen local civic and religious organizations charged in a petition that, over a period of more than three years, Dr. Carl McIntire systematically vilified ethnic and racial minorities, repeatedly refused to air other viewpoints, and operated contrary to the community's interest.[51] This would be the only time the FCC denied a station's license renewal because it violated the Fairness Doctrine.

Even with increased citizen engagement, the FCC gave great leeway to broadcast licensees regarding how they met their obligation to fairly air

46. *Id*.

47. *See* Deirdre Carmody, *Challenging Media Monopolies*, N.Y. TIMES, July 31, 1977, at SM6 (outlining a challenge by Feminists for Media Rights to the Steinman family's dominant hold over the news media in Lancaster, PA).

48. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 651 (1971) (report and order) (emphasizing the importance of diversity, and suggesting that the Primer will help broadcasters become more responsive to community problems); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 229–30 (1976) (report and order) (describing how the FCC plans to implement rules relating to equal employment opportunities for women and minorities).

49. *See* STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 210 (1978) (examining complaint and ruling figures).

50. *Id*. at 210–11.

51. Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18, 34–35 (1970), *aff'd on other grounds*, Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972).

important issues. Despite the limited FCC response to Fairness Doctrine complaints, most broadcasters attempted to comply with the goals of the Doctrine.

Even into the 1970s and 1980s, the vast majority of broadcasters did not consider the Fairness Doctrine a problem. A 1972 Radio–Television News Directors Association (RTNDA) survey showed that only 5% of its members thought the Doctrine posed a major problem.[52] A 1982 RTNDA survey found only 2% held that view.[53] The notion that the FCC regulation authorized by *Red Lion* was overly burdensome is a relatively recent creation of the broadcast lobby.

CONCLUSION

Red Lion was not a controversial departure from First Amendment jurisprudence, nor was the Court confused about either the electromagnetic spectrum or economic theories regarding scarcity. The burden of the Fairness Doctrine was neither unleashed by *Red Lion* nor much of a burden.

Whatever *Red Lion* established has now been dismantled by the conservative backlash of the Reagan era. Almost the entire regulatory structure of the mid-1970s is gone. License terms are longer, citizens have no real means to challenge whether a broadcaster is operating in the public interest, and ascertainment requirements have been abolished. The Fairness Doctrine is a distant memory; even the NAB Code of Conduct is gone. The airwaves once again are under the control of consolidated commercial interests and the First Amendment rights of broadcasters are de facto paramount.

If we take off the rose-colored glasses, we can clearly see that the public trustee concept endorsed in *Red Lion* was bankrupt from the beginning; it was mainly a justification to push the public off the air to make room for commercial radio. While the civil rights movement—in the persons of Everett Parker, Earle Moore, and dozens of other brave public interest lawyers—gave that concept real meaning, it lasted for only a dozen years.

The First Amendment rights of the public have always been under pressure from private commercial interests, and those rights can neither be secured nor lost with a single Supreme Court decision. If the First Amendment rights of the public are ever to be reestablished, let us begin by doing away with the confusions.

---

52. *See* WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO–TV REGULATION 105 (1990).

53. *Id.* at 106.

* * *

THE FAIRNESS DOCTRINE: A FLAWED MEANS TO ATTAIN A NOBLE GOAL

MARVIN AMMORI*

TABLE OF CONTENTS

INTRODUCTION

This Paper is a response to the current, but largely manufactured, controversy over whether or not to revive the long-dead Fairness Doctrine. In 2007 and 2008, right-wing radio hosts and bloggers used this controversy as a partisan wedge to detract from more pressing and timely media policy issues. The Fairness Doctrine was a regulation that the Federal Communications Commission (FCC) repealed in 1987. While in effect, the Fairness Doctrine required broadcasters (1) to devote a reasonable percentage of time to the coverage of public issues and (2) to cover these issues in a way that provides an opportunity for the presentation of contrasting points of view.[1] The Doctrine was "concerned

* Assistant Professor, University of Nebraska–Lincoln College of Law, Faculty

with controversial issues of both local and national importance."[2]

In recent months, right-wing talk radio hosts have been talking a lot about the Fairness Doctrine, claiming both that Democrats seek to reinstate the Doctrine and that the goal of such reinstatement is mainly to kill right-wing radio.[3] Indeed, one sitting FCC Commissioner decided to one-up even the right-wing shock jocks and claimed that Democrats would implement a Fairness Doctrine for Internet and new media as well as old.[4] While the talk radio hosts and disingenuous bureaucrats tell an entertaining story, neither of their claims is accurate. First, with the exception of a few comments, Democrats have not attempted to reinstate the Fairness Doctrine and have not introduced any bill to do so.[5] The 2008 Democratic presidential nominee and President-elect Barack Obama unequivocally opposes any attempt to reinstate the Fairness Doctrine.[6] Second, the Fairness Doctrine would not silence conservative radio even if it were reinstated. Accordingly, there is no conspiracy to reinstate the Fairness Doctrine or to kill talk radio. Indeed, while the Fairness Doctrine sought to advance a noble goal—ensuring public access to public information and diverse viewpoints—the Doctrine is no longer an effective means for doing so. Rather than following the lead of talk show hosts debating a doctrine repealed twenty years ago, legislators should focus on current media policies that can enhance the public's access to public information and

---

Advisor, Space & Telecomm Law Program. Also serves as counsel for the consumer group Free Press.

1. *See, e.g.*, The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 48 F.C.C.2d 1, 7 (1974) (Fairness Report) (explaining broadcasters' duties under the Fairness Doctrine).

2. The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 89 F.C.C.2d 916, 925 (1982) (Memorandum Opinion and Order).

3. *See, e.g.*, James Gattuso, *Beyond Talk Radio: Fairness Doctrine Taking a Beating in Blogosphere Too*, TECHNOLOGY LIBERATION FRONT, June 28, 2007, http://techliberation.com/2007/06/28/beyond-talk-radio-fairness-doctrine-taking-a-beating-in-blogosphere-too/ (claiming that talk-radio-show hosts are against revival of the Fairness Doctrine); Michelle Malkin, *Fairness Doctrine Watch: A "Progressive" Attack on Talk Radio*, MICHELLEMALKIN.COM, June 21, 2007 (and other posts on the page), http://michellemalkin.com/2007/06/21/fairness-doctrine-watch-a-progressive-attack-on-talk-radio/ (arguing that the left wants to address the "lack of ideological diversity" in radio).

4. Posting of jstearns to Save the Internet Blog, http://www.savetheinternet.com/blog (Aug. 13, 2008, 13:34 EST); Matthew Lasar, *Fairness Doctrine Panic Hits FCC, Spreads Through Blogosphere*, ARSTECHNICA, August 17, 2008, http://arstechnica.com/news.ars/post/20080817-fairness-doctrine-panic-hits-fcc-spreads-through-blogosphere.html.

5. Just about every one of these comments can be found in SENATE REPUBLICAN POLICY COMMITTEE, THE FAIRNESS DOCTRINE: UNFAIR, OUTDATED, AND INCOHERENT 3 (2007).

6. John Eggerton, *Obama Does Not Support Return of Fairness Doctrine*, BROADCASTING & CABLE, June 25, 2008, http://www.broadcastingcable.com/article/CA6573406.html.

diverse viewpoints without the drawbacks of the Fairness Doctrine.

This Paper has three primary parts. First, it rebuts the conservative messages about the Fairness Doctrine. Neither Congress nor the FCC will likely impose the Fairness Doctrine, and support for the Doctrine did not historically, and should not now, track partisan lines. Second, though the Doctrine's goals are praiseworthy, the Doctrine would be an ineffective means to attain those goals. As the Doctrine's history until 1987 shows, the Doctrine is easy to avoid, is difficult to enforce, and is at most a second-best solution. Third, as a result of its ineffectiveness, Congress and the FCC should focus on more effective means of fostering local and national public information and diversity of viewpoints, primarily by fostering responsiveness to local tastes and diverse and antagonistic sources of information. More effective means would include implementing strict ownership limits, authorizing community radio, and encouraging open, high-speed Internet access.

I. THE FAIRNESS DOCTRINE WILL NOT BE IMPOSED AND SHOULD NOT BE PARTISAN

The Fairness Doctrine will not be readopted. The conservative buzz on this issue derives from no more than a few isolated quotes over the past several months by 5 of the 284 Democrats in Congress. Several legislators have merely suggested that they would consider or look into imposing the Fairness Doctrine,[7] but not a single legislator has introduced a bill to reinstitute the Fairness Doctrine. Indeed, the only legislative activity in this area has involved attempts by Republicans to foreclose the FCC from reinstituting the Fairness Doctrine[8]—even though Democrats had not acted to reinstitute it, and the Republican FCC chairman said he would not act to reinstitute it.[9] The current Fairness Doctrine controversy consists largely of talk radio's sound and fury about nothing.

---

7. These quotations can be found, for example, on the website of Congressman Mike Pence. *See* Mike Pence, Fairness Doctrine Democrat's Quotes, http://mikepence.house.gov/ConstituentServices/democratquotes.htm (last visited Aug. 22, 2008). According to this page, several legislators believed that Nancy Pelosi and Steny Hoyer also supported reviving the Doctrine. *Id.*

8. *See, e.g.*, John Eggerton, *House Passes Amendment Disallowing Funding for Fairness Doctrine*, BROADCASTING & CABLE, June 28, 2007, http://www.broadcastingcable.com/article/CA6456430.html (explaining that the House recently passed an amendment to an appropriations bill with a 310–15 vote, which prevents any money from being spent on reviving the Fairness Doctrine).

9. *See* John Eggerton, *Martin Reinforces Opposition to Fairness Doctrine*, BROADCASTING & CABLE, July 26, 2007, http://www.broadcastingcable.com/article/CA6463549.html?rssid=193 (quoting FCC Chairman Kevin Martin's statement that he sees "no compelling reason to reinstate the Fairness Doctrine in today's broadcast environment, and believe[s] that such a step would inhibit the robust discussion of issues of public concern over the nation's airwaves").

Moreover, when the Fairness Doctrine was being enforced, it was not a partisan issue. Conservatives supported and opposed it, as did liberals. As one conservative opponent of the Doctrine has noted, "Many conservatives embraced the Fairness Doctrine during its life and even lamented its demise, viewing the doctrine as a handy club to be wielded against 'liberal' programming, especially at the network level."[10] At the same time, a wide range of liberal scholars have strongly opposed the Doctrine.[11] In 1987, the FCC voted to repeal the Doctrine by a 4–0 vote, even though only three Commissioners were Republicans. Following that vote, the Senate passed a bill reinstating the Fairness Doctrine, which was cosponsored by a Democratic Senator and a Republican Senator; the House passed an identical bill, but the legislation was ultimately vetoed.[12] Moreover, the Fairness Doctrine has received considerable support from both conservative and liberal nonprofit groups attempting to disseminate their messages.[13]

Not only has the Fairness Doctrine not historically been partisan, it should not now be a partisan issue because it formally applies to conservative and liberal programming alike. It would apply to Ed Schultz, *Democracy Now*, Pacifica, and Air America no less than it would to Rush

10. E. Brandt Gustavson, *The Fairness Doctrine: Once and Future Threat to Speech, Religion*, *in* SPEAKING FREELY: THE PUBLIC INTEREST IN UNFETTERED SPEECH; ESSAYS FROM A CONSERVATIVE PERSPECTIVE 87, 88 (1995).

11. Professors Harry Kalven, Herbert Wechsler, and Archibald Cox filed amici briefs for the broadcasters to argue that the Court should strike down the Fairness Doctrine. *See* Brief for Respondent Radio Television News Directors Ass'n, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (Mar. 22, 1969); Brief for Respondent Columbia Broadcasting System, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). Professor Laurence Tribe also believes the doctrine is unconstitutional. *See* Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, http://www.epic.org/free_speech/tribe.html (last visited Nov. 22, 2008).

Other liberal scholars have suggested the Fairness Doctrine, while not unconstitutional, is still bad policy. *See, e.g.*, Yochai Benkler, *Free Markets vs. Free Speech: A Resilient* Red Lion *and Its Critics*, 8 INT'L J.L. & INFO. TECH. 214, 214–15 (2000) (reviewing ROBERT CORN-REVERE, RATIONALES AND RATIONALIZATIONS, REGULATING THE ELECTRONIC MEDIA (1997)) (arguing that several scholars have taken aim at the Supreme Court's logic in *Red Lion*); *see also* Jack M. Balkin, *The Fairness Doctrine, Part I*, BALKINIZATION.COM, July 28, 2007, http://balkin.blogspot.com/2007/07/fairness-doctrine-part-i.html (arguing that the Fairness Doctrine is bad public policy, but is not facially unconstitutional).

12. Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 29, 1987). The Senate sponsors of the bill were John Danforth and Daniel Inouye. For a discussion of the issues underlying the opposition to the Fairness Doctrine, see Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licenses, 102 F.C.C.2d 143, 226 (1986) [hereinafter *General Fairness Doctrine Obligations*].

13. *See, e.g.*, FORD ROWAN, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 73–74 (1984) (listing the groups that are the Media Access Project's clients as an example of those that have supported the Fairness Doctrine).

Limbaugh, Sean Hannity, and Michael Savage. While AM talk radio is overwhelmingly conservative, not all FM radio and broadcast television are similarly conservative. Furthermore, programming complaints would come from liberal *and* conservative groups because groups on both sides of every issue—from gun control to abortion to the Iraq war—can file complaints. In addition to nonprofit groups, corporations can file their own complaints. That is, corporations can dispute stories discussing global warming, wages, downsizing, environmental harms, accounting fraud, or tax avoidance.[14]

Rather than being a partisan attempt to silence speech, the Fairness Doctrine should be seen as a well-intentioned, if flawed, means to ensure that the public receives diverse viewpoints in the presentation of public information.

II. THE FAIRNESS DOCTRINE WILL NOT ACHIEVE ITS PRAISEWORTHY GOALS

If the Fairness Doctrine attempts to ensure that the listening public receive news about controversial public affairs and diverse views about that news, it is seeking to achieve praiseworthy goals. When Americans are exposed to diverse views about public matters, they can better debate policy issues, hold elected officials to account, and reach consensus on matters of vital public importance.[15]

But the Fairness Doctrine likely will not *increase* such diverse coverage for at least three reasons:[16] it is easy to avoid, it is difficult to enforce, and it is at most second-best when compared to the option of diverse speakers.

A. The Fairness Doctrine Is Easy to Avoid

First, the Fairness Doctrine is easy to avoid. Because it requires ample play for diversity of views, the Fairness Doctrine would require difficult judgment calls. Much of the discretion for making those judgments must

14. *See, e.g.*, *id*. at 75–76 (discussing an aluminum company's negotiating with ABC in response to a *20/20* segment on the dangers of aluminum wiring).

15. For in-depth academic discussions, see CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xi (1993) (arguing that the First Amendment is a significant barrier to official censorship); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 29 (2001) (arguing that a market-focused information policy with highly concentrated markets comes at the significant cost of personal autonomy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (arguing that one of the four functions of speech is to spread political truths and asserting that this aspect is "different from any other form of human activity").

16. In repealing the Doctrine, the FCC concluded the Doctrine resulted in less, not more, diverse news. *See General Fairness Doctrine Obligations*, *supra* note 12, at 159 (asserting that the Fairness Doctrine may prevent a licensee from "presenting controversial issues of public importance").

be left to the broadcasters. These judgments include whether the issue is even controversial; whether a specific subissue is controversial; whether a diversity of views has indeed been presented; whether enough time for each view has been allotted; whether enough different views have been presented; and whether a local issue is important to the community. If the government makes these judgments, then government officials would play far too great a role in determining the news, in ways that would threaten private provision of the news. So broadcasters must have some considerable discretion in making these judgments to reduce the threat of government censorship.

If the broadcasters receive considerable discretion, as they did when the Fairness Doctrine was being enforced,[17] then the Doctrine is easy to avoid. The Fairness Doctrine permits the broadcaster to cover different points of view and does not generally authorize *other* people to present those views.[18] So the broadcaster controls the presentation. If a news reporter covered a controversy, that reporter could merely follow the usual journalistic ethic of seeking neutrality and objectivity in presenting both sides of a story.[19] Moreover, if the broadcaster wanted to present one view, it could undercut rival views with relative ease. The broadcast could present the rival's views itself or choose spokespersons for those views; in choosing spokespersons, it could select the least articulate, least coherent, and less (or more) extreme spokespersons, as it chose.[20]

If those imposing the Fairness Doctrine seek not to promote diverse views but to silence talk radio, the Fairness Doctrine will likely fail in that regard as well. Partisan talk show hosts would still be able to convey their views clearly, to the exclusion of other views. As Professor Jack Balkin of Yale Law School has observed, "Rush Limbaugh might have to invite a series of liberal patsies to give their views, which he could bully, make fun of, or talk past."[21] As he noted, a radio version of *Hannity and Colmes*

17. *See* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com (July 27, 2007, 19:34 EST) (quoting authors and noting that, when the Fairness Doctrine was being enforced, "surprisingly little balance [was] necessary to meet the obligation to cover all significant sides of an issue").

18. The broadcaster had to permit certain persons to advocate their views under two subdoctrines: the personal-attack and political-editorial rules. Both were far narrower than the Fairness Doctrine and rarely applied. *See* Balkin *supra* note 11; STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 10 (1978) (stating the two subdoctrines are "applicable in a limited number of situations").

19. *See* Balkin, *supra* note 11 (noting an example where the "traditional journalistic neutrality/objectivity" satisfied the Fairness Doctrine).

20. *See* Volokh, *supra* note 17 (questioning whether a broadcaster's discretion will allow broadcasters to select "rival speakers who are just inarticulate or foolish" to present a rival viewpoint); Balkin, *supra* note 11 (stating that licensees determined the sides to a relevant issue and then decided who would represent those sides).

21. Balkin, *supra* note 11.

would probably meet the Fairness Doctrine for that reason—though Colmes is more moderate and less articulate than the conservative Hannity.[22] Indeed, Limbaugh need not invite any liberals and could offer his own account of "liberal views, which would no doubt be highly amusing to his audience."[23] So broadcasters could easily avoid the Fairness Doctrine because of the necessary discretion they receive in presenting diverse views.

B. The Fairness Doctrine Would Once Again Rarely Be Enforced

Second, the later history of the Fairness Doctrine demonstrates that the Doctrine was difficult to enforce and therefore infrequently enforced. While the FCC received many complaints, far fewer than 1% of them succeeded.

The FCC did not rely on an internal FCC content police, but rather enforced the Doctrine through its action on viewer complaints. Before the early 1960s, there were "few fairness complaints," but then the number of filed complaints soared.[24] In 1963, the FCC decided to address Fairness Doctrine complaints as they were filed, rather than to continue the previous practice of considering the complaints at license renewal.[25] While the number of complaints quickly rose from 233 complaints in 1960 to 1,632 in 1969,[26] very few complaints succeeded.

The FCC's process resulted in very few adverse rulings against broadcasters. Complaints by telephone were not even addressed unless supported by extensive documentation. Written complaints fared little better.[27] They were considered by a broadcast analyst first. In reviewing these complaints, the analyst typically found half to lack all merit and filed those complaints in a "No Response Necessary" file.[28] Of the rest, another half would receive an 8330-FD document, which explained that the complaint was too vague, therefore inadequate, and sought the necessary specific information.[29] "Most" recipients of these letters did not follow

22. *Id.*
23. *Id.*
24. SIMMONS, *supra* note 18, at 11, 14 n.20.
25. *Id.* at 14 n.20.
26. *Id.* at 214.
27. *See* ROWAN, *supra* note 13, at 52–53 (describing the process through which written complaints were processed while noting, however, that only 1,000–2,000 of the 10,000 complaints the FCC received in an election year were actually complaint letters).
28. *See id.* (noting that complaints placed in the "No Response Necessary" files included those that were sent to the FCC for information, those that were general and did not address a particular network or station, and "crank" letters).
29. *See id.* at 53 (outlining the additional information that a complainant must provide to satisfy the FCC's specificity requirements).

up.[30] The analyst could refer other complaints to lawyers in the Fairness/Political Broadcasting Branch; these lawyers would often also request more information from the complainant or simply send a Form 8330-FD. Either way, again, most complainants did not follow up at that point.[31] In most cases, the station had never been asked to respond or had never even received a copy of the complaint, though the FCC would file the complaint in the station's public files.[32] These responses accounted for more than 99% of written complaints.[33] When faced with the less than 1% of complaints that complied with all the requirements and were sufficiently specific, the FCC would ask the broadcaster to respond.[34] After briefing, the staff would rule on the complaint. While the ruling was appealable to the FCC Commissioners, the Commissioners generally upheld staff decisions.[35]

This process resulted in a handful of adverse rulings a year. One scholar noted that in 1976, less than one tenth of one percent of complaints resulted in a station inquiry.[36] Out of over 41,000 complaints, only 24 resulted in station inquiries, and only 16 of those resulted in adverse rulings.[37] In 1975, there were a little over 3,000 complaints, with only 10 adverse rulings, and in 1974, there were 1,874 complaints, and 6 adverse rulings.[38] The odds became even worse in subsequent years, with the success rate falling from 1 in 1,000 to 1 in 2,000.[39] In 1980, 10,000 complaints resulted in 6 adverse rulings, and in 1981, almost 6,000 complaints resulted in only 3 adverse rulings—all based on issue advertising, not programming imbalance.[40] Generally, individuals' chance of success was "virtually nil," as most would give up before the ruling stage, while nonprofit groups,

30. *See id.* (stating the reason "most people" do not respond to the form is because the FCC requires precision in the description of the complaint in order to "relieve broadcasters of the burden of disproving vague complaints").

31. *See id.* (explaining that most complainants never follow up even where their complaint raises a question that an analyst or legal technician cannot answer).

32. *See id.* at 54 (describing the process that the FCC uses in filing most complaints and staff responses).

33. *See id.* (noting that in 99.5% of all Fairness Doctrine complaints the station need not do anything in response).

34. *See id.* (noting that only those complaints that "compl[y] with all the requirements" can build a case strong enough to require a reply from the station).

35. *See id.* at 53–54 (noting that the right of appeal from a staff decision is of questionable utility given that "staff decisions [were] upheld in all [eighteen] Fairness cases appealed to the full commission from 1979 to 1981").

36. SIMMONS, *supra* note 18, at 210.

37. *See id.* (examining fairness complaints during the mid-1970s).

38. *See id.* (analyzing the number of the complaints in the mid-1970s and describing the small number of station inquiries as "striking").

39. ROWAN, *supra* note 13, at 62.

40. *Id.*

mainly "single-issue" groups, had a marginally higher chance.[41] They would often receive some success through negotiating informally with broadcasters, but they were negotiating in the shadow of what was, to the nonprofits, unsympathetic law.[42] The main reason for the high rate of failure was the FCC's complaint-discouraging policies. The FCC sought to protect broadcasters from harassment by eliminating vague or inappropriate complaints, and most complaints failed because the FCC conferred considerable discretion on broadcasters in presenting diverse views.

Indeed, the FCC's policy on devoting time to covering controversial issues made that prong of the Fairness Doctrine almost unenforceable. Even though the FCC once said that "the single most important requirement of operation in the public interest"[43] was to devote a reasonable amount of time to coverage of controversial issues of public importance, the FCC explicitly refused to "interfere with the broadcaster's journalistic discretion in this area except in the rare case . . . ."[44] As a result, the FCC would "presume compliance with [the prong] unless a complainant [could] substantially indicate otherwise."[45]

Finally, resolution of complaints was slow. Even those few organizations that did pursue and win their fairness complaints had to press their claims for months or years. In 1973, the average time between airing a program and the final resolution was approximately eight months, and in 1984, the average time was more than a year.[46]

C. The Fairness Doctrine Is at Most a Second-Best Solution for a Concentrated Speech Market

Third, even the early history of the Fairness Doctrine demonstrates it was always a second-best option. The best option was to use the spectrum not for a few "balanced" speakers but for many diverse and antagonistic speakers.

---

41. *See id.* at 62, 73 (stating that the reason that small, locally organized groups are more successful is that these groups "can afford, or at least have access to, expert legal counsel" and are "in a position to jump when something airs that appears to deal with 'their' issue").

42. *See generally id.* at 71–87 (chronicling various organizations' attempts to settle Fairness Doctrine disputes with broadcasters informally).

43. Complaints of Comm. for the Fair Broad. of Controversial Issues, 25 F.C.C.2d 283, 292 (1970) (Memorandum Opinion and Order) (citation omitted).

44. The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 89 F.C.C.2d 916, 920 (1982) (Memorandum Opinion and Order).

45. *Id.*

46. *See* ROWAN, *supra* note 13, at 54 (noting that the author's review of FCC rulings just prior to the book's 1984 publication indicated that the then-current resolution time was more than one year).

The Fairness Doctrine developed from 1929 to 1949—the year the FCC recapitulated its evolving Doctrine. The Fairness Doctrine was imposed "at the outset," when the FCC and its predecessor agency, the Federal Radio Commission (FRC), reallocated broadcasting licenses in the late 1920s and early 1930s. Because the spectrum was congested with users, the FCC reallocated licensees, largely disfavoring the existing nonprofit and educational users and favoring large commercial networks. In reallocating the licenses in its 1929 *Third Annual Report*, the FCC stated, "In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views . . . ."[47] For the next ten years, the FCC enunciated this fairness concept in license renewals. In 1940, it described the duty of "well-rounded rather than one-sided discussions of public questions."[48] In 1949, the Commission summarized its policy in its *Report on Editorializing*.[49]

"Balance" was required because so few speakers were being licensed. In the late 1920s, when the FCC reallocated licensees, its stated preference for "balance" was based on—one supposed—favoring large commercial broadcasters over ideological nonprofit organizations.[50] In 1928, with perhaps so many broadcasters on air that listeners often received static, the FRC announced a reallocation plan to alter the frequencies of 94% of broadcasters and, over the next several years, to severely reduce the number of broadcasters.[51] The plan and its implementation favored large commercial broadcasters over smaller noncommercial broadcasters because the plan assigned fewer and more powerful licenses.[52] Within a year of implementing the plan, there were 100 fewer broadcasters.[53] In defending the reallocation, the FRC claimed that stations best served the public interest if they served the entire public, notably with "a well-rounded program" of entertainment and cultural programming, such as the programs

47. Great Lakes Broad. Co., 3 FRC ANN. REP. 32, 33 (1929).

48. 6 FCC ANN. REP. 55 (1940).

49. *See generally* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949) (Report of the Commission) (reexamining the Commission's position on broadcasters' obligations and ultimately determining that the broadcast licensees are the ones who must "be responsible for the selection of the particular news items to be reported").

50. ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY 26–27 (1993).

51. *See id.* at 25 (recounting the Federal Radio Commission's (FRC) decision to implement the reallocation plan General Order 40 and the FRC's public assertions that the plan was the only reasonable way to provide good broadcasting to the listening public).

52. *See id.* at 26 (explaining that the FRC initially maintained that it was in the public interest that more highly capitalized stations get the limited slots that the reallocation created because those stations "had the equipment to take advantage of [those] slots").

53. *See id.* (stating that the number of stations after the reallocation declined despite the FRC's never having rejected a license renewal application).

endorsed by the Fairness Doctrine.[54] By contrast, the FRC claimed that "propaganda" stations, meaning merely those stations disseminating particular viewpoints, such as today's talk radio stations, did not best serve the public interest. As the FRC chose to allocate fewer, more powerful licenses, it claimed that there was "not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station . . . ."[55] In the 1929 *Third Annual Report*, in which the FRC first announced the fairness concept, also stated that a commercial station providing well-rounded programs has "a claim of preference over a propaganda station" for a license, even if the ideological station accompanied its "messages with entertainment and other program features of interest to the public," because of the ideological station's "temptation not to be fair to opposing schools of thought."[56] In implementing its reallocation, the FRC required broadcasters to share the same frequencies and would divide the hours based on which licensee was most worthy. When the FRC renewed licenses every three months and determined the balance of hours per broadcaster, it consistently favored the "balanced" commercial stations over the ideological nonprofit stations. For example, on WGN, the nonprofit Voice of Labor lost a hearing for more hours against the *Chicago Tribune*.[57] As George Will recently noted, the FRC in 1928 decided that the programming on WEVD, a New York station licensed to the Socialist Party, was not in the public interest and warned the station to show "due regard for the opinions of others."[58]

The Fairness Doctrine, which commercial broadcasters embraced to claim that they served the public interest, was never the ideal policy solution. The better option was to have unfettered exchange of views by different speakers, including nonprofit and for-profit ideological speakers. Faced with the technology of the 1920s, the FRC concluded that not every school of thought could have its own mouthpiece, so the few lucky commercial licensees would have to present competing views. As discussed above, imposing this obligation on licensees was largely ineffective.

---

54. *See id.* at 27 (outlining and explaining the criteria that the FRC found important in determining which stations best served the public interest).

55. *Id.*

56. *Id.* at 28; *see also id.* (quoting the FRC's *Third Annual Report* for the proposition that general public service stations take precedence over propaganda stations "for access to the same channel").

57. *See id.* (asserting that the nonprofit stations often fell victim to one of the two networks); *see also* SIMMONS, *supra* note 18, at 34.

58. George F. Will, *Fraudulent "Fairness,"* NEWSWEEK.COM, May 7, 2007, http://www.newsweek.com/id/35081/output/print; Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35, 44 (1998) (citation omitted).

With today's technology, however, government can pursue better policy options that are more likely to enhance the public's exposure to public information and diverse viewpoints.

III. THERE ARE MORE APPROPRIATE MEANS TO ENSURE ACCESS TO DIVERSE VIEWPOINTS AND INFORMATION ABOUT LOCAL ISSUES

Rather than join talk show hosts and bloggers in discussing a policy abandoned in the 1980s, Congress should implement policies that would actually result in diverse viewpoints. Congress should not attempt to regulate (ineffectively) a few broadcasters for diverse viewpoints, but should ensure that more and more speakers are free to reach their intended audiences with their public messages. The American communications system generally seeks political truth not through a few regulated speakers but through diverse speakers. The Supreme Court has repeatedly endorsed what "has long been a basic tenet of national communications policy," which is "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[59] The Court has stated, similarly, that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[60] Another basic tenet, which has been part of broadcast policy from the outset of regulation, has been to foster local information sources and local information.[61]

Congress should favor policies that increase the diversity of sources. These include media ownership limits, low power FM, and open-Internet initiatives.

A. Media Ownership Limits

Congress should act quickly to pass a bill eliminating the FCC's quadrennial reviews and retaining, or tightening, the broadcast ownership limits as they existed in 2002. It should also require the FCC to perform a study to determine how the digital transition may necessitate even stricter ownership limits. Congress or the FCC should also initiate an inquiry into

59. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) (quoting Assoc. Press v. United States, 326 U.S. 1, 20 (1945)). For a discussion of how this principle animates communications policy, see Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 446 (1999).

60. *Turner*, 512 U.S. at 663.

61. *See, e.g.*, Broad. Localism, 19 F.C.C.R. 12,425, 12,425 (2004) (Notice of Inquiry) (asserting that broadcast licensees "must air programming that is responsive to the interests and needs of their communities of license").

how the ownership relationships between station owners and program syndicators affects the radio market.

B. Low Power FM

Congress should act quickly to pass legislation permitting the FCC to license additional low power radio stations to local nonprofit organizations in more towns and cities.

C. Open-Internet Initiatives

Most importantly, Congress should take steps to ensure that all members of the public have access to open, high-speed Internet. The Internet can provide an open platform for many diverse and antagonistic speakers. Congress can ensure a competitive market in Internet delivery and open platforms by adopting rules that ensure network neutrality (building on the foundation of a recent, celebrated decision against Comcast's blocking of peer-to-peer technologies),[62] supporting community broadband, providing more access to unlicensed spectrum (such as in the television white spaces), and imposing wholesale and open-device obligations on licensed wireless providers (for example, in the 700 MHz auction).[63]

CONCLUSION

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. Rather than debate a 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. The history of the Fairness Doctrine's inability to achieve its intentions as well as the lack of any recent effort to bring it back are evidence that the Fairness Doctrine was noble in its intentions but lacking in its execution.

62. *See generally* Formal Complaint of Free Press, No. EB-08-IH-1518 (Aug. 20, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf; Posting of Lawrence Lessig to Lessig Blog, http://lessig.org/blog/ (Aug. 20, 2008, 17:54 EST).

63. For a discussion of these issues, see, for example, *Communications, Broadband and Competitiveness: How Does the U.S. Measure Up?: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) (statement of Ben Scott, Policy Director, Free Press), *available at* http://www.freepress.net/files/42407bssentestimony.pdf.

* * *

A MODEST PLEA FOR FCC MODESTY REGARDING THE PUBLIC INTEREST STANDARD

RANDOLPH J. MAY*

TABLE OF CONTENTS

INTRODUCTION

I am encouraged by the title the *Administrative Law Review*'s editors chose for one of the sessions of this important Symposium—*New Frontiers: Public Interest Regulation in a Converging Twenty-First Century Media Marketplace.* This indicates an awareness that, as far as today's communications marketplace goes, we indeed inhabit a new frontier. The twenty-first century marketplace, still shy of a full decade into the century, bears little resemblance to the more monopolistic environment that prevailed well into the last century. It certainly bears little resemblance to the much less competitive communications marketplace that prevailed at the time of *Red Lion Broadcasting Co. v. FCC*,[1] the fortieth anniversary of which provided the occasion for this

* President of The Free State Foundation, a nonprofit think tank located in Potomac, Maryland. I gratefully acknowledge the excellent research assistance on this article of Kate Manuel, FSF Research Associate.

1. *See* 395 U.S. 367, 400 (1969) (finding that existing broadcasters had a "substantial

Symposium.

As the Symposium's subtitle indicates, *Red Lion*, rightly, is best known for providing further sanction against constitutional attack for the Federal Communications Commission's (FCC or Commission) public interest regulation of broadcasting content.[2] To be sure, the constitutionality of the FCC's administrative exercise of its public interest authority had been upheld in the early years of broadcast regulation, most notably in *FCC v. Pottsville Broadcasting Co.*[3] and *NBC, Inc. v. United States*.[4] But *Red Lion* was icing on the public interest cake—to the extent the public interest needed further icing.

What I aim to do in this short Essay is, at bottom, fairly modest. I want to suggest—in light of all the changes that have occurred in the communications marketplace in the forty years since *Red Lion*—that the FCC itself should act more modestly. In an exercise of regulatory self-restraint, going forward the agency should narrow the exercise of its public interest authority. Through either the issuance of policy statements or case-by-case adjudication, or both, the agency should demonstrate its understanding that it no longer serves the public's interest for the FCC to exercise unbridled public interest regulatory authority. At the end, I will suggest several specific instances in which the FCC could commence this exercise in regulatory modesty.

First, I want to provide some context by outlining the pervasive extent of the FCC's present public interest authority, even after adoption of the Telecommunications Act of 1996,[5] which Congress said was intended to provide a "pro-competitive, de-regulatory national policy framework."[6] Second, I want to suggest that, given the standard's indeterminateness, it might have been thought that Congress's delegation of public interest authority violates the nondelegation doctrine. Third, I want to point out, at least in a cursory fashion, the extent to which competition and convergence have rendered the communications marketplace that existed at the time of *Red Lion* a distant memory. Finally, I want to end by urging the FCC to embrace the notion of regulatory modesty by exercising self-restraint in the exercise of its public interest authority. Given the understandable space

---

advantage over new [market] entrants").

2. The Symposium's subtitle is "Public Interest Media Regulation Forty Years After *Red Lion Broadcasting Co. v. FCC*."

3. 309 U.S. 134, 145 (1940) (noting the FCC's responsibility to consider applications based on public interest factors).

4. 319 U.S. 190, 227 (1943) (holding that the public interest standard did not unconstitutionally delegate legislative authority to the FCC under the Federal Communications Act).

5. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

6. H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.).

constraints of this Symposium issue, I necessarily will do all of this in a suitably brief fashion. Nevertheless, I hope to do so convincingly enough to at least provoke interest and some sympathy for—if not total agreement with—my argument, especially among present and future FCC Commissioners.

I. THE PERVASIVE NATURE OF PUBLIC INTEREST REGULATION

The public interest standard that was the keystone of the Radio Act of 1927 and its successor, the Communications Act of 1934,[7] still pervades the current regulatory regime. After passage of the Telecommunications Act of 1996,[8] there remain nearly one hundred statutory provisions that direct or authorize the FCC to act in the public interest.[9] The public interest standard is at the heart of regulation of the radio spectrum. Thus, all of the FCC's decisions relating to spectrum licenses must be based on findings that the action is in the public interest.[10] For example, the agency's decision to grant or renew a broadcast or other spectrum license must be based on a finding that such action serves the public interest.[11] And if a licensee wishes to assign or transfer control of an existing license, the Commission must make a determination that the assignment or transfer is in the public interest.[12] Therefore, as a matter of practical effect, the FCC must approve all mergers of media companies because the licenses they hold are integral to the operation of their businesses.

Just as the public interest standard is at the heart of the FCC's regulation of broadcasters and other spectrum licensees, it also plays a central role in the agency's regulation of communications common carriers. There are over twenty separate provisions in Title II of the Communications Act, the part of the Act concerning common carriers, which refer to public interest determinations.[13] Key provisions are found in § 201(b) of the Act, authorizing the FCC to prescribe such provisions "as may be necessary in

7. Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, Pub. L. No. 416, § 602(a), 48 Stat. 1064, 1102 (codified as amended in various sections of 47 U.S.C.).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

9. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, at 456–67 (2001) (listing provisions in the Communications Act that pertain to the public interest standard).

10. Title III of the Communications Act contains the provisions relating to the Commission's authority to license uses of the spectrum for broadcasters and others. There are forty separate provisions in Title III that refer to "the public interest" or "the public interest, convenience, and necessity." *See id.*

11. 47 U.S.C. §§ 307(a), 309(a) (2000).

12. 47 U.S.C. § 310(d).

13. *See* May, *supra* note 9.

the public interest" to carry out the provisions of the Act,[14] and § 214(a), which requires the Commission to make a public interest determination before issuing a certificate authorizing a common carrier to construct new facilities or extend or acquire existing ones.[15] Thus, § 214, like § 310,[16] requires that the Commission make a public interest determination before an assignment or transfer of control of operating authority takes place. In effect, this requires preapproval of mergers involving companies holding § 214 common-carrier certificates of authority.

The 1996 Telecommunications Act (1996 Act) not only left the traditional public interest regulatory model in place, it extended its reach in some important respects. For example, both of the so-called regulatory reform provisions added by the 1996 Act—one granting the FCC authority to forbear from applying any of the Act's provisions or any Commission regulation to a telecommunications carrier or service, and the other requiring periodic review of regulations—require public interest determinations.[17] And, the new section governing the provision of universal service subsidies incorporates a public interest determination.[18] In language typical of that found throughout the Communications Act, the FCC is directed, in establishing the definition of services that will be supported by universal service support mechanisms, to consider the extent to which such services "are consistent with the public interest, convenience, and necessity."[19] The fact that Congress delegated public interest authority in key sections of the 1996 Act is an indication of the extent to which the public interest model was embedded in the public policy mindset of the time.

II. THE PUBLIC INTEREST MODEL RAISES CONSTITUTIONAL CONCERNS

Absent having kept up with all the latest jurisprudence—say, post-1935—one might suppose that a congressional delegation of authority to an administrative agency to act in the "public interest," with the indeterminateness inherent in the phrase, would violate constitutional separation-of-powers principles inherent in the nondelegation doctrine.[20]

14. 47 U.S.C. § 201(b) (2000).

15. *Id.* § 214(a). The FCC has exercised its forbearance authority under § 10 of the Communications Act, 47 U.S.C. § 160, to relieve some carriers of the requirements under § 214 and to make them less burdensome for others.

16. *See supra* note 12 and accompanying text.

17. 47 U.S.C. §§ 160(c), 161(a) (2000).

18. *Id.* § 254(c)(1)(D).

19. *Id.*

20. *See* THE FEDERALIST NO. 47, at 264 (James Madison) (J. R. Pole ed., 2005) (quoting Montesquieu's injunction that "[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty").

Article I of the Constitution vests "all legislative Powers" in Congress.[21] This provision could have been construed strictly to mean that Congress could not delegate *any* lawmaking power to an Executive Branch agency nor, certainly, to a so-called independent agency.[22] But if construed so literally, the modern administrative state could not exist. Thus, in modern times, the nondelegation doctrine has come to be understood to prohibit only standardless delegations of legislative authority.

The Supreme Court articulated the still-extant test for determining whether an act violates the nondelegation doctrine in 1928. In *J.W. Hampton, Jr., & Co. v. United States*, the Court declared: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[23] The purpose of requiring an intelligible principle is so that Congress must establish, even if within somewhat broad parameters, the policy guidelines it wishes its delegates to follow. Otherwise, the delegate—not Congress—is engaging in lawmaking, and Congress has abdicated its legislative function and, with it, political accountability.

The last time the Supreme Court struck down a law for violating the nondelegation doctrine was 1935, when it did so twice.[24] For our purposes here, it is sufficient to note the Court's characterization of the laws it held unconstitutional—two different provisions of the New Deal's National Industrial Recovery Act (NIRA) intended to address Depression Era economic woes. In *Panama Refining Co. v. Ryan*, the Court said a provision of the statute authorizing the President to prohibit the shipment in interstate commerce of certain petroleum products was unconstitutional because it "establishe[d] no criterion to govern the President's course."[25] Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated NIRA's provision authorizing the President to establish "codes of fair competition" for various commercial sectors. The Court stated that

21. U.S. CONST. art. I, § 1.

22. For one of the older cases that adopted this literal approach, see Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

23. 276 U.S. 394, 409 (1928) (emphasis added).

24. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 432–33 (1935) (holding Congress's delegation of authority to an agency under the National Industrial Recovery Act was unconstitutional because the Act did not establish any rules or procedures for the agency to follow); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935) (finding Congress's delegation of legislative power to the Executive Branch was unconstitutional because the Legislative Branch did not provide any standards or procedures by which to govern the President's determinations).

25. *Panama Refining*, 293 U.S. at 415.

"Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[26] If our constitutional system is to be maintained, Chief Justice Hughes declared, Congress must not be allowed "to transfer to others the essential legislative functions with which it is thus vested."[27]

After *Panama Refining* and *Schechter Poultry*, one might suppose a delegation to an agency to act in the "public interest" would fall prey to a nondelegation doctrine attack. After all, in 1999, constitutional law scholar Gary Lawson called the public interest standard "[e]asy kill number 1" on nondelegation doctrine grounds because the licensing provisions of the Communications Act grant "nearly absolute discretion about a subject that is absolutely central to the regulation of broadcasting."[28]

In reality, the public interest standard has been anything but an easy kill. Not long after the *Panama Refining* and *Schechter Poultry* nondelegation doctrine high-water mark, the Supreme Court proclaimed that the public interest standard "is as concrete as the complicated factors for judgment in such a field of delegated authority permit."[29] Thus, in 1943, in the landmark case of *NBC, Inc. v. United States*,[30] the Supreme Court rejected a nondelegation doctrine attack claiming that the public interest standard "is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional."[31] The Court referred to its admonition in *FCC v. Pottsville Broadcasting Co.* that the criterion "is as concrete" as could be expected in such a dynamic field.[32] And it cited an earlier Federal Radio Commission case in which it had said the public interest standard "is to be interpreted by its context," taking into account various aspects of radio-transmission services.[33] All told, the Court found this sufficient, if unenlightening.

And despite its conceded vagueness, to this day the public interest standard has remained good enough to pass constitutional muster. In 2001

26. *Schechter Poultry*, 295 U.S. at 537–38.
27. *Id.* at 529.
28. Gary Lawson, *Delegation and the Constitution*, REG., Spring 1999, at 23, 29, *available at* http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf.
29. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).
30. *See* 319 U.S. 190 (1943) (affirming the Commission's first rules governing network broadcast practices).
31. *Id.* at 225–26.
32. *See id.* at 216 (citation omitted) (noting that the Court had previously held the public interest standard articulated by Congress was an appropriate one for broadcast regulations).
33. *See id.* (citation omitted) (listing several factors—including the scope, character, and quality of services—that are relevant when divining the public interest).

the Supreme Court sustained the Clean Air Act against a nondelegation doctrine challenge.[34] In the course of doing so, the Court reaffirmed the (at least theoretical) vitality of the "intelligible principle" requirement.[35] To bolster his position that the Clean Air Act provision is constitutional, Justice Scalia, writing for the majority, observed that the Court had "found an intelligible principle" even in the "public interest" itself.[36] Realistically, at least for the foreseeable future, we may assume that the Supreme Court is highly unlikely to hold that the public interest standard violates the nondelegation doctrine.

Hence, my fallback position: The FCC should commit acts of regulatory modesty by constraining the exercise of its public interest authority. Before offering some suggestions for self-restraint, a very brief word about the changed marketplace environment is in order.

III. COMPETITION AND CONVERGENCE IN TODAY'S DIGITAL WORLD

Last century's analog age was characterized for the most part by a monopolistic environment in the provision of telephone and other telecommunications services, and a less than vigorously competitive environment in the provision of most mass media services, such as broadcasting and cable television. Last century's era of limited—and in some instances, nonexistent—competition is largely a bygone memory.

As the title of this Symposium session indicates, today's marketplace is characterized by convergence—that is, the blurring or disappearance of formerly distinct service boundaries. And although the title does not refer to competition, it is a fact that competition is as much a defining characteristic of today's marketplace as lack of competition was of last century's. The rapid advent of both competition and convergence is attributable in large part to the transition from analog to digital technologies and from narrowband to broadband services.[37] And, to be sure, in addition to technological advances, changes in the regulatory and legal environment have facilitated a manifestation of convergence through

34. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (holding that, while congressional delegation of authority to the EPA was not unconstitutional, the agency unreasonably interpreted the Clean Air Act as it related to the implementation of revised ozone standards).

35. *See id.* at 472 (noting that Congress must "offer an intelligible principle" when delegating its decisionmaking authority to an agency).

36. *Id.* at 474.

37. *See* Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 108–10 (2006). As for convergence, in 2004, the FCC explained how the greater bandwidth of broadband networks encourages the introduction of services "which may integrate voice, video, and data capabilities while maintaining high quality of service." IP-Enabled Services, 19 F.C.C.R. 4863, 4876 (2004) (notice of proposed rulemaking).

the entry of new communications competitors and the availability of offerings of formerly distinct services on a bundled basis.

This is not the place to rehearse—with a surfeit of accompanying facts and figures which change monthly, if not more frequently—all of the developments that distinguish today's marketplace from the one that existed even a few years ago. It suffices to highlight a few salient points indicative of the increasingly competitive and convergent marketplace. Wireless providers have emerged as such vibrant competitors that by the end of 2007 more than 15% of American households were strictly wireless.[38] Cable companies now offer Internet-based telephone services that have increased competition still further, with the number of cable-based voice subscribers now numbering over 16 million people.[39] With respect to their traditional video offerings, cable operators face continued competition from satellite companies, which occupy about 30% of the market.[40] And now traditional telephone companies, having invested billions of dollars in upgrading their networks with high-capacity fiber, are quickly becoming significant competitors in the video-services market.[41] Moreover, consumers increasingly use their wireless devices not only to make phone calls, but to distribute and receive all manner of video content, including television programs.[42] Telephone, cable, wireless, and satellite operators all compete in the Internet access market segment.

---

38. CTIA, Wireless Quick Facts, http://www.ctia.org/advocacy/index.cfm/AID/10323 (last visited Sept. 11, 2008).

39. *See* TELECOMMS. INDUS. ASS'N, TIA 2008 TELECOMMUNICATIONS MARKET REVIEW AND FORECAST 91 (2008) (estimating that the number of subscribers to Internet-based telephone services will increase to twenty-three million by 2009).

40. *See* Danny King, *Providers Aim to Keep Up with Growth*, TVWEEK, Mar. 16, 2008, http://www.tvweek.com/news/2008/03/providers_aim_to_keep_up_with.php (giving the relative market shares of cable- and satellite-television providers).

41. *See, e.g.*, David Ho, *Verizon to Speed Up Internet in Ten States*, ATLANTA J. CONST., June 19, 2008, at C3, *available at* http://www.ajc.com/business/content/business/stories/2008/06/19/verizon_internet.html (describing the telecommunications industry's "escalating broadband war with cable companies"); Stephanie N. Mehta, *Verizon's Big Bet on Fiber Optics*, FORTUNE, Feb. 22, 2007, http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/05/8401289/index.htm (estimating that Verizon will spend twenty-three billion dollars "to wire 18 million homes—just over half of its market"—for proprietary fiber-optic service (FiOS) by the end of 2010).

42. *See, e.g.*, Anna Henry, *Driving Mobile Television*, RURAL TELECOMM., May–June 2007, at 21, 21 (hypothesizing that 102 million subscribers will view mobile television by 2010); Amol Sharma, *Telecommunications; What's New in Wireless: A Look at Mobile Devices and Services You Can Expect in the Next Year—And Beyond*, WALL ST. J., Mar. 26, 2007, at R1; Editorial, *A Bundle of Competition: Collin County on the Front Lines in a New Technology Battlefront*, DALLAS MORNING NEWS, June 22, 2008, at 12B, *available at* http://www.dallasnews.com/sharedcontent/dws/news/city/collin/opinion/stories/DN-north_compete_22edi.ART.North.Edition1.4db4496.html ("The telephone also used to be just a telephone, something used to call grandma. Now you can call grandma, surf the Internet, watch live television, take and send pictures, and send text messages from the same device.").

Again, the point here is not to provide anything resembling a complete compendium of all the latest indicators showing the extent of competition and convergence, for it would be outdated long before you read this. The point, rather, is to provide a basis for arguing that it is time for the agency to chart a new, more modest course with respect to public interest regulation.

IV. NARROWING PUBLIC INTEREST REGULATION THROUGH AGENCY SELF-RESTRAINT

In light of the marketplace and technological developments sketched in Part III, Congress should pass a new communications law that replaces the statute's ubiquitous public interest delegation with a competition-based standard akin to the "unfair competition" standard contained in the Federal Trade Commission Act.[43] Indeed, just such a bill incorporating the "unfair competition" standard was introduced in the 109th Congress in the Senate.[44] A competition-oriented standard, which necessarily requires an antitrust-type analysis, would focus the FCC's regulatory decisions on the realities of the marketplace. The new law should also require the FCC to rely more heavily on ex post remedial orders resulting from particular adjudications of complaints, rather than on overly broad ex ante proscriptions adopted in generic rulemakings. By its very nature, the application of a competition standard in the context of fact-specific adjudications would promote an institutional environment much more conducive to employment of rigorous economic analysis than the environment that currently prevails at the FCC.

In the near term, however, it is doubtful Congress will enact a new law overhauling the Communications Act along these lines. So, short of such a new law or the Supreme Court's deciding, suprisingly, that the public interest standard is unconstitutional, regulatory constraint under the public interest standard must come from the agency itself. The fact that the public interest standard remains in the statute and is not unconstitutional does not mean that the FCC itself should not narrow its application in appropriate circumstances and contexts. Recall Justice Frankfurter's remark in *Pottsville Broadcasting* that the standard is "as concrete as the complicated

43. Federal Trade Commission Act § 5(b), 15 U.S.C. § 45 (2000) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition . . . .").

44. Digital Age Communications Act of 2005 § 102, S. 2113, 109th Cong. (2005); Randolph J. May, *Perspective: Time for a Digital Age Communications Act*, CNET.COM, July 13, 2005, http://news.cnet.com/Time-for-a-Digital-Age-Communications-Act/2010-1071_3-5785159.html; May, *supra* note 37, at 103.

factors for judgment in such a field of delegated authority permit."[45] There is no logical reason why the lack of "concreteness" should only be used to extend the agency's regulatory reach, as opposed to contract it. There are many instances in which such narrowing might be appropriate—especially in ways that tie the need for regulation more closely to competitive market conditions. To illustrate, below are a few important examples.

A. Merger Approvals

As explained above, whenever entities holding FCC licenses or authorizations seek to merge by acquiring or transferring control of a license or authorization, the FCC must find that the proposed transaction is in the public interest.[46] The FCC's review of a proposed transaction's competitive impact largely duplicates the antitrust review performed by the Department of Justice (DOJ) or the Federal Trade Commission (FTC). The DOJ and FTC possess the expertise to conduct such competitive-impact analyses. No one benefits from the wasteful expenditure of time and resources resulting from such duplicative competitive-impact reviews from two different government agencies.

Moreover, in conducting its review under the public interest standard, the FCC often ranges far beyond just analyzing the specific impact of the proposed merger. The inherent vagueness of the public interest standard leaves the Commission largely free to seek to impose "voluntary" conditions on a merger that are unrelated to any alleged competitive impact of the specific transaction. The Commission merely withholds approval of the merger until the parties come forward to propose conditions which the Commission has telegraphed in closed door negotiations that it would find acceptable to meet whatever public interest concerns that opponents, the FCC, and others have raised. So, for example, in the past, the Commission has conditioned approval of the merger of two telephone companies on its provision of discounts to low-income households for broadband service, on repatriation of jobs that have been outsourced overseas, and on adherence to net-neutrality commitments. However salutary such regulatory mandates might, or might not, be if imposed on an industry-wide basis in a generic rulemaking proceeding, it is inappropriate and often unseemly for the agency to impose such requirements on specific companies through a process of last-minute regulatory extraction when the conditions bear no relationship unique to the proposed merger.

The FCC should reform the merger review process by announcing a policy that, absent extraordinary circumstances, it will largely defer to the

45. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).
46. *See supra* notes 12 & 16 and accompanying text.

DOJ's and the FTC's expertise regarding any competitive concerns raised by the merger. And the agency should announce that it will refrain from imposing "voluntary" conditions on merger proponents that are unrelated to compliance with existing statutory or regulatory requirements. In this way, in the context of merger reviews, the agency would narrow substantially the application of the public interest standard. While the interested parties and the public would benefit from the cost savings associated with the elimination of duplicative agency reviews, the public interest would still be protected by ensuring that the merger would not be approved until it meets all existing Communications Act and agency regulatory requirements.[47]

B. Regulatory Review Proceedings

The 1996 Telecommunications Act added provisions requiring the FCC to conduct periodic reviews of all regulations relating to telecommunications service providers and media ownership.[48] Regarding the periodic review of regulations pertaining to telecommunications services providers, the Act requires the Commission to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[49] With respect to review of media ownership regulations, the Act requires the agency to "determine whether any of such rules are necessary in the public interest as the result of competition."[50] In both instances, the FCC is directed to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[51]

It seems obvious that these rather unique agency-specific periodic-review provisions were intended by Congress in 1996 to alter the regulatory status quo by mandating that the Commission affirmatively consider whether new competition has displaced the need for legacy regulations. But the Commission, thus far, has been inclined to treat them in a rather business-as-usual manner. In two early cases involving the

47. I have previously addressed this proposal. *See* Randolph J. May, *Reform the Process*, 27 NAT'L L.J. 23, 27 (2005), *available at* http://www.freestatefoundation.org/images/Reform_the_Process--NLJ.pdf (suggesting that government agencies wastefully spend resources in duplicating review of mergers and "merger proposals should be considered in a fair, timely, and efficient manner").

48. *See* Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161 (2000) (review of regulations pertaining to telecommunications services); Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111 (1996) (review of media ownership regulations).

49. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161(a)(2) (2000).

50. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111 (1996).

51. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161(b) (2000); Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56, 111 (1996).

agency's first post-1996 Act regulatory review of its media ownership rules, the D.C. Circuit reversed agency decisions not to relax certain existing ownership rules.[52] For present purposes, the particular rules at issue and the Commission's analysis regarding review of the rule in each instance are not important. What is important is the Commission's approach to the task assigned by Congress. In both the *Fox* and *Sinclair* cases, the court stated that "[§] 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[53] The court read the statute to require the FCC to repeal or modify a rule unless the rule was "necessary" in a sense akin to indispensable, while the agency maintained it needed merely to determine whether a rule's retention was "in the public interest" or useful or appropriate, but not indispensable.[54] Indeed, the Commission petitioned for rehearing, arguing that the court set too strict a standard for retaining rules. On rehearing, the court deleted its discussion concerning the appropriate regulatory review standard because it found that the Commission had erred even applying the more relaxed standard that simply equated "necessary" with being consonant with the public interest.[55] Thus, it left this interpretative issue unresolved.

Whether or not the Commission agrees with the initial D.C. Circuit view that the statute creates a presumption in favor of repealing rules, it nevertheless could articulate a standard that gives more weight to the existence of marketplace competition in making the public interest determination. After all, when Congress refers specifically to "competition" in conjunction with a determination as to whether regulations are still "necessary" in the public interest, it is fair to surmise it meant to establish a stricter standard than if it had said simply "in the public interest." But more to the point for present purposes, it is likely that the courts would find (as the D.C. Circuit once did) that the FCC at least possesses the discretion to narrow the scope of its public interest determination in this way. The Commission should avail itself of the opportunity to construe this provision incorporating the public interest standard in a narrowing way that gives effect to the Act's obvious deregulatory intent.

52. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), *modified*, 293 F.3d 537 (D.C. Cir. 2002); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).

53. *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159.

54. 2002 Biennial Regulatory Review, 17 F.C.C.R. 18,503, 18,511 (2002) (notice of proposed rulemaking).

55. *Fox*, 293 F.3d at 540.

C. Forbearance Relief

In addition to the periodic-regulatory-review provisions, the 1996 Telecommunications Act contained a related reform provision. This provision *requires* the FCC to forbear from applying any Communications Act provision or agency regulation to a telecommunications carrier or service if the Commission determines that enforcement of the regulation or provision (1) is not necessary to ensure that the providers' rates or practices are just and reasonable and not unjustly or unreasonably discriminatory; (2) is not necessary for the protection of consumers; and (3) "is consistent with the public interest."[56] As far as I have been able to determine, this forbearance authority is unique, and not found in other regulatory statutes. Like the periodic review requirement, the deregulatory intent of the forbearance provision is obvious on its face.[57]

Despite the fact that competition and convergence have rendered many of the agency's legacy regulations obsolete, the Commission has granted forbearance petitions sparingly, in part because it has interpreted the add-on public interest prong of the forbearance test expansively. Again, the indeterminate nature of the standard easily allows the Commission to do so. But it ought to be sufficient for purposes of evaluating whether forbearance should be granted for the Commission to determine whether, absent enforcement, a provider's rates and practices are just and reasonable and not unjustly or unreasonably discriminatory, and whether enforcement is necessary for the protection of consumers. After all, should not the agency's principal concern be the protection of consumers?

Therefore, the Commission should announce as a matter of policy that it will construe the public interest prong as surplusage which imposes no additional requirement that is not already encompassed by the first two prongs of the test. Because of the public interest standard's indeterminateness, the Commission possesses discretion to adopt such an

56. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 160(a) (2000).

57. As far back as 1981, the FCC had asserted some measure of forbearance authority, despite the absence of any provision in the Communications Act explicitly providing for it. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 84 F.C.C.R.2d 445 (1981) (further notice of proposed rulemaking). Several times the FCC exercised its claimed authority to forbear from enforcing the Communications Act's tariff-filing requirements, and it was reversed by the lower courts. In 1994, the Supreme Court definitively resolved that the FCC lacked authority not to apply the Act's tariff-filing requirement. MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218 (1994). The Supreme Court's decision, along with the earlier judicial decisions, provided a significant impetus for inclusion of explicit forbearance authority in the Telecommunications Act of 1996. For this forbearance history, with citation to authorities, see generally Randolph J. May, *Why Forbearance History Matters*, PERSP. FROM FSF SCHOLARS, June 17, 2008, at 1–2, *available at* http://www.freestatefoundation.org/images/Why_Forbearance_s_History_Matters.pdf.

interpretation, and this narrowing construction would be consistent with the forbearance provision's overall deregulatory intent.

D. Universal Service

There are other sections of the Communications Act, like the forbearance section, in which the public interest standard is tacked onto the end as a catch-all. By way of example, take § 254,[58] the provision governing universal service, which was also added by the 1996 Act. The provision lists seven principles upon which the FCC is to base policies for the preservation and advancement of universal service. These include factors such as the provision of quality services at reasonable rates, access to advanced services, access by consumers in rural high-cost areas to services at rates comparable to rates charged in urban areas, and equitable contributions by service providers to support universal service.[59] Not surprisingly, the last principle stated is the catch-all public interest standard.[60]

After Congress delineates in fairly specific terms six decisionmaking principles, what is to be made of a seventh that merely directs the Commission to consider the public interest? This is a case in which agency modesty suggests the Commission should announce that—at least absent some exigent circumstances that it determines Congress could not have foreseen—it will base its decisions on the six specific principles included in the statute. And the Commission would do well to comb through the Communications Act for other instances in which the catch-all public interest standard is added to a list of specified factors for consideration. These provisions should be high on the list of candidates for a Commission pronouncement that it will narrow their application in an exercise of self-restraint.

CONCLUSION

With convergence and competition in the communications marketplace a reality, it is indeed time to revisit the application of the public interest standard. Whatever the merits of regulation under the indeterminate standard in the earlier, more monopolistic analog age (and I have serious doubts), the exercise of such unbridled and malleable discretion by the FCC is no longer appropriate in today's digital environment. Assessments of marketplace competition primarily should guide the Commission's regulatory decisions. Absent Congress's or the courts' narrowing the

58. 47 U.S.C. § 254 (2000).
59. *Id.* § 254(b)(1)–(6).
60. *Id.* § 254(b)(7).

agency's public interest authority, which is unlikely, the Commission, uncharacteristically, should heed my modest plea for regulatory modesty. In an exercise of self-restraint, the FCC should commit itself to narrowing the application of its public interest authority.

* * *

ARTICLES

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

RONALD J. KROTOSZYNSKI, JR.*

TABLE OF CONTENTS

INTRODUCTION

Red Lion was an unpersuasive decision from its inception, but that has not proven to be an impediment to its longevity.[1] The public interest

* John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. I wish to acknowledge the support of the University of Alabama Law School Foundation, which provided a generous summer research grant that

standard set forth in *Red Lion*—and the infamous scarcity rationale that the case established to justify government regulation of television and radio broadcasters' editorial choices—has refused to go quietly into the night. Instead, to borrow an apropos metaphor from another area of First Amendment law, the scarcity rationale is "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"[2] in the scholarly commentaries. *Red Lion* continues to stalk the legal landscape of mass media regulation, serving as a loaded gun with which incumbent politicians may attempt to frighten commercial broadcasters into doing their bidding (whether that bidding encompasses children's television, localism, less racy programming, or, unsurprisingly, more public affairs broadcasting).[3]

---

facilitated my work on this project. In addition, I also want to thank the Lewis & Clark Law School for hosting me as a visiting scholar in residence while I was working on this Article. As always, any errors or omissions are my responsibility alone.

1. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); *see* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1688 (1997) (noting that "[a]lthough [the public interest] regulatory regime has been in place more than seventy years, it rests on uneasy constitutional footing," namely the widely criticized "scarcity rationale"); *see also id.* at 1689 (explaining that the scarcity rationale, which refers to the limited amount of frequency that exists for government to allocate among a large number of would-be broadcasters, "seems to provide little justification for treating broadcasters differently than newspaper publishers under the First Amendment. The analytical weaknesses behind *Red Lion*'s central rationale has [sic] led to a steady drumbeat over the years calling for the Supreme Court to overturn the 1969 decision.").

2. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (describing a similar phenomenon that occurred when the Court repeatedly invoked the *Lemon* test over time, appearing to ignore the many criticisms of the test that had been expressed by several Justices).

3. *See, e.g.*, John Eggerton, Washington Watch, *FCC Mulls Next Move on Indecency*, BROADCASTING & CABLE, June 11, 2007, at 3 (noting Federal Communication Commission's (FCC) tough stance on the airing of profanity, even in the form of inadvertent or "fleeting" expletives); Editorial, *Court to FCC: Go %$&! Yourself*, BROADCASTING & CABLE, June 11, 2007, at 50 (discussing the dialogue between industry and regulators over the use of the "fleeting expletives" rule). The Supreme Court has agreed to review the Second Circuit's ruling invalidating the FCC's expansion of its indecency rules to encompass incidental use of profanity in a live broadcast. *See* Robert Barnes & Frank Ahrens, *High Court to Rule on Broadcast Obscenity*, WASH. POST, Mar. 18, 2008, at A1; *and* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 455–59 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008) (assessing the FCC's justification for its crackdown on fleeting expletives—that the agency unfairly subjects viewers to a "first blow"—but ultimately rejecting the FCC's "departure from established precedent"). Even so, if the Justices confine their decision in this case to the administrative law issue that the Second Circuit found dispositive, the opinion could leave *Red Lion* and its progeny entirely untouched. *See* FCC v. Fox Television Stations, 76 U.S.L.W. 3489, 3490 (Mar. 18, 2008) ("Question presented: Did court of appeals err in striking down FCC's determination that broadcast of vulgar expletives may violate federal restrictions on broadcast of 'any obscene, indecent, or profane language' . . . when expletives are not repeated?") (citation omitted). Given the broad scope of the question before the Supreme Court—literally, "[d]id court of appeals err"—it is quite possible that the FCC's significant change of policy without a

The problem, however, is not so much *Red Lion* as the public interest standard itself. Indeed, it is not difficult to construct a persuasive theory that justifies government regulation of commercial broadcasters; for example, Buck Logan has cogently argued that a property theory associated with the free use of spectrum could easily substitute for the long-discredited scarcity theory that Justice White deployed in *Red Lion*.[4] Thus, one cannot talk sensibly about *Red Lion* without considering the larger issue of the public interest standard itself; *Red Lion* is the symptom, whereas the public interest standard is the disease.

About ten years ago, I was invited to review former Federal Communications Commission (FCC or Commission) Chairman Newt Minow's book, *Abandoned in the Wasteland: Children, Television, and the First Amendment*.[5] In this book, Chairman Minow and his coauthor Craig LaMay argue that the FCC should mount a new and aggressive effort to enforce the public interest standard against commercial radio and television broadcasters.[6] Using his (now iconic) *Vast Wasteland* speech as a point of departure, Chairman Minow posited that the FCC had largely failed to hold commercial broadcasters accountable for meeting their public interest duties, particularly for failing to demand the production and dissemination of cultural and educational programming aimed at kids.[7]

My review, snarkily entitled *The Inevitable Wasteland*, observed that Chairman Minow had a dog that would not hunt: Because commercial broadcasters have little, if any, economic incentive to provide high-quality cultural, educational, or children's programming, no amount of regulatory fist shaking is likely to produce satisfactory results, regardless of whether the regulations are premised on *Red Lion*'s scarcity rationale or some more persuasive theory, like Logan's public forum approach.[8] I suggested that "the Commission's attempts to implement the public interest standard, which Congress enshrined in the Communications Act of 1934 and the Telecommunications Act of 1996, are a portrait of regulatory failure, notwithstanding the good faith efforts of virtually every subsequent Chairman of the Commission."[9] I claimed then, and still believe now, that "[t]he Commission's efforts to enforce the public interest standard largely

sufficient "reasoned explanation" might well determine the outcome of the case.

4. *See* Logan, *supra* note 1, at 1723–26 (arguing that spectrum is a kind of government property that broadcasters use for private speech and suggesting that most public interest broadcast regulations could be justified under the public forum doctrine).

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

6. Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2102 (1997).

7. MINOW & LAMAY, *supra* note 5, at 4, 7, 14–15, 199–202.

8. Krotoszynski, *supra* note 6, at 2103–04.

9. *Id*. at 2103.

have failed to produce cognizable improvements in either the quality or scope of commercial broadcasters' discharge of their 'public trustee' responsibilities."[10]

Accordingly, if American children are to rely on the Fox Network to meet their educational programming needs, we are in deep trouble.[11] Happily, of course, parents need not rely on commercial television networks to provide educational programming. PBS continues to provide high-quality cultural, educational, and children's programming, and is available free on over-the-air broadcast television to any person who possesses a receiver. If one expands the universe of available educational programming to include programs on cable and satellite-based stations, the educational options blossom exponentially. Thus, my argument in 1997 was that the government should not seek public goods from entities (commercial broadcasters) with little or no interest in providing them.[12]

Ten years have passed.[13] And, in many ways, the past decade has

---

10. *Id.*

11. *See id.* at 2112–15 (arguing that in the early years of broadcast television, a very small, well-educated, affluent audience facilitated programming and programming decisions that became less economically feasible with the emergence of a less elite, mass audience, suggesting that if programming is not profitable for television stations, stations "will make only whatever minimal efforts are necessary to placate the Commission's staff," and positing that the Commission "cannot make them [commercial broadcasters] produce first-rate public interest programming"); *see also* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 306–09 (1994) (noting that the nature of the viewing audience in the 1950s significantly affected programming decisions and suggesting that as access to television receivers expanded exponentially in the 1960s, the nature of television programming changed dramatically from the 1950s, a period generally known as the "Golden Age" of television).

12. *See* Krotoszynski, *supra* note 6, at 2133–34 (questioning the efficacy of the means that the FCC has pursued in attempting to bolster public interest programming).

13. In the interim, I argued that multiple ownership restrictions on mass media outlets, rather than content-based rules on programming, could better secure a diversity of speakers and viewpoints. Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 832–34, 862–68. In other words, the way to ensure diverse programming on over-the-air broadcast stations is to create structural regulations that divide and separate ownership, thereby creating important competitive incentives and increasing the possibility that some stations will cover stories in a different way or cover different stories entirely. *Id.* at 859–62, 867–68, 873–76. If a single entity owns a television station, a radio station, and a newspaper within the same community, the content and viewpoint of the news coverage is very likely going to be identical, with a single story being recycled and simply redistributed in each medium. I do not resile from these views but will concede that the relative importance of commercial broadcasting continues to decline in the United States vis-à-vis other forms of program distribution, including cable, DBS, and the Internet. I would not yet endorse the view that the multiple ownership rules should be abandoned *in toto*, however, primarily because of the continuing—albeit fading—importance of the broadcast media to elections and electioneering. *Id.* at 876–80, 886–87. *But cf.* Brian Stelter, *Obama Harnesses Power of Web Social Networking*, SEATTLE TIMES, July 7, 2008, at A1 (noting that "[t]he [Obama] campaign's new-media strategy, inspired by social networks such as MySpace and Facebook, has revolutionized the use of the Web as a political tool, helping the candidate

brought about a complete communications revolution. The Internet, coupled with the ubiquity of high-speed wireless networks that feature virtually unlimited bandwidth, has democratized the mass distribution of both audio and video content.[14] Today, virtually anyone with Internet access can create a message that can be distributed to the world, at virtually no cost, in either print or video format.[15] The notion that "broadcasting" is solely the domain of the legacy television networks no longer has salience.[16] This raises an important, related question: In the era of low-cost Internet-based mass communications, why should we care whether commercial television and radio broadcasters serve the public interest? To state the matter simply, the "inevitable" wasteland is now arguably an "irrelevant" wasteland.[17]

---

raise more than 2 million donations of less than $200 each and swiftly mobilize hundreds of thousands of supporters before various primaries"). That said, we are closer now to the point at which control of television and radio stations does not matter materially to the vibrancy and diversity of the democratic process than we were in 2000, when I objected strenuously to the Commission's proposed repeal of the multiple-ownership rules on diversity grounds. *See*, *e.g.*, Julie Bosman & John M. Broder, *Obama's Campaign Opens a New Web Site to Strike Back at 'Dishonest Smears*,*'* N.Y. TIMES, June 13, 2008, at A24 (describing Obama campaign's plan to use the Web to rapidly respond to "rumors" attacking Senator Obama and his wife, Michelle Obama); Michael Luo, *Small Online Contributions Add Up to Huge Fund-Raising Edge for Obama*, N.Y. TIMES, Feb. 20, 2008, at A18 (describing Barack Obama's historic, highly successful use of the Internet to generate millions of dollars in small donations from individual donors); Stelter, *supra*, at A6 (same).

14. *See* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1205–06 (1996) (noting "seismic changes" wrought by new media and arguing that "[t]oday, a would-be 'broadcaster' has far more effective tools readily at hand to disseminate his message effectively to a wide audience than a would-be [print] publisher"); *A Series of Tubes: The Summer's Best Sitcoms Aren't on TV. They're Online*, WILLAMETTE WEEK, July 9, 2008, at 59, *available at* http://wweek.com/editorial/3435/11225 (last visited Oct. 13, 2008) ("Historians will someday look back on our time as the golden age of television—at least on the Internet.").

15. In fact, the whole concept of "viral videos" has reversed the distribution chain: now, content produced for Internet distribution gets redistributed on broadcast, cable, and satellite channels. For example, the "Obama Girl" videos began as Internet-based programming, but quickly morphed into programming distributed via more traditional mass media outlets. *See* Matt Bai, *The Web Users' Campaign*, N.Y. TIMES MAG., Dec. 9, 2007, at 29 (discussing the increasing importance of third party Internet content to political campaigns and referencing the "Obama Girl" videos); Lisa Tozzi, *'Obama Girl,' the Sequel*, N.Y. TIMES, July 17, 2007, at A19 (announcing the launch of the second "Obama Girl" video, entitled "Obama Girl vs. Giuliani Girl").

16. *See* Maria Puente, *Amateurs Curry Favor on the Web*, USA TODAY, June 30, 2008, at 1D (discussing growth of original program content on YouTube and arguing that "on YouTube anyone can be famous for doing almost anything," and noting that "[i]n just a few years, Internet TV has been transformed, with scores of professionally produced episodic shows, networks, ratings, trackers, fans, and *TV Guide*-style reviews").

17. Perhaps ironically, the major networks seem to recognize that the glory days of broadcast television as a means of distributing content have come and gone. Jeff Zucker, CEO of NBC Universal, recently observed that "[t]he world has changed. . . . Our competition is not just broadcast networks, it's cable networks and video games and online

In this brave new world of decentralized access to mass audiences,[18] concerns about the public interest duties of commercial broadcast stations are like worries about the public interest duties of telegraph operations. In other words, people no longer need rely, and in fact no longer rely, on the national television and radio networks as primary (or exclusive) sources of news and information. Moreover, the notion that the means of distribution of content matters to its accessibility no longer holds true. Indeed, younger persons increasingly read the newspaper on the Web, rather than in hard copy. Does this make the *New York Times* a broadcaster? In some ways, it does. Moreover, NBC routinely provides access to its news programming on the Internet; one can watch *Meet the Press* as easily from a laptop as from a television receiver (and with much greater convenience).

We either have reached, or are rapidly reaching, the point of convergence: the means of distributing content no longer prefigures its mass accessibility. Whether in print, broadcast, cable, satellite, or Internet form, content is no longer a prisoner to its primary means of distribution.[19] In this new era of enhanced and democratized distribution of content, the idea that commercial broadcasters present a serious risk of skewing the marketplace of ideas is a quaint notion. The real question is not whether commercial broadcasters can define the nation's agenda, but rather whether commercial broadcasters are needed any longer as a means of making markets for program distributors, advertisers, and mass audiences.[20]

---

social sites." David Lieberman, *Leading a Different Upfront Charge*, USA TODAY, May 23, 2008, at 1B. His conclusion seems spot on: "If we're going to wring our hands over the fact that we want the days of the three broadcast networks to come back, then we will get left behind." *Id.*

18. *See* Puente, *supra* note 16, at 2D (explaining that low-cost modern programming gives online personalities "total control over their own productions").

19. *See* Erwin G. Krasnow & M. Wayne Milstead, *FCC Regulation and Other Oxymorons Revisited*, 7 MEDIA L. & POL'Y 7, 13–14 (1999) (arguing that "with the growth in the number of broadcast stations and the proliferation of cable television, cable networks, wireless cable, Direct Broadcast Satellite (DBS), the Internet, and a host of other services, such scarcity [of potential outlets for programming content] no longer exists. The proliferation of outlets and the convergence of communications technology have thrown a monkey wrench into the gears of conventional regulatory wisdom"); Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 24 (2003) ("With the convergence of Internet, cable, satellite and broadcast technologies, and new platforms being used to transmit content that was once only available over television, traditional media law is quickly becoming inconsistent and out-of-date."). For thoughtful discussions of the concept of convergence in a broader context, see Khaldoun Shobaki, Comment, *Speech Restraints for Converged Media*, 52 UCLA L. REV. 333, 346–51 (2004), and Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 49–52 (2005).

20. *See* Brooks Barnes, *Google and Creator of 'Family Guy' Strike a Deal*, N.Y. TIMES, June 30, 2008, at C1 (reporting on a plan for "Web-only distribution for Seth MacFarlane's new cartoon series" and noting that "Google is experimenting with a new method of distributing original material on the Web, and some Hollywood film financiers are betting millions that the company will succeed"); Michael Hiestand, *Playoff Traffic*

In sum, we have moved from a world in which the "vast wasteland" of commercial television is inevitable, to one in which it is both inevitable and largely *irrelevant*. To state the matter plainly, we need not, and do not, rely primarily on commercial television networks to provide programming that constitutes a public good.[21] By any relevant measure, citizens of the United

Swings to 'Net, USA TODAY, June 18, 2008, at 3C (reporting that more people relied on Internet-based coverage of the 2008 U.S. Open golf tournament than on television-based coverage of the event). At some point, for example, the National Football League (NFL) might conclude that directly netcasting the Super Bowl would yield higher rents than selling the rights to broadcast the event to a national television network. And, when that day comes, the Super Bowl will be netcast rather than broadcast. Why should the NFL pay a finder's fee to a network for distribution of its programming if it can direct market to advertisers itself? *See* Barnes, *supra*, at C3 (noting that first-run Web-based distribution of well-financed programming could "if successful . . . send shockwaves through the entertainment business"). *But cf.* Brian Stelter, *For Web TV, a Handful of Hits but No Formula for Success*, N.Y. TIMES, Sept. 1, 2008, at C1 (concluding that "producing Web content may be easy but profiting from it is hard" and describing technical and financial barriers to successful Web distribution of "webisode"-based programming). At the moment, the transaction costs must be sufficiently high that the NFL finds it more profitable to continue using a middleman to market its product. But, as has happened in the travel industry, where direct marketing efforts have significantly reduced the size and number of travel agents, there is no reason to suppose that content producers will continue to rely on networks to distribute their programming, essentially leaving money on the table. *See* Eric Pfanner, *Google, Microsoft Worry Ad Agencies*, SEATTLE TIMES, June 23, 2008, at E4 ("The growing advertising ambitions of technology powerhouses like Google and Microsoft are creating alarm at ad agencies."). The networks can make money only by paying the program producer an amount that is less than the advertising value of the programming, less transaction costs; thus, if program producers could access the same audience directly, there would be no reason, or incentive, to license its distribution to a television network. *See* Barnes, *supra*, at C3 (suggesting that television networks lack the same appeal they once had as distributors because ratings are "dwindling"). For the time being, the television networks have a competitive advantage in distributing content to mass audiences; how long this will remain true is something of an open question. If Yahoo or Google could generate the same audience numbers at a lower cost than Fox or NBC, the NFL will have little reason to continue relying on television network distribution of its programming. At the same time, broadcasters must change their definition of an audience to include persons using the Internet to access programming and consider pricing for advertiser access to that audience. *See* Suzanne Vranica, *NBC's Olympic Test: Counting All the Games' Viewers*, WALL ST. J., July 7, 2008, at B5 (announcing NBC's launch of a "new system for measuring viewership across an array of different media, including video-on-demand, cell-phones, and the Web, as well as traditional television").

21. By "public good" programming, I meant (and mean) programming that contributes in some significant way to the community, but which is not as profitable as the next best non-public-good show. Thus, broadcasting cultural events like opera, theater, or ballet might make for a wiser, better citizenry that can undertake democratic self-government more effectively. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256–57, 262–63 (describing some of the "many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express"). *But see* Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 932–33 (1990) (criticizing Meiklejohn's effort to extend the democratic self-government rationale to encompass artistic, literary, and scientific speech as unpersuasive for myriad reasons, notably including the fundamental point that such speech has intrinsic

States in 2008 have access to more information, at less cost, than any other civilization known to man. The notion that broadcast television has some talismanic power to make the market, or to define the national agenda, no longer holds true.[22]

To be sure, the Supreme Court faced a radically different technological landscape in 1969. At the time when the Justices decided *Red Lion*, network television really was the only game in town. Imagine a world without cable television, without satellite television, and, most importantly, without the Internet. Reduce the number of national network operations to three (or four, if one counts PBS) and make the evening news the most common means of obtaining relevant information about local, state, or national news. In 1969, the notion that broadcast television held if not a monopoly, certainly an oligopoly, over the nation's agenda was not some sort of paranoid fantasia. Instead, the networks really did serve as a kind of funnel, or filter, for the mass distribution of news and information.[23]

Much has changed, however, since 1969. Yet *Red Lion* endures even as the predicate for its holding—that government may regulate the editorial decisions of broadcast television and radio stations in order to promote the

---

value of its own). Even so, a commercial television station will broadcast "Married by America" reruns rather than events at the Metropolitan Museum of Art if doing so generates a larger viewing audience and, hence, higher advertising revenue. For some kinds of programming, such as educational programming aimed at a very young audience, it will never make economic sense to prefer showing this programming rather than programming of low quality, aimed at an older audience, that does not serve the "public interest"—unless "public interest" is synonymous with maximization of station revenue. Thus, if public-good programming is to be available, it must be made available by some means other than advertiser-supported commercial broadcasting.

22. *See* Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting is Good for the Country*, 46 WM. & MARY L. REV. 439, 482 (2004) (noting that, over time, broadcasters have consistently lost audience share to other distribution platforms, including cable, DBS, and the Internet).

23. Filters play an essential role in helping to organize and sort information; in a sense, an almost infinite amount of information is not materially more useful than a null set. *Cf.* J. M. Balkin, Comment, *Media Filters, The V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1141–53, 1165–75 (1996) [hereinafter Balkin, *Media Filters*] (lauding the lingering, essential role filters play in modern society of helping us organize an almost infinite supply of information and thereby prevent a different sort of scarcity problem—one of audience, rather than of information); *see also* JACK M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 43, 57–60, 79–81 (1998) [hereinafter BALKIN, CULTURAL SOFTWARE] (discussing how memes, or widely shared epistemological shorthands, including "skills, norms, ideas, beliefs, attitudes, values, other forms of information," and even language itself, help to filter perceptions, information, and ideas; how filters are essential to both accessing and using information; and suggesting that in our "computer-oriented information society" we have a "need and the opportunity for ever new forms of filtering to control the amount of information being created and broadcast"). As Balkin puts the matter, "[i]n the Information Age, the information filter, not information itself, is king." Balkin, *Media Filters*, *supra*, at 1132.

public interest—makes increasingly little sense.[24] Moreover, as an empirical matter, government efforts to make broadcasters shoulder meaningful public interest duties seem no more effective at producing good results than they did in 1969 or at any point in between.[25] Thus, even if *Red Lion* is irrelevant, in terms of the ability of the national broadcast networks to filter news and information, it certainly is not irrelevant from the perspective of broadcast television and radio or for theorizing the scope of the First Amendment's guarantees of a free press and freedom of speech. Furthermore, were Congress to extend *Red Lion*'s mandate to other means of disseminating content—such as cable, satellite, or the Internet[26]—the decision could be both profoundly important and pernicious. Thus, to say that *Red Lion* is irrelevant in its own context begs some very important questions that need to be asked and answered, lest government claim the same power to regulate the marketplace of ideas (all in the name of the "public interest," to be sure) that governments in China, Cuba, and even Russia currently both claim and enforce against their citizens.[27]

---

24. *But cf.* Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1089–93, 1096–99, 1100–03, 1110–13, 1118–20 (1996) (broadly defending the public interest standard as the touchstone of the FCC's mass media regulatory policies, calling for "a sea change in FCC policy and practice regarding the public interest standard," and specifically advocating new, enhanced FCC efforts to force broadcasters to air *more* political and public affairs programming, *more* children's programming, and *less* sexually explicit and violent programming).

25. In this regard, it bears noting that the FCC has made little (if any) progress toward achieving former Chairman Reed Hundt's "sea change" in defining and enforcing the public interest obligations of commercial broadcasters. *See id.* at 1097–1100, 1129 (describing Chairman Hundt's vision for a renewed and expanded regulatory effort to promote public interest values, an effort that, at least of 2008, appears to have borne little fruit, to say nothing of a "sea change" in the way commercial-television broadcasters undertake their public interest responsibilities).

26. *See* John C. Quale & Malcolm J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite*, 60 FED. COMM. L.J. 37, 38–41, 65–66 (2007) (discussing various proposals to extend the proscription against indecent programming to satellite-based communications, such as DBS video and radio services, and noting potential constitutional objections to such legislation). Notwithstanding Quale & Tuesley's skepticism about the constitutional status of extension of an indecency ban on subscriber-based services, *see id.* at 44–47, 63–65, imposition of more generic public interest duties would seem less problematic, to the extent that Congress and the Commission tie any such new duties expressly to the use of publicly owned spectrum. In other words, even if a ban on a particular kind of programming might not pass constitutional muster, an affirmative requirement to provide certain kinds of programming might present a harder question, particularly if the Supreme Court adheres to *Red Lion*'s "scarcity" doctrine.

27. *See* Christopher Mason, *Web Tool Said to Offer Way Past the Government Censor*, N.Y. TIMES, Nov. 27, 2006, at C3 (discussing government efforts to block Internet access to content that government officials deem objectionable or offensive); Joe Nocera, *Horatio Alger Multiplied by 1.3 Billion*, N.Y. TIMES, Apr. 26, 2008, at C1 ("In a country of more than 1.3 billion people, 'only' 162 million use the Internet (as of 2007) and what they see there is strictly censored."); *see also* Paul D. Callister, *The Internet, Regulation and the Market for Loyalties: An Economic Analysis of Transborder Information Flow*, 2002 U. ILL. J.L. TECH. & POL'Y 59, 74–77 (discussing government censorship of the Internet in Cuba

My argument will proceed in three parts. Part I begins by briefly revisting *Red Lion* itself. The decision, even in 1969, did not offer a persuasive rationale for its outcome. Even so, it is not difficult to imagine a plausible basis for the imposition of public interest duties on commercial broadcasters, even if it is not the rationale that Justice White himself invoked. Part II then briefly deconstructs the merits of *Red Lion*. The most obvious point of attack is the meager intellectual merit of the scarcity doctrine, but this is hardly the most objectionable aspect of *Red Lion*. As Buck Logan has persuasively written, the government's ownership and control of spectrum rights could easily provide a property-based theory for imposing public interest duties on commercial broadcasters who receive access to this valuable resource at no direct financial cost.[28] The larger problem with *Red Lion*, and indeed with the public interest standard itself, is that the policy presupposes the good faith production of public goods from commercial broadcasters with little, if any, economic incentive to provide them. A third and more fundamental objection goes to the very notion that the government has any legitimate interest in compelling speech by private speakers (whether in a newspaper, a broadcast television station, or a video post on YouTube).

Finally, Part III considers better means of securing public goods in video programming and also of promoting a diverse and vibrant marketplace of ideas. The public interest standard, at least as presently conceived, does a very poor job of delivering programming to those who need it, and the real risk to diversity in the marketplace flows, not from ownership of a broadcast station license, but rather from a monopoly power over access to the means of sending and receiving media content.[29] From this perspective,

---

and China); Antoine L. Collins, Comment, *Caging the Bird Does Not Cage the Song: How the* International Covenant on Civil and Political Rights *Fails to Protect Free Expression Over the Internet*, 21 J. MARSHALL J. COMPUTER & INFO. L. 371, 402 (2003) (noting the existence of Web censorship in Russia).

28. *See* Logan, *supra* note 1, at 1723–26 (explaining that government regulation would not ensure that private broadcasters and station owners make time available only to those who can afford it, but rather would impose public interest duties on the stations to encourage diversity of thought).

29. *See* Janine Zacharia, *Google, Web Access and Censorship*, INT'L HERALD TRIB., June 4, 2008, at 13 (reporting that "[a]long with other American Internet companies, Google, which owns the world's most popular online search and video sites," has engaged in business practices abroad that "they would never dream of doing in the United States," in terms of censorship to please nervous foreign governments and that "Yahoo, Google's rival, turned over email messages and other information to the Chinese government in 2006, leading to the imprisonment of a journalist, Shi Tao, and a writer, Wang Xiaoning"). The fact that Google and Yahoo would engage in this behavior abroad should make U.S. users of both Web browsers nervous about precisely what they are doing at home but in truth, without mandatory disclosure laws, privacy protections, and the like, U.S. citizens have no effective means to know precisely how much data these companies collect and sell to third parties. *See generally* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX.

the greater threat to diversity is not from a national television network that fails to report important national stories in a fair and balanced fashion, but rather from the ability of Internet service providers (ISPs), including cable and telephone companies, as well as popular web search engines such as Google and Yahoo, to use their control over access to the network to favor some content and disfavor other content.[30]

In sum, we need to reconceptualize and reclaim the public interest in the age of the Internet not in terms of mandatory programming duties,[31] but rather as a mandate for universal access to the Internet under transparent conditions. In this context, *Red Lion* could make a significant and positive contribution by securing the constitutional legitimacy of new government efforts to require private companies using spectrum incident to their ISP or web browser operations to address the digital divide[32] and to refrain from

---

L. REV. 83 (2006) (discussing the problem of deceptive marketing techniques in print and electronic media and the legal system's inadequate attempts to protect consumers against such tactics).

30. Indeed, the willingness of Google and Yahoo to cooperate and assist the Chinese government with its censorship efforts provides useful, but troubling, insight into the core values of these companies. *Supra* note 29. Sometimes, the largest threats to freedom of expression come not from government sources, but from private entities. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 79–83 (1996) [hereinafter FISS, IRONY OF FREE SPEECH] (noting the importance of understanding that while the state may at times act to undermine democracy by regulating free expression, the state also often works to enhance democracy by limiting or controlling the exercise of unlimited private power to control the marketplace of ideas); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 5–6, 114–15 (1996) [hereinafter FISS, LIBERALISM DIVIDED] (advancing similar arguments that government regulation, in some circumstances, enhances rather than debases the marketplace of ideas); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783–91 (1987) [hereinafter Fiss, *Why the State?*] (noting that public debate is likely to be controlled by private forces that can and do dominate the social structure and arguing that, in light of this state of affairs, government regulations of free expression often can enhance, rather than inhibit, the marketplace of ideas); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415–16 (1985) [hereinafter Fiss, *Social Structure*] (asserting that "contemporary social structure is as much an enemy of free speech as is the policeman" and recognizing that the state, often seen as the enemy of free speech, can act as a friend as well).

31. Would we really want www.hustler.com to produce children's content? Not every website can or should attempt to cater to all tastes. The beauty of the Internet is that any would-be speaker can attempt to reach any would-be reader, listener, or viewer. Of course, if popular search engines like Google or Yahoo begin to block content in favor of linking web surfers to sites paying a commission for the preferential treatment, the ability of a would-be audience to reach desired content becomes seriously threatened. So too, if the companies controlling the physical architecture of the Internet use that control to favor some sites and disfavor others, quite invisibly to most users, a serious problem arises. When I attack the public interest standard as it has been defined, developed, and enforced in the context of commercial broadcasting, I should not be understood to advocate an entirely unregulated marketplace with respect to the Internet. Private monopolies can present threats to free speech no less pressing than self-serving government regulations. *See* Fiss, *Social Structure*, *supra* note 30, at 1415 ("Just as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship.").

32. *See* Bob Keefe, *Broadband Internet's Reach Limited*, OREGONIAN, July 3, 2008, at

unfair, deceptive, or anticompetitive operating practices.

I. *RED LION* AND THE SCARCITY RATIONALE FOR IMPOSING PUBLIC INTEREST DUTIES ON COMMERCIAL BROADCASTERS

Since the Communications Acts of 1927 and 1934, the Commission has been charged with licensing and regulating broadcasters under the "public interest, convenience, [and] necessity" standard.[33] Under the aegis of this regulatory mandate, the Commission has adopted a wide variety of public interest obligations, the satisfaction of which is a precondition to a licensee's retention of the station's license.[34] *Red Lion* presented a direct and powerful challenge to the use of the public interest standard to impose mandatory programming duties on television and radio broadcasters.

The facts of *Red Lion* are easy to understand. The case involved two appeals: one from the U.S. Court of Appeals for the District of Columbia Circuit[35] and the other from the U.S. Court of Appeals for the Seventh Circuit.[36] The D.C. Circuit appeal arose from the Commission's efforts to enforce an FCC policy, later codified into a regulation, requiring licensees to permit an individual personally attacked on air to respond to the attack and, if necessary, with free air time.[37] "On November 27, 1964, WGCB [a radio station operating in Red Lion, Pennsylvania] carried a 15-minute broadcast by the Reverend Billy James Hargis," during which Hargis attacked Fred J. Cook, author of *Goldwater—Extremist on the Right*, claiming that

> Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[38]

B1 (reporting on race and wealth disparities in access to broadband Internet service and suggesting that "[t]he stagnant numbers among low-income and black households could be indicative of a new type of 'digital divide' between the societal haves and have-nots in the Internet age").

33. 47 U.S.C. §§ 303, 307(a), 309(a) (2000); *see also* Krotoszynski & Blaiklock, *supra* note 13, at 814; Krotoszynski, *supra* note 6, at 2102; Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 607 (1997).

34. *See* Hundt, *supra* note 24, at 1089–92 (describing four areas where Congress and the Commission have provided broadcasters with guidance for satisfying the public interest standard requirements).

35. Red Lion Broad. Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

36. Radio Television News Dirs. Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

37. *Red Lion*, 395 U.S. at 367, 370–73.

38. *Id.* at 371.

Cook learned about the broadcast, concluded that Hargis's comments constituted a "personal attack" for purposes of the Commission's Fairness Doctrine policies, and demanded free air time to respond to the attack; WGCB refused his request.[39] Administrative proceedings ensued before the Commission, in which Cook prevailed.[40] Even so, however, the station refused to provide free air time for Cook to respond to Rev. Hargis's attack.[41] On appeal to the D.C. Circuit, the Commission prevailed, with the panel affirming the Commission's order.[42]

During the pendency of the WGCB proceedings, the Commission codified its Fairness Doctrine policies into a new set of administrative regulations. The regulations expressly required licensees to provide a right of reply for persons subjected to a personal attack and also mandated that broadcast stations provide free air time for candidates for public office if a station opposed the candidate's election or endorsed a competing candidate

39. *Id.* at 371–72.

40. *See id.* at 372 ("After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the Fairness Doctrine . . . to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it."); *see also Red Lion*, 381 F.2d at 911–17 (reproducing all relevant correspondence between Cook, Red Lion, and the FCC and noting that the Commission adopted a staff letter sent to Red Lion on December 9, 1965, as its official final order on December 10, 1965). Thus, the proceeding was an informal adjudication, conducted through a series of letters between Cook, the FCC, and Red Lion, from May 1965 to the December 10, 1965 final order of the Commission ordering Red Lion to provide free air time to Cook. *Id.*

41. *See Red Lion*, 381 F.2d at 911–12 ("It has been our understanding that the Commission's Fairness Doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to 'sponsor' or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry. . . . The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to 'sponsor' or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.").

In a letter to the FCC on November 8, 1965, however, Red Lion withdrew its offer of free airtime upon a statement of financial need from Cook and instead argued that the policy was unfair and unconstitutional. *See id.* at 913–14 ("We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in 'fairness,' we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other 'Hate Clubs', [sic] as he calls them, would we then be required to give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?"); *see also id.* (formally requesting "a ruling by the Commission on the constitutionality of the 'Fairness Doctrine' as applied to the instant situation").

42. *Red Lion*, 395 U.S. at 372–73.

for the same office.[43] The Radio Television News Directors Association sought judicial review of the new regulations and prevailed before the Seventh Circuit.[44] In ruling for the petitioner, Judge Swygert explained that

> [d]espite the Commission's disclaimers to the contrary, we agree with the petitioners that the rules pose a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance. This inhibition stems, in part, from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply.[45]

Accordingly, the Seventh Circuit voided the Commission's new rules in their entirety.[46]

The Supreme Court agreed to review both the D.C. Circuit's ruling sustaining the application of the personal-attack rule against WGCB in the administrative adjudication and the Seventh Circuit's ruling voiding the newly codified personal-attack and political-editorial rules that the Commission adopted in the rulemaking proceeding.[47] The Court affirmed the D.C. Circuit's holding and reversed the Seventh Circuit.[48]

Writing for a unanimous Supreme Court, Justice White quickly concluded that Congress intended for the Commission to establish and enforce public interest duties on commercial broadcasters and that no serious question existed about the delegation of power to establish the personal-attack and political-editorial rules.[49] This required the Supreme Court to address squarely the First Amendment objections to the Fairness Doctrine that the Red Lion Broadcasting Company and the Radio Television News Directors Association had raised to the Commission's rules.

Justice White rejected these objections, ruling that in a medium of communication not open to all, government could require those holding broadcast licenses to serve as public trustees for the community as a whole. The crux of Justice White's opinion is the notion of scarcity: Because more

---

43. *See id.* at 373–75 (quoting the regulations).

44. *See* Radio Television News Dirs. Ass'n v. United States, 400 F.2d 1002, 1011–12, 1020–21 (7th Cir. 1968) (holding that the Commission's personal attack and political editorial rules were vague and could potentially lead to censorship of speech).

45. *Id.* at 1012.

46. *See id.* at 1021 ("The Commission's order adopting the personal-attack and political-editorial rules, as amended, is set aside.").

47. *Red Lion*, 395 U.S. at 367–68.

48. *See id.* at 400–01 (finding the Fairness Doctrine to be constitutional).

49. *See id.* at 375–86 (interpreting the United States Code as directing the FCC to consider the public interest when granting, renewing, or modifying a broadcast license and finding the Commission's new regulations implementing the Fairness Doctrine to be a permissible means of enforcing the public interest mandate).

persons wish to broadcast than is technologically feasible, an entity holding a license does not have any superior claim to editorial freedom than an entity lacking a license. The first step in the argument is distinguishing broadcasters from other press entities in order to justify degraded free-speech and free-press rights for broadcasters. "Although broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of new media justify difference in the First Amendment standards applied to them."[50]

The second step is to draw a material equivalence between those holding and those lacking broadcast licenses: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[51] Thus,

> as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.[52]

Under this reasoning, those seeking access to the airwaves, but denied access to them by the government, have an equal claim to those operating a broadcast station to a say in the station's programming decisions. This approach essentially negates any and all editorial rights that might adhere to the broadcast media by virtue of the First Amendment's Free Press Clause.

The third and final move is to empower the government to act on behalf of the *vox populi* by creating and enforcing public interest duties on commercial television and radio broadcasters.

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[53]

Receipt of a broadcast license thus involves a nonnegotiable quid pro quo exchange, in which the recipient of a license must, as a condition of its receipt, foreswear full and complete editorial control over the station.

The most objectionable feature of this reasoning, of course, is the reflexive equation of the government's programming preferences with

50. *Id.* at 386 (citation omitted).
51. *Id.* at 388.
52. *Id.* at 389.
53. *Id.*

those of "the community." Why should one suppose that the Commission would use the power to mandate programming to benefit repressed, unpopular, and silenced minorities within a community (whether defined by race, gender, sexual orientation, religion, national origin, or culture), as opposed to deploying this power to benefit incumbent politicians (and in particular, the President and the President's political party)? As an historical matter, the notion that the Commission views itself as a kind of regulatory tribune of the people does not fare very well.[54]

Nevertheless, the combination of the scarcity of licenses with the Commission as tribune of the people easily justifies substantial abridgement of the editorial freedom of broadcasters. Justice White earnestly explained that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[55] He added, "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[56]

Considered in light of these factors, the personal-attack and political-editorial rules easily passed constitutional muster. Justice White rejects the notion that

> it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[57]

The alternative approach, vesting broadcasters with unfettered editorial discretion, would leave "station owners and a few networks [with] unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people, and candidates, and to permit on the air only those with whom they agreed."[58] Justice White rejected this possibility, thundering that "[t]here is no sanctuary in the First Amendment for unlimited private censorship

---

54. *See, e.g.*, Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994, 997–98, 1009 (D.C. Cir. 1966) (rebuking the Commission for renewing the license of a Jackson, Mississippi television station, WLBT, which openly advocated racism and consistently provided false, negative coverage of the civil rights movement); Mary Tabor, Note, *Encouraging "Those Who Would Speak Out with Fresh Voice" Through the Federal Communications Commission's Minority Ownership Policies*, 76 IOWA L. REV. 609, 612–16 (1991) (analyzing and criticizing the "FCC Tolerance for Racism" in its licensing decisions from the 1960s to the 1970s). For an excellent history of the Commission's persistent failure to rein in openly racist broadcasters during the Civil Rights Era, see STEVEN D. CLASSEN, WATCHING JIM CROW: THE STRUGGLES OVER MISSISSIPPI TV, 1955–1969 (2004).

55. *Red Lion*, 395 U.S. at 390.

56. *Id*.

57. *Id*. at 392.

58. *Id*.

operating in a medium not open to all."[59]

Broadcasters objected that the personal-attack and political-editorial rules, and the Fairness Doctrine more generally, would have a profound chilling effect on programming that triggered a right of reply. Moreover, the Seventh Circuit voided the Commission's rules precisely because of this potential chilling effect.[60] These arguments proved unpersuasive to the Supreme Court. If broadcasters avoid covering controversial topics or political campaigns because of potential Fairness Doctrine obligations, then the Commission can respond by mandating coverage or punishing broadcasters who fail to provide such programming.[61] In sum, "[i]n 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 expression of their views," the Supreme Court held that "the regulations and ruling at issue here are both authorized by the statute and constitutional."[62]

Five years later, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court resoundingly rejected a Florida right-of-reply statute applicable to print media.[63] Reviewing prior freedom of the press cases, Chief Justice Burger concluded that "[t]he clear implication has been that any such a compulsion to publish that which 'reason' tells [newspaper editors] should not be published is unconstitutional."[64] Thus, "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many virtues it cannot be legislated."[65]

In ringing tones, Chief Justice Burger celebrated the virtues of a free and open press. "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising."[66] Accordingly, "[t]he choice of material

59. *Id*.

60. *See* Radio Television News Dirs. Ass'n v. United States, 400 F.2d 1002, 1013–15, 1020–21 (7th Cir. 1968) (arguing that the rule would discourage coverage of controversial issues that might trigger a right of reply and noting that this outcome would be inconsistent with the function served by the broadcast press in influencing public opinion and exposing public ills).

61. *See Red Lion*, 395 U.S. at 394 ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.").

62. *Id*. at 400–01.

63. 418 U.S. 241 (1974).

64. *Id.* at 256 (quotations omitted).

65. *Id*.

66. *Id*. at 258.

to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[67] This judgment cannot be subject to government control or regulation consistent with the First Amendment.[68]

Interestingly, *Tornillo* did not cite *Red Lion* or in any way attempt to square the virtually unlimited freedom of the print media with the far more limited rights of television and radio broadcasters. In theory, *Tornillo* could have represented a rejection of *Red Lion*'s optimistic assessment of the benefits of government-mandated programming duties. This was not, however, the way things came to pass. Three years later, in *Pacifica Foundation*, the Supreme Court explained that broadcasters do not fall under *Tornillo*'s rubric.[69] Accordingly, the *Tornillo* decision did not alter or amend *Red Lion*'s regime of lesser First Amendment freedoms for television and radio broadcasters—although it did exacerbate the tension in the Supreme Court's jurisprudence that affords print outlets significantly broader First Amendment rights than television and radio broadcasters enjoy. Moreover, the Supreme Court has declined to extend *Red Lion* to other forms of media, including cablecasting[70] and the Internet,[71] even though both use spectrum incidentally in order to facilitate their operations.[72]

---

67. *Id*.

68. *See id.* ("It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").

69. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems. . . . [A]lthough the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize . . . it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism.") (citation omitted). *Pacifica Foundation* offered two new rationales for imposing more draconian editorial restrictions on broadcasters than could be applied to print media. "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans." *Id.* at 748. "Second, broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. In light of these considerations, the Supreme Court upheld a ban on indecent broadcasts. *See id.* at 750–51 ("We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.").

70. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 636–39 (1994) (holding that cable-system operators enjoy full First Amendment rights and fall on the *Tornillo* side of the *Red Lion–Tornillo* dichotomy).

71. *See* Reno v. ACLU, 521 U.S. 844, 868–70 (1997) (holding that federal courts should apply the strict scrutiny standard of review to viewpoint and content-based regulations of the Internet, rather than reduced *Red Lion* scrutiny).

72. *See* Hon. Kevin J. Martin et al., *Expansion of Indecency Regulation: Presented by the Federalist Society's Telecommunications Practice Group*, 60 FED. COMM. L.J. 1, 9 (2007) ("A question today is whether cable, satellite TV, satellite radio, and cell phones should be exempt from indecency regulation, even though these media utilize the public

II. WHY *RED LION* MATTERS (EVEN IF COMMERCIAL BROADCASTING INCREASINGLY DOES NOT)

Even at its inception, the scarcity rationale was not a particularly powerful justification for affording broadcasters degraded First Amendment rights.[73] For example, Judge Swygert, writing for the Seventh Circuit panel, demolished the scarcity argument by noting that there were many more television and radio stations than newspapers, even in 1968.[74] Moreover, the verdict of history has not been kind to the scarcity rationale: "Academia has maintained a withering attack on the scarcity rationale for years," and "it is fair to say that the rationale 'has lost credibility in the contemporary legal literature.'"[75]

The underlying economic reality is that if any input in providing a good or service commands a price greater than zero, it is "scarce" in economic terms and limits market entry.[76] As Buck Logan has aptly noted, "[s]carcity therefore provides no basis for distinguishing broadcasting from other media—which similarly rely on scarce resources—in First Amendment analysis."[77] It is, then, at the end of the day, very difficult to take *Red Lion* seriously as a basis for conferring only junior-varsity First Amendment rights on broadcasters.[78]

But the critique of *Red Lion* really only begins with consideration of the merits of Justice White's scarcity rationale for imposing editorial controls on broadcasters. A much larger issue immediately arises regarding the very ability of the Commission to define and enforce public interest obligations on commercial broadcasters—without restating prior

---

airwaves or public right-of-ways and are, at least in their basic service, available to the public just like traditional broadcasting. I will add that on its face, the definition of broadcasting clearly encompasses satellite TV and radio and wireless.").

73. *See* Krotoszynski, *supra* note 14, at 1206–08 (explaining that nearly every private activity requires some form of government assistance that relies on a finite resource).

74. Radio Television News Dirs. Ass'n v. United States, 400 F.2d 1002, 1018–19 (7th Cir. 1968). Judge Swygert also considered, and rejected, the government's ownership of the spectrum as a property-based theory for imposing programming obligations on broadcasters, invoking the unconstitutional conditions doctrine. *Id.* at 1019–20; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (providing a thorough review and critique of the Court's approach to the unconstitutional conditions doctrine).

75. Logan, *supra* note 1, at 1700–01 (quoting and citing Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 138 n.15 (1990)).

76. *See* R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) ("[I]t is a commonplace of economics that almost all resources used in the economic system . . . are limited in amount and scarce, in that people would like to use more than exists.").

77. Logan, *supra* note 1, at 1701. For a very thoughtful and comprehensive exploration of why the scarcity rationale is incoherent, see *id.* at 1700–05.

78. Krotoszynski, *supra* note 14, at 1205–08.

arguments, getting commercial broadcasters to undertake unprofitable (or even simply less profitable) public interest programming is akin to seeking blood from a stone.[79] Regardless of whether the public interest model of broadcast regulation is constitutional, it represents a very ineffective and illogical public policy.[80] Moreover, the Commission's efforts to enforce the public interest model provide case studies in regulatory failure.[81]

It would be easy, then, simply to dismiss *Red Lion* as a poorly reasoned decision that relates to a poorly crafted and implemented public policy. But one would be wrong to suppose *Red Lion* irrelevant simply because it provides the wrong answer to the wrong question.

Red Lion, in its broadest strokes, draws a material equivalence between the public's interest in news, information, and ideas and the federal government's efforts to use command-and-control regulations to produce that programming. In other words, broadcasters are proxies for the larger community, but the larger community's wants, needs, and desires are to be translated into regulatory mandates by the Commission (with an occasional assist from Congress).[82] *Red Lion* thus reflects a troubling and naïve understanding of how the regulatory process works. Simply put, there is little reason to believe (or even hope) that government regulators will assiduously work to identify unmet programming needs desired by the body politic and effectively work to force unwilling broadcasters to meet those needs.[83]

At a larger level of abstraction, *Red Lion* suggests that government should be able to compel private speech in order to advance vague, poorly defined "public interest" notions. This is the most potentially pernicious implication of *Red Lion*, and it carries full force today. Howard Stern, to

79. *See* Krotoszynski, *supra* note 6, at 2108–22 (describing the failure of the public trustee model); *see also* Krotoszynski, *supra* note 14, at 1236–46 (detailing the challenges associated with creating and enforcing meaningful children's programming rules).

80. *See* Krotoszynski, *supra* note 14, at 1240–43 (detailing the problems with public interest regulations designed to promote children's educational television programming).

81. *See* Krotoszynski, *supra* note 6, at 2121–22 (questioning the efficacy of command-and-control regulations designed to promote public interest programming, arguing that "other methods of achieving public interest objectives" would probably have more efficacy, and positing "a need for finding alternatives to the public interest model").

82. *See, e.g.*, Hundt, *supra* note 24, at 1091–1100.

83. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 44 (1991) ("In public choice, government is merely a mechanism for combining private preferences into a social decision. The preferences themselves remain untouched."); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 347–51 (1988) (discussing the supply–demand model of legislation); *see also* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34–56 (1998) (describing and critiquing public choice theory in the context of administrative and legislative action); Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 310–28 (2002) (same).

escape indecency rules that he found unduly restrictive, fled broadcast radio in favor of Sirius satellite radio.[84] Satellite radio stations do not have to meet the public interest duties applicable to broadcast radio stations, including the statutory and regulatory duty to refrain from broadcasting indecent materials between the hours of 6 a.m. and 10 p.m.[85] And, as noted earlier, this also holds true for programming distributed on cable, via satellite, or over the Internet.[86] If *Red Lion* is correct to posit that government, acting as a kind of tribune of the people, may compel speech in order to perfect the marketplace of ideas, there would be no constitutional impediment to extending the Commission's reach to include other means of distributing program content.[87]

---

84. *See* 18 U.S.C. § 1464 (2000) (providing that those who use profane language on the radio may be fined or jailed); Action for Children's Television v. FCC, 58 F.3d 654, 669–70 (D.C. Cir. 1995) (en banc) (upholding an FCC order to ban the broadcast of indecent material on the radio or television during daytime hours); *see also* Quale & Tuesley, *supra* note 26, at 38–39, 44–49, 65–66; Eric A. Taub, *As His Sirius Show Begins, Radio Ponders the Stern Effect*, N.Y. TIMES, Jan. 9, 2006, at C3; *see generally* Jeff Leeds, *Scrambling to Fill a Vacancy After Stern*, N.Y. TIMES, Oct. 6, 2005, at E1 (describing efforts by broadcasters to secure those listeners who were not expected to follow Howard Stern to Sirius radio); Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1747–52 (2007) (noting that the ability to evade FCC regulations is one reason that satellite media is becoming an "attractive alternative" for some radio personalities).

85. *See* Aurele Danoff, Comment, *"Raised Eyebrows" Over Satellite Radio: Has* Pacifica *Met Its Match?*, 34 PEPP. L. REV. 743, 744–48, 759–69 (2007) (noting controversy over Howard Stern's radio broadcasts and providing a history of the judicial and regulatory decisions that led to greater First Amendment protections for cable television and satellite radio). It bears noting that sitting members of the Commission have questioned the agency's efforts to extirpate smut from the public's airwaves. *See, e.g.*, Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8020–21 (2001) (Policy Statement) (Furchtgott-Roth, Comm'r, concurring) (arguing that increasing irrelevance of content delivery mechanisms, amounting to a "market transformation[]," requires the Commission to eliminate broadcast-content restrictions).

86. *See supra* notes 70–72.

87. *See* Quale & Tuesley, *supra* note 26, at 44 (noting that § 1468 permits the government "to regulate obscenity on cable or subscription services on television"). *But cf. id.* at 63–66 (arguing that "[g]iven that DBS offers a very robust platform, we believe that the Court is very likely to accord equal First Amendment rights to DBS and cable television" and concluding that "[w]ith DBS and cable subjected to full First Amendment protection, any attempt to regulate indecency on either platform would surely run afoul of the Constitution"). It bears noting, however, that Quale and Tuesley also concede that "§ 1464's prohibition on the transmission of indecent material by means of radio communication could extend to DBS and satellite radio, or even cable, to the extent that it uses radio spectrum to receive programming services, which it then delivers to subscribers through cable headends." *Id.* at 44. Although "the Commission consistently has declined to regulate indecency on subscription services," the statutory language would seem to support regulation of any indecent material transmitted using spectrum. Realistically, however, the ability of the Commission to change its mind after maintaining a consistent position regarding § 1464 is very much open to doubt. *Id.*; *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–43 (1983) (holding that an agency may not abandon a prior consistent position without providing a "reasoned analysis" for the change that goes beyond the duty of explanation that initially applies when an agency adopts a

The good news, however, is that the Supreme Court would likely take a very dim view of government efforts to assume such a censorial role. In every case subsequent to *Red Lion* in which the federal government has sought to extend the holding's reach to a new medium, the Justices have declined the invitation. Thus, much like a saguaro cactus in the Sonoran Desert, *Red Lion* stands alone in a vast doctrinal wasteland. It is very much alive, but its impact on subsequent free speech jurisprudence has been, at best, minimal. Moreover, the Supreme Court's consistent and persistent refusal to extend either *Red Lion*'s scarcity doctrine or *Pacifica Foundation*'s "uniquely pervasive" rationales to new forms of media provides strong evidence that the Justices recognize (even if they will not admit it) that *Red Lion*'s optimism about good faith efforts by government to improve the marketplace of ideas through regulation was mistaken.

Turning to the one context in which *Red Lion* continues to have some doctrinal importance—regulation of broadcasting—subsequent technological developments have largely rendered limits on the content of broadcast programming irrelevant. Just as the ubiquitous availability of pornography on the Internet has greatly reduced the importance of cases upholding zoning regulations that limit the location of adult theaters and bookstores, [88] so too the ability to distribute programming free and clear of television and radio stations makes their importance as a means of disseminating information and ideas far less important a concern in 2008 than was the case in 1968—or even 1998.

To be clear, I would not suggest that television or radio programming quality is getting better. On the contrary, good arguments exist that it is getting worse. News departments have been significantly cut. Entertainment divisions have become increasingly addicted to low-cost, high-viewer "reality" television programming that permits producers to avoid the cost of writers, costumers, set designers, and the like.[89] In a nation where *American Idol*, *Deal or No Deal*, *I Survived a Japanese Game*

policy); Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 455–59 (2d Cir. 2007) (rejecting the Commission's effort to expand indecency rules to encompass incidental use of profanity in a live broadcast as insufficiently reasoned in light of well-settled policy of excluding such incidents from the indecency rule).

88. *See* RONALD J. KROTOSZYNSKI, JR. ET AL., THE FIRST AMENDMENT 555–56 (2008) (describing the Supreme Court decisions that upheld the development of zoning ordinances by local governments seeking to restrict locations of adult businesses due to their "secondary effects," but noting that the availability of sexually-explicit materials over the Internet has reduced the practical importance of these cases).

89. *See, e.g.*, Daniel Carlson, *Turning Japanese*, WILLAMETTE WEEK, July 9, 2008, at 58, *available at* http://www.wweek.com/editorial/3435/11227 ("*I Survived a Japanese Game Show* is the perfect import because it's actually a self-reflexive travelogue/reality show that offers viewers the same old reality show trappings they're used to—tan caricatures of human beings, mood music, B-roll—and shoehorns them into a contest where Americans are flown to Japan to compete on a local show.").

Show, and *American Gladiator* represent some of the most popular over-the-air programming on network television, television's importance as a harbinger of cultural change is decidedly a negative one. Yet, it is very easy to ignore the growing cacophony of schlock.[90] One need only change the channel to a public broadcasting station, a cable station, or content provided by Internet in order to find less depressing fare.

In fact, the demise of the ability of television networks to dictate programming choices should be celebrated rather than lamented. The growing irrelevance of broadcasters means that the American public enjoys access to more programming, from more sources, than at any other time in human history. There is, of course, some kernel of truth to the maxim "500 channels, and nothing is on."[91] But even if there is "nothing on," consumers today have far more alternatives available to them to find something of at least potential interest. Programming on demand, in fact—whether by cable, satellite, or Internet—is a reality. When a consumer can select whatever she wishes to see, and watch it at her convenience, does it really matter what ABC, NBC, CBS, and Fox are broadcasting at 8 p.m. on

90. This is hardly a new trend. We have been a long way from Sid Caesar's "Show of Shows" for a very long time. *See* Gail Pennington, *Fox, Football, and Sleaze*, ST. LOUIS POST-DISPATCH, Sept. 4, 1994, at 8C (describing the low-brow programming offered by the Fox Network for the 1994 season, notably including "'Wild Oats,' in which sex-crazed singles swap jokes about 'lip locking' and 'tongue hockey,'" and adding that if we "[work] our way down the ribaldry meter, there's also 'Fortune Hunter,' an adventure about a special agent who gets the goods and the babes, and 'Hardball,' a locker-room comedy about a baseball team"). One could mention efforts like *Married by America*, *Boy Meets Boy*, and *Gay, Straight, or Taken?* Indeed, the Fox Network 1994 new season offerings look positively Shakespearean in contrast. My point is not to bash the networks—they are doing what any rational economic actor would do in a declining market (i.e., lowering costs in order to maintain profitability for as long as possible). Rather, the idea that broadcasters are best positioned to produce and distribute low-demand, high-cost public interest programming is a less plausible proposition today than at any other earlier point in time. Rather than attempting to extract programming from broadcasters, it would make for better public policy simply to charge them for their use of spectrum (just as virtually all other spectrum users must pay for the right of access) and allow them to program as they think best. *See* Krotoszynski, *supra* note 6, at 2126–28, 2134 (advocating the adoption of a system of spectrum royalties in lieu of public interest programming duties).

91. With apologies to Bruce Springsteen and Rick Matasar, see Neil Genzlinger, *Go On, Bold Couch Potatoes, Click Into the Unknown*, N.Y. TIMES MAG., Nov. 11, 2007, at 2 ("'Fifty-seven channels and nothin' on,' Bruce Springsteen sang back in 1992, but nowadays that number is laughably low."); Richard A. Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 5, 6 (1998) ("[W]e've got one hundred channels but nothing on.") (quotations omitted)). Of course, in today's world of digitally compressed cable service and DBS, both the Boss and Dean Matasar are off by a factor of 500%–1,000%; most subscribers today can access 500–1,000 channels on standard cable or DBS services. *See* Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1420 (2004) (noting that "digital compression technologies allow traditional subscription television services like cable and satellite to offer hundreds of content channels at various price points").

Monday night?

Does this mean that, in our new era of programming on demand, there is no room or role for the public interest? Will the market routinely provide public goods to all potential consumers? It would take grossly undue faith in the invisible hand's beneficence for me to endorse the market as the epitome of the public interest—in fact, the unregulated market is no better at securing public interest programming from commercial broadcasters than the Commission, with its various ineffective regulatory efforts over the years to force commercial broadcasters to take their public interest duties seriously. Accordingly, important questions remain to be addressed under the rubric of the "public interest," but they are very different kinds of questions than those that faced the generation that litigated *Red Lion*. And, to be clear, government plainly has an important role to play in securing equal access to the marketplace of ideas.[92]

III. RECLAIMING THE PUBLIC INTEREST: GETTING BEYOND THE IRRELEVANT (AND INEVITABLE) WASTELAND

To say that regulatory efforts to enforce the public interest standard against broadcasters are a waste of time and energy is not to say that telecommunications policy should not seek to promote the public interest, including the provision of public goods, like children's educational television programming. Some forty years after *Red Lion*, however, it is time for the Commission—and Congress—to rethink how best to secure access to public interest programming.

Attempting to hijack the programming schedules of commercial television and radio stations simply will not work. First, commercial broadcasters will strongly resist any new mandatory programming duties if compliance will have a negative impact on their bottom line.[93] The kinds

92. *See* Fiss, *Why the State?*, *supra* note 30, at 786–90, 793–94 (arguing that private entities often present no less a threat to a vibrant, free, and open marketplace of ideas than the government and that "[i]n another world things might be different, but in this one, we will need the state"); Fiss, *Social Structure*, *supra* note 30, at 1415–16 (noting that "[a]t the core of my approach is a belief that contemporary social structure is as much an enemy of free speech as is the policeman," suggesting that "[w]e should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them," and arguing that "[w]hen the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment").

93. Recall too that the Commission has attempted to relax or repeal the multiple ownership rules on the theory that the television networks are economically so weak that absent more owned-and-operated stations, the networks might not survive. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 412–20 (3d Cir. 2004); *id.* at 436–37 (Scirica, C.J., dissenting in part and concurring in part); 2002 Biennial Regulatory Review, 18 F.C.C.R. 13,620, 13,814, 13,818 (2003) (Report and Order, Further Notice of Proposed Rulemaking).

of programming traditionally associated with Commission efforts to enforce the public interest standard fit this description: children's programming, educational programming, public affairs programming, and the like (none of which are as potentially profitable as low-cost game shows or reality-based programming).[94] All things considered, the Commission could better advance the public interest by simply leaving the vast wasteland alone. If the use of spectrum requires some sort of quid pro quo, Congress should assess spectrum fees on broadcasters that replicate the access costs paid by other spectrum users (such as wireless-phone companies). Monies raised from the spectrum fees could be used to provide public goods, including public interest programming.[95]

If attempting to control the programming decisions of commercial broadcasters is a poor means of advancing the public interest, how should Congress and the Commission define and enforce the concept in the twenty-first century? The first thing to keep in mind is that the public interest standard applies to any and all users of spectrum, not just to broadcasters. Thus, an ISP that uses spectrum incident to its operations is no less obligated to use the spectrum in a way consistent with, and not antithetical to, the "public interest, convenience, and necessity" as are commercial-television and radio broadcasters.[96] The same would hold true of a communications service provider that uses satellites, and hence satellite frequencies, to provide a service. For too long, the Commission has made the public interest almost exclusively about commercial-television and radio broadcasting; the agency needs to think in broader terms when defining the public interest project.[97]

If this is so, how can the Commission at the same time plausibly increase programming costs even as it forces broadcasters to air programming that generates lower advertising revenue returns? It does not make sense; the very rationale for the Commission's multiple ownership "reforms" makes the imposition of new programming duties unthinkable.

94. *See* Krotoszynski, *supra* note 6, at 2108–18, 2122 (examining and discussing reasons that broadcasters will not voluntarily provide public interest programming in general and children's programming in particular, and also why Commission efforts to bring commercial broadcasters to book are almost certain to fail).

95. *See id.* at 2126–28 (advocating use of spectrum fees for commercial broadcasters in lieu of programming duties).

96. Congress borrowed the public interest standard itself from the Interstate Commerce Commission's (ICC) organic statute, which charged the ICC with regulating commercial common-carrier transportation in the "public interest," meaning that the agency was to ensure that transportation-service providers with monopoly or oligopoly pricing power did not extort more than a reasonable rate of return on investment from their customers. *See* NEWTON N. MINOW, EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST 8–9 (Lawrence Laurent ed., 1964); MINOW & LAMAY, *supra* note 5, at 4. In a sense, I simply propose rethinking the public interest standard more in terms of its organic roots; we should ensure that ISPs and major search engine portals do not use their market power in ways that are fundamentally inimical to their customers' welfare or unduly abusive.

97. Again, my proposal essentially urges reconceptualizing and redeploying the public interest standard to play a meaningful role in regulating ISPs and major Web browser

With the multitude of distributional networks, access and control of the means of distributing content have become more, rather than less, important. If your search engine accepts payment to make a particular website the first result, or blocks access to a disfavored website, a user may have no way of knowing that her access to content is being limited, manipulated, or blocked.[98] And, although competition exists among ISPs (which is a good thing), reliance on a handful of search engines creates a powerful ability to filter content in ways that might not be in the public interest.[99] As Professor Jack Balkin has argued, "[i]t might be best to start over again and think about where the real differences between broadcast and other media lie."[100] Filters and filtering mechanisms are inevitable; an unlimited universe of potential information makes finding desired information akin to seeking a proverbial needle in a haystack. As Balkin explains, "[b]ecause there is too much information in the world, all communications media produce attempts at filtering by their audiences."[101] But filtering efforts are not restricted to self-imposed limits adopted by someone seeking information; filtering efforts can originate from the government or private entities that control the portals and gateways that individuals use to seek and obtain desired content.[102]

The dangers of unseen filtering are real and present a serious risk of disabling the ability of citizens to obtain desired information on the Internet.[103] National governments in places like China, North Korea, and

providers that would largely parallel the role it once played in regulating common-carrier railroad and trucking companies. *See* discussion, *supra* note 96; *see also* Michael F. Finn, *The Public Interest and Bell Entry into the Long-Distance Under Section 271 of the Communications Act*, 5 COMMLAW CONSPECTUS 203, 205–06 (1997) (noting the historical link between the ICC's "public interest" mandate and the FCC's parallel regulatory mission); Glen O. Robinson, *Title I: The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, *in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, 3, 11–23 (Max D. Paglin ed., Oxford Univ. Press 1989) (same). *See generally* ICC v. Ry. Labor Executives Ass'n, 315 U.S. 373, 376 (1942) (discussing the "public interest" concept in the context of common-carrier regulation). It would make a great deal of sense to conceptualize ISPs and major Web browsers as a kind of common carrier precisely because these entities have the same market power, and ability to abuse it, that the railroads once possessed; moreover, both carry "traffic," albeit of a very different sort.

98. Goodman, *supra* note 29, at 85–89, 108–12.

99. On filtering and the power of media filters, see Balkin, *Media Filters*, *supra* note 23, at 1141–53 (1996); *see also* ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING PEOPLE IN CHARGE AND CHANGING THE WORLD WE KNOW 107–09 (1999); CASS R. SUNSTEIN, REPUBLIC.COM 10–16, 98–99 (2001).

100. Balkin, *Media Filters*, *supra* note 23, at 1141.

101. *Id.* at 1143.

102. *See* Zacharia, *supra* note 29, at 13 (reporting that ISPs work with foreign governments to deny access to information).

103. *See id.* (describing how the Chinese government prevents its citizens from accessing information about Tibet, Taiwan, or Tiananmen Square); *see also* Goodman, *supra* note 29, at 108–12.

Cuba routinely block access to websites that contain offensive content (offensive, that is, to those holding political or military power).[104] In this context, government itself imposes filters in order to limit or deny access to information thought to be seditious. With the possible exception of repeated—and failed—efforts to banish indecency from the Internet, we have not seen any serious, sustained, broad-based efforts by the federal or state governments to limit access to web content. This state of affairs should be celebrated and maintained.

By way of contrast, regulation of ISPs and web browsers is quite minimal at the state and federal level. Most users of Microsoft Explorer or Mozilla Firefox do not know whether, and how much, information the search engines collect about them and their browsing habits. Most users also probably have little knowledge of whether their search engine skews search results in return for cash payments from web advertisers. To be clear, I do not advocate the prohibition of product-placement deals, but I would advocate legislative or regulatory efforts to make any such arrangements meaningfully transparent to users.[105] If Microsoft wants to mine and sell my web-surfing data, I should be put on clear notice of this fact.[106] Moreover, I should have the ability to select a search engine that

104. *See supra* note 27 (discussing government censorship of the Internet); *see also* Andrew Jacobs, *Beijing Games Denying Media Full Use of Web*, N.Y. TIMES, July 31, 2008, at A1 (describing overt forms of censorship that the Chinese government deployed against foreign journalists seeking to use the Internet from China); Calum MacLeod, *China Backtracks on Web Access Promise*, USA TODAY, July 31, 2008, at 2A (noting that the Chinese government resiled from earlier promises to provide unfettered access to the Internet during the 2008 Summer Olympic Games).

105. *See* Goodman, *supra* note 29, at 84–87, 96–99, 108–12, 120–21, 125–29, 142–51 (advocating that television broadcasting disclosure regulations be extended to other forms of media). The model provided by mandatory disclosures for credit-card offers could provide a useful starting point for thinking about creative ways to address this problem. *See* Arnold S. Rosenberg, *Better Than Cash?: Global Proliferation of Payment Cards and Consumer Protection Policy*, 44 COLUM. J. TRANSNAT'L L. 520, 592–99 (2006) (discussing mandatory, easy-to-understand disclosure requirements applicable to credit-card offers in the United States). An "honesty box," also known as a "Schumer Box," *see id.* at 593 (a disclosure that highlights key terms with greater elaboration elsewhere in the document), would be an excellent first start—Web search engines should be required to disclose whether results reflect product-placement obligations, whether—and how much—information the Web browser provider mines from users' searches, and what uses the provider makes of the mined data. Of course, mandatory disclosures work to effectively communicate terms only if they are simple, easy to understand, and do not bury the recipient in endless detail. *See* Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199, 220–35 (2005) (discussing the benefits of the simplification of Truth in Lending disclosures and noting that further improvements are possible); Jason Ross Penzer, Note, *Grading the Report Card: Lessons from Cognitive Psychology, Marketing, and the Law of Information Disclosure for Quality Assessment in Health Care Reform*, 12 YALE J. ON REG. 207, 248–54 (1995) (noting that Truth in Lending disclosures remain complex and questioning whether the disclosures serve the purpose for which they were intended).

106. A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1468–69

protects my privacy more completely or that guarantees search results that are not skewed by bribes.[107]

The ability to control Internet filters is ultimately the ability to control Internet content. Congress and the Commission should fashion a "Net Surfers' Bill of Rights" that ensures transparency with respect to data mining and meaningful choice regarding the terms and conditions of using a particular ISP or search engine. Competition can only function if consumers have access to relevant information; currently, mandatory disclosure of data mining and product placement practices are woefully underdeveloped.

A second major public interest imperative is ensuring universal access to the Internet. Several major cities, including Portland, Oregon, and New Orleans, Louisiana, attempted to create "wired" cities with free, universal access to wireless Internet services. Both cities are in the process of closing their free city-wide networks.[108] Given that subscribing to an Internet service can easily cost $50 or more per month per household, the loss of these free services is to be greatly lamented. One has to wonder:

(2000) (describing the different types of "privacy destroying" technologies and the consequences of techniques such as data mining); James P. Nehf, *Incomparability and the Passive Virtues of Ad Hoc Privacy Policy*, 76 U. COLO. L. REV. 1, 20–27 (2005) (highlighting the challenges that users face while trying to protect their privacy when using the Internet).

107. Goodman, *supra* note 29, at 119–21, 125–29. As Professor Goodman puts the matter: "[i]f ABC has to disclose sponsorship over the air, there is no reason it should not have to disclose sponsorship over the Internet." *Id*. at 150. The same logic applies with full force to entities like Google, Yahoo, and Microsoft.

108. *See* Kimberly Quillen, *Municipal Wireless Network Ending; Earthlink Can't Sell, or Give Away, System*, TIMES PICAYUNE (New Orleans), Apr. 27, 2008, at C1 ("Earthlink Inc. will shut down its municipal wireless network in New Orleans next month after failing to find a buyer for the business. The Atlanta company said in February that it hoped to sell its municipal networks, but 'we were unable to find anyone interested in taking over the (New Orleans) network, either to buy it or assume ownership free of charge,' Earthlink Vice President of Corporate Communications Chris Marshall said this week."); Mike Rogoway, *The End Is Nigh for Free Wi-Fi*, OREGONIAN, May 17, 2008, at A1 ("Portland's free, ad-supported wireless link to cyberspace faces shutdown next month unless the city or someone else comes up with nearly $900,000 to buy the partially completed network from contractor MetroFi Inc. and rescue it from oblivion."). For an overview and discussion of the trials and tribulations associated with trying to build and maintain a free municipal broadband wireless network, see Anthony Sciarra, Comment, *Municipal Broadband: The Rush to Legislate*, 17 ALB. L.J. SCI. & TECH. 233 (2007) (discussing the development of municipal high-speed networks); Anna J. Zichterman, Note, *Developments in Regulating High-Speed Internet Access: Cable Modems, DSL, & Citywide Wi-Fi*, 21 BERKELEY TECH. L.J. ANN. REV. 593, 609–11 (2006) (explaining that telephone and cable companies opposed the development of such a network in Philadelphia, claiming it would be a "direct assault on their businesses"). Portland, Oregon is considering deploying a new "community fiber network" to replace the failed MetroFi free public Internet access. Corey Pein, *The Hole in the Fiber Doughnut*, WILLAMETTE WEEK, July 23, 2008, *available at* http://wweek.com/editorial/3437/11294 ("Though municipal fiber networks have been hit-or-miss in the U.S., they're common in Europe and Asia.").

Where is the Commission?[109]

The universal service mandate supposedly seeks to ensure that low-income persons enjoy access to telecommunications services, yet the program currently makes its principal focus (at least for low-income urban dwellers) access to wireline telephone service.[110] The failure of these free avenues of high-speed access to the Web ill serves the public interest—and makes the universal service mandate (telephones?) something of a bad joke.[111]

Unfortunately, the digital divide is both real and growing in the United States, and constitutes a serious failure to advance the public interest.[112] Moreover, the digital divide tracks persistent and troubling lines of race and class.[113] The public interest concept can and should be deployed to address the problem of unequal access to the Internet.

Indeed, perhaps the best way of ensuring that low-income parents can access public interest programming would be to provide highly subsidized—or even free—access to cable, direct broadcast satellite (DBS), and a high-bandwidth wireless Internet connection. As the universe of information expands, we are increasingly at grave risk of creating an informational caste system in which the world of the information "haves" is much wider, broader, and more vibrant than the world in which the information "have nots" reside.

Professor Cass Sunstein has suggested that "[n]ew technologies create

---

109. The answer to this question turns on the Commission's decision to classify Internet service as an "information" service rather than a "telecommunications" service, thereby excluding it from eligibility for universal service support, as well as any obligation by ISPs to pay universal service fees into the federal universal service fund. Zichterman, *supra* note 108, at 593–94, 598–600. The exclusion of ISPs from the federal universal service fund makes little sense in light of the increasingly fungible nature of telephone service and Internet service; if the distinction was ever a meaningful one, it has ceased to be so.

110. Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 245–50, 277–99 (2005).

111. As one commentator aptly has noted, "[T]here is a significant disconnect between the FCC and the localities as evidenced by the failure of the FCC to include high-speed Internet access under the umbrella of universal service while municipalities at the same time seek to subsidize the provision of such access." Zichterman, *supra* note 108, at 612.

112. *See Digital Divide: What It Is and Why It Matters*, http://www.digitaldivide.org/dd/digitaldivide.html (last visited Aug. 7, 2008) (discussing the gap between those with access to information technology and those without); *see also* Keefe, *supra* note 32, at B1 (reporting that the percentage of Americans with high-speed Internet access at home is growing, but also noting that this growth is uneven among various demographic groups and household income levels); Mark Lloyd, *The Digital Divide and Equal Access to Justice*, 24 HASTINGS COMM. & ENT. L.J. 505, 523–28 (2002) (examining government attempts to increase access to the Internet and noting the mixed results of government efforts to bridge the "digital divide").

113. *See* Keefe, *supra* note 32 (noting the lack of high-speed Internet access in many African-American and low-income households).

extraordinary and growing opportunities for exposure to diverse points of view, and indeed growing opportunities for shared experiences and substantive discussions of both policy and principle."[114] But this holds true only for those who have the ability to access those technologies. As the Internet becomes more and more the technological replacement of the traditional town square, it is imperative that all citizens have the ability to access news, information, and ideas on the Web. So too, we cannot be sanguine about the good faith of companies that control the architecture of the Internet or that serve as portals to its content. If we think it necessary to require banks to disclose the terms of consumer credit cards, why should we expect, or accept, less of entities that could, in theory, collect and retain virtually all of our most private information?

To circle back to the question of *Red Lion*'s relevance in the twenty-first century, it should be obvious that government has a legitimate interest, if not a duty, to facilitate access to the marketplace of ideas.[115] To the extent that *Red Lion* embraces the notion that government efforts to increase access to the channels of news, information, and ideas are both legitimate and constitutional, it makes clear that any failure to address the digital divide today is one of institutional will rather than constitutional power.

CONCLUSION

Broadcasting matters less today than at any time since Marconi because of the Internet, yet the Commission still spends countless staff hours

114. SUNSTEIN, *supra* note 99, at 168; *see also id.* ("It is certainly possible that private choices will lead to far more, not less, in the way of exposure to new topics and viewpoints . . . . But to the extent that they fail to do so, it is worthwhile to consider public initiatives designed to pick up the slack.").

115. *See* Fiss, *Social Structure*, *supra* note 30, at 1416 ("We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them. When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment. What is more, when on occasions it fails to, we can with confidence demand that the state so act."); *see also id.* ("The duty of the state is to preserve the integrity of public debate—in much the same way as a great teacher—not to indoctrinate, not to advance the 'Truth,' but to safeguard the conditions for true and free collective self-determination. It should constantly act to correct the skew of social structure, if only to make certain that the status quo is embraced because we believe it the best, not because it is the only thing we know or are allowed to know."); Fiss, *Why the State?*, *supra* note 30, at 786–90 (arguing that private speech markets, if left wholly unregulated by the government, will result in a poorer and skewed public debate that will ill serve the project of democratic self-government). The Commission took a big step in the right direction by ordering Comcast to cease selective blocking of online traffic. *See* David Ho, *FCC Orders Comcast to Stop Blocking Some Online Traffic*, PALM BEACH POST (Florida), Aug. 2, 2008, at 10B (reporting on FCC action to protect "network neutrality").

conducting hearings into localism, children's television, and indecency.[116] Our public policy continues to fetishize the programming decisions of the major television networks, even though programming of virtually any kind is readily available, twenty-four hours a day, seven days a week, on cable and DBS, to say nothing of programming on demand on the Internet.[117] The most pressing public interest question today should not be whether ABC, CBS, Fox, and NBC provide enough children's programming, educational programming, cultural programming, or public affairs programming.[118] The real public policy questions should be these: How can we ensure that every schoolchild has access, both at school and at home, to the remarkable universe of news, information, and ideas that the Internet represents? How can we empower parents to better facilitate their children's education with access to age-appropriate educational, cultural, and informational programming on cable, DBS, and the Web? These are questions far more deserving of sustained regulatory attention than Ms. Jackson's infamous "wardrobe malfunction" at the Super Bowl halftime show. Yet, the Commission's interest in addressing these questions seems much lower than its interest in holding dog and pony shows designed to demonstrate how poorly commercial broadcasters serve the public and how necessary the Commission's oversight of broadcasting continues to be.

Serious and pressing issues also exist regarding the transparency of the terms and conditions associated with accessing information on the Internet. ISPs and popular search engines go about their business without being called to account for their business practices. The public interest requires that government protect consumers from unfair, abusive, or deceptive trade practices.[119] 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. Content- and

116. *See, e.g.*, Eggerton, *supra* note 3, at 3 (discussing the FCC's response to a recent court ruling on indecency).

117. *See* Barnes, *supra* note 20 (reporting plans by Google to release TV-style content exclusively over the Internet); Puente, *supra* note 16, at 1D (discussing popular webcasts on YouTube).

118. In some ways, the future of the public interest concept as it relates to spectrum use probably should look more like the Commission's efforts to ensure competition, fair business practices, transparency, and universal service in local- and long-distance telephone service than the Commission's traditional mass media public interest regulatory efforts. *See generally* Glen O. Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 YALE J. ON REG. 517 (1988) (discussing the Commission's historical approach to regulating telephony and examining the breakup of AT&T and its effect on competition and regulation).

119. *Cf.* Hundt, *supra* note 24, at 1096–1100, 1129 (asserting that the FCC should promulgate clear, enforceable public interest regulations regarding educational programming requirements, free access to the airwaves for candidates, and indecent violent programming).

viewpoint-neutral regulations to protect consumers from unfair and deceptive Internet practices would not violate the First Amendment and are essential if the Internet is to achieve its full potential as a powerful new marketplace of ideas and information.[120]

In the end, then, *Red Lion* provides the right answer to the wrong question. The federal government certainly has a legitimate interest in ensuring that the spectrum, a kind of virtual commons, is used in ways that advance the public interest. But the public interest encompasses much more than attempting to control or superintend the editorial decisions of television- and radio-station managers. A communications policy for the twenty-first century can and must redefine the public interest to encompass concerns about access to informational networks and the conditions under which such access takes place. 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. For the moment, the decision, like the concept of the public interest itself, remains mired in the inevitable, irrelevant wasteland of commercial broadcasting.

120. *See* Krotoszynski, *supra* note 14, at 1211–26 (arguing that the commercial speech doctrine could be used as an alternative basis for imposing public interest duties on commercial broadcasters). By parity of logic and reasoning, the same rationale could be applied to ISPs and search engines that provide a service in order to sell advertising and product placements to third parties.

ABANDONING STANDING: TRADING A RULE OF ACCESS FOR A RULE OF DEFERENCE

RICHARD MURPHY*

TABLE OF CONTENTS

* Professor of Law, William Mitchell College of Law. Many thanks to Jack Beerman, Robert Delahunty, William Funk, Patrick Garry, Edward Hartnett, Thomas Healy, Kristin Hickman, William Jordan III, A. John Radsan, Sidney Shapiro, Thuy Vo, and Kathryn Watts for helpful observations and discussion at various stages of this Article's preparation.

> EPA maintains that because greenhouse gas emissions inflict *widespread* harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree.[1]

> The very concept of global warming seems inconsistent with [standing's] *particularization* requirement. Global warming is a phenomenon harmful to *humanity at large* . . . .[2]

INTRODUCTION

In 2007, the Supreme Court issued significant opinions in three cases that addressed whether a generalized grievance can amount to the type of injury required for constitutional standing—a doctrine that, by lingering consensus, is notoriously indeterminate,[3] incoherent,[4] politicized,[5] and

1. Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007) (5–4 decision) (emphasis added).

2. *Id.* at 1467 (Roberts, C.J., dissenting) (emphases added) (internal quotations omitted).

3. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (decrying the "apparent lawlessness of many standing cases" and their "wildly vacillating results").

4. *See, e.g.*, 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.1, at 1107 (4th ed. 2002) ("The Supreme Court has decided over 280 standing disputes, issuing approximately 600 opinions in the process. It is impossible to reconcile all of the majority opinions of the Court that purport to announce tests and decisional criteria that lower courts must follow.").

5. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999) (characterizing Supreme Court standing decisions as politically driven). *But see* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614–15 (2004) (suggesting that the claim that standing is purely political is overblown).

lacks firm historical foundations.[6] The most well-known member of this 2007 troika is the source of the opening quotations above, *Massachusetts v. EPA,* in which the Justices split 5–4 over whether the threat of catastrophic global warming caused Massachusetts an injury sufficient for standing.[7] The other two are the obscure *Lance v. Coffman*[8] and the fractured *Hein v. Freedom from Religion Foundation, Inc.*[9] Read together, they confirm that, after many decades of effort, the Court cannot forge a consensus regarding the nature of the injury requirement because the Justices fundamentally disagree over whether the basic purpose of standing doctrine is to block federal courts from usurping the policymaking power of the political branches.[10]

---

6. For a few of the leading articles concluding that the Court's constitutional standing doctrine is a recent invention, see, for example, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961). *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (contending that American courts have a long history of throwing out suits brought by plaintiffs who have not suffered the right kind of injury).

7. *See* 127 S. Ct. at 1453 (concluding that Massachusetts enjoyed constitutional standing to challenge EPA's refusal to initiate rulemaking to regulate greenhouse gas emissions from motor vehicles). *But see id.* at 1463, 1467 (Roberts, C.J., dissenting) (concluding that Massachusetts lacked standing and contending that determination of global-warming policy was the business of the political branches). The standing analysis in *Massachusetts v. EPA* has already been the subject of considerable comment that focuses on whether the majority's application of standing principles marked a significant change in the law. *See, e.g.*, Robin Kundis Craig, *Removing "The Cloak of the Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149, 194–96 (2007) (discussing the significance of *Massachusetts v. EPA* for whether a risk of harm can count as an injury in fact); Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN ST. L. REV. 1 (2007) (similar); Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA*: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1030–39 (2008) (discussing the majority's contention that states have a special claim to standing in federal court). Rather than wade into these interesting thickets, this Article focuses on a much simpler aspect of *Massachusetts v. EPA* that, depending on the next Supreme Court appointment or so, has the potential to alter standing doctrine fundamentally: the 5–4 conflict it exposes with regard to whether federal courts can resolve generalized grievances. *See infra* Part I.C (discussing this conflict in the Roberts Court).

8. 127 S. Ct. 1194, 1197 (2007) (per curiam) (explaining that plaintiffs cannot base constitutional standing on generalized grievances).

9. 127 S. Ct. 2553, 2559 (2007) (3–2–4 decision) (holding that an atheist group lacked standing to litigate whether executive-branch spending violated the Establishment Clause).

10. *See infra* Part I.C (analyzing the troika's discussions of standing and its relation to separation of powers). In the interest of completeness, it should be noted that the new Roberts Court has resolved important standing issues in two additional cases beyond the 2007 troika. *See* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1864 (2006) (denying plaintiffs' claim to standing based on their state-taxpayer status); Sprint Commc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2533 (2008) (holding that "an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee

By highlighting the Court's lasting disagreements over the nature of standing, the 2007 troika provides still more evidence that this doctrine's invocation of an injury requirement to limit access to the federal courts has been misguided and should, as many scholars have long insisted, be abandoned.[11] Standing's failure to provide a coherent means for separating judicial from political power does not, however, delegitimize this important project. Rather, it suggests that the courts should explore different means to advance it. In this exploratory spirit, this Article expands upon a suggestion made by a giant of twentieth-century administrative law, Professor Louis Jaffe, nearly fifty years ago: Rather than use standing's rule of *access* to curb judicial usurpation of political power, the federal courts should instead develop a rule of judicial *deference* to serve this end.[12]

The 2007 troika confirms that the four reliably conservative Justices—the Chief Justice as well as Justices Scalia, Thomas, and Alito—believe that standing doctrine protects a fundamental value of both separation of powers and representative democracy: *Courts do not get to decide everything!*[13] The judicial job is to protect "the rights of individuals," not

---

has promised to remit the proceeds of the litigation to the assignor"). For brief commentary on these two cases, see *infra* note 112.

11. *See, e.g.*, Daniel A. Farber, *A Place-Based Theory of Standing* 2 (U.C. Berkley Public Law Research, Working Paper No. 1013084, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013084 ("Much could be said for simply abandoning the 'injury in fact' test that is currently so central to standing doctrine."); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 135 (2007) (contending that standing doctrine "serves no useful function" in cases "where allegedly unlawful action affects widespread groups"); Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2D 17, 18 (2002) ("[T]he concept of standing, while vital to civil litigation, has no connection to any distinctive constitutional limitation of the use of federal judicial power."); Sunstein, *supra* note 6, at 167 (referring to the injury-in-fact requirement of constitutional standing as a "large-scale conceptual mistake"); Fletcher, *supra* note 3, at 223 (proposing that "we . . . abandon the idea that Article III requires a showing of 'injury in fact'").

12. *See* Jaffe, *supra* note 6, at 1305–06 (proposing that standing principles should not block "public actions" brought by plaintiffs to enforce the public interest, but that in such cases, to respect room for political judgment, "*the court should not intervene unless it can see the law as reasonably clear*"). For another recent, critical reassessment of the relationship between standing and separation of powers that also draws inspiration from Professor Jaffe but to different effect, see generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. (forthcoming 2008) (identifying several different separation-of-powers purposes that constitutional standing doctrine purports to serve; explaining why standing doctrine serves these purposes badly; and proposing that the Court replace its standing doctrine with a "prudential abstention" doctrine that would focus on separation-of-powers concerns directly and forthrightly).

13. *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. at 1464 (Roberts, C.J., dissenting) ("This Court's standing jurisprudence simply recognizes that redress of [generalized] grievances of the sort at issue here is the function of Congress and the Chief Executive, not the federal courts." (citation and internal quotation marks omitted)).

to determine public policy.[14] To prevent judicial usurpation of the policymaking function, courts must avoid resolving public actions brought by plaintiffs who have suffered only generalized grievances.[15] Instead, they should confine themselves to resolving claims of plaintiffs who have suffered particularized injury.[16] The potential power of this form of restrictive standing can be seen in Chief Justice Roberts's dissent in *Massachusetts v. EPA*, in which he suggested that global warming could not count as an injury because it hurts everybody.[17] It bears strong emphasis that, with the accession of Justices Roberts and Alito, restrictive standing is now, quite suddenly, within one vote of a slim but solid majority.

The four relatively liberal members of the Court—Justices Stevens, Souter, Ginsburg, and Breyer—take a much more permissive approach to standing. They contend that the federal courts may hear actions based on generalized grievances so long as they are sufficiently "concrete" rather than "abstract."[18] On this view, the basic point of standing is not to protect separation of powers but to ensure that plaintiffs bring the right kind of personal stake to litigation to ensure that it is properly adversarial.[19] The lax nature of this permissive approach finds an excellent recent illustration in Justice Souter's dissent in *Hein v. Freedom from Religion Foundation, Inc.*[20] This dissent, which all four "liberals" joined, concluded that an ideologically motivated plaintiff had standing to bring an Establishment Clause claim to challenge executive-branch spending to support the President's Faith-Based and Community Initiatives Program.[21] Presumably, the plaintiffs brought the right kind of stake to their case because they absolutely hate it when the government mixes church and state.

---

14. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

15. *See, e.g.*, *Lujan*, 504 U.S. at 576 (explaining that permitting federal courts to resolve generalized grievances would enable them to usurp the legislative and executive functions of "[v]indicating the *public* interest"). It bears noting that, although the Court's precedents ground the justification for a bar on generalized grievances in separation-of-powers concerns, Professor Kontorovich has recently offered a provocative economic justification for this rule. *See* Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1684 (2007) (contending that standing doctrine "does valuable work precisely when a plaintiff has a real injury [and] a genuine cause of action, but the social costs of entertaining it exceed the plaintiff's valuation of his entitlement and transaction costs block an efficient solution").

16. *Lujan*, 504 U.S. at 576.

17. Massachusetts v. EPA, 127 S. Ct. at 1467 (Roberts, C.J., dissenting).

18. Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2587–88 (2007) (Souter, J., dissenting).

19. *Id.* at 2584.

20. *Id.* at 2584–88.

21. *Id*.

And Justice Kennedy? He is in the middle.[22]

This 4–1–4 split is the latest expression of a decades-long fight over whether and how to use standing doctrine to limit access to the federal courts to protect separation of powers.[23] One reason this struggle has persisted is that both sides tap into important values that happen to contradict. Restrictive standing purports to expand space for representative government to operate, but it does so at the expense of increasing the risk of illegal government action. Permissive standing enhances the power of the Judiciary to ensure that political officials' actions are legal, but it may allow the Judiciary to intrude upon the legitimate policymaking authority of the political branches. As both factions in the fight both serve and undermine important values, perhaps neither *should* win an outright victory.

In this spirit, this Article proposes a compromise: Restrictive standing is correct to stress the importance of judicial respect for political-branch policymaking authority, but permissive standing is also correct that this separation-of-powers concern does not justify a constitutional bar on access to the federal courts. Instead, just as Professor Louis Jaffe suggested long ago, the separation-of-powers motivation behind restrictive standing justifies a rule of judicial *deference* rather than a categorical rule of judicial *access*.[24] Two basic ideas inform this alternative framework. The first is the rule-of-law value that independent judicial review of official action is necessary to ensure that law can meaningfully constrain the government's power.[25] This value counsels against the strategy of separating the political and judicial realms by creating an injury-based constitutional bar to judicial review of an ill-defined category of government action. The second basic idea is that respect for representative democracy suggests that judicial control of the policy choices made by politically accountable officials should be no more intrusive than necessary to ensure the benefits of the

22. *See id*. at 2572–73 (Kennedy, J., concurring) (joining the plurality in blocking standing for a generalized grievance). *But see* Massachusetts v. EPA, 127 S. Ct. at 1453 (joining the majority opinion that upheld petitioner's standing based on the "widespread harm" of global warming).

23. *See infra* Part I.B (discussing contradictory Supreme Court precedents on this subject).

24. *See supra* note 12 (quoting Professor Jaffe's proposal); *cf.* Elliott, *supra* note 12, at *6 n.18 (following another thread of Jaffe's standing analysis to support a proposal to replace standing doctrine with an abstention doctrine).

25. For discussion of the rule-of-law rationale for independent courts, see, for example, Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 304 (1989) (explaining that the concept of the "rule of law" provides the best lens for understanding separation of powers, and identifying its roots in English concepts of natural justice); WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 127–28 (1965) (identifying the "purest" basis for separation of powers as the rule-of-law concept that no man may be judge of his own cause).

rule of law. As will be explored below, combining these ideas suggests (a) that the Constitution does not categorically bar federal courts from resolving actions brought to enforce the public's shared (i.e., "generalized") interest in requiring the government to obey its laws; but (b) that courts should grant relief when resolving such actions only to enforce the government's *clear legal duties*.[26]

Part I of this Article will begin with a brief review of the origins and nature of the standing inquiry. It will then examine a series of leading Supreme Court precedents in which the Justices wrestled over the relation of separation of powers to standing, culminating with a discussion of the 2007 troika of *Lance v. Coffman*,[27] *Massachusetts v. EPA*,[28] and *Hein v. Freedom from Religion Foundation, Inc.*[29] Part II argues that constitutional standing's project of using a vague injury test to determine access to the federal courts should be abandoned. More particularly, the Constitution does not require a plaintiff to demonstrate that her injury is either "particularized" (*à la* restrictive standing) or "concrete" (*à la* permissive standing). Part III makes the case that a rule of judicial deference (*à la* Jaffe) could provide a better means for ensuring proper separation of judicial and political powers than constitutional standing's contentious, injury-based limits on judicial access.

I. THE SUPREME COURT ON THE RELATION OF STANDING TO SEPARATION OF POWERS

A. The Nature of the Standing Inquiry

It is easy to see the danger of allowing all citizens the right to sue in court to challenge any and all government actions that purportedly violate any law. In a political culture where judicial orders are obeyed, such a system might degenerate quickly into rule by the courts. Where no judicial review is available to review government action, however, government officials become the final judges of the legality of their own actions, and the rule of law must suffer. To steer a path between these two extremes, Congress and the courts have developed a complex set of doctrines governing the availability and timing of judicial review of government action, including, *inter alia*, doctrines on political questions, sovereign immunity, ripeness, primary jurisdiction, finality, and exhaustion.

26. *See* Jaffe, *supra* note 6, at 1305–06 (suggesting that courts, when resolving public actions, should enforce the government's clear legal duties and observing that this model can draw historical support from mandamus practice).

27. 127 S. Ct. 1194 (2007) (per curiam).

28. 127 S. Ct. 1438 (2007).

29. 127 S. Ct. 2553 (2007).

Standing, which purports to limit *who* can bring suit, is an important member of this set. Compounding complexity, it comes in three different types—statutory standing, prudential standing, and constitutional standing. (Note: For ease of reference, references to "standing" that do not refer to a particular type refer to "constitutional standing.")

All three types of standing bear a close relationship to the concept of the "cause of action"—an idea that presents its own interpretive difficulties.[30] For the present purpose, however, stipulate that a plaintiff has a cause of action where (a) the defendant has violated some legal obligation; and (b) the law authorizes the plaintiff to obtain a judicial remedy. In private law, it is a familiar concept that not everyone gets to sue to correct every legal wrong. For instance, if you hit me in the face, then I have a cause of action for battery. If, several thousand miles away from me, you hit someone whom I do not know, then *I* have no cause of action against you—although the person you hit does. The same principle operates in public law: just because the government has violated a law, it does not follow that *everyone* has the right to sue the government for a remedy.

In the nonstatutory world of the common law, the courts themselves determined what grievances were actionable. To get into court, a plaintiff had to fit her grievance into one of the common law's "forms of action," such as trespass, debt, etc.[31] As part of the long process of defining and implementing the forms of action, courts quite naturally developed principles for determining who could properly use them. Thus, courts did not need to engage in an independent inquiry into standing to determine whether the "right" plaintiff had brought an action.[32]

Just as courts must determine who can sue to enforce common law obligations, so they must also determine who can sue to enforce obligations created by positive law. Frequently, a legislative body provides controlling guidance by creating an express cause of action that specifies who can sue to enforce a particular law.[33] The most important example of this practice lies in § 10(a) of the Administrative Procedure Act (APA), which grants a cause of action to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the

30. *See generally* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004) (exploring the evolving meaning of "cause of action" and its deployment by courts and scholars to argue about the limits of the judicial power).

31. *See id.* at 784–85 (emphasizing that causes of action existed "by virtue of the availability of a form of action" that offered a remedy).

32. *See id.* at 817 ("At common law, there was no doctrine of standing per se. A case was justiciable if a plaintiff had a cause of action for a remedy under one of the forms of proceeding at law or in equity.").

33. *See, e.g.*, 33 U.S.C. § 1365(g) (2000) (authorizing a right to review under the Clean Water Act to "[any person] having an interest which is or may be adversely affected").

meaning of a relevant statute."[34]

But positive law that creates a legal obligation often fails to specify who has the right to enforce it in court. Many open-ended provisions of the United States Constitution fall into this category. In the absence of guidance in the form of an express, legislatively created cause of action, courts must figure out for themselves who can sue to enforce a given bit of positive law. Put another way, they must determine how and where to infer the existence of an implied cause of action.[35]

As the twentieth century progressed, federal courts began to discuss various aspects of the who-can-sue problem under the rubric of "standing" of various types.[36] "Statutory standing" is just a newish name for the old idea that the source of a plaintiff's cause of action to enforce a law may be the legislature. Thus, for instance, § 10(a) of the APA grants statutory standing to challenge a wide swathe of government action.[37]

Whereas statutory standing refers to legislative *authorization* to sue, "prudential standing" refers to *limitations* on who can sue based on judicial policy judgments.[38] For example, the prudential doctrine of "third-party standing" often blocks plaintiffs from suing to enforce another person's rights in light of the judicial judgment that parties generally do a better job of enforcing their own rights than someone else's.[39] One might think of prudential standing as a newish name for the old idea that, in the absence of clear legislative guidance, courts must figure out for themselves who can

34. 5 U.S.C. § 702 (2000). The Court has interpreted this statutory cause of action very broadly. Thus, we find that a *rancher* can invoke the Endangered Species Act to contest agency action designed to protect *fish*. Bennett v. Spear, 520 U.S. 154, 176–77 (1997).

35. *See, e.g.*, H. Miles Foy III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 524–69 (1986) (discussing the evolution of the Supreme Court's approach to inferring the existence of implied causes of action).

36. Scholars have suggested several reasons why standing came to the fore as an independent doctrine as the twentieth century progressed. One is that standing provided a means for the courts to modulate judicial control of the administrative state. Professor Sunstein, for instance, contends that Justices Brandeis and Frankfurter developed a restrictive standing doctrine as a means to "insulate progressive and New Deal legislation from frequent judicial attack." Sunstein, *supra* note 6, at 179. A few decades later, courts relaxed standing to increase the power of private attorneys general to use the courts to police government action. *Id.* at 183–85. Another, quite different reason for the rise of standing may lie in the evolution of procedural law. Most notably, with the abandonment of the old forms of action, they could no longer perform the work of determining who can sue. Courts therefore needed to develop a new framework for solving this problem, which they called "standing doctrine." Bellia, *supra* note 30, at 827–32.

37. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1176–77 (9th Cir. 2004) (describing § 10(a) of the APA as a grant of statutory standing).

38. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 991 (7th Cir. 2006), *rev'd sub nom.* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007).

39. Kowalski v. Tesmer, 543 U.S. 125, 129 (2004).

sue to right a claimed wrong. Of course, as the term "prudential" suggests, Congress can, whenever it wishes, trump prudential-standing limitations by granting any given class of plaintiffs an express cause of action to sue.[40]

The Court insists, however, that Congress cannot use its power to create a cause of action to trump constitutional standing requirements. The Court has often stated that these requirements are located in the Constitution's limitation of the Article III "judicial power" to resolution of "cases" and "controversies."[41] Expounding upon these limits, the Court has time and again intoned a standard that is trivially easy to state but notoriously hard to apply. To demonstrate constitutional standing, a "plaintiff must allege personal injury [also known as injury in fact] fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[42] In other words, a plaintiff can use the federal courts only to challenge conduct that caused injury to her, and only if there is some decent chance that a judicial remedy will somehow redress that injury. Where these requirements go unfulfilled, a plaintiff lacks standing to sue—even if the legislature has granted her an express cause of action authorizing her to do so.[43]

B. Four Cases on Injury, Separation of Powers, and Generalized Grievances

Each of standing's three canonical requirements—injury, causation, and redressability—has caused great confusion among courts, litigants, and scholars. The most intractable problems, however, have revolved around determining what sorts of injury should suffice for standing. In particular, as the 2007 *Lance–Massachusetts–Hein* troika highlights, the Justices have struggled over whether separation-of-powers principles permit generalized grievances to qualify.[44] To set the stage for examination of the troika's discussions of this dispute, this Article will examine four leading precedents in which the Court's answer to this question flipped back and forth.

40. *See* Bennett v. Spear, 520 U.S. 154, 163 (1997) (noting that prudential standing principles apply except where Congress expressly negates them).

41. DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1860 (2006).

42. *Id.* at 1861.

43. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–74 (1992) (holding that plaintiffs could not invoke the citizen-standing provision of the Endangered Species Act due to their failure to satisfy constitutional standing requirements).

44. For discussion of the conflicts over standing in the troika, see *infra* Part I.C.

1. Frothingham v. Mellon *Bars Generalized Grievances*

Although *Frothingham v. Mellon*[45] predates the Court's common use of the term "standing," this case has, as much as any other, come to represent the idea that the federal courts lack power to hear claims brought by persons who have suffered only generalized grievances.[46] Mrs. Frothingham and the Commonwealth of Massachusetts both sued Secretary of the Treasury Mellon to challenge the constitutionality of the Maternity Act, a federal statute designed to reduce infant and maternal mortality that offered funds to participating states.[47] Both claimed that the statute violated the Tenth Amendment by intruding on state prerogatives.[48] In addition, Frothingham alleged that taxing and spending in support of this unconstitutional program took her property without due process of law, damaging her as a federal taxpayer.[49] But of course, if *one* taxpayer can challenge the constitutionality of a federal statute on such grounds, then *all* taxpayers can make the same challenge.[50]

The Court found the prospect of opening the floodgates to such taxpayer actions too horrible to contemplate.[51] To block them, the Court gave a very short but grand exposition on separation of powers.[52] It explained that the "administration of any statute, likely . . . to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of *public* and not of *individual* concern."[53] Such matters of purely public concern were insufficient to invoke the power of judicial review, which requires a party "to show . . . that he has sustained . . . some *direct injury* as the result of its enforcement, and not merely that he suffers in *some indefinite way in common with people generally*."[54] This limitation was necessary to ensure that the Court did not step beyond the judicial role of "interpreting and applying [laws] in cases properly before the courts" and usurp political authority properly

45. Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447 (1923).

46. *Id.* at 487–88. In just the last two terms, *Frothingham* has been cited for its bar on generalized grievances several times. *E.g.*, Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2563–64 (2007) (Alito, J., plurality); *id.* at 2575 (Scalia, J., concurring); Lance v. Coffman, 127 S. Ct. 1194, 1197 (2007) (per curiam); *DaimlerChrysler Corp.*, 126 S. Ct. at 1862.

47. *Frothingham*, 262 U.S. at 478–79.

48. *Id.* at 479.

49. *Id.* at 486.

50. *Id.* at 487.

51. *See id.* ("The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.").

52. *Id.* at 488. For pointed criticism of the Court's deployment of separation of powers in *Frothingham*, see Epstein, *supra* note 11, at 23–25.

53. *Frothingham*, 262 U.S. at 487 (emphasis added).

54. *Id.* at 488 (emphasis added).

belonging to the other branches.[55] The Court did not, however, explain precisely how a judicial determination regarding the *legality* of government action could infringe upon the authority of political actors, who presumably have no discretion to violate the law. Notwithstanding this explanatory gap, the Court has periodically relied upon *Frothingham*'s bar on generalized grievances to block judicial resolution of what one might call "inconvenient" constitutional claims.[56]

2. Flast v. Cohen *Unbars Generalized Grievances*

In *Flast v. Cohen*, the plaintiffs sued to enjoin spending of federal funds for secular instruction at parochial schools pursuant to the Elementary and Secondary Education Act of 1965.[57] The plaintiffs claimed that this spending violated the Establishment Clause and sought standing based on their status as federal taxpayers.[58] One might well think that application of *Frothingham*'s bar on federal-taxpayer standing should have doomed this claim.[59] The Warren Court, however, did not agree, declaring it time for a "fresh examination of the limitations upon standing to sue in a federal court."[60]

To begin this examination, the Court observed that Article III extends the federal courts' judicial power only to resolution of cases and controversies.[61] The concept of justiciability captures the limitations on the judicial power imposed by this case-or-controversy requirement.[62] Broadly speaking, these limitations flow from three sources. First, there is history—for a court to resolve a matter, it must arrive in "a form historically viewed as capable of resolution through the judicial process."[63] Second, courts resolve real fights only—questions must be presented in an adversarial context.[64] Third, in a nod to the separation-of-powers concern

55. *Id.*

56. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225–27 (1974) (denying standing to plaintiffs who claimed that membership in Congress of persons who held commissions in the Reserves violated the Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 179–80 (1974) (denying standing to a plaintiff who claimed that the Government's failure to disclose CIA expenditures violated the Accounts Clause); *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam) (dismissing an Incompatibility Clause challenge to Justice Black's appointment to the Supreme Court).

57. 392 U.S. 83, 85 (1968).

58. *Id.* at 85–86.

59. *See id.* at 85 (conceding that *Frothingham*'s "ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers").

60. *Id.* at 94.

61. *Id.*

62. *Id.* at 95.

63. *Id.*

64. *Id.*

of *Frothingham*, the Court added that another function of the case-or-controversy requirement is to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[65]

The Court then made the crucial move of explaining that, while it is true that standing is *a* justiciability doctrine, not every justiciability doctrine has roots in separation of powers. As it relates to justiciability, separation of powers blocks courts from resolving *issues* that are properly the business of the political branches.[66] Standing does not speak to whether a court can determine an issue but rather to the problem of *who can raise it*.[67] Therefore, the *Flast* Court reasoned, standing cannot be rooted in separation of powers.[68] Instead, the true "gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[69] In other words, standing seems to be about whether the plaintiff will try hard enough.

This functional approach to standing left the problem of determining whether the *Flast* plaintiffs, invoking their status as federal taxpayers, had the right kind of "personal stake." To make this determination, *Flast* established an opaque two-pronged test that checks (a) whether there is a "logical link between [taxpayer] status and the type of legislative enactment attacked" and (b) whether there is a "nexus" between the plaintiff's taxpayer status "and the precise nature of the constitutional infringement alleged."[70] The Court has applied this odd test with extreme narrowness,[71] with the practical result that federal taxpayers can claim standing under *Flast* only to challenge congressional exercises of taxing and spending authority that allegedly violate the Establishment Clause.[72]

The fate of *Flast*'s two-pronged test, however, should not obscure the importance of its more general claim that standing doctrine is not, at its

65. *Id.*
66. *Id.* at 100–01.
67. *Id.*
68. *Id.*
69. *Id.* at 99 (internal quotations omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
70. *Id.* at 102.
71. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 479–80 (1982) (holding that plaintiffs' claim failed *Flast*'s first prong because, rather than challenge an exercise of congressional taxing and spending authority, they instead had challenged an exercise of power under the Property Clause).
72. *Cf.* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1863 (2006) (recognizing that the Court has applied *Flast*'s exception for federal-taxpayer standing only to Establishment Clause claims).

core, a doctrine of separation of powers designed to protect political branch authority from overreaching courts. Four Justices of the current Court agree with this claim.[73] Four flatly disagree.[74]

3. Lujan v. Defenders of Wildlife *Bars Generalized Grievances (Again)*

Since joining the Court, Justice Scalia—long *Frothingham*'s greatest friend and *Flast*'s greatest foe—has pressed his vision of constitutional standing at every chance, but with mixed success. His greatest victory came in 1992's *Lujan v. Defenders of Wildlife.*[75] The merits of this case revolved around interpretation of a provision of the Endangered Species Act (ESA) that requires agencies to go through a consultation process before undertaking projects that may threaten endangered wildlife. The Secretaries of Interior and Commerce jointly issued a rule declaring that this consultation requirement applied only to projects within the United States or on the high seas.[76] The plaintiffs, Defenders of Wildlife and two of its members, brought suit to contest this rule. Congress had armed such plaintiffs with the ESA's citizen-suit provision, which provides that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States, . . . who is alleged to be in violation of any provision of this chapter."[77] This provision made clear that the plaintiffs enjoyed statutory standing and that prudential standing principles should not block their way.

But according to Justice Scalia's majority opinion, constitutional standing principles did. The most significant portion of this opinion came in response to the Court of Appeals' contention that the rule, by eliminating federal agencies' duty to consult regarding foreign projects, had caused the plaintiffs to suffer a "procedural injury" sufficient for standing.[78] Justice Scalia characterized the Court of Appeals' holding as claiming that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[79] In other words, the Court of Appeals had allowed standing based upon the

73. *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2584–88 (2007) (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.) (applying *Flast* and notably declining to use substantial separation-of-powers rhetoric in standing analysis).

74. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1464 (2007) (Roberts, C.J., dissenting; joined by Scalia, Thomas, and Alito, JJ.) (insisting that standing funnels certain types of issues to the Executive and Legislative Branches for decision).

75. 504 U.S. 555 (1992).

76. *Id.* at 558–59.

77. 16 U.S.C. § 1540(g)(1) (2000).

78. *Lujan*, 504 U.S. at 571–72.

79. *Id.* at 573.

plaintiffs' generalized grievance that the Executive really should obey the law. This, Justice Scalia insisted, was impermissible because the Court had

> consistently held that a plaintiff raising only a *generally available* grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that *no more directly and tangibly benefits him than it does the public at large*—does not state an Article III case or controversy.[80]

Justice Scalia claimed that honoring this limitation on judicial power was vital to preserve "the separate and distinct constitutional role of the Third Branch."[81] The courts' function, as Chief Justice Marshall explained in *Marbury v. Madison*, "is, solely, to decide on the rights of individuals."[82] The job of "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is," by contrast, "the function of Congress and the Chief Executive."[83] Just as *Frothingham* had claimed long before, generalized grievances implicate the public interest rather than individual rights, and they are therefore the business of the political branches.[84]

A striking irony of *Lujan* is that it grounds the bar on generalized grievances on a need to protect the policymaking authority of the political branches, yet it interfered with Congress's *political* decision to allow private plaintiffs to bring citizen suits to force the government to obey the ESA. Justice Scalia resolved this tension by explaining that limiting congressional power to create causes of action was necessary to block the Legislature and Judiciary from combining forces to eviscerate the Executive Branch's constitutional authority.[85] More particularly, Congress could not authorize federal courts to resolve generalized grievances because

> [t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to

80. *Id.* at 573–74 (emphasis added); *see also id.* (collecting authority).

81. *Id.* at 576.

82. *Id.* (internal quotation marks omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

83. *Id.*

84. *See id.* at 574 (quoting Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 488 (1923)) (discussing the separation-of-powers significance of the ban on generalized grievances).

85. *See generally* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999) (giving a sympathetic examination of the proposition that the core separation-of-powers concern underlying constitutional standing doctrine must be protection of the Executive's Article II authority).

"take Care that the Laws be faithfully executed," Art. II, § 3.[86]

Thus, constitutional standing serves separation of powers in two ways: (a) it blocks the federal courts from unilaterally usurping political power and (b) it blocks Congress and the federal courts from teaming up to usurp the Executive's constitutional authority to enforce the law.[87]

4. FEC v. Akins *Unbars Generalized Grievances (Again)*

The Court quickly backed off from *Lujan*'s aggressive vision of constitutional standing's limits on judicial power in 1998's *FEC v. Akins*.[88] In this case, the respondents challenged the FEC's determination that the American Israel Public Affairs Committee (AIPAC) was not a "political committee" within the meaning of the Federal Election Campaign Act of 1971 (FECA).[89] Such political committees face statutory obligations to disclose information about their members, contributions, and expenditures—information that the respondents said they needed to assess political candidates.[90] The FEC argued for dismissal on the ground that the respondents lacked standing because their claimed injury—lack of access to information concerning AIPAC—was too "generalized."[91]

Justice Breyer—writing for a six-Justice majority and over Justice Scalia's vigorous dissent—disagreed.[92] He boldly claimed that, in all the precedents in which the Court had ruled a generalized grievance to be insufficient for standing, the injury had also been "abstract" rather than "concrete."[93] Abstract injuries cannot suffice for standing because they do not imbue cases with the "concrete specificity that characterized those controversies which were 'the traditional concern of the courts at Westminster.'"[94] A widely shared injury can, however, support standing provided it is "sufficiently concrete."[95]

To demonstrate his point, Justice Breyer gave two examples. His first was that a "widespread mass tort" that damages many people inflicts a concrete injury on each one.[96] His second was that widespread interference

86. *Lujan*, 504 U.S. at 577.
87. For further and critical discussion of Justice Scalia's theory of standing that he propounded in *Lujan*, see *infra* Part II.B.1–2.
88. 524 U.S. 11 (1998).
89. *Id.* at 18.
90. *Id.* at 14–15, 21.
91. *Id.* at 23.
92. FEC v. Akins, 524 U.S. 11, 23 (1998) (Breyer, J.). *But see id.* at 33–37 (Scalia, J., dissenting).
93. *Id.* at 24.
94. *Id.* (quoting Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).
95. *Id.*
96. *Id.* at 24–25.

with voting rights inflicts a concrete injury on each individual voter it affects.[97] With these examples in mind, he concluded that Akins's claim of informational injury, which was "directly related to voting, the most basic of political rights," was "sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."[98]

Of course, notwithstanding Justice Breyer's examples, the meaning of "concrete" in this context is terrifically unclear.[99] To criticize the abstract–concrete dichotomy as vague, however, is to miss the underlying point of its deployment in *Akins*, which was to draw the teeth of the injury inquiry that Justice Scalia had so recently sharpened in *Lujan*. In *Akins*, as in *Flast*, we see that the central idea behind standing is to make sure that plaintiffs have suffered the kind of "injury" that will ensure "concrete specificity" in litigation.[100] As it is unclear what either of these terms means in this context, a court applying this approach could almost always justify the conclusion that a plaintiff has suffered the right kind of injury for constitutional standing.

5. Separation-of-Powers Ping–Pong

Frothingham v. Mellon embedded the bar on standing for "generalized grievances" in separation of powers;[101] *Flast v. Cohen* plucked it out;[102] *Lujan v. Defenders of Wildlife* put it back;[103] and *FEC v. Akins* ripped it up.[104] On one level, this sort of doctrinal vibration is hardly surprising. Whether various aspects of standing doctrine are properly embedded in separation of powers is itself a question of separation of powers, which, as Professor Corwin observed, is not so much a body of law as an "invitation to struggle."[105]

In this struggle, standing doctrine has veered toward stricter limits on

---

97. *Id.*

98. *Id.*

99. *See generally* Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 458–62 (2007) (noting the absence of a general definition of "concrete" and analyzing what this term might mean).

100. *See Akins*, 524 U.S. at 24 (indicating that "abstract" injuries do not generate "concrete specificity"); *cf.* Flast v. Cohen, 392 U.S. 83, 99 (1968) (explaining that the "gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

101. Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 488 (1923); *see also supra* Part I.B.1 (discussing *Frothingham*).

102. 392 U.S. at 10. *See supra* Part I.B.2 (discussing *Flast*).

103. 504 U.S. 555, 576–77 (1992). *See supra* Part I.B.3 (discussing *Lujan*).

104. 524 U.S. at 23–25; *see also supra* Part I.B.4 (discussing *Akins*).

105. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS: 1787–1957, at 171 (4th rev. ed. 1957).

judicial power in the hands of jurists keen to protect the political branches' authority from the danger of judicial interference. Thus, in the Progressive and New Deal eras, we see Justices Brandeis and Frankfurter strengthening standing as a means of fending off the ghosts of *Lochner*-style activism.[106] Decades later, we see Justice Scalia using standing to discipline courts that in the 1960s and 1970s had in his view usurped power to determine public policy.[107] Standing doctrine has veered toward less strict limits on judicial power in the hands of jurists keener to use the courts to police the other branches. Thus, we see in Chief Justice Warren's *Flast* opinion an effort to limit standing's constitutional dimension to the vague requirement that litigants have a "personal stake" in their lawsuits.[108] Inevitably, where a given Justice stands on the interminable dispute over the nature of standing must be bound up with that Justice's general ideology regarding the relationship between judicial and political power.

C. A Doctrine on the Edge—Generalized Grievances in 2007

As it happens, an especially ferocious proponent of executive power, President George W. Bush, recently appointed two eminent (and rather young) conservative jurists, Chief Justice Roberts and Justice Alito, to the Supreme Court. Examination of the 2007 troika of *Lance v. Coffman*,[109] *Massachusetts v. EPA*,[110] and *Hein v. Freedom from Religion Foundation, Inc.*[111] reveals that standing doctrine is now balanced on the edge of a knife. With the arrival of the two new Justices at the Court, a potent form of restrictive standing now has four solid votes; permissive standing has another four, and Justice Kennedy is the swing vote.[112]

---

106. *See* Sunstein, *supra* note 6, at 179 (describing Justices Brandeis and Frankfurter as the "principal early architects" of standing doctrine, who wished to "insulate progressive and New Deal legislation from frequent judicial attack"); Winter, *supra* note 6, at 1443–52 (examining the development of standing doctrine in the opinions of Justices Brandeis and Frankfurter).

107. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893 (1983) (criticizing relaxation of standing requirements as one of the factors that had enabled courts to emerge as "an equal partner" with the Executive and Legislative Branches in the formulation of public policy).

108. Flast v. Cohen, 392 U.S. 83, 101 (1968) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

109. 127 S. Ct. 1194 (2007) (per curiam).

110. 127 S. Ct. 1438 (2007).

111. 127 S. Ct. 2553 (2007).

112. In addition to the 2007 troika, the Roberts Court has resolved two other cases with notable things to say about standing. The first, *DaimlerChrylser Corp. v. Cuno*, 126 S. Ct. 1854 (2006), disguised rather than highlighted the Justices' split over the relation of standing to separation of powers. The plaintiffs, Ohio taxpayers, claimed that tax breaks the state had extended to a corporation violated the Commerce Clause. Seven other Justices joined Chief Justice Roberts's opinion in which he explained that the plaintiffs lacked standing based upon their state-taxpayer status because, among other related reasons, the

1. The Misleading Unanimity of Lance v. Coffman

The Supreme Court issued its first significant opinion on standing in 2007 in *Lance v. Coffman*, in which the plaintiffs claimed that a redistricting plan created by Colorado's state courts violated the Elections Clause.[113] The Court dismissed the claim on the ground that the plaintiffs' injury amounted to a mere generalized grievance with a per curiam opinion issued without argument or dissent.[114] Usually, such brusque procedural treatment is an indication that an opinion does not contain anything interesting. *Lance*, however, is worth a brief look if only because it is so marvelously misleading. The Court's unsigned opinion reads like a brief written to support the proposition that generalized grievances cannot support constitutional standing.[115] To that end, it spends several pages touring a century's worth of precedents to establish that "[o]ur refusal to

---

effect of the challenged tax break on their tax bills was too attenuated and speculative to amount to concrete and particularized injury. *Id.* at 1862. *DaimlerChrysler* contains broad language stressing the importance of standing as a means to protect separation of powers, and one might plausibly read it as a sudden and resounding victory for the forces of restrictive standing. *Id.* at 1861. Nonetheless, three Justices who joined the opinion—Justices Stevens, Souter, and Breyer—plainly do not agree that separation-of-powers principles categorically bar federal court resolution of generalized grievances. *See infra* Part I.C.2–3. They presumably would favor a narrow reading of *DaimlerChrysler* that regards it as commentary on when damage to a plaintiff's interest as a *taxpayer* can support standing rather than as a broader commentary on the constitutional status of generalized grievances. *Cf.* FEC v. Akins, 524 U.S. 11, 22 (1998) (Breyer, J.) (indicating that a plaintiff who lacks taxpayer standing may nonetheless enjoy standing on the basis of some other broadly shared interest—e.g., the plaintiff's interest as a voter).

The Court's most recent interesting standing case, *Sprint Communications Co. v. APCC Services, Inc.*, analyzed the obscure issue of whether "an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor." 128 S. Ct. 2531, 2533 (2008). A five-Justice majority—the four liberals plus Justice Kennedy—concluded that such assignees have standing "[b]ecause history and precedent make clear that [they have] long been permitted to bring suit." *Id.* The four conservatives joined Chief Justice Roberts's dissent, which claimed that the majority's fundamental error was to fail to recognize that the standing inquiry does not focus on whether a court order would redress *any* injury (e.g., the assignor's claim for damages); rather, the standing inquiry focuses on "whether the *complaining party's* injury is likely to be redressed." *Id.* at 2551. As the assignee (the complaining party) had agreed by contract to remit any recovery it obtained to the assignor, an award could not redress any injury to the assignee. *Id.* at 2550. Therefore, the dissent concluded, the assignee lacked the personal stake needed for standing. *Id.* Chiding the majority for reaching the opposite conclusion, Chief Justice Roberts declared that the majority's approach "could not be more wrong [because the Court has] never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court. Never." *Id.* at 2551. Thus, although *Sprint Communications* does not address the problem of generalized grievances in the same manner as the cases of the 2007 troika, on a more general level, it confirms that the Court is sharply and almost evenly divided between restrictive and permissive approaches to constitutional standing.

113. 127 S. Ct. at 1196 (per curiam).

114. *Id.* at 1198.

115. *Id.* at 1196–97.

serve as a forum for generalized grievances has a lengthy pedigree."[116] At no time does *Lance* advert to the fact that its analysis conflicts with the views of four (perhaps five) sitting Justices—as opinions issued later in the term would confirm.[117] What is one to make of this fact? Did *Lance*'s author expect a rebuttal that never came? Not everyone has let *Lance* slide by. Just a few months later, Justice Scalia cited it for the proposition that the Court had recently and *unanimously* reaffirmed the ban on standing for generalized grievances.[118]

2. Massachusetts v. EPA*: Does Global Doom Count as Injury?*

The most important case of 2007 on its merits was *Massachusetts v. EPA*, in which a 5–4 majority of the Court ruled that EPA had arbitrarily rejected a rulemaking petition requesting that it use its Clean Air Act authority to regulate greenhouse gas emissions of motor vehicles.[119] Before reaching the merits, however, the Court had to forge through the standing issue, on which it also split 5–4.[120] The Justices' analysis of standing in this case touches on many important issues, but for the present purpose, the critical point to note is that the five-Justice majority declared that the fact that an injury is widely shared is no obstacle to standing, whereas the four-Justice dissent indicated that separation of powers should block standing

116. *See id*. at 1197–98 (discussing authority including, *inter alia*, *DaimlerChrysler*, 126 S. Ct. at 1862 (observing that an injury that one "suffers in some indefinite way in common with people generally" cannot support standing); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220 (1974) ("Standing to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public."); United States v. Richardson, 418 U.S. 166, 176–77 (1974) (dismissing a constitutional challenge to the Government's failure to disclose CIA expenditures as it was based on a generalized grievance); *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam) (dismissing an Incompatibility Clause challenge to Justice Black's appointment to the Supreme Court); Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 488 (1923) (rejecting taxpayer standing for an injury that a plaintiff "suffers in some indefinite way in common with people generally"); Fairchild v. Hughes, 258 U.S. 126, 129 (1922) (stating that a plaintiff could not institute suit in federal courts based "only [on] the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted").

117. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1453, 1456 (2007) (maintaining that "widely shared" injuries can support standing so long as they are concrete); Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2587 n.3 (2007) (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.) (declaring that there is no categorical bar on standing to resolve "generalized grievances").

118. *Freedom from Religion Found.*, 127 S. Ct. at 2574 (Scalia, J., concurring).

119. *See* 127 S. Ct. at 1460, 1463 (holding that EPA had incorrectly construed its statutory authority and abused its discretion); *cf. id.* at 1471–77 (Scalia, J., dissenting) (rejecting the majority's merits analysis).

120. *See id*. at 1458 (ruling that petitioners had standing to challenge EPA's denial of their rulemaking petition); *cf. id.* at 1464 (Roberts, C.J., dissenting) (rejecting standing for petitioners).

based upon the sort of generalized grievance caused by global warming.

Justice Stevens's majority opinion held that Massachusetts had satisfied the injury requirement by demonstrating that global warming threatened to cause rising sea levels, which in turn threatened coastal property owned by the state.[121] Causation and redressability requirements were satisfied because, were EPA to initiate rulemaking, it might promulgate a rule limiting at least some greenhouse gas emissions and because any move in that direction would reduce the risk of catastrophic harm at least a little.[122] Also, the majority buttressed its conclusion in favor of Massachusetts by invoking an obscure, one-hundred-year-old precedent, *Georgia v. Tennessee Copper Co.*,[123] for the principle that *states* have a special claim to standing in the federal courts to protect their quasi-sovereign interests that extend to "all the earth and air within [their] domain[s]."[124]

Responding to the majority opinion on its own terms, Chief Justice Roberts contended that Massachusetts's claim of standing based on the prospective loss of coastal land faced insurmountable causation–redressability problems.[125] He also disputed the majority's reliance on *Tennessee Copper* for the proposition that states are entitled to "special solicitude" when it comes to standing, suggesting that one might best understand invocation of this principle as a tacit admission by the majority that its standing analysis needed all the help it could get.[126]

The dissent's core objection, however, was that the true injury at stake was not the stalking horse of prospective loss of coastal land. The *real* injury was "catastrophic global warming,"[127] which does not harm anyone in the particularized way needed for standing.[128] Correcting government

121. *Id.* at 1456.

122. *See id.* at 1458 ("The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek."). Note also that the prospect that EPA might, after completing the rulemaking process, decline to adopt a rule limiting greenhouse gas emissions did not present an insufferable redressability problem because Congress had granted the petitioners a "procedural right" to "challenge agency action unlawfully withheld" in 42 U.S.C. § 7607(b)(1), and, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Massachusetts v. EPA, 127 S. Ct. at 1453. Thus, the possibility that EPA would promulgate a rule limiting greenhouse gas emissions—which would help curb Massachusetts's injury at least a little—was sufficient to satisfy redressability.

123. 206 U.S. 230, 237 (1907).

124. Massachusetts v. EPA, 127 S. Ct. at 1454 (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

125. *Id.* at 1469 (Roberts, C.J., dissenting).

126. *Id.* at 1466 (Roberts, C.J., dissenting). *See generally* Watts & Wildermuth, *supra* note 7 (discussing in detail the significance of the revivification of *Tennessee Copper*).

127. Massachusetts v. EPA, 127 S. Ct. at 1470 (Roberts, C.J., dissenting).

128. *See id.* at 1467 (Roberts, C.J., dissenting) ("The very concept of global warming seems inconsistent with this particularization requirement.").

action that causes generalized harm is the proper work of the Legislature and the Executive.[129] Where courts usurp this work, they "intrude on the politically accountable branches," and thus violate the purpose of standing, which in the dissent's view is to "maintain[] the tripartite allocation of power set forth in the Constitution" and ensure "that courts function as courts."[130]

Strictly speaking, the majority did not need to address the reviewability of generalized grievances because it had concluded that Massachusetts had asserted a particularized injury. Nonetheless, it did not let the Chief Justice's views on generalized grievances go unchallenged. The majority insisted that a plaintiff can possess standing based on "widely shared" harms so long as the harms are "concrete."[131] Recalling principles familiar from cases such as *Flast v. Cohen*, the logic behind this view is that "the gist of the question of standing is whether petitioners have such a personal stake . . . as to assure . . . concrete adverseness."[132] A petitioner can bring such a personal stake to court regardless of how many people share her injury.

We thus see that buried in *Massachusetts v. EPA* lies the very same struggle between *Frothingham*- and *Flast*-style approaches to standing (and its relation to separation of powers) that has so long bedeviled the Court. Chief Justice Roberts and Justice Alito plainly have joined Justices Scalia and Thomas in the *Frothingham* camp.

3. Freedom from Religion Foundation *Fractures* Flast

The Court's most revealing discussion of standing in 2007 came in *Hein v. Freedom from Religion Foundation, Inc.*[133] In this case, a five-Justice majority (the four conservatives plus Justice Kennedy) held that the respondents' claimed injury was too generalized to support constitutional standing to litigate their Establishment Clause claim; the four liberals, by contrast, would have held that the injury was concrete enough for constitutional standing.[134]

---

129. *See id.* at 1464 (Roberts, C.J., dissenting) ("This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts." (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992))).

130. *Id.* at 1470–71 (Roberts, C.J., dissenting).

131. *Id.* at 1456 (citing FEC v. Akins, 524 U.S. 11, 24 (1998)).

132. *Id.* at 1453 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); *see also* Flast v. Cohen, 392 U.S. 83, 101 (1968) (quoting *Baker* to the same effect).

133. 127 S. Ct. 2553 (2007) (3–2–4 decision).

134. *See id.* at 2563 (Alito, J., plurality; joined by Roberts, C.J., and Kennedy, J.) ("We have consistently held this type of interest is too generalized and attenuated to support Article III standing."); *id.* at 2582 (Scalia, J., concurring; joined by Thomas, J.) (observing that "generalized grievances do not satisfy Article III's requirement that the injury in fact be

The respondent Foundation and some of its members had sued to block spending on conferences to promote President Bush's Faith-Based and Community Initiatives Program for violating the Establishment Clause.[135] Of course, the real reason that the respondents sued was because they were upset by what they saw as an unconstitutional mixing of church and state. Harm to their mere ideological interests could not support a public action, however.[136] Respondents therefore claimed injury to their interests as federal taxpayers on the basis of the *Flast* exception to the general rule against federal-taxpayer standing.[137]

But, as usual, there was a fly in the *Flast* ointment. By its own terms, the *Flast* exception applies solely to *congressional* action.[138] The money spent to support these conferences came from general executive appropriations—Congress had not directed how this money should be spent.[139] Of course, *Flast*'s understanding of the function of standing—to make sure that plaintiffs have the right personal stake in litigation[140]—suggests that this distinction should make no difference whatsoever—government spending that promotes religion offends those who do not like it regardless of which branch authorizes it. The general rule against ideological plaintiffs, however, creates pressure to limit *Flast* as narrowly as plausible.

The Seventh Circuit panel that heard *Freedom from Religion Foundation* produced two excellent, scholarly opinions that reached opposite results. Writing for the majority, Judge Posner ruled that the legislative–executive distinction made no difference. To hammer this point home, he claimed that *Flast* standing would certainly exist to contest, for example, a decision by the Secretary of Homeland Security to use unearmarked funds to construct a mosque to build goodwill and reduce the likelihood of Islamic terrorism.[141] Judge Ripple, dissenting, argued with equal force that the majority's extension of *Flast* to executive action amounted to a "dramatic expansion of current standing doctrine" that "cuts the concept of taxpayer

concrete and particularized"). *But see id.* at 2587 (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.) (indicating that the respondents' claimed injury was concrete enough for standing).

135. *Id.* at 2559.

136. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (holding that harm to special interest that members of environmental organization had in protecting endangered species could not, by itself, support standing).

137. *Flast*, 392 U.S. at 105–06.

138. *Id.* at 102.

139. Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2560 (2007).

140. *Flast*, 392 U.S. at 101.

141. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 994 (7th Cir. 2006), *rev'd sub nom.* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007).

standing loose from its moorings."[142]

When the case reached the Supreme Court, the five most conservative Justices concluded that the Foundation lacked taxpayer standing under *Flast* but disagreed as to why. Justice Alito wrote the controlling plurality opinion, which the Chief Justice and Justice Kennedy joined. At the outset of its analysis, the plurality gave strong support to the general rule against federal-taxpayer standing and to the broader principle that courts are not the place to settle generalized grievances.[143] The plurality did not, however, need to resolve whether this principle justified overruling *Flast* because that was not the question before it. The real question was, not whether to apply *Flast* but whether to *expand* it to cover executive action.[144] Expanding *Flast* to cover executive action would be a terrible idea, however, as it would "effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court."[145] Bloating the judicial power in this way would subvert separation of powers and democracy.[146]

By distinguishing *Flast* rather than confronting it head-on, the Chief Justice and Justice Alito were able to undermine it without technically overruling it. Nonetheless, it is plain enough from a close reading of Justice Alito's plurality opinion in *Freedom from Religion Foundation* and Chief Justice Roberts's dissent in *Massachusetts v. EPA* that they share Justice Scalia's view that generalized, widely available grievances are for the political branches to resolve.[147] Were a case to arise where determining *Flast*'s fate were unavoidable, these two Justices would help speed it to the grave.[148]

Justice Scalia, joined by Justice Thomas, wrote a forceful concurrence that condemned the plurality's approach for being both dishonest and confusing. Given his way, he would have overruled *Flast* as "wholly irreconcilable with the Article III restrictions on federal-court jurisdiction [overgeneralized grievances] that this Court has repeatedly confirmed are

142. *Id.* at 997–98 (Ripple, J., dissenting).
143. *Freedom from Religion Found.*, 127 S. Ct. at 2563–64 (plurality).
144. *Id.* at 2566–69.
145. *Id*. at 2569.
146. *Id.* at 2569–70.
147. *Id*. at 2563–64 (2007); Massachusetts v. EPA, 127 S. Ct. 1438, 1464 (2007) (Roberts, C.J., dissenting).
148. Although he joined the plurality, Justice Kennedy, unlike the Chief Justice and Justice Alito, made clear that he thought *Flast v. Cohen*, 392 U.S. 83 (1968), had been correctly decided. *See Freedom from Religion Found.*, 127 S. Ct. at 2572 (Kennedy, J., concurring). He nonetheless joined the plurality "in full" because he agreed that extending *Flast* to cover executive action threatened separation of powers by creating a danger of excessive judicial oversight of executive activities. *Id.* at 2572–73.

embodied in the doctrine of standing."[149]

Dissenting, Justice Souter—joined by Justices Stevens, Ginsburg, and Breyer—agreed with Justice Scalia that *Flast*'s logic justified standing for the Foundation.[150] Rather than overrule *Flast*, however, the dissent would have applied it.[151] Like all of the other opinions issued in *Freedom from Religion Foundation*, the dissent consumed the resources needed to offer a skillful, plausible gloss on the Court's maze of standing precedents to justify its result.[152] But like the concurrence, the deeper part of the analysis addressed the problem of limiting the concept of injury. As far as the dissent was concerned, Justice Scalia's familiar claim that judicial resolution of generalized grievances cannot support standing is flat-out wrong.[153] Rather, just as the Court had asserted in *Akins* a scant nine years before, a "widely shared" injury can support standing so long as it is "concrete" rather than "abstract."[154]

The most critical part of the dissent lies in its brief, vague reflections on what it means to be concrete enough for standing:

> In the case of economic or physical harms, of course, the "injury in fact" question is straightforward. But once one strays from these obvious cases, the enquiry can turn subtle. Are esthetic harms sufficient for Article III standing? What about being forced to compete on an uneven playing field based on race (without showing that an economic loss resulted), or living in a racially gerrymandered electoral district? These injuries are no more concrete than seeing one's tax dollars spent on religion, but we have recognized each one as enough for standing. This is not to say that any sort of alleged injury will satisfy Article III, but only that *intangible harms must be evaluated case by case*.[155]

This case-by-case analysis contemplated by the dissent considers "the nature of the interest protected" and whether, ultimately, "the injury alleged is too abstract, or otherwise not appropriate, to be judicially cognizable."[156]

4. Looking Back at the Troika

After touring the 2007 troika, it is plain to see that the substance of the debate over constitutional standing to pursue generalized grievances has not evolved very far in recent decades. One four-Justice faction of the Court favors a restrictive approach to standing that invokes the bar on

149. *Freedom from Religion Found.*, 127 S. Ct. at 2574 (Scalia, J., concurring).
150. *Id.* at 2584 (Souter, J., dissenting).
151. *Id.*
152. *Id.* at 2585–86.
153. *Id.* at 2587 n.3.
154. *Id.* (quoting FEC v. Akins, 524 U.S. 11, 24 (1998)).
155. *Id.* at 2587 (emphasis added) (quotation marks and internal citations omitted).
156. *Id.* (quotation marks and internal citation omitted).

generalized grievances in the name of separation of powers. By limiting the judicial role to resolution of claims based on particularized injury, this faction seeks to protect the political branches (and the people) from an overreaching, inept, illegitimate juristocracy.

The other four-Justice faction favors a permissive approach to standing that allows the federal courts to resolve generalized grievances so long as they are concrete rather than abstract. This concreteness requirement seems to boil down to the idea that a plaintiff can have constitutional standing to contest an "intangible harm" so long as the courts think, on the basis of case-by-case judgment, that it makes good sense.[157]

Excluding Justice Kennedy's swing vote from the picture, neither faction is likely to enlist the support of anyone from the other side. With the arrival of Chief Justice Roberts and Justice Alito, however, restrictive standing has become much stronger very quickly as a matter of the Court's internal electorate. Restrictive standing is suddenly just one vote away from becoming the controlling view of the Court for some indefinite period of time. *Massachusetts v. EPA* provides a potent example of what such control might mean.[158] Had restrictive standing attracted just one more vote in that case, the Court would have ruled that Massachusetts lacked constitutional standing because catastrophic global warming hurts everyone.[159]

II. ABANDONING STANDING: WHY THE CONSTITUTION REQUIRES NEITHER CONCRETE NOR PARTICULARIZED INJURY

As we have seen, although standing's injury requirement sounds simple enough on its face, the Justices of the Supreme Court have been unable to reach consensus on what it means. For this and many other reasons, the law of constitutional standing is extremely confusing. Why, then, put up with it? The Constitution's text does not expressly mention an injury requirement. Nor do historical understandings of the judicial power clearly compel its adoption—a strong scholarly consensus holds that standing's injury requirement is a twentieth-century invention.[160]

---

157. *Id.* at 2587.

158. Massachusetts v. EPA, 127 S. Ct. 1438, 1467 (2007) (Roberts, C.J., dissenting).

159. *Id*. ("The very concept of global warming seems inconsistent with this particularization requirement.").

160. *See, e.g.*, Sunstein, *supra* note 6, at 170–75 (discussing prerogative-writ and qui tam practice as evidence that, prior to 1920, "[n]o one believed that the Constitution limited Congress's power to confer a cause of action"); Winter, *supra* note 6, at 1375–76 (discussing the "surprisingly short history" of standing doctrine); Berger, *supra* note 6, at 824–25 (concluding that "a colonial lawyer might well have concluded that [based on English precedents] mandamus was capable of issuance at the suit of a stranger who sought to assert the public interest"); Jaffe, *supra* note 6, at 1275–81 (documenting American courts' common allowance of public actions brought by persons seeking to vindicate general

Absent clear textual or compelling historical support, the justification for constitutional standing must be functional in the sense that it provides a means for implementing a constitutional value so important that it justifies empowering the federal courts to overturn legislative judgments regarding who can sue. Neither permissive nor restrictive standing, however, rests on a persuasive justification for its particular limits on judicial power. Permissive standing's justifications—e.g., that the injury requirement ensures that litigants bring the right personal stake to litigation—are, frankly, difficult to take seriously. The proponents of restrictive standing, led by Justice Scalia, at least provide a colorable theory for their doctrine. They claim that restrictive standing's insistence on particularized injury is necessary to protect the power of the political branches to determine and act upon the public interest.[161] But, as discussed below, this separation-of-powers theory fails to justify restrictive standing's limits on access to the courts because (a) it is antimajoritarian, (b) it undermines the rule of law, and (c) the generalized–particularized dichotomy upon which it rests is indeterminate and easy to manipulate.[162]

In short, constitutional standing's insistence that a plaintiff must suffer the right kind of injury to gain access to the federal courts lacks sufficient textual, historical, or functional support to justify the confusion and other ills it causes. It should be abandoned.[163]

A. Why Permissive Standing's Concrete Injury Test Is Difficult to Take Seriously

Again, the most significant recent discussion of permissive standing from the Supreme Court appears in Justice Souter's dissent in *Hein v. Freedom from Religion Foundation, Inc.*[164] Two prominent, related themes appear in this opinion, which all four liberals joined: (a) constitutional standing requires that a plaintiff bring the right kind of personal stake to court; and (b) constitutional standing requires a concrete rather than abstract injury.[165]

The obvious problem with personal-stake analysis is that it cannot

---

rights enjoyed by all). *But see* Woolhandler & Nelson, *supra* note 6, at 691 (declining to claim that "history *compels* acceptance of the modern Supreme Court's vision of standing" but insisting also that "history does not *defeat* standing doctrine").

161. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–76 (1992) (discussing the separation-of-powers justification for restrictive standing's bar on generalized grievances).

162. *Infra* Part II.B.1–2.

163. *See supra* note 11 (citing to leading scholars contending that constitutional standing and its injury test should be abandoned).

164. 127 S. Ct. 2553, 2584 (2007) (Souter, J., dissenting).

165. *See generally id.* at 2584–88.

measure anything in a sensible and useful manner. As Justice Harlan observed with devastating common sense in his dissent in *Flast v. Cohen*, in cases where plaintiffs are motivated by their values rather than economic concerns "it is very nearly impossible to measure sensibly any differences in the intensity of their personal interests in their suits."[166] Moreover, even if one could measure the strength of such impulses, one might think it needless to do so given the fair supposition that anyone motivated enough to sue is very likely to have a sufficient personal stake in the litigation.[167]

With regard to the more general problem of determining whether an injury is adequately concrete, Justice Souter explained that "[t]he question, ultimately, has to be whether the injury alleged is too abstract, or otherwise not appropriate, to be considered judicially cognizable."[168] This language, rather than providing a meaningful legal standard, instead gives the courts a license to exercise policymaking discretion to determine which suits may proceed in federal court and which may not. This is not a novel role for the courts to play. At common law, courts determined who-could-sue-whom-over-what as part of the process of developing the forms of action.[169] In modern law, the concept of prudential standing captures the idea that courts can continue to exercise discretion to block certain plaintiffs from suing.[170] The problem is that, if this power has constitutional status, then courts can and should use it to trump congressional policy judgments concerning who can sue. If, however, the injury inquiry simply boils down to whether it is a *good idea* as a matter of policy to let someone sue, it is far from obvious why a judicial determination on this point should trump a congressional one.

Of course, there is a simple way for the four Justices who signed on to the *Freedom from Religion Foundation* dissent to avoid this problem: Whenever confronted by a plaintiff whom Congress has expressly authorized to sue, they could find that this particular plaintiff has, indeed, suffered an injury concrete enough for standing. Given the hazy nature of permissive standing's injury inquiry, as well as a proper impulse to defer to congressional policy judgments, such outcomes should be easy enough to

166. Flast v. Cohen, 392 U.S. 83, 124 (1968) (Harlan, J., dissenting).

167. *See* Scalia, *supra* note 107, at 891 (observing that "[o]ften the very best adversaries are national organizations such as the NAACP or [ACLU] that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever"); *cf.* Siegel, *supra* note 11, at 87 ("Of all the arguments concerning the purposes of the justiciability requirements, this [personal stake rationale] is perhaps the most obviously wrong. Indeed, we could hardly take the argument seriously if repetition had not benumbed us to its flaws.").

168. *Freedom from Religion Found.*, 127 S. Ct. at 2587 (Souter, J., dissenting) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)) (internal quotation marks omitted).

169. *See supra* notes 31–32 and accompanying text.

170. *See supra* notes 38–40 and accompanying text.

justify. If, however, the Court never disagrees with Congress over standing, then standing—considered as a constitutional rather than prudential doctrine—becomes totally toothless. It is tempting to suppose that the four dissenting Justices, in keeping with the weight of scholarly criticism of constitutional standing, would not mind this result.[171] In short, maybe they do not take permissive standing very seriously either.

B. Why Restrictive Standing Fails to Justify Barring Access to the Courts

Restrictive standing's core appeal lies in the fact that it reflects a serious response to the deep separation-of-powers problem of enabling courts to protect individuals without enabling the courts to usurp political power. The importance of drawing the right line between the political and judicial realms is undeniable in a system committed to both representative democracy and the rule of law. Restrictive standing, however, draws this line in a way that undermines both democracy and law, and is alarmingly indeterminate. To back up this claim, this Article will take a closer look at the jurisprudential underpinnings for restrictive standing developed by its intellectual godfather, Justice Scalia.

1. A Closer Look at Justice Scalia's Restrictive Standing

One rock upon which Justice Scalia built his theory of restrictive standing is the second-most famous quotation from *Marbury v. Madison*: "The province of the court is, solely, to decide on the *rights of individuals* . . . ."[172] By contrast, the political task of "[v]indicating the *public interest* . . . is the function of Congress and the Chief Executive."[173] Restrictive standing's limits on who can sue are supposed to be a means to enforce this individual-rights–public-interest dichotomy.

---

171. *Cf.* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 642–43 (1999) (concluding that the majority opinion in FEC v. Akins, 524 U.S. 11 (1998), which all four of the *Freedom from Religion Foundation* dissenters joined, suggests that the injury-in-fact requirement should be regarded as satisfied so long as "Congress or any other source of law gives the litigant a right to bring suit"); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 336 (2002) (suggesting that *Akins* signified that the Court (as then composed) would not use the injury requirement to trump an express congressional grant of a cause of action). For further discussion of *Akins*'s effort to weaken standing requirements, *see supra* Part I.B.4. For a hint that at least one of the *Freedom from Religion Foundation* dissenters seems ready to junk constitutional standing doctrine in its current form, see *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1869 (2006) (Ginsburg, J., concurring) (declining, pointedly, to endorse the Court's major standing decisions of the last thirty years).

172. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)) (emphasis added).

173. *Id.* (emphasis added).

Perhaps the most obvious problem with the preceding approach is that it rests on an assumption that there can be no overlap between public and individual rights. Might not every citizen enjoy an individual right to enforce the public interest? Congress, all concede, has vast power to create new causes of action—indeed, it does so all the time. Might Congress use this power to grant all citizens an individual right to sue to enforce some public-interest statute? If Congress can make this move, then so much for the individual-rights–public-interest dichotomy—and so much for restrictive standing.

Justice Scalia's answer to this problem rests on an intuitively appealing vision of the role of the courts in a representative democracy. In such a government, the judicial function should be confined to protecting the rights of *minorities* from democratically empowered *majorities*.[174] Expanding judicial intervention to protect majority interests is both unnecessary and costly. It is unnecessary because our form of government is based on the axiom that the majority can look after itself through the political process.[175] It is costly because, where a court intervenes to impose its own conception of the public interest on the public at large, it displaces the judgments of institutions that, by design, reflect majority will.[176] Such displacement is illegitimate as it undermines majority rule without benefiting minority rights.

Thus, the true point of constitutional standing doctrine for Justice Scalia is that it "roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interests *of the majority itself*."[177] This view that the legitimate function of courts is to protect minorities makes the notion of an "individual right" to protect the "public interest" a contradiction in terms that Congress cannot overcome.[178]

This vision of standing requires a means for distinguishing between minority and majority interests, which leads to restrictive standing's approach to the problem of injury. According to Justice Scalia, to assert a minority interest (or individual right) suitable for judicial protection, a plaintiff must allege that she has in some way been "harmed *more* than the rest of us."[179] A plaintiff who has not alleged any such particularized harm

174. Scalia, *supra* note 107, at 894.
175. *Id.* at 896.
176. *Id.*
177. *Id.* at 894.
178. *See Lujan*, 504 U.S. at 576–77 (holding that the "public interest in proper administration of the laws" cannot be "converted into an individual right by a statute that denominates it as such").
179. Scalia, *supra* note 107, at 894–95.

"has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention."[180] It is the business of the political branches to address such generalized grievances relating to the propriety and legality of government actions that *affect everyone exactly the same way*. Of course, a minority of citizens may object to a particular government action that has such uniform effects. Restrictive standing takes the view, however, that such a minority has no right to use the courts to trump the majority's choice so long as the majority is not picking on the minority in a particularized way.

Certainly, the idea that majorities should use the political process to look after themselves is attractive. Restrictive standing's majoritarian bona fides are, nonetheless, dubious at best for two obvious reasons. First, it is a basic tenet of political science and common sense that motivated special interests often hijack the legislative process at the expense of diffuse majorities.[181] Second, standing doctrine—regarded as an expression of *constitutional* law—limits the power of *Congress* to authorize plaintiffs to sue. Where a court fashions constitutional law to trump a congressional statute, an unelected body trumps the political decision of a representative body. Justice Scalia's majoritarian story thus carries, ironically, a strong antimajoritarian strain.

His parry to this objection indicates that restrictive standing may be more about protecting *executive* rather than majoritarian power. Recall that in *Lujan*, Justice Scalia stressed that it is the President whom the Constitution charges with the specific duty and power to "take Care that the Laws be faithfully executed."[182] Allowing courts to resolve generalized grievances would enable them to usurp this Article II enforcement authority, and "with the permission of Congress, to assume a position of authority over the governmental acts of another and coequal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action. We have always rejected that vision of our

180. *Id.* at 895.

181. *See* Siegel, *supra* note 11, at 101–02 (observing that free-rider problems plague political efforts to correct illegal action that harms a large group of people, but, by contrast, "the concentrated minority that benefits from the illegal action would have strong incentives to act politically to retain its advantage"); Sunstein, *supra* note 6, at 219 (noting that well-organized minorities are often better positioned to manipulate the political process than ill-organized majorities and observing that Congress authorizes citizen suits precisely to address this problem); Elliott, *supra* note 12, at *31–32 (observing that "dismissing a case because an injury is widely shared, on the assumption that the group will mobilize to obtain redress through the political branches, does not take into the account the political reality that some groups have more access than others").

182. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3).

role . . . ."[183]

The logic of this argument seems to be that (a) the Constitution created three coequal branches of government; (b) without a bar on standing to resolve generalized grievances, Congress could make the Executive subordinate to the courts; and (c) therefore, to preserve the coequal status of the Executive, the Constitution demands a bar on standing for plaintiffs with generalized grievances.

Underlying this structural argument is a functional concern that the Executive can run the government much better than can a bunch of unelected judges. Remarkably, Justice Scalia has followed the logic of this competency argument so far as to argue that restrictive standing improves government performance by protecting the Executive's power to *ignore* the law from officious judicial efforts to enforce it.[184] Advocates of the rule of law might be excused for thinking that, in keeping with Article II's Take Care Clause, the Executive's job is to *enforce* the laws until they are changed by competent authority. This contention misses, however, that the Executive's practical power "to lose or misdirect laws" is a "prime engine[] of social change."[185] If any plaintiff can use the courts to force the Executive to enforce the law, then this useful nonenforcement power may disappear.[186]

We thus see that Justice Scalia's attempt to strike a separation-of-powers balance between majority rule and the rule of law might be said to betray both. Although his theory purports to protect majoritarian political power from overreaching courts, it does not permit the (majoritarian) legislature to create a cause of action that grants an individual right to plaintiffs to seek judicial enforcement of laws designed to protect the public interest. The rationale for this limitation is that, without it, Congress could authorize the courts to issue orders to the Executive requiring it to *obey* the law, thus depriving the Executive of its power to *ignore* it.

2. The Indeterminacy of the Generalized-Grievance–Particularized-Injury Dichotomy

For the moment, ignore doubts about the majoritarian bona fides of

183. *Id.* (citations and internal quotation marks omitted).

184. Scalia, *supra* note 107, at 897.

185. *See id.* ("Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways [of the bureaucracy.]").

186. For recent, pointed criticism of Justice Scalia's view that the Executive should be able to exercise a "dispensing" power to ignore law, see Farber, *supra* note 11, at *23–25 ("At the very least, we can say that Justice Scalia's core notion—that the Executive should have leeway to exercise benign neglect in enforcement, thereby leaving statutory mandates to wither from neglect—would have been repugnant to the Framers.").

restrictive standing or its consistency with the rule of law. Even with these problems set to one side, restrictive standing is seriously flawed because the generalized-grievance–particularized-injury dichotomy upon which it rests is alarmingly indeterminate and easy to manipulate.

The core problem is that *any* set of injuries suffered by *any* group of individuals can be described as either generalized or particularized by varying the level of abstraction of the description. Recall, for example, Chief Justice Roberts's dissent in *Massachusetts v. EPA*, in which he declared that "[t]he very concept of global warming seems inconsistent with [standing's] particularization requirement. Global warming is a phenomenon harmful to humanity at large."[187] Well, one can certainly say that global warming will cause the generalized harm of threatening everyone in the world with catastrophic climate change. Because we walk through this life in our own bodies, however, global warming will do different things to different people. For instance, it may cause *X*'s crops to fail; it might cause *Y*'s air conditioning bill to rise; it might threaten *Z*'s coastal home with inundation. When we focus on the fact that global warming threatens all three by one mechanism, their injuries look generalized. When we focus on the differences among their particular factual circumstances, the injuries look particularized.

Justice Scalia's attempt to wrestle with this problem in his dissenting opinion in *FEC v. Akins* is especially damning.[188] Recall that the plaintiffs claimed that they had suffered "informational injury" due to the FEC's allegedly incorrect determination that AIPAC was not a "political committee" subject to various statutory disclosure requirements.[189] Dissenting, Justice Scalia rejected standing for the plaintiffs on the ground that they only claimed a "generalized grievance."[190] Writing for the majority, Justice Breyer had preempted this move by holding that the generalized-grievance bar lacked constitutional force.[191] In support of this claim, he noted that it was obvious that the victims of a "widespread mass tort" would each enjoy standing even though their injuries were in some sense "widely shared."[192] If five hundred people are injured in a plane crash, all five hundred have standing to sue. It follows that there can be no constitutional bar on standing for generalized grievances.

Justice Breyer thus put Justice Scalia in the ticklish position of having to explain why victims of a mass tort can sue even if their injuries are widely

187. Massachusetts v. EPA, 127 S. Ct. 1438, 1467 (2007) (Roberts, C.J., dissenting) (internal quotation marks and citation omitted).
188. 524 U.S. 11, 29 (1998) (Scalia, J., dissenting).
189. *Id.* at 21 (majority opinion).
190. *Id.* at 35–36 (Scalia, J., dissenting).
191. *Id.* at 24 (majority opinion).
192. *Id.*

shared. To steer clear of this trap, Justice Scalia explained that, even where a mass tort such as a plane crash causes widespread harm to many people, it causes particularized injury to each one—each person suffers her own *particular* broken limb, not somebody else's.[193] Where this particularization requirement is satisfied, a grievance does not become generalized no matter how many people have suffered it.[194] By contrast, according to Justice Scalia, the *Akins* plaintiffs failed the generalized-grievance bar because the FEC's decision deprived everybody of the same information, thus causing "undifferentiated" rather than "particularized" harm.[195]

But the obvious rejoinder to this characterization is that, just as each person hurt in a plane crash suffers injury to *her own* body, so the FEC's treatment of AIPAC had deprived *particular individuals* of information. Moreover, the FEC's decision affected these *different* people *differently*. Just as one plane crash victim might suffer a broken arm and another a broken leg, so the effects of the FEC's determination varied across people, depending, among other factors, on how interested they were in obtaining information concerning AIPAC's political connections. The bottom line is that, because each individual's factual situation is different, it is always possible to frame injuries suffered by a group of people in a differentiated way.

A proponent of restrictive standing might try to deflect the preceding argument by claiming that mental differences among people regarding the intensity of their desire for information cannot particularize their injuries in light of the rule that "ideological" harms do not count for standing.[196] Justice Scalia stressed a similar move in his concurrence in *Hein v. Freedom from Religion Foundation, Inc.*, where, writing with his customary force, he drew a sharp distinction between "Wallet Injury" and "Psychic Injury."[197] The former, which includes but is not limited to economic injury, is "concrete and particularized" and thus can constitute an

193. *See id.* at 35 (Scalia, J., dissenting) (noting that, in the mass tort situation, "[o]ne tort victim suffers a burnt leg, another a burnt arm—or even if both suffer burnt arms they are *different* arms").

194. *Id.*

195. *See id.* at 35–36 (observing that the "undifferentiated" harm "caused to Mr. Akins by the allegedly unlawful failure to enforce FECA is precisely the same as the harms caused to everyone else: unavailability of a description of AIPAC's activities").

196. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (stating that plaintiffs needed to assert harm to more than their mere "special interest" in species preservation to satisfy the injury requirement); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (holding that injury to Sierra Club's long-standing "special interest" in environmental protection did not suffice for standing under the APA). *But cf.* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2587 (2007) (Souter, J., dissenting) (allowing that "intangible harms" can provide a basis for constitutional standing).

197. *Freedom from Religion Found.*, 127 S. Ct. at 2574 (Scalia, J., concurring).

injury in fact for constitutional standing.[198] The latter, which is really nothing more than "mental displeasure," cannot suffice for standing thanks to "the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the *generalized grievance* that the law is being violated."[199] This move expands the potential scope of the category of generalized grievances by the simple expedient of declaring that many obvious ways to particularize injury across individuals do not count. On this view, a plaintiff could not, for example, claim particularized injury from an alleged Establishment Clause violation merely because it upsets her far more, and thus differently, than her neighbors.

It is certainly convenient for proponents of restrictive standing to invoke the bar on psychic or ideological injuries supporting standing to help make their theory work, but the legitimacy of doing so is far from clear. The primary reason that the Court has sometimes announced this bar is that, without it, its injury-based framework for constitutional standing cannot work. Virtually any plaintiff motivated enough to sue could plausibly claim that they were doing so to challenge some act or omission that upset them.[200] If everyone who wants to claim injury can plausibly do so, then an injury screen on access to the courts becomes worthless.

But no matter how useful a bar on psychic injuries may be to the current standing framework, it still does not make much sense. As a threshold matter, given that mental displeasure *hurts*, it is not obvious why it should not count as an injury. Nor, given that people's emotional reactions to events in the world vary wildly, is it obvious why the injury of mental displeasure should always be regarded as generalized. Moreover, implementing a bar on psychic injury leads the law towards bizarre hair-splitting. For instance, suppose the government decided to kill the last tiger, which is living a quiet life in the San Diego Zoo. Members of the Natural Sierra Defenders of Tigers Council (NSDTC) are appalled by the prospect, but the rule against "ideological" plaintiffs blocks such persons from bringing suit absent some additional, extrapsychic injury. Fortunately for them, Supreme Court precedents allow this injury to take the form of the "aesthetic" harm of being unable to look at a live tiger.[201] Therefore,

198. *Id.*

199. *Id.* (emphasis added).

200. *Cf.* Fletcher, *supra* note 3, at 231 ("If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint. If this is so, there can be no practical significance to the Court's 'injury in fact' test because all people sincerely claiming injury automatically satisfy it.").

201. *See Lujan*, 504 U.S. at 562–63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.").

for NSDTC to gain standing, it need only find a member willing to sign an affidavit swearing that she likes to go see the tiger from time to time at the zoo.[202] Current standing doctrine thus encourages persons who have suffered real emotional injuries to manufacture fake but legally cognizable injuries to get into federal court.

Suppose nonetheless that it makes sense to exclude all psychic injuries as generalized. Even so, restrictive standing would still face the problem that it is often child's play for a judge, with the right will, to characterize various "nonpsychic" injuries as either generalized or particularized. Restrictive standing's generalized-grievance–particularized-injury dichotomy is therefore better viewed as a tool for stopping analysis rather than advancing it. In this vein, it seems fair to suspect that the dissenting Justices in *Massachusetts v. EPA* did not conclude that global warming causes generalized injury and that therefore, alas, the Court lacked the power to fix EPA's climate change policy. The causal arrow ran the other way: They concluded that climate change was not the Court's business, which suggested that global warming does not cause particularized injury.[203]

C. Surveying the Wreckage

The broad lesson of Part III is that neither the supporters of permissive standing nor those of restrictive standing have offered a satisfying rationale for establishing a constitutional rule that a plaintiff must suffer a certain kind of injury to gain access to the federal courts. In the hands of the *Hein v. Freedom from Religion Foundation, Inc.* dissenters, permissive standing, which demands concrete injury, seems so weak that it arguably does not meaningfully limit congressional power at all.[204] It might best be viewed as a vehicle for depriving constitutional standing doctrine of any serious substance without taking the controversial step of overruling a long line of problematic precedents. Restrictive standing, by contrast, insists that plaintiffs must suffer particularized injury to protect the power of political officials to make the rules that govern the public at large from judicial

202. *Cf. id.* at 579 (Kennedy, J., concurring) (suggesting that American plaintiffs could have established injury in fact related to inability to look at leopards and elephants by purchasing plane tickets to visit Sri Lanka and Egypt).

203. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1463–64 (2007) (Roberts, C.J., dissenting) (opening opinion with the observation that "[g]lobal warming may be a 'crisis'" but that "[i]t is not a problem . . . that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government").

204. *See supra* Part II.A (discussing the weakness and indeterminacy of permissive standing's concrete injury requirement as deployed by Justices Souter, Stevens, Ginsburg, and Breyer).

usurpation.[205] Restrictive standing does not, however, provide a satisfactory framework for achieving this end given that it is antimajoritarian, it undermines the rule of law, and it is fundamentally indeterminate.[206]

The failure of either restrictive or permissive standing to make a persuasive case for its preferred limitation on the concept of injury is a manifestation of a deeper problem. Anyone who sues can plausibly claim to be doing so to obtain relief from some kind of injury because *no one sues for no reason at all*. It follows that, for constitutional standing to have any teeth, it must require not a mere showing of injury but rather a showing of the *right kind* of injury. The Constitution itself, however, provides no textual guidance with regard to which sorts of injuries can support a cause of action in federal court, and which cannot, and the historical record is contestable at best.[207] Therefore, it is hardly surprising that the Court's efforts to build a coherent, determinate doctrine of standing around the concept of injury have failed. This failure suggests that we should—as Judge Fletcher suggested many years ago—simply accept that anyone who claims to have been injured has been injured enough for standing if he can prove his allegations.[208] Accepting this suggestion would, of course, spell the end of standing as a constitutional bar on access to the federal courts.

III. FROM A RULE OF ACCESS TO A RULE OF DEFERENCE

A. A Rule That Demands Deference Rather Than Denies Access

Notwithstanding constitutional standing's many problems, most observers would presumably agree that restrictive standing, in particular, purports to serve a worthy value: Given our society's commitment to representative democracy, as a general matter, within the range permitted by law, political branch officials who answer to the electorate, not unelected judges, should make the rules that govern the public at large. The failure of this value to justify standing's ill-defined limits on access to the federal courts does not make this value illegitimate or unappealing. This failure does, however, suggest that it may be worthwhile to explore other means to enforce separation of judicial and political power. And now may be an especially propitious time for such investigation given how close

205. *See generally supra* Part II.B.1 (discussing the jurisprudential underpinnings of restrictive standing).

206. *See generally supra* Part II.B.1–2 (criticizing restrictive standing doctrine as indeterminate, inconsistent with majority rule, and in tension with the rule of law).

207. *See supra* note 160 (discussing lack of historical authority for the Supreme Court's modern standing doctrine).

208. Fletcher, *supra* note 3, at 231.

the Court seems to be to adopting an aggressive form of restrictive standing.[209]

In this spirit of inquiry, this Article proposes revisiting a suggestion that the great Professor Jaffe made nearly fifty years ago that a rule of *deference* could provide a better tool for separating judicial and political power than constitutional standing's categorical rule of *access*.[210] Professor Jaffe framed his proposal in terms of the federal courts' power to resolve "public actions," which he defined as actions brought by private persons "primarily to vindicate the public interest in the enforcement of public obligations."[211] These are precisely the types of actions that restrictive standing wishes to block at the courthouse door for presenting generalized grievances.[212] Professor Jaffe documented, however, that such actions—often requesting relief in the form of mandamus or an injunction—had long flourished in many state court systems in America.[213] In part due to this history, he opposed efforts to impose a constitutional bar on public actions. He was nonetheless quite sensitive to their potential to intrude improperly on political decisionmaking.[214] To respond to this concern, he suggested that a court should not grant relief in a public action "*unless it can see the law as reasonably clear.*"[215] Equivalently, courts should apply mandamus-style levels of judicial deference when resolving public actions and only grant relief to enforce the government's "clear legal duty."[216]

This Article submits that Professor Jaffe's half-century-old solution to the standing conundrum is basically correct: Federal courts can, consistent with Article III limitations, resolve public actions, but in doing so, they should uphold the legality of actions taken by political branch officials so long as these actions fall within the space where reasonable jurists could conclude they are legal. More specifically, in the public-action context, a court should uphold an agency's action so long as it comports with a reasonable construction of relevant law (constitutional, statutory, or regulatory) and is based on reasonable factual and policy determinations.

For the present purpose, let the concept of public action embrace those

209. *See generally supra* Part I.C (discussing the Court's 2007 opinions on standing).

210. Jaffe, *supra* note 6, at 1305–06.

211. Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961).

212. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992) (contending that Article III bars access to the federal courts where a plaintiff "claim[s] only harm to his and every citizen's interest in proper application of the Constitution and laws, and seek[s] relief that no more directly and tangibly benefits him than it does the public at large").

213. Jaffe, *supra* note 6, at 1275–82.

214. *Id.* at 1306.

215. *Id.* at 1305.

216. *Cf. id.* ("[I]t is part of the traditional conceptualism of mandamus that the writ issues only to command 'a clear legal duty.'").

suits in which (a) the only legally protected interest the plaintiff asserts is that the government should enforce rather than violate (or ignore) a particular law; (b) the plaintiff shares this interest equally with the public at large—i.e., she is not a member of any special class that this law singles out for protection; (c) the plaintiff's right to relief does not depend on any particular factual circumstances that are true of her but not of every other member of the public at large; and (d) the plaintiff seeks only relief that would run to the benefit of the public at large.

The point of the preceding definition is to capture actions that raise generalized grievances in a *legal* sense rather than in restrictive standing's unworkable *factual* sense. As a matter of "fact," government action that affects many people affects them all differently because, not to put too fine a point on the matter, we are all different.[217] Most factual differences among individuals' particular circumstances lack legal significance, however. For instance, recall that in *FEC v. Akins* various people wanted to get information about the American Israel Political Affairs Committee—supposedly to guide their voting.[218] The intensity of their respective desires for this information must have varied, but this factual variance had no significance for whether they had a legal right to the information they sought. In a public action, *no* factual differences among individuals' particular circumstances have any bearing on whether they may assert the legal interest at issue. From the point of view of *law* rather than of *fact*, every member of the public at large is in the same boat.

Defined this way, public action captures the cases in which the Court has wrestled over whether a constitutional bar on generalized grievances requires dismissal. For instance, in *Massachusetts v. EPA*, petitioner Massachusetts sought to force EPA to initiate rulemaking to regulate greenhouse gas emissions pursuant to its Clean Air Act authority to regulate "air pollutants."[219] Playing the game of constitutional standing required Massachusetts to insist that EPA's refusal to regulate had increased the risk that rising sea levels would swallow some indeterminate bit of its coastal property.[220] The legal protection that Massachusetts asserted against this type of injury, however, flowed from the Clean Air Act's requirement that EPA curb "air pollutant[s]."[221] Every member of the public—regardless of his particular circumstances—enjoys the right to clean air that this statute expresses. Also, the threat to Massachusetts's

217. *See supra* Part II.B.2 (explaining that restrictive standing's deployment of the generalized-grievance–particularized-injury distinction is indeterminate for this reason).

218. 524 U.S. 11, 21 (1998). *See generally supra* Part I.B.4 (discussing the Court's standing analysis in this opinion).

219. 127 S. Ct. 1438, 1447 (2007).

220. *Id.* at 1456.

221. *Id.* at 1454 (quoting 42 U.S.C. § 7521(a)(1)).

property had no necessary connection to the merits of its claim, which turned on (a) whether Congress meant the statutory phrase "air pollutant" to include carbon dioxide and (b) whether EPA had given a reasoned explanation for its refusal to regulate.[222] The answers to these questions would not change even if Massachusetts did not exist. Moreover, the particulars of the state's circumstances had no bearing on the nature of the relief it sought, which was to force EPA to initiate rulemaking, and the benefits of this relief ran to the public at large.

A similar exercise can be done for *Hein v. Freedom from Religion Foundation, Inc.*[223] Recall that the Foundation and some of its members had brought an Establishment Clause claim to challenge a presidential policy pursuant to which executive agencies funded conferences in support of the President's Faith-Based and Community Initiatives Program.[224] From the point of view of the law, there was nothing special about the plaintiffs' circumstances or their legal interest. The government had not, for instance, strapped them down and forced them to listen to the conference proceedings. Although it seems safe to presume that the plaintiffs harbored a special distaste for government support for religion that was not shared by most members of the public, this factual distinction has no legal significance. In keeping with the strange *Flast* doctrine, the plaintiffs claimed standing based upon injury they suffered in their capacity as federal taxpayers.[225] Putting this fiction to one side, the real legal interest in play was the shared public interest in blocking government support for religion expressed by the Establishment Clause. Neither the merits of the plaintiffs' claim nor the relief they sought turned in any way on the specifics of their factual circumstances. The merits turned on a question of law regarding whether executive allocation of unearmarked funds to support the conferences violated the Establishment Clause. The relief the plaintiffs sought—making the government stop—ran to the public at large (by the plaintiffs' lights, anyhow).

The proposed definition of public action excludes challenges to government conduct that may have been targeted at some vulnerable individual or group in a legally significant way. For instance, suppose that FBI officers, acting without a warrant, break down your door in the middle of the night and search your house. You bring a *Bivens* claim against the officers, claiming that they violated your Fourth Amendment rights, and

222. *Id.* at 1460–63.
223. 127 S. Ct. 2553 (2007).
224. *Id.* at 2559.
225. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (allowing federal-taxpayer standing for the plaintiffs' Establishment Clause claim). *See generally supra* Part I.B.2 (discussing *Flast*).

also sue for trespass. From the point of view of the law, you are in a situation distinct from that of the public at large. You lay claim to legal interests—constitutional and common-law protections against trespass into *your* house—that the public does not fully share. Also, you seek relief—damages—that run to you rather than the public at large and that depend upon your particular factual circumstances (e.g., just how much will it cost to replace that door?).

With these reflections on the concept of public action in mind, it is time to return to Professor Jaffe's suggestion that courts should apply a deferential standard of review when resolving them. Again, just like restrictive standing, the underlying justification for this proposal is that it provides a means to keep the courts from improperly usurping the political branches' discretion to govern.[226] Backing up this claim requires consideration of a very basic and big question: Why have independent courts at all? Or, to put the same question another way, why not trust legislative and executive officers to behave legally and honorably and uphold rather than violate the law?

The need for independent judicial control over governmental power traces back to the ancient rule-of-law maxim that no one can be the judge of his own cause.[227] The rationale for this maxim is, given a moment's reflection on human nature, obvious: Where a person judges her own cause, she is far too likely to see the facts and the law in whatever way is necessary to support her own victory, thus making the rule of law meaningless.[228] This principle applies to government officials as well as private actors, which is why, no matter how much we respect them, we do not want prosecutors making final determinations of guilt and innocence. A similar logic motivated Hamilton's observation that, were the Legislature (rather than the courts) in charge of determining the constitutional limits on legislative authority, "all [the Constitution's] reservations of particular rights or privileges would amount to nothing."[229] The fundamental point of

226. Jaffe, *supra* note 6, at 1305–06.

227. *See, e.g.*, THE FEDERALIST NO. 80, at 511 (Alexander Hamilton) (Robert Scigliano ed., Random House 2000) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."); *Dr Bonham's Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.) (applying the maxim to block a financially interested body from determining whether to grant a license to a doctor). *See generally* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 403–04, 413 (1996) (discussing the relation of the "no man can be the judge of his own case" maxim to separation of powers in the thought of luminaries including Locke, Montesquieu, Harrington, Madison, and Wilson).

228. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES 260 (noting that the infamous Court of Star Chamber, which combined "the provinces of a judge and a minister of state," had the unfortunate habit of "pronounc[ing] that for law, which was most agreeable to the prince or his officers").

229. THE FEDERALIST NO. 78, *supra* note 227, at 497.

independent courts is thus, from a separation-of-powers point of view, to give practical effect to the rule of law.[230]

On one overly simple view of the matter, it is difficult to see how courts could, in the course of enforcing the law, usurp the policymaking discretion of political officials. If we assume that federal courts do not regularly misinterpret law or find facts incorrectly, then, generally speaking, a judicial order that resolves a case should simply instruct litigants to do what the law requires in light of the facts. Stipulate that, in a system devoted to the rule of law, no one has discretion to violate the law.[231] Even the inconvenient bits of the Constitution are *part of the Constitution* until they are properly removed by amendment, which, by design, is extremely hard to do. Or, returning to the global warming example, the Clean Air Act is the law, and EPA does not get to change that law by ignoring or distorting it. It follows that, except when they make their occasional mistakes, courts cannot, by ordering an official to obey the law, infringe on that official's legitimate policymaking discretion.

But the preceding paragraph does not take into account an almost omnipresent problem: Reasonable minds can (and do) disagree over how to construe vague or ambiguous laws, exercise official discretion, or determine uncertain facts. Any governmental system must allocate power to resolve such doubtful questions to someone. In the context of judicial review of governmental action, one broad possibility is that the courts should control all of this power—in essence exercising de novo review of the propriety of government decisions. Another broad possibility is that this power over doubtful questions should belong to political officials—in which case, courts should uphold these officials' decisions so long as they fall within the space where reasonable minds might disagree. Where a court in the course of resolving a case exercises the first, tight type of control over a government decision, but instead should exercise the second, the court may usurp the decisionmaking authority of other officials.

Two fundamental values—the rule of law and representative democracy—pull in different directions with regard to whether courts or political officials should enjoy the power to resolve doubtful questions. The rule of law often favors assigning this power to the courts to ensure that officials do not unfairly twist law or fact to justify their preferred outcomes. For instance, suppose that it is criminal to "pollute" a stream.

230. *See* 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 161 (J.V. Prichard ed., Thomas Nugent trans., Fred B.G. Bell & Sons Ltd. 1914) (1748) (explaining that the justification for separation of powers is to protect "political liberty," which is the "right of doing *whatever the laws permit*" (emphasis added)).

231. *But see* Scalia, *supra* note 107, at 894 (lauding the Executive's power to ignore the law).

This proscription naturally raises the question: What is "pollution"? Suppose that, on one reasonable view, a certain kind of "sludge" is "pollution," but on another reasonable view, it is not. Were it left up to executive officials to exercise final, unreviewable authority on a case-by-case basis over which view should prevail, we might find that "sludge" is "pollution" when Alberto dumps it in a lake but not when Bella does. Moreover, where economic and political power are on the line, we might find that application of the law proscribing "pollution" varies for less than innocent reasons—maybe Alberto gave to the wrong political party. In short, allowing political branch officials to exercise final authority to resolve legal ambiguity and factual uncertainty increases the risk of uneven, arbitrary government action, strengthening the case for strict judicial review in such contexts.[232] This point helps explain why a prosecutor must do more than prove that her case is minimally reasonable; she must prove it beyond reasonable doubt.

Respect for representative democracy, by contrast, pulls in favor of assigning the power to resolve doubtful questions to political officialdom. This point is particularly clear as it relates to the problem of assigning operative meaning to ambiguous laws. By hypothesis, an action that is consistent with a reasonable construction of ambiguous law *X* cannot violate the force of *X itself*—for the simple reason that *X itself* does not specify which of its reasonable meanings is binding. In this vein, the Supreme Court has recognized that the task of choosing among reasonable legal constructions partakes of policymaking.[233] Its leading expression of this point is the "counter-*Marbury*" of the modern administrative state, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[234] The outcome of this case turned on the meaning of "stationary source," a phrase that appears in the Clean Air Act Amendments of 1977.[235] The D.C. Circuit rejected EPA's construction of this phrase because, in the court's view, it conflicted with the best available construction.[236] Reversing, the

232. Admittedly, this proposition is in tension with the practice of agency adjudication in the modern administrative state. For instance, under modern administrative law, an agency charged with enforcing a law against "pollution" might prosecute and judge the liability of an alleged polluter in an internal agency proceeding. On judicial review, the court would likely extend substantial deference to the agency on issues of fact, law, and policy; the cards are stacked in favor of the agency. The fact that some practices of the modern administrative state are in tension with the rule of law, however, does not alter the point that rule-of-law principles counsel close judicial control of application of law to fact where the government targets coercive force against vulnerable individuals or groups.

233. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44, 865–66 (1984) (describing resolution of statutory ambiguity as policymaking).

234. *Id.* at 837.

235. *Id.* at 839–40.

236. Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 725–28 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

Supreme Court chided the D.C. Circuit for usurping EPA's policymaking power to resolve ambiguities in statutes it administers.[237] Rather than throw out EPA's reading because it was not the *best* (by judicial lights), the D.C. Circuit should have instead affirmed it as *reasonable*.[238]

The essence of the Jaffe proposal as it relates to deference is that the power to resolve doubtful questions raised by public actions should be assigned to politically accountable officials. This allocation makes sense in light of the fact that a public action does not raise concerns that the government is treating people differently in a way that implicates any interests *that the law recognizes*. Thus, public actions do not raise the sort of equal treatment concerns that cause the rule of law to pull in favor of tight judicial control over doubtful questions. They do, however, implicate representative democracy's pull in favor of allocation of such control to the political branches. For instance, suppose EPA declines to regulate the emission of carbon dioxide from motor vehicles on the ground that this gas is not an "air pollutant."[239] Stipulate that one might reasonably conclude that carbon dioxide is an "air pollutant" or that it is not.[240] EPA's refusal to regulate will surely have particularized effects (as a matter of "fact") on everyone in the world. Massachusetts's coastline will be threatened, but so will California's different coastline. As far as the law is concerned, however, EPA has treated everyone in the *same* way—the different effects its policy will have on different persons are legally meaningless and do not signify that it has treated some persons unfairly or arbitrarily. There is, in particular, absolutely no danger that EPA will declare that carbon dioxide emitted by your car is an "air pollutant" (and that therefore you should pay a civil penalty) but that the carbon dioxide emitted by my car is not. Absent such fears of arbitrarily unequal treatment, respect for representative democracy suggests that politically accountable officials should be free to choose among reasonable, uniform interpretations of "air pollutant."

Applying this approach in public actions that raise statutory challenges to administrative action would not, in point of fact, require especially dramatic changes to the approach that courts purport to apply under the

237. *Chevron*, 467 U.S. at 842.

238. *Id.* at 842–43, 865–66.

239. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1450 (2007) (citing EPA's determination, 68 Fed. Reg. 52,926–28, that it lacks authority to regulate greenhouse gases as "air pollutants" under the Clean Air Act).

240. *See id.* at 1476 (Scalia, J., dissenting) (concluding that EPA had reasonably construed its statutory authority to regulate "air pollutants" as excluding power to regulate greenhouse gas emissions from motor vehicles). *But see id.* at 1460 (holding that the "statutory text forecloses" EPA's conclusion that it lacks authority to regulate carbon dioxide as an air pollutant).

current judicial-review regime. Indeed, as noted above, the *Chevron* doctrine already requires that, where certain conditions hold, a court should apply a lax form of rationality review to an agency's construction of a statute it administers.[241] Similarly, courts are supposed to apply deferential standards of review when reviewing agency findings of fact and policy determinations.[242] One might therefore say that, at least in the statutory context, this Article merely seeks to establish that *Chevron*-style rationality review provides a better tool for protecting separation of powers than constitutional standing's mysterious injury requirement.

This Article's proposal and current judicial practice notably part company, however, when it comes to the problem of constitutional construction. In essence, when the Court construes the Constitution it tends to exercise independent judgment rather than defer the views of other officials.[243] This Article's proposal threatens this claim to interpretive supremacy by contending that the courts should, at least in the context of public actions, defer to the political branches' reasonable constitutional constructions.

Applying a "clear error" approach to judicial review of constitutional questions in public actions may sound jarring to those used to regarding the Court as the repository of all power to determine the Constitution's meaning. It bears noting, however, that this approach can draw support from the views of many leading statesmen and judges of the early Republic.[244] It is also broadly consistent with a burgeoning modern

241. *See Chevron*, 467 U.S. at 842–43 (instructing courts to defer to an agency's permissible (i.e., reasonable) resolution of ambiguity in a statute that the agency administers).

242. *See* 5 U.S.C. § 706(2)(A), (E) (2006) (establishing arbitrariness and substantial-evidence standards for review of issues of fact and policy). An earlier draft of this Article asserted somewhat carelessly that judicial review under the "arbitrariness" standard *is* deferential. Professor Kathryn Watts pointed out to me that one of the criticisms commonly leveled against the current judicial review regime is that, in practice, arbitrariness review—especially in its "hard look" form—is often quite strict. It is therefore more accurate to say that arbitrariness review is *supposed to be* a relatively lax form of review for rationality. It is certainly fair to say that one of the costs of any regime that allows judicial review for rationality is that sometimes the courts will improperly apply tougher standards, thus displacing the judgment of other officials.

243. *See, e.g.*, Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 9 (1983) ("[H]ere, as elsewhere, Holmes's page of history is worth a volume of logic. The Court and the profession have treated the judicial duty as requiring independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text, and that specific conception of the judicial duty is now deeply engrained in our constitutional order.").

244. *See, e.g.*, THE FEDERALIST NO. 78, *supra* note 229, at 497 (indicating that the courts should overturn legislation only where it is "contrary to the *manifest tenor* of the Constitution") (emphasis added); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819) (Marshall, C.J.) (declaring that "in no doubtful case, would [the Court] pronounce a legislative act to be contrary to the constitution"); Cooper v. Telfair, 4 U.S. (4

literature that insists that political actors should play a greater role in determining operative constitutional meaning than the modern Supreme Court seems ready to concede.[245] Most importantly, those disturbed by the prospect of deferential judicial review in this context should bear in mind that, where the Court chooses to apply a restrictive form of standing, the alternative to deferential review of a constitutional issue may be *no review at all*.[246]

Stepping back, this Article seeks to change the terms of the debate over how to limit operation of the judicial power to block the courts from usurping political power. Constitutional standing doctrine has framed this debate around a very bad question: What sort of injury in fact does the Constitution—which on its face is silent on this point—require a plaintiff to assert to gain access to the federal courts? Attempting to answer this question has spawned decades of confusion over the metaphysics of injury. Moreover, in the hands of aggressive proponents of restrictive standing, this doctrine limits judicial review in a way that undermines the rule of law. This Article suggests a better question: How much judicial control is necessary to ensure that the actions of the political branches comport with the rule of law? The need to block arbitrary, uneven application of law

---

Dall.) 14, 19 (1800) (Paterson, J.) (declaring that a "clear and unequivocal breach of the constitution" is necessary to justify invalidating legislation); Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.) ("I will not decide *any law to be void, but in a very clear case*."). *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140–46 (1893) (identifying nearly a score of judicial opinions from the early Republic declaring a "clear error" rule for judicial review of legislation for constitutionality); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 59–65 (1990) (contending that during the earliest years of the Republic, a consensus existed that the power of judicial review "was confined to the concededly unconstitutional act").

245. *See, e.g.*, NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 238–39 (2004) (contending that constitutional questions should be resolved by "coordinate construction" among the branches, which bring differing institutional capabilities to this process); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 248 (2004) (arguing for greater popular and less judicial control over constitutional construction); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 187 (1999) (similar); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 846 (2002) (suggesting that, when resolving constitutional ambiguity, the courts should "enforc[e] the principled decisions reached elsewhere rather than . . . autonomously and authoritatively defin[e] constitutional meaning").

246. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2555 (2007) (rejecting standing for Establishment Clause claim); DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1862 (2006) (rejecting standing for Commerce Clause claim); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974) (rejecting standing for Incompatibility Clause claim); United States v. Richardson, 418 U.S. 166, 176–77 (1974) (rejecting standing for Account Clause claim); *cf.* Scalia, *supra* note 107, at 894 (explaining that a bar on standing for generalized grievances should bar certain types of claims from ever being litigated by any claimant).

suggests a need for tight judicial control where government action targets legally distinct interests of groups smaller than the public at large. Public actions do not implicate this danger of unequal treatment as, in essence, they challenge the legality of government policies that, from the law's point of view, treat us all in the same way. In the absence of concerns over unequal treatment, courts can apply a deferential standard of review that leaves space for political branch policymaking but still upholds the rule of law.

B. A Quick Reminder That There Are Other Forms of Judicial Docket Control

Before attempting to make the virtues of this Article's proposal more concrete by applying it to some cases, it bears pausing to stress what this Article does *not* propose. It condemns constitutional standing's invocation of a vague concept of injury to limit federal jurisdiction, but it does not insist that courts must resolve the merits of any and all questions a plaintiff might try to raise. For instance, as a threshold matter, to obtain relief for a claimed violation of law, a plaintiff must have a cause of action to enforce it.[247] Also, the instant proposal does not call into question the use of *prudential* standing principles to determine whether, given the range of potential plaintiffs, a given person is the *right* plaintiff to bring suit.[248] Nor does it call into doubt the political question doctrine that courts invoke where they determine that a claim depends on constitutional provisions that are best left entirely to the political branches.[249]

One might therefore fairly ask the following question: Given that this Article's proposal leaves such doctrines in place, is it worth the bother? Why eliminate the power of constitutional standing to bar access to the courts given that a court might manipulate related doctrines to reach similar ends anyway? One answer to this question lies in the value of reasoned, transparent justification. The doctrine of constitutional standing is so rife

247. *Cf.* Sunstein, *supra* note 6, at 166 (contending that access to the courts should depend not on an injury-in-fact requirement but instead on whether "the law—governing statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action"); Fletcher, *supra* note 3, at 229 (similar).

248. *See* Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 991 (7th Cir. 2006) (describing prudential standing principles as denying standing where the plaintiff "is not the 'right' person to bring suit, maybe because someone has been injured more seriously and should be allowed to control the litigation"), *rev'd on other grounds,* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007); *see also supra* notes 38–40 and accompanying text (discussing prudential standing doctrine).

249. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (identifying six factors bearing on whether an issue presents a political question, including, *inter alia*, "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion").

with indeterminacy that its application must often turn on whether a judge thinks it is a good idea for the courts to intervene to determine a given claim. The language of constitutional standing—with its many vague labels—distracts from direct discussion of such concerns, causing confusion.[250] As a result, judicial opinions applying the doctrine veer into strained, lengthy, wasteful discussions over whether, for instance, global warming causes the right kind of injury to *everyone* or the wrong kind of injury to *everyone*.[251] By contrast, where a court decides to block a plaintiff's claim on the prudential ground that that there are *better* plaintiffs available, the court should give a reasoned explanation justifying this conclusion. Similarly, to justify invoking the political question doctrine, a court must explain why it makes sense to conclude that the Constitution has committed construction and application of one of its provisions exclusively to the political branches.[252]

C. Two Applications

With the preceding qualifications in mind, consider now how this Article's proposal might have simplified and improved the two most important and contentious members of the 2007 troika.

1. Massachusetts v. EPA[253]

Various petitioners, Massachusetts among them, had petitioned EPA to begin a rulemaking to regulate greenhouse gas emissions from motor vehicles pursuant to its Clean Air Act authority to regulate "air pollutants."[254] The D.C. Circuit panel that heard the case had three judges, so they split three ways on constitutional standing.[255] The Supreme Court

250. *See* PIERCE, *supra* note 4, at 1108 (contending that the "obvious solution [to the standing mess] is greater candor [and that if] the Court considers it inappropriate for the federal Judiciary to become enmeshed in a new class of disputes because the Court cannot identify a justiciable standard to govern such disputes, for instance, it should say so"); *see also* Elliott, *supra* note 12, at *6 (proposing that the Court develop a "vibrant abstention doctrine" that would "directly face the separation-of-powers issues now clouded by the vagaries of standing doctrine").

251. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1456 (2007) (concluding that the risk of global warming caused particularized injury to Massachusetts). *But see id.* at 1467 (Roberts, C.J., dissenting) (observing that "[t]he very concept of global warming seems inconsistent with [standing's] particularization requirement").

252. *Cf.* Epstein, *supra* note 11, at 25 (condemning the distorting effect of using standing doctrine to justify refusal to resolve political questions).

253. Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

254. *Id.* at 1449–50.

255. *See* Massachusetts v. EPA, 415 F.3d 50, 54–56 (D.C. Cir. 2005) (Randolph, J.) (avoiding the issue of standing), *rev'd*, 127 S. Ct. 1438 (2007); *id.* at 60 (Sentelle, J., concurring) (contending that the bar on generalized grievances blocked standing); *id.* at 64–67 (Tatel, J., dissenting) (contending that Massachusetts had satisfied constitutional standing

reversed. It split 5–4 on standing; a slim majority ruled that Massachusetts had shown particularized injury; the four dissenters insisted that Massachusetts had raised a generalized grievance that the Constitution, properly understood, commits to the political branches to resolve.[256] Together, the various opinions issued by both courts added up to about seventy pages in the Westlaw reporters, of which about twenty-one, or thirty percent, were devoted to standing.[257] More to the point, given the vast number of parties and amici, it is fair to hazard that attorneys and others must have devoted thousands of hours to standing analysis. No one—it may bear mentioning—is going to get that time back.

Had this Article's proposal been applied, all of the effort wasted on discussion of constitutional standing would have been saved. Prudential standing would not have posed a serious concern given the absence of any reason to think Massachusetts an unqualified or underqualified litigant. All the litigants, and both courts, could have proceeded simply and directly to the merits. Given that standard administrative law principles required the courts to apply deferential review in any event,[258] adopting this Article's proposed framework should not have altered the form or outcome of the Court's merits analysis.

2. Hein v. Freedom from Religion Foundation, Inc.[259]

The plaintiffs claimed that executive expenditures in support of conferences organized to promote President Bush's Faith-Based and Community Initiatives violated the Establishment Clause.[260] Just as in *Massachusetts v. EPA*, the courts poured a vast amount of energy into the side-show of standing. To get into federal court, the plaintiffs had invoked the narrow exception to the rule against federal taxpayer standing established by *Flast v. Cohen*.[261] The District Court dismissed on the ground that *Flast* permits challenges only to congressional action.[262] A

requirements).

256. Massachusetts v. EPA, 127 S. Ct. at 1456 (Stevens, J.). *But see id.* at 1467 (Roberts, C.J., dissenting).

257. *Id.* at 1452–58 (Stevens, J.); *id.* at 1464–71 (Roberts, C.J., dissenting); Massachusetts v. EPA, 415 F.3d at 54–56, *rev'd*, 127 S. Ct. 1438 (2007); *id.* at 59–60 (Sentelle, J., dissenting in part and concurring in part); *id.* at 64–66 (Tatel, J., dissenting).

258. *See* Massachusetts v. EPA, 127 S. Ct. at 1459–61 (applying *Chevron* framework to EPA's statutory construction but rejecting it as unreasonable); *id.* at 1462–63 (applying arbitrariness review to EPA's policy rationale for refusing to initiate rulemaking). *Cf. id.* at 1471–77 (Scalia, J., dissenting) (applying *Chevron* to uphold EPA's statutory construction).

259. 127 S. Ct. 2553 (2007).

260. *Id.* at 2559.

261. 392 U.S. 83, 105–06 (1968).

262. Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2561 (2007) (plurality) (discussing Freedom from Religion Found., Inc. v. Towey, No. 04-C-381-S, 2005

Seventh Circuit panel produced two splendid opinions that reached opposite results on this point.[263] Denying rehearing en banc, two judges wrote opinions explaining that the law made so little sense that no one other than the Supreme Court could fix it.[264] At the Supreme Court, (a) Justice Alito, writing for a three-Justice plurality, ruled that the plaintiffs lacked standing because *Flast* did not apply; (b) Justice Scalia, writing for himself and Justice Thomas, demanded that *Flast* be overruled because it violates the bar on generalized grievances; and (c) Justice Souter, writing for a four-Justice dissent, contended that standing existed under *Flast*; there is no constitutional bar on generalized grievances; and standing for intangible harms requires nuanced, case-by-case analysis.[265] The upshot of this fractured decision was to immunize executive spending that mixed church and state in a potentially suspect way from Establishment Clause scrutiny.

Had this Article's approach been taken, none of the preceding debates over the strange metaphysics of injury would have been necessary. No one had been more directly harmed than the plaintiffs by the government's support for the conferences; therefore, prudential standing would not have demanded dismissal in favor of a better plaintiff. The plaintiffs did not challenge government action that targeted their interests in some way the law regards as distinct. Rather, the plaintiffs had asserted a shared public interest in blocking executive officials from violating the Establishment Clause. In the absence of concerns that the government was arbitrarily targeting distinct legal interests of the plaintiffs, the judicial function could be safely limited to determining whether the policy decision to support the conferences was consistent with some reasonable understanding of the Establishment Clause. Had the Court adopted this approach, it would have elucidated that constitutional provision instead of immunizing the government from its force.

CONCLUSION

By far the most important conflict regarding constitutional standing revolves around its relation to separation of powers. This conflict has been percolating at the Court for many decades but has taken on new

U.S. Dist. LEXIS 39444 (W.D. Wis., Nov. 15, 2004)).

263. Freedom from Religion Found, Inc. v. Chao, 433 F.3d 989, 994 (7th Cir. 2006) (Posner, J.), *rev'd sub nom.* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007); *id.* at 998 (Ripple, J., dissenting).

264. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 990 (7th Cir. 2006) (Easterbrook, J., concurring); *id.* (Flaum, C.J., concurring).

265. *See supra* Part I.C.3 (discussing the Justices' opinions in Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007)).

significance with the accession of Chief Justice Roberts and Justice Alito. As the 2007 *Lance–Massachusetts–Hein* troika demonstrates, four Justices are now firmly committed to restrictive standing's view that separation of powers bars plaintiffs with generalized grievances.[266] Demonstrating the potential power of this approach, these four were willing to apply restrictive standing to block judicial review of the legality of EPA's failure to regulate greenhouse gas emissions in part because global warming hurts *everyone*.[267] Four other Justices, adherents to what one might call "permissive standing," seem committed to the view that the fundamental point of constitutional standing is to preserve the adversarial process by insisting on concrete injuries—a standard that does not block plaintiffs who come to court with widely shared, generalized grievances.[268]

Examination of this clash reveals that neither faction's approach is justified. This Article therefore concludes—like many before it—that the courts should abandon constitutional standing's project of barring judicial access based on an injury screen that is indeterminate and contentious, lacks compelling historical foundations, and has no obvious grounding in constitutional text. The separation-of-powers concerns that motivate restrictive standing do, however, justify a framework for judicial deference that is sensitive to the degree of judicial intervention needed to ensure the lawfulness of government conduct while maximizing respect for the political branches' policymaking authority. The need for close judicial scrutiny of official action is especially acute where such action targets the legally distinct interests of vulnerable individuals or groups. In a public action, where a plaintiff seeks to enforce a shared legal interest belonging equally to all members of the public at large, concerns over unequal treatment recede. In the absence of such concerns, courts resolving public actions should—just as Professor Jaffe suggested almost fifty years ago—grant relief against the government only to enforce a clear legal duty.[269]

266. *See supra* Part I.C (discussing standing analysis in Lance v. Coffman, 127 S. Ct. 1194 (2007) (per curiam); Massachusetts v. EPA, 127 S. Ct. 1438 (2007); Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007)).

267. *Massachusetts v. EPA*, 127 S. Ct. at 1463, 1467 (Roberts, C.J., dissenting; joined by Scalia, Thomas, and Alito, JJ.).

268. *Freedom from Religion Found.*, 127 S. Ct. at 2584–88 (Souter, J., dissenting; joined by Stevens, Ginsburg, and Breyer, JJ.).

269. Jaffe, *supra* note 6, at 1305–06.

* * *