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Taming *Red Lion*: The First Amendment and Structural Approaches to Media Regulation

By Monroe E. Price*

INTRODUCTION

There are orphans of the law, and the fairness doctrine¹ may fast become one of them. Its finest hour, perhaps, was in 1969, when the Supreme Court, eight to nothing, held the doctrine constitutional.² But now that the power of Congress and the Federal Communications Commission (FCC) has been established, there is much more sober reflection about the wisdom of the fairness policy. The signs of orphanhood are strong. The missing Justice in *Red Lion*, Mr. Justice Douglas, subsequently went out of his way to say that had he participated, he would have held the doctrine unconstitutional.³ Mr. Justice Stewart has shown signs of a change of mind.⁴ And in the

* Professor of Law, UCLA School of Law. This Article is adapted from a speech delivered at the Federal Trade Commission's Conference on Media Concentration, Washington, D.C., December 15, 1978. I am most appreciative of the helpful and illuminating suggestions I received from Professor Stephen Shiffrin of the UCLA School of Law.

1. The fairness doctrine imposes upon broadcasters an affirmative duty to devote a reasonable amount of air time to coverage of public issues and to provide an opportunity for presentation of opposing viewpoints. *In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, Fairness Report, 48 F.C.C.2d 1, 7, 30 R.R.2d 1261 (1974) [hereinafter cited as Fairness Report]. See generally EMERSON, THE SYSTEM OF FREE EXPRESSION 653 (1970).

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

3. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring).

4. *Id.* at 146 (Stewart, J., concurring). In discussing *Red Lion*, Justice Stewart said that due to "the unique electronic limitations of broadcasting, at least in the then-existing state of the art," the Court "[r]ightly or wrongly. . . decided that

famous *Tornillo* case,⁵ which everyone but the Court seemed to think revolved around *Red Lion*, the fairness case was not even cited. There is more tumbling around. After its policy of requiring fairness was vindicated, the Commission started backing away from aggressive access decisions that were outer extensions of the doctrine.⁶ And one of the architects of authority for the FCC, a driver of power, then Chief Judge Bazelon, has officially recanted.⁷

None of the foregoing is to suggest that the Court will officially repudiate the fairness doctrine. Since *Tornillo* the Court has cited *Red Lion* on several occasions,⁸ carefully refraining from outright overruling, but also carefully limiting the extent of its embrace. What is happening, in terms of first amendment vibration, is quite important. Coming almost to the edge of the content regulatory cliff in *Red Lion*, there has been a general retreat. Concerns about concentration,⁹ about diver-

broadcasters' First Amendment rights were 'abridgeable.'" *Id.* at 146 (emphasis added). He also noted that he had agreed with the *Red Lion* decision "with considerable doubt, because I thought that much Government regulation of program content was within the outer limits of First Amendment tolerability." *Id.* at 138 (emphasis added).

5. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Here the Supreme Court overruled a Florida "right to reply" statute which granted political candidates newspaper space equal to the space used by the newspaper in criticizing the candidate or attacking his record. The Court held that the statute intruded on the editorial function and infringed on freedom of the press under the first and fourteenth amendments.

6. The FCC in 1967 ruled that cigarette commercials implicitly raised the issues of desirability of smoking and of related health hazards and thus triggered the fairness doctrine. *In re WCBS-TV*, Memorandum Opinion and Order, 9 F.C.C.2d 921, 11 R.R.2d 1901 (1967), *aff'd sub nom.*, *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). But in 1971, the Commission attempted to reverse field by ruling that automobile advertisements did not raise the issues of desirability of using cars and of related air pollution hazards. *In re Friends of the Earth*, 24 F.C.C.2d 743, 19 R.R.2d 994 (1970), *rev'd*, *Friends of the Earth v. FCC*, 447 F.2d 333 (D.C. Cir. 1971). The agency since has exempted "ordinary product and service commercials" from the fairness doctrine. Fairness Report, *supra* note 1, at 24-26.

7. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213 [hereinafter cited as Bazelon].

8. See *FCC v. Pacifica Foundation*, 98 S. Ct. 3026, 3037 (1978), where Justice Stevens joined by Justice Rehnquist and Chief Justice Burger resorted to *Red Lion* as they affirmed the regulatory proscription of certain indecent language on television at the time and in the context of that broadcast. See also *First Nat'l Bank v. Bellotti*, 98 S.Ct. 1407 (1978).

9. See *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978)

sity,¹⁰ about access¹¹ remain intense, perhaps justifiably so; but something deep inside was suggesting that the progress of the law was moving headlong in a difficult direction. There is more of a search for alternative approaches. Structure has been identified as a prime candidate for reform, replacing content regulation as a method for achieving first amendment goals.¹²

Increased emphasis on structure is happening for at least three reasons. First, an empirical point: the fairness doctrine was designed to enhance the discussion of controversial issues of public importance, yet the evidence is not great that the doctrine contributes to that goal; indeed, there are indications that it is counterproductive.¹³ Second, the cases seem to be moving toward a concept of editorial autonomy that is inconsistent with aggressive implementation of fairness requirements.¹⁴

(affirming FCC rules barring future creation or acquisition of newspaper-broadcast combinations).

10. See Fairness Report, *supra* note 1, at 1-3.

11. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (broadcasters not required to accept paid editorial advertising).

12. Government measures to encourage a multiplicity of newspaper outlets, for instance, have been described as a course of action that is "far preferable" to content-oriented regulation. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 627 (1970). Judge Bazelon has identified the "major project for reform [of the telecommunications media] to be an increase in programming competition." Bazelon, *supra* note 7, at 238.

13. The fairness doctrine has been singled out as being one of the most significant contributors to bland rather than controversial programming. Since most broadcasters are profit-oriented, they may be reluctant to raise a controversial issue for fear of estranging an advertiser. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 187-89 (1973) (Brennan, J., dissenting); Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 764 (1974); Simmons, *Commercial Advertising and the Fairness Doctrine: The New FCC Policy in Perspective*, 75 COLUM. L. REV. 1083, 1111 (1975); Green and Lewis, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 560 (1971); Comment, *Evaluation of the Basis for and Effect of Broadcasting's Fairness Doctrine*, 5 RUTGERS-CAMDEN L.J. 167, 179-80 (1973).

14. The Supreme Court, in rejecting the view "that every potential speaker is the best judge of what the public ought to hear," reasoned that "[f]or better or worse, editing is what editors are for. [And although] editors . . . can and do abuse this power, . . . that is no reason to deny the discretion Congress provided." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973). And the Court has concluded that "[i]t has yet to be demonstrated how governmental regulation of this crucial process (of editorial control and judgment) can be exercised consistent with the First Amendment guarantees of a free press or how they have evolved to this time." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Third, the new technology provides the basis for a new romantic notion that structural intervention on a wholesale basis is possible and will lead to increased diversity and access.¹⁵

This Article will sketch the shift in emphasis from regulation of content to regulation of structure and suggest the emerging first amendment guidelines that might influence the government, the industry and public attitudes in the next few years.

I. SOURCES OF THE SHIFT TOWARD REGULATION OF STRUCTURE

A. *The Regulatory Objective and the Results of Regulation*

As a form of social engineering, the implementation of the fairness doctrine over the last fifteen years is subject to question.¹⁶ The logic of implementation has occasionally been so extended and the methodology for determining whether a fairness objection exists so tortured and intrusive that the risks of carrying controversial programming have been increased.¹⁷ Affirmative obligations of the fairness doctrine aside, there may, in fact, be a truly chilling aspect of the doctrine. Regulation may restrict rather than enhance speech. To the extent the regulatory agency is entitled to make a prediction about the impact on diversity, courts may for a long while go along with the FCC, even if they have their own doubts as to the first

15. Videocassettes, videodiscs, pay television, cable television and satellite distribution systems have been mentioned as prospective servants of diversity that will provide viewers and listeners with unprecedented alternatives. See Price, *Requiem for a Wired Nation*, 61 VA. L. REV. 541 (1975); Rappaport, *The Emergence of Subscription Cable Television and its Role in Communications*, 29 FED. COMM. B. J. 301 (1976); Gerlach, *Toward the Wired Society: Prospects, Problems, and Proposals for a National Policy on Cable Technology*, 25 MAINE L. REV. 193 (1973); Note, *Committee on the Future of Broadcasting*, 40 MOD. L. REV. 460 (1977).

16. See note 13 *supra*.

17. An NBC television documentary on private pensions was the subject of a complaint that the program overemphasized the negative aspects of such plans. Although the network indicated that some pension plans worked, the FCC at first determined that the program was one-sided and violated the fairness doctrine. A series of court and Commission rulings and reconsiderations on the same case led to no final resolution on the merits, as the matter was vacated as moot. *In re Complaint of Accuracy in Media, Inc., Against NBC*, Memorandum, Opinion and Order, 44 F.C.C.2d 1027, 1035, 28 R.R.2d 1371 (1973), *rev'd sub nom.*, *NBC v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated as moot upon rehearing en banc, id.* at 1155, *cert. denied*, 424 U.S. 910 (1976). See also *American Security Council Educ. Foundation v. FCC*, No. 77-1443 (D.C. Cir. Sept. 13, 1978).

amendment efficacy of the particular regulatory policy. Put differently, assuming that a regulatory agency has a constitutionally proper authority to make rules that would enhance diversity, and the agency purports to do so, courts will hesitate to judge on their own whether the agency action, in some real world sense, actually achieves the objectives which it set out to achieve.¹⁸ Assuming the constitutionality of the fairness doctrine and similar content-related rules as established by Congress and the FCC, it would generally be proper for the court to give due deference to interpretive efforts of the agency.¹⁹ There are limits to deference, however, and judges are sometimes influenced by their own intuitions about the effect of a rule on the real world.²⁰

B. *Attitudinal Shifts: Regulation and the First Amendment*

Supporters of a full-blown fairness approach to program diversity have more than empirical skepticism to deal with. The future course of first amendment law may be more with the absolutist approach of *Tornillo* than with the experimental, creative, interventionist and balancing approach of *Red Lion*. There has been the incipient suggestion that the "freedom of the press" clause provides a certain editorial autonomy that is independent of "freedom of speech."²¹ *Red Lion*, looking to the speech rights of the listener, oddly discounted the licensee, perceiving the station as the carrier rather than the speaker. Subsequently, however, there has been much more focus on

18. The Supreme Court has noted "that Congress has chosen to leave such questions [as access] with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973). The Court thus expressed its belief "that nothing in the language of the Communications Act or its legislative history compels a conclusion different from that reached by the Commission." *Id.*

19. *Id.*

20. *Home Box Office v. FCC*, 567 F.2d 9, 25-34 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 621 (1978) (the D.C. Circuit struck down most of the Commission's "pay-cable" rules).

21. Stewart, "Or of the Press", 26 *HASTINGS L. J.* 631 (1975); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, *id.* at 639. It is important to note that the Chief Justice has disassociated himself from this view in his concurring opinion in *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407, 1426 (1978). The Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), can also be seen as an indication that a majority of the Justices do not believe that the press possesses any greater first amendment rights than do individual citizens.

the rights of "the press" as an institution and the place of television licensees as elements of the press.²²

Another important change, not textually based, has been the rather forceful cultural trend away from regulation, away from appreciation of the benefits of government intervention in the society.²³ The "chain broadcasting" case in 1943 was the first occasion for the United States Supreme Court to address the problem of substantive regulatory power by the FCC. In that decision, *NBC v. United States*,²⁴ Justice Frankfurter laid the basis for a positivist role for the FCC, asserting that the agency was more than a traffic cop and might really think about what kind of licensee could best carry out the ideals of the Communications Act of 1934. But it should be recalled that this was a time when there was a great urge to support the development of a central government and the administrative process. This was a period in which it was unusual for the Supreme Court to conclude that an administrative law initiative was unauthorized, much less that the authorization was unconstitutional.

It was not until twenty-five years later in *Red Lion* that the Supreme Court next turned to the issue of first amendment constraints on agency action. This was toward the end of a period in which a major effort had been to prod and resuscitate seemingly moribund agencies, to tear them from the grasp of their industrial constituencies and make them and the regulated industries more accountable to the public. The tenor of the early 1960s had been to mobilize the authority of the FCC and its sister institutions and make them more aggressive in their efforts to accomplish Congressionally-delegated goals. There was more emphasis on hearing from the groups left out of the process and finding a way in which they could more consistently and effectively participate. As much as *Red Lion*

22. One could conclude that "the press" has rights, but that a television station is not part of "the press," at least where it is not engaged in press-related activities. The tendency, for example, is to characterize cable operators (except to the extent they operate locally-originated channels) as technicians rather than editors, even though they make program choices to fill still scarce channels. Perhaps, however, it is too great an infringement of "press" rights to attempt to distinguish among press and non-press-related functions of privileged institutions.

23. The most recent example of this can be seen in *FCC v. Midwest Video Corp.*, 99 S. Ct. 1435 (1979).

24. *NBC v. United States*, 319 U.S. 190, 226-27. (1943).

raised first amendment issues, it captured these other strains as well.²⁵ For this was more or less a model agency effort. Studies in the late 1940s had laid the basis for initiation of the doctrine.²⁶ Congress subsequently ratified the doctrine specifically.²⁷ And the agency had used its rulemaking authority to promulgate the regulations in question in one case.²⁸ Not only was there agency initiative, but it was democratic in its purport, an experiment in improving harmful rigidities in the system.

In the years following *Red Lion*, particularly in recent years, there has been a perceptible change, a general cultural drift toward less statism in the society. Whether this is a rhetorical or an actual shift remains to be seen. But the first amendment, as an anti-statist encomium, is likely to be more forcefully and bluntly interpreted.

C. *The New Technology as a Means Toward Diversity*

The third reason for a change in emphasis is the prospect that such new technologies as cable, satellite and videodisc offer opportunities for a structuring of the media in which diversity and access objectives can be achieved without content regulation. That has been the hallmark of the efforts that led to the *1972 Cable Report* of the FCC and the rules that flowed from that Report.²⁹ For the Commission and the courts, there is the desperate hope that the abundance of frequencies and flexibility promised by the new technology will provide a way out of the constitutional and regulatory box of the fairness doctrine.³⁰ For those with an interest in access and diversity the

25. See, e.g., Johnson & Weston, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971).

26. Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

27. Congress, in amending the statutory equal time requirement for political candidates in 1959, provided that the measure afforded no exception "from the obligation imposed upon them (licensees) under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a) (1978). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969).

28. Fairness Report, *supra* note 1; Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 36 R.R.2d 1021 (1976).

29. Cable Television Report and Order, 36 F.C.C.2d 143, 24 R.R.2d 1501 (1972); 47 C.F.R. §§ 76.1-.617 (1977).

30. The Supreme Court has indicated its own anticipation of such developments by noting that "at some future date Congress or the Commission—or the broadcast-

trends in decisions and the feeble results of "fairness" decisions have led to a focus on the structural possibilities afforded by the new technology.

II. DOCTRINAL JUSTIFICATIONS FOR A NEW EMPHASIS ON STRUCTURE

A. *Contingent Access Requirements Versus A Structural Approach*

It is not enough in a system of law to have cultural and technological forces shifting the emphasis from one approach to another. There also must be a legal underpinning which suggests, in an analytical way, why a structural approach is preferable to an approach to diversity which involves content regulation.

Analysis must start with the semantic game of mystification; only by increasing complexity at the outset can there be the catharsis of demystification. Professor Benno Schmidt, in his useful Twentieth Century Fund study, *Freedom of the Press vs. Public Access*,³¹ characterizes the fairness doctrine and similar access rules as "contingent" access requirements. A contingent access rule exists when access is triggered by something the publisher does, such as broadcasting a personal attack or one side of a controversial issue of public importance or selling

ers—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 131 (1973). The FCC has announced that the fairness doctrine is necessary until "effective development of an electronic medium with an abundance of channels." Fairness Report, *supra* note 1, at 6-7. See also Price, *Requiem for a Wired Nation*, 61 VA. L. REV. 541, 551-52 n.61 (1975).

31. B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* (1942). I am referring here to the so-called "second part" of the fairness doctrine. The first part of the doctrine, by contrast, imposes an affirmative duty upon the broadcaster to devote a reasonable amount of air time to coverage of controversial issues of public importance. While this portion of the doctrine could also be viewed as a contingent access requirement in the sense that the issue of public importance is the "triggering event," such a view would seem to blur unnecessarily the distinction between contingent and non-contingent access. Clearly, if the non-contingent aspect of the doctrine were ever taken seriously (fortunately it is not), the Commission would have to establish a roll call of controversial issues for each community and demand that such issues be covered with "reasonable" time devoted to each. If contingent access requirements are too complex and too intrusive, part one of the fairness doctrine is simply impossible.

political advertising to one candidate. Contingent access requirements pose special first amendment problems. They require the regulatory agency to determine whether the triggering event took place. And because there are risks and hazards associated with particular kinds of triggering speech, it is less likely that the publisher or broadcaster will indulge them. Furthermore, contingent access requirements involve the regulating agency in complex and intrusive efforts to find appropriate remedies.

In contradistinction to the contingent access requirements are structural approaches which provide for noncontingent access. An example of a noncontingent access requirement is the compulsion which existed in the *1972 Cable Rules*,³² albeit much watered down in 1976,³³ to furnish in certain cable systems a reserved channel for education, for government, for leasing and for public access purposes. This year the Supreme Court negated the authority of the FCC to establish these particular noncontingent access requirements in the *Midwest Video (II)* case.³⁴

An understanding of the reservation of channels,³⁵ as in the cable rules, may be assisted by analogy. The analogy of

32. Cable Television Report and Order, 36 F.C.C.2d 143, 189-92, 24 R.R.2d 1501, 1557 (1972).

33. *In re* Channel Capacity and Access Channel Requirements, 59 F.C.C.2d 294, 37 R.R.2d 313 (1976).

34. *FCC v. Midwest Video Corp.*, 99 S. Ct. 1435 (1979). Here mandatory access, channel capacity and equipment regulation of cable TV by the FCC was struck down as exceeding the FCC's jurisdiction on the grounds that the Commission had no statutory authority and the regulations were not "reasonably ancillary" to the FCC's regulation of broadcast TV.

In discussing this question with respect to cable, there is a threshold issue: namely, whether Congress authorized the FCC to engage in noncontingent reservations—i.e., reserving a channel on a system for educational uses or government uses or public access. The questions of general authority over cable were before the Supreme Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) and in the first *Midwest Video* case (*Midwest Video Corp. v. FCC*, 406 U.S. 649 (1972)). It is only important for this discussion because a court, concerned about the constitutional implications, may narrowly interpret the authority of the agency. I am assuming, for our discussion of policy implications, that a court would hold that the FCC or other agency was acting within its statutory authority. Thus the constitutional issues must be faced.

35. A danger inherent in this area, it should be noted, is that government would be implicated in determining whether a dedicated channel was being used for its prescribed purpose.

disposition of public land has been used³⁶ to help explain the alternatives open to the federal government in managing the electromagnetic spectrum.³⁷ The analogy is based, of course, on the famous perception, housed in a Senate Resolution that "the ether and the use thereof for the transmission of signals, word, energy, and other purposes is hereby reaffirmed to be the inalienable possession of the people of the United States and their government. . . ."³⁸

This comparison of the spectrum to public lands is helpful because it indicates the flexibility and purposiveness of the management of public property. In the nineteenth century and even in the twentieth, the federal government used its power to relinquish portions of the public domain to achieve certain important social objectives. There were reservations of land to aid in the civilization of Indian tribes;³⁹ land was set aside to support higher education or public schools;⁴⁰ townsites were reserved for new communities.⁴¹ Through the Homestead Acts, land was issued in units that fostered, at least in the minds of the Congress, a kind of national ideal of family farming.⁴² Furthermore, land retained in public ownership was, and remains, classified by the Secretary of the Interior for various kinds of uses⁴³ (such as grazing, wilderness, mining or agriculture).

This analogy is helpful in the sense that it provides assurance that the sovereign can act rationally and with purpose in managing or disposing of public property. Its helpfulness dwindles, however, as difficult first amendment issues mount. Merely because the government has the power to dispose of public property does not mean that it can do so in a discriminatory manner. Similarly, because the government can dispose of the spectrum or contract out its use, it cannot do so in a

36. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539 (1978).

37. B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975).

38. S. Res. 2930 reprinted in B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 125 (1942).

39. See *United States v. Clapox*, 35 F. 575 (D.C. Ore. 1888).

40. 43 U.S.C. § 851 (1970).

41. 43 U.S.C. §§ 713, 719 (1970).

42. 43 U.S.C. § 161 (repealed in 1976, but effective until 1986 for Alaska).

43. 43 C.F.R. § 2070.3 (1977).

manner that violates first amendment rights.⁴⁴ There is little doubt, however, that a classification scheme in frequency allocation, like a classification scheme in public land disposition, would withstand constitutional scrutiny even in the post-*Tornillo* era. Just as a portion of the spectrum can be set aside for land-mobile, or national defense purposes, or for broadcast television and radio,⁴⁵ classifications within the television spectrum can be made, with reservations for education, and perhaps for other uses—such as sports or children's programming or news.

Such a structural approach to licensing policy is significantly more harmonious with the first amendment than the present licensing system. As discussed above, licensing at present provides for contingent access⁴⁶ with its hazardous implications for chilling the programming decisions of broadcasters.⁴⁷ Furthermore, diversity is achieved, if at all, through the difficult to articulate goals for news and public affairs.⁴⁸ Imagine instead a licensing system in which channels are segmented

44. The Supreme Court, in rejecting the argument that denial of a broadcast license was contrary to the first amendment, stated that "Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other capricious basis. If it did, or if the Commission by (its) Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." *NBC v. United States*, 319 U.S. 190, 226 (1943).

45. The Communications Act of 1934 gave the FCC power to "assign bands of frequencies to the various classes of stations, . . ." 47 U.S.C. § 303(c) (1970).

46. The FCC has considered strict adherence to the fairness doctrine to be a broadcaster's most important duty. Comm. for the Fair Broadcasting of Controversial Issues, Memorandum Opinion and Order, 25 F.C.C.2d 283, 292, 19 R.R.2d 1103 (1970), *rev'd on other grounds*, *CBS v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971).

47. The possibility of intimidating broadcasters through the licensing process seems to have been especially well-recognized in this decade. Through its spokesman, the White House, in 1972, warned that stations which did not correct "network imbalance" or bias might find themselves in trouble at renewal time. *THE POLITICS OF BROADCASTING* 228-34 (M. Barrett ed. 1975). A tape recording revealed that President Nixon discussed the possibility of "retaliating" against the Washington Post via its broadcast licenses. *N. Y. Times*, May 16, 1974, at 1.

48. The FCC, for instance, has considered proposals for quantified standards with regard to what would constitute "superior" programming. But the agency has been reluctant to define a specific amount of local, news and public affairs programming as "superior" for fear that most licensees would adopt that minimum level as their standard. *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, Report and Order*, 66 F.C.C.2d 419, 427 (1977), *aff'd sub nom. Nat'l Black Media Coalition v. FCC*, No. 77-1500 (D.C. Cir. Oct. 13, 1978).

and portions licensed for differing purposes. An independent national news entity (or several) might be provided the license to program from seven to eight p.m. with the traditional licensee given only the remainder of the evening. Competing children's networks could receive the licenses to broadcast on Saturday morning;⁴⁹ other specialized entities could also receive a share of the spectrum.

This would be a structural solution, similar to the classification of land, and would avoid some of the present entanglements of current FCC policy (though undoubtedly new pitfalls would take the place of the old). Those who are internationally inclined know that Independent Television in Great Britain somewhat follows this approach: London Weekend, for example, had control of a channel for Saturday and Sunday; ITV News, a separate entity, had the rights to the spectrum during a specified portion of each evening. Similarly, Dutch television, in its wonderfully pillaristic way, segments the time on each of the channels among broadcast entities representing proportionate shares of the subscribing population.⁵⁰

B. *The Public Forum Issue*

One additional and important first amendment issue is raised by the analogy to land, namely the public forum problem, and it is instructive to consider it. If much is made of the fact that the frequency is public in nature and the licensees are trustees for the public,⁵¹ it is not surprising that the members of the public who have a hard time getting on will claim that they ought to have access just as they would to a soapbox in the corner park.⁵² And, indeed, there is considerable litigation over the obligations of a municipal or federal officer who is in charge of a public forum and must assign rights to use that

49. See, Comment, *The FCC as Fairy Godmother: Improving Children's Television*, 21 UCLA L. REV. 1290 (1974).

50. A. SMITH, *THE SHADOW IN THE CAVE: THE BROADCASTER, HIS AUDIENCE, AND THE STATE* (1973).

51. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 383, 389 (1969); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 118 (1973).

52. Such a state action argument failed to carry the day with the Supreme Court in *CBS v. Democratic Nat'l Comm.*, *id.* Three justices concluded that licensee action amounted to government action. But three justices found no basis for state action, two justices found state action irrelevant to the case, and one justice was unwilling to decide the issue.

forum to competing interests.⁵³

The power of analogy can take one too far in this area. It may be true, as Justice Roberts has said somewhat hyperbolically, that streets and parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁵⁴ That does not mean that each state-owned or state-controlled space or opportunity must be treated the same.⁵⁵ Even the park analogy does not prove the point. Let us take Central Park. It should be beyond doubt that a portion of the park can be dedicated to Shakespeare, another to the sailing of children's boats, another to a Hans Christian Anderson statue and another to a zoo. So opening the park does not, by itself, make each aspect of it a common carrier.⁵⁶ The city is not required to provide equal access to playwrights if it leases the outdoor theater to Joseph Papp on a long term basis.⁵⁷

On the other hand, it is also possible and reasonable for a public entity that has a park, conducts public meetings or operates and manages frequency allocation to establish appropriate rules for access to that facility.⁵⁸ We have all been involved with public bodies that seek to hear from the citizenry but recognize that the process of oral and written participation must be made subject to rules. In a court, this may take the

53. See, e.g., *Fowler v. R.I.*, 345 U.S. 67 (1953); see also *Cox v. La.*, 379 U.S. 536, 557-58 (1965). This is not necessarily the same question as was presented in *CBS v. Democratic Nat'l Comm.*, in which the applicant sought to challenge the use of the spectrum by the licensee, not the allocation among competitors by the government itself. 412 U.S. 94 (1973).

54. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

55. Similarly, the Supreme Court has held that different characteristics in different media justify differences in first amendment standards applied to them. *United States v. Paramount Pictures*, 334 U.S. 131, 166-67 (1948).

56. *But see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

57. Furthermore, if the city leases the theater to Joseph Papp with the expectation that he will exercise his editorial discretion in the management of the theater, first amendment issues would arise if the city subsequently compelled access or otherwise attempted to exercise control over the producer's own independent judgment. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the Court makes it clear that the government does not abdicate its first amendment responsibilities by engaging in this type of proprietary activity.

58. The Supreme Court has upheld time, place and manner regulations that assured advance notice to afford proper protection and to avoid overlapping uses. *Cox v. N.H.*, 312 U.S. 569, 576 (1941).

form of the length of a brief that may be filed. In a public meeting, the rule may take the form of a limitation upon the number of minutes a speaker is allowed or the frequency with which he may appear at the tribunal's sessions.⁵⁹ A park forum can be regulated like a tennis court, with the allocation of time and the requirement of advance reservation. Similarly, in broadcasting, there can be rules concerning the allocation of time among competing users so that there is some fairness in the distribution of what is a scarce resource.

To this, a grace point may be added. There is nothing inherently wrong with the government contracting out its regulation and management of a facility in accordance with access obligations. Furthermore, just as the government can use a resource for a dedicated purpose, it can lease or contract that resource for a dedicated purpose, without the requirement of constitutional necessity of access.

III. DISTINCT REGULATORY CONSIDERATIONS OF DIFFERENT MEDIA

I have gone through this somewhat laborious exercise because of its implications for cable and the new technology rather than to suggest a possible avenue for the reformation of the broadcast licensing process. In a sense, the structural and classificatory model derived from the public land analogy is very much the model used by the FCC in dedicating channels on cable television systems. In the *1972 Cable Rules*, as I have indicated, the structural approach of the FCC was to reserve channels for public access, for education, for government and for leasing.⁶⁰ I am not concerned here with the statutory authority for such an approach. But in terms of first amendment policy, the reservation and dedication of channels is far more preferable than the contingent access approach of the fairness doctrine.

There is, however, one significant difference between applying the public land analogy to cable television and applying it to broadcast licensees. The spectrum is arguably public

59. *But see* Madison Joint School Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976), indicating that with respect to public meetings, discrimination on the basis of content is not permissible.

60. *See* notes 32-34 and accompanying text *supra*.

property; cable channels (and for that matter, newspapers) are not. This does not mean that cable, or newspapers, must be free of all regulation. It may mean, however, that first amendment considerations are different because the government is not managing its own resources. Even now, one would have grave doubts about imposing a scheme that would reduce first amendment rights solely on the basis that a cable system was carrying a broadcast channel.⁶¹ And absent that, it is hard to imagine that because cable carries its messages below the streets (through ducts) or above them (along telephone poles) it has first amendment rights that are different from those of newspapers.

Obviously, to the extent that cable is a utility and a natural monopoly like the telephone company, it should be recognized and regulated as such. But here, it would be preferable from a first amendment perspective if cable's roles as a conduit and as a programmer were distinguished. The FCC, in the *1972 Cable Rules*, required cable operators to originate programming.⁶² From a first amendment standpoint it might have been preferable if a cable operator, like a telephone operator, sold time on a nondiscriminatory basis and was not involved in the profitability of the message that was carried.⁶³

The current rules allow the cable operator to impose his own pay television system and to decide on programming that will be received through satellite or other mechanism on the other channels.⁶⁴ Ultimately, there will be a conflict between the cable operator as originator and the cable operator as carrier. There will be an interest in restricting output (i.e., channel space and time), raising prices, and reducing competition for the cable operator's own programming (whether advertising-supported, or for pay or for both). Both from an antitrust perspective and a first amendment perspective, this would be a harmful result.

Another issue which distinguishes cable from broadcast television involves federal allocation of program categories among regulated media. Earlier this Article indicated that the

61. See *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1038 (8th Cir. 1978), *aff'd*, 99 S. Ct. 1435 (1979).

62. *Cable Television Report and Order*, *supra* note 29, at 189-93.

63. See 47 U.S.C. § 202(a) (1970).

64. 47 C.F.R. § 76.225 (1977).

federal government had the power to reserve certain frequency allocations for news and for children's television. Probably the government could go further and prohibit VHF stations from showing more recent films, reserving them instead for UHF outlets.

But does the government have the additional power to restrict certain program categories to one regulated medium by precluding their sale or delivery to other media? The question here, of course, is whether it is constitutional for the FCC to deny pay distributors the right to place motion pictures over cable until there have been certain clearance procedures with broadcast nonpay television.

I have my doubts about this practice as did the Court of Appeals for the District of Columbia in *Home Box Office*.⁶⁵ That kind of restrictive practice would be highly suspect and must be clearly justified. But one might be tempted to go further, holding it to be a violation of the first amendment for the federal government to limit the ability of any distributor of speech to avail himself of the supply of speech from a prospective merchant of speech.⁶⁶

IV. THE FIRST AMENDMENT AND THE ENHANCEMENT OF DIVERSITY

Thus far, I have focused narrowly on first amendment implications of specific structural interventions designed to affect diversity in television. I have tried to suggest some categories for analysis because of a fear that most generalizations about first amendment policy implications are not as all-encompassing in their applicability as they are often represented to be.

It is often said, for example, that first amendment objectives are better served by a multitude of voices than by concen-

65. *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert denied*, 98 S. Ct. 621 (1978). See also *Weaver v. Jordon*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537, *cert denied*, 385 U.S. 844 (1966).

66. Two caveats should be noted here: I have suggested earlier that if a distributor is using a federal resource like the spectrum, a classification scheme may be appropriate so as to advance certain federal goals. There is difficulty, however, in determining which activities should be so regulated. Additionally, one may ask, as was previously mentioned, whether the distributor should be free from such restraints by virtue of being a full-fledged member of "the press."

tration.⁶⁷ That may or may not be the case and depends on the nature of incentives within the system. In the newspaper industry, economies of scale have often led to dominant single newspaper cities.⁶⁸ It is sometimes, though not necessarily always, desirable to have large media organizations with adequate investigatory resources to serve as critic. In European television, government organizations, managing a monopoly media, may be more successful in achieving diversity through the management of objectives than is the system of three competing private networks seeking, by and large, a segment of the same audience.⁶⁹ The first amendment goals are not necessarily incompatible with a strengthened and more centralized public broadcasting service.⁷⁰

It is also said that the first amendment implies, if it does not always compel, a hands-off attitude by government.⁷¹ The first part of this Article attempted to indicate the need for more rigorous analysis in determining when governmental classification or regulation in fact abridges speech. It is also fairly clear that the *laissez-faire* approach is not correct if it implies that particular incentives and enhancement efforts by the government are not warranted. The United States can provide a sub-

67. Judge Learned Hand wrote that the interest in dissemination of news from many different sources:

is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly, but we have staked upon it our all.

United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

Such values also are implicit in the first amendment policy of "uninhibited, robust and wide open" debate. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

68. The Newspaper Preservation Act attempted to lead economies of scale into the service of diversity by permitting two newspapers in the same city to enter into a joint operating agreement if one was in danger of folding. 15 U.S.C. § 1802(2) (1970).

69. But such government controlled media operations, at times, have disserved the interests of diversity. The French government-owned media, for instance, has been criticized for its performance as a state propaganda tool during national crises over Suez and Algeria and during the country's 1968 riots. See *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 1031 (1972).

70. See, e.g., CARNEGIE COMMISSION, A PUBLIC TRUST: THE LANDMARK REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING (1979).

71. *Id.* at 871-79.

sidy for second class mail so as to promote the health of magazines;⁷² it can provide funds for a national public broadcasting corporation to sponsor programs for noncommercial outlets;⁷³ it can legitimate certain otherwise illegal activities by legislation such as the Newspaper Preservation Act.⁷⁴

Another first amendment guide that has some currency suggests that governmental steps that enhance speech may be lawful, while governmental steps that do not enhance speech are not.⁷⁵ The problem with this rule is not in its goals, which are beyond reproach, but with its application. It seems that agencies often have little basis for determining whether a particular rule or restriction will, in fact, enhance speech, even though enhancement is clearly the objective. And courts, seeking to review the correctness of an agency determination as to the enhancement value of a regulation, usually have to resort even more to speculation in determining whether a rule should be upheld or not.

The first amendment alone is not a secure guide to anti-trust policy. Where anticompetitive practices exist, such as refusals to deal, price-fixing or tying arrangements, it should be as appropriate to apply antitrust principles in the media area as in any other. But the ambiguity of speech consequences of various forms of government intervention is such that there is no special reason to focus on the media as opposed to anticompetitive abuses in other areas of the economy. Indeed, the lesson of *Citizens Publishing*⁷⁶ and *Times-Picayune*⁷⁷ may be that effective enforcement of antitrust laws may be less likely or less enduring when newspapers are directly affected than when the

72. Indirect subsidization of magazines in the form of lower postal rates has been regarded as one of the most significant contributions to the first amendment interest in diversity. Ablard and Harris, *The Post Office and the Publisher's Purse-strings: A Study of the Second Class Mailing Permit*, 30 GEO. WASH. L. REV. 567, 601 (1962). But Congress backed away from such affirmative action and opened the way to higher second class rates by deciding that mail must pay its own way under an independent postal service. 39 U.S.C. § 3622 (1976). The government still could subsidize periodicals by adding such a subsidy to the subjects of appropriations under 39 U.S.C. § 2401 (1976).

73. Public Broadcasting Act, 47 U.S.C. §§ 390-99 (1970).

74. 15 U.S.C. §§ 1801-04 (1976).

75. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 n.82 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 621 (1978).

76. *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969).

77. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

target of antitrust attack is a less politically impressive industry. On the other hand, as we know from the *Associated Press* case, the fact that the media are involved does not mean that there is a shield from antitrust enforcement.⁷⁸

CONCLUSION

What is left, perhaps, is the exercise of prosecutorial discretion: not only in terms of what cases to bring, what dragons to slay, but also in terms of an overall vision, a sense of imperfections in the present structure of the media that can be corrected by architectural intervention rather than program regulation. I think the debate over the last decade concerning the appropriate role that cable should play in the national media structure is a promising example of the kind of broad analysis that must be done continuously by the FTC, the FCC, the Justice Department and the Department of Commerce, so that the proper course can be charted. And in designing such a structure consistent with first amendment policies, one would hope for an architecture in which both diversity and access could have their play with a minimum of contingent government intrusion.

There are several characteristics which would be desirable as part of the emerging architecture of a more first amendment-sensitive media structure. These would include reducing restrictions on pay television so that there can be a more substantial market system between suppliers and purchasers of programs, encouraging program access to cable on a common carrier basis, reducing the barriers to ownership that preclude the spread of cable, encouraging multi-channel satellite distribution, leaving newspapers more or less alone (except for anticompetitive abuses) and embracing Geller-like principles⁷⁹ for minimizing government intrusion in the enforcement of fairness doctrine principles.

For me, the first amendment sets a tone for, as well as some outer limits to, the kind of intervention that the govern-

78. *Associated Press v. United States*, 326 U.S. 1 (1945).

79. See, e.g., Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471 (1975); *Communications Law*, 63 GEO. L. J. 39 (1974); *Does Red Lion Square with Tornillo*, 29 U. MIAMI L. REV. 477 (1975); *A Modest Proposal to Modest Reform of the Federal Communications Commission*, 63 GEO. L. J. 705 (1975).

ment can make. But there is a peril in trying, too deliberately, to implement the goals of free speech, with insufficient attentiveness to the restrictions such implementation appears to impose on government and the media. Where there is haste to act to achieve what seem to be obvious first amendment goals, I suggest attention to Justice Stewart's ominous warning in the *CBS* case of "the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its values."⁸⁰

80. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 146 (1973) (Stewart, J., concurring).