RED LION CONFUSIONS

MARK LLOYD∗

TABLE OF CONTENTS

Introduction 869
I. Confusion One: *Red Lion* Violates the First Amendment 870
II. Confusion Two: *Red Lion* Is Wrong About Spectrum Scarcity......872
III. Confusion Three: The Fairness Doctrine Is Burdensome to Broadcasters..875
Conclusion...879

INTRODUCTION

On June 9, 1969, the Supreme Court decided *Red Lion Broadcasting Co. v. FCC*.[1] The Court's ruling upheld the decision of the United States Court of Appeals for the District of Columbia Circuit, that affirmed a Federal Communications Commission (FCC) order that required a Pennsylvania radio station to provide time for Fred J. Cook to respond to a personal attack. It also reversed an order of the Court of Appeals for the Seventh Circuit, that affirmed the FCC's promulgation of regulations under the Fairness Doctrine. Associate Justice Byron White wrote the unanimous decision, which contained no concurring opinions. In an era where bare majorities seem to be the norm for Supreme Court rulings and all Justices need to have their say, it may be difficult to understand how a unanimous and generally well-written decision could become so disputed.

The core holding of *Red Lion* is hardly controversial. Restated simply, the First Amendment requires a balancing of the rights of the private speaker with the rights of the public listener, and when government

∗ Mark Lloyd is an affiliate professor of public policy at Georgetown University. An Emmy Award-winning broadcaster and communications attorney, he is the author of PROLOGUE TO A FARCE: COMMUNICATION AND DEMOCRACY IN AMERICA (2007). He is a graduate of the University of Michigan and the Georgetown University Law Center.

1. 395 U.S. 367 (1969).

licensing of public property to speak is at issue, the rights of the public are paramount.[2]

The mess the broadcasting lobby made of this fairly straightforward proposition demonstrates the ability of broadcasters to warp the public debate. There are now at least three confusions surrounding *Red Lion*.

The first confusion is in the belief that *Red Lion* represented a stark break in First Amendment jurisprudence—that the Supreme Court of Earl Warren foisted a radically warped interpretation of free-speech rights upon the country, thereby sullying the place of honor accorded to the First Amendment as the very first item listed in the Bill of Rights.[3] The second confusion is that the Supreme Court in *Red Lion* approved FCC oversight over licensees because of a misunderstanding of the physical nature of the spectrum or because of a warped view of economics.[4] The third misunderstanding regarding *Red Lion* is that it unleashed the FCC to overburden poor, struggling broadcasters with unnecessary regulation—particularly the supposedly onerous Fairness Doctrine.[5] These arguments about *Red Lion* are nonsensical and ahistoric. They can be advanced only by ignoring the clear language of the case, the history of broadcast regulation, and the rather ignoble record of First Amendment jurisprudence.

I. CONFUSION ONE: *RED LION* VIOLATES THE FIRST AMENDMENT

The first confusion—that the decision in *Red Lion* departs from the First Amendment protection against government abridgement of speech—is less about an actual misunderstanding of *Red Lion* and more about a too-rosy view of free speech jurisprudence.

The modern notions of a right to free speech and free press were not established until the beginning of the twentieth century; even then, early First Amendment jurisprudence was discouraging for advocates of free

2. *Id.* at 390.

3. *See generally* Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15 (1967) (providing an overview of the interrelationship between the traditions of the First Amendment and broadcasting).

4. *See generally* JOHN W. BERRESFORD, FED. COMMC'NS COMM'N, MEDIA BUREAU STAFF RESEARCH PAPER NO. 2005-2, THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING: AN IDEA WHOSE TIME HAS PASSED (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf [hereinafter BERRESFORD] (stating that the Court reaffirmed *Red Lion* because it believed there was a limited number of frequencies).

5. *See generally* James Gattuso, *Back to Muzak? Congress and the Un-Fairness Doctrine*, THE HERITAGE FOUNDATION WEBMEMO NO. 1472, 1–2 (May 23, 2007), http://www.heritage.org/research/regulation/upload/wm_1472.pdf (describing how broadcasters and station managers faced Fairness Doctrine challenges, which were costly even if the challenges failed in the end).

speech. For example, Thomas Patterson, a United States Senator and newspaper publisher in Colorado, was charged with criminal contempt for criticizing a court decision that reversed a Denver election. In *Patterson v. Colorado*,[6] the Supreme Court upheld the state court's ruling against Patterson. Writing for the majority, Oliver Wendell Holmes ruled that the First Amendment does not limit punishment to only false speech.[7]

In a later Holmes opinion, *Fox v. Washington*,[8] the Court upheld the conviction of a writer who had endorsed a boycott of opponents of nude bathing. Again in 1919, Holmes wrote for a unanimous Court in *Schenck v. United States*,[9] ruling that it was illegal to distribute fliers opposing the draft during World War I because, as Holmes put it, Charles Schenck's leaflet was akin to "falsely shouting fire in a theatre and causing a panic" and was thus "a clear and present danger" to the public.[10] As a number of scholars have noted, Holmes's analogy was dramatic but misleading because Schenck's speech was more like telling people outside the theatre not to go in because there was a fire inside.[11]

Yet, the same year he decided *Schenck*, Holmes also issued his famous dissent that many consider the birth of modern free speech jurisprudence. In *Abrams v. United States*,[12] the Court held that the First Amendment did not protect criticism of U.S. involvement in World War I because the leaflet at issue advocated a strike of weapons production and the violent overthrow of the government.[13] Holmes dissented and argued that the "surreptitious publishing of a silly leaflet by an unknown man," did not present a clear and present danger.[14] However, the Supreme Court, along with other branches of the federal government, would not embrace Holmes's newfound recognition of the value in a "free trade in ideas" for

---

6. 205 U.S. 454 (1907).

7. *See id.* at 461–63 (reasoning that since freedom of speech extends to true and false speech, punishment may also extend to true and false speech).

8. 236 U.S. 273 (1915).

9. 249 U.S. 47 (1919).

10. *Id.* at 52 (emphasizing the importance of the speech's context by stating that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort . . . that no Court could regard them as protected by any constitutional right").

11. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 366 (20th Anniv. Ed. 1999) (providing a more appropriate analogy because Holmes' analogy, while "clever and attractive," did not fit the criticism of the war); *see also* Alan M. Dershowitz, *Shouting "Fire!"*, ATLANTIC MONTHLY, Jan. 1989, at 72, 73, *available at* http://www.theatlantic.com/issues/89jan/dershowitz.htm (arguing that Holmes's analogy was not realistic because "[m]ost Americans do not respond to political rhetoric with the same kind of automatic acceptance expected of schoolchildren responding to a fire drill").

12. 250 U.S. 616 (1919).

13. *Id.* at 624.

14. *See id.* at 628 (asserting that the pamphlet would not obstruct the government's military operations).

many years.[15] For example, the U.S. Postal Service would continue to regularly confiscate mail it deemed objectionable from pacifists, suspected communists, birth control advocates, and the NAACP.[16]

There was, in short, nothing unusual about state or federal governments' limiting the speech of citizens, particularly around the dawn of broadcast regulation. This may not be entirely consistent with our modern understanding of what the Founders meant by stating that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[17] But the same collection of men who promoted the First Amendment also passed the Sedition Act of 1798, which limited criticism of government officials.[18] The First Amendment was never quite as inviolate as its defenders like to suggest. The distributors of antiwar leaflets[19] or articles on contraceptives[20] or proponents of "bong hits for Jesus"[21] are somehow never as protected or as free as Rupert Murdoch's News Corporation or General Electric's NBC.

II. CONFUSION TWO: *RED LION* IS WRONG ABOUT SPECTRUM SCARCITY

The second confusion is in the belief that the Court did not properly understand either the physical nature of the electromagnetic spectrum or the economic concept of scarcity. There is a related confusion that the Court did not adequately anticipate new communications technologies such as cable and the Internet. This confusion about scarcity is the most persistent.

In *Red Lion*, the Court relied on (and restated nearly verbatim) the language of *NBC, Inc. v. United States*,[22] regarding the limited availability

15. *Id.* at 630.

16. *See* Edward de Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 LAW & CONTEMP. PROBS. 608, 608 (1955) (describing how the United States Post Office Department's monopoly over the mail, which allows it to determine which newspapers, magazines, and book publishers may distribute, has led the Post Office to become the only governmental agency that has the authority to censor obscene literature and art).

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

18. *See* Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596 (1798) (punishing individuals who "combine or conspire" together to oppose government regulations).

19. *See* Schenck v. United States, 249 U.S. 47 (1919) (upholding Schenck's conviction for distributing a leaflet during wartime because the leaflet presented a "clear and present danger" to military operations).

20. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding Health and Human Services' interpretation of Title X, which prohibited fund recipients from disseminating articles about abortion as a form of contraception).

21. Morse v. Frederick, 127 S. Ct. 2618 (2007) (reversing the Ninth Circuit's decision that a school violated a student's free speech right to display a banner at a nonschool event that took place during school hours).

22. 319 U.S. 190, 194 (1943) (finding that the Communication Act of 1934's selective

of broadcast licenses. The focus of the opinion was not on whether there might be a more efficient use of the spectrum, whether Congress had determined the best way to use the public resource, or whether there were alternative channels of communication. Despite dictum that suggests the Court was aware of the spectrum as a public resource, the opinion was about the constitutionality of FCC authority over broadcast licensees.[23]

As the Court in *Red Lion* made relatively clear, broadcast regulation and FCC authority were born as an attempt to establish order out of the chaos of early radio broadcasting. Up until 1927, the federal government had no authority to limit anyone from using any "frequency at whatever power level he wished."[24]

> 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. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.[25]

This has been the consistent view of the Court.

The Court's determination that there was a "scarcity of broadcast frequencies" did not result from an engineering analysis or an economic analysis, but was the result of a legal analysis based on precedent and the record that centered on previous challenges to FCC authority.[26] The confusion arises through the creation of a concept dislodged from the question before the Court—the invention of a "Scarcity Rationale." As FCC researcher John Berresford wrote,

> The Scarcity Rationale appears to assume that there is a physical thing, like land and water, of which there is a scarce amount. What is commonly called "the radio frequency spectrum," however, has no discrete physical existence. . . .
>
> . . . .
>
> The Scarcity Rationale thus appears to be based on fundamental

station licensing scheme, which was based on "public interest, convenience, or necessity," was constitutional).

23. *See id.* at 224 (concluding that "the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting").

24. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969).

25. *Id.* at 388–89.

26. *Id.* at 400.

misunderstandings of physics.[27]

The key word here is *appears*. Berresford's concern does not seem to be *Red Lion*, but a straw man: a bogey concept called the Scarcity Rationale. Berresford relies on an argument of the economist Ronald Coase to conclude that the Scarcity Rationale is also wrong as a matter of economics.[28] In 1959, Coase wrote,

> [I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation.[29]

Coase's argument has nothing to do with whether the FCC has the authority to enforce the personal attack rule or to promulgate a Fairness Doctrine. Coase's abstract point, that scarcity does not of itself call for government regulation, is both irrefutable and irrelevant.

A third argument that Berresford raises is that "[t]he Scarcity Rationale, based on the scarcity of channels, has been severely undermined by plentiful channels."[30] Berresford goes on to marvel at one recent example: blogs.[31] This is another persistent confusion. The scarcity in question in *Red Lion* was not the scarcity of channels, but the scarcity of government broadcast licenses. The question was not whether Mr. Cook had access to other means of communication to respond to personal attacks—he most certainly did. Rather, the question was this: What is the responsibility of the federal licensee, and does the FCC have authority to enforce that responsibility?

After smashing his straw man, Berresford acknowledges that "'scarcity' is largely the result of decisions by government, not an unavoidable fact of nature."[32] Berresford has finally come around to *Red Lion*.

The Court clearly understood scarcity to be the result of decisions by government. *Red Lion* makes clear that the Court understood that Congress created the FCC to license broadcast frequencies and that there were more people who wanted federal licenses to broadcast on protected frequencies than the federal government would distribute. The Court was not wrong about the physical nature of the spectrum. It was not wrong about the

27. BERRESFORD, *supra* note 4, at 8–9.

28. *See id.* at 10 (arguing that the Scarcity Rationale has a weak foundation because, unlike natural resources, spectrum use is potentially limitless).

29. *See* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) (countering Justice Frankfurter's argument that federal regulation is needed for radio frequencies).

30. BERRESFORD, *supra* note 4, at 11.

31. *See id.* at 16–18 (arguing that channels for broadcasting are no longer scarce, as evidenced by the billions of web pages and millions of blogs currently on the Internet).

32. *Id.* at 11.

proper economic response to scarcity. It was not wrong about the availability of other means of communication. It could not be wrong because it did not address these obfuscations.

III. CONFUSION THREE: THE FAIRNESS DOCTRINE IS BURDENSOME TO BROADCASTERS

The third confusion is that *Red Lion* justified the great burden of the Fairness Doctrine. This is a confusion because critics have greatly exaggerated the Doctrine's burden.

The history of the Fairness Doctrine actually sheds some light on why it was not much of a burden. The Fairness Doctrine was not an invention of eager regulators unmindful of the tribulations that brave broadcasters faced. Rather, the Fairness Doctrine grew from a pre-New Deal notion that broadcasters suggested to advance their own commercial interests. The Court in *Red Lion* avoids mentioning that the so-called public trustee concept was a regulatory scheme that commercial broadcasters instigated to take control of the spectrum in the early 1920s.

Serving under Presidents Harding and Coolidge, Secretary of Commerce Hebert Hoover presided over the creation of broadcast scarcity and its twin, the public trustee model. It was a time when what was good for business was presumed good for America. The military and business combination called the Radio Corporation of America—and other commercial operators—were eager to get the interfering public off of what was then called "the ether." They petitioned Secretary Hoover and Congress, successfully establishing the Federal Radio Commission (FRC) in 1927. Shortly thereafter, the FRC issued General Order 40, creating forty clear channels and thirty-four regional channels—all reserved for commercial operators. With General Order 40, the FRC deemed commercial operators deserving of preferential treatment because they served the general interests of the public. According to General Order 40, "[t]here is not room in the broadcast band for every school of thought" and so most nonprofit organizations were forced off the air.[33]

As a careful reading of *Red Lion* makes apparent, the first clear articulation of the Fairness Doctrine was from the FRC in the 1929 case *Great Lakes Broadcasting Co. v. Federal Radio Commission*[34] Operating

33. *See* ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY 27–28 (1993) (observing that the Federal Radio Commission (FRC) disfavored stations whose broadcasters spread a particular viewpoint, thus resulting in many nonprofits losing air time).

34. 3 FRC ANN. REP. 32 (1929), *rev'd on other grounds*, Great Lakes Broad. Co. v. Fed. Radio Comm'n, 37 F.2d 993 (D.C. Cir. 1930). While 1949 is often given as the date of the beginning of the Fairness Doctrine, *Red Lion* makes clear that the Report on

in the public interest would mean that radio licensees were required to air opposing views on public issues. *Great Lakes* made clear that private commercial stations serving the general public would receive preferential treatment over the "propaganda stations" operated by labor, educational, and religious institutions.[35]

By early 1935, the *Harvard Business Review* wrote,

> [T]he point seems clear that the Federal Radio Commission has interpreted the concept of public interest so as to favor in actual practice one particular group. While talking in terms of the public interest, convenience and necessity the commission actually chose to further the ends of the commercial broadcasters.[36]

Schaeffer Radio Co. v. Federal Radio Commission, an unpublished 1930 decision by the FRC, rearticulated the Fairness Doctrine.[37] The Schaeffer Radio Company sold its interest in the radio station KVEP after going bankrupt during the Depression of 1929. Control of the license was transferred to Robert Gordon Duncan. Mr. Duncan announced himself to be "The Oregon Wildcat" and used profane language attacking Sears & Roebuck and other chain stores, along with "Merrill-Lynch and the rest of the banking gang."[38] In addition to his profanity-laced broadcasts, Duncan refused to honor the FRC-ordered time division with other area broadcasters. Letters of complaint, no doubt including some from Sears and Merrill-Lynch, flooded the FRC. In late 1930, the FRC denied KVEP's license renewal. As the Commission wrote,

> [Although t]he conscience and judgment of a station's management are necessarily personal, . . . the station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: "Manage this station in our interest." . . . The standing of every station is determined by that conception.[39]

Not long after *Schaeffer Radio Co.*, the National Association of

---

Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949), was a summation and clarification of earlier Fairness Doctrine rules dating back to the Federal Radio Commission. *Red Lion*, 395 U.S. at 377–78.

35. *See* FRC ANN. REP., *supra* note 34, at 33–34 (articulating that "public interest" means that there must be "free and fair competition of opposing views" for broadcasting political issues and all "issues of importance to the public").

36. ERIK BARNOUW, A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES 219 (1966).

37. *See* Comment, *Indirect Censorship of Radio Programs*, 40 YALE L.J. 967, 969 (Apr. 1931) (citing Schaeffer Radio Co. v. Fed. Radio Comm'n, No. 5228 (1930)).

38. *See* Posting of Craigadams to The Portland Radio Message Board, http://feedback.pdxradio.com/messages/995/990.html?1001912159 (Sept. 29, 2001, 08:13PST).

39. John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B.J. 5, 14 (1950) (reprinting large portions of the FRC's decision in *Great Lakes*).

Broadcasters (NAB) adopted much of the supposedly burdensome Fairness Doctrine language in their "1938 Code."[40] Among other things, the 1938 Code pledged that broadcasters would "allot time fairly for the discussion of controversial views" and provide "fair and accurate" news programs.[41] One reason the Fairness Doctrine might have been so popular with broadcasters was that the public was largely powerless to complain to the FCC about how the broadcast licensees were serving them. It was, in other words, no burden at all.

Then, in 1966, the burden of being accountable to the public to operate in the public interest was established after the United Church of Christ and a Jackson, Mississippi chapter of the NAACP brought a lawsuit against the FCC over licensing a racist television operation. The case established that listeners and viewers had standing before the FCC. Writing for the United States Court of Appeals for the District of Columbia Circuit in *Office of Communication of the United Church of Christ v. FCC* (*UCC*),[42] the moderate-Republican judge Warren Burger shook the broadcasting industry by saying, "In order to safeguard the public interest in broadcasting, . . . we hold that some 'audience participation' must be allowed in license renewal proceedings."[43] Burger delayed his ascension to the Supreme Court in 1969 to admonish the FCC and take away WLBT's license, in part because of the station's violation of the Fairness Doctrine.

Around the time of the *Red Lion* and *UCC* cases, the nation was also in the throes of dramatic social changes. Annual riots and unrest throughout the country accompanied these social changes. President Johnson formed the Kerner Commission to study the unrest. His specific question was this: "What effect do the mass media have on the riots?"[44]

The Kerner Commission's findings suggested that broadcasters had failed to cover controversial issues fairly.

> Important segments of the media failed to report adequately on the causes and consequences of civil disorders and on the underlying problems of race relations. They have not communicated to the majority of their audience—which is white—a sense of the degradation, misery and hopelessness of life in the ghetto.[45]

The Kerner Commission recommended expanded coverage of the black

40. *See* Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 CARDOZO ARTS & ENT. L.J. 667, 672–73 (1995) (describing early self-regulation attempts by radio broadcasters).

41. *Id.* at 672.

42. 359 F.2d 994 (D.C. Cir. 1966).

43. *Id.* at 1005.

44. U.S. KERNER COMMISSION REPORT: REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 201–12 (1968).

45. *Id*. at 10.

community, integration of news staff, and training and recruitment of black journalists.[46]

The combined effect of the Kerner Commission's findings, the *UCC* decision, increased civil activism, and greater social acknowledgement of the challenges facing women and minorities led to many changes in the operation of the FCC. Public interest lawyers and community groups became more vocal in the comparative hearings process.[47] The FCC adopted both equal employment opportunity rules and a requirement to ensure that broadcasters actively ascertain and report on how they address local interests.[48] All this, plus limited license terms and the old NAB Code of Conduct, worked to keep licensees aware of their public interest duties.

While the Fairness Doctrine was a highly visible touchstone for the public regarding the duties of licensees, it rarely resulted in license revocation. Between 1973 and 1976, the FCC received a total of 49,801 Fairness Doctrine complaints.[49] The FCC rejected the overwhelming majority of them for failing to meet various filing requirements. Only 244 complaints resulted in FCC inquiries into station practices; of those, only 16 ended with adverse rulings because of Fairness Doctrine violations.[50] Only 1 resulted in a loss of license.

In July 1973, the FCC refused to renew Brandywine-Main Line Radio, Inc.'s license for radio station WXUR-AM-FM in Media, Pennsylvania, after nineteen local civic and religious organizations charged in a petition that, over a period of more than three years, Dr. Carl McIntire systematically vilified ethnic and racial minorities, repeatedly refused to air other viewpoints, and operated contrary to the community's interest.[51] This would be the only time the FCC denied a station's license renewal because it violated the Fairness Doctrine.

Even with increased citizen engagement, the FCC gave great leeway to broadcast licensees regarding how they met their obligation to fairly air

---

46. *Id*.

47. *See* Deirdre Carmody, *Challenging Media Monopolies*, N.Y. TIMES, July 31, 1977, at SM6 (outlining a challenge by Feminists for Media Rights to the Steinman family's dominant hold over the news media in Lancaster, PA).

48. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 651 (1971) (report and order) (emphasizing the importance of diversity, and suggesting that the Primer will help broadcasters become more responsive to community problems); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 229–30 (1976) (report and order) (describing how the FCC plans to implement rules relating to equal employment opportunities for women and minorities).

49. *See* STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 210 (1978) (examining complaint and ruling figures).

50. *Id*. at 210–11.

51. Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18, 34–35 (1970), *aff'd on other grounds*, Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972).

important issues. Despite the limited FCC response to Fairness Doctrine complaints, most broadcasters attempted to comply with the goals of the Doctrine.

Even into the 1970s and 1980s, the vast majority of broadcasters did not consider the Fairness Doctrine a problem. A 1972 Radio–Television News Directors Association (RTNDA) survey showed that only 5% of its members thought the Doctrine posed a major problem.[52] A 1982 RTNDA survey found only 2% held that view.[53] The notion that the FCC regulation authorized by *Red Lion* was overly burdensome is a relatively recent creation of the broadcast lobby.

CONCLUSION

Red Lion was not a controversial departure from First Amendment jurisprudence, nor was the Court confused about either the electromagnetic spectrum or economic theories regarding scarcity. The burden of the Fairness Doctrine was neither unleashed by *Red Lion* nor much of a burden.

Whatever *Red Lion* established has now been dismantled by the conservative backlash of the Reagan era. Almost the entire regulatory structure of the mid-1970s is gone. License terms are longer, citizens have no real means to challenge whether a broadcaster is operating in the public interest, and ascertainment requirements have been abolished. The Fairness Doctrine is a distant memory; even the NAB Code of Conduct is gone. The airwaves once again are under the control of consolidated commercial interests and the First Amendment rights of broadcasters are de facto paramount.

If we take off the rose-colored glasses, we can clearly see that the public trustee concept endorsed in *Red Lion* was bankrupt from the beginning; it was mainly a justification to push the public off the air to make room for commercial radio. While the civil rights movement—in the persons of Everett Parker, Earle Moore, and dozens of other brave public interest lawyers—gave that concept real meaning, it lasted for only a dozen years.

The First Amendment rights of the public have always been under pressure from private commercial interests, and those rights can neither be secured nor lost with a single Supreme Court decision. If the First Amendment rights of the public are ever to be reestablished, let us begin by doing away with the confusions.

---

52. *See* WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO–TV REGULATION 105 (1990).
53. *Id.* at 106.