THE LEGACY OF *RED LION*

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

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

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

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

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

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

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

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

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

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

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

6. *Id*. at 389.

7. *Id*. at 390.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I find that having the level of constitutional scrutiny turn on whether the medium at issue is or is not "like broadcasting" is troubling. What do we mean by broadcasting? Is it something that uses the electromagnetic spectrum? If so, why are cell phones, which use the spectrum, not considered broadcasting? Is broadcasting the transmission of content from one to many rather than from point to point as with a telephone call? If so, why is cable television not considered broadcasting? Is broadcasting different because the public generally does not have to pay for it but does have to pay for cable? While both broadcast and cable require consumers to purchase a television set, it is argued that those who also pay a monthly subscription fee have invited such programming into their homes. But since most households now subscribe to cable or satellite service, is it realistic to infer that subscribers necessarily want all of the programming that is packaged together? And with even more channels on cable from which to tune in and out, if anything, consumers are more likely to come

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

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

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

across undesired content on cable than on broadcasting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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