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D.C. Circuit Allows FCC to Kill Fairness Doctrine: Syracuse Peace Council v. Federal Communications Commission

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COMMENTS

D.C. CIRCUIT ALLOWS FCC TO KILL FAIRNESS DOCTRINE: *SYRACUSE PEACE COUNCIL v. FEDERAL COMMUNICATIONS COMMISSION*

Beginning in 1927, the federal government prohibited the vast majority of Americans from freely expressing themselves over the public airwaves,[1] and bestowed upon a lucky few the exclusive li-

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[1] *See* Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (1927) (repealed 1934). Prior to 1927, the federal government was required to issue a broadcast license to anyone who met certain general technical requirements. *See* Hoover v. Intercity Radio Co., 286 F. 1003, 1006-1007 (D.C. Cir. 1923).

The federal government is given the authority to regulate broadcasting by the commerce clause. *See* U.S. CONST. art. I, § 8, cl. 3.; National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943) ("The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce").

The first amendment states in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The first amendment applies to broadcasting by limiting and directing the power of the government to regulate broadcasting. *See* 47 U.S.C. § 326 (1982 & Supp. III 1985); FCC v. League of Women Voters, 468 U.S. 364, 374-381 (1984).

The first statute to regulate radio communication was the Wireless Ship Act of 1910, Pub. L. No. 262, 36 Stat. 629 (1910) (repealed 1934). This statute required that any ship leaving an American port and capable of carrying fifty or more persons had to be equipped with a radio and a qualified operator. *Id.*

The first comprehensive statute regulating broadcasting was the Radio Act of 1912, Pub. L. No. 264, 37 Stat. 302 (1912) (repealed 1927). This Act was passed to fulfill the United States' obligations under the first international radio treaty. *See* Wireless Telegraph Convention, Nov. 3, 1906, 37 Stat. 1565. The statute prohibited anyone from broadcasting without a license from the Secretary of Commerce and Labor. *See* Radio Act of 1912, Pub. L. No. 264, 37 Stat. 302, 302. *See generally National Broadcasting Co.*, 319 U.S. at 210 (discussing early history of broadcasting).

After World War I, along with the rapid advancement of radio technology, the number of broadcasters multiplied so rapidly that the limited number of frequencies could no longer accommodate everyone. *See id.* at 210-13. However, the Radio Act of 1912 did not authorize the Secretary of Commerce to deny a license to those who met the general technical requirements, regardless of whether or not it would result in interference with other broadcasters.

cense to broadcast pursuant to the newly enacted Radio Act of 1927.[2] In exchange for the silence of the public at large, Congress agreed to regulate the licensees to ensure that they broadcast in the public interest.[3] In order to promote a free marketplace of

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See Intercity Radio Co., 286 F. at 1006-07. In fact, the courts held that the Secretary did not have the power to impose even restrictions as to frequency, power, and hours of operation. *See* United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926). After the Acting Attorney General issued an opinion agreeing with these court decisions, 35 Op. Att'y Gen. 126 (1926), the Secretary abandoned his efforts and urged stations to undertake self-regulation. *See National Broadcasting Co.*, 319 U.S. at 212. During the ensuing seven months until February 23, 1927, when Congress enacted the Radio Act of 1927, almost 200 new stations went on the air, using any frequency and hours they desired. *Id.* The result was "confusion and chaos." *Id.* The President, in a message to Congress, appealed for enactment of a comprehensive radio law, claiming that "[d]ue to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down." H.R. Doc. No. 483, 69th Cong., 2d Sess. 10 (1926).

For a history of broadcast law, see generally F. KAHN, DOCUMENTS OF AMERICAN BROADCASTING (3d ed. 1978) (compilation of broadcasting's landmark cases, statutes, reports, and other documents). For a general history of American broadcasting, see generally, E. BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES (1966).

[2] Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (1927) (repealed 1934). This act established the basic framework of present day broadcast law by setting up a regulatory agency—then known as the Federal Radio Commission ("FRC")—charged with the regulatory standard of ensuring the "public interest, convenience, and necessity," a standard which prevails to this day. *See National Broadcasting Co.*, 319 U.S. at 213-17.

In executing its first major task of clearing the airwaves of all broadcasters except for a chosen few, the FRC used the following criteria to decide who would remain: "as between two broadcasting stations with otherwise equal claims for privileges, the station which has the longest record of continuous service has the superior right." Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32, 32 (1929), *modified on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

The Radio Act of 1927 was superseded by the Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-609 (1982 & Supp. IV 1986)). The Communications Act of 1934, however, maintained the basic framework of the Radio Act of 1927: (1) the regulatory standard of "public interest, convenience and necessity," was incorporated into 47 U.S.C. § 309(a) (1982); and (2) a permanent regulatory agency, the Federal Communications Commission, took the place of the FRC. *See National Broadcasting Co.*, 319 U.S. at 213-17.

In granting licenses, it is important to note that Congress stipulated that the granting of a license would not vest any property right entitling the licensee to renewal. 47 U.S.C. § 309(h)(1).

[3] *See* Radio Act of 1927, Pub. L. No. 632, § 9, 44 Stat. 1162, 1166 (1927) (repealed 1934). The Act states that "[t]he licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act." *Id.* This regulatory standard was adopted by the superseding statute, the Communications Act of 1934. *See* 47 U.S.C. §§ 307(a), 309(a) (1982). On the origin of the phrase "public interest, convenience and necessity," see generally T. CARTER, M. FRANKLIN & J. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 56 n.1 (1986).

For the early statements of the FRC on the meaning of the public interest standard, see generally 2 F.R.C. ANN. REP. 166, 170 (1928) ("The emphasis must be first and foremost on

ideas,[4] the Federal Communications Commission ("FCC"), the agency which Congress entrusted with the duty of ensuring the public interest,[5] imposed a two prong duty on licensees, known as the fairness doctrine.[6] The first prong required licensees "to pro-

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the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser"); Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. at 32 ("Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals").

The public interest standard has been interpreted as giving the public a limited right to participate in broadcast regulation; specifically, public representatives have been recognized as having standing to intervene in license renewal proceedings. *See* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1002 (D.C. Cir. 1966).

[4] The general purpose of the first amendment and freedom of speech in general has been interpreted as protecting a free exchange of ideas in which truth and falsehood are allowed to clash in order to permit the public to identify truth. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"); J. MILL, ON LIBERTY 19 (1956) (no one has a monopoly on truth, the public interest is best served by allowing all opinions to clash in order to identify truth). *See generally*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 108-40 (1954) (synopsis of *Abrams* case); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-16 (1967) (explaining function of freedom of expression in democratic society). For an interesting series of opinions, see generally ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, FIRST AMENDMENT AND THE NEWS MEDIA, Annual Chief Justice Earl Warren Conference on Advocacy in the United States 21-32 (1973) (recommendations and commentary on broadcast journalism). For a critique of the marketplace of ideas, see Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978).

[5] *See* 47 U.S.C. § 151 (1982). The Federal Communications Commission was created by the Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges:" *Id.*; *see also* 47 U.S.C. § 307(a) (1982) ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter"); 47 U.S.C. § 309(a) (1982 & Supp. IV 1986) (if public interest served, commission may grant application).

Relying on the scarcity doctrine, the Supreme Court upheld the constitutionality of granting the FCC broad regulatory power to impose public interest obligations on licensees in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). The Court ruled, first, that Congress had delegated broad regulatory powers to the FCC which required that the agency do more than merely act as "a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other." *Id.* at 215-17. Second, the Court ruled that the first amendment did not bar the FCC from conditioning the issuance of licenses as the agency deemed required by the public interest. *Id.* at 226-27. The Court based its reasoning unequivocally on the scarcity doctrine: "The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission." *Id.* at 216. *See generally* H. ZUCKMAN & M. GAYNES, MASS COMMUNICATIONS LAW Ch. IX at 317-36 (1983) (defining regulatory role of FCC).

[6] The fairness doctrine was codified as an FCC regulation. Fairness Doctrine, 47 C.F.R.

vide coverage of vitally important controversial issues."[7] The second prong required them "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."[8] In 1969, the Supreme Court unanimously affirmed the constitutionality of the fairness doctrine in the landmark decision of *Red Lion v. Federal Communications Commission.*[9] In 1985, however, the

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§ 73.1910 (1988). It is important to note that in 1941, as a result of broadcaster abuses, the FCC instituted the *Mayflower* doctrine, which essentially *forbade* broadcasters from editorializing at all. *See* Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941). The Commission declared that "[r]adio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented." *Id.* at 340. In the decision which ended the ban on editorializing, the FCC created the fairness doctrine as a way to permit broadcasters to editorialize while ensuring that they were fair to all sides. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). *See generally In re* Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (1974 Fairness Report), 48 F.C.C.2d 1 (1974) (broadcasters serve as trustees for public).

While the dictates of the fairness doctrine gave the broadcaster wide discretion on the choice of who would represent the contrasting viewpoints, two other fairness doctrine subrequirements dictate that particular individuals implicated be given an opportunity to respond. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 373-75 (1969). The "personal attack" rule of the fairness doctrine requires that an individual who has been personally assailed in a broadcast discussing issues of public concern be given an opportunity to respond. *See id.* The "political editorial rule" requires that should a broadcaster endorse a candidate for political office, he is then obligated to give the other candidates a reasonable opportunity to respond. *See id.*

For an overview of the fairness doctrine, see generally H. NELSON & D. TEETER, JR., LAW OF MASS COMMUNICATIONS 584-600 (1986) [hereinafter NELSON & TEETER] (discussing general two prong duty, and personal attack and political editorial rules). Commentators have expressed differing views of the fairness doctrine. *Compare* Krattenmaker & Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151 (attack on fairness doctrine) *with* Ferris & Kirkland, *Fairness—The Broadcaster's Hippocratic Oath*, 34 CATH. U.L. REV. 605 (1985) (vigorous defense of doctrine as being in public interest).

[7] *In re* Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 146 (1985) [hereinafter 1985 Fairness Report].

[8] *Id.* In Syracuse Peace Council, 99 F.C.C.2d 1389 (1984), the Commission elaborated on the factors it used to determine whether the second prong's "reasonable opportunity" requirement had been met: "(1) the total amount of time afforded to each side, (2) the frequency with which each side is presented, and (3) the size of the listening audience during the various broadcasts." *Id.* at 1399.

[9] 395 U.S. 367, 394 (1969). *Red Lion* involved two cases. *Id.* at 370-71. The first concerned a personal attack on a writer by a television preacher. *Id.* at 371-73. The second case involved a challenge by the Radio Television News Directors Association ("RTNDA") that the personal attack and political editorial rules recently promulgated by the FCC were unconstitutional. *Id.* at 370-71. The Court noted, however, that "insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine." *Id.* at 378.

In 1974, however, the Supreme Court struck down a rule which, like the fairness doc-

FCC, under the leadership of Chairman Fowler, a zealous advocate of deregulation,[10] released a report which strenuously criticized the fairness doctrine.[11] In a further blow to the doctrine, Judge Bork, in *Telecommunications Research & Action Center v. Federal Communications Commission*,[12] ruled that the fairness doctrine had not been codified by Congress.[13] Recently, in *Syracuse Peace Council v. Federal Communications Commission*,[14] the United

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trine, required newspapers to provide space for responses from political candidates whose record had been criticized in the newspaper. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). For a discussion of the contradictions between *Red Lion* and *Tornillo*, see Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

[10] *See In re* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 104 F.C.C.2d 358 (1986); Commercial TV Stations, 98 F.C.C.2d 1076, (1984); Deregulation of Television; Notice of Proposed Rule Making, 94 F.C.C.2d 678, (1983); Deregulation of Radio, 46 Fed. Reg. 13888 (1981). *See generally* H. NELSON & D. TEETER, *supra* note 6, at 601-07; Wimmer, *Deregulation and the Market Failure in Minority Programming in the Socio-economic Dimensions of Broadcast Reform*, 8 HASTINGS COMM/ENT L.J. 329, (1987).

With respect to Mark Fowler, see generally *The FCC Under Chairman Fowler*, 10 HASTINGS COMM/ENT L.J. 405-569 (1988) (compilation of articles covering FCC under Chairman Fowler). Mr. Fowler's leadership of the FCC has been criticized. *See, e.g.*, Geller, *The FCC Under Mark Fowler: A Mixed Bag*, 10 HASTINGS COMM/ENT L.J. 521 (1988).

[11] *See* 1985 Fairness Report, *supra* note 7. The 1985 Fairness Report asserted that because of changes in the communications market the fairness doctrine no longer served the public interest. *Id.* at 246. The Report questioned the constitutionality of the doctrine but did not repeal it, reasoning that such a decision should be made by Congress and the courts. *See id.* at 246-47.

[12] 801 F.2d 501 (D.C. Cir.), *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

[13] *Id.* at 517-18. It is submitted that this ruling was incorrect insofar as it contradicted the long standing view that Congress had adopted the fairness doctrine in its 1959 amendments to the Communications Act. *See* Act of September 14, 1959, PUB. L. No. 86-274, § 1, 73 Stat. 557 (amending 47 U.S.C. § 315(a)); *Research & Action Center*, 806 F.2d at 1116 (Mikva, J., dissenting from denial of rehearing en banc) (conclusion was "flatly wrong"); 1985 Fairness Report, *supra* note 7, at 253 (Quello J., concurring) ("[T]his record compels the conclusion that Congress intended to codify the fairness doctrine as part of the 1959 amendments to the Communications Act. The Commission has long acquiesced in the view that the fairness doctrine was codified by these amendments"); *see also* 1974 Fairness Report, 48 F.C.C.2d 1, 1 (1974). In addition, the Supreme Court's language in *Red Lion* may indicate that the Court interpreted the 1959 Amendment as having adopted the fairness doctrine. *See Red Lion*, 395 U.S. at 380-382; *see also* Comment, *Teletext—Searching For the First Amendment*: Telecommunications Research and Action Center v. FCC, 61 ST. JOHN'S L. REV. 167, 178 (1986) ("This interpretation, it is submitted, contradicts the legislative history of section 315 and is irreconcilable with construction of that provision by the Supreme Court"); *Regulating Teletext: Can Traditional Broadcast Principles Justify Government Regulation After* TRAC v. FCC?, 38 SYRACUSE L. REV. 1101, 1121 (1987) ("Since *Red Lion* it has been the opinion of the majority of courts considering the question that the fairness doctrine was codified by the 1959 amendment to section 315(a)").

[14] 867 F.2d 654 (D.C. Cir. 1989).

States Court of Appeals for the District of Columbia Circuit affirmed an FCC order which abrogated both prongs of the fairness doctrine.[15]

In *Syracuse Peace Council*, WTVH, a television station based in Syracuse, New York, broadcast several commercials designed to persuade the public to approve a proposed nuclear power plant.[16] The Syracuse Peace Council filed a complaint with the FCC alleging that WTVH had failed to broadcast any contrasting points of view.[17] Agreeing with the Council, the Commission found that WTVH had violated the second prong of the fairness doctrine.[18] In its petition for reconsideration, the owner of WTVH, the Meredith Corporation, argued that the fairness doctrine violated its first amendment rights.[19] The Commission, however, refused to address Meredith's constitutional claim.[20] On appeal, the United States Court of Appeals for the District of Columbia remanded the case to the FCC with express instructions to consider the constitutional issues.[21] On remand, the Commission held that the "fairness doctrine contravenes the First Amendment and thereby disserves the public interest."[22] On appeal,[23] the United States Court of Appeals for the District of Columbia Circuit, affirmed the FCC's decision, but based its decision exclusively on public policy grounds, ignoring the very constitutional issues for which it had remanded the case to the FCC.[24]

Writing for the court in *Syracuse Peace Council*, Judge Williams reasoned that the court was bound to dispose of the case on a non-constitutional ground if one was available.[25] The court iden-

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[15] *Id.* at 669.

[16] *Id.* at 656.

[17] *Id.*

[18] Syracuse Peace Council, 99 F.C.C.2d 1389, 1401 (1984).

[19] Meredith Reply to Opposition and Petition for Reconsideration and Supplement, April 12, 1985, at 11-41, Joint Appendix in Case No. 85-1723 at 261-91.

[20] Syracuse Peace Council, 59 Rad. Reg. 2d (P&F) 179 (Oct. 30, 1985). The Commission asserted that the "issue should be left to Congress and the courts." *Id.* at 182 n.4.

[21] Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987).

[22] Syracuse Peace Council, 2 FCC Rcd. 5043, 5057 (1987). The net effect language is based on Red Lion Broadcasting v. FCC, 395 U.S. 367, 393 (1969).

[23] Two petitioners, Geller and Lampert, petitioned the court to compel the FCC to adopt their proposed alternatives to the abrogation of the fairness doctrine. *Syracuse Peace Council*, 867 F.2d at 665. Geller and Lampert had previously urged that the FCC review a broadcaster's compliance with the fairness doctrine only at license renewal and that the FCC use a malice standard of review. *Id.*

[24] *Id.* at 669.

[25] *Id.* at 657 (citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-348

tified two of the Commission's intermediate conclusions as "core findings," namely (1) that the application of the fairness doctrine had a net chilling effect on the coverage of controversial issues, and (2) that there had been dramatic increase in the number of broadcasting outlets since the *Red Lion* decision which rendered the fairness doctrine no longer "narrowly tailored to meet a substantial government interest."[26] The court noted the FCC's express assertions that the policy and constitutional issues in the case were "inextricably intertwined," and that "its policy conclusion was a mere consequence of its constitutional one."[27] Notwithstanding these statements, Judge Williams asserted that, based on its intermediate conclusions which *could have* been labeled policy judgements, the FCC *could have* based its order solely on policy grounds.[28] Concluding that the court was justified in reviewing the FCC decision as if the Commission had based its decision exclusively on policy grounds,[29] Judge Williams applied an arbitrary and capricious standard of review and affirmed the FCC's termination of both prongs of the fairness doctrine without reaching the constitutional issues.[30] In a separate opinion, Chief Judge Wald dissented from the court's affirmation of the repeal of the first prong of the fairness doctrine.[31] She stated that the FCC's decision was the "very model of arbitrary and capricious decisionmaking," and characterized it as "deregulation running riot."[32]

In another separate opinion, Judge Starr emphatically disagreed with the majority's refusal to address the first amendment issues—characterizing such refusal as doing "violence to the basic

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(1936) (Brandeis, J., concurring)).

[26] *See id.* at 657, 660-661.

[27] *Id.* at 658.

[28] *See id.* at 658-661.

[29] *Id.* at 658-661. The court reasoned that it could have compelled the FCC to base its decision solely on non-constitutional grounds. *See id.* at 659. *But see id.* at 677 (Starr, J., concurring) (asserting court could not compel FCC to base decision on non-constitutional grounds).

[30] *Id.* at 669.

[31] *Id.* at 673 (Wald, C.J., concurring in part and dissenting in part).

[32] *Id.* (Wald, C.J., concurring in part and dissenting in part). The Chief Judge concluded, first, that the FCC had failed to provide adequate notice, as required by the Administrative Procedure Act, that the first prong of the fairness doctrine was under review. *Id.* at 669 (Wald, C.J., concurring in part and dissenting in part). Second, she asserted that the FCC's failure to allege that continued enforcement of the first prong would adversely affect the public violated the Supreme Court's *Red Lion* decision, which asserted that the right of the public is paramount to the right of broadcasters. *See id.* at 670-73 (Wald, C.J., concurring in part and dissenting in part).

framework of the modern administrative state."[33] Judge Starr asserted that the principle relied on by the majority to avoid constitutional analysis permitted reliance on non-constitutional grounds only where "the agency in fact based its decision, either exclusively or alternatively, on such grounds."[34] Judge Starr maintained that there was no independent non-constitutional rationale in the FCC's decision, especially since the FCC had sought to modify or overrule the Supreme Court's *Red Lion* decision.[35] Judge Starr reasoned, however, that the only first amendment rights implicated were those of the broadcasters.[36] Consequently, he concluded that an arbitrary and capricious standard of review was sufficient to judge the validity of the FCC's determinations.[37]

It is submitted that by upholding the FCC's decision to abrogate the fairness doctrine without reviewing the FCC's first amendment analysis, the *Syracuse Peace Council* court ignored the Supreme Court's interpretation of the first amendment. It is asserted that the majority was required to review the FCC's self-styled first amendment reasoning which contravened Supreme Court precedents. This Comment will first examine the Supreme Court's application of the first amendment to broadcasting. Second, it will review the constitutional nature of the Commission's intermediate conclusions. Finally, this Comment will assert that the FCC's abrupt switch to complete reliance on an advertiser based market mechanism violates the first amendment.

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[33] *Id.* at 676-677 (Starr, J., concurring) ("Where, as here, the agency's policy judgment is wholly driven by its constitutional reasoning and conclusions, the reviewing court is obliged to analyse the case in those terms").

[34] *Id.* at 674 (Starr, J., concurring) (based on Ashwander v. TVA, 297 U.S. 288 (1935) (Brandeis, J., concurring) and SEC v. Chenery Corp., 318 U.S. 80 (1942)). Judge Starr emphasized that, though it should endeavor to avoid unnecessary constitutional determinations, a reviewing court is explicitly forbidden from upholding an agency's action by supplying grounds that the agency would have found and from compelling an agency on remand "to make a separate and independent public interest determination." *Id.* at 678.

[35] *See id.* at 676-79 (Starr, J., concurring). With respect to *Red Lion*, Judge Starr asserted:

> [T]he Commission decided, in light of the *Meredith* remand, to tangle with *Red Lion* itself. There is no escaping this hard, cold fact: in the wake of the generously worded *Meredith* remand, the Commission has rendered a *Red Lion* decision . . . .
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> . . . *Meredith* has unleashed *Red Lion*, and it will not do to pretend, with cheery *bravado*, that *Red Lion* is still secure in its pre-*Meredith* cage. *Red Lion* is now out on the streets, released by a deliberate and careful FCC decision.

Id. at 675-76 (Starr, J., concurring).

[36] *See id.* at 679-80 (Starr, J., concurring).

[37] *See id.* at 679-88 (Starr, J., concurring).

THE FIRST AMENDMENT IN BROADCASTING

The Supreme Court has determined that the primary function of the first amendment in broadcasting is to protect the rights of the public.[38] In *Red Lion*, the Court maintained that, with respect to the first amendment, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[39] The Court emphasized that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[40] As a result, the Court held that the first amendment is not violated by a policy of mandatory public access to private broadcast frequencies.[41] The Court's rationale was based on the fact that the broadcasting system which Congress created in 1927 requires the government to prohibit virtually all citizens from using the publicly owned airwaves in order to give "frequency monopolies" to government licensed broadcasters.[42]

For decades the fairness doctrine has been the FCC's primary means of protecting the public's first amendment right to receive varying points of view on controversial topics.[43] Consequently, it is asserted that the *Syracuse Peace Council* court should have ad-

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[38] *See Red Lion* 395 U.S. at 390 (1969) ("the 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"); *see also* FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) (primary concern of broadcast regulation "has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views").

[39] *Red Lion*, 395 U.S. at 390.

[40] *Id.* As the Court reiterated, "[t]hat right may not constitutionally be abridged either by Congress or by the FCC." *Id.*

[41] *See id.* at 389. The Court asserted that its consistent view has been that "[w]here 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." *Id.* at 388; *see* National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 226-27 (1943).

[42] *See Red Lion*, 395 U.S. at 390 ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium").

[43] *See* 1974 Fairness Report, 48 F.C.C.2d 1, 7 [hereinafter 1974 Fairness Report]. In its 1974 report, the FCC described the fairness doctrine "as the single most important requirement of operation in the public interest—the '*sine qua non*' for grant of renewal of license." *Id.* at 10 (quoting Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 292 (1970)); *see also Syracuse Peace Council*, 867 F.2d at 677 (Starr, J., concurring) ("The FCC has never wavered from justifying the fairness doctrine, instrumentally, by reference to the fostering of First Amendment values. This view, moreover, has been repeatedly endorsed by the Supreme Court" (citations omitted)).

dressed whether repeal of the doctrine violated the public's first amendment rights—even if the FCC had justified its decision solely on policy grounds.

THE FCC'S FACT FINDINGS WERE DE FACTO CONSTITUTIONAL RULINGS

The FCC itself claimed that its intermediate conclusions were not administrative "fact findings" but self-styled judgments on how the first amendment should be applied to broadcasting. [44] In fact, it is suggested that the *Syracuse Peace Council* court simply turned a blind eye to the Commission's brazen proclamation that "[t]he special broadcast standard applied by the [Supreme] Court in *Red Lion*, which sanctions restrictions on speakers in order to promote the interest of viewers and listeners, contradicts" the first amendment.[45]

A. Only the Supreme Court May Overrule Its Net Effect Judgment

With respect to the FCC's first finding that the net effect of

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[44] *See* Syracuse Peace Council, 2 FCC Rcd at 5046. The Commission itself made it perfectly clear that it was unable to dispose of the case solely through policy judgments. The Commission noted: "it became evident to us that the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the doctrine." *Id.* Judge Starr observed that the FCC was justified in analyzing the decision "through First Amendment lenses," given the fairness doctrine's "constitutionally-charged history." *Syracuse Peace Council*, 867 F.2d at 677 (Starr, J., concurring). He noted that even the majority rationalized the FCC's judgment in constitutional terms. *Id.* at 679 (Starr, J., concurring). After a painstaking analysis, Judge Starr concluded: "With all respect, the court can find only constitutional reasoning within the [FCC] Order and can support the Order only by relying upon constitutional reasoning." *Id.* (Starr, J., concurring).

[45] Syracuse Peace Council, 2 FCC Rcd at 5057. The FCC engaged in a fierce criticism of the Supreme Court's interpretation of the first amendment in *Red Lion*. *See id.* at 5048-58. The Commission promulgated its own standard: "we believe that under the First Amendment, the right of viewers and listeners to receive diverse viewpoints is achieved by guaranteeing them the right to receive speech unencumbered by government intervention." *Id.* at 5057. The Commission observed: "The *Red Lion* decision, however, apparently views the notion that broadcasters should come within the free press and free speech protections of the First Amendment as antagonistic to the interest of the public in obtaining access to the marketplace of ideas." *Id.* Consequently, it declared: "As a result, it is squarely at odds with the general philosophy underlying the First Amendment." *Id.* It is asserted that an administrative agency's blatant disregard of the Supreme Court's interpretation of the Constitution is violative of a constitutional framework in which the Supreme Court is the "final arbiter" of the Constitution. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958); Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803).

the fairness doctrine is to reduce controversial speech, the *Syracuse Peace Council* court recognized that the FCC's conclusion was not based on a statistically valid study, but rested, by and large, on the anecdotal accounts of a few broadcasters.[46] In fact, Judge Williams asserted that the effect of the fairness doctrine on the volume of controversial speech simply is not amenable to empirical fact finding.[47] Nonetheless, the majority approved of the FCC's "normative value judgment"—that the doctrine's deterrent effect on expression outweighed its power to generate speech—on the ground that it was similar to the Supreme Court's first amendment rationale concerning the *print media*.[48] The FCC judgment, however, directly contravened the Supreme Court's own net effect value judgment concerning the *broadcast media* in *Red Lion*.[49]

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[46] *See Syracuse Peace Council*, 867 F.2d at 664 (majority noted validity of the United Church of Christ's criticism that "the NAB study . . . was 'not based on a statistically valid sample of broadcasters' experiences, but rather, was merely a series of anecdotal accounts' ").

One eminent commentator has emphasized the weakness of the Commission's evidence. *See* Hyde, *FCC Action Repealing the Fairness Doctrine: A Revolution in Broadcast Regulation*, 38 SYRACUSE L. REV. 1175, 1185-86 (1987). Rosel H. Hyde, a former Chairman of the FCC, pointed out that:

> The Commission record, while replete with opinions, offers no basis upon which a sound judgment could be made as to the effect of the fairness doctrine. Specifically, whether the doctrine increased or decreased the coverage of controversial issues of public importance remains unknown. However, the Commission found that the comments received were sufficient to make a generalized finding that the fairness doctrine inhibits broadcasters, with no basis on which to hold that the views submitted were representative of the industry, and with no consideration given to the fact that the finding made was inconsistent with findings made previously by the FCC and by Congressional committees that were based on much broader investigations.

Id.; *see also* Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COM. L.J. 161, 189 ("Congressional committees have explicitly rejected this [net effect] argument in the past finding no conclusive evidence to support such assertion. Additionally, both the Supreme Court in *Red Lion* and the FCC itself in its 1974 Fairness Report found that the Fairness Doctrine does not have an overall chilling effect on speech").

[47] *Syracuse Peace Council*, 867 F.2d at 664-65. "Editorial decisions are obviously driven by many factors. Isolation of causes in any scientific way seems virtually impossible." *Id.* at 664. A finding of the net effect of the fairness doctrine theoretically would involve weighing how much controversial speech would be broadcast as a result of enforcing the fairness doctrine against the amount of controversial speech that would be chilled. *Id.* at 664-65. The court noted that it could not understand how "anyone could be sure either way." *Id.* at 665.

[48] *Id.* at 665. ("The policy judgment seems to us . . . quite similar to the Supreme Court's finding of similar value judgments implicit in the First Amendment as applied to the print media").

[49] *See Red Lion*, 395 U.S. at 393 (fairness doctrine has not reduced coverage of controversial issues).

Moreover, although the Supreme Court has acknowledged the possibility of reversing its net effect judgment of the fairness doctrine, the Court, it is urged, has reserved for itself—not the FCC—the right to reconsider "the constitutional basis" of its own decision.[50]

B. *Numerical Scarcity Is a "Straw Man's Argument"*

With respect to the FCC's second "finding," namely that increases in the total number of broadcasting outlets have rendered the fairness doctrine unconstitutional in that it was no longer "narrowly tailored to meet a substantial government interest," it is suggested that the *Syracuse Peace Council* court failed to recognize that the Supreme Court upheld the fairness doctrine because it was "tailored" to remedy allocational scarcity, not numerical scarcity. Allocational scarcity concerns the first amendment problems that are created by the very limited number of government licenses available relative to the actual number of citizens who wish to access the public airwaves.[51] Numerical scarcity, on the other hand, refers to the notion that there may not be enough broadcasting outlets to ensure a diversity of viewpoints.[52] The FCC's finding that there has been an increase in the total number of broadcast stations relates to numerical scarcity.[53] The Supreme Court, however, upheld the fairness doctrine in *Red Lion* on the expressed ground that the doctrine alleviated allocational scarcity.[54] More-

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[50] *See* FCC v. League of Women Voters, 468 U.S. 364, 379 n. 12 (1984) ("As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, *we* would then be forced to reconsider the constitutional basis of our decision in that case.") (emphasis supplied).

Moreover, it is suggested that the *Syracuse Peace Council* court's recognition that the primary basis for the FCC's "value judgment" involved a first amendment analysis mandated, at minimum, that the court review the FCC's first amendment reasoning.

Finally, with respect to the net effect finding, it is suggested that the majority failed to recognize the Supreme Court's admonition that it might be necessary for the FCC to enforce the first prong of the fairness doctrine in order for the net effect of the doctrine to remain positive. *See Red Lion*, 395 U.S. at 393 ("if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues").

[51] Syracuse Peace Council, 2 FCC Rcd 5043, 5054-55 (1987); *see Syracuse Peace Council*, 867 F.2d at 682-83 (Starr, J., concurring).

[52] *Syracuse Peace Council*, 2 FCC Rcd at 5053-54.

[53] *Id.*

[54] *See Red Lion*, 395 U.S. at 400. The Court held:

> In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without gov-

over, in 1984, the Supreme Court explained in *Federal Communications Commission v. League of Woman Voters of California* [55] that the fairness doctrine was a prime example of a regulatory doctrine which was narrowly tailored to promote an important governmental interest.[56]

> ernment assistance to gain access to those frequencies for expression of their views, we hold the regulations and rulings at issue here are both authorized by statute and constitutional.

Id. In fact, the Court was so concerned with the evil of allocational scarcity that it asserted that even if allocational scarcity should become a thing of the past, something not even the FCC has claimed, the government would still be justified in enacting public interest regulations because of the past advantages of licensees while allocational scarcity existed. *See id.* at 399-400.

It is submitted that Judge Starr was incorrect in his assertion that the Supreme Court had partially justified the fairness doctrine on numerical scarcity. *See Syracuse Peace Council*, 867 F.2d at 683 (Starr, J., concurring). As the former FCC Chairman Hyde has pointed out:

> Neither the fairness doctrine nor the *Red Lion* decision made any claim that the doctrine was necessary, or that it was justified by reason of a shortage in broadcast frequencies or broadcast outlets. The *Red Lion* opinion does not include a reference as to the number of broadcast stations, or even a suggestion that the fairness doctrine was necessary to provide an assurance that sufficient diversity of opinion on controversial issues of public importance would be provided. Hence, the Commission's observations that there has been a 54 percent increase in the number of radio stations and a 57 percent increase since the *Red Lion* decision . . . are not responsive or relevant to any argument set forth in the fairness doctrine or the *Red Lion* decision.

Hyde, *supra* note 46, at 1179.

Of course, the FCC was aware of the Supreme Court's scarcity rationale but chose to replace it with its own anti-scarcity reasoning. *See* Syracuse Peace Council, 2 FCC Rcd at 5054 ("We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media"). In fact this was not the first time that the pro-deregulation FCC had attempted to overrule the Court's scarcity doctrine. For example, in Telecommunications Research & Action Center v. FCC, 801 F.2d 501, 509 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), Judge Bork admonished the Commission for attempting to replace the scarcity doctrine:

> Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media . . . or announce a constitutional distinction that is more usable than the present one. In the meantime, neither we nor the Commission are free to seek new rationales to remedy the inadequacy of the doctrine in this area. The attempt to do that has led the Commission to find "implicit" considerations in the law that are not really there. The Supreme Court has drawn a first amendment distinction between broadcast and print media on a premise of the physical scarcity of broadcast frequencies.

Id. at 509.

[55] 468 U.S. 364 (1984).

[56] *See id.* at 378-80. The Court noted that it had upheld the fairness doctrine "because the doctrine advanced the substantial governmental interest in ensuring balanced presentations of views in this limited medium and yet posed no threat that a 'broadcaster [would be

A Monopolized Broadcast Market and the First Amendment

Finally, it is suggested that the FCC's abrupt switch to total reliance on an unrestricted market, controlled by broadcasters and advertisers violates the notion that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[57] For example, citizens do not have a right even to purchase airtime in order to exercise their paramount first amendment rights,[58] while licensees, with inferior first amendment rights, can now make round-the-clock use of the public airwaves for their own purposes, free of charge. In addition, the

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denied permission] to carry a particular program.'" *Id.* Furthermore, in articulating the standard the court again referred to the doctrine as follows: "these restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues." *Id.* at 380. It is suggested that these statements by the Supreme Court are all the more relevant because they were made in 1984, fifteen years after *Red Lion*, and hence tend to undercut the FCC's contention that vast changes since 1969 have rendered the fairness doctrine unconstitutional.

[57] *See Red Lion*, 395 U.S. at 390. In considering the granting of absolute rights to licensees over the use of their assigned frequencies, the Court determined that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use." *Id.* at 391.

It is submitted that the *Syracuse Peace Council* court ignored the fact that the FCC failed to provide the requisite reasoned basis for a new policy since the Commission did not produce any evidence demonstrating how an advertiser based market mechanism would protect the public's first amendment right to express controversial ideas. Justice Brennan, for example, has pointed out that because "of the strong interest of broadcasters in maximizing their audience, . . . in the commercial world of mass communication, it is simply 'bad business' to espouse—or even to allow others to espouse—the heterodox or the controversial." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 187 (1973) (Brennan, J., dissenting); *see also* Action for Children's Television v. FCC, 821 F.2d 741, 750 (D.C. Cir. 1987) (invalidating FCC's termination of its commercialization guidelines for children's programming becasuse such deregulation policy had no "reasoned basis").

[58] *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 130-32 (1973) (Brennan, J., dissenting). In a vigorous dissent, Justice Brennan, joined by Justice Marshall argued that "retention of such *absolute* control in the hands of a few government licensees is inimical to the First Amendment, for vigorous, free debate can be attained only when members of the public have at least *some* opportunity to take the initiative and editorial control into their own hands." *Id.* at 189 (Brennan, J., dissenting). It is important to note that the Court has not found that broadcasting is government action, which could require that broadcasters give a right of access to the general public. *See generally* T. Carter, M. Franklin & J. Wright, The First Amendment and the Fifth Estate: Regulation of Electronics Mass Media 78-81 (1986) (discussing issue of whether broadcasting is government action).

FCC's recent wholesale deregulatory policies have eliminated mainstay regulations designed to ensure the diversity and integrity of the market itself.[59] Consequently, it is asserted that without the fairness doctrine, viewpoints that are neither commercially profitable for advertisers nor strongly held by licensees will be barred from the airwaves.[60]

CONCLUSION

In affirming the FCC decision to abrogate both prongs of the fairness doctrine, the District of Columbia Circuit ignored the paramount first amendment rights of the American public, the property owners of the airwaves. In order to avoid facing the first amendment, the *Syracuse Peace Council* court twisted the FCC's self-proclaimed constitutional judgments into policy judgments. By doing so, the court has approved a regulatory climate conducive to monopolization of the public airwaves by licensees.

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[59] *See* Unified Agenda, 49 Fed. Reg. 16,600 (1984). In its deregulatory policies the Fowler Commission did not stop at the "underbrush of regulation" but eliminated many ownership rules regulating the structure of the market, such as: (1) rules limiting regional concentration of ownership; (2) cross-ownership rules; and (3) multiple ownership rules. *See id.*; *see also supra* note 10 and accompanying text.

[60] It is suggested that creating an inhibiting threshold based on the profitability of speech contradicts the core values of the first amendment, which places a premium on controversial political speech and provides only limited protection for commercial speech. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980).

For proposed alternatives to the Fairness Doctrine, see Labunski, *May it Rest in Peace: Public Interest and Public Access in the Post-Fairness Doctrine Era*, 11 HASTINGS COMM/ENT L.J. 219 (1989); Hilen, *Alternatives to the Fairness Doctrine: Structural Limits Should Replace Content Controls*, 11 HASTINGS COMM/ENT L.J. 291 (1989).