

AS PREPARED FOR DELIVERY

REMARKS

by

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Good afternoon and thank you for inviting me to be your luncheon speaker today. I am pleased to have this opportunity to share some of my thoughts on media regulation with you. I think it appropriate, when speaking to a group committed to free speech, such as this one, not to monopolize the discussion, and thus I will keep my remarks short and let you all ask questions of me. Take note here: This is perhaps the only public endorsement of the view that the First Amendment imposes an affirmative obligation to maximize the number of voices in the marketplace of ideas that you are likely to hear from me, so savor it.

It seems that whenever there is the slightest change in telecommunications law, economics or technology we hear cries from various corners of the telecom cosmos to reassess the public interest obligations of broadcasters. More pointedly, we are usually summoned (or strongly encouraged) to explore additional government-directed program content or, conversely, restrictions on content. The latest such call is in response to the transition to digital broadcasting. The public interest town-criers have announced matter-of-factly that we must consider broadcaster's public interest obligations in the digital era, suggesting, that the change from analog to digital transmission technology justifies renewed focus on content. (What really is meant, of course, is what can the government extract in exchange for having chosen to give broadcasters free spectrum.)

The public interest standard has been with us a long time, and it is as vague as it is venerable. Recently a friend of mine, who is a lawyer, asked me what I do in my new job as an FCC Commissioner. I said, pointing to the language in the Communications Act of 1934, that I regulate in a manner that serves the "public interest, convenience and necessity." He said: "oh, how do you do that exactly?" Never having quite thought of it so starkly, I attempted to dismiss my friend's puzzlement by throwing out a haughty quote from Felix Frankfurter who said that the "vagueish, penumbral bounds expressed by the standard of the public interest" "[leave] wide discretion and [call] for imaginative

interpretation." My friend thought about it for a moment and then exclaimed: "wow!. . . so, you can do anything you want." "More or less," I replied.

In truth, I personally have been uncomfortable with the "penumbral bounds" of the public interest standard and have tried, as best I can, to develop some basic principles for how I exercise this wide discretion, rather than resting on my imagination, as Frankfurter suggested I do. A few weeks ago, I spoke to the American Bar Association Forum on Communications Law and described my framework for working through calls for new broadcast regulation under the public interest. I explained that, in my mind, I have an obligation to develop and clearly communicate guiding principles that I will apply in the exercise of this public trust. Only in that way, can I reach conclusions that I am comfortable are reasoned applications of the public interest standard and not just the result of the most effective lobbyist or well-placed political pressure. I will not now reiterate in detail this framework, but let me restate it briefly.

My decisional schematic asks five basic questions:

1. Does the Commission have the authority to do what is asked? This is the first question any regulatory agency must ask, for its authority is strictly limited to that which Congress has delegated.
2. Even if we do, is it nonetheless better to leave the matter to Congress or await more specific instruction? Congress is a unique institution uniquely able to reflect broad consensus among both industry and consumers. And, it, not the Commission relying on general grants of authority, should address matters that implicate the very fundamentals of American government, such as elections.
3. Is the issue best addressed by a State or another Federal Agency? Agencies vary in their expertise and the FCC is no more qualified to assess an energy issue as FERC is to assess a communications policy. We should yield when others have specific jurisdiction or are better suited to the task.
4. Should we address the matter at all? Is there really a demonstrated problem? Is this a good use of our resources? There are more good ideas in this world than there is time, money, or personnel to tackle and we must prioritize our efforts carefully. And, finally,
5. Would any action we take violate the First Amendment? I always ask this question last, not because it is the least important, but because I think too often in public interest debates people hide behind the First Amendment question rather than ask whether the policy is warranted. Just because something is constitutional does not make it a good idea.

This leads me to the heart of my remarks today. Though I consider the constitutionality of proposed broadcast regulation last when I work through such issues under the public interest standard, at least I do work through it. I have observed that while changes in technology, the law, markets and consumer preferences often ignite discussion about the impact of changed circumstances on broadcaster's public interest obligations, such changes rarely initiate an equally serious examination of their constitutional protections.

I believe that any attempt to consider how changes in technology and the regulatory environment affect public interest obligations, necessarily must include a review of the underpinnings of current First Amendment jurisprudence. There is a symbiotic relationship between the scope and content of public interest duties and the Constitution. The greater the protection afforded by the latter the less intrusive the government can be with respect to the former. It is not coincidental that there is a President's Commission examining broadcaster's obligations and not one looking at the public interest obligations of newspapers, film-makers, authors, or internet service providers -- in other words, those who enjoy the full breadth of the First Amendment privilege. The real irony is that as the government pushes the limits of its authority to regulate the content of speech, the more its actions should be constitutionally scrutinized, not less.

I submit that the time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace. As far back as 1984, the Supreme Court indicated in the League of Women Voter's case, that it would await "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."⁽¹⁾ I believe we should be getting those signal fires ready.

As you all know, there is a dual standard that exists today, which holds that broadcasting is somehow less deserving of First Amendment protection than other mass media. This theory, which derives primarily from the Supreme Court's 1969 decision in Red Lion Broadcasting Co. v. FCC,⁽²⁾ has been the target of much criticism. Many scholars have pointed out that the factual assumptions underlying this case and its progeny, if they were ever true, clearly are not true today. I will not attempt to debunk all the subtle rationales for treating broadcasting differently under the Constitution (others have done that more ably than I could), but I think it useful to step back and look at how drastically the communications marketplace has changed in the time since Red Lion.

It is undeniably true that the communications industry of 1969 that served as the frame of reference for the Red Lion Court was very different from the industry that exists in 1998. Think back to 1969: telephones, by and large, were black, rotary dialed devices that people rented from AT&T, the legendary "Ma Bell" controlling about 90% of the telephone industry in the United States. And, Mom was only concerned about telephone service -- she was not concerned about providing Internet connections that might, in turn, provide video programming to consumers.

In 1969, cable television systems reached less than 30% of the country and offered not much more than clear local broadcast signals. Nothing even remotely approximated the significant video programming source cable has become. Today, cable passes more that 97% of the households in this country, and more than 2/3 of the country subscribes to cable. Additionally, there are more than 165 national cable video networks offering a wide array of programming.

In 1969, broadcasting consisted of a handful of radio stations in any given market plus 2 or 3 television stations affiliated with one of the three major networks. Occasionally, larger markets had an independent television station too. Three major television networks held more than 90% of the market for video programming. Not so anymore. Not only has the market share of the three largest networks been eroded by cable programming, the last time I looked there were about seven "declared" national television networks working feverishly to bring new stations on the air. Obviously, things have changed a lot.

It is also true that in 1969, no one, except large corporate organizations and universities, owned a computer. In part, because computers were huge, clunky and very expensive devices. No one had ever heard of the Internet, except maybe a couple guys buried deep in the Pentagon. And, if they had told you about it, they would have had to kill you...

Most importantly, the advances in technology have been astonishing since the time of Red Lion. Digital convergence, rather than reinforcing the unique nature of broadcasting, has blurred the lines between all communications medium. The TV will be a computer. A computer will be a TV. Cable companies will offer phone service, and phone companies will offer video service. Digital convergence means sameness in distribution. What one sees or hears is dependent only on the order of zeros and ones, nothing more. It will become impossible to separate "broadcast" from other services, and to continue to maintain the historic fiction of "uniqueness" of broadcasting is to see the world through Lewis Carroll's looking glass.

Even this brief overview of the marketplace makes the reasoning of Red Lion seem almost quaint and leads unavoidably to the simple question: Should we continue to apply the reasoning of Red Lion to determine the First Amendment rights of broadcasters in today's communications environment? At the very least, any responsible government official who has taken an oath to support and defend the Constitution must squarely address this important question.

The Court in Red Lion grounded its analysis in "the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views... ." ⁽³⁾ How can these rationales continue to be applied today?

Above all else, scarcity -- the need to ration licenses -- stands as the single greatest justification for dual track First Amendment analysis. Yet, contrary to the Court's assertions, there is nothing unique about the scarcity of radio frequencies. They are no more scarce than any other natural resource, such as oil, timber or gas, that is an essential input to other industries. As the D.C. Circuit noted in the TRAC case, ⁽⁴⁾ in at least some sense, scarcity is a "universal fact" pertaining to all economic goods, and thus cannot really explain the different treatment afforded to broadcasters. Moreover, as I mentioned, technological convergence is shattering any technical distinction between mediums. Nonetheless, because the courts continue to refer to scarcity as a distinguishing characteristic of broadcasting, I submit that we should squarely confront the theory and judge its validity.

If one parses Red Lion and its progeny, one will find a number of subtle variations on the scarcity rationale. Two, however, have the most prominence: (1) the false belief that spectrum is uniquely scarce; and (2) that there is an excess of demand for the limited number of outlets available, leaving the government to choose among applicants. Both predicates fundamentally misunderstand the technology and the nature of the broadcast industry.

Since the beginning of radio, the Court seems to have viewed broadcasting almost mystically, unable to understand the nature of the technology that brought voice and pictures to consumers over the air. Indeed, it has been reported that Chief Justice Howard Taft once remarked "[I]f I'm to write a decision on this thing called radio, I'll have to get in touch with the occult." Constitutional law need not be based on ouji boards and tarot cards, however. As the expert communications agency, the FCC has a duty to bring the facts about technology and the marketplace into the light.

The fact is that spectrum is not really scarce. It may actually be infinite, dependent only on advances in technology that can make ever-increasing efficient use of it. Witness the potential of digital broadcasting. TV stations now have the potential to produce at least four times the number of channels of programming that once were necessary to produce a single channel of analog programming and compression technology promises to expand this even further. Cable companies openly talk of the 500 channel world. And, advanced technologies such as spread spectrum have ushered in all sorts of innovative and efficient services. Indeed, rather than being a uniquely scarce resource, spectrum has the potential to be a bottomless resource, unlike coal, oil, or timber which are more susceptible to depletion. Perhaps, it is iuniquely abundant rather than uniquely scarce.

The Red Lion Court also suggested a scarcity in the number of outlets as a basis for allowing the government to make choices about content without First Amendment constraint. Yet, actual experience shows that media outlets have been proliferating. In our current technological environment, it can reasonably be argued that there is a bounty, not a scarcity of outlets for expressing one's viewpoint. In the traditional broadcasting arena, the numbers are impressive: There are 1207 commercial TV stations and 367 non-commercial stations. There are also some 5000 TV translators and 2000 low power TV stations. In addition, there are almost 12,500 radio stations.

As I mentioned earlier, cable services are available almost everywhere in the country. The average number of cable channels available on these systems is 32, with many systems offering more than 100 channels of programming. Other outlet sources include satellite services, microwave services, and, yes, Internet services. The reality is that outlets for expression are more plentiful now than at any time in our history. But we can expect there will always be excess demand for such outlets as long as the price for a license is zero. The increased use of auctions will create an appropriate vehicle for balancing supply and demand.

I should note, briefly, that while unique scarcity has offered the justification for affirmative content regulation, the Court has also asserted that broadcasting is uniquely

intrusive as a basis for restricting speech.⁽⁵⁾ I find this argument only marginally more persuasive than scarcity. As I have noted, the pervasiveness of broadcasting certainly has rivals in cable, satellite services and increasingly, Internet services as well. The TV set attached to rabbit ears is no more an intruder into the home than cable, DBS, or newspapers for that matter. Most Americans are willing bring TVs into their living rooms with no illusion as to what they will get when they turn them on. Indeed, we even have an FCC Commissioner who proves that it is possible to decide not to have a television in one's home.

With scarcity and the uniqueness of broadcasting such demonstrably faulty premises for broadcast regulation, one is left with the undeniable conclusion that the government has been engaged for too long in willful denial in order to subvert the Constitution so that it can impose its speech preferences on the public -- exactly the sort of infringement of individual freedom the Constitution was masterfully designed to prevent. As Professor Tom Krattenmaker has observed: "the belief -- or at least the assertion of a belief -- in a scarcity theory exists because those who wish to continue broadcast regulation believe that some theory of unique scarcity must exist. Otherwise, broadcasters could not be controlled by the government -- or its perception of the 'public interest.'"⁽⁶⁾

As he further notes, the FCC has continually asserted scarcity as a justification for content regulation, while simultaneously pursuing policies that ensure it. In the 1920's, the FRC refused to expand the AM band, in the 1950s, the FCC adopted television allocations designed to ensure no more than three networks could exist, and in the 1960's it pursued policies designed to blunt cable's intrusion into video programming. We cannot continue to expand the envelope of public interest obligations without a sincere and rigorous evaluation of the viability of maintaining a lessor First Amendment standard for broadcasting.

In sum, I submit that it is time to reexamine the defensibility of maintaining a separate First Amendment jurisprudence. We must take the truth about scarcity for broadcast media out of the closet. Rather than continuing to engage in willful denial of reality, the time has come to move toward a single standard of First Amendment analysis that recognizes the reality of the media marketplace and respects the intelligence of American consumers.

Thank you very much.

1. ¹ FCC v. League of Women Voters, 468 U.S. 364 (1984).

2. ² Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

3. ³ Red Lion Broadcasting Co. v. FCC, 395 U.S. at 401-2.

4. ⁴ Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).

5. ⁵ FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

6. ⁶ Thomas Krattenmaker & Lucas Powe, Regulating Broadcast Programming 219 (1994).