IT'S TIME TO END THE ZOMBIE REIGN OF *RED LION BROADCASTING*

CATHERINE J. CAMERON*

The Internet is hunkered down in a ramshackle cabin, and the only walls protecting it from the zombie case that is Red Lion Broadcasting Co. v FCC, 395 U.S. 367 (1969)*, are the walls constructed by section 230 of the Communication Decency Act. As a creature of legislation, those walls are flimsy and could crumble at any moment. And the* Red Lion Broadcasting *zombie is aggressive. The premises of the* Red Lion Broadcasting *case—that the government should be allowed to regulate the broadcast spectrum to promote the public interest because the spectrum is "scarce"—were proven wrong over forty years ago, but the case has been revived in zombie form and continues to lumber around the legal landscape seeking to infect new law. The only way to save the Internet and new technologies of the future from regulatory schemes based on strained notions of scarcity is for the Court to expressly overrule* Red Lion Broadcasting *and dispense with arguments that scarcity of any imagined kind warrants regulation of new media.*

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* Professor of Law, Stetson University College of Law. The author would like to thank Stetson University College of Law for the scholarship grant that supported this article.

I. INTRODUCTION

On January 8, 2021, President Donald J. Trump's Twitter account was suspended after he issued two tweets responding to the January 6, 2021, attack on the capitol building.[1] They read:

> The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!
>
> * * *
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> To all of those who have asked, I will not be going to the Inauguration on January 20th.[2]

That same day, Twitter issued a statement detailing how these tweets violated it's "Glorification of Violence policy, which aims to prevent the glorification of violence that could inspire others to replicate violent acts."[3] Within days, leaders of other countries decried the suspension. A spokesperson for German Chancellor, Angela Merkel, said the Chancellor found suspension of media accounts by private companies to be "problematic" and believed that suspending a person's ability to express themselves on social media should be a "framework defined by legislators."[4] French Junior Minister for European Union Affairs, Clément Beaune, said of the suspension, "I'm shocked by the fact that it is . . . entirely in private hands. It cannot be in private hands only" and that there should be a "public framework for regulation" of

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[1] X, *Permanent Suspension of @realDonaldTrump*, XBLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/Q6MX-HEHQ].
[2] *Id.*
[3] *Id.*
[4] ASSOCIATED PRESS, *Germany's Merkel: Trump's Twitter Eviction "problematic"* (Jan. 11, 2021, 7:29 AM), https://apnews.com/article/merkel-trump-twitter-problematic-dc9732268493a8ac337e03159f0dc1c9 [https://perma.cc/TE5V-9UMK].

social media.[5] French Finance Minister Bruno Le Maire and Mexican President Andrés Manuel López Obrador expressed similar concerns.[6]

Regulation of speech is always trickier in the United States than it is in other countries that don't have a right to free speech deeply entrenched in their law.[7] However, that hasn't stopped U.S. lawmakers from trying to find avenues to justify regulation of private social media companies. As these law makers scan the horizon for legal justifications to force private Internet companies to carry speech that supports their positions, they will inevitably discover the zombie[8] that is *Red Lion Broadcasting v. FCC*, a case that determined the Federal Communications Commission (FCC) can force broadcasters to provide equal time to opposing viewpoints because of the scarcity of the electromagnetic spectrum.[9] There have been calls over the years to kill this zombie by destroying its brain—dissecting the faulty logic that underlies the case and suggesting that the court expressly overrule the case.[10] But despite subsequent cases that implicitly overrule so much of the *Red Lion Broadcasting* case, the zombie continues to roam the legal landscape, threatening to spread to other cases if the right facts present themselves. And the right facts may have arrived in the social media landscape of the Internet.

This article will detail the regulatory history that led to the birth of the *Red Lion Broadcasting* case, the reasoning the Court used in its analysis, why that reasoning died, and the reanimation of the *Red Lion*

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[5] *Clement Beaune Says U.K. 'Not Fully Sovereign' After Brexit*, BLOOMBERG (Jan. 11, 2021), https://www.bloomberg.com/news/videos/2021-01-11/clement-beaune-says-u-k-not-fully-sovereign-after-brexit-video (Beaune is asked about the President Trump suspension at 13:25 timestamp).

[6] Mark Moore, *World Leaders Speak Out Against Twitter Suspending Trump's Account*, N.Y. POST (Jan. 12, 2021, 1:43 PM), https://nypost.com/2021/01/12/merkel-world-leaders-speak-out-against-trumps-twitter-ban/ [https://perma.cc/5HB8-2GN9].

[7] For a comparative look at the rights of free expression in the U.S. and other Western democracies, *see* Guy E. Carmi, *Dignity – The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity As a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 960–61 (2007) ("Currently, freedom of expression is considered a prominent right among virtually all Western democracies, yet its scale and scope vary among different systems. The United States is probably the most protective of (most) speech rights among Western democracies—a phenomenon that receives the label "American Exceptionalism.").

[8] Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of* Red Lion, 9 NW. J. TECH. & INTELL. PROP. 51, 51 (2010) (noting "[t]he logic of *Red Lion Broadcasting Co. v. FCC* (1969) has been widely acknowledged as fatally flawed for a generation. Yet, the verdict enjoys a rich and rewarding existence in the afterlife.").

[9] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

[10] *See* Hazlett et al., *supra* note 8.

Broadcasting corpse over the last 50 years. The potential for application of the principles from *Red Lion Broadcasting* to regulation of social media will then be explained to support the need for the U.S. Supreme Court to expressly overrule the case to end its zombie existence once and for all.

II. THE PROGENITOR OF *RED LION BROADCASTING*

The lineage of media regulation can be traced back to a specific technology—the telegraph. The federal money[11] involved in establishing the telegraph lines gave Congress a logical entry-point to regulating the technology.[12] Although telegraph receivers remained a product of private enterprise, the lines that connected the receivers were funded by Congress.[13] While lobbying Congress for the money to build telegraph lines, Samuel F.B. Morse, of "Morse code" fame, argued that the government should build the lines because the telegraph was a "public utility" that needed to be protected from "enriching the corporation at the expense of the bankruptcy of thousands."[14] Congress agreed, and began to exert its regulatory power over telegraph communications in 1857 when it passed legislation that established a rate structure for using telegraph lines to communicate messages.[15]

By the early 1900s, wireless telegraph technology was developed, which became particularly useful for ship communication.[16] There were several companies making telegraph technology at the time, and their systems were not compatible with each other.[17] There was also interference problems from the vast number of wireless telegraphs all

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[11] Part of the pitch to Congress by those interested in gaining federal funding for telegraph line construction was that telegraph lines were like the postal service—a necessary "public utility." JOHN R. BITTNER, LAW AND REGULATION OF ELECTRONIC MEDIA 3 (2d ed. 1994).

[12] *Id.* at 1. "Captain Samuel C. Reid, a mariner, petitioned Congress on January 25, 1837 for funding to build a telegraph between New York and New Orleans via Washington, DC." *Id.* It took six years, but Congress approved funding for building the first telegraph line from Washington to Baltimore on March 3, 1843. *Id.* at 6.

[13] *Id.* at 7. Notably, one of the fathers of the telegraph, Samuel F.B. Morse, offered to sell his rights to the telegraph to the government for $100,000 in 1844, but the government declined the offer. *Id.*

[14] *Id.* at 5–7.

[15] *Id.* at 10–11.

[16] *Id.* at 19.

[17] *Id.* This incompatibility problem spawned an international convention—the International Radiotelegraph Convention—to develop protocols so government vessels could talk to each other. *Id.*

trying to send signals at the same time.[18] The Titanic famously sent distress signals as it sank that were largely garbled because of interference from other wireless telegraph communications.[19] In an attempt to fix these issues, Congress passed the Wireless Ship Act of 1910 and the Radio Act of 1912, which required telegraph equipment to receive signals from rival companies and regulated how far signals could travel to reduce signal interference.[20] The task of issuing these licenses fell to the Secretary of Commerce and Labor.[21]

The technology of the radios we know today—a car radio, for instance, that can receive and play audio signals from a one central location if tuned to that location's frequency—began not long after the Radio Act was passed.[22] World War I and patent disputes delayed the development of the technology, but in 1920, the first radio programs were broadcast out of a station in Pittsburgh.[23] Within two years, there were so many users of the spectrum[24] that signal interference became a problem again.[25] Government stations, licensed commercial stations, often with badly tuned transmitters that took up far too much of the spectrum band,[26] and amateur radio broadcasters, many of whom functioned unlicensed, were all trying to use the same spectrum, causing

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[18] CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK xiii (2000).

[19] *Id.*

[20] DOCUMENTS OF AMERICAN BROADCASTING 12–14 (Frank J. Kahn ed., 4th ed. 1984). The Wireless Ship Act of 1910 mandated that a company installing telegraph equipment in a ship must ensure the equipment can "exchange . . . messages with shore or ship stations using other systems of radio-communication." *Id.* at 12. The Radio Act of 1912 required a license from the federal government to send messages on the broadcast spectrum. *Id.* at 18, 21.

[21] BITTNER, *supra* note 11, at 24. However, as noted in the case of *Hoover v. Intercity Radio Co., Inc.*, 286 F. 1003 (D.C. Cir. 1923), the language of the 1912 Act did not allow the Secretary to deny any application for a spectrum license to avoid signal interference, which, essentially, gutted one of the main purposes of the Act. *Id.* at 23–24.

[22] TILLINGHAST, *supra* note 18, at 28–29.

[23] *Id.*

[24] "Some historians of the period have estimated that at the end of 1920 there were fewer than 50,000 wireless receivers in the hands of the public, whereas just 13 months later there were between 600,000 and 1 million such sets." TILLINGHAST, *supra* note 18, at 41.

[25] BITTNER, *supra* note 11, at 23.

[26] "Listeners complained that KDKA [the first radio station, broadcast out of Pittsburgh, Pennsylvania] sometimes covered all the frequencies from 832.8kHz (where it was supposed to broadcast) down to 428.3kHZ." HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920–1960 15 (2000).

listeners of the technology to hear a garbled mess from their receivers. By 1927, Congress passed the Radio Act of 1927, which gave the Secretary of Commerce the right to deny licenses to entities he found were not "qualified" for a license.[27] The Act also created a commission within the Department of Commerce called the Federal Radio Commission (FRC).[28] The FRC had the power to assign radio spectrum to licensees and hold hearings if disputes arose over signal interference.[29] And Congress directed the FRC to assign the spectrum in a manner that served the "public convenience, interest, or necessity."[30]

In 1934 came the passage of the Communications Act, which created the Federal Communications Commission.[31] The FCC was to be a separate government authority that took the place of the FRC.[32] The 1934 Act incorporated much of the 1927 Act, including the directive to make decisions that "promote public convenience or interest or will serve public necessity."[33] The FCC was also directed to govern wired and wireless communication, which means that the modern FCC has evolved to regulate wireless telephone operators, radio and broadcast stations, cable providers, and Internet transmissions.[34]

The FCC took its directive to work in the "public interest" to heart, and in 1940 renewed a license to The Yankee Network to continue its radio programming in Boston, Massachusetts only after the station promised to stop airing editorials designed "to win public support for some person or view favored by those in control of the station."[35] The FCC noted:

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[27] BITTNER, *supra* note 11, at 26.
[28] *Id.*
[29] *Id.*

> Control over frequency, power, and times of operation was covered by the act, giving the FRC power to: "Assign bands of frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate." Coverage areas for stations were to be fixed by the FRC . . . . *Id.* (citing Section 4 of the Radio Act of 1927).

[30] Radio Act of 1927, Pub. L. No. 69-632, § 4.
[31] Communications Act of 1934, Pub. L. No. 73-416, 47 U.S.C. § 151–614.
[32] *Id.* at § 151.
[33] *Id.* at § 303(f).
[34] *Id.* at § 152; *What We Do*, FED. COMMC'NS COMM'N, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/NV5H-6G68].
[35] Mayflower Broad. Corp. v. Yankee Network, Inc., 8 F.C.C. 333, 339 (1940).

> [W]ith the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.
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> Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. And while the day-to-day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission.[36]

By 1948, the FCC had grown wary of this ban on one-sided editorializing and issued a report, termed the Fairness Doctrine, that reversed its previous position on editorials.[37] The report noted that the "public interest" standard imposed on the FCC a duty to "insure the fair and balanced presentation of all public issues."[38] And the FCC reasoned that "licensee editorialization, within reasonable limits and subject to the general requirements of fairness . . . is not contrary to the public

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[36] *Id.* at 340.
[37] FED. COMMC'NS COMM., EDITORIALIZING BY BROADCAST LICENSEES (1949), https://docs.fcc.gov/public/attachments/DOC-295673A1.pdf.
[38] *Id.* at ¶ 10.

interest."[39] The FCC refused to give specific guidance on how this "fair and balanced presentation" could be accomplished, writing:

> Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view.[40]

Later FCC rulings and case law dictated that the air time had to be provided free of charge if a candidate couldn't afford to pay for the time.[41]

In 1959 Congress partially codified the Fairness Doctrine by amending § 315 of the Communications Act to indicate that if "any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[42] However, the amendment specifically excluded coverage of candidates on a news broadcast from this calculation of equal time, due, in part, to the FCC's desire that coverage of news conventions not trigger a need to give equal time to opposing candidates.[43]

As the FCC and Congress ratcheted up the regulation on the spectrum, pundits began to pick at the underlying logic behind these regulations. In 1959, economist Ronald Coase pointed out that all resources are finite, but that is a justification for ownership going to the

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[39] *Id.* at ¶ 13.
[40] *Id.* at ¶ 10.
[41] *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110–11 (1973) ("In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, and it must initiate programming on public issues if no one else seeks to do so." (internal citations omitted)).
[42] 47 U.S.C. § 315(a).
[43] *Id.*; Off. of Commc'n of United Church of Christ v. FCC, 590 F.2d 1062, 1066 (D.C. Cir. 1978) ("The exemption in question developed in some measure from a congressional desire to protect news coverage of national political conventions from the equal time doctrine.").

highest bidder for the resource, not government regulation.[44] Coase argued that the marketplace can sort out scarce resource issues.[45] Just as owners of land vie for those ownership rights through the purchase of such land, so too could spectrum owners.[46] This, Coase argued, is why the spectrum chaos was occurring prior to government regulation—not because government regulation was needed but because property rights were needed to create a traditional supply and demand structure for the spectrum marketplace.[47]

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[44] R.H. Coase, *The Federal Communications Commission*, 56 J.L. & ECON. 879, 897 (2013).

> Despite all the efforts of art dealers, the number of Rembrandts existing at a given time is limited; yet such paintings are commonly disposed of by auction. But the works of dead painters are not unique in being in fixed supply. If we take a broad enough view, the supply of all factors of production is seen to be fixed (the amount of land, the size of the population, etc.).

[45] *Id.*

> Producers in a particular industry can obtain more of any resource they require by buying it on the market, although they are unlikely to be able to obtain considerable additional quantities unless they bid up the price, thereby inducing firms in other industries to curtail their use of the resource. This is the mechanism which governs the allocation of factors of production in almost all industries. Notwithstanding the almost unanimous contrary view, there is nothing in the technology of the broadcasting industry which prevents the use of the same mechanism.

[46] *Id.* at 891.

> If one person could use a piece of land for growing a crop, and then another person could come along and build a house on the land used for the crop, and then another could come along, tear down the house, and use the space as a parking lot, it would no doubt be accurate to describe the resulting situation as chaos. But it would be wrong to blame this on private enterprise and the competitive system. A private enterprise system cannot function properly unless property rights are created in resources, and, when this is done, someone wishing to use a resource has to pay the owner to obtain it.

[47] *Id.* at 902.

> The main reason for government regulation of the radio industry was to prevent interference. It is clear that, if signals are transmitted simultaneously on a given frequency by several people, the signals would interfere with each other and would make reception of the messages transmitted by any one person difficult, if not impossible. The use of a piece of land simultaneously for growing wheat and as a parking lot would produce similar results. As we have seen in an earlier section, the way this situation is avoided is to create property rights (rights, that is, to exclusive use) in land. The creation of

III. THE BIRTH OF *RED LION BROADCASTING*

It was in this legal landscape that the *Red Lion Broadcasting* case entered the world. *Red Lion Broadcasting*, like many a speech case, was born of political rhetoric—this time speech occurring prior to the presidential election of 1964.[48] In November of 1964, Democrat Lyndon B. Johnson won the U.S. Presidential election, defeating the Republican nominee, Barry Goldwater. On November 27, 1964, several weeks after the election, WGCB, a radio station in Red Lion, Pennsylvania devoted to religious programming, aired a radio program titled "Christian Crusade."[49] WGCB was owned by Red Lion Broadcasting Company.[50] Reverend Billy James Hargis used this episode of "Christian Crusade" to discuss a book by Fred J. Cook titled *Goldwater–Extremist on the Right*.[51] During that discussion, Hargis made several claims about Cook's employment history as a journalist and author, including that he was "fired by a newspaper for making false charges against city officials; that [he] 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.'"[52] Cook requested WGCB to give him free time on the air to reply to Hargis's statements, pursuant to the dictates of the Fairness Doctrine, but WGCB refused the request.[53] Cook complained to the FCC, and the FCC agreed

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> similar rights in the use of frequencies would enable the problem to be solved in the same way in the radio industry.

[48] TILLINGHAST, *supra* note 18, at 65.

[49] Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 371 (1969).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Red Lion Broad. Co. v. FCC, 381 F.2d 908, 912 (D.C. Cir. 1967). The opinion of the lower court noted that when Cook asked for time on WGCB to respond to the comments made about him by Hargis, Cook was given a rate card by the station and told he could have time if he paid for it, but Cook thought he deserved the time for free under the FCC decision of *Cullman Broad. Co. Inc.*, which determined that,

> where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation. *Id.* at 926 (emphasis added) (quoting Cullman Broad. Co. Inc., 40 F.C.C. 576, 577 (1963)).

that WGCB had failed to comply with the requirements of the Fairness Doctrine because WGCB had not notified Cook of the allegations made in the broadcast nor offered him reply time.[54]

Instead of complying with the FCC's directives, Red Lion Broadcasting sued Cook in federal court. The FCC, in return, noticed that it would be reconsidering its rules regarding political editorials while the case was pending.[55] After several rounds of amendments,[56] the FCC regulation on "Personal attacks [and] political editorials" (PAPE) was enacted in 1967.[57] The regulation required any station granted a license to a portion of the spectrum to notify anyone whose "honesty, character, integrity, or like personal character" had been impugned on the station's airwaves and to give the person an opportunity to respond on its piece of the spectrum, unless that slight came within the context of a news story or from an opposing candidate in an election.[58] Additionally, if the station endorsed a candidate, it must provide similar notice to an opposing candidate and an opportunity to respond.[59]

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[54] *Red Lion Broad.*, 395 U.S. at 372.

[55] *Id.* at 373.

[56] *Id.* These amendments were largely in response to litigation begun by the RTNDA.

[57] *Id.* at 373, 378.

[58] *Id.* at 373–74.

> "Personal attacks; political editorials.
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> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked
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> (1) notification of the date, time and identification of the broadcast;
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> (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack, and
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> (3) an offer of a reasonable opportunity to respond over the licensee's facilities." (citing 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679).

[59] *Id.* at 374–75.

> "(c) Where a licensee, in an editorial,
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> (i) endorses or
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> (ii) opposes a legally qualified candidate or candidates,
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> the licensee shall, within 24 hours after the editorial, transmit to respectively
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> (i) the other qualified candidate or candidates for the same office or

While the *Red Lion Broadcasting* case was moving through the court system, the Radio Television News Directors Association (RTNDA), along with several spectrum licensees, challenged the constitutionality of the PAPE regulations, claiming the regulations violated the stations' First Amendment freedom of speech and press.[60] The U.S. Supreme Court decided to consolidate the *Red Lion Broadcasting* case and the RTNDA case to allow it to assess the constitutionality of the Fairness Doctrine and PAPE regulations at the same time.[61]

In a unanimous opinion,[62] the Court began the *Red Lion Broadcasting* opinion by focusing on scarcity. The Court recounted the chaos that was the use of the spectrum before government control of the spectrum began in the 1920s.[63] Government regulation is the savior of the spectrum, according to the Court, noting "[w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."[64] The Court noted that the Fairness Doctrine imposed two duties on a licensee, to "give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views."[65]

> (ii) the candidate opposed in the editorial
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> (1) notification of the date and the time of the editorial;
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> (2) a script or tape of the editorial; and
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> (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities:
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> Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." (citing 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679).

[60] Radio Television News Dir.'s Ass'n v. United States, 400 F.2d 1002, 1004, 1010 (7th Cir. 1968).

[61] *Red Lion Broad.*, 395 U.S. at 370–71.

[62] *Id.* at 401. Justice Douglas took no part in the opinion because he was unavailable for oral arguments.

[63] *Id.* at 375 ("Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.").

[64] *Id.* at 376.

[65] *Id.* at 377–78.

> There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees. The broadcaster must give adequate coverage to public

The Court acknowledged that the PAPE regulation imposed even more duties on the licensee than the Fairness Doctrine did because, under the PAPE rules, the licensee had to give the opportunity to respond to the injured party, not just present a balanced response themselves or by any third party,[66] but the Court found this difference was not "critical" in assessing the constitutionality of the regulations[67] and found the enhancement "reasonable" because the best response would come from the injured party itself.[68] The Court then summarily found that the FCC had "expansive" powers given to it by Congress, that those powers encompassed the regulations at issue in the case,[69] and that these regulations were in line with the FCC's duty to work in the "public interest."[70] Additionally, the Court noted that Congress

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> issues, and coverage must be fair in that it accurately reflects the opposing views. This must be done at the broadcaster's own expense if sponsorship is unavailable. Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *Id.* (internal citations omitted).

[66] *Id.* at 378.

[67] *Id.* at 378–79.

> The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

[68] *Id.*

[69] *Id.* at 379. The Court reasoned:

> The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions as may be necessary to carry out the provisions of this chapter." The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, renewing them, and modifying them. Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest. This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," whose validity we have long upheld. It is broad enough to encompass these regulations. *Id.* at 379–80 (internal citations omitted).

[70] *Id.* at 380.

clearly approved of the Fairness Doctrine because it partially ratified it in § 315 of the Communications Act.[71]

The Court acknowledged the regulations likely infringed on a broadcast licensee's First Amendment right to free speech.[72] However, the Court reasoned that regulations that infringe on free speech are appropriate when they prevent one party from infringing on the free speech of another party.[73] The Court found the free speech rights of the licensees must be subservient to the free speech rights of others because the scarcity of the spectrum meant that a fortunate licensee represented all of the licensees who can't have that spectrum, and therefore, the licensee functions as a "public trust."[74] The Court performed a slight-of-hand trick by claiming that the First Amendment rights of the "people as a whole" were preserved by this regulatory scheme, even if the First Amendment rights of individual broadcasters were trampled on in the process.[75] After acknowledging that the regulations likely infringed on the broadcasters' First Amendment rights, the Court fell back on the "purpose" of the First Amendment being to preserve the "marketplace of ideas" as a valid reason for the broadcasters losing those rights.[76] The Court ends it's reasoning for why broadcasters lose

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> This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard.

[71] *Id.* at 381–82 ("Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.").
[72] *Id.* at 386.
[73] *Id.* at 387 ("The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.").
[74] *Id.* at 383. "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id.* at 386 (internal citations omitted). "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." *Id.* at 394.
[75] *Id.* at 390.

> But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

[76] *Id.* at 394 ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance

their First Amendment rights in this process by indicating that the right of the people to open and robust debate on public issues may not be constitutionally abridged by the FCC nor Congress, which is ironic in light of the fact that this particular concept is not expressly stated in the Constitution like the broadcasters' rights that the *Red Lion Broadcasting* opinion decimated.[77]

The Court noted the concern that the notice and reply obligations the Fairness Doctrine and the PAPE regulations impress on broadcasters might cause stations to "self-censor," by avoiding covering topical issues for fear of having to provide reply time, but the Court brushed this concern aside indicating that no such issues had happened under the tenure of the Fairness Doctrine, and those issues could be dealt with later on if they materialized.[78] The Court impliedly promised to reconsider the constitutionality of the regulations "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage."[79]

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monopolization of that market, whether it be by the Government itself or a private licensee.") Additionally, the Court reasoned:

> 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. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect. *Id.*

[77] The Court did not cite any precedent when it declared: "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. That right may not constitutionally be abridged either by Congress or by the FCC." *Id.* at 390.

[78] "And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect." *Id.* at 393.

[79] *Id.*

IV. THE DEATH OF *RED LION BROADCASTING*

In the 1980s, political pressure mounted on Congress and the FCC[80] to abolish the Fairness Doctrine.[81] In 1984, The Supreme Court acknowledged these criticisms of the fairness doctrine and the scarcity premise of *Red Lion Broadcasting*. In *FCC v. League of Woman Voters*, the Court held that a statute prohibiting noncommercial educational stations from editorializing violated the First Amendment.[82] Although the Court recognized in this case that Congress "ha[d] power to regulate the use of this scarce and valuable national resource," the Court determined that a statute that only prohibited a station receiving public funds from editorializing was not narrowly tailored enough to survive constitutional scrutiny when there was no similar statute preventing editorializing by commercial stations not receiving public funds.[83] But buried in footnote eleven of the opinion was an indication that the Supreme Court was beginning to rethink the premise *Red Lion Broadcasting* was built on.[84] Footnote eleven of the opinion acknowledged the increased scrutiny the FCC had given to the scarcity rationale, and indicated that the Court recognized the technology changes might necessitate a reconsideration of the spectrum regulation paradigm.[85]

The FCC reacted to the criticisms of the Fairness Doctrine in 1984 as well. That year, the FCC initiated an inquiry into the continued

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[80] This was the era of deregulation brought on by the election of President Ronald Regan. *See* TILLINGHAST, *supra* note 18, at 86–93.

[81] DONALD J. JUNG, THE FEDERAL COMMUNICATIONS COMMISSION, THE BROADCAST INDUSTRY, AND THE FAIRNESS DOCTRINE 1981–1987 25–98 (1996).

[82] FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984).

[83] *Id.* at 376.

[84] *Id.* at 376 n.11.

[85] *Id.*

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required. *Id.* (internal citations omitted).

viability of the Fairness Doctrine.[86] The FCC noted that there were three main reasons it originally found the Fairness Doctrine to be in the public interest:

> First, in light of the limited availability of broadcast frequencies and the resultant need for government licensing, we conclude that the licensee is a public fiduciary, obligated to present diverse viewpoints representative of the community at large . . . [s]econd we presume that a governmentally imposed restriction on the content of programming is a viable mechanism . . . by which to vindicate this public interest . . . [and t]hird, . . . the fairness doctrine, in operation, has the effect of enhancing the flow of diverse viewpoints to the public.[87]

However, after the inquiry process, in which more than 100 formal comments and an undisclosed amount of informal comments were submitted, and the FCC heard two days of live testimony, the FCC determined the Fairness Doctrine no longer served the public interest.[88] Although the FCC acknowledged there was still an interest in the public receiving diverse viewpoints, it found that the Fairness Doctrine was not the correct "means" for accomplishing this goal because the Fairness Doctrine "actually inhibit[ed] the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists."[89]

Also in the report, the FCC acknowledged that the *Red Lion Broadcasting* Court found that the Fairness Doctrine was constitutional, but the FCC noted that the decision was based on the faulty premise that the doctrine promoted a diversity of viewpoints. [90] After reviewing the evidence, the FCC concluded that there were multiple layers to the chilling effect on coverage of controversial issues. First, there was the fear of the cost and effort necessary for broadcast stations to comply with giving equal airtime to diverse viewpoints on a controversial

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[86] Inquiry into Section 73.1910 of the Comm'n's Rules and Reguls. Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C. 2d 145 (Aug. 23, 1985), https://www.worldradiohistory.com/Archive-FCC/FCC-Fairness-Report-1985.pdf.
[87] *Id.* at 146–47.
[88] *Id.* at 146.
[89] *Id.* at 147.
[90] *Id.* at 150–51.

issue.[91] If a station chose to cover a controversial issue, it had to, then, allow time to the opposing view, which may have to be offered for free, and the station may even have to front the cost of developing programming to allow for the opposing issue to be covered.[92] Additionally, the station could be fined, lose its license, or have its reputation damaged by an accusation that it hadn't complied with the Fairness Doctrine.[93] It might have also cost the station if it had to fight a Fairness Doctrine charge in front of the FCC or in court.[94] Ultimately, the fear of the potential effort and monetary loss the station would suffer to fully cover a controversial topic meant that the stations avoided covering controversial topics. The FCC report detailed many specific instances where stations didn't air controversial issues[95] or developed policies regarding avoiding airing controversial issues to avoid triggering the Fairness Doctrine.[96] The report pointed out that broadcasters' desire not to trigger its obligations under the Fairness Doctrine might even cause stations to avoid issues that wouldn't even rise to the level of a "controversial issue of public importance."[97]

The FCC also stated in the report that the changes in the media marketplace at that time required the FCC bring an end to applying

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[91] *Id.* at 163.

[92] *Id.* ("Typically, upon a finding that a licensee has violated the fairness doctrine, we order the broadcaster to provide additional programing in order to redress the balance in time and frequency given to one side of a controversial issue.").

[93] *Id.* at 162–69.

[94] *Id.* at 162–67.

[95] One story was attributed to CBS news anchor, Dan Rather:

> I can recall newsroom conversations about what the FCC implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost." *Id.* at 171.

[96] Many stations detailed that they don't sell or limit advertising on ballot initiatives. *Id.* at 174–75. Additionally, the report notes there are reports of stations avoiding covering stories on the nuclear arms race, issues with religious organizations, and pay for government workers, for fear of triggering the fairness doctrine. *Id.* at 172–74.

[97] *Id.* at 183.

> As a consequence, the broadcaster, in order to avoid even the possibility of litigation, may be deterred from airing material even though the Commission, after hearing all the evidence, would have concluded that the program did not trigger fairness doctrine obligations. Indeed, the uncertainty as to whether or not a broadcast contains information which rises to the level of a controversial issue of public importance may itself have an inhibiting effect.

different regulatory standards to broadcast than print communications.[98] In the decade that had passed between the creation of the Fairness Doctrine and the date of this report, cable television had become ubiquitous, the number of radio and television stations had increased significantly,[99] and print media continued to be a popular news outlet.[100] The FCC noted that television broadcasting was still the dominant media but said: "We do not believe that the purported dominance of one media voice necessarily detracts from the significance of other voices with respect to the availability of antagonistic and diverse sources of information."[101] It took two more years after this scathing report on the continued viability of the doctrine, but in 1987, the FCC finally voted to abrogate the Fairness Doctrine.[102]

Notably, the PAPE rules died in a different manner than the Fairness Doctrine. In 1983, the FCC responded to a petition for reconsideration of the PAPE rules' continued viability, by issuing a Notice of Proposed Rule Making that stated the FCC found that the petitioner had made a "compelling case that the personal attack and political editorial rules do not serve the public interest.[103] However, in 1997 and, again, in 1998, the FCC expressed that it was deadlocked on the issue of whether to repeal the rules.[104] The D.C. Circuit reviewed a claim that the abrogation of the Fairness Doctrine necessarily included an abrogation of the PAPE rules, but the court found that the PAPE rules were separate and distinct from the Fairness Doctrine and not affected by the death of the Fairness Doctrine.[105] The court noted that it couldn't uphold the PAPE rules because the FCC had not submitted enough of a justification for the rules serving the public interest, so the court

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[98] *Id.* at 155–57.

> While it is true that the limited availability of the electromagnetic spectrum may constitute a per se justification for certain types of government regulation, such as licensing, it does not follow that all other types of governmental regulation, particularly rules which affect the constitutionally sensitive area of content regulation, are similarly justified. *Id.* at 157.

[99] The report detailed a 48% increase in the number of radio stations since the *Red Lion Broadcasting* case was decided and a 44.3% increase in the amount of television stations. *Id.* at 202–04.

[100] *Id.* at 198, 200.

[101] *Id.* at 199.

[102] Syracuse Peace Council v. WTVH, 2 FCC Rcd. 5043 (Aug. 6, 1987).

[103] Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28,295, at ¶ 52 (June 21, 1983) (to be codified at 47 C.F.R. pt. 73).

[104] Radio-Television News Dir. Ass'n v. FCC, 184 F.3d 872, 878 (D.C. Cir. 1999).

[105] *Id.* at 887 ("[T]here is nothing inherently inconsistent about preserving the two challenged rules despite abrogation of the fairness doctrine.").

remanded the case to the FCC to consider whether the rules should continue.[106] In response to the D.C. Circuit opinion, the FCC decided to bring an end to the life of the PAPE rules in 2000 by repealing them.[107]

Despite the FCC's repudiation of the Fairness Doctrine and PAPE rules, one vestige of these rules did linger for a few decades before it was put to sleep. In 1970, a counselor to the Senate Commerce Committee, Nicholas Zapple, argued that the Fairness Doctrine demanded that broadcasters give equal time to supporters of candidates that were granted airtime.[108] Forever known as the Zapple Doctrine, there was some controversy about whether the FCC's decision to end the Fairness Doctrine also ended the applicability of the Zapple Doctrine. In 2014, the FCC clarified that the Zapple Doctrine died when the Fairness Doctrine was upended in 1987.[109]

The only piece of equal-time law that remains after the FCC's decision that these types of regulations do not function in the "public interest" is the 1959 partial codification of the Fairness Doctrine by Congress in § 315 of the Communications Act. However, that law has been modified in several significant ways, indicating that it is as practically problematic as the Fairness Doctrine and the Personal Attack and Political Editorial rules were. In addition to the original caveat in the law that the law didn't apply to news shows, documentaries, political debates, and talk shows have also been exempted.[110] Despite

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[106] "The FCC's failure to address relevant factors, distinguish applicable precedents, and explain the scope of its rules despite acknowledging that the rules might be too broad renders meaningful judicial review impossible because the court lacks a coherent rationale against which to weigh petitioners' factual, policy, and constitutional claims." *Id.*

[107] Personal Attack and Political Editorial Rules, 15 FCC Rcd. 20697 (Oct. 26, 2000) (repeal or modification).

[108] Fed. Commc'ns Comm'n, Reply Letter to Complaint Against Capstar TX LLC (May 8, 2014), https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0508/DA-14-621A1.pdf.

[109] *Id.*

> [W]e note that we have no basis to enforce the Zapple Doctrine. The doctrine was based on an interpretation of the fairness doctrine, which the Commission abrogated in Syracuse Peace Council in 1987 after concluding that it no longer served the public interest, was not statutorily mandated, and was inconsistent with First Amendment values.

[110] Eriq Gardner, *Anderson Cooper's Talk Show Is a News Program, FCC Rules*, HOLLYWOOD REP. (Dec. 24, 2011), https://www.hollywoodreporter.com/business/business-news/anderson-cooper-talk-show-269175/ [https://perma.cc/Z8TG-K5DN].

these attempts to limit the application of the law, stations have had to pull syndicated shows in recent years that happen to have hosts that later run for office because airing the show would require giving equal time to opposing candidates on the channel's schedule.[111]

The Supreme Court, for its part, did not choose to extend the *Red Lion* Doctrine to print media when given the opportunity. In 1974, the Court took up the case of *Miami Herald v. Tornillo*, in which the Court reviewed a Florida law requiring newspapers to give equal space to opposing political candidates unconstitutional. The Court noted that there had been consolidation of newspapers in many large cities by the time the case was being decided, which reduced the number of diverse viewpoints the public was privy to.[112] In language eerily similar to the language of those complaining about media conglomeration of radio and TV that lead to the Fairness Doctrine, the Court wrote:

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

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[111] Stephen Battaglio, *Here's What Happens to Dr. Oz's Talk Show Now That He's Running for Senate*, L.A. TIMES (Nov. 30, 2021), https://ca.sports.yahoo.com/news/heres-happens-dr-ozs-talk-234113950.html [https://perma.cc/LST2-RL96].

[112] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 249–50 (1974).

> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

> "This concentration of nationwide news organizations—like other large institutions—has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them."
>
> Appellee cites the report of the FCC on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that "(t)he right of free public expression has . . . lost its earlier reality."
>
> The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to [e]nsure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.[113]

Despite the Court's acknowledgement that "[a] responsible press is an undoubtedly desirable goal," the Court reasoned that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[114] Additionally, the Court noted that this kind of requirement would likely limit public discourse because it would deter newspapers from giving any space to any political candidates for fear of having to provide space to an opponent.[115]

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[113] *Id.* at 253 (internal citations omitted).

[114] *Id.* at 256.

[115] *Id.* at 257.

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the

Although the Court did not note the correlation, its prediction of a dampening of political discourse by an equal-time/space requirement had already been born out in the FCC's 1985 report that abrogated the Fairness Doctrine. The Court did not choose to balance the editorial rights of the newspapers against the public's right to receive balanced news. Instead, it simply indicated that requiring newspapers to print responses from political opponents infringed on a newspaper's editorial control, which is protected speech under the First Amendment, and was, therefore, not a constitutional requirement.[116]

V. REANIMATION OF *RED LION BROADCASTING*

Although the FCC has put the Fairness Doctrine and the PAPE rules down, they never fully affixed the nails to the coffin of the doctrine, so it's reanimation was inevitable. Months before the FCC abrogated the Fairness Doctrine, Congress attempted to preserve the doctrine by codifying it.[117] The Fairness in Broadcasting Act of 1987 passed by both houses of Congress in June of 1987, but President Reagan vetoed the legislation, commenting at the time that he did so because he felt the law conflicted with the freedom of speech.[118]

Congress and the courts have taken a similar approach to the Internet as they have with print media and have allowed the Internet to grow relatively regulation-free.[119] This may be because, unlike television and radio, there isn't a limitation of the space with which to communicate messages on the Internet like there is on the radio and broadcast spectrum. However, there have been situations where two entities wanted to share the same communication space on the

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> Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate." *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

[116] *Id.* at 258.

[117] JUNG, *supra* note 81, at 158–63.

[118] Press Release, Ronald Reagan, Message to the Senate Returning Without Approval the Fairness in Broadcasting Bill (June 19, 1987) ("S.742 simply cannot be reconciled with the freedom of speech and the press secured by our constitution. Well-intentioned as S. 742 may be, it would be inconsistent with the First Amendment and with the American tradition of independent journalism. Accordingly, I am compelled to disapprove this measure.").

[119] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

Internet.[120] Resolutions for these conflicts were often mediated by the courts under the property rights theories that many commentators have pushed for in the broadcast spectrum arena.[121]

By the early 90s, Internet platforms were beginning to be punished for the sins of their users.[122] In order to curb this liability, § 230 of the Communications Decency Act was passed.[123] Although other portions of the Act were later found unconstitutional, section 230 remains in effect and has been called the "backbone of the Internet" because it has allowed Internet sites to innovate and grow free of any fear of liability.[124] Section 230 provides immunity to websites, including social media platforms, for the many wrongs that can be perpetrated on their sites by users, like defamation, copyright infringement, and communications of a criminal nature.[125] Many commentators have argued that the Internet would not have grown as fast as it has without the protection of section 230.[126]

Section 230 has created a much different framework for the Internet to grow in the U.S. than that which haunts the broadcast spectrum.[127] Other than the occasional arguments over domain names, there is room, in theory, for all voices on the Internet if there are

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[120] *See generally* Daniel Hancock, *You Can Have It, But Can You Hold It?: Treating Domain Names as Tangible Property*, 99 KY. L.J. 185, 187 (2011) (analyzing attempts by courts to treat domain disputes under contract, property, and tort law); Kremen v. Cohen, 337 F.3d 1024 (9th Cir. 2003).

[121] Hancock, *supra* note 120, at 202.

[122] *See, e.g.*, Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (finding the owner of an online bulletin board liable for copyright infringements perpetrated by the board's users); Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (finding the owner of another online bulletin board responsible for libel perpetrated on the board by a third party).

[123] *Zeran*, 129 F.3d at 330.

[124] Haliman Prado, *Gonzalez v Google and the Future of an Open, Free and Safe Internet*, GOOGLE: THE KEYWORD (Jan. 12, 2023), https://blog.google/outreach-initiatives/public-policy/gonzalez-v-google-and-the-future-of-an-open-free-and-safe-internet/ [https://perma.cc/2RET-LB2J].

[125] 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[126] *See generally* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639 (2014).

[127] *Section 230*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 [https://perma.cc/P2PV-NHAL] ("When Section 230 was passed in 1996, about 40 million people used the Internet worldwide. By 2019, more than 4 billion people were online, with 3.5 billion of them using social media platforms. In 1996, there were fewer than 300,000 websites; by 2017, there were more than 1.7 billion.").

unlimited servers that can house Internet domains.[128] However, while there may not be physical space limitations that plague communicators on the Internet, there are gatekeeping barriers set up by the owners of Internet platforms, particularly on social media. YouTube, Facebook, Twitter, and TikTok all have platform rules that must be complied with, or content is removed and accounts are suspended.[129] Despite these attempts by the platforms themselves to monitor and control the content shared on the platforms, there have been calls by the public, academics, and lawmakers to increase government oversight.[130]

In 2021, CEO of Facebook, Mark Zuckerberg testified before the House Energy and Commerce Committee.[131] During his testimony, Zuckerberg argued for changes to section 230 that would require social media companies to create content moderation policies and protocols to avoid liability for the wrongs done on the platforms by users.[132] These policies and protocols could be costly, so Zuckerberg may have been motivated to argue for these requirements as a financial barrier to keep startups from entering the field, but he is certainly not alone.[133] A report by the Government Research Service on section 230 noted that twenty-six bills were submitted in the 116th Congress (2020) seeking to reform section 230 in some way, and several other bills were introduced that sought to completely repeal the law.[134] The Department of Justice, the FCC, and even the President weighed in on reform to section 230 as

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[128] Reno v. Am. C.L. Union, 521 U.S. 844, 870 (1997) ("[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.").

[129] For a discussion of Terms of Service contracts, *see* Jacquelyn E. Fradette, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*, 89 NOTRE DAME L. REV. 947, 958–59 (2013).

[130] Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597 (2019); Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. SCI. & TECH. L. 193, 195–97 (2018).

[131] Dylan Byers, *Zuckerberg Calls for Changes to Tech's Section 230 Protections*, NBC NEWS (Mar. 24, 2021), https://www.nbcnews.com/news/amp/rcna486 [https://perma.cc/P2PV-NHAL].

[132] *Id.*

[133] Aaron Mackey, *Facebook's Pitch to Congress: Section 230 for Me, but Not for Thee*, ELEC. FRONTIER FOUND. (Mar. 24, 2021), https://www.eff.org/deeplinks/2021/03/facebooks-pitch-congress-section-230-me-not-thee [https://perma.cc/Q2ES-G6UR].

[134] VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 30 (2021).

well during that same Congressional session.[135] In the end, no changes were made to section 230, but the calls for reform continue to grow louder.[136]

Perhaps not surprisingly, the *Red Lion Broadcasting* zombie lurks in these reform conversations. The same Government Research Service report that discussed the section 230 reform proposals, mentions that government regulation of communication is not unprecedented as *Red Lion Broadcasting* gives the government legs to stand on when regulating communications on the broadcast spectrum because "[t]he public interest is paramount . . . [a]nd while the day to day decisions applying these requirement are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the FCC."[137]

Red Lion Broadcasting has also popped up in the ongoing Net Neutrality debate. Net Neutrality is the phrase used to describe government regulations requiring Internet carriers to transmit all websites to end users at the same download speeds.[138] Without a government mandate to this effect, the fear is that Internet content creators could monetarily incentivize Internet providers to slow down the download speeds for competitors' content in the hopes that end-users will become aggravated with the slow speed and view different content.[139] Even though the *Red Lion Broadcasting* case preceded the Internet and expressly applied only to the radio and broadcast spectrum, FCC Chairman Robert McDowell has warned that the Fairness Doctrine could be applied to the Internet through legislation by intertwining it

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 47 n.477; Mayflower Broad. Corp. v. Yankee Network, Inc., 8 F.C.C. 333, 340 (May 29, 1940).

[138] Robbie Troiano, *Assessing the Current State of Net Neutrality and Exploring Solutions in Creating and Maintaining Open, Available, and Innovative Internet and Broadband Services*, 14 J. BUS. & TECH. L. 553, 555–56 (2019).

> At its most basic level, net neutrality involves the level of control that ISPs can exercise over American citizens' Internet usage. A commonly cited example of a net neutrality violation would involve an ISP deliberately slowing down Internet speeds for certain websites, thereby steering traffic to another website. The ISP would theoretically profit by doing so, and federal regulators would work to regulate and restrict this type of control. This type of ISP control, referred to as 'bandwidth throttling,' is among the most commonly cited examples of net neutrality concerns.

[139] *Id.*

with the Net Neutrality discussion.[140] Additionally, even when Internet viewers intentionally visit a website or set their algorithm to only feed a particular view to them, McDowell worries that legislation could be passed that requires opposing viewpoints to be pushed to the viewer as well, similar to the regulations at issue in *Red Lion Broadcasting*.[141]

These theories are making their way into case law as well. In *Ohio v. Google*, the state of Ohio argued that Google could not push its own products over other's when users use Google to run Internet searches.[142] The Court of Common Pleas that reviewed this case pointed out Google is one of the Internet companies that dominates its corner of the Internet market, noting that 88% of Internet searched in Ohio were conducted on Google at the time the case was decided.[143] Google requested dismissal of the complaint because, among other arguments, requiring Google to be more neutral in its algorithm would violate the First Amendment.[144] In denying the motion, the court noted that *Red Lion Broadcasting* was one of several cases where the Supreme Court had upheld regulations that require media companies to host speech that insures full coverage of opposing points of view, implying that the case supports a similar requirement for Google to provide links to websites other than its own is supported by *Red Lion Broadcasting*.[145]

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[140] Robert M. McDowell, Commissioner, Fed. Commc'ns Comm'n, Remarks at Media Institute (Jan. 28, 2009), https://docs.fcc.gov/public/attachments/DOC-288134A1.pdf.

[141] *Id.*

[142] State v. Google LLC, No. 21-CV-H-06-0274, 2022 WL 1818648, at *2 (Ohio C.P. May 24, 2022).

[143] *Id.*

> In 2020 and 2021, 88 percent of all internet searches in Ohio were conducted through Google Search. On mobile devices, that market share was near 90 percent. There is an inherently high barrier to enter the internet search industry. Because users do not pay a fee to conduct a search, users tend to search where they will get the best search results. The algorithms that dictate search results become better and more refined with each search. Therefore, because Google Search is by far the most used search engine, its popularity inherently produces the best results over time. Its dominant market share leads to more users, which leads to better refined search results, which leads to even more users. Because of this, Google Search possesses "substantial market power."

[144] *Id.*

[145] *Id.* at *8.

> Courts have held that infringing on a private actor's speech by requiring that actor to host another person's speech does not always violate the First Amendment. *See* PruneYard Shopping Ctr. v.

VI. DISPATCHING THE ZOMBIE OF *RED LION BROADCASTING*

Many problems with the *Red Lion Broadcasting* case were illustrated forty years ago in the FCC report abrogating the doctrine when the FCC first killed the Fairness Doctrine.[146] However, with age, the fissures in the case's logic have become even more apparent, and the Court seems to have recognized its error as well. And despite the FCC dispatching the Fairness Doctrine, the *Red Lion Broadcasting* case lingers today as a walking corpse that continues to infect the law and has the potential to do so at a faster rate with the increased interest in government regulation of the Internet. The only way to prevent this inevitable spread of the *Red Lion Broadcasting* virus is to give the case what it deserves—an express and clearly stated end to allow it to be finally and completely at rest.

Many academics and the courts have poked at the rotting corpse over the years.[147] Statistics demonstrate the Fairness Doctrine actually

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> Robins, 447 U.S. 74, 87 (1980) (noting that the views expressed by speakers who are granted a right of access to a shopping center would "not likely be identified with those of the owner"); Rumsfeld v. F. for Acad. and Institutional Rts., Inc., 547 U.S. 47 (2006) (unanimous Court held the government may require law schools to host speech from military recruiters); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding restrictions on editorial authority); *see also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082 (2020) (Breyer, J., dissenting) ("requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do."). There are several examples in which private companies involved in mass communications were prohibited from censorship. The best known are the now-repealed fairness doctrine imposed by the FCC, Florida's right-of-reply statute at issue in *Miami Herald*, regulation of telephone carriers, and the aforementioned must-carry laws targeting cable television operators.

[146] *See* Inquiry into Section 73.1910 of the Comm'n's Rules and Reguls. Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, *supra* note 86, at 146–47.

[147] Hazlett et al., *supra* note 8, at 80–81.

> *Red Lion*, decided on June 9, 1969, was decided on the trifecta of factual error, economic error, and technological error. First, the Court did not have a factual record to support the conclusion that the Fairness Doctrine did not actually impose self-censorship on radio and television broadcasters. Second, the Court perpetuated a blunder of economic logic, misperceiving the standard economic condition of scarcity as unique. Third, the "physical" limits thought to reside in the special nature of radio waves were wrong. While generating

created a broad "chilling effect" on the broadcast of topical information about controversial people and that the doctrine was used as a harassment mechanism to force broadcasters not to cover certain points of view.[148] And since the *Red Lion Broadcasting* Court made it clear that this kind of revelation would have made them decide the case differently, the continued existence of the case can only cause damage to modern jurisprudence. Additionally, as technology advances, the physical distinctions between print and broadcasting have evaporated. Newspapers and radio programs are read and listened to online as well as in their original print and broadcast forms, so regulating the same information in two different ways, depending on its delivery method, seems to be a distinction without merit.[149]

Despite the fact that the *Red Lion Broadcasting* decision was based on false premises of scarcity and the separateness of technologies, and the FCC has seen fit to abandon the Fairness Doctrine for the last forty years, its corpse reappears over and over again in modern case law. Many commentators have bemoaned this continued existence.[150] But the mountain of criticisms of the case have not ended its reign. In the *Overly Active Corpse of* Red Lion Broadcasting, the authors noted that in the 2009 case of *FCC v. Fox Television Stations*,[151] a case involving fines for indecent broadcast programming, four separate amici curae briefs argued over the continued necessity of *Red Lion Broadcasting*, even though this wasn't an issue in the case itself.[152] Since this article

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> greater bandwidth is generally a costly exercise, there is no set number of frequencies—or radio licenses—that can be defined in nature. The restrictions result from conflict among rival users and the legal rules for resolving such conflicts. Notwithstanding the numerous lacunae embedded in the decision, *Red Lion* remains the foundation for the reduced First Amendment rights afforded broadcasters, relative to other media, today.

[148] *Id.* at 55.

[149] *Id.* at 64.

[150] *See* Jim Chen, *Liberating* Red Lion *from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. TELECOMM. & HIGH TECH. L. 293, 296 (2002). "Dissatisfaction with *Red Lion* has spawned an academic cottage industry. For nearly a generation, lower court judges have urged the Supreme Court to overrule *Red Lion*." *Id.* (citing to Time Warner Ent. Co. v. FCC, 105 F.3d 723, 724–26 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing); Telecomm. Rsch. & Action Ctr. v. FCC, 801 F.2d 501, 509 (D.C. Cir. 1986).

[151] FCC v. Fox Television Stations, 556 U.S. 502 (2009) (reviewing the lower court's finding that the FCC acted arbitrarily and capriciously in leveling fines against broadcast channels for curse words used during the airing of live awards shows).

[152] Hazlett et al., *supra* note 8, at 53–54.

was published in 2009, the zombie of *Red Lion Broadcasting* has bitten even more case law. And this time, the zombie virus has grown behind the bounds of broadcast cases, into the realm of an entirely different type of technology—the Internet.

About forty cases have cited to *Red Lion Broadcasting* for issues dealing with the constitutionality of government regulations on speech since the *FCC v. Fox* case was decided in 2009,[153] and many of those cases cite to *Red Lion Broadcasting* for the case's declaration that it is the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas"[154] and "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market." These concepts have been used to prop up a wide variety of court decisions, including a case regarding quoting copyrighted material to respond to that material,[155] a case in which laws prohibiting employers from mandating diversity training was challenged,[156] and a case assessing whether closed captioning of government meetings streamed on the Internet is required under the Americans with Disabilities Act (ADA).[157] It is hard to imagine that the *Red Lion Broadcasting* Court fathomed a case regarding the government's right to force privately-owned broadcast stations to carry various viewpoints on its airwaves to be used in these ways.

What the *Red Lion Broadcasting* Court may have found even more shocking is that the opinion is now being used to promote government regulations of the limitless resource of the Internet.

> In amicus briefs for Fox Television Stations v. Fed. Commc'n Comm'n, a case where a broadcaster contested FCC fines for programs deemed "indecent," many advocacy groups insisted that the Court leave *Red Lion* undisturbed: "Questioning *Red Lion*, even in dicta, could upset all broadcast ownership limits, broadcast must-carry rights, spectrum build-out provisions, political content obligations, and the wide range of spectrum policy decisions." On the opposing side, advocates for free speech rights, such as the Progress and Freedom Foundation, former FCC members Newton Minow and Glen Robinson, and the American Civil Liberties Union, argued that the regulatory approach of *Red Lion* and the related *Pacifica* verdict are ripe for reappraisal.

[153] Search conducted on Westlaw by running a "citing references" search for all cases after *FCC v. Fox* was decided in April of 2009 that involve headnotes related to the constitutionality of government regulations on speech.

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

[155] Stern v. Does, 978 F. Supp. 2d 1031, 1049 (C.D. Cal. 2011).

[156] Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 1180 (N.D. Fla. 2022).

[157] Reininger v. Oklahoma, 292 F. Supp. 3d 1254 (W.D. Okla. 2017).

Academics and advocates have used *Red Lion Broadcasting* to suggest a different kind of scarcity than the *Red Lion Broadcasting* Court considered. While *Red Lion Broadcasting* was focused on the difficult task the FCC had in allocating the spectrum between license applicants because there was only so much spectrum space to allocate, the new scarcity is not one of physical space, but one of time.[158] The argument is that viewers tend to watch the same news sources with the little time they have to devote to the intake of news during a busy day. This means, there are only so many news sources one person can consume in a day, and if the person watches a news outlet that does not present balanced opinions on public interest issues, the person may have a skewed vision of these issues.[159] Additionally, some have argued that the monopolization of media causes a different kind of scarcity.[160] That monopolization can come in the form of the traditional notions of monopolies—that is, fewer companies owning more media outlets, dominating the marketplace, and squeezing out young start-up

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[158] Mark Conrad, *Fake News, Personal Attacks, and Ideological Media Run Amuck – It is Time for Fairness Doctrine 2.0*, 21 VA. SPORTS & ENT. L.J. 77 (2022).

> Another way to look at scarcity is not that of available content, but the scarcity of time for people to view news. There are only so many hours in a day that people can (and maybe should) watch cable news, broadcast television, or radio. Because of this "time scarcity" people will likely gravitate to a select few news sources, which are often the sources with which people most feel comfortable. That comfort may be based on the connection between the biases of the person and the biases of the outlet. If the viewer is taking a portion of his or her limited time to watch, that person should receive different viewpoints in a given outlet. *Id.* at 115–16.

[159] *Id.* at 111.

> There is nothing inherently wrong with a news or information service that engages in frequent commentary. However, there is something problematic about stations and networks that push a singular narrative based on repetitive messaging and personal attacks. The latter does not fulfill the public interest. It does not lead to a marketplace of ideas. Instead, it results in many people being uninformed or unaware of different perspectives or alternative views on controversial topics.

[160] *But see id.* at 108.

> [T]he issues of greater media concentration is not particularly relevant here, because the issue of access [by those with opposing viewpoints] is not directly related to antitrust or monopolization. One could have 1,000 different owners and 1,000 different entities, but if they espouse similar views or engage in similar commentaries, what is the difference? It is not the market concentration; it is the *information* concentration by one ideological media outlet or another that is at the heart of the problem.

companies.[161] Or, some have argued, this monopolization is one of singular points of view. When a handful of companies dominate the media landscape and are not committed to balanced coverage of issues, it can lead to only one point of view on the issue of public importance being pushed through to the masses.[162] This argument is amazingly similar to the argument referenced by the Court in *Miami Herald v. Tornillo* that consolidation of media may skew public discourse towards the political leanings of the owners of the media.[163] However, the *Tornillo* Court was dubious that an equal space mandate would broaden public discourse, and did not feel that this goal overcame the unconstitutional nature of stepping on the editorial judgment of the newspaper. And any case making this kind of argument that makes it to the Supreme Court gives the Court the opportunity to affirm the *Tornillo* analysis for all media and disavow the *Red Lion Broadcasting* analysis, which was based on faulty assumptions about the scarcity of broadcast channels and how an equal time rule could broaden discussion of issues of public importance.

It should not be surprising that the *Red Lion Broadcasting* zombie is not chasing after the law that defines the Internet. About half of Americans indicate they get their news "often" from the Internet,[164] and 19% indicate that the news comes from social media sites.[165] This makes monopolization and limited viewer viewing time a pragmatic concern. In an environment where viewers can click off a website and

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[161] FRANCIS FUKUYAMA & ANDREW GROTTO, SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD, PROSPECTS FOR REFORM 214–15 (Nathanial Persily & Joshua A. Tucker eds., 2020).

> The question today, however, is whether the platforms' near-monopoly or oligopoly position puts them in a similar position to the broadcast networks back in the early days of television. Because the market for social media is less competitive, a decision to remove certain content is much more consequential than the decision of, say, *USA Today* not to carry it.

[162] *Id.*

[163] *See* Hazlett et al., *supra* note 10.

[164] A 2022 poll by Pew Research Center found 49% of adults indicate they get their news "often" from the Internet. Naomi Forman-Katz & Katerina Eva Matsa, *News Platform Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet [https://perma.cc/5DUG-3NB8].

[165] A 2021 poll by Pew Research Center found 19% of Americans get news "often" from social media platforms. Mason Walker & Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, PEW RSCH. CTR. (Sept. 20, 2021), https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/ [https://perma.cc/854Q-ES4B].

into another in a fraction of a second, keeping viewer attention is paramount.[166] Even though *Red Lion Broadcasting* was limited to regulation of the radio and broadcast spectrum, the case was decided long before the Internet existed. But analogizing the practical limitations of viewpoints on the Internet to the physical limitations of the broadcast spectrum is not a difficult mental feat. Coupled with the purpose of Fairness Doctrine, the analogy becomes even stronger.

Despite efforts to show how a scarcity of views somehow equals the scarcity referred to in *Red Lion Broadcasting*, the analogy fails for multiple reasons. The *Red Lion Broadcasting* scarcity was expressly built on a limited number of licenses available for a limited amount of spectrum.[167] However, there is no limit to the Internet.[168] Although two web pages cannot share the same website address, the number of websites is only bound by the amount of server space available, and that can always be increased, unlike the radio and broadcast spectrum, which has a finite space limitation.[169] And the monopolization of the viewpoint on social media platforms is not *Red Lion Broadcasting* scarcity either. Limited printing presses are a much closer analogy to limited social media platforms, and again, because there is the potential for growth, even if that growth is not easily accomplished, that does not justify stepping on broadcasters' First Amendment rights like the *Red Lion Broadcasting* scarcity was found to justify. The Court has also been dubious about the scarcity justification in later case law.[170]

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[166] The Nielson Norman Group found website owners have about ten seconds to grab a viewer's attention before the viewer clicks off the webpage. Jakob Nielson, *How Long Do Users Stay on Web Pages*, NIELSON NORMAL GRP. (Sept. 11, 2011), https://www.nngroup.com/articles/how-long-do-users-stay-on-web-pages/ [https://perma.cc/UZL9-RYXQ].

[167] The *FCC v. League of Women Voters of California* case clarified that the regulations allowed in *Red Lion Broadcasting* were only because of "spectrum scarcity." FCC v. League of Women Voters of Cal., 468 U.S. 364, 398 (1984). Some have argued there is no broadcast scarcity anymore. *See* Hazlett et al., *supra* note 8, at 54–55 ("There is literally no limit to the number of 'broadcast frequencies' given time sharing or frequency-splitting possibilities, e.g., or the creation of joint ownership interests in a license.").

[168] *See* Chander, *supra* note 126.

[169] *Id.*

[170] *See* Hazlett et al., *supra* note 8, at 51;

> The split regime is no longer just a curious historical artifact. Technological convergence has obliterated even misperceived lines of demarcation. The *New York Times* is a news*paper* but is delivered to readers via *electronic* data networks. If free speech rights tie to delivery path, then all media can be licensed and regulated in the

The Fairness Doctrine and PAPE rules were expressly designed to ensure that the electromagnetic spectrum was "devoted to the communication of information and the exchange of ideas fairly and objectively presented."[171] Forcing the few companies that monopolize the Internet space to carry all voices in a public debate would appear to assist democracy. But the failed promise of *Red Lion Broadcasting* demonstrates this is not how these equal-time mandates work out. Instead of increasing speech, these equal-time mandates force media companies into a decision between two unattractive choices—either invest time and money making sure all voices are heard or not cover the issue in the first place. Under *Red Lion Broadcasting*, most media companies opted for the cheaper and less time-consuming choice of not covering the issue.[172] Internet companies will, no doubt, do the same.

To be fair, the profit-motive driven approach that media other than broadcasting functions under may not promote "the exchange of ideas fairly and objectively presented" either.[173] Presumably, viewers will continue to do what they have been doing on the Internet since its inception—viewing stories that fit with their world view and clicking off of any material that doesn't, which incentivizes media to show stories to particular demographics of viewers.[174] The solution to the problem of information silos may be hard to find, but it will not be found in *Red Lion Broadcasting*.

Most scarce resources are dealt with through property rights—the party willing to pay the most for the bandwidth gets it with anti-trust

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> Wireless Age. Yet, this has not yet obtained; indeed, the Court has held—notably in *Playboy* and *Reno*—that speech via computer networks ("spectrum in a tube") is protected via the strict scrutiny extended print media. Whatever the lines of *Red Lion*,the Court today means something quite different when looking at new media.

see also Connectivity Is Driving How Americans Are Engaging with TV, NIELSEN (Mar. 2023), https://www.nielsen.com/insights/2023/connectivity-is-driving-how-americans-are-engaging-with-tv/ [https://perma.cc/PM39-MKGC] (noting that 33% of Americans watched their broadcast TV over the Internet in the third quarter of 2022).

[171] Mayflower Broad. Corp. v. Yankee Network, Inc., 8 F.C.C. 333, 340 (May 29, 1940).

[172] *See supra* note 96.

[173] *Mayflower Broad. Corp.*, 8 F.C.C. at 340.

[174] Axel G. Ekström, Diederick C. Niehorster & Erik J. Olsson, *Self-imposed Filter Bubbles: Selective Attention and Exposure in Online Search*, 7 COMPUTS. IN HUM. BEHAV. REPS. 1, 6–7 (2022), https://www.sciencedirect.com/science/article/pii/S2451958822000604?via%3Dihub [https://perma.cc/MGG8-T2B5] (finding that Internet viewers tend to click on news articles that match the viewer's political leanings).

as a backstop to monopolization.[175] New communication technologies are no stranger to scarcity. There have certainly been situations in our history where printing resources were scarce, and property rights dominated who was able to mass print messages.[176] So the FCC declaring radio and broadcast airwaves to be a new scarce resource that must be managed in a completely different manner than any other media technology, made little sense. And with time, the problem that the Fairness Doctrine and PAPE rules sought to resolve did not go away. In fact, the problem was intensified by the Fairness Doctrine and the PAPE rules. Ironically, as the FCC's 1985 report on the Fairness Doctrine pointed out, the voices that the Fairness Doctrine sought to increase were actually decreased as stations stopped covering controversial

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[175] Hazlett et al., *supra* note 8, at 58 (arguing "[m]ore open and reliable avenues for constitutional regulation exist, including antitrust law, where legal standards for competition analysis would presumably upgrade the manner in which rules were crafted, implemented, and evaluated."); Coase, *supra* note 44, at 34.

> In fact, the antitrust laws do apply to broadcasting, and recently we have seen the Department of Justice taking action in a case in which the Federal Communications Commission had not thought it necessary to act. The situation is not simply one in which there are two organizations to carry out one law. There are, in effect, two laws. The Federal Communications Commission is not bound by the antitrust laws and may refuse an application for a license because of the monopolistic practices of the applicant, even though these may not have been illegal under the antitrust laws. Thus, the broadcasting industry, while subject to the antitrust laws, is also subject to another not on the statute book but one invented by the Commission.

[176] In the late 18th century, the Gutenberg-type presses could only print 125 pages an hour, and printers could not keep up with demand. Heming Nelson, *A History of Newspaper: Gutenberg's Press Started a Revolution*, WASH. POST (Feb. 11, 1998), https://www.washingtonpost.com/archive/1998/02/11/a-history-of-newspaper-gutenbergs-press-started-a-revolution/2e95875c-313e-4b5c-9807-8bcb031257ad/ [https://perma.cc/HE9Y-7SNC]. By 1814, new steam-powered presses could print 1000 pages an hour to keep up with demand. *Id.* Only the rich could afford papers in the late 1700s because the cost of paper and printing demanded a high subscription price, but by the early 1800s, advances in papermaking and printing allowed for editions of papers to be sold for only 1 cent, garnering the name the penny press. Adelina, *History of Newspapers. From the First One Published to the Digital Age*, FLIPSNACK BLOG (Feb. 9, 2023), https://blog.flipsnack.com/history-of-newspapers/ [https://perma.cc/82DM-PPQL]. The cut of the costs allowed many more papers to be printed, many of which were tied to political parties and presented biased versions of news stories. DAVID HUBERT, ATTENUATED DEMOCRACY ch. 47 (2021), https://slcc.pressbooks.pub/attenuateddemocracy/chapter/chapter-47/ [https://perma.cc/6BUD-6PFS]. These were the heydays of "yellow journalism," when the rivalries between papers owned by William Randolph Hearst and Joseph Pulitzer made up stories that lit the fuse for the Spanish-American War. *Id.*

topics in order to avoid triggering the Fairness Doctrine altogether.[177] And the FCC sought to remedy this by refusing to enforce the Fairness Doctrine anymore.[178] However, without an express abrogation of *Red Lion Broadcasting*, the zombie case continues on.

Attempting to analogize the purpose behind the Fairness Doctrine to increasing viewpoints is a red herring as well. There are many efforts undertaken by the government to increase viewpoints, not the least of which is refraining from regulating speech entirely. Attempting to argue that the means must be analogous because the end goals are the same, is not a logical assumption at all. Means that are both constitutional and unconstitutional often reach the same end. Congress, for instance, could mandate newspapers devote a page of their publication a day to print platforms of candidates running for local office, which would likely be unconstitutional under the compelled speech doctrine.[179] Or Congress could grant money to those same papers that choose to print such a page and that would be constitutional under the existing U.S. Supreme Court case law.[180] The ends are the same—a page of the paper devoted to candidate platforms—but the means fare very differently when looked at through a constitutional lens.

Enforcement issues are yet another problem with the *Red Lion Broadcasting* case's continued zombie existence. Deciding what issues fall in the category of issues that are controversial enough to demand a response by opposing views is a regulatory nightmare. As the FCC pointed out in its 1985 report on the Fairness Doctrine, many broadcasters avoided covering issues that the FCC would not have considered "controversial issues of public importance" out of an

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[177] *See supra* notes 95–97 and accompanying text.

[178] *See, e.g.*, Syracuse Peace Council v. WTVH, 2 FCC Rcd. 5043, ¶ 2 (Aug. 6, 1987).

[179] The compelled speech doctrine prevents the government from forcing a speaker to express a belief. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995). "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 61 (2006).

[180] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) (finding that a law requiring the National Endowment for the Arts to consider decency in issuing grants was not an infringement on artists' free speech rights); Rust v. Sullivan, 500 U.S. 173 (1991) (dealing with government funding of family planning services). In *Rust*, the Court ruled, 5–4, that a prohibition on the use of federal funds under the Title X program for abortion counseling by doctors and other health care professionals was constitutional and did not violate the First or the Fifth Amendment. *Id.* at 203.

abundance of caution.[181] If Congress or the courts attempted to enact a similar regulatory scheme on new media to promote coverage of conflicting viewpoints, similar over-correction is bound to occur.

Red Lion Broadcasting's existence as a walking corpse of a case is not new. For forty years, legal commentators have noticed the zombie and have attempted to peel back its frail skin to reveal it for what it is—a dead case built on faulty premises. Courts have been faced with similar cases before that have not been fully dispatched by being expressly overruled, but often the reason they have not been overruled is because the zombie case involved facts that are no longer being litigated frequently.[182] But that is not the case with *Red Lion Broadcasting*. The continuing evolutions of new media technology mean that the courts will be faced with regulatory requests based on strained analogies to the *Red Lion Broadcasting* case. And the attempts to make these kinds of analogies to the Internet demonstrate the need to dispatch this zombie. The Internet is hunkered down in a ramshackle cabin, and the only walls protecting it from the *Red Lion Broadcasting* zombie outside is section 230 of the CDA.[183] As a creature of legislation, those walls are flimsy and could crumble at any moment. The only way to save the Internet and new technologies of the future from regulatory schemes based on strained notions of scarcity is for the Court to expressly overrule the *Red Lion Broadcasting* zombie and dispense with arguments that scarcity of any imagined kind warrants regulation of new media.[184]

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[181] *See supra* note 97 and accompanying text.

[182] The situation faced by the *Red Lion Broadcasting* case happens so frequently that some believe lower courts can treat the "dead" case as being "anticipatorily overruled" and function as if the case is no longer precedent. *See* C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 41 (1990).

[183] *See* Prado, *supra* note 124.

[184] There may be other legal grounding for a Fairness Doctrine not based on the scarcity rationale of *Red Lion*. Prof. Noah Zatz suggests that the Commerce Clause would allow Congress to pass laws designating the Internet a public forum because the infrastructure of the Internet crosses state borders. "Since virtually all activity in cyberspace will be significantly intertwined with interstate commerce, impinge upon the exercise of federal constitutional rights, and rely on the use of public property, there seems little reason to doubt an adequate basis of congressional power to intervene." Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 227 (1998).