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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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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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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*

by

Prof. R.J. Krotoszynski, Jr.[1]

Red Lion was an unpersuasive decision from its inception, but that has not proven to be an impediment to its longevity.[2] The public interest standard itself, and the scarcity rationale that the Supreme Court invoked to justify government regulation of the editorial choices of television and radio broadcasters, has refused to go quietly into that good night. Instead, "[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 [in the scholarly commentaries],"[3] *Red Lion* continues to stalk the legal landscape of mass media regulation, serving as a kind of loaded gun with which

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[1] John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. I wish to acknowledge the support of the University of Alabama Law School Foundation, which provided a generous summer research grant that greatly facilitated my work on this project. In addition, the Lewis & Clark Law School graciously hosted me as a visiting scholar in residence while I was working on this Article. As always, any errors or omissions are my responsibility alone.

[2] *See* Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1688-89 (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 "scarcity rationale," a rationale that "has been criticized for years"); *see also id.* at 1689 ("Scarcity 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 led to a steady drumbeat over the years calling for the Supreme Court to overturn the 1969 decision.").

[3] Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

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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).[4]

The problem, however, is not so much with *Red Lion* as with the public interest standard itself. Indeed, it is not difficult to construct a more persuasive theory on which to justify government regulation of commercial broadcasters; Buck Logan has persuasively 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*.[5] Thus, one cannot talk sensibly about *Red Lion* without considering the larger issue of the public interest standard itself; *Red Lion* is merely the symptom, whereas the public interest standard is itself the disease.

About ten years ago, I was invited to review former Federal Communications Commission ("FCC") Chairman Newt Minow's new book, *Abadoned in the Wasteland: Children, Television and the First Amendment*.[6] In this book, Chairman Minow and his co-

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[4] *See, e.g.*, Washington Watch, *FCC Mulls Next Move on Indecency*, BROADCASTING AND CABLE, June 11, 2007, at 3, 9, 19; Editorial, *Court fo FCC: Go %$&! Yourself*, BROADCASTING AND CABLE, June 11, 2007, at 50. The Supreme Court has agreed to review the U.S. Court of Appeals for 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, A3; *see also* Fox Tele. Stations, Inc., v. FCC, 489 F.3d 444, 455-59 (2nd Cir. 2007). Even so, if the Justices confine their decision in this case to the *State Farm* administrative law issue that the Second Circuit found dispositive of the case, the opinion could leave *Red Lion* and *Pacifica* entirely untouched.

[5] *See* Logan, *supra* note ___, at 1723-39 (arguing that spectrum is a kind of government property used for private speech by broadcasters and suggesting that most public interest broadcast regulations could be justified under the public forum doctrine).

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

Electronic copy available at: http://ssrn.com/abstract=1279464

author, Craig LaMay, forcefully argue that the FCC should mount a new and aggressive effort to enforce the public interest standard against commercial radio and television broadcasters.[7] 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 including the production and dissemination of cultural and educational programming aimed at kids.[8]

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). I suggested that "the Commission's efforts 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 have failed to produce cognizable improvements in either the quality or scope of commercial

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[7] Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101 (1997).

[8] Minow & LaMay, *supra* note ___, at 4, 7, 14-15, 199-202.

[9] Krotoszynski, *supra* note ___, at 2103.

broadcasters' discharge of their "public trustee" responsibilities."[10]

Accordingly, if the children of the United States 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 these public goods. PBS continues to provide high quality cultural, educational, and children's programming, and is available on free, over-the-air broadcast television to any person who possesses a receiver. If one expands the universe of content provides to include cable and satellite based stations, the options blossom in an exponential fashion. 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.

Ten years have passed.[12] And, in many ways, the past decade has brought about a

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[10] *Id.*

[11] *See id.* at 2112-15.

[12] 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. *See* 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 ensuring at least the possibility that some stations will cover stories in a different way and/or cover different stories entirely. *See 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 á 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. *See id.* at 876-80, 886-87; *but cf.* Brian Stelter, *Obama harnesses power of Web social networking*, SEATTLE TIMES, July 7, 2008, at A1, A6 (noting that "[t]he Obama campaign's new-media strategy, inspired by social networks such as MySpace and Facebook, has revolutionized the use

complete communications revolution. The Internet, coupled with the ubiquity of high speed, wireless networks, with virtually unlimited bandwidth, has entirely democratized the mass distribution of both audio and video content.[13] Today, virtually anyone can create a message and distribute that message to the world, at virtually no cost, whether in print or video format.[14] The notion that "broadcasting" is solely the domain of the main television networks no longer has salience.[15] This raises an important, related question: in the era of cost-free Internet based mass

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of the Web as a political tool, helping the candidate 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 much closer to the point in time at which control of television and radio stations do not matter materially to the vibrancy and diversity of the democratic process than was the case 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 a web based rapid response to "smears" 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).

[13] *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 mediaand 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").

[14] 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. Thus, 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, Dec. 9, 2007, at 029 (discussing the increasing importance of third party Internet content to political campaigns and referencing the "Obama Girl" videos); *see also* Lisa Tozzi, *'Obama Girl,' the sequel*, N.Y. TIMES, July 17, 2007, at A19.

[15] *See* Maria Puente, *Amateurs curry favor on the Web*, USA TODAY, June 30, 2008, at D1-D2 (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

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.[16]

In this brave new world of decentralized access to mass audiences,[17] concerns about the public interest duties of commercial broadcast stations is little different than worrying 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. And, 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,

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years, Internet IV has been transformed, with scores of professionally produced episodic shows, networks, ratings, trackers, fans, and *TV Guide* style reviews").

[16] Perhaps ironically, the corporate leadership at the major networks seems 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. . . [o]ur competition is not just broadcast networks – it's cable networks and video games and online social sites." David Lieberman, *Leading a different upfront charge*, USA TODAY, May 23, 2008, at B1, B2. 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.*

[17] *See* Puente, *supra* note ___, at D2.

cable, satellite, or Internet form, content is no longer a prisoner to its primary means of distribution.[18] 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 – instead, it is whether commercial broadcasters are needed any longer as a means of making markets for program distributers, advertisers, and mass audiences.[19]

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[18] *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 Satellites ("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 Cyberlawyer*, 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); Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 49-52 (2005).

[19] *See* Brooks Barnes, *Google and Creator of 'Family Guy' Strike a Deal*, N.Y. TIMES, June 30, 2008, at C1, C3 (reporting on 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"); *see also* Web Watch, *Playoff traffic swing to 'Net*, USA TODAY, June 18, 2008, at C3 (reporting taht more persons relied on Internet-based coverage of the 2008 U.S. Open golf tournament then on television based coverage of the event). At some point, for example, the National Football League might conclude that directly netcasting the Superbowl would yield higher rents than selling the rights to broadcast the event to a national television network. And, when that day comes, the Superbowl will be netcast rather than broadcast. Why should the NFL pay a finder's fee to a network to distribute 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 coudl "if successful. . .send shockwaves through the entertainment business"). 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

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.[20] By any relevant measure, citizens of the United 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.[21]

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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 C1, C3. 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 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 for pricing advertiser access to those audiences. *See* Suzanne Vranica, *NBC's Olympic Test: Counting All the Games' Viewers*, WALL STREET JOURNAL, July 7, 2008, at B5.

[20] By "public good" programming, I meant 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, showing cultural events like opera, theater, or ballet might make for a wiser, better citizenry that can undertake democratic self-government more effectively. Even so, a commercial television station will broadcast "Married by America" reruns rather than the Met 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 poor quality programming aimed at an older audience. Thus, if such programming is to be available, it must be made available by some means other than advertiser supported commercial broadcasting.

[21] *See* Stuart Minor Benjamin, *Evaluating the Federal Communications*

To be sure, the Supreme Court faced a 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.[22]

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 public interest – makes increasingly little sense.[23]

Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good for the Country, 46 WM. & MARY L. REV. 439, 483 (2004) (noting that over time broadcasters have consistently lost audience share to other distribution platforms, including cable, DBS, and the Internet).

[22] 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 null set. *See* Jack M. Balkin, *Media Filters, The V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1141-53, 1165-75 (1996); *see also* Jack M. Balkin, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 43, 57-60, 79-81 (1998) (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.

[23] *But cf.* Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest*

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 intermediate point in between.[24] 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. Moreover, were Congress to extend *Red Lion*'s mandate to other means of disseminating content, such as cable, satellite, or the Internet,[25] 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

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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* naughty and violent programming).

[24] In this regard, 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.

[25] *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, 38-44, 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 publically 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.

ideas (all in the name of the "public interest," to be sure), that governments in places like China, Cuba, and even Russia currently both claim and enforce against their citizens.[26]

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 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. 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 government has any legitimate interest in

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[26] *See* Christopher Mason, *Web Tool Siad to Offer Way Past the Government Censor*, N.Y. TIMES, Nov. 21, 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, April 28, 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, 74-78 (discussing government censorship of the Internet in Cuba 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*, 23 J. MARSHALL J. COMPUTER & INFO. L. 371, 402 (2003) (noting existence of web censorship in Russia).

compelling speech by private speakers (whether a newspaper, a broadcast television station, or a private citizen posting video on YouTube).

Finally, in Part III, the article 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 does a very poor job of delivering programming to those who need it, and the real risk to diversity in the marketplace does not flow from ownership of a broadcast station license, but rather from a monopoly power over access to the means of sending and receiving media content.[27] From this perspective, the greater threat to diversity is not a national television network that fails to report important national stories in a fair and balanced fashion, but rather from the ability of 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.[28]

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[27] *See* Janine Zacharia, *Google, Web access and censorship,* INTERNATIONAL HERALD TRIBUNE, 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 of doing in the United States," in terms of censorship to please nervous foreign governments and that "Yahoo, Google's rival, turned over e-mail 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 browers nervous about precisely what they are doing at home – 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. 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).

[28] 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. *See* Zacharia, *supra* note ___. Sometimes, the largest threats to freedom of expression come not from government sources, but from private entities. *See* OWEN M. FISS,

In sum, we need to reconceptualize and reclaim the public interest in the age of the Internet not in terms of mandatory programming duties,[29] but rather as a mandate for universal

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THE IRONY OF FREE SPEECH 79-83 (1996); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 5-6, 114-15 (1996); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783-91 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415-16 (1986).

[29] Would we really want www.hustler.com to produce children's content? Not every web site 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/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

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[30] and to refrain from unfair, deceptive, or anticompetitive operating practices.

I. *Red Lion* and the Scarcity Rationale for Imposing Public Interest Duties on Commercial Broadcasters

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marketplace with respect to the Internet. Private monopolies can present threats to free speech no less pressing than self-serving government regulations. *See supra* note ___ [Fiss].

[30] *See* Bob Keefe, *Broadband Internet's reach limited*, THE OREGONIAN, July 3, 2008, at 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").

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.[31] 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 retaining the station's license.[32] *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[33] and the other from the U.S. Court of Appeals for the Seventh Circuit.[34] 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 a person personally attacked on air to respond to the attack and, if necessary, with free air time.[35] "On November 27, 1964, WGCB [a radio station operating in Red Lion, Pennsylvania] carried a 15-minute broadcast by the Reverened Billy James Hargis," during which Hargis attacked Fred J. Cook, author of "Goldwater–Extremist on the Right," claiming

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[31] *See* 47 U.S.C. §§ 303, 307, 309; *see also* Krotoszynski & Blaiklock, *supra* note ___, at 814; Krotoszynski, *The Inevitable Wasteland*, *supra* note ___, at 2102; Erwin G. Krasnow & Jack K. Goodman, *The Public Interest Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 607 (1998).

[32] *See* Hundt, *supra* note ___, at 1089-92.

[33] *See* Red Lion Broadcasting Co. v. FCC, 381 F.2d 308 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

[34] RTDNA v. United States, 400 F.2d 1002 (7th Cir. 1968), *rev'd sub nom.*, 395 U.S. 367 (1969).

[35] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 371-73 (1969).

"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.'"[36] 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.[37] Administrative proceedings ensued before the Commission, in which Cook prevailed. Even so, however, the station refused to provide free air time for Cook to respond to Rev. Hargis's attack. On appeal to the D.C. Circuit, the Commission prevailed, with the panel affirming the Commission's order.[38]

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 for the same office.[39] RTNDA sought judicial review of the new regulations and prevailed before the Seventh Circuit.[40] In ruling for the petitioner, Judge Swygert explained that:

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[36] *Id.* at 371.

[37] *Id.* at 371-72.

[38] *Id.* at 372-73.

[39] *See id.* at 373-75.

[40] *See* 400 F.2d at 1011-13, 1020-21.

> Despite 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.[41]

Accordingly, the Seventh Circuit voided the Commission's new rules in their entirety.[42]

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.[43] It affirmed the D.C. Circuit's holding, but reversed the Seventh Circuit.[44]

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.[45] This required the Supreme Court to address squarely the First Amendment objections to the fairness doctrine that Red Lion and RTNDA 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

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41 *Id.* at 1012.

42 *Id.* at 1021 ("The Commission's order adopting the personal attack and political editorial rules, as amended, is set aside.").

43 *Red Lion*, 395 U.S. at 367-68.

44 *Id.* at 401.

45 *Id.* at 375-86.

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 persons wish to broadcast than is technologically feasible, entities holding licenses do not have any superior claim to editorial freedom than an entity that lacks 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. . . difference in the characteristics of new media justify difference in the First Amendment standards applied to them."[46] 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."[47] 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."[48] Then, 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

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[46] *Id.* at 386.

[47] *Id.* at 388.

[48] *Id.* at 389.

with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of the community and which would otherwise, by necessity, be barred from the airwaves."[49]

The most objectionable feature of this reasoning, of course, is the reflexive equation of the government's programming preferences with 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.[50]

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 explains 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

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[49] *Id.*

[50] *See, e.g.*, Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (rebuking Commission for renewing 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 with fresh voice" Through the Federal Communication 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 1950s to the 1970s). For an excellent history of the Commission's persistent failure to reign in openly racist broadcasters during the Civil Rights Era, *see* Steven D. Classen, WATCHING JIM CROW: THE STRUGGLES OVER MISSISSIPPI TV, 1955-1969 (2004).

expressed on this unique medium."[51] "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."[52]

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."[53] 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."[54] Justice White rejects this possibility, thundering that "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."[55]

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

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

52 *Id.*

53 *Id.* at 392.

54 *Id.*

55 *Id.*

precisely because of this potential chilling effect.[56] These arguments proved singularly 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.[57] 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, we hold the regulations and ruling at issue here are both authorized by the statute and constitutional."[58]

Five years later, in *Tornillo*, the Supreme Court resoundingly rejected a Florida right of reply statute applicable to print media.[59] 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 them [newspaper editors] should not be published is unconstitutional."[60] Thus, "[a] responsible press is an undoubtedly desirable goal, but press

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[56] *See RTNDA*, 400 F.2d at 1013-15, 1020-21.

[57] *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.").

[58] *Id.* at 400-01.

[59] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[60] *Id.* at 256.

responsibility is not mandated by the Constitution and like many virtues it cannot be legislated."[61]

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."[62] Accordingly, "[t]he choice of material 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."[63] This judgment cannot be subject to government control or regulation consistently with the First Amendment.[64]

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 the rubric of *Tornillo.*[65] Accordingly, the

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61 *Id.*

62 *Id.* at 258.

63 *Id.*

64 *See id.* ("It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendmetn guarantees ofa free press as they have evolved to this time.").

65 FCC v. Pacifica Foundation, 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

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[66] and the Internet,[67] even though both use spectrum incidentally in order to facilitate their operations.[68]

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.[69] For example, Judge Swygert, writing for the Seventh Circuit panel, demolished the scarcity argument by noting that there were

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contrary, they must give free time to the victims of their criticism."). *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.").

[66] Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 636-39 (1996).

[67] Reno v. ACLU, 521 U.S. 844, 868-70 (1997).

[68] *See Expansion of Indecency Regulation: Present 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 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.").

[69] *See* Krotoszynski, *Into the Woods*, *supra* note ___, at 1206-08.

many more television and radio stations than newspapers, even in 1968.[70] 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.'"[71]

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.[72] 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."[73] It is, then, at the end of the day, very difficult to take *Red Lion* seriously as a basis for conferring only some form of junior varsity version of First Amendment rights on broadcasters.[74]

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

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[70] *RTNDA*, 400 F.2d at 1018-19. Judge Swygert also considered, and rejected, the government's ownership of spectrum as a property based theory for imposing programming obligations on broadcasters, invoking the unconstitutional conditions doctrine. *See id.* at 1019-20; *see also* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

[71] Logan, *supra* note ___, 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).

[72] *See* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

[73] Logan, *supra* note ___, at 1701. For a very thoughtful and comprehensive exploration of why the scarcity rationale is incoherent, *see id.* at 1700-05.

[74] *See* Krotoszynski, *Into the Woods*, *supra* note ___, at 1205-08.

interest obligations on commercial broadcasters – without restating prior arguments, getting commercial broadcasters to undertake unprofitable (or even simply less profitable) public interest programming is akin to seeking blood from a stone.[75] Regardless of whether or not the public interest model of broadcast regulation is constitutional, it represents a very ineffective, and illogical public policy.[76] Moreover, the Commission's efforts to enforce the public interest model provide case studies in regulatory failure.[77]

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.

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[75] *See* Krotoszynski, *The Inevitable Wasteland*, *supra* note ___, at 2108-22; *see also* Krotoszynski, *Into the Woods*, *supra* note ___, at 1236-46.

[76] Krotoszynski, *Into the Woods*, *supra* note ___, at 1240-43.

[77] *See* Krotoszynski, *The Inevitable Wasteland*, *supra* note ___, at 2121-22.

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).[78] *Red Lion* thus reflects a troubling and naive 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.[79]

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 escape indecency rules that he found unduly restrictive, fled broadcast radio in favor Sirius satellite radio.[80] Satellite radio stations do not have to meet the public interest duties

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[78] *See, e.g.*, Hundt, *supra* note ___, at 1091-1100.

[79] *See* Daniel A. Farber & Philip P. Frickey, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 43-44 (1991); Robert D. Tollison, Public Choice and Legislation, 74 VA. L. REV. 339 (1988); *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 the Baby*, 87 CORNELL L. REV. 309, 310-28 (2002) (same).

[80] *See* 18 U.S.C. § 1464; Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc); *see also* Quale & Tuesley, *supra* note ___, 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; *see also* Christopher Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1747-52

applicable to broadcast radio station, including the statutory and regulatory duty to refrain from broadcasting indecent materials between the hours of 6 AM and midnight.[81] And, as noted earlier, this also holds true for programming distributed on cable, via satellite, or over the Internet.[82] 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, however, there would be no constitutional impediment to extending the Commission's reach to include other means of distributing program content.[83]

(2007).

[81] *See* Aurele Danoff, Note, *"Raised Eyebrows" Over Satellite Radio: Has* Pacifica *Met Its Match?*, 34 PEPP. L. REV. 743, 759-69 (2007). 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.*, In re 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, 8017 (2001) (Furchtgott-Roth, Comm'r, concurring) (arguing that increasing irrelevance of content delivery mechanisms, amounting to a "market transformation," require the Commission to eliminate broadcast content restrictions).

[82] *See supra* note ___.

[83] *But cf.* Quale & Tuesley, *supra* note ___, 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 "[a]rguably, § 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," *id.*, 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 section 1464 is very much open to doubt. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co, 463 U.S. 29, 41-43 (1983), *see also* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 455-59 (2nd Cir. 2007) (rejecting Commission's effort to expand indecency rules to encompass incidental use of profanity in a live broadcast as insufficiently

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 provide 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 an irrelevancy. Just as the ubiquitous availability of pornography on the Internet has great reduced the importance of cases upholding zoning regulations that limit the location of adult theaters and bookstores,[84] 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

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reasoned in light of well-settled policy of excluding such incidents from the indecency rule).

[84] *See* Ronald J. Krotoszynski, Jr., Steven Gey, Lyrissa Barnett Lidsky, and

the case in 1968 – over even 1998.

Christina Wells, FIRST AMENDMENT: CASES AND THEORY 555-56 (2008).

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 audience "reality" television programming that permits the program producers to avoid the cost of writers, costumers, set designers, and the like. In a nation where "American Idol, "Deal or No Deal," 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.[85] 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

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[85] 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 C8 (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 "[w]orking 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, *The Inevitable Wasteland, supra* note ___, at 2126-28, 2134 (advocating the adoption of a system of spectrum royalties in lieu of public interest programming duties).

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."[86] But even if there is "nothing on," consumers today have far more alternatives

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[86] With apologies to Bruce Springsteen and Rick Matasar. *See* Neil Genzlinger, *Go On Bold Couch Potatoes, Click Into the Unknown*, N.Y. TIMES, Nov. 11, 2007, at § 4, p. 2 ("'Fifty-seven channels and nothin' on," Bruce Springsteen sang back in 1992, but nowadays that number is laughably low.); Rick Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 5, 7 (1998) ("'we've got one hundred channels but nothing on"). 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 to 1000%; most subscribers today can access 500 to 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*

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 PM on Monday night?

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.").

Does this mean that, in our new era of programming on demand, that there is no room or role for the public interest? Will the market routinely provide public goods to all potential consumers? It would take far more faith in the invisible hand's beneficence than I possess in it for me to endorse the market as the epitome of the public interest, any more than I accept the government assuming that role for itself. Serious questions about providing reliable access to public interest programming 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.[87]

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 is 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.

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[87] *See supra* note ___ [Fiss].

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.[88] The kinds 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).[89] 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 wirless phone companies). Monies raised from the spectrum fees could be used to provide public goods,

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[88] 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 (3rd Cir. 2004); *id.* at 436-37 (Scirica, C.J., dissenting in part and concurring in part); *see also* In Re Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, Rules and Regulations 47 C.F.R. Part 73 (MB Docket 02-277, and MM Dockets 01-235, 01-317, and 00-244; FCC 03-127) (Aug.5, 2003) (Report and Order & Further Notice of Proposed Rulemaking). 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.

[89] *See* Krotoszynski, *The Inevitable Wasteland*, *supra* note ___, at 2108-18, 2122 (examining and discussing reasons why 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).

including public interest programming.[90]

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 21st 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. 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.

With the mutitude of distributional networks, access and control of the means of distributing content has become more, rather than less, important. If your search engine accepts payment to make a particular web site the first result, or blocks access to a dispreferred web site, a user may have no way of knowing that her access to content is being limited, manipulated, or blocked.[91] 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

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[90] *Id.* at 2126-28 (advocating use of spectrum fees for commercial broadcasters in lieu of programming duties).

[91] *See* Goodman, *Stealth Marketing*, *supra* note ___, at 85-89, 108-12.

the public interest.[92] 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."[93] 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 audience."[94] But filtering efforts are not limited to self-imposed limits adopted by someone seeking information; filtering efforts can originate by the government or by private entities that control the portals and gateways that individuals use to seek and obtain desired content.[95]

The dangers of unseen filtering is real and presents a serious risk of disabling the ability of citizens to obtain desired information on the Internet.[96] National governments in places like China, North Korea, and Cuba routinely block access to web sites that contain offensive content (offensive, that is, to those holding political or military power). 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,

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92 On filtering and the power of media filters, *see* Jack M. Balkin, *Media Filters, The V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1141-53 (1996); *see also* Andrew L. Schapiro, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING PEOPLE IN CHARGE AND CHANGING THE WORLD WE KNOW (1999); Cass R. Sunstein, REPUBLIC.COM 10-16, 98-99 (2001).

93 Balkin, *supra* note ___, at 1141.

94 *Id.* at 1143.

95 *See* Zacharia, *supra* note ___.

96 *See id.*; *see also* Goodman, *Stealth Marketing*, *supra* note ___, at 108-12.

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 web browser 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.[97] If Microsoft wants to mine and sell my web surfing data, I should be put on clear notice of this fact.[98] Moreover, I should have the ability to select a search engine that protects my privacy more completely. Or that guarantees search

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[97] *See* Goodman, *Stealth Marketing*, *supra* note ___, at 84-87, 96-99, 108-12, 120-21, 125-29, 142-51. 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.*, 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. & POL'Y 199, 220-35 (2005); 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).

[98] A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1468-69 (2000); James P. Nehf, *Incomparability and the Passive Virtues of Ad Hoc Privacy Policy*, 76 U. COLO. L. REV. 1, 20-27 (2005).

results that are not skewed by bribes.[99]

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.

[99] Goodman, *supra* note ___, at 119-21, 125-29. As Professor Goodman puts the matter: "if ABC has to disclose sponsorship over the air, there is no reason it should not have to disclose sponsorship over the Internet." Goodman, *supra* note ___, at 150. The same logic applies with full force to entities like Google, Yahoo, and Microsoft.

A second major public interest imperative: 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.[100] Given the cost of 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: where is the Commission?[101]

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.[102] The failure of these

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[100] *See* Kimberely Quillen, *Municipal wireless network ending; Earthlink can't sell, or give away, system*, TIMES PICAYUNE, April 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*, THE 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 completely 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); Anna J. Zichterman, Note, *Developments in Regulating High-Speed Internet Access: Cable Modems, DSL, and the Citywide Wi-Fi*, 21 BERKELEY TECH. L.J. 593, 609-11 (2006).

[101] 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 ___, 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.

[102] Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine:*

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.[103]

Unfortunately, the digital divide is both real and growing in the United States, and constitutes a serious failure to advance the public interest.[104] Moreover, the digital divide tracks persistent and troubling lines of race and class.[105] 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, DBS, and/or a high bandwidth wireless Internet connection. As the universe of information expands, we increasingly are 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 extraordinary and growing opportunities for exposure to diverse points of view, and indeed growing opportunities

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Universal Service, the Power to Tax, and the Ratification Doctrine, 80 IND. L.J. 239, 245-50, 277-99 (2005).

[103] As one commentator aptly has noted, "there 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 ___, at 612.

[104] *See* www.digitaldivide.org/dd/digitaldivide.html; *see also* Keefe, *supra* note ___, at B1-B2; Mark Lloyd, *The Digital Divide and Equal Access to Justice*, 24 HASTINGS COMM. & ENT. L.J. 505, 523-28 (2002).

[105] *See* Keefe, *supra* note ___.

for shared experiences and substantive discussions of both policy and principle."[106] 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 21st century, it should be obvious that government has a legitimate interest, if not a duty, to facilitate access to the marketplace of ideas.[107] To the extent that *Red Lion* embraces the notion that government efforts to increase access to the channels of news, information, and ideas, it makes clear than any failure to address the digital divide today is one of institutional will, rather than constitutional power.

IV. Conclusion

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106 Sunstein, *supra* note ___, at 168.

107 *See supra* note ___ [Fiss].

Broadcasting matters less today than at any time since Marconi because of the Internet, yet the Commission still spends countless staff hours conducting hearings into localism, children's television, and indecency.[108] Our public policy continues to fetishize the programming decisions of the major television networks, even though programming of virtually any kind is readily available, 24 hours a day, seven days a week, on cable and DBS, to say nothing of programming on demand on the Internet.[109] 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.[110] The real public policy questions should be: how can we ensure that every school child 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 Superbowl 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 show how poorly

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[108] *See, e.g.*, Washington Watch, *supra* note ___.

[109] *See* Barnes, *supra* note ___, at C1, C3; Puente, *supra* note ___, at D1-D2.

[110] 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).

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.[111] If a particular search engine sells the right to rig search results, consumers should be aware of this fact. So too, if a search engine blocks content (for whatever reason), this should also be disclosed. Content and 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.[112]

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 21st century can and must redefine the public interest to encompass concerns about access to informational networks and the conditions

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111 *Cf.* Hundt, *supra* note ___, at 1096-1100, 1129.

112 *See* Krotoszynski, *Into the Woods*, *supra* note ___, 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 web search engines that provide a service in order to sell advertising and product placements to third parties.

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 to helping 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.