

# Journal of Civil Rights and Economic Development

---

Volume 1  
Issue 1 *Volume 1, 1985, Issue 1*

Article 4

---

September 1985

## The Fairness Doctrine: A Principle Under Attack

Richard Halpern

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

### Recommended Citation

Halpern, Richard (1985) "The Fairness Doctrine: A Principle Under Attack," *Journal of Civil Rights and Economic Development*. Vol. 1 : Iss. 1 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol1/iss1/4>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# THE FAIRNESS DOCTRINE: A PRINCIPLE UNDER ATTACK

While the first amendment provides for the freedom of speech and press in the United States,<sup>1</sup> no particular licensee of television or radio has a first amendment right to broadcast.<sup>2</sup> The licensee's particular privilege to broadcast may be qualified through regulation.<sup>3</sup> The award of a broadcast license may be subjected to reasonable regulation in furtherance of goals other than the suppression of ideas.<sup>4</sup>

The fairness doctrine is a reasonable regulation that developed out of reports from the Federal Communications Commission (FCC),<sup>5</sup> the Communications Act of 1934,<sup>6</sup> and case law.<sup>7</sup> The

1. See U.S. CONST. amend. I. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.* The purpose of the first amendment is to set up a "marketplace of ideas," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), where "debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The importance of freedom of speech has been recognized by the courts. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (first amendment freedoms are in a preferred position); see also *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (freedom of speech is a fundamental right). *Contra Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring) (criticizing the preferred position of freedom of speech).

In 1927, Justice Brandeis noted that the freedoms of speech and press fundamentally ensured the stability of democratic government. See *Whitney v. California*, 274 U.S. 357, 375 (1927). Justice Brandeis reasoned that through the promotion of public discussion, which is the purpose of the first amendment, logic would prevail. See *id.*; see also *Cohen v. California*, 403 U.S. 15, 24 (1971) (freedom of speech will yield a more capable citizenry); F. ROWAN, *BROADCAST FAIRNESS* 15-21 (1984) (society benefits from public debate). Allowing all speakers free expression of their own ideas will aid the public in choosing those which are correct or worthy. F. ROWAN, *supra*, at 15.

2. J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 894 (2d ed. 1983).

3. *Id.* Due to the unique nature of electronic media, see *infra* notes 15-22 & accompanying text, and the present state of the art, there is no comparable first amendment right of everyone to broadcast on radio and television what one could speak or publish through the traditional media forms. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 2, at 894.

4. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 2, at 894. Regulation of broadcast licensees is permissible because the rights of the viewing and listening public are paramount. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

5. See *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949) [hereinafter cited as *The 1949 Fairness Report*]; *The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974) [hereinafter cited as *The 1974 Fairness Report*].

6. See Pub. L. No. 416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609

## Fairness Doctrine

doctrine imposes two affirmative obligations on broadcast licensees.<sup>8</sup> First, a licensee must devote some broadcast time to the coverage of controversial issues of public importance.<sup>9</sup> Second, the coverage must fairly represent conflicting views.<sup>10</sup> By imposing these duties on broadcasters, the fairness doctrine attempts to balance the free speech interest of the broadcaster with the right of the public to be informed.<sup>11</sup>

Recently, the fairness doctrine came under criticism by the FCC in the 1985 Fairness Report.<sup>12</sup> The report attacked the constitutionality of the fairness doctrine,<sup>13</sup> and argued that the doctrine no longer serves the public interest.<sup>14</sup> This Article will address the criticisms lodged by the FCC against the doctrine. After giving a brief history of the fairness doctrine, the Article will outline the major points of the 1985 Fairness Report. It is submitted that the

(1982)).

7. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

8. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969); The 1974 Fairness Report, *supra* note 5, at 9-10.

9. See *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973); *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1475 (D.C. Cir. 1983) (*per curiam*).

The courts have varied their terminology in describing the obligation of licensees to present controversial issues to the public. Compare *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973) (coverage must be "adequate") with *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1475 (D.C. Cir. 1983) (*per curiam*) ("reasonable percentage of broadcast time"). See also *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1110 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976) ("substantial portion of available time").

10. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969); see also *Public Media Center v. FCC*, 587 F.2d 1322, 1328 (D.C. Cir. 1978) ("programming must fairly reflect differing viewpoints on controversial issues").

11. *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1110 (D.C. Cir. 1975). The aims of the first amendment and of the fairness doctrine are the same; they both seek "to insure an open forum for robust discussion." See *Democratic Nat'l Comm. v. FCC*, 460 F.2d 891, 910 (D.C. Cir.), *cert. denied*, 409 U.S. 845 (1972). However, the FCC has the burden of promoting this "open forum" while at the same time not interfering with the journalistic processes of the broadcast. See A. SHAPIRO, *MEDIA ACCESS* 16 (1976).

12. See *General Fairness Doctrine Obligations of Broadcast Licensees*, 50 Fed. Reg. 35,418 (1985) [hereinafter cited as *The 1985 Fairness Report*]. The 1985 Fairness Report is the first major re-examination of the role of the fairness doctrine in broadcasting since 1974. See *The 1974 Fairness Report*, *supra* note 5.

13. See *The 1985 Fairness Report*, *supra* note 12, at 35,422. The FCC believes that the fairness doctrine does not promote the first amendment rights of the public and can no longer be justified. *Id.*

14. *The 1985 Fairness Report*, *supra* note 12, at 35,453.

criticisms in the report are one-sided and do not paint an accurate picture of the doctrine as it exists today. This Article will show why the fairness doctrine still serves the public interest.

## I. HISTORY OF THE FAIRNESS DOCTRINE

Along with the growth of radio in the 1920's came a realization that more people wanted to broadcast than there were available frequencies.<sup>15</sup> In response to this "spectrum scarcity" crisis, Congress passed the Communications Act of 1934<sup>16</sup> which created the Federal Communications Commission.<sup>17</sup>

In addition to granting the federal government the authority to license broadcasters,<sup>18</sup> the Act also granted the FCC the power to enact any regulations it deemed necessary to protect the public interest in the area of radio broadcasting.<sup>19</sup> The constitutionality of the above provision was upheld in a landmark 1943 Supreme

15. See The 1974 Fairness Report, *supra* note 5, at 3. Until the Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162, the federal government was largely powerless to restrict radio broadcasting. See *United States v. Zenith Radio Corp.*, 12 F.2d 614, 618 (N.D. Ill. 1926). In the early 1920's Herbert Hoover, then Secretary of Commerce and Labor, tried unsuccessfully to regulate radio broadcasters. See *Hoover v. City Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923); *Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926). Stations would broadcast on any desired frequency and "[w]ith everybody on the air, nobody could be heard." *National Broadcasting Co. v. United States*, 319 U.S. 190, 212 (1943).

The radio listener in the 1920's frequently encountered reception of two or three stations at the same time. S. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 18 (1978). As an example, in 1922, for three weeks in a row, two radio stations broadcast religious services from two churches in Washington, D.C. on the same frequency. *Id.* "What poured from the receivers was a pain-provoking jumble of noises that was more conducive to neuroses than quiet religious worship." W. EMERY, *BROADCASTING AND GOVERNMENT* 26 (1971).

16. Pub. L. No. 416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609 (1982)).

17. See 47 U.S.C. § 151 (1982).

18. See *id.* at § 301. The section provides in part:

[I]t is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

*Id.*

19. See 47 U.S.C. § 303(f). Section 303 provides in part: "[T]he Commission from time to time, as *public convenience, interest, or necessity* requires, shall . . . [m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter . . ." *Id.* (emphasis added); see also *id.* § 307(a) (public interest duty of the Commission in granting licenses).

## Fairness Doctrine

Court decision, *National Broadcasting Co. v. United States*.<sup>20</sup>

Acting pursuant to its "public interest" duties, the FCC issued a report in 1949 that became the origin of the fairness doctrine.<sup>21</sup> The 1949 report, after setting out the provisions of the fairness doctrine, concluded that the doctrine was the best way to serve the public interest.<sup>22</sup>

Congressional approval of the fairness doctrine was manifested in the 1959 amendment of section 315 of the Communications Act of 1934.<sup>23</sup> The amendment, enacted to provide for "equal opportunity" access to broadcast stations in limited cases,<sup>24</sup> restated the fairness obligations of licensees.<sup>25</sup> Although the 1985 Fairness

20. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943). In *National Broadcasting Company*, the National Broadcasting Company [hereinafter "NBC"] brought a suit to enjoin the enforcement of certain regulations promulgated by the FCC in the "public interest." *Id.* at 194. Justice Frankfurter recognized that although the Act provided the FCC with broad powers, Congress had inserted a "public interest" provision which limited the Commission's powers. See *id.* at 216. Utilizing the rationale that radio broadcasting is a "scarce resource," see *id.* at 226, the Court held that the FCC's authority to act in the public interest did not violate NBC's first amendment rights. See *id.* at 227.

21. See The 1949 Fairness Report, *supra* note 5. Before the issuance of the 1949 report, the components of the fairness doctrine arose in several cases. See, e.g., *In re United Broadcasting Co. (WHKC)*, 10 F.C.C. 515, 517 (1945) (sufficient broadcast time must be made available for presentation of public concerns); *In re Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1940) (requiring "full and equal" opportunity for the coverage of all sides of public issues).

22. See The 1949 Fairness Report, *supra* note 5, at 1251. The licensee's obligation to serve the public interest necessarily includes an affirmative duty to broadcast all sides of controversial public issues. *Id.* The Commission stated that there can be "no one all embracing formula" to determine compliance with the doctrine. *Id.* Instead, each licensee is to exercise "his best judgment and good sense" in complying with the fairness requirements. *Id.* For a discussion of the wide discretion afforded licensees in fulfilling the fairness requirements, see *infra*, notes 81-86 and accompanying text.

23. See Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a) (1982)).

24. See 47 U.S.C. § 315(a) (1982). Section 315(a) is triggered whenever a legally qualified candidate for public office appears in a broadcast. See *id.* Once this happens, the licensee must give an equal opportunity to all other legally qualified candidates for that office to use the broadcasting station. See *id.*

25. See 47 U.S.C. § 315(a) (1982). Section 315(a) provides as follows:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

*Id.*

The 1959 amendments to section 315 of the Communications Act of 1934 were promulgated as a result of the *Lar Daly* case. See *In re Columbia Broadcasting Sys.*, 26 F.C.C. 715 (1959); W. FRANCOIS, *MASS MEDIA LAW AND REGULATION* 581 (3d ed. 1982). *Lar Daly* was a

Report questions whether the last line of section 315(a) is a sign of congressional approval of the doctrine,<sup>26</sup> the legislative history behind its enactment<sup>27</sup> and subsequent court interpretations show otherwise.<sup>28</sup>

The Supreme Court's turn to put its imprimatur on the constitutionality of the doctrine came in 1969 in *Red Lion Broadcasting Co. v. FCC*.<sup>29</sup> In *Red Lion*, the Court upheld the authority of the

candidate for the mayor of Chicago. *In re Columbia Broadcasting Sys.*, 26 F.C.C. at 716. Television stations in Chicago had shown clips of Daly's opponents in their newscasts. *Id.* at 716-17. Daly requested equal time under section 315 and was refused. *Id.* The Federal Communications Commission held that the appearance of the candidates on the newscast triggered the equal time provisions of section 315. *See id.* at 739-40.

Congress viewed the decision as discouraging stations to show candidates on their newscasts and amended section 315 to include an exception for newscasts. W. FRANCOIS, *supra*, at 581. Section 315(a) now includes four types of appearances which will not trigger an equal opportunity obligation on the part of the broadcaster: "(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary . . . or (4) on-the-spot coverage of bona fide news events . . . ." 47 U.S.C. § 315(a)(1)-(4) (1982).

26. *See* The 1985 Fairness Report, *supra* note 12, at 35,446 (FCC does not believe the 1959 amendments codified the fairness doctrine).

27. *See* 105 CONG. REC. 14,439-63 (1959). The debate in the Senate on the amendments to section 315 of the Communications Act of 1934 demonstrated an intention to codify the fairness doctrine. *Id.* Senator Pastore, arguing for the passage of the bill, commented that "[e]very licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." *Id.* at 14,439 (statement of Senator Pastore) (emphasis added). "Under existing law and policy it is absolutely mandatory that [the licensees] serve the public interest because these media are in the public domain and, therefore, they should be fair in their treatment in all events." *Id.* at 14,440. Senator Pastore asserted that the provision of the amendment to section 315(a) restating the fairness doctrine was written for the sole purpose of reminding the FCC and broadcasters that Congress was "not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." *Id.*

28. *See* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-86; *see also* *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 n.8 (the 1959 amendments statutorily approved the fairness doctrine). The *Red Lion* Court noted that after thirty years of administrative construction, Congress specifically adopted that same construction. *Red Lion*, 395 U.S. at 382. The Court stated that the amendment vindicated the FCC's view, at that time, that the fairness doctrine inhered in the public interest standard of the 1934 Act. *Id.* at 380.

The FCC, in 1978, adopted a regulation expressly affirming that the fairness doctrine is contained in section 315(a) of the Communications Act of 1934. *See* 47 C.F.R. § 73.1910.

29. *See* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In 1964, the Red Lion Broadcasting Company, a Pennsylvania radio station, conducted a program by the Reverend Billy James Hargis in which he verbally attacked Fred Cook. *See id.* at 371. Reverend Hargis, in discussing a book written by Cook about Barry Goldwater, said that Cook had made false charges against a New York City official. *Id.* at 371 n.2. Reverend Hargis also implied that Cook was a communist and otherwise attacked his character. *See id.* Cook demanded free reply time to answer the criticisms and was refused by the station. *See id.* at

## Fairness Doctrine

FCC to promulgate the personal attack rule and the political editorializing rule.<sup>30</sup> The personal attack rule gives a person whose honesty, character or integrity are attacked in the course of a broadcast the right to a reasonable opportunity to respond.<sup>31</sup> The political editorializing rule applies to licensee endorsement of a legally qualified candidate.<sup>32</sup> The Court held that these specific applications of the fairness doctrine do not violate the first amendment rights of the broadcast licensees.<sup>33</sup> The *Red Lion* Court recognized the necessity of the government's involvement in granting licenses because of the scarcity of the spectrum.<sup>34</sup> The

371-72. Instead, *Red Lion* responded to Cook's demands for time by sending him their "rate card" in order to purchase air time. F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 44 (1975). Cook replied that it was *Red Lion's* obligation to provide him with free time to respond or it was conceivable that radio stations would be able to conduct a profitable business by selling reply time to persons who have been slandered. *Id.* (quoting from a letter by Fred J. Cook to John M. Norris, December 31, 1964). Cook subsequently filed a fairness complaint with the FCC. *Red Lion*, 395 U.S. at 372; F. FRIENDLY, *supra*, at 44. *Red Lion* challenged the fairness doctrine claiming it was an abridgment of their freedom of speech and press. *Red Lion*, 395 U.S. at 386. *Red Lion* claimed a right to continue using their frequency at all times with a right to exclude anybody from broadcasting. *Id.*

*Red Lion* was joined with another case before the Supreme Court, *United States v. Radio Television News Directors Ass'n* [hereinafter "RTNDA"]. See *Red Lion*, 395 U.S. at 367. In *RTNDA*, the Court of Appeals for the Seventh Circuit held that the newly enacted FCC rules concerning personal attacks and political editorializing in broadcasts were unconstitutional. See *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002, 1020 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969); see also *infra* notes 31-32 (discussing the provisions of the personal attack and political editorializing rules).

30. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969).

31. 47 C.F.R. § 73.1920 (1984). In addition, the licensee must notify the person attacked, 47 C.F.R. § 73.1920(a)(1) (1984), and must give him a script or a tape of the attack, 47 C.F.R. § 73.1920(a)(2) (1984). Exceptions to this rule include verbal attacks on foreign groups, foreign public figures and verbal attacks made during newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events. 47 C.F.R. § 73.1920(b)(1)-(4) (1984) (the last series of exceptions for newscast and news events are identical to those exceptions found in 47 U.S.C. § 315(a) (1982)).

32. See 47 C.F.R. § 73.1930(a)(2)(A) (1984). If the licensee either endorses or opposes a legally qualified candidate, the licensee is required to notify the other candidates and offer them a reasonable opportunity to respond. 47 C.F.R. § 73.1930(a)(2)(A),(C) (1984).

33. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969). In *Red Lion*, the Court held that the fairness doctrine met all the standards for constitutionality and upheld the fairness complaint of Cook. *Id.* at 375, 400-01.

34. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376, 389 (1969). The unique characteristics of broadcasting, with its scarcity of frequencies, justify certain obligations placed on licensees. See *id.* at 388. In an oft quoted phrase, the Court noted, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390. Justice White, in recounting the history of broadcast regulation, asserted, "[w]ithout government control, the [broadcast] medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."

Court stated that to require licensees to act as fiduciaries for views "which would otherwise, by necessity, be barred from the airwaves" does not violate the first amendment.<sup>35</sup> Although the Court stated that if the doctrine effectively reduced coverage, its constitutionality should be reconsidered,<sup>36</sup> it is submitted that the *Red Lion* doctrine is still valid today.

The development of the fairness doctrine was also, to an extent, refined through FCC reports<sup>37</sup> and rulings in specific cases.<sup>38</sup> It is submitted that within this historical background, the 1985 Fairness Report is not a further refinement of the doctrine in order to assure first amendment rights.

## II. THE 1985 FAIRNESS REPORT

Seeing a need to reexamine the implications of the fairness doctrine, the FCC, in May of 1984, sought input from qualified parties concerning the doctrine<sup>39</sup> and, on August 7, 1985, issued a report detailing its findings.<sup>40</sup> The report attacked the doctrine on

*Id.* at 376. The *Red Lion* Court also concluded that scarcity of the electromagnetic spectrum still existed in 1969. *See id.* at 396. Although new technology has led to more efficient use of the electromagnetic spectrum, uses for the frequencies have also increased. *Id.* at 397. The Court concluded that scarcity of the spectrum exists as long as "there are more immediate and potential uses than can be accommodated, and for which wise planning is essential." *See id.* at 399.

35. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969). *Contra* W. FRANCOIS, *supra* note 25, at 542-43 (fiduciary concept ignores first amendment rights of broadcasters).

36. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1969).

37. *See, e.g.*, The 1974 Fairness Report, *supra* note 5, at 13 (defining a "reasonable opportunity for contrasting viewpoints"); The 1949 Fairness Report, *supra* note 5, at 1250-51 (obligations of "fairness" imposed on broadcasters).

38. *See, e.g.*, *In re Nicholas Zapple*, 23 F.C.C.2d 707, 709 (1970) (access required when spokespersons for candidates are broadcast is somewhere between broad overall balance and absolute equal opportunity); *In re Cullman Broadcasting Co.*, 40 F.C.C. 576, 577 (1963) (broadcaster must provide free time to opposing groups to respond if they cannot obtain sponsorship).

39. Notice of Inquiry, 49 Fed. Reg. 20,317 (May 14, 1984).

40. *See* The 1985 Fairness Report, *supra* note 12. The 1985 Report is a broad based attack on the principles underlying the fairness doctrine. *See id.* at 35,445.

After questioning the constitutional and policy arguments for the fairness doctrine, the Commission, nonetheless, decided it could not cease enforcing it. *Id.* at 35,453. Instead, the FCC deferred to Congress whether to modify, restrict or abandon the doctrine altogether. *Id.* The deference to Congress is necessary as it is unclear if the fairness doctrine was codified in 47 U.S.C. Section 315(a) (1984). *Id.* at 35,448. If Congress does not act on the report's findings, and if it is determined that the fairness doctrine is not statutorily mandated, future courts are likely to rely heavily upon the Commission's judgment regarding the public interest, given that the FCC is the expert agency charged with the issue. *See*



## Fairness Doctrine

three fronts: its constitutionality, its “chilling effect” on coverage of controversial issues, and its inappropriateness in light of the expanding marketplace for information.<sup>41</sup> In order to facilitate examination of the report, each area of concern will be analyzed separately.

### A. *Constitutionality of the Fairness Doctrine*

The 1985 Fairness Report questioned the constitutionality of the fairness doctrine<sup>42</sup> and suggested that the conditions on which *Red Lion* was premised no longer exist.<sup>43</sup> The FCC noted that the Court in *Red Lion* did not give its approval to all aspects of the doctrine.<sup>44</sup> Furthermore, it noted that the question of constitutionality should be reconsidered if the fairness doctrine has the net effect of reducing the “volume and quality of coverage.”<sup>45</sup>

The report criticized the doctrine as bringing the government into the constitutionally disfavored role of examining editorial decisionmaking.<sup>46</sup> The report then cited *Miami Herald Publishing Co. v. Tornillo*<sup>47</sup> as supporting authority for that criticism.<sup>48</sup> In *Miami Herald Publishing Co.*, a statute requiring newspapers to give space to someone who had been personally attacked was struck

FCC v. WNCN Listener's Guild, 450 U.S. 582, 596 (1981).

41. See The 1985 Fairness Report, *supra* note 12, at 35,445-46; *infra* notes 43-63 and accompanying text.

42. The 1985 Fairness Report, *supra* note 12, at 35,420.

43. *Id.* The report states three reasons why *Red Lion* does not mandate that the fairness doctrine should still apply. *Id.* First, the *Red Lion* Court did not approve every aspect of the fairness doctrine. *Id.* Second, *Red Lion* requires reconsideration of the doctrine's constitutionality if it has the net effect of inhibiting coverage. *Id.* Third, the broadcasting marketplace has changed in the sixteen years since *Red Lion*. *Id.*

44. The 1985 Fairness Report, *supra* note 12, at 35,420; see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969).

45. The 1985 Fairness Report, *supra* note 12, at 35,420 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1969)).

46. The 1985 Fairness Report, *supra* note 12, at 35,434. The FCC describes the evaluation process used in deciding a fairness complaint as follows:

In evaluating whether or not a broadcaster has met his or her balanced programming obligations under the fairness doctrine, we are obligated to determine whether or not the broadcaster made a reasonable determination as to whether or not the programming presented controversial issues of public importance, and if so, we must assess whether or not the broadcaster provided reasonable opportunities for the presentation of contrasting viewpoints.

*Id.*

47. 418 U.S. 241 (1974).

48. The 1985 Fairness Report, *supra* note 12, at 35,434.

down as inconsistent with the first amendment right of free press.<sup>49</sup> The FCC applied *Miami Herald* to the broadcasting industry by citing the case as supportive of its theory that the fairness doctrine implicates the government as an unconstitutional regulator of program content.<sup>50</sup>

### B. *Chilling Effect of the Doctrine*

Another aspect of the doctrine under attack by the FCC is the deleterious effect it has on journalistic discretion.<sup>51</sup> The 1985 Report, relying on testimony of various broadcast journalists, concluded that the fairness doctrine has had a "chilling effect" on the presentation of controversial issues.<sup>52</sup> Since the requirement of licensees to present controversial issues<sup>53</sup> is easier to comply with than the requirement to present conflicting views on those issues fairly,<sup>54</sup> the net effect, it is contended, is for broadcasters to air only the minimum amount of coverage necessary to satisfy the first requirement.<sup>55</sup> The fear of government sanction, the FCC

49. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

50. See The 1985 Fairness Report, *supra* note 12, at 35,434.

51. See *id.* at 35,426-27.

52. *Id.* An example of the fairness doctrine's "chilling effect" on broadcasters is related by Dan Rather of CBS News. See *id.* Mr. Rather speaks of working at his first job at a radio station. *Id.* It was there that he learned of the fairness doctrine and noticed that there would be constant concern as to what the implications of airing a report would be. *Id.*

53. See *supra* note 9 and accompanying text. The first prong of the fairness doctrine requires licensees to provide coverage of important controversial issues that concern the community. The 1985 Fairness Report, *supra* note 12, at 35,418. A licensee has broad discretion as to what issue is controversial. See *id.* at 35,423. Moreover, a first prong violation will be triggered only when it is determined that the issue the licensee failed to present is of "critical importance." *In re Brent Buell*, 97 F.C.C.2d 55, 57 (1984). A broadcast is not required to air every important issue. The 1974 Fairness Report, *supra* note 5, at 9-10.

54. See *supra* note 10 and accompanying text. Under the fairness doctrine, when a licensee broadcasts controversial issues it is required to present contrasting views. The 1985 Fairness Report, *supra* note 12, at 35,418. Although the licensee is required to allow response time, the fairness doctrine does not require the allocation of equal time. See *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 452 (D.C. Cir. 1980) (quoting *Democratic Nat'l Comm. v. FCC*, 460 F.2d 891, 905 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972)) (only reasonable response time required); *Green v. FCC*, 447 F.2d 323, 332 (D.C. Cir. 1971) (reasonableness sole criterion as to response time).

It is important to note that evaluation of doctrine compliance is not judged by a single incident. See *Kennedy*, 636 F.2d at 452. The nature of the entire programming of the licensee is considered. See *id.* The inquiry is whether the entire programming content represents a reasonable effort to present contrasting views. See *Democratic Nat'l Comm. v. FCC*, 460 F.2d 891, 902 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972).

55. See The 1985 Fairness Report, *supra* note 12, at 35,423. In the 1985 Fairness Re-

## Fairness Doctrine

claims, is one reason why broadcasters seek to avoid fairness obligations and thus lessens their coverage of controversial issues.<sup>56</sup>

### C. *The Expanding Marketplace*

Finally, the FCC asserted that the need for a fairness doctrine no longer exists since new information technologies, coupled with the growth of traditional broadcast facilities, provides the public with suitable access to doctrine-related information.<sup>57</sup> Specifically, the increasing penetration of cable television into our homes, the FCC argued, has provided an abundance of information without the need for government regulation.<sup>58</sup> The FCC rejected the contention that there is no substitute for broadcast television<sup>59</sup> and that television operates in a different informational marketplace than newspapers.<sup>60</sup> The Commission also claimed that there has been a significant increase in the number of television stations

port, the FCC noted a paucity of challenges under the first part of the fairness doctrine due to the broad discretion a licensee has in determining the actual controversial issues it will present. *See id.* at 34,424. The Commission claims that a violation of the second obligation, to afford a reasonable opportunity for the presentation of opposing views, is easier to trigger than the first. *Id.* It is this asymmetry that encourages the airing of no more than a minimal amount of programming devoted to controversial issues of public importance. *Id.*

56. *See id.* 35,424. Strict compliance with the fairness doctrine has been characterized by the FCC as the "*sine qua non*" for the renewal of a broadcasting license. *Id.* As the government sanction of denying renewal is severe, the FCC claims that a licensee will not provide coverage of certain issues in order to avoid challenges to compliance with the doctrine's second prong.

57. *See id.* at 35,436. To assert that new technologies obviate the need for the fairness doctrine, the FCC had to show that there is substitutability among the newly available technologies and television and radio broadcasting. *See id.* at 35,437. If it was unable to prove this, then the additional presentation of controversial issues resulting from the new media would be irrelevant to the broadcasting industry. *See id.*

58. *Id.* In the 1985 Fairness Report, the FCC mentions several types of new media that render the fairness doctrine obsolete. The new media mentioned are as follows: cable television, low power television, multipoint distribution service, multichannel multipoint distribution service and satellite master antenna service. *Id.* At least one commentator, however, has argued that the fairness doctrine should apply to some of these new media technologies. *See Swillinger, Candidates and the New Technologies*, 49 *Mo. L. Rev.* 85, 86 (1984).

59. *See* The 1985 Fairness Report, *supra* note 12, at 35,437. The FCC denies "that the purported dominance of one media voice necessarily detracts from the significance of other voices with respect to the availability of antagonistic and diverse sources of information." *Id.*

60. *Id.* The fact that newspapers are read while television and radio are perceived in a more casual manner does not justify the conclusion that they are in separate marketplaces. *Id.*

since *Red Lion*.<sup>61</sup> The FCC concluded that the new technologies "provide the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary."<sup>62</sup>

### III. A CASE FOR THE FAIRNESS DOCTRINE

#### A. *The Fairness Doctrine is Constitutional*

A constitutional basis for the fairness doctrine was found in *Red Lion*.<sup>63</sup> It is submitted that the holding and the justifications for the decision in *Red Lion* are still valid today.

While the broadcasting industry may operate with restraints not imposed on other media forms, a *de facto* determination of first amendment infringement is not necessary.<sup>64</sup> Congress has the power to regulate the airwaves, provided that the "public interest, convenience, and necessity" would thereby be served.<sup>65</sup> Once the government is placed in the position of granting licenses to pre-

61. *Id.* at 35,438. The data released in the 1985 Fairness Report show an increase of 13 percent in the number of VHF television stations since *Red Lion* and an increase of 8 percent since the release of the 1974 Fairness Report. *Id.*

62. *Id.* at 35,436.

63. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-01 (1969); see *supra* notes 29-36 and accompanying text.

64. *FCC v. League of Women Voters*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3106, 3118 (1984). Justice Brennan, in *League of Women Voters*, asserted that "although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions had generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern . . ." *Id.* at \_\_\_, 104 S. Ct. at 3118.

The *Red Lion* case asserts that the different treatment afforded the broadcasting media is not in and of itself unconstitutional. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an *unbridgeable* First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388 (emphasis added).

65. See *FCC v. League of Women Voters*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3106, 3116 (1984); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978); *National Broadcasting Co. v. FCC*, 319 U.S. 190, 216 (1943).

The Court in *League of Women Voters* stated:

[F]irst, we have long recognized that Congress, acting pursuant to the Commerce Clause, has power to regulate the use of [the airwaves]. The distinctive feature of Congress' efforts in this area has been to ensure through the regulatory oversight of the FCC that only those who satisfy the "public interest, convenience and necessity" are granted a license to use radio and television broadcast frequencies.

*League of Women Voters*, \_\_\_ U.S. at \_\_\_, 104 S. Ct. at 3116. An important result of the power to regulate is the FCC's authority to grant licenses. See 47 U.S.C. § 309(a) (1982).

## Fairness Doctrine

serve the airwaves as a viable means of communications,<sup>66</sup> the fairness doctrine is used for balancing the competing interests of the broadcaster with the public interest.<sup>67</sup>

The contention that a licensee is not a fiduciary acting for the public interest conflicts with Supreme Court pronouncements<sup>68</sup> and congressional legislation.<sup>69</sup> The Supreme Court in *Red Lion* recognized the fact that the people own the airwaves.<sup>70</sup> As a result, the rights of the viewers become more important than the rights of the broadcasters.<sup>71</sup> A license is not a government grant of an unconditional monopoly of a scarce resource, the electromagnetic spectrum,<sup>72</sup> rather, it is a government grant conditioned on the licensee's acting in the public interest.<sup>73</sup>

It is submitted that the FCC's use of *Miami Herald* to discredit the fairness doctrine<sup>74</sup> is unconvincing based on the distinctions between the newspaper and broadcast industries. Each medium deserves its own first amendment standard taking into account its unique characteristics.<sup>75</sup> When comparing newspapers to televi-

66. See *supra* notes 15-20 and accompanying text.

67. See *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973). "[The] role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing of competing interests." *Id.*

68. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969); *National Broadcasting Co. v. FCC*, 319 U.S. 190, 216 (1943).

69. 47 U.S.C. § 315(a) (1982).

70. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969). "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Id.*

71. *Id.*; see also *W. FRANCOIS*, *supra* note 25, at 543-44 (fiduciary concept views licensee as a trustee for the public).

72. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969). The *Red Lion* Court viewed the FCC's licensing procedure as superior to forced sharing under which blocks of time would be assigned to a broadcaster for a specified part of a day or week. *Id.* Pursuant to the imposed licensing scheme, a licensee is conferred a virtual monopoly, however, it must make time available to people with viewpoints opposing those expressed on the station. See *id.*

73. See *id.* at 391; *supra* note 65 and accompanying text.

74. See The 1985 Fairness Report, *supra* note 12, at 35,434; see also *supra* notes 47-50 and accompanying text (discussing the FCC's implication of the fairness doctrine via *Miami Herald*).

75. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). Supreme Court decisions have generally applied a different first amendment standard for broadcast regulation than in other media forms. *FCC v. League of Women Voters*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3106, 3115 (1984). In other forms of media, some regulation of speech is permitted, provided it serves a com-

sion or radio stations, the most obvious distinction is the physical scarcity of the radio spectrum.<sup>76</sup> Television is inherently not available to all potential broadcasters and consequently the government is forced to monitor the broadcasting industry.<sup>77</sup> Newspapers, at least theoretically, are available to anyone willing to buy a newspaper press.<sup>78</sup> It is submitted that once the government is injected into the licensing process out of necessity, it is its duty to act in the public interest and the fairness doctrine is a guarantee of this.<sup>79</sup>

### B. *The Fairness Doctrine is Not "Chilling"*

Aware of the possibility of a "chilling effect" on broadcast journalists, the evolution of the fairness doctrine has given licensee's wide latitude and discretion in presenting controversial issues.<sup>80</sup>

elling state interest and is narrowly tailored to meet that interest. *League of Women Voters v. FCC*, 547 F. Supp. 379, 384 (C.D. Cal. 1982), *aff'd*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3106 (1984). The "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *League of Women Voters*, \_\_\_ U.S. at \_\_\_, 104 S. Ct. at 3116 (1984) (quoting *Red Lion*, 395 U.S. 367, 386 (1969)).

The fundamental distinguishing characteristic of broadcasting, from other media, that mandates a specialized first amendment analysis is the scarcity of broadcasting frequencies. *See id.* at \_\_\_, 104 S. Ct. at 3116. Other distinguishing characteristics of the broadcasting media were pointed out in a 1978 Supreme Court case dealing with an "obscene" radio broadcast. *See FCC v. Pacifica Found.*, 438 U.S. 726, 759-60 (1978) (Powell, J., concurring). Broadcasts reach unsupervised children and come directly into the home. *Id.* Furthermore, listeners and viewers of the broadcast media are in actuality a "captive audience" and the FCC can take this fact into account. *Columbia Broadcasting Sys.*, 412 U.S. at 127. For a discussion of frequency spectrum scarcity, *see supra* notes 15-20.

76. *See FCC v. League of Women Voters*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3106, 3116 (1984).

77. *See Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

78. *See National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1112 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976). "[T]he physical limitations of the [broadcast media] restrict the number of those who would broadcast whereas expression by publication is, at least in theory, available to all." *Id.*; *see also* Comment, *The Fairness Doctrine: Protection For a Scarce Public Resource*, 14 ST. MARY'S L.J. 1083, 1105 (1983) (print media is more accessible to opposing views).

79. *See Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1478-79 (D.C. Cir. 1983). "[T]he doctrine remains a vital aspect of a broadcasting regime characterized by a delicate balance of fiduciary duties to the public and right of journalistic discretion." *Id.*

80. *See Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111 (1973) (broadcaster is allowed significant journalistic discretion in complying with the doctrine); *see also* *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1477 (D.C. Cir. 1983) (*per curiam*) ("ample deference" allowed broadcaster); *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1113-14 (D.C. Cir. 1975) (reasonableness is all that is required of licensee); *Democratic Nat'l Comm. v. FCC*, 460 F.2d 891, 906 (D.C. Cir. 1972) (voluntary good-faith

## Fairness Doctrine

The standard of reasonableness is imposed on the licensee, and absent bad faith or abuse of discretion it will not be held violative of the fairness doctrine.<sup>81</sup> It is submitted that this standard of review allows the licensee to be aggressive in its coverage while shielding it from petty complaints about its coverage. In addition, the FCC is still able to enforce the first prong of the fairness test should the licensee fail to provide adequate attention to public issues.<sup>82</sup>

In addition to applying a lenient standard towards licensees in deciding fairness complaints, the FCC requires that the complainant set forth a *prima facie* case.<sup>83</sup> In order to weed out insubstantial complaints which might have a chilling effect, the complainant must specifically indicate the nature of his grievance.<sup>84</sup> The fairness doctrine has been enforced with a "light hand" as is evident by the fact that from 1973 to 1976, a fairness doctrine complaint had approximately a one-in-one-thousand chance of obtaining a favorable ruling.<sup>85</sup>

### C. *The New Media and the Fairness Doctrine Can Coexist*

The Commission's argument that the growth of new media

compliance by licensee).

81. See *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973) (Commission's responsibility is to decide if licensee made a sustained good faith effort); *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1127 (D.C. Cir. 1975) (must show unreasonableness or abuse of discretion).

82. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393-94 (1969). A "chilling effect" due to the fairness doctrine is unlikely because the FCC has authority to require coverage of public issues and to deny licenses to broadcasters that fail to comply. *Id.*

83. See *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1475 (D.C. Cir. 1983) (*per curiam*). The requirement of a *prima facie* case in fairness complaints acts as a "formidable procedural barrier" against a chilling effect. *American Security Council Education Found. v. FCC*, 607 F.2d 438, 453 (D.C. Cir. 1979) (*en banc*) (Wright, J., concurring), *cert. denied*, 444 U.S. 1013 (1980).

84. See *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1476 (D.C. Cir. 1983) (*per curiam*). Some of the required items for a *prima facie* case for a fairness complaint are: (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that only one side of the question was presented, and (5) whether the station has afforded, or plans to afford an opportunity for the presentation of contrasting viewpoints. *Id.* Moreover, the complainant has the initial burden of proving a fairness violation. *Democratic Nat'l Comm. v. FCC*, 460 F.2d 891, 911 (D.C. Cir. 1972).

85. See *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1478 n.5 (D.C. Cir. 1983) (*per curiam*).

technologies, such as cable television, has rendered the fairness doctrine useless<sup>86</sup> is based more on theory than empirical evidence.<sup>87</sup> Cable television penetrates only thirty-five percent of the television households in the United States,<sup>88</sup> and much of the programming on cable television is devoted to entertainment and not the dissemination of information.<sup>89</sup> Access by the public to the media today is still limited,<sup>90</sup> and it is the government's job to protect those unable to gain access.<sup>91</sup>

The viability of the fairness doctrine in light of the new technologies was affirmed by the District of Columbia Circuit Court as recently as 1983 when it held that "[t]he doctrine remains a vital aspect of a broadcasting regime characterized by a delicate balance of fiduciary duties to the public and rights of journalistic discretion."<sup>92</sup>

#### IV. CONCLUSION

The role of the first amendment in our present electronic media has been the subject of much debate. On the one hand, we have the broadcasters claiming the freedom of speech as their shield from any governmental intrusion, and on the other hand, the proponents of the fairness doctrine claim that the doctrine protects the aims of the first amendment by promoting discussion of public issues.

Into this fray enters the 1985 Fairness Report authored by the Federal Communications Commission, the very same agency authorized to enforce the fairness doctrine. While the report seeks to reevaluate the necessity and value of the fairness doctrine in present day broadcasting, its methods are narrow and unforceful. By denying that there is a limited means of access to the airwaves,

86. See The 1985 Fairness Report, *supra* note 12, at 35,438-42.

87. See Ferris & Ballard, *Independent Political Action Groups: New Life for the Fairness Doctrine*, 36 VAND. L. REV. 929, 944 (1983).

88. *Id.* at 946.

89. *Id.*

90. Comment, *supra* note 78, at 1099.

91. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400 (1969).

92. *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1478-79 (D.C. Cir. 1983) (*per curiam*).



## Fairness Doctrine

the FCC report is barring voices from the airwaves which, without the fairness doctrine, would not be heard. This consequence, and not the operation of the doctrine, is the inhibiting factor on coverage of controversial public issues.

The report also errs in its assessment of a "chilling effect" on coverage. The FCC fails to accurately describe the standard of review in fairness complaints: the wide discretion afforded licensees in presenting both sides of an issue, the need for a *prima facie* case, and the almost automatic dismissal of complaints absent a showing of bad faith on the part of the broadcaster. In addition, the report overemphasizes the impact of new technologies on the coverage of controversial issues.

The 1985 Fairness Report admits that its findings have no immediate significance. However, it is strongly urged that any court or legislature relying on it consider the policy and constitutional arguments that are behind it. The current wave of government deregulation should not strike down a necessary and vital aspect of our broadcasting media. To do so would deny the great majority of people any access to the airwaves they own.

*Richard Halpern*