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

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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

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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]

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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

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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]

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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]

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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

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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]

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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,

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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

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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

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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

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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]

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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

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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]

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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

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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.