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

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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.

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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]

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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

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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.

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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.

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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).