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THE MÖBIUS STRIP OF THE FIRST AMENDMENT: PERSPECTIVES ON RED LION*

WILLIAM W. VAN ALSTYNE**

I. INTRODUCTION: A TALE OF TWO CASES

The airwaves in this country are governed principally by the Federal Communications Act of 1934.¹ Substantially imitating the Radio Act of 1927,² the Communications Act prohibits all claims of private property to the airwaves and vests sole authority to license the private use of the airwaves in a government agency, the Federal Communications Commission [FCC]. In electing this system of control, Congress made a choice which, in significant respects, was much the same as that which the English monarchy had made nearly three centuries earlier for the press with the establishment of the crown's Stationers' Monopoly and the outlawry of private publications not licensed by that monopoly.³

Unlike the standards which were to guide the Stationers' Monopoly, however, the standards of the Communications Act did not contemplate that the FCC would grant or withhold licenses on the basis of the political or religious content of an applicant's proposed broadcasts. Instead, Congress adopted a general

* This essay-article was originally presented on April 14, 1977, at the University of South Carolina School of Law as the First Annual Benjamin Hagood Distinguished Lecture. I am grateful to the Law School and to the Hagood family for their hospitality. I am also grateful to the editors of the South Carolina Law Review for permitting me to retain the informality of an essay, with a bare minimum of footnotes. Additional references for the law-descriptive portions of this essay are readily supplied elsewhere in the extensive literature on this subject. Where appropriate, I have provided footnotes to that literature.

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1. 47 U.S.C. §§ 151-609 (1970) (originally enacted as Federal Communications Act of June 19, 1934, ch. 652, 48 Stat. 1064).

2. Radio Act, ch. 169, 44 Stat. 1162 (pt. II) (1927) (repealed 1934).

3. 1 E. ARBER, A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON xxviii (1875). See C. BLAGDEN, THE STATIONERS COMPANY: A HISTORY 1403-1959 (1960); L. LEVY, LEGACY OF SUPPRESSION 88-125 (1960); F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, at 64-263 (1952).

standard of licensing in imitation of that which it had adopted for the very first of the independent regulatory agencies, the Interstate Commerce Commission.⁴ In brief, applications for licenses were to be determined by the FCC according to the public interest, convenience, and necessity.⁵

Still, in applying that standard, the FCC did not confine itself to the issuance of licenses simply by examining the financial responsibility and technical competence of license applicants. Rather, it began very early also to police the program content of applicants and of licensees. One may think of this partly by analogy to the work of the Interstate Commerce Commission, whose statutory standard Congress had borrowed in establishing the FCC: the FCC was determining whether the "public interest, convenience, and necessity" would be well served partly by asking what kind of freight would be carried by the broadcaster. One may also think of this, however, with vague misgivings and recollections of the Stationers' Monopoly.

The development of FCC program-content standards has been thoroughly presented elsewhere.⁶ It should be sufficient here merely to recapitulate the current situation. An applicant is required to survey community interests within the receiving area of the broadcast signal for which he seeks a license, and to file with its application a profile of proposed programming according to the percentage of time he proposes to devote to each of fourteen Commission-described subject areas. Each licensee is required to devote a nontrivial portion of broadcast time to the treatment of public issues deemed significant within his broadcast area. Each is to do so at his own expense, if commercial sponsorship is unavailable, whether or not the licensee would personally have chosen to forbear such coverage. At the same time, each licensee who broadcasts a partisan perspective on any public issue of a contro-

4. The Interstate Commerce Commission was created in the nineteenth century by the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), but the licensing provisions (current version at 49 U.S.C. § 1(18)-(19) (1970)) were not added until 1920 (subsec. (19) was subsequently repealed, Pub. L. No. 94-210, § 801(b), 90 Stat. 127 (1976)).

5. 47 U.S.C. §§ 151-609 (1970).

6. The full development of FCC speech-content regulations is presented in Hegelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 U. CIN. L. REV. 427 (1975) and Simmons, *Fairness Doctrine: The Early History*, 29 FED. COM. B. J. 207 (1976). The FCC's own most recent summary of the fairness doctrine rules is in *In re the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 RAD. REG. 2d (P & F) 1261 (July 12, 1974).

versial nature must also take care to provide a fair representation of other views, although not necessarily on the same program and not necessarily in equal proportion to the time, or timing, of the original partisan broadcast.⁷ This obligation is exacted of each licensee without regard to the extent to which other views may already be communicated over any number of other frequencies readily received in the same market,⁸ and also without regard to the extent that those other views may already be featured in other sources of news and opinion (such as newspapers and magazines) readily accessible to persons within the same market.⁹

Additionally, when an identifiable person is mentioned in some disparaging manner—although not necessarily in a false or a defamatory manner—in the course of a broadcast treating a controversial public issue, the licensee must use reasonable effort to contact that person and make available to him free time for a personal reply. This must be done whether the original broadcast was itself the product of a commercial sponsor or a presentation by the licensee, and the time must be offered without charge regardless of the individual's ability to pay for it.¹⁰

Each of these, and other,¹¹ speech-content requirements applies regardless of the number of broadcast frequencies readily receivable in a given area. Each applies, moreover, without regard to whether in fact a particular license issued by the FCC has no market value whatever and, assuming the license may have a market value, without regard to whether the particular broadcaster has in fact already paid for that value.¹² A good example of some of these "nonlegal" features of FCC regulation is displayed in the facts of its most famous case, *Red Lion Broadcast-*

7. Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues, 39 Fed. Reg. 26,372 (1974).

8. 30 RAD. REG. 2d (P & F) 1277-78 (July 12, 1974).

9. See *Brandywine Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 63-80 (D.C. Cir. 1972) (Bazelon, J., dissenting), *aff'g* 27 F.C.C.2d 565 (1972), *cert. denied*, 412 U.S. 922 (1973).

10. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

11. *E.g.*, the separate statutory provisions, 47 U.S.C. § 315 (1970), which, subject to four exceptions, require that equal time be provided for all legally qualified candidates to the extent that any time is provided for any candidate and, of much more doubtful validity, the oversight of the Federal Communications Commission regarding "vulgar" broadcasting or broadcasting deemed to be contrary to the public interest in light of its message, *e.g.*, "drug oriented" music. See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973), *Sonderling Broadcasting Corp. WGLD-FM*, 27 RAD. REG. 2d (P & F) 285 (1973).

12. When a licensee, with the FCC's consent, transfers his license to another, the inflated price paid by the purchaser for the broadcasting facilities and other "property" of the transferor reflects the market value of the license.

ing Co. v. FCC.¹³ The licensee, who was required to honor the free reply requirement of the fairness doctrine, operated a small 1,000-watt radio station in a town of 5,684 persons. The commercial rate of the station for one hour of prime time was only twenty-five dollars. The station was in competition with at least twenty AM and ten to fifteen FM stations readily receivable by the residents of Red Lion. There were also twelve television stations, received over cable in 2,080 homes, as well as local newspapers competing for advertiser dollars.¹⁴

In 1943, certain powers of the FCC were reviewed and sustained by the United States Supreme Court.¹⁵ Despite more wide-ranging dicta in the case, however, the Court determined merely that the statutory standard of "public interest, convenience, and necessity" permitted the FCC to consider not only the technical competence and financial responsibility of a licensee, but also the licensee's economic position for antitrust purposes, in order to avoid undue concentration in broadcasting.¹⁶ Not until 1969, however, did any of the FCC's speech-content regulations come under direct Supreme Court scrutiny for consideration of first amendment objections. When these regulations—and more specifically, when the fairness regulations, including the free-time, right-of-reply aspect of "fairness"—were at last reviewed, however, they were unanimously sustained. The Court found them wholly compatible with the first amendment's prohibition that "Congress shall make no law abridging the freedom of speech or of the press."¹⁷ The Court was unanimous even though the regime of the FCC clearly involves mechanisms of licensing and prior restraint ultimately enforceable by a power to suspend, cancel, or nonrenew a license, without which the broadcaster is forbidden to broadcast at all. The case was *Red Lion Broadcasting Co. v. FCC*.¹⁸

* * * * *

13. 395 U.S. 367 (1969).

14. These and other details are well described in F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT* 5-7 (1975).

15. *NBC v. United States*, 319 U.S. 190 (1943). See also *Associated Press v. United States*, 326 U.S. 1 (1944).

16. 319 U.S. at 222-23. The validity of the FCC prohibition against cross-ownership of broadcast and newspaper media in the same location was recently upheld in *FCC v. National Citizens Committee for Broadcasting*, 46 U.S.L.W. 4609 (June 12, 1978).

17. U.S. CONST. amend. I.

18. 395 U.S. 367 (1969).

In 1913, twenty-one years prior to Congress' adoption of the Federal Communications Act, the state legislature of Florida had adopted a similar, but more sharply limited statute.¹⁹ It required any newspaper that presumed to assail the personal character or official record of any candidate in any election to print any non-obscene and nonlibellous reply the candidate might make to the attack. The reply was to be printed without charge, in as conspicuous a place, and in the same kind of type as the disparaging story.²⁰ The desirability (and constitutionality) of such statutes subsequently received substantial academic endorsement,²¹ albeit not without dissent,²² much as had been true of writings about the speech-content licensing regulations of the FCC.²³ Not until 1974, however, did the United States Supreme Court have occasion to consider a first amendment objection to the Florida statute. When it did, a unanimous Court, with Justice Burger writing the opinion, held that the statute was an unconstitutional invasion of the newspaper publisher's freedom of speech—and of the press. The case was *Miami Herald Publishing Co. v. Tornillo*.²⁴

The Court reached its decision in *Tornillo* notwithstanding its acknowledgment that the Florida statute involved no prior restraint on the publishing policy of the defendant newspaper. The Court invalidated the statute, moreover, fully understanding that the statute did not forbid any speech whatever by the *Miami Herald*.²⁵ At worst, the statute operated only as an indirect restraint upon the newspaper's freedom of speech insofar as the paper might be hesitant to publish its disparaging views in light of its statutory obligation to accept a reply. The Court also acknowledged that daily newspapers are not casual or substantially uninfluential sources of daily news (compare the status of WGCB in *Red Lion*).²⁶ Indeed, the *Miami Herald* was the principal daily newspaper in the greater Miami area, with by far the dominant

19. FLA. STAT. ANN. § 104.38 (Harrison 1975) (repealed 1975).

20. *Id.*

21. See, e.g., J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 670-71 (1970).

22. See, e.g., Lange, *The Role for the Access Doctrine in the Regulation of Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973).

23. See note 49 *infra*.

24. 418 U.S. 241 (1974).

25. *Id.* at 256.

26. *Id.* at 249.

daily circulation.²⁷ As applied, moreover, the statute did no more than provide a right of reply to an individual in whom there was widespread public interest in Miami—a local resident and candidate for local office, who was disparaged precisely in terms of his suitability for that office. Clearly, the Court was well aware that the net effect of holding the statute invalid, even as applied, might well be to embolden the Miami *Herald* to press its unequal advantage in local politics, thereby unilaterally influencing the outcome of elections through its combination of heavy negative partisanship and substantial contributions to public misinformation.²⁸ Finally, the Court, reaching its holding even though the actual cost to the Miami *Herald* of complying with the statute would have been negligible or nothing, declared: “Even if a newspaper would face *no* additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida Statute fails to clear the barriers of the First Amendment. . . .”²⁹

It is possible to square either *Tornillo* or *Red Lion* with a single view of the first amendment. “Explaining” the first amendment consistency of both at once, however, has been a terrific academic strain. Professor Barrow of Hastings,³⁰ Professor Emerson of Yale,³¹ and Professor Barron of George Washington³² believe that the *Tornillo* rationale is bad law. Professor Powe of Texas believes it is *Red Lion*, rather than *Tornillo*, that is bad law, that the case is plainly wrong and that its own premises are demonstrably unsound.³³ Professor Bollinger of Michigan believes that the *Red Lion* regime might be unconstitutional, but because the private print media cannot be subject to any equivalent restraints and may thus serve both as a competitive goad to radio

27. See F. FRIENDLY, *supra* note 14, at 192-98; B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 219-36 (1976).

28. 418 U.S. at 258.

29. *Id.* (emphasis added).

30. Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659 (1975).

31. T. EMERSON, *supra* note 21, at 670-71. Subsequently, however, Professor Emerson appeared to be reconciled to *Tornillo*. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

32. J. BARRON, *supra* note 21.

33. Powe, “*Or of the [Broadcast] Press*,” 55 TEXAS L. REV. 39 (1976).

and television and as a check against any self-censoring tendencies by those media, the regime of *Red Lion* may be constitutional as limited to radio and television.³⁴ Professor Kalven of Chicago wrote as though a result like that of *Red Lion* would not be compatible with the first amendment³⁵ while Professor Karst of UCLA, with substantial reservations, believes that much of the case can be understood as compatible with the equality principle and the first amendment.³⁶ Yet, the most recent address to this much vexed (overvexed?) area concludes that *Tornillo* is correct and that *Red Lion* is in error because the regime of the FCC does not represent "the least restrictive alternative" among speech-abridging means of regulating the airways.³⁷

Professor Friendly of the Columbia University Journalism School believes that the first amendment issues of *Tornillo* and *Red Lion* are confounding even to those who want to give maximum protection to first amendment values, but who are unable to figure out which case "really" does this better!³⁸ Professor Schmidt of Columbia believes that *Tornillo* may well be rightly decided, but that nothing the Court declaims in the case is the least bit persuasive.³⁹ His exposition of the difficulty with *Tornillo* is an excellent one and well worth our attention at this point. Professor Schmidt's questions about the Supreme Court's reasoning in *Tornillo* go to the very heart of the Court's neglect of what it had said only five years earlier in *Red Lion*.

The decision in *Tornillo* was based substantially on the point

34. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

35. Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15 (1967).

36. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43-52 (1975). Professor Karst's position is quite complex, resting in part on the observation that the government's peculiar involvement in the hegemony of its licensees may sustain certain third party requests for access based on the first amendment and expressing misgivings that the substitution of the FCC for the judicial determination of those claims is "shaky." See *id.* 46-50.

37. Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563 (1976).

38. Thus, witness the title of his book (THE GOOD GUYS, THE BAD GUYS . . .) and his quotation from Judge Wright in the frontispiece ("[in] some areas of the law it is easy to tell the good guys from the bad guys. . . . In the current debate . . . each debator claims to be the real protector of the First Amendment. . . .") and his conclusion in discussing *Red Lion* and *Tornillo*. ("The Supreme Court's inability to cope with *Red Lion* and *Tornillo* in the same opinion suggests that it recognizes the inherent contradiction of the two cases.") F. FRIENDLY, *supra* note 14, at 5-7, 198.

39. B. SCHMIDT, *supra* note 27, at 227-31.

of view once observed by Thomas Jefferson. Jefferson had himself been vilified by the Federalist press and yet observed:

I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.⁴⁰

Similarly, quoting Chafee's observation that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper,"⁴¹ Chief Justice Burger concluded in *Tornillo*:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.⁴²

Yet, the Florida Supreme Court, in upholding the statute as applied,⁴³ had relied very heavily upon the United States Supreme Court's own unanimous decision in *Red Lion*. In *Red Lion* the same Court had already concluded that evidently a way *had* been demonstrated by which governmental regulation to insure greater fairness was possible by means wholly congenial to the first amendment as it had evolved to that time.⁴⁴ That way, as approved by the Supreme Court, was for the government

(1) to establish by federal statute national government monopoly ownership of an entire medium of speech;

(2) to outlaw any speech by any private party not issued a government license;

(3) to vest sole licensing authority in a government agency to authorize such speech as, in its view, was consistent with "the public interest, convenience, and necessity";

40. T. JEFFERSON, DEMOCRACY 150-51 (Padover ed. 1939), *quoted in* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 153 (1972) (Douglas J., concurring).

41. 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947), *quoted in* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 254, 258 (1974).

42. 418 U.S. at 258 (emphasis added).

43. 287 So. 2d 78 (Fla. 1973).

44. 395 U.S. at 394-96.

(4) to include among its speech-content licensing tests a full, prompt, and free right of reply and also to impose very substantial additional "reply-type" burdens, such as the fuller affirmative duty to provide coverage of public issues the licensee would not himself elect to cover, and to provide a fair representation of dissenting views the licensee found inconsistent with his own view; and

(5) to enforce this regime by an ultimate power to cut off the licensee from any use whatever (including uses that offend no regulation) by a cancellation or nonrenewal of the license, without which it is a federal crime to operate.⁴⁵

In comparison with this arrangement, the Florida Supreme Court had found the Florida statute mild.⁴⁶ In the United States Supreme Court, moreover, the *Red Lion* precedent was the very center of the *Tornillo* briefs and oral arguments. In the *Tornillo* opinion, however, *Red Lion* is not even cited. That omission, and the failure of the Court to discuss, to distinguish, or even to acknowledge *Red Lion*, Professor Schmidt finds to be appalling.⁴⁷ Others, more cynical than Professor Schmidt, may find pointless any effort to cross-cite *Red Lion* and to offer some discussion of it. For them the Supreme Court's performance in these particular decisions may best be explained by Fleetwood Mac's acerbic refrain from their best-selling single, aptly titled "Over My Head":

Your mood is like a circus wheel,
Changin' all the time.
Sometimes I can't help but feel
I'm wasting all of my time.⁴⁸

Whether one disagrees with such flippancies (or whether one privately believes they contain a kernel of truth), I cheerlessly concede that it is highly implausible anything new remains to be said about this subject, given the extraordinary range of comment it has already evoked.⁴⁹ Yet there is such an obvious tension be-

45. *Id.*

46. See 287 So. 2d at 78.

47. B. SCHMIDT, *supra* note 27, at 227-31.

48. Copyrighted by Gentoo Music, Inc., 1975. Used by permission.

49. The professional literature on *Red Lion* and *Tornillo* (principally on *Red Lion*) is extensive. The following sources provide a comprehensive treatment of the subject, but even this listing is by no means exhaustive: J. BARRON, *supra* note 21; Z. CHAFEE, *supra* note 41; T. EMERSON, *supra* note 21, at 653-71; F. FRIENDLY, *supra* note 14; W. HOCKING, *FREEDOM OF THE PRESS, A FRAMEWORK OF PRINCIPLE*, (1947); B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975); Barrow, *supra* note 30; Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting*:

tween *Tornillo* and *Red Lion* that one cannot help being fascinated. The more one thinks about it, the more one is likely to appreciate the appropriateness of the metaphor which I have borrowed to conclude this introduction and to title this lecture. It is a metaphor suggested by a Duke law student, Wilson Parker, who described the conundrum of these cases as follows: "Deriving a consistent theory of the First Amendment from the myriad opinions of the Supreme Court represents a task similar to defining the inside and outside of a Möbius strip; that which appears logical at one point evaporates from another perspective."⁵⁰

II. THE TROUBLE WITH RED LION: ONE LONG BOOTSTRAP

Four years after the unanimous decision in *Red Lion*, a dissenter appeared. In *CBS v. Democratic National Committee* Mr. Justice Douglas voiced his dissent to *Red Lion*, a case in which he had not participated. It is, I think, a fitting starting place for a brief critical review. It ties in powerfully with the Supreme Court's unanimous position in *Tornillo*. It also reflects the seasoned view of the longest tenured Justice in the history of the

Pillars in the Forum of Democracy, 37 U. CIN. L. REV. 447 (1968); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213; Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969); Bollinger, *supra* note 34; Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 LAND ECON. 161 (1965); Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Emerson, *Colonial Intentions and Current Realities of the First Amendment*, *supra* note 31; Emerson, *Legal Foundations of the Right to Know*, *supra* note 31; Freund, *The Great Disorder of Speech*, 44 AM. SCHOLAR 541 (1975); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972); Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CIN. L. REV. 550 (1968); Kalven, *supra* note 35; Karst, *supra* note 36; Lange, *supra* note 22; Loevinger, *Free Speech, Fairness, and Fiduciary Duty in Broadcasting*, 34 LAW & CONTEMP. PROB. 278 (1969); Powe, *supra* note 33; Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Schiro, *Diversity in Television's Speech: Balancing Programs in the Eyes of the Viewer*, 27 CASE W. RES. L. REV. 336 (1976); Simmons, *supra* note 6; Note, *Constitutional Ramifications of a Repeal of the Fairness Doctrine*, 64 GEO. L.J. 1293 (1976); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964); Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulations*, *supra* note 37; Comment, *The Fairness Doctrine: Time for the Graveyard?*, 2 FORDHAM URB. L.J. 563 (1974); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L.L. REV. 137 (1975); Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEXAS L. REV. 727 (1974); Bollinger, Book Review, 76 COLUM. L. REV. 1354 (1976).

50. W. Parker, Class Exercise (unpublished paper in partial fulfillment of seminar requirement at Duke University Law School) (unavailable).

Supreme Court, a view ruggedly skeptical of any government action abridging speech for the alleged common good. It has a clear and admirable standard to which most of us might want to repair. Mr. Justice Douglas stated:

My conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. . . .

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, . . . in a carefully written opinion that was built upon predecessor cases, put TV and radio under a different regime. I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends.

. . . .

. . . Both TV and radio news broadcasts frequently tip the news one direction or another and even try to turn a public figure into a character of disrepute. Yet so do the newspapers and the magazines and other segments of the press. The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of Government.

. . . .

. . . The First Amendment is written in terms that are absolute. Its command is that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

. . . The ban of "no" law that abridges freedom of the press is in my view total and complete. . . .

. . . .

. . . [T]he daily papers now established are unique in the sense that it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era. The result is that in practical terms the newspapers and magazines, like TV and radio, are available only to a select few. Who at this time would have the folly to think he could combat the New York Times or the Denver Post by building a new plant and becoming a competitor? That may argue for a redefinition of responsibility of the press in First Amendment terms. . . .

. . . .

But the prospect of putting Government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take government off the backs of people. Separation of powers was one device. An independent judiciary was another device. The Bill of Rights was

still another. And it is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press. There is unhappiness in some circles at the impotence of Government. But if there is to be a change, let it come by constitutional amendment. *The Commission [i.e., the FCC] has an important role to play in curbing monopolistic practices, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship.*⁵¹

If one agrees with Mr. Justice Douglas with regard to newspapers (as the Court does in *Tornillo*, and as I do⁵²) then how is the Court to answer him with regard to radio and television? The answer sought to be provided by the Court is offered in *Red Lion* itself. That answer is . . . scarcity.

The peculiar "scarcity" which allegedly distinguishes radio and television from newspapers is not economic scarcity—that is, that it may cost a great deal to start up a broadcast station—but literal scarcity. No matter how much capital one might need to amass, given enough dollars any person, group, or enterprise could field a handbill, brochure, or newspaper of its own in any community wholly without regard to the number of handbills, brochures, or newspapers already under the control of others. Whatever one's fortune, however, for most significant markets in the United States, there is no way one could put together an additional functioning VHF television station. To be "functioning," it must be able to transmit intelligible signals. With all usable frequencies already assigned, unless one buys a signal already in use, commandeers it, or simply presumes to treat it like a noman's land and broadcasts over a frequency already in use, one is out of luck.

The *Great Speckled Bird* may not displace the *Atlanta Constitution* in Carter Country, but nothing restrains it from trying; nothing restrains it from competing in that market for sympathetic ideologies of its own and, by enlisting them, moving on to enlist appropriately avaricious advertisers as well. A proposed "WGSB," however, may not be able to compete at all.

51. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 148-62 (1973) (Douglas, J., concurring) (footnotes omitted) (emphasis added).

52. See Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977).

Other operatives may already sit astride the only usable frequencies.

If, then, freedom of speech and of the press is ordinarily protected because we are fully committed to the proposition that the best test of truth is the power of an idea to win acceptance in the competition of the market—rather than through any authoritative selection by government—the peculiarity of a technologically restricted market does seem to make a difference. There is no a priori reason to suppose that WGSB's version of truth could not be hyped with sufficient appeal to woo the willing ears of radio fans from whatever station to which they are currently attuned. Yet WGSB cannot slip even the equivalent of an aural handbill into an FM wave band already appropriated by others by courtesy of the government. If, under these circumstances, the current oligopolists of the Atlanta FM airwaves were themselves at liberty to crusade incessantly against all that WGSB may believe to be holy, with no chance even for the most willing FM listener to hear WGSB's version, what kind of a first amendment would it be?

Thus, it is argued, the first amendment need not be construed to tolerate a guaranteed hegemony for local media incumbents. Indeed, if the airwaves were regulated in this manner the government would itself be implicated as an active agent in the skewing of the ideological marketplace.⁵³ That would be the net effect of a federal licensing agency that grants exclusive licenses to those left free to broadcast their own propaganda and that declines to switch the license to WGSB from time to time, or to require an incumbent to vacate its frequencies at designated times so that a WGSB may have some chance to gather its own fans (and profits), or at least to impose some minimum program obligations on current licensees insuring some presentation of issues and views of concern to someone other than the licensees themselves.

As it is, all that the FCC does is to impose a minimum fiduciary duty on each incumbent licensee: not restraining it from taking extreme positions, not requiring any general release time to third parties, but merely requiring it to provide some program fare reflecting the fact of public issues deemed controversial—issues to which WGSB might have liked to speak. In the

53. See Note, *Constitutional Ramifications of a Repeal of the Fairness Doctrine*, 64 GEO. L.J. 1293 (1976).

course of treating those issues, the FCC requires a licensee to provide some mild, albeit not equal, representation of points of view other than its own, with a limited right of reply to those who are disparaged.

On this basis it is not so surprising that *Tornillo* omitted to cite or to discuss *Red Lion*. These cases are respectively addressed to such obviously distinguishable situations as to need no comparison. The separate basis of *Red Lion* was, very much in the terms already noted, made quite clear in the *Red Lion* opinion:

The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934. . . .

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . .

. . . .
In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.⁵⁴

Most of those supportive of *Red Lion* agree, moreover, that the literal scarcity distinction is both necessary and sufficient to sustain the case alongside *Tornillo*.⁵⁵

54. 395 U.S. 367, 388, 400-01 (footnotes omitted).

55. In *Red Lion*, the Court itself disclaimed other grounds for sustaining the fairness doctrine. 395 U.S. at 401 n.28. The scarcity argument as a basis for validating FCC speech-content regulations was approved in dicta by Mr. Justice Frankfurter in *NBC v. FCC*, 319 U.S. 190, 226 (1943), and relied upon in *Red Lion*. It is reiterated in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See also *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977). It is relied upon by the FCC in its 1974 Report, *In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 RAD. REG. 2d (P & F) at 1270 (July 12, 1974).

The difficulty with this seemingly persuasive explanation of the first amendment propriety of the basic FCC speech-content rules is that it may have been pulled up entirely by its own bootstrap, a point made a number of years ago by Ronald Coase.⁵⁶ Coase acknowledged the plausible consistency of most FCC regulations once one makes the correct factual observations about the consequences of the Radio Act of 1927: the establishment of government monopoly ownership of the airwaves and the allocation of exclusive private licenses with indifference to market pricing. Given that the airwaves are characterized as "owned" by the public for whom the FCC then acts to ration its private use consistent with the public interest, nearly all else follows logically:

(1) Insofar as the award of a license extends to a licensee a portion of publicly owned property without regard to any bargained-for consideration, it would be a constitutional dereliction by the FCC so to appropriate to private use portions of this public domain without any requirement that the persons so

Judge Bazelon, a principal critic of the doctrine, finds that the scarcity argument is the only basis for the FCC speech-content regulations. See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 68 (D.C. Cir. 1972) (Bazelon, J., dissenting), cert. denied, 412 U.S. 922 (1973). Professor Freund finds it necessary and sufficient. Freund, *The Great Disorder of Speech*, 44 AM. SCHOLAR 541 (1975). Professor Friendly relies upon it exclusively. F. FRIENDLY, *supra* note 14, at 192, 212, 217, 236. Professor Emerson is essentially of the same view. Emerson, *Legal Foundations of the Right to Know*, *supra* note 31, at 9; Emerson, *Colonial Intentions and Current Realities of the First Amendment*, *supra* note 49, at 752. Professor Schmidt appears to embrace it. B. SCHMIDT, *supra* note 27. The scarcity argument is also most relied upon as the underlying rationale of the FCC regime in the following: CHAFEE, *supra* note 41; Lange, *supra* note 22, at 6-7, 65; Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, 47 N.Y.U.L. REV. 83, 88-89 (1972); Note, *Newspaper Regulation and the Public Interest: The Unmasking of a Myth*, 32 U. PITT. L. REV. 595, 601-03 (1971).

Compare the observation of Justice Brennan in *FCC v. Pacifica Foundation*:

The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of "spectrum scarcity" to support their result. As Chief Judge Bazelon noted below, "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." 556 F.2d, at 29 (emphasis in original). See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969).

46 U.S.L.W. 5018, 5029 n.4 (July 3, 1978) (Brennan, J., dissenting).

56. Coase, *The Federal Communications Commission*, *supra* note 49; Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, *supra* note 49. Very strong criticism of the underpinnings of the scarcity rationale is also found in B. OWEN, *supra* note 49, at 90-92, 103-08 (1975); Bollinger, *supra* note 34; DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969) [hereinafter cited as *DeVany*]; Bollinger, *supra* note 34; Powe, *supra* note 33; Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, *supra* note 37.

subsidized acknowledge a duty to satisfy the public interest in consideration of the subsidy thus provided.

(2) Insofar as the FCC license insulates a licensee from direct competition by guaranteeing him exclusive use of one of a limited number of frequencies, the insulating involvement of the government itself generates a first amendment duty to insure that the joint venture—of FCC and licensee—does not skew the ideological marketplace. Such skewing may inevitably occur, however, unless the FCC enforces at least certain specific affirmative obligations such as programmatic offerings fairly reflective of proportionate community interests, affirmative fairness treatment of differing views respecting issues of public concern, opportunity for reply by persons singled out for criticism in the course of treating such issues, and equal access for every candidate. Indeed, even with things as they are, one properly may be uneasy about whether the operation of any or all radio and TV stations even crudely approximates an ideologically fair forum.

That all of this is but a “bootstrap,” however, becomes quite clear from a comparison with the utterly different mode by which rights and uses of other equally scarce resources are determined—a mode which neither necessitates nor tolerates a regime like that of the FCC. The most cogent comparison is that of land.

Beginning with the consolidation of estates during the late Middle Ages, it was the prevailing law in England and in much of Europe that the several lords owned the lands. Those who occupied these lands were permitted to use it on sufferance of various kinds of service such as socage, scutage, or knight’s service. The occupants did not have title to the land, however, and clearly could not presume to transfer any part of it, whether by sale, gift, testamentary device, or any other means; the land was not theirs to dispose of personally.

In the course of consolidation, the law developed that the king owned all the land, each lord owing fealty to the king and each himself being something of a grand tenant. Nothing would have been illogical (and indeed many believe it would have been far better) had the notion of “private” property never developed any further. In contemporary terms, land would be properly described as a “scarce resource.” Clearly it is not infinitely available, it is not a “free good,” and clearly certain unalterably fixed pieces of land are more valuable than others, favored by their market location and by other accidental circumstance.

As parliamentary forms of government gradually displaced

monarchic government, moreover, nothing necessarily had to change in terms of the legal incapacity of individuals or enterprises ever to acquire ownership of land. Instead Parliament, and in this country Congress, would be said to be the instrument of the people, rather than simply the legislative council of the king as it was previously described. The government itself would own *all* real property and, as is the duty of the government in respect to any publicly held scarce resource, it would be viewed as being bound to administer property in accordance with "the public interest."

It scarcely seems necessary to trace the implications of this scenario, because it is already clear what would happen: literally everything urged in respect to the "publicly owned" airwaves, the FCC, and the first amendment, would apply identically to the "publicly owned" land. Most assuredly is this true of its literal scarcity. Rather, it is only because the legal devices used in respect to land have been so vastly different from those represented by the FCC that we unthinkingly suppose that there must be some intrinsic differences.

Consider again the alleged uniqueness of the airwaves:

(1) *There are only so many of them; that is, a limited number of usable frequencies.* Obviously this is true also of land. There is a limited usable surface which, like the airwaves, may be cut into larger or smaller parcels (each to be "licensed" for a term to a particular party?).

(2) *Unless regulated in some way, broadcast communication would be utter chaos; for example, it would suffer from overlapping signals in overlapping markets. No one could be heard since each would be fatally dependent upon the noninterference of others.* Obviously this is true also of land—both in the immediate sense that others could commandeer the same plot unless exclusivity of possession is assured by law and, in the larger sense, that incompatible uses of adjoining plots must be restrained in order for each possessor to be able to make any particular use of his own plot. For example, persons unrestrained in the volume of noise they might issue from "their" land would manifestly make it impossible for persons to conduct their own speech activity even within "their" land.

(3) *Some frequencies in some locations are immensely more valuable than other frequencies in other locations.* This is obviously true in equal measure of land.

(4) *Some markets are wholly saturated, even if others still have available channels.* This is equally true of land. Insofar as

parcels of land might be treated like governmentally issued segments of the airwaves, and nonassignable term licenses issued, there would be more persons "standing in line" to apply for "free" licenses in certain markets than there would be parcels to issue to them at any one time.

The more interesting point of comparison is that, notwithstanding these similarities, the legal devices that apply to land and to free speech are utterly different from the regime applicable to the airwaves in spite of the erroneous assertion that the regime applicable to the airwaves was simply unavoidable. Notice, for instance, how differently "similar" problems are resolved in the following cases:

(1) X owns a movie house, and Y attempts to show a movie in X's theater without X's permission. X does not go to an FLCC [Federal Land Control Commission] for relief from such trespass. Rather, he files a private civil action for damages or injunctive relief, or both, he summons the police to enforce the criminal trespass law, or he uses limited self-help to eject Y.

(2) X operates his theater with so loud a speaker system or with such thin walls that he interferes with persons frequenting another nearby theater, book store, or department store. Those seeking relief from X's abuse of his property do not go to the FLCC for relief. Rather, they file suit for damages, injunction, or both, or they summon the police to enforce such ordinances as may regulate excessive noise that unreasonably interferes with their own land uses, or they may do both.

(3) Y believes that X is not presenting those movies clearly in the best public interest and Y wants to stop X from further exhibitions that, in Y's view, are contrary to the public interest. Y cannot now go to an FLCC. Instead, he must be able to demonstrate which law X is violating *and he must be prepared to demonstrate that any such law is itself not forbidden by the first amendment.*

(4) Y believes that, if the state transfers X's land site to him, Y would exhibit motion pictures more in the public interest than those that X has been exhibiting. If there were an FLCC, he might, at "license renewal time," have a good case. As it is, he has the same difficulty as in case (3) above; even supposing he is able to find a statute granting him the relief he seeks, *the statute is certain to be held violative of the first amendment.*

(5) Y would like to offer the public something "better" than

what he believes *X* offers the public, but *Y* is unable to do so for one or more of the following reasons:

- (a) *Y* is without sufficient funds to buy land and to build a theater;
- (b) the land and buildings available in the relevant market of *Y*'s interest are very high priced, and no one is willing to sell to him at what he personally would regard as a reasonable price;
- (c) the only theater *Y* can afford to buy or build would not, in any event, be as favorably located from the public's point of view as *X*'s theater, so that in fact *Y* would be able to serve only that part of the public interest represented by persons sufficiently interested and wealthy to pay the cost of coming out to his theater (similar to those people able to afford more complicated radio and TV receivers that pull in additional, more remote, signals).

So, what can *Y* do in this last case? Assuming no antitrust issues are involved, the answer as of now is nothing. While many people may be separately concerned (rightly so) with the maldistribution of wealth, it is surely doubtful that they would endorse the notion that the proper solution is to set up a *government* agency, with power to review *X*'s movies from time to time and to "nonrenew" his license in favor of another whenever, by its conscientious standards, *X* defaults on "the public interest" by exhibiting motion pictures portraying but one perspective.

Thus far, nothing has been said in the land use case, incidentally, about how *X* came to be owner of his motion picture theater. Indeed, in most discussions of *X*'s first amendment rights nothing *would* be said about the matter, because it would be considered constitutionally irrelevant. But because such matters are sometimes thought to make a critical difference in discussions of the airwaves, we may consider it for just a moment. Suppose, then, that

- (1) *X* acquired the theater as a result of his own frugal savings during thirty years of hard work, paying an arms-length, bargained-for price to the previous owner;
- (2) *X* acquired it from windfall gains from a lucky day at the track;
- (3) *X* acquired it by borrowing from a bank, with the loan secured by a mortgage on the property, expecting to repay the principal and interest from future profits;
- (4) *X* acquired it by forming a corporation, selling stock,

and using the proceeds to purchase the theater as "X, Inc.";

(5) X acquired it at public auction from the city (for which the land and building were surplus property) by being the highest bidder in competitive, sealed-bid proceedings; or

(6) X acquired it at a public lottery from the city (like some of the western land lotteries in the past century), as a lucky ticket holder.

For first amendment purposes, Y will be no more successful in displacing X under a claim that, if given the theater, he would program "better" movies, irrespective of the origins of X's ownership. In like fashion, the extent to which a party originally might have been a windfall acquirer of an "ownable" airwave segment (and incidentally might have sold at once to an arms-length purchaser who paid full market value) makes no difference, if it is assumed, as is true here, that the lottery itself was not rigged by limiting the participants to those who were ideologically acceptable to the government.

If, but only if, the government were the owner (as it might have been, had it acquired the theater literally by escheat if the previous owner had died without a will and without heirs) *and* the government were also determined neither to sell the theater nor to give it away by random lottery, but was determined instead to license its use to X, then we would, in that instance, at last have to consider what first amendment duties may be imposed upon X. Under these circumstances, X would indeed be involved in some important sense as a joint venturer with the government itself. But it is with the mere fact of just this type of relationship, rather than with a demonstration of the necessity or propriety of that relationship, that nearly all rationalizations of FCC speech-content controls have begun.

The difficulty is, however, that it is with the assumed necessity or propriety of this most peculiar relationship that our fundamental questions should begin. Offered as a reason which explains the propriety of FCC speech-content regulations, the bare fact of the FCC's relationship with licensees provides wholly circular reasoning: because the government insists upon its ownership monopoly of the airwaves (which no one has shown to be essential) and because it insists upon a system of exclusive joint ventures with preferred licensees, so also may it go forward to impose affirmative speech-use controls over each of those windfall, term licensees. The result of imposing identical affirmative duties on every licensee, moreover, is the tendency to field a

replicated series of similarly “balanced” speech uses throughout the FCC system—in contrast with a more diverse and competitive array of privately owned stations that would be fully subject to antitrust laws but otherwise as editorially free as newspapers.

As one might suggest in remembering the different legal order that regulates land, it is quite clear that the choice made by government is not necessarily one of “either/or.” That is, it is not a question that the government must own all of the airwaves or that it must own none of them. Neither is it a question that, assuming the government will continue to own all of the airwaves, either it must charge full market price for all licenses in every market (and, accordingly, leave each licensee strictly alone) or it must charge no licensee anything in any market (and, accordingly, should continue to impose compensatory speech regulations of an identical kind on each licensee). Without doubt, reservation could be made of the equivalents to public parks and streets—people’s forums in each community (as in *Hague v. CIO*⁵⁷)—with access rights as constitutionally free as the first amendment already well provides actual streets and parks. It may also be noteworthy concerning streets and parks that the first amendment presumably would void any rule authorizing that a permit be refused because the applicant represents a point of view previously presented in the same park a week earlier, or that he will not furnish a pledge to be balanced in his presentation.

There is, in short, no self-evident necessity why the eclecticism of the full property metaphor, some private and some public, is any less applicable or feasible for the airwaves. That this arrangement might actually provide some equivalents to the *Great Speckled Bird* (as well as the *Manchester Union Leader*)—it might provide some broadcasters with an idiosyncrasy, a strong coloration, and an indulged “unfairness” of their own, and do so in markets which it is preposterous to regard as truly captive or victim of any one station—is surely not to be feared. After all, that is what one should expect of a free press. That is what is assumed in the first amendment itself. The vague pastels of the “public interest” as required by the “fairness” regulations of the FCC may be easier on the eyes, one may argue, but they are surely a great deal less interesting. They may also be a great deal further removed from the model of a truly diverse,

57. 307 U.S. 496 (1939).

robust, competitive ideological marketplace, free from government licensing, that animated the first amendment.

But in any case, the bootstrap of *Red Lion* does seem to be showing: because Congress *chose* to regulate the airwaves as it did, the FCC does not act unconstitutionally in presuming to regulate broadcasters as it does.

III. DOES THE FIRST AMENDMENT "ENACT" A SYSTEM OF PRIVATE PROPERTY?

In retrospect, it appears that *Red Lion* may in fact have proceeded too swiftly. By supposing that the scarcity of usable frequencies was "unique," *Red Lion* supposed also that this alleged uniqueness dictated a system of government monopoly ownership. After supposing the appropriateness of that ownership, it supposed also that, given the limited number of usable frequencies in any particular area, nothing other than the imposition of affirmative licensee obligations could offset the unfairness to those unable to hold licenses of their own. If the relative physical scarcity of usable frequencies does not require either basic feature of the FCC regime, however—if it does not require continuing government ownership of all airwaves or if continuing government ownership need not require allocation by speech-content criteria as the sole means of compensating those disadvantaged by the subsidized value of the license awarded to licensees—then the rationale of the FCC standards may fail when once again challenged on first amendment grounds.

The basis for this new challenge is as bold as it is straightforward. It begins with the Court's own observations in *Tornillo* and moves at once from the principles of that case to the application of other, reasonably well-settled first amendment principles. In fact, we have already canvassed it. Briefly it is, again, as follows.

The requirement that a licensee devote *any* portion of his broadcast time to issues or to subjects not of his own selection perforce restricts his own freedom of speech in a way that cannot be reconciled with *Tornillo*. The additional requirement that he ventilate views that would undermine the force of his own view, or such views as he alone prefers to present on his station, is a similar restriction equally repugnant to *Tornillo*. That he must yield his station for the presentation of such matters at his own expense and that he must also supply a free forum for personal replies by those whom he has permitted to be criticized, is more of the same: they all directly abridge the licensee's "editorial

control and judgment,” and are inconsistent with *Tornillo*. If a way can be found to allocate the airwaves, a way that would itself be less restrictive of licensee discretion *and* that would simultaneously wholly eliminate any governmentally conferred advantage the licensee derives from the protected nature of his exclusive license, then the first amendment itself requires the selection of that way. If this argument is sound, then only one question remains: given the scarcity of the airwaves, is there no alternative for a rational allocation process other than the current one in which the award of a license necessarily involves a degree of federal subsidy secured at the expense of the free speech interests of others and demanding the kind of access or representation rights currently established by the FCC’s speech-content regulations?

It is said that there is such an alternative; even consistent with government ownership of the airwaves, it is altogether feasible to allocate licenses by a market-pricing mechanism that awards each usable frequency to the highest bidder with the government remaining absolutely neutral in passing any judgment whatever on the value of the proposed program fare. Whatever he wants to feature, the highest bidder-applicant would take all the risks that his own proposed uses may or may not be successful in attracting audiences and sponsors. Competitive sealed bid awards of channels and of frequencies would involve no governmental approval or judgment or endorsement or subsidy of any licensee’s program fare. Insofar as a given license is valuable because it is one of but several in a given market and because that market is an excellent one, the licensee will have paid fully for that value just as would be true if he had bid successfully on one of but a few possible theaters in a given town. In neither instance is there any need to use a speech-content standard in awarding the license. In neither is the licensee favored by government over others by reason of his program intentions. Accordingly, or so it is argued, the justification for imposing speech restrictions on his use of that license, for which he will have paid top dollar, collapses.

The argument is built on a creditable foundation of Supreme Court cases that do indeed hold that the first amendment obliges government to cope with a given social problem by electing from among feasible alternatives that which is least speech-restrictive.⁵⁸ As applied to this situation, a straightforward ver-

58. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), in which the court said:

sion of the argument has been reiterated very recently in the *Stanford Law Review*:

These proposals generally suggest that economic competition be substituted for FCC regulation, and that allocation of the spectrum be performed by recognizing private property rights in the spectrum, exchanged according to property and contract law and enforced at private initiative in the courts, rather than by government rationing to those whom it considers worthy. This regulatory strategy would remove the government from direct determination of the particular individuals who are allowed to broadcast, leaving this decision to market forces, and would avoid the need for specific behavioral commands and sanctions now necessary to secure compliance by broadcasters with the various obligations imposed by the public interest standard. . . . Under strict scrutiny, then, the existence of this clearly identifiable less restrictive alternative indicates that the Communications Act is unconstitutional.⁵⁹

The argument is appealing, but it is based on a fatal myopia in its failure to see how clearly freedom of speech is also abridged by a government policy that adheres only to a private property system and a market-pricing mechanism in determining who shall be able to speak. Insofar as the emphasis is upon maximizing the free speech of *broadcasters*, consistent with some impersonal mode by government to allocate broadcast frequencies, the proposal almost certainly is a feasible, less speech-restrictive alternative to the current regime. Insofar as the "problem" is maximizing freedom of speech *in general*, however, the proposal is by no means clearly the least speech-restrictive alternative. This is so simply because the choice of the option to go to a pure, or even to a mixed, market mechanism is itself a choice that is *more* speech-restrictive insofar as it winnows the field of otherwise eligible applicants strictly according to their ability to pay; it eliminates from the licensing competition those who lack dollars to put in an effective bid.^{59.1}

In a series of decisions this court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

59. Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, *supra* note 37, at 583. Similar observations are offered by Bollinger, Coase, DeVany, and Owen, each cited *supra* note 56.

59.1 For a persuasive statement of the reasons why a bid auction system might

The regime of the FCC subsidizes speech by making possible the presentation of some material which presumably would not command as much advertiser interest as the material it displaces. To put the airwaves entirely up for competitive bidding would simply insure *that* material would go unspoken on the airwaves, since a bidder who contemplated using such material would be constrained to submit a bid lower than the bidder who is a pure profit maximizer. A purely competitive bid or other market-pricing allocative mechanism therefore would not necessarily be overall the least speech-restrictive means.

To say that the use of such a mechanism might itself not violate the first amendment is far from saying that *therefore* any other mechanism does violate the first amendment. Congress may indeed be free to “sell off” the airwaves, and it may be wholly feasible to allocate most currently established broadcast signals by competitive bidding that, when done, may well produce private licensees operating truly without subsidy. But only a singularly insensitive observer would believe that this choice is not implicitly also a highly speech-restrictive choice by Congress. It is fully as speech-restrictive as though, in the case of land, government were to withdraw from *all* ownership and all subsidized maintenance of all land, including parks, auditoriums, and streets and to remain in the field exclusively as a policeman to enforce the proprietary decisions of all private landowners.

Unless, then, the first amendment enacts a system of free speech only for those who can compete with dollars—in other words, unless the first amendment enacts an exclusive free market system of private property—it cannot be maintained that the feasibility of such a system, as an alternative mode of airwave rationing or allocation, is less speech-restrictive. It is, implicitly, highly speech-restrictive.

One may also address the bid-auction proposals for airwave allocation from still another perspective that yields the same conclusion. This perspective is supplied by a specific profile of “state action” cases⁶⁰ that help us to understand how ostensibly impersonal policies of government nonetheless deeply implicate the

nonetheless be as egalitarian as the current system in view of actual FCC practices, however, see Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 240-43 (1978).

60. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (structuring of state law to encourage private discrimination held invalid); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

government in the shaping of private decisions that, ordinarily, are not themselves subject to the first amendment.

Under any competitive bid-auction method for leasing designated frequencies, the government at once becomes entangled as a recipient and as an inducer of highly restrictive "speech rents." The government will profit from speech-use restrictions imposed by its own lessees who, by imposing these restrictions, are able to pay the higher rent reflected in the successful bid they submit to secure their franchise. And here, too, it is the government's own bid-auction allocative policy that operates to encourage such restrictive broadcast policies on the part of its rent-paying licensees.

In both respects, the government's position is quite indistinguishable from that of the state-as-arms-length-lessor in *Burton v. Wilmington Parking Authority*.⁶¹ There, as Mr. Justice Clark observed,⁶² the difficulty was not that the State was subsidizing the lessee. Rather, if one assumes that the lessee truly paid *full* market value, not only for use of the premises but for any tax advantages that went along with the lease, that fact simply confirmed the government's own role as an active encourager and principal beneficiary of "race rents." The allocative (profit-maximizing) policy of the State was itself an active influence in shaping an entrepreneurial policy to exclude minority persons insofar as their presence might result in a net loss of customers or a net loss of revenue from which the entrepreneur must pay his rent to the State. In the actual case, the presence of this State participation in the enterprise of the lessee was deemed sufficient to apply the fourteenth amendment directly to the lessee himself. The duty of the state under these circumstances is quite clear: to forego such additional revenue as it may receive as a consequence of racially exclusionary practices by its lessee, and to require, instead, that its lessee forbear from a race-restrictive policy.

The same argument can be made in our own case as well. An FCC licensee, additionally induced by the government's own profit-maximization policy to shape his broadcast policies to refuse time or to forbear from programs insofar as the subject or the sponsorship would adversely affect his capacity to pay his rent or his capacity to offer the highest amount in rent, is himself

61. 365 U.S. 715 (1961).

62. *Id.* at 724. Compare Mr. Justice Rehnquist's attempt to limit and to distinguish *Burton* partly on this basis in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

"answerable" to the first amendment access claims of others.⁶³ A government that structures airwave restrictions in this fashion, moreover, may be required to restructure them in some alternative fashion that is less speech-suppressive than that resulting from a bid-auction system.

Finally, the basic point will not be altered even if government, whether by sale, by lottery, or by some other device, were to take the last step; that is, even if it were to release the airwaves outright into the untrammelled market place of private enterprise. To be sure, government would thereafter no longer be involved at all except in its purely traditional role as "policeman" who stands willing to enforce the "rights" of the several private owners. And, to be sure, as each owner arrives at his own broadcast policy free of any participation by government, whether direct or oblique, neither is *he* answerable to the first amendment—any more than was the *Miami Herald* in the *Tornillo* case. The fact remains, however, that at the juncture of deciding *whether* to release the airwaves in this fashion, the government is still deciding. And, insofar as among its several choices, the choice to release the airwaves into private hands contemplates that each of these airwaves may thereafter be severely restricted by the policies of its new owners, through program content or through the acceptability of certain sponsors, the critical decision is one that itself contemplates *more* restrictive uses of each frequency than is currently tolerated. Given the inevitable competitive pressures that may themselves induce profit-maximization program policies by private owners (again, policies tending to eliminate less popular subjects and unpopular sponsors), the proximate consequence is an overall system that in vital respects is even more speech-suppressive than what we currently have. This being so, it cannot be held that the first amendment itself compels such a decision by government.

IV. ARE FAIRNESS STANDARDS "UNCONSTITUTIONAL CONDITIONS"?⁶⁴

We know from *Tornillo* that the editorial discretion of private

63. In *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), the fact that the government did *not* give free rein to FCC licensees and that it did subject them to the affirmative duties of the fairness doctrine was relied upon to explain why an FCC licensee may not otherwise be directly answerable to the first amendment. *Id.* at 129, 130. See also *id.* at 147 (White, J., concurring).

64. For more extensive discussions of this doctrine, see Hale, *Unconstitutional Condi-*

newspapers cannot be trammelled by statutory equivalents to the fairness doctrine, despite the superior market position of a particular newspaper, the overt partisanship of its managers, or the meanness of its editors in foreclosing access to those whom the newspaper may malign. We have been taught by other cases, moreover, that what government is forbidden by the Bill of Rights to do directly, it is also forbidden to do indirectly: that to which free persons cannot be made to yield when they seek nothing from government, they cannot be made to yield to by coercion of circumstance controlled by government. As declared a half-century ago in the compelling rhetoric of Mr. Justice Sutherland:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.⁶⁵

So this general doctrine, the doctrine of "unconstitutional conditions," seems to provide that a waiver of first amendment rights cannot be annexed to the rationing of goods or services in the public sector. The Bill of Rights precludes the government from proposing such terms and, correspondingly, from attempting to enforce them.

May we claim the advantage of this doctrine, then, as an *alternative* basis for mounting a successful challenge to *Red Lion*? At first glance, it would surely seem that we may. Consistent with the doctrine, we may willingly concede that the airwaves are part of the public domain (and that no sufficient argument has been made to demonstrate that the Constitution itself compels their outright abandonment to private owners). Let the matter stand at that. Still, is it not clear that the fuller editorial

tions and Constitutional Rights, 35 COLUM. L. REV. 321 (1935); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

65. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926).

freedom, which we know government cannot deny according to *Tornillo*, is in fact emphatically denied "under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold"—that each applicant for an FCC license is compelled to yield a freedom of editorial discretion that the first amendment otherwise protects?

There is but one obstacle to the force of this argument: it, too, involves a bootstrap of its own and rests entirely upon a misapplication of the unconstitutional conditions doctrine. Properly understood, the doctrine merely protects *preexisting* rights from surrender-by-contract with the welfare state.⁶⁶ It is limited to a case in which in exchange for some valuable privilege, the state presumes to take from the individual some measure of freedom previously held by that individual and still held by all others. In the context of our problem, proper application of the doctrine would mean merely that an applicant for an FCC license who happens also to publish a newspaper cannot, as a condition of receiving an FCC license, be forced to observe "fairness" standards *in respect to his newspaper*. To permit this would permit "the same result [which result is forbidden by *Tornillo* when attempted directly] . . . under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."⁶⁷

On the other hand, whether the applicant can be forbidden to exercise the same latitude of editorial freedom *on the airwaves* that he remains constitutionally entitled to pursue in respect to his newspaper, cannot be answered by the unconstitutional conditions argument. To say that it is so answered is simply to confuse the two claims as though they were one and the same. But the very question we are attempting to resolve is whether FCC licensees stand on the same footing as newspaper publishers. It is not the different question of which preexisting rights, if anything, newspaper publishers may be made to surrender as a condition of becoming FCC licensees.

The case is truly no different analytically than one in which we ask whether the state may forbid those whom it employs as jailers from electioneering at the jail itself, a place from which all

66. See discussion and citations in Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500, 1525 (1977).

67. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. at 593.

others are excluded insofar as they, too, might wish simply to electioneer. Assuredly we shall get nowhere in attempting to answer that question by asking the wholly different question of whether the state could also forbid the jailer from electioneering at large, outside the jail and on his own time, as any private citizen would be free to do. The doctrine of unconstitutional conditions presumes to answer the second question with an unqualified "no"; that is, the state may not compel his surrender of that common right as a condition of his employment.⁶⁸ Quite plainly, however, it says nothing about whether, now that he is also the jailer, he can seize the advantage of that status to electioneer in a place from which virtually all others are excluded. Most assuredly, nothing in the conservative innovation of the unconstitutional conditions doctrine was ever intended to compel so anomalous a result. Identically, nothing associated with the doctrine is of any assistance to an FCC licensee in determining the latitude of his prerogatives on an airwave.

V. THE FIRST AMENDMENT PLURALISM OF PUBLIC FORUMS

In dismissing the technical irrelevance of the unconstitutional conditions doctrine, I did not mean to imply that therefore *any* restriction that government might impose within a facility that it owns is automatically free of first amendment objections. Within a prison, or even within the curtilage of a jail, we are aware that a *uniform* prohibition on varieties of assembly or demonstration might be sustained.⁶⁹ Within a public park, however,

68. In each of the following cases, the "right" that the individual sought to pursue, free from any waiver or restriction attached to some benefit or connection with government, was a right the individual was fully capable of exercising simply as an unattached private citizen: *Elrod v. Burns*, 427 U.S. 347 (1976); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958).

When, however, the alleged "right" is sought to be extended into the additional relationship that the individual has formed with the government, the question is conventionally regarded as the different question of whether a reasonable basis exists to forbid its exercise within that context. See, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967). See also *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (limiting dicta); *Van Alstyne, The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A. L. REV. 751 (1969).

In adhering to the conventional wisdom on the scope of the unconstitutional conditions doctrine, incidentally, I do not mean to express any approval of the doctrine or of its scope. Quite plainly, the Supreme Court has not adhered to the doctrine with any great consistency. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Wyman v. James*, 400 U.S. 309 (1971).

69. See *Adderley v. Florida*, 385 U.S. 39 (1966). See also *Greer v. Spock*, 424 U.S.

the established wisdom is to the contrary; the equal protection clause is not the only restraint that government must respect in determining who goes there. Rather, though government may be without constitutional obligation to provide a park, once government undertakes to do so it is as though the first amendment itself rushed in to fill the vacuum. While in existence, a public park is claimed by the first amendment which, of its own force, prevents government from cordoning it off from use as a forum.⁷⁰ One has a very strong impression, moreover, that even when government has to contend with park "allocation" problems in some ways analogous to those of the publicly owned airwaves, it very probably could not attempt to solve them through the use of rules at all resembling those associated with the fairness doctrine.

Might we not, then, take a still closer look at this more familiar publicly owned forum to see better whether the airwaves are truly so different that they warrant a kind of restriction that might well be stricken if anything similar were proposed for the rationing of park permits? That a permit (a license) may be required for park use is well established.⁷¹ That during certain periods more persons or groups may seek access to that free forum than the size or characteristics of the park can bear is also obvious. That government may adopt virtually any kind of rationing scheme pursuant to which such licenses may be allocated, restricted in behalf of others seeking access or limited in any other *parliamentarily* reasonable way to apportion access and use consistent with the equal protection clause, also seems likely.⁷² But perhaps it is arguable, and vigorously so, that the function of all such restrictions, whether for parks or for airwaves, must indeed be *merely* parliamentary; that is, what may not be done (even in the name of equal protection) is to impose on any licensee restrictions that tend to deprive each person of the vitality of his own freedom of speech, that crush the robustness of committed speech, and that impose an enervating "fairness" on each indi-

828 (1976); *Cox v. Louisiana*, 379 U.S. 559 (1965).

70. *Hague v. CIO*, 307 U.S. 496 (1939). See also *Gregory v. Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

71. *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

72. See Kalven, *supra* note 70, and consider Kalven's reflections on this problem in the specific context of the FCC in his article, *supra* note 35.

vidual speaker. That the lone haranguer must provide notice to third parties whom he intends to assail and yield any of his voluntarily assembled audience for reply time? That he must devote some fraction of his rhetoric to some issue of local interest or, if not that, at least to acknowledge the fair diversity of opinions arranged against the singular polemic he prefers to develop? Surely, after *Tornillo*, after *Hague*,⁷³ after *Hannegan*,⁷⁴ and after *New York Times v. Sullivan*,⁷⁵ any such inhibiting, stultifying, self-abnegating genuflections on behalf of some feckless fairness would be swept away. Surely it was not for this that Milton, Mill, Holmes, and Brandeis celebrated a much more passionate personal freedom of speech.

Perhaps it is here that we reach at last an unavoidable tension between a principle of equal protection (which it is the design of the fairness doctrine to serve) and a principle of free speech that sometimes will cause the principles to collide. In four different and separately important ways, the administration of the airwaves is *already* highly sensitive to the equal protection principle wholly without reference to the fairness doctrine. First, it copes with broadcast scarcity by refusing to release the airwaves to the unequal rights of private property. Second, it declines to confer exclusive licenses by any kind of pocketbook test^{75.1} or by any kind of ideological loyalty oath. Third, it declines to provide a permanent hegemony even for those licensed without a fee, even in markets in which there are numerous rivals, many competitors in other media, and very little, if any, market value for the license they hold. And fourth, it disqualifies from licensing those already holding a concentration of economic power over other means of communication.⁷⁶

The "fairness" doctrine, as an addition, however, differs in kind from all of these devices. It does so by imposing an aggregate of surrogate obligations the net effect of which may directly discourage the licensee's own freedom of speech: the message of the

73. *Hague v. CIO*, 307 U.S. 496 (1939).

74. *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).

75. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

75.1 *But see* note 59.1 *supra*.

76. Beyond or apart from these devices, it is well within the range of government authority even to add still other devices that would further diffuse distributive opportunities, *e.g.*, the reservation within each market of certain frequencies exclusively as public channels. These, in turn, might be reserved on a first-come-first-served basis for any groups to provide whatever programs they see fit to offer.

fairness doctrine is that he must deliver his station into the hands of others if he presumes himself to become an advocate. That, after all, was the real objection in *Tornillo*. It remains as a genuine objection to *Red Lion*, despite all other distinctions.

Indeed, if one continues to be troubled by *Red Lion*, I think it is not because one takes lightly the difficulty of forum allocation in a society of scarce resources. Rather, it is because one believes that the technique of the fairness doctrine in particular may represent a very trivial egalitarian gain and a major first amendment loss; that a twist has been given to the equal protection idea by a device the principal effect of which is merely to level down the most vivid and versatile forum we have, to flatten it out and to render it a mere commercial mirror of each community. What may have been lost is a willingness to risk the partisanship of licensees as catalysts and as active advocates with a freedom to exhort, a freedom that dares to exclaim "Fuck the draft," and not be made to yield by government at once to add, "but on the other hand there is also the view, held by many. . . ."⁷⁷

77. Compare this somewhat diluted version of free speech with the view of the first amendment enunciated for the Supreme Court by Mr. Justice Harlan:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us. . . .

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.

. . . . Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944).

Cohen v. California, 403 U.S. 15, 24-26 (1971). It is also this spirit, I believe, that animated the very powerful (and, for me, convincing) dissent by Judge Bazelon in *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 63 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

The point developed in the text is meant to be a larger one, directed at the inhibiting discouragement of the fairness doctrine itself, and not limited to the separate (smaller) issue respecting the validity of section 303 of the Act, 47 U.S.C. § 303(m)(1)(D) (1970), that provides that the Commission has the "authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee . . . (D) has transmitted . . . signals or communications containing profane or obscene words, language, or meaning. . . ." For an excellent critical review of that section, see Note, *Filthy*

In brief, the equal protection clause (or rather the equal protection principle) does not stand alone in the Constitution. And rather, if it is not to become a stultifying principle enacted into regulations that eliminate all occasions for jealousy and unevenness by achieving a drab and uniform "centrism"⁷⁸ on the airwaves, it must take into account the astringent effect of more colorful (and indeed, more radical) principles within the same Constitution. The first amendment is one of these. The emphasis here, with all respect, is not predominantly on equality per se but on freedom per se: freedom from government and more particularly freedom from government's debilitating inhibitions upon one's own speech; freedom to say what one feels—without apology, without a muffling gentility, without genuflection to what others may think, and without the heavy moralism of surrogate obligation.

To be sure, I have overdrawn the specific analogy between parks and the airwaves. One can readily anticipate the deserved rejoinder offered in terms of other "public forums" that themselves are constrained by public regulation at least as tight as anything captured by the fairness doctrine. There is, for instance, the very different analogy of public schools and public universities. These, too, are state owned. In these as well, choices are made through government about who shall teach there. The selection of those who teach is dictated in significant part by speech content, that is, by the dictation of subject matter. It is dictated as well by *treatment* of the subject matter—in other words, by the requirement that it be professionally responsible and, indeed, in an analogous sense that it be "fair."

Words, the FCC and the First Amendment: Regulating Broadcast Obscenity, 61 VA. L. REV. 579 (1975). The authority of the FCC under this section received limited approval in *FCC v. Pacifica Foundation*, 46 U.S.L.W. 5018 (July 3, 1978), a 5-4 decision. The case involved the broadcasting of George Carlin's satiric album "Filthy Words" during an afternoon program about contemporary society's attitude toward language. The Court distinguished the case from *Cohen v. California*, 403 U.S. 15 (1971) (Paul Cohen's entrance into a Los Angeles courthouse wearing a jacket with "Fuck the Draft" written across the back was a protected political statement in a public place) by a "time, place and manner" analysis.

78. The tendency is eloquently criticized in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1, 77-89 (1973). The tendency is encouraged by the Commission's most recent reiteration of duties under the fairness doctrine, at 30 RAD. REG. 2d (P & F) at 1282 (July 12, 1974): "[T]he broadcaster . . . is not expected to present the views of all political parties no matter how small and insignificant. *** [T]he licensee should make a good faith effort to identify the *major* viewpoints and shades of opinion being debated in the community, and to make provision for their presentation." (Emphasis in original).

That this last control must dampen the proselytizing ardor of particular teachers is not to be doubted. But a teacher, though protected by the first amendment,⁷⁹ is not wholly unaccountable for his classroom utterances and presumably may well be required to take into account the fair diversity of responsible opinion relevant to the subject matter of his instruction.⁸⁰ The teacher might be said to stand astride a classroom much as an FCC licensee stands astride an airwave. Even if those in attendance were present wholly voluntarily (equivalent to those who choose to tune to a given frequency), we would find it utterly unnecessary to grant the teacher the same range of polemical commitment as he may enjoy in the streets, and we think it not at all strange to impose fiduciary obligations of professional fairness on his treatment of the subject. If one thinks of the airwaves in this way, and of licensees as fiduciaries of the public interest, then of course it cannot seem at all strange to explain the fairness doctrine in a way that isolates and suitably distinguishes the lone haranguer in the public park.

Because of the extraordinary range of public forums, each of which has had its own particular first amendment tradition, several of which provide some modicum of comparison with the airwaves, but none of which exactly "fits," I see no point in trying to make a case that the Supreme Court was *plainly* wrong in *Red Lion*. The decision to reserve the airwaves from the vicissitudes of the private marketplace, wholly unpoliced by the first amendment or by the equal protection clause, seems to me to have been a defensible one. Similarly, I believe it would have been a mistake to utilize anything resembling a bid-auction system of allocation (and, moreover, had it been used, by no means would it have settled the question of access). Neither did the determination to issue licenses for but three years seem mistaken, nor the decision to take antitrust considerations into account. And finally, a plau-

79. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

80. See discussion in Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty* in *THE CONCEPT OF AMERICAN FREEDOM* 59-86, 125-33 (E. Pincoffs ed. 1972). The 1940 *Statement of Principles*, jointly authored by the American Association of University Professors and the Association of American Colleges (and currently endorsed by more than one hundred professional associations), acknowledges the accountability of professional educators for wilfully compromising the treatment of one's subject. See Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841.

sible case *can* be made even for the additional imposition of some public interest, fiduciary obligations upon all licensees. There are almost as many vantage points along the Möbius strip of our first amendment as there are analogies within the pluralism of public forums from which to gain perspective.

Perhaps, therefore, even as Professor Bollinger has suggested,⁸¹ it is the fuller sweep of the *whole* tradition (a tradition that includes *Tornillo* as importantly as it includes *Red Lion*) that should give us sufficient confidence and repose that the licensing regime of the FCC is, within its current limits, satisfactory after all. Certainly one cannot say that the case against the fairness doctrine is so clear-cut that the Supreme Court should necessarily have set its face against the ratification that Congress itself gave to the doctrine.

And yet, when one is finished with these myriad comparisons of other kinds of public forums, one may still believe that *Red Lion* was a first amendment misfortune. In yielding to the fear of licensee abuse, the fairness doctrine may ultimately betray a lack of confidence in the presuppositions of the first amendment itself. By inadvertently modeling the airwaves more nearly on the controlled, instructional environment of academic forums than on the freer spirit of the public park or the avowed partisanship of much of the press, the fairness doctrine means, in practice, that there will be few, if any, Great Speckled Birds of the air and, indeed, no place at all within this vast forum for a *Red Lion* to roar. What can possibly be plainer than that the luminescence of the first amendment itself is dimmed whenever freedom for passionate expression is systematically discouraged by state-imposed duties of fiduciary obligation and the yellow light of self-restraint?

Despite weak attempts to distinguish it on other grounds, moreover, *Tornillo* is a case that represents a fundamentally different and more confident view of the first amendment. The practical hopelessness of countering the immediate partisanship of the *Miami Herald* was persuasively presented to the Supreme Court, and rightly acknowledged in the *CBS* opinion by Mr. Justice Douglas. Additionally, only the weakest kind of case can be made for the ubiquitousness of the fairness doctrine spread through *every* market and *every* airwave. Given the actuality of

81. Bollinger, *supra* note 34.

alternative radio signals readily receivable in virtually every community, and the doubtful ability of any one radio station to dominate the politics or tastes of an average city or town, the rationale for imposing the fairness doctrine on *all* of radio broadcasting (precisely the case in *Red Lion* itself) borders on the mythical, if not the absurd. Given the antitrust authority of the Commission to provide for reasonable deconcentration among television licensees and across types of media frontiers and given also the rapid development of cable television (which is already collapsing the premises of the "scarcity" rationale itself),⁸² a different outcome in *Red Lion* would surely not have risked very much. That different outcome would have expressed more confidence in ourselves and in others, repudiating the doleful view that we are helpless captives of night riders on the air or that we need protection from every political charlatan who may seek to corrupt us with 1,000 watts of radio power. That different outcome, far more consistent with *Tornillo*, would have placed a higher value on the right to passionate expression and to that robust freedom of speech that animates our first amendment.⁸³

82. See the discussion (and multiple citations) in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir. 1977). See also *Midwest Video v. FCC*, 46 U.S.L.W. 2447 (8th Cir., Feb. 21, 1978).

83. I have frankly not thought through an adequate formulation that puts into convincing language a suitable first amendment proposition that would capture the point of this closing section. I am quite sure that others can do a far better job of it, and I hope that they will. Something of the following sort (but less trivially expressed) seems to be called for: however limited a "property" one may hold by government sufferance, that interest may not be additionally burdened by subjecting it to the demands of others as a condition of using it to present some point of view of one's own exclusive choosing. Whether the "property" is the limited interest of an FCC licensee or the limited interest of a tenant in a public housing unit, the principle seems soundly grounded in the first amendment.

The Court has long held that no person may be made the unwilling herald of other people's politics, whether they be the government's own or those of private third parties. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). See also *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). And a portion of the Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), set its face against the notion that restricting some from speaking because others may lack the means to command equivalent forums is compatible with the first amendment: "levelling down" speech is an unacceptable view of equal protection. As noted in the text, moreover, the decision in *Tornillo* proceeds on the assumption that the imposition of self-abnegating duties as a condition of one's own controversial comments is likely to be more speech-stultifying than speech-enhancing. At the very least, a substantial burden of exceptional justification should rest on government insofar as it demands a departure from this approach. Very likely that burden can be shouldered in certain instances. An example is the controlled instructional environment of the public school classroom

within which the teacher's utterances are sheltered by the first amendment's protection of academic freedom. But the classroom situation otherwise presents itself in sharp contrast, rather than as any credible functional likeness, to the airwaves. *See, e.g.*, *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).