LIBERATING *RED LION* FROM THE GLASS MENAGERIE OF FREE SPEECH JURISPRUDENCE

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I. ECCE LEO

> I could break free
> From the wood of a coffin
> If I need
> But nothing's hard as
> Getting free from places
> I've already been
> - THE WALLFLOWERS, *I've Been Delivered* (2000)[1]

The law of information platforms has blurred numerous doctrinal categories within the law and has begun to assimilate a widening array of nonlegal disciplines.[2] Communications law alone has become "so vast that fully to comprehend it would require an almost universal knowledge ranging from" engineering, economics, and management science "to the niceties of the legislative, judicial, and administrative processes of government."[3] In contemporary regulatory analysis, it therefore borders on apostasy to address a strictly legal proposition. But straightforward legal analysis has its place, if only because law alone consistently presents "truth in the pleasant disguise of illusion."[4]

I hereby propose a little legal fantasy.[5] Which case, statute, or rule would scholars erase from the books if they suddenly acquired the power to "strike like lightning" and vaporize any sin-

1. *Hear* THE WALLFLOWERS, *I've Been Delivered*, *on* BREACH (Interscope Records 2000).

2. *See generally* Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMMS. & HIGH TECH. L. 1 (2002).

3. Queensboro Farm Prods., Inc. v. Wickard, 137 F.2d 969, 975 (2d Cir. 1943) (Frank, J.) (making this observation in the context of agriculture). *See generally* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

4. TENNESSEE WILLIAMS, THE GLASS MENAGERIE 4 (New Directions Books 1999) (1st ed. 1945).

5. *See generally* Symposium, *The Sound of Legal Thunder: The Chaotic Consequences of Crushing Constitutional Butterflies*, 16 CONST. COMMENTARY 483 (1999).

gle development from the law of information platforms?[6] *Red Lion Broadcasting Co. v. FCC*,[7] the 1969 decision in which the Supreme Court decreed a medium-specific approach to first amendment controversies involving radio and broadcast television, might be the leading choice.[8] Although the Supreme Court has never applied the "scarcity" rationale associated with *Red Lion* to any medium besides broadcasting,[9] the Court has frequently resolved free speech controversies in a new communications medium by drawing analogies to broadcasting. *Red Lion* remains the most exotic and most fragile beast in the glass menagerie of the Supreme Court's free speech jurisprudence.

Analysis of communications law ordinarily disdains an appeal to history. *Red Lion*'s vintage and prominence, however, may warrant an exception. All jurisprudence "associated with broadcasting . . . ha[s] a musty odor" even though *Red Lion*, its "chief source of constitutional authority," is barely "thirty years old."[10] This time span, which is roughly equivalent to a single human generation, typically provides ample "time for the Supreme Court to complete a constitutional hiccough."[11] We scholars should do no less. Cognizant that one rarely gets ahead by praising existing law,[12] I shall dedicate the balance of this article to trashing *Red Lion*. After arguing that *Red Lion* still matters, albeit not because of its "scarcity" rationale, I will conclude that we should let it go.

II. The King of First Amendment Beasts

> I believe in the future of television! . . . Full steam - . . . *Knowledge* - Zzzzzp! *Money* - Zzzzzzp! - *Power!* That's the cycle democracy is built on!
>
> - Tennessee Williams, The Glass Menagerie (1945)[13]

The constitutional law of broadcasting, so central to the free speech jurisprudence of information platforms, carries the echoes

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6. Duckworth v. Eagan, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring).

7. 395 U.S. 367 (1969).

8. *See* sources cited *infra* note 24.

9. *Cf., e.g.*, Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing* 1997 Sup. Ct. Rev. 141, 146 ("[T]he broadcasting cases have generally had rather little gravitational force. . . .")

10. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L.J. 899, 903-04 (1998).

11. Jim Chen, DeFunis*, Defunct*, 16 Const. Commentary 91, 98 (1999).

12. *See generally* Daniel A. Farber, *Gresham's Law of Legal Scholarship*, 3 Const. Comment. 307 (1986); Mark G. Kelman, *Trashing*, 36 Stan. L. Rev. 293 (1984).

13. Williams, *supra* note 4, at 82.

of that "quaint period . . . when the huge middle class of America was . . . . having [its] fingers pressed forcibly down on the fiery Braille alphabet of a dissolving economy."[14] *Red Lion* evaluated the constitutionality of a cluster of rules springing from the FCC's "fairness doctrine," which required "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."[15] The personal attack rule provided that "[w]hen a personal attack has been made on a figure involved in a public issue . . . the individual attacked himself [must] be offered an opportunity to respond."[16] The political editorializing rule required a broadcaster who endorsed or opposed a political candidate to offer all disfavored "candidates . . . reply time to use personally or through a spokesman."[17] Both the personal attack rule and the political editorializing rule "differ[ed] from the general fairness requirement . . . in that the broadcaster [did] not have the option of presenting the attacked party's side himself or choosing a third party to represent that side."[18] In deflecting a first amendment attack by aggrieved broadcasters, the Supreme Court recited what has become the standard formulation of the scarcity rationale: "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."[19]

Quite notoriously, the Court failed to rely on *Red Lion* a mere five years later. *Miami Herald Publishing Co. v. Tornillo*[20] invalidated a state right-of-reply law identical in all relevant respects to the FCC's fairness doctrine. *Tornillo* treated the right of reply as an unacceptable affront to a newspaper publisher's "exercise of editorial control and judgment."[21] The Court also objected to the "costs [of] comply[ing] with a compulsory access law," measured not only "in terms of the cost [of] printing" but also in terms of the opportunity cost of forgoing "other material that the newspaper may have preferred to print."[22]

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14. *Id.* at 5.
15. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369 (1969).
16. *Id.* at 378.
17. *Id.*
18. *Id.*
19. *Id.* at 388.
20. 418 U.S. 241 (1974).
21. *Id.* at 258.
22. *Id.* at 256-58.

Although *Tornillo* never cited *Red Lion*, let alone distinguished it,[23] subsequent cases and commentary have elevated the scarcity doctrine to mythic status. Since 1969 the Supreme Court has consistently relied on *Red Lion* to dilute first amendment review of laws having some connection to conventional broadcasting.[24] Of course, no one besides the Justices actually believes the scarcity rationale. Dissatisfaction with *Red Lion* has spawned an academic cottage industry.[25] For nearly a generation, lower court judges have urged the Supreme Court to overrule *Red Lion*.[26] Even the FCC at one point repudiated *Red Lion*'s rationale[27] (though the Commission in more recent years

23. *See*, *e.g.*, Roland F.L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 760-61 (1994); Jeffrey S. Hops, Red Lion *in Winter: First Amendment and Equal Protection Concerns in the Allocation of Direct Broadcast Satellite Public Interest Channels*, 6 COMMLAW CONSPECTUS 185, 190 (1998); Norman Redlich & David R. Lurie, *First Amendment Issues Presented by the "Information Superhighway,"* 25 SETON HALL L. REV. 1446, 1449 n.13 (1995); Robinson, *supra* note 9, at 909.

24. *See*, *e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 380 (1984); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 n.30 (1978); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973); *cf.* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." (footnote omitted)).

25. *See*, *e.g.*, LEE BOLLINGER, IMAGES OF A FREE PRESS 87-90 (1991); L.A. SCOT POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197-209 (1987); MATTHEW SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 7-18 (1986); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982); Hall, *supra* note 22, at 708-14; Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 151-52; Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1106 (1993); Lawrence H. Winer, *The Signal Cable Sends - Part I: Why Can't Cable Be More like Broadcasting?*, 46 MD. L. REV. 212, 221-22 (1987). One particularly harsh observation, made more than two decades ago, summarizes the academic consensus: "The 'scarcity' rationale . . . has worn so thin that continuing it would be gratuitous." Daniel D. Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223, 257-58.

26. *See*, *e.g.*, Time Warner Entm't Co. v. FCC, 105 F.3d 723, 724-26 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing); Telecomm. Research & Action Center v. FCC, 801 F.2d 501, 509 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). Most lower federal courts, of course, unhesitatingly apply *Red Lion* in first amendment cases involving broadcasting. *See*, *e.g.*, Time Warner Entm't Co. v. FCC, 93 F.3d 957, 975-77 (D.C. Cir. 1996).

27. *See* Syracuse Peace Council, 2 F.C.C.R. 5843 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *cf.* William N. Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539, 574 (1978) (criticizing the use of the scarcity rationale to uphold the fairness doctrine); Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 49 (1975) (same).

has tried to renounce this heretical stance).[28] Throughout, the Supreme Court has continued to regard a "forced response" of the sort at issue in *Tornillo* - or, for that matter, in *Red Lion* - as "antithetical to the free discussion that the First Amendment seeks to foster."[29] In 1998 the Court admitted that subjecting *broadcasters* to "broad rights of access for outside speakers" is "antithetical . . . to the discretion that stations and their editorial staff must exercise."[30] *Red Lion* and its kindred broadcasting cases have become so "freakish" within the livery of free speech decisions that they no longer "feel . . . at home with the other [cases], the ones that don't have horns."[31]

This freakishness impairs the accurate assessment of *Red Lion*'s proper place in free speech jurisprudence. The scarcity rationale, a myth whose impenetrability has grown from its sheer implausibility, now overshadows *Red Lion*. Lest we aggravate the law's tendency to "turn even outrageous myth into history through a sufficiently persistent pattern of citations,"[32] perhaps we should inspect *Red Lion* more diligently. Fidelity to controlling legal texts, after all, is widely regarded to be a core constitutional value.[33]

In their rush to condemn *Red Lion*, critics often overlook or ignore the Justices' recognition that scarcity in broadcasting was technologically contingent. "Advances in technology," *Red Lion* acknowledged, "have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace."[34] Mindful of "[t]he rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that

28. *Compare* Radio-Television News Directors Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999) (declining to abrogate the personal attack and political editorializing rules at issue in *Red Lion* solely on the strength of the repeal of the fairness doctrine in *Syracuse Peace Council*), *with* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (issuing a writ of mandamus ordering the Commission to repeal the personal attack and political editorializing rules).

29. Pac. Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 16 (1986) (plurality opinion); *see also* Riley v. Nat'l Fed'n of the Blind, Inc., 487 U.S. 781, 797 (1988) (relying on *Tornillo* to invalidate a statute mandating certain disclosures triggered by the solicitation of charitable contributions).

30. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998).

31. WILLIAMS, *supra* note 4, at 86.

32. Jim Chen, Filburn*'s Forgotten Footnote - Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 277 (1997).

33. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); *cf.* Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1092-93 (1995) (identifying similarities and differences among religious, literary, and legal interpretation).

34. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396-97 (1969).

space by ever growing numbers of people on the other," the Court thought it "unwise to speculate on the future allocation of that space."[35]

It thus behooves us to look beyond *Red Lion's static* defense of scarcity and to focus on that decision's *dynamic* dimension. "Technological change occupies a unique place in the modern development of judicial doctrine because it provides a singularly uncontroversial justification for modifying established doctrine."[36] Lawmakers routinely treat the emergence of new communications technologies as the occasion to launch fresh regulatory assaults on speech. "New technology," far from providing "the easy answer to everything,"[37] could represent the first amendment's "Trojan horse."[38]

Within the law of information platforms, the most enduring statement in *Red Lion* is therefore not its formulation of its scarcity rationale, but Justice White's assertion that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[39] Emboldened by this endorsement of a conduit-specific approach, courts routinely exploit technological differences between older and newer modes of communication in setting the level of constitutional protection for speech in the newer medium. Because "[c]ourts often succumb to the temptation to analogize new electronic media to existing technologies for which they have already developed First Amendment models,"[40] *Red Lion* has proved surprisingly durable, surviving even though technological change has catapulted communications far beyond conventional broadcasting.

Tracing the Supreme Court's uses of Justice White's "new media" dictum reveals the extent to which *Red Lion* has shaped the Supreme Court's efforts to determine the degree of protection

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35. *Id.* at 399.

36. Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 1008 (1997).

37. Thomas W. Hazlett, *Predation in Local Cable TV Markets*, 40 ANTITRUST BULL. 609, 643 (1995); *see also* Fred H. Cate, *Telephone Companies, the First Amendment, and Technological Convergence*, 45 DEPAUL L. REV. 1035 (1996).

38. Robinson, *supra* note 9, at 902. *See generally* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983).

39. *Red Lion*, 395 U.S. at 386; *accord*, *e.g.*, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

40. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1062 (1994).

that speech merits in diverse conduits of communication. I turn now to that task.

III. ANDROCLES AND *RED LION*: SOME THORNY MATTERS OF DOCTRINE

> The open mind never acts: when we have done our utmost to arrive at a reasonable conclusion, we still . . . must close our minds for the moment with a snap and act dogmatically on our conclusions.
> - GEORGE BERNARD SHAW, ANDROCLES AND THE LION (1916)[41]

Red Lion reached far beyond its mythical scarcity rationale. In addition to "the scarcity of broadcast frequencies," the Court cited "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."[42] The Court explicitly reserved judgment on two "related argument[s]" beyond the admittedly temporary "technological scarcity of frequencies."[43] First, the Court acknowledged that legally induced "economic scarcity" arising from actual or potential "limit[s] [on] entry to the broadcasting market" might justify intervention in favor "of those excluded" from the airwaves.[44] Second, the Court hinted that it might immunize "legislation [that] directly or indirectly multipl[ies] the voices and views presented to the public through . . . devices which limit or dissipate the power of those who sit astride the channels of communication with the general public."[45]

Careful examination of *Red Lion* therefore reveals no fewer than three distinct justifications for tailoring first amendment protection according to the characteristics of a specific conduit. First, if scarcity is something more than a strictly technological phenomenon, the government might be able to defend more aggressive intervention. Second, the history and thoroughness of economic regulation may warrant greater deference to the legislative structuring of particular information platforms. Third, the

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41. GEORGE BERNARD SHAW, ANDROCLES AND THE LION: AN OLD FABLE RENOVATED 108-09 (1951) (1st ed. 1916); *accord* Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1502 (1989) (reviewing REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS (1986)). For a more traditional version of Aesop's fable, see JOSEPH JACOBS, *Androcles and the Lion*, *in* EUROPEAN FOLK AND FAIRY TALES 107 (1916).

42. *Red Lion*, 395 U.S. at 400.

43. *Id.* at 401 n.28.

44. *Id.*

45. *Id.*

vulnerability of an information platform to domination by a single entity may justify authorizing the government to mute louder voices so that softer ones might be heard. The 1978 case of *FCC v. Pacifica Foundation*,[46] which upheld the FCC's authority to restrict the timing of potentially offensive broadcasts such as George Carlin's "Seven Dirty Words" routine, suggested a fourth possibility beyond "the notion of 'spectrum scarcity'":[47] some media are "uniquely pervasive," able without warning to shatter privacy even at home, and "uniquely accessible to children, even those too young to read."[48]

Far from relying thoughtlessly on scarcity - which after all is "a universal fact" - to supply a "distinguishing principle" for "explain[ing] regulation in one context and not another,"[49] the Supreme Court's decisions since 1969 have, by and large, accounted for the nuances underlying its broadcasting cases. As communications technologies have evolved from broadcast television to cable and the Internet, the Court has gradually fulfilled *Red Lion*'s promise of a multifaceted, conduit-specific approach to free speech cases arising in new media.

Cable television posed the first test of *Red Lion*'s applicability outside its native context.[50] In 1968, one year before deciding *Red Lion*, the Supreme Court upheld the FCC's authority to regulate cable in defense of the Commission's broadcasting agenda.[51] Congress, the Commission, and the Court all expressed a desire to shield broadcast television from cable's "'unregulated explosive growth.'"[52] A decade later, the Court acknowledged that "[c]able operators . . . share with broadcasters a significant amount of editorial discretion regarding what their programming will include."[53] In its first opportunity to apply the

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46. 438 U.S. 726 (1978).

47. *Id.* at 770 n.4 (Brennan, J., dissenting).

48. *Pacifica*, 438 U.S. at 748-49; *accord* Reno v. ACLU, 521 U.S. 844, 866 (1997); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (plurality opinion of Breyer, J.); Sable Communications, Inc. v. FCC, 492 U.S. 115, 127 (1989).

49. Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (labeling this treatment of scarcity as the source of much "analytical confusion"), *cert. denied*, 482 U.S. 919 (1987).

50. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 627 (1994) (describing cable as a way "to bring broadcast television signals to remote or mountainous communities[,]" intended "not to replace broadcast television but to enhance it"); DANIEL L. BRENNER & MONROE E. PRICE, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY § 1.02 (1992) (explaining the early history and purposes of cable television).

51. *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

52. H.R. REP. NO. 1635, at 2d Sess. 7 (1966).

53. FCC v. Midwest Video Corp., 440 US. 689, 707 (1979).

first amendment in a cable-related dispute, the Court in 1986 conceded that cable "plainly implicate[s] First Amendment interests" but did not embrace any particular standard of review.[54] The Court's 1991 decision in *Leathers v. Medlock*,[55] which upheld Arkansas's decision to subject cable services to sales tax while exempting or excluding "newspapers, magazines, and satellite broadcast services,"[56] invited precisely the sort of distinction that separated the treatment of broadcasters in *Red Lion* from the treatment of print journalists in *Tornillo*.

The Court stopped short of equating cable with broadcasting.[57] In the first of two cases named *Turner Broadcasting System, Inc. v. FCC*,[58] both involving the FCC's requirement that cable operators transmit the signals of conventional broadcasters who request carriage, the Court reasoned that "[t]he justification for [its] distinct approach to" first amendment claims arising in the context of broadcasting "rests upon the unique physical limitations of the broadcast medium."[59] *Turner I* held that *Red Lion* and other "broadcast cases are inapposite" because cable "does not suffer the inherent limitations that characterize the broadcast medium."[60] Recognizing "rapid advances in fiber optics and digital compression technology," the Court predicted the quick elimination of "practical limitation[s] on the number of speakers who may use the cable medium."[61] The Court also downplayed "any danger of physical interference between two cable speakers attempting to share the same channel."[62] *Turner I* expressly rejected the proposition that "the foundation of [the Court's] broadcast jurisprudence is not the physical limitations of the electromagnetic spectrum, but rather the 'market dysfunction' that characterizes the broadcast market."[63] The "mere assertion of dysfunction or failure in a speech market, without more," the Court held, "is not sufficient to shield a speech regulation from

54. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

55. 499 U.S. 439 (1991).

56. *Id.* at 443.

57. *Hear generally* THE BUGGLES, *Video Killed the Radio Star*, *on* THE AGE OF PLASTIC (UNI/Mercury 1980).

58. 512 U.S. 622 (1994).

59. *Id.* at 637.

60. *Id.* at 638-39; *see also id.* at 639 ("This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not.").

61. *Id.* at 639.

62. *Id.*

63. *Id.*

the First Amendment standards applicable to nonbroadcast media."[64]

Turner I nevertheless declined to apply *Tornillo*'s strict scrutiny standard. "Given cable's long history of serving as a conduit for broadcast signals," the Court observed, "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[65] The Court placed even greater weight on "an important technological difference between newspapers and cable television."[66] Whereas a "daily newspaper," even if it enjoys a local monopoly, "does not possess the power to obstruct readers' access to other competing publications," the "physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[67]

Despite placing exclusive emphasis on the physical characteristics of cable television, in stark contrast with *Red Lion*'s more nuanced cluster of rationales, *Turner I* did imitate *Red Lion*'s methodology in searching for a conduit-specific first amendment approach for cable. Neither of these aspects of *Turner I* controlled the high court's next cable case. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[68] decided in 1996, involved a battery of statutory obligations directing cable operators to enhance the ability of subscribers to avoid or reject "indecent" programming. No fewer than five opinions advocated distinct approaches to first amendment standards of review in a new communications medium. None commanded a majority of the Court.

Justice Breyer's plurality opinion for four Justices pointedly declared that "no definitive choice among competing analogies (broadcast, common carrier, bookstore)" could permit the Court "to declare a rigid single standard, good for now and for all future media and purposes."[69] Justice Stevens's concurrence declared it "unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as

64. *Id.* at 640.
65. *Id.* at 655.
66. *Id.* at 656.
67. *Id.* at 656.
68. 518 U.S. 727 (1996).
69. *Id.* at 741-42 (plurality opinion of Breyer, J.).

this."[70] Justice Souter, also writing separately in support of Justice Breyer's plurality opinion, noted that "[a]ll of the relevant characterstics of cable are presently in a state of technological and regulatory flux."[71] As "broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver," Justice Souter surmised, "we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others."[72] Combining his skepticism that "it will continue to make sense to distinguish cable from other technologies" with his faith that "changes in these regulated technologies will enormously alter the structure of regulation itself," Justice Souter confessed the "real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.'"[73]

Justice Kennedy excoriated the plurality for its refusal to anchor its analysis to existing first amendment models. "When confronted with a threat to free speech in the context of an emerging technology," he urged, the Court "ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles."[74] He went so far as to describe "the creation of standards and adherence to them" as "the central achievement of . . . First Amendment jurisprudence": "Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day."[75]

Despite disagreeing with Justice Kennedy on the particulars of the disputed indecency rules, Justice Thomas accepted Justice Kennedy's approach of adhering to established first amendment models. Condemning the "doctrinal wasteland" to which the Court had consigned the free speech rights of cable operators, Justice Thomas suggested "that cable operators should enjoy the same First Amendment rights as the nonbroadcast media."[76] He

70. *Id.* at 768 (Stevens, J., concurring); *cf.* MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 235 (1994) (Stevens, J., dissenting) ("The communications industry has an unusually dynamic character.").

71. *Denver*, 518 U.S. at 776 (Souter, J., concurring).

72. *Id.* at 776-77.

73. *Id.* at 777 (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995)).

74. *Id.* at 781 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

75. *Id.* at 785.

76. *Id.* at 813-14 (Thomas, J., concurring in part and dissenting in part). This passage represents a transparent allusion to former FCC chairman Newton Minow's

took pains to throttle *Red Lion*'s dictum that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[77] Concluding that *Turner I* had undermined *Red Lion*'s emphasis on "the rights of viewers, at least in the abstract" and "in the cable context," Justice Thomas declared that "[i]t is the [cable] operator's right that is preeminent."[78]

One term after *Denver*, the Court framed its approach for evaluating first amendment claims involving the Internet. True to form, the pivotal controversy hinged on the Telecommunications Act of 1996,[79] a statute that notoriously ignored the Internet[80] except as a pornographic medium.[81] *Reno v. ACLU*,[82] which challenged the Communications Decency Act (title V of the epochal 1996 Act), reinstated *Red Lion*'s multifaceted approach. The contrast with the doctrinal chaos of *Denver* was striking. The Court held that the Internet lacked three essential features that justified the relaxation of first amendment scrutiny in broadcasting: "the history of extensive Government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and [broadcasting's] 'invasive' nature."[83] Justice Stevens's opinion for the Court observed that "the vast democratic forums of the Internet" have never "been subject to the type of government supervision and regulation that has attended the broadcast industry."[84] In light of this medium's relative freedom from regulation, he detected no risk "that members of the [Internet community] might infer some sort of official or societal approval of" content on the Internet.[85] He also noted that "the Internet is not as 'invasive' as radio or television."[86] "Finally,"

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description of broadcast television as a "vast wasteland." *See* Newton N. Minow, *Address to National Association of Broadcasters* (1961), *quoted in* JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 198 (1991) *and reprinted in* NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT app. 2. at 188 (1995).

77. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969), *quoted in Denver*, 518 U.S. at 816 (Thomas, J., concurring in part and dissenting in part).

78. *Denver*, 518 U.S. at 816 (Thomas, J., concurring in the judgment in part and dissenting in part).

79. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

80. *See generally* John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093 (1996).

81. *See* Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 55 (1999) (noting that Congress paid more attention to the Internet's pornographic potential than any other aspect of what was then an emerging mode of communication).

82. 521 U.S. 844 (1997).

83. *Id.* at 868 (citations omitted).

84. *Id.* at 868-69.

85. *Id.* at 869 n.33.

86. *Id.* at 869.

Justice Stevens added, "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity."[87]

IV. EXIT THE LION

> You know it don't take much intelligence to get yourself into a nailed-up coffin . . . . But who in hell ever got himself out of one without removing one nail?
>
> - TENNESSEE WILLIAMS, THE GLASS MENAGERIE[88]

If it were not so firmly anchored in the law of broadcasting, *Red Lion* might serve admirably as a constitutional law mascot for all information platforms. Supplementing the justifications articulated by *Red Lion* with *Pacifica*'s "pervasiveness" rationale yields something quite close to the multifaceted approach endorsed in *Reno v. ACLU*: "the history of extensive Government regulation," "the scarcity of available" avenues for expression, and the contested medium's "invasive nature."[89] Throughout this jurisprudential sequence, the Supreme Court feels a palpable obligation to pay homage to *Red Lion*, if only to distinguish broadcasting from every new communications medium it encounters.

Indeed, the greatest doctrinal satisfaction comes from dissecting the exceptional cases in which the Court has either ignored or mishandled *Red Lion*. For instance, *Sable Communications, Inc. v. FCC*,[90] never pondered the appropriate application of *Red Lion* to "dial-a-porn" cases. Why did the Supreme Court forgo the "trivial ritual" of determining the proper level of first amendment scrutiny for restrictions on speech carried over telephone wires?[91] The answer is quite simple: carriage on two-way, switched telephone networks adds no expressive significance to sexually explicit messages. Sometimes a medium is just a medium.[92]

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87. *Id.* at 870.

88. WILLIAMS, *supra* note 4, at 27.

89. *Reno v. ACLU*, 521 U.S. at 868 (citations omitted).

90. 492 U.S. 115 (1989).

91. *Cf.* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1719 (1995) (describing the tendency of analysts to proclaim the convergence of "telecommunications technologies and media" as the field's favorite "trivial ritual").

92. *Contra* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964) ("The medium is the message.").

An even more striking treatment of *Red Lion* took place in the case that rejected it most emphatically. Alone among the high court's decisions since 1969, *Turner I* insisted that *Red Lion* involved nothing but physical scarcity, as though the decision to uphold the fairness doctrine rested solely on the physical characteristics of the electromagnetic spectrum. That assertion does not withstand a careful rereading of *Red Lion*. *Turner I* rightly declined to let first amendment analysis hinge solely on the presence of a monopoly in any speech market,[93] but it erred in insisting that "Congress granted must-carry privileges to broadcast stations [solely] on the belief that the broadcast television industry [was] in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry."[94] *Red Lion* at a minimum counsels consideration of "the Government's role in allocating . . . frequencies" and other planks of the information platform at issue.[95] Proper application of *Red Lion* would have directed the Court's attention to an extensive history demonstrating how "Congress preferred broadcasters over cable programmers based on the content . . . each group offers."[96]

A deeper problem, however, stems from *Red Lion*'s strategy of inspecting every novel communications medium as prelude to fixing the appropriate level of first amendment review. That aspect of *Red Lion* typifies what appears to be an extensive but imperfectly limned jurisprudence on *conduit*-based regulation of speech. Somewhere between the doctrinal extremes of presumptive strict scrutiny for content-based regulation of speech[97] and the radically weaker review drawn by restrictions on the time, place, or manner of speech,[98] lawmakers routinely subject specific *conduits* to regulations that may target the economic struc-

93. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640 (1994), *aff'd*, 520 U.S. 180 (1997).

94. *Id.* at 659.

95. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400 (1969).

96. *Turner I*, 512 U.S. at 658-59 (denying nonetheless that Congress expressed a content-based preference for broadcasting). *See generally* Jim Chen, *The Last Picture Show (on the Twilight of Federal Mass Communications Law)*, 80 MINN. L. REV. 1415 (1996); Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171 (2002).

97. *See*, *e.g.*, Erznoznick v. City of Jacksonville, 422 U.S. 205, 209 (1975); Cohen v. California, 403 U.S. 15 (1971).

98. *See*, *e.g.*, City of Renton v. Playtime Theatres, Inc. 475 U.S. 41, 47 (1986) ("[T]ime, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."); *see also*, *e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Kovacs v. Cooper, 336 U.S. 77 (1949).

ture of these information platforms but invariably also affect their underlying *content*. Systematically untangling that doctrinal mess vastly exceeds the scope of this article. It is difficult enough to bridge the temporal chasm between *Red Lion* and the ensuing battery of cases that confined *Red Lion* to its origins in broadcasting. "[T]ime," after all, "is the longest distance between two places."[99]

Red Lion made two crucial contributions to free speech jurisprudence. First, it declared that courts should study the characteristics of the conduit in which speech is transmitted and should be prepared if necessary to dilute constitutional protection for the expression of ideas. Second, it concluded that broadcasting, as a conduit, merited less rigorous first amendment review not only because of scarcity but also because the government played a prominent role in structuring the broadcast industry and because the public at large retained its interest in access to this unique, intensively regulated medium. Almost all of the judicial and academic objections to *Red Lion* have addressed scarcity, a concept that represented a mere fragment of the second holding. Whether *Red Lion*'s analysis of broadcasting may have been defective initially and whether that analysis is obsolete today are both beside the point. It is *Red Lion*'s prescription of conduit-based first amendment review—its implicit exhortation for the development of a separate jurisprudence on conduit-based regulation of speech—whose time has passed. Technology evolves, but the irreconcilable imperative of protecting expressive freedom while accommodating legitimate regulation will endure forever.

Only by stressing the dynamic over the static can we "find in motion what was lost in space."[100] Let us therefore bid farewell to *Red Lion*, flawed but faithful servant of the law. Across the decades *Red Lion* nursed the flames of a doctrine whose specific application to broadcasting was unjustly condemned and whose broader impact on free speech jurisprudence in a technologically dynamic world has gone unnoticed. "For nowadays the world is lit by lightning! Blow out your candles . . . - and so goodbye."[101]

99. WILLIAMS, *supra* note 4, at 96.
100. *Id.* at 97.
101. *Id.*