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Returning Fairness to the Broadcast Media

Milda K. Hedblom*

The Fairness Doctrine has been a cornerstone of federal regulation of broadcasting for forty years. Yet on August 4, 1987, the Federal Communications Commission (FCC) voted to abolish the Fairness Doctrine on the grounds that it unconstitutionally restricts the freedom of speech rights of broadcast journalists.[1] This article will explore the claims of the Fairness Doctrine; evaluate the recent attack on the Fairness Doctrine; consider the merits of the argument that broadcasting and the press should be treated as functional equivalents under the first amendment; identify the nature of the inequalities in access that are likely to develop under a "Fairness-free" regulatory environment; and recommend legitimate regulatory goals.

Regulation of broadcasting in the United States has a history that is almost as old as broadcasting itself. The first licensing statute appeared in 1912.[2] After another decade and a half of chaotic, unregulated spectrum competition, the 1927 Radio Act signalled a first attempt at more comprehensive regulation of broadcasting.[3] That Act soon outgrew its usefulness. The Communications Act of 1934 was enacted in its place but moved far beyond in scope, and established the present general regulatory framework for broadcasting and telecommunications.[4]

One of the most controversial, interesting, and historically important regulatory doctrines emerging from the administration of the Communications Act of 1934 is the Fairness Doctrine. There are two parts to the Doctrine. As a condition of license to broadcast for radio or television reception, broadcasters (1) have a public obligation to air controversial issues of public importance; and (2) when they do air controversial issues of public importance, broad-

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1. Syracuse Peace Council v. Television Station WTVH, Syracuse, 2 F.C.C. Rcd. 5043 (1987) (memorandum opinion & order).

2. Radio Act of 1912, ch. 250, 37 Stat. 199 (1912) (amended 1927, repealed 1934).

3. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

4. Communications Act of 1934, 47 U.S.C. § 151 Stat. 1064 (1934).

casters are required to give fair coverage to contrasting viewpoints.[5] The licensee may choose to personally present contrasting views or may ask others to do so.[6] The same conditions apply to cable system operators for programs they produce.[7] The Fairness Doctrine does not apply to cable programs which are retransmitted or produced by members of the public for public access channels.

The Fairness Doctrine applies to overall broadcast content. For example, it includes coverage of any ballot issue, national and state issues within localities, and international issues featuring United States relations or involvement.[8] News formats to which the Doctrine applies include newscasts, news interviews, on the spot news, and news documentaries.[9] Commercials are exempt, unless they intentionally present controversial public issues.

In addition, separate rules, developed as off-shoots of the Fairness Doctrine, pertain to personal attacks and political editorializing. These rules were specifically left in place by the FCC when it announced the abolition of the general Fairness Doctrine in August, 1987, but they are likely to be reconsidered.[10] The "personal attack rule" requires a broadcaster attacking any person's character, honesty, or similar personal quality while airing a controversial issue of public importance in other than bona-fide news programs, to notify the person, provide a transcript, and offer response time.[11] Under the editorializing rule, the station must give time for contrasting viewpoints if it broadcasts its own position on an issue, endorses a candidate for public office, or takes a position on an issue obviously allied to a candidate.[12]

The Fairness Doctrine is important because it involves the twin purposes of securing citizens' first amendment rights to be informed, and of protecting broadcasters' rights to speak without restraint. These rights are fundamental to the existence of an informed citizenry and a free speech environment.[13] Whether or

5. Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues, 39 Fed. Reg. 26,372, 26,374 (1974) [hereinafter Fairness Report]. The Fairness Doctrine is not an FCC rule but it has the force of regulation.

6. *Id.* at 26,374.

7. 47 C.F.R. §§ 76.205, 76.209.

8. Steven J. Simmons, The Fairness Doctrine and the Media 157-60 (1978).

9. Ford Rowan, Broadcast Fairness: Doctrine, Practice, Prospects 7 (1984).

10. *Dennis Tells NAB Fate of Fairness Doctrine Rests on Industry Performance*, Comm. Daily, Sept. 22, 1987, vol. 7, no. 183, at 3.

11. Rowan, *supra* note 9, at 5.

12. *Id.* at 5.

13. John L. Hodge, *Democracy and Free Speech: A Normative Theory of Society and Government*, in The First Amendment Recondsidered: New Perspectives on the Meaning of Freedom of Speech and Press 156-61 (1982).

not the Fairness Doctrine promotes or hinders either has been vigorously debated since the policy's inception.[14]

Proponents of the Fairness Doctrine argue that it also protects against the creation and/or increase of various inequalities: inequalities of access for expression of views between owners of media facilities and non-owners; inequalities of access between those with means to buy time for advocacy advertising in the media and those without; inequalities of access for timely response to personal attack between those who are attacked and owners of media facilities; inequalities in the capacity to protect oneself from unwanted messages (such as highly biased messages on public issues) between those who control broadcast messages and those who receive them.

Assignment of a license to broadcast necessarily creates inequalities in regard to expression of views. All non-speakers are in a less than equal position compared to those with licenses. But among the non-speakers, some are less deprived than others. For example, persons who are politically active, who command social and economic resources to express views in other channels of communication, and who have acquired the cultural habit of participation will, in general, succeed in expressing their views through other means.[15] By contrast, people lacking command of psychic and social resources are deprived of alternative opportunities for expression and are more heavily burdened by their lack of access to broadcasting.[16] In short, the greatest burden from unavoidable inequalities in expression of views will be borne by those who are less educated, less affluent, less informed, less active in public and community life, and less politically competent. By aiming to enhance diversity of viewpoints in the presentation of controversial public issues, the Fairness Doctrine places a public service obligation on the broadcaster to actively seek out and present viewpoints in addition to those which easily find expression, such as a majority view or a well-financed view.

The Political Setting

The assumption that Fairness Doctrine regulation should apply to broadcasting dominated policy for decades, but by the mid-

14. *See* Fred Friendly, The Good Guys, The Bad Guys and the First Amendment (1976); Rowan, *supra* note 9; Lucas A. Powe, Jr., American Broadcasting and the First Amendment (1987); Simmons, *supra* note 8.

15. William J. Keefe, Parties, Politics and Public Policy in American 165-69 (1988).

16. *Id.* at 165-69.

1980s the concept and its rationale were being strongly opposed.[17] The Doctrine evolved through FCC policy statements and court rulings,[18] and was thought by many to have a statutory basis by virtue of incorporation into a 1959 amendment to the Communications Act.[19] The Doctrine is difficult to administer and provokes controversy whatever the political climate.

Support for the Fairness Doctrine rests on the view that it assures access for diverse, contrasting viewpoints. Opponents of the Fairness Doctrine argue that a superior approach to securing diversity in broadcast handling of public issues is to equate broadcasting with the print press, which is specifically exempted from Fairness Doctrine-type obligations.[20] Under that approach, access is determined by editorial decisions of the media editor and/or owner. On the whole the broadcast industry opposes the Doctrine, though there are some notable exceptions.[21] Support for the Doctrine is found among a wide variety of other interest groups, but particularly among advocacy, consumer, civil rights, and minority groups.[22]

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17. *See* Rowan, *supra* note 9, at 204-07.

18. In addition to the Fairness Report, *supra* note 5, the FCC's main policy statements on the Fairness Doctrine are: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communication Act, 58 F.C.C. 2d 691 (1976); Broadcast Procedure Manual, 39 Fed. Reg. 32, 288, 32, 290 pars. 12-14 (rev. ed. 1974); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10, 415 (1964); Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

19. 47 U.S.C. § 315(a) (1970).

20. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (Court held that a Florida "right of reply" statute was unconstitutional).

21. *The Decline and Fall of the Fairness Doctrine*, Broadcasting, August 10, 1987, at 27. Westinghouse Broadcasting, one of the largest U.S. media conglomerates, has consistently supported the Fairness Doctrine and expressed its continuing support in the face of the FCC action.

22. *Staff of Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess., Groups Supporting Legislation to Codify the Fairness Doctrine (1987). The following groups are on record supporting legislation to codify the Fairness Doctrine in the 1987-88 Congressional session. Accuracy in Media; Action for Children's TV; AFL-CIO; American Baptist Churches; American Civil Liberties Union; American Conservative Union; American Clothing & Textile Workers' Union; American Federation of State County and Municipal Employees; American Jewish Committee; American Lung Association; Americans for Democratic Action; Anti-Defamation League of B'nai B'rith; Black Citizens for a Fair Media; Center for Science in the Public Interest; Center for Study of Responsive Laws; Church Women United; Christian Church (Disciples of Christ); Citizens Communications Center; Common Cause; Communications Workers of America; Conservative Caucus; Consumer Federation of America; Consumers Union; Department for Professional Employees, AFL-CIO; Eagle Forum; Environmental Action; Environmental Policy Institute; Episcopal Church-Office of Communication; Friends of the Earth; Fund for Renewable Energy and the Environment; General Motors; International Ladies Garment Workers Union; Media Access Project; Mobil Oil Corporation; Morality in Media of Massachusetts; Motion Picture Association of America; National

The FCC has usually been a strong advocate of the Fairness Doctrine and has in the past taken the position that the Doctrine was "the single most important requirement of operation in the public interest—the *sine qua non* for grant of a renewal of license."[23] However, as President Reagan's appointees came to dominate the Commission in the 1980s, the FCC became the most pointed critic of the Fairness Doctrine. The position taken by the Commission in the *1985 Report on Fairness*, stood 180 degrees from their historic defense of the Fairness Doctrine stated plainly their wish to end the Doctrine.[24]

Despite the obvious desire of the FCC to end the Fairness Doctrine, the FCC believed that a unilateral deregulatory move was beyond their reach so long as the Doctrine was understood to have statutory status and so long as the Doctrine enjoyed powerful congressional support.[25] In *Telecommunications Research & Action Center v. F.C.C.*,[26] however, the D.C. Circuit Court of Appeals held, in a decision written by Judge Robert Bork, that the Fairness Doctrine was not a binding statutory directive but, rather, an "administrative construction."[27] Following sharply on the heels of that decision, the claimants in *Meredith Corporation v. F.C.C.* challenged the constitutionality of the Fairness Doctrine before the same court, appealing from an FCC finding that a violation of the Fairness Doctrine had occurred.[28] The case was returned to the FCC with a directive to consider whether the Fairness Doctrine was "self-generated pursuant to its general congressional authori-

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Association of Arab Americans; National Conservative Political Action Committee; National Council of Churches—Communications Commission; National Education Association; National Federation of Local Cable Programmers; National League of Cities; National Organization for Women; National Rifle Association; People for the American Way; Public Citizen; Safe Energy Communication Council; Seagrams and Sons, Inc.; Sierra Club; United Auto Workers; United Church of Christ-Office of Communications; United Food and Commercial Worker International; Upjohn; U.S. Catholic Conference-Department of Communications; Union of Concerned Scientists; U.S. Public Interest Research Group.

23. Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, 292 (1970) (Memorandum Opinion and Order). *See also* Fairness Report, *supra* note 5.

24. *Broadcasters and the Fairness Doctrine: Hearings on H.R. 1934 Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 100th Cong. 1st Sess. 98 (1987) [hereinafter *Hearings on H.R. 1934*]. "On the basis of the voluminous factual record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation, we no longer believe that the fairness doctrine, as a matter of policy, serves the public interest." *Id.*

25. *Hearings on H.R. 1934*, *supra* note 24, at 183-202.

26. 801 F.2d 501 (D.C. Cir. 1986), *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 3196 (1987).

27. *Id.* at 519.

28. 809 F.2d 863 (D.C. Cir. 1987).

zation or specifically mandated by Congress."[29] The court action enabled the FCC to take radical action at the very moment congressional scrutiny of the Fairness Doctrine intensified.

Congressional views on the Fairness Doctrine tend to divide depending upon the specific issue raised under the Doctrine's umbrella, but there is a reservoir of continuing congressional support for the Doctrine. The actions by the D.C. Circuit Court of Appeals, affecting the potential status of the Doctrine spurred intense congressional activity. In the spring of 1987, both houses passed bills by wide margins, creating a statutory basis for the Fairness Doctrine.[30] President Reagan vetoed the bill, effectively killing it since congressional override was not very likely.[31]

The sequence of events in the courts, in Congress, and at the White House presented the FCC with an opportunity to alter the Fairness Doctrine. Under the leadership of the new chairman, Dennis Patrick, the FCC in August of 1987 announced the abolition of the Fairness Doctrine on grounds that they believed it to be a violation of the first amendment.[32]

Further action from the FCC, in Congress, and in the courts is inevitable. Several possibilities exist. Congress may fail to resurrect the Fairness Doctrine. In that event, the FCC will lead the redefinition of policy along more de-regulated lines, at least until the next round of FCC appointments by a new president. Moreover, rules allied to the Fairness Doctrine will be vulnerable and the public interest standard for award of broadcast licenses will be redefined.

Another possibility is that Congress will pursue new Fairness Doctrine legislation, either in traditional or newly-crafted form and send it to the president in what they hope will be a veto proof bill,[33] or perhaps wait until the election of a more sympathetic president. In the event Congress resurrects the Fairness Doctrine in some form, a court test of its constitutionality is almost inevitable. Even without a clear congressional mandate on the Fairness

29. *Id.* at 872.

30. H.R. 1934, 100th Cong., 1st Sess., 133 Cong. Rec. 4141 (1987). S. Res. 742, 100th Cong., 1st Sess., 133 Cong. Rec. 5218 (1987). The vote was 302-102 in the House, 59-31 in the Senate.

31. *See* President's Message to Congress Transmitting Vetoes, Weekly Comp. Pres. Doc., vol. 23, No. 25, at 715-16 (June 29, 1987).

32. Syracuse Peace Council v. Television Station WTVH, Syracuse, 2 F.C.C. Rcd. 5043 (1987) (memorandum opinion & order).

33. The President does not have the power to veto a particular item while signing the rest of the bill into law. However, the President took the position that the Fairness Doctrine provision was unacceptable and Congress agreed to withdraw it, though promising to reintroduce the measure. *The Rise and Fall of the Fairness Doctrine*, Broadcasting, Dec. 28, 1987, at 31.

Doctrine, it is likely proponents of the Doctrine will seek an opportunity to test the constitutionality of the FCC action. The Supreme Court has signalled a possible willingness to reconsider the constitutionality of the Fairness Doctrine,[34] but the outcome of possible reconsideration is unclear, especially if Congress has made it law with or without presidential acquiescence. Whatever the course of actual events, the Fairness Doctrine will probably be heard from again.

Broadcasting Regulation: Administrative & Constitutional Bases

The key idea embodied in the Fairness Doctrine—overall program balance—reaches back to the adoption of the Radio Act of 1927.[35] Subsequent legislative history demonstrates a clear, continuous congressional concern for the need to present balanced public affairs information and to prevent private partisan interests from propagandizing their own views through their licenses to occupy the airwaves.[36] Twice in 1959[37] and 1987, Congress passed Fairness Doctrine acts but both bills were vetoed. Congress considered embodying the public interest standard in statutory Fairness Doctrine language at several other junctures, but refrained in order to preserve greater FCC administrative flexibility in implementing the doctrine.[38] Congress did, however, include a specific reference to the Fairness Doctrine in 1959 amendments to the Communications Act. This step was interpreted by many, including some courts in subsequent decisions, to have incorporated the Doctrine into statute. The D.C. Circuit Court of Appeals finding in *Telecommunications Research & Action Center* that the Doctrine was a regulation, not a statute, opened the door to intense litigation to sweep the Doctrine away.[39]

The recent cases attacking the Doctrine have emphasized

34. Simmons, *supra* note 8, at 22. There is considerable dispute among scholars on this point. Some, such as Jerome Barron, believe the FCC tentatively formulated the Doctrine only in 1941. Jerome Barron, *The Federal Communication Commission's Fairness Doctrine: An Evaluation*, 30 Geo. Wash. L. Rev. 1, 2 (1969). Others see the real genesis of the doctrine in the Commission's 1949 Report on Editorializing by Broadcast Licensees 13 (June 1, 1949).

35. Simmons, *supra* note 8, at 20.

36. *Id.* at 46-53.

37. *Id.* at 22-30.

38. 47 U.S.C. § 315(a) (1970). Cases which refer to the assumed codification include Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 129-30 (1973) and Straus Communications, Inc. v. F.C.C., 530 F.2d 1001 n.11 (D.C. Cir. 1976). The issue of whether the 1959 amendment created a statutory basis for the Fairness Doctrine was not an issue specifically decided by either of these cases. The cases do indicate the trend of judicial thinking on the matter.

39. 801 F.2d 501 (D.C. Cir. 1986).

congressional failure to unequivocally write the Doctrine into statute as evidence that Congress has permitted but not required the Fairness Doctrine.[40] The success of that argument may reflect less its ultimate strength than the current ideological make-up of the FCC leadership and unusual judicial receptiveness. A more accurate reading is that Congress failed to create a statute before 1987 out of deference to the FCC's role in developing detailed policy. The failure was also a result of concern for the complexity of the issues raised by a Fairness Doctrine-type requirement.[41] It is apparent from the record that Congress has worried consistently about problems of distortion from a completely unregulated broadcasting industry, though preferring that solutions be worked out among the FCC, the industry, and interested public groups.[42] This reading is supported by the fact that, in the spring of 1987 when the Fairness Doctrine seemed likely to fall before a combined judicial and administrative attack, Congress speedily passed a bill to protect the concept.

The constitutional development of the Fairness Doctrine involved close interaction between the FCC and two courts, the Court of Appeals, D.C. Circuit, and the Supreme Court. The key event in that development is the Supreme Court's declaration of the constitutionality of the Fairness Doctrine in the 1969 *Red Lion Broadcasting Co. v. F.C.C.* case.[43] The recent cases from the D.C. Circuit discussed above, included successful frontal attacks on *Red Lion* and the Fairness Doctrine.

The *Red Lion* case arose from a fifteen minute broadcast by Rev. Billy Hargis, a political preacher doing a "Christian Crusade" series for Red Lion Broadcasting Company. His presentation featured a discussion of a book written by Fred J. Cook about Sen. Barry Goldwater. The broadcast occured in November of 1964. Hargis said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[44] Cook concluded he had been personally at-

40. Brief for Petitioners at 54, Radio-Television News Directors Association v. F.C.C., 809 F.2d 860 (D.C. Cir. 1987). This case is a companion case to Meredith Corporation v. F.C.C., 809 F.2d 863 (D.C. Cir. 1987). This argument necessarily requires that one ignore the recent adoption of the Doctrine by substantial margins in both congressional bodies.

41. Simmons, *supra* note 8, at 22-58.

42. *Id.* at 22-59.

43. 395 U.S. 367 (1969).

44. *Id.* at 371.

tacked and demanded free reply time, which the station refused.

The FCC declared that the Hargis broadcast was a personal attack on Cook and that the station had failed to meet its fairness obligatons.[45] On appeal, the Supreme Court not only affirmed the decision of the FCC but also addressed the broader role of the Fairness Doctrine within the constitutional framework of the first amendment. The Court asserted that two rules related to the Fairness Doctrine, the personal attack and political editorializing rules, fell within the constitutional ambit of the Fairness Doctrine itself.[46] The Court observed that the public has a right of access to diverse ideas in broadcast content; a right which may not be constitutionally abridged and which is dominant over broadcasters' rights.[47]

The basis for this view is that the public has a "collective right to have the medium function consistently with the ends and purposes of the first amendment."[48] Among those purposes is the contribution to self-government. The Court explicitly linked provision of information on controversial public issues to self-government in its statement that "[S]peech concering public affairs is more than self-expression, it is the essence of self-government."[49]

The broadcaster's unsuccessful primary argument against the Fairness Doctrine in 1969 rested on first amendment grounds. This is the same challenge that persuaded the FCC in its administrative attack on the Doctrine. The essence of the challenge is that no person's freedom to speak or publish can be restricted in order to provide time or space for the views of one's opponents. It is claimed that this right of broadcasters is violated by the Fairness Doctrine. Broadcasters also assert that the Fairness Doctrine has the perverse effect of depressing broadcasters' willingness to present controversial public issues. The *Red Lion* Court unequivocally rejected this claim. At the same time, the Court indicated that if this effect developed in the future, "there will be time enough to

45. Considerable emphasis is now placed on the likelihood that the complaint in *Red Lion* arose out of political efforts centered in the Kennedy/Johnson teams. These efforts were focused on identifying possible fairness complaints and bringing them to the attention of those individuals entitled to bring an action at the FCC. Friendly, *supra* note 14. That effort is cited as 'proof' that the Fairness Doctrine was being used as a tool of political harassment. Powe, *supra* note 14, at 113-20. However, it is the purpose of the Fairness Doctrine to correct significant content imbalance regardless of how that imbalance was identified. The complaint about harassment seems to be a complaint that the Fairness Doctrine can work at all.

46. 395 U.S. 367, 390 (1969).

47. *Id.*

48. *Id.*

49. *Red Lion*, 395 U.S. at 390 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

consider the constitutional implications."[50] The Court went on to note in *Red Lion* that broadcasters were on somewhat dubious grounds in advancing that claim, because they were already ". . . obligated to give suitable time and attention to matters of great public concern."[51]

The Fairness Doctrine and Protected Interests

The model of broadcast regulation from which the Fairness Doctrine derives differs sharply from the government's role in regulating the press. The first amendment has been read so as to leave the print editorial process virtually inviolate.[52] By contrast, broadcasting is regulated. Broadcasters hold a license under an obligation to serve the public interest. The FCC has elaborated numerous specific requirements for a broadcasting license, including the Fairness Doctrine obligation to devote a reasonable amount of time to public issues and present conflicting viewpoints. The print editor is accountable mainly through the laws of libel and slander. The broadcasting editor is accountable not only through those laws, but also through FCC rules and the need for regular license renewal.[53]

The foremost rationale for regulating broadcast media through the Fairness Doctrine is the argument that the spectrum is scarce, i.e., the electromagnetic spectrum cannot accomodate all who might wish to use it.[54] Therefore, those few who do receive a license must serve some interests of the many non-speakers who are barred, even while they further their own interests. This rationale is inapplicable to the print media because additional voices can always enter that forum of expression, regardless of the number already actively using print.[55]

A second evolving rationale for regulating broadcasting, but not print media will likely become increasingly important in future policy making decisions.[56] This rationale argues that regulation is justified because broadcasting has a unique impact and pervasive presence in people's lives that is different from print me-

50. 395 U.S. 367, 393 (1969).

51. *Id.* at 394.

52. Some commentators have argued that print editorial rights may prevail even over speech rights. *See* Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?* 26 Hastings L. J. 639 (1975).

53. David L. Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, in Free But Regulated: Conflicting Traditions in Media Law 52, 53 (Daniel Brenner & William Rivers eds. 1982).

54. Simmons, *supra* note 8, at 41.

55. Thomas I. Emerson, The System of Freedom of Expression 632 (1970).

56. F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

dia. That difference undermines assumptions about freedom of choice which pertain to speech in other forms of media.[57] However, the current attack on the Fairness Doctrine centers on the scarcity rationale which will be considered below.

The Attack on the Fairness Rationale

Red Lion looked to the spectrum rationale for justifying restraints on licensees under the Fairness Doctrine. "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[58] Those who do broadcast can be required to share the frequency and present views of others which would otherwise be barred.[59] In the recent deregulatory developments, both the Court of Appeals, D.C. Circuit, and the FCC argue that the factual underpinning for the rationale of spectrum scarcity which justifies a different first amendment position for broadcasting than for the press has been undermined since *Red Lion*.[60]

When Is Spectrum Space Scarce?

Has the technological predicate of content regulation been undermined since *Red Lion*? In its action ordering the end of the Fairness Doctrine, the FCC cited multiplication of broadcast and radio outlets, and growth of new types of media outlets (such as cable, low-power television, satellite to home service, teletext, video-text) as curing the Supreme Court's concern for access and diversity.[61] "The Commission found in recent years that there had been an explosive growth in both the number and types of outlets providing information to the public. Hence, the Supreme Court's apparent concern that listeners and viewers have access to diverse sources of information has now been allayed."[62]

This line of reasoning assumes that the meaning ascribed to spectrum scarcity in *Red Lion* is a form of numerical scarcity. This

57. *Id.* at 748.

58. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 388 (1967).

59. *Id.* at 389.

60. Telecommunications Research and Action Center v. F.C.C., 801 F.2d 501, 508 (D.C. Cir. 1986) *reh'g denied en banc*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied* 107 S.Ct. 3196 (1987); Syracuse Peace Council v. Television Station WTVH, Syracuse, 2 F.C.C. Rcd. 5043 (1987) (memorandum opinion and order).

61. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C. Rcd. 5043, 5053 (1987) (memorandum opinion and order).

62. *Id.* at 5053.

was based on the fact that historically, and at the time of the decision, broadcast media outlets were less numerous than print outlets. The number of outlets, however, is not critical to the meaning of the rationale. An absolute increase in the number and types of media outlets does not address the first amendment concerns of Fairness Doctrine broadcast regulation.[63] The underlying concern is to set a public standard for all license holders, be they few or many, so as to discourage biased presentation of public issues. A few "fair" broadcasters cannot carry the burden for other "unfair" broadcasters.

Nothing in the *Red Lion* approach suggests that sheer increase in the number of broadcaster voices will assure access of viewpoints on issues other than those of the broadcaster. Stated differently, nothing in the *Red Lion* opinion suggests that the Court viewed the relatively small number of broadcaster voices as the chief obstacle blocking broadcast of diverse viewpoints on controversial issues. The chief obstacle arises from the fact that broadcaster voices, whatever their actual number, are a disproportionately small number of voices in relation to all those who wish to speak. The Court's interest in numerical scarcity arose from its wish to avoid the possiblity that a small number of broadcasters could unfairly use the airwaves to advance their personal interests. This concern was unacceptable in view of the additional fact that use of the airwaves is a publicly-granted right given to some but denied to others.[64]

Furthermore, it can be argued that rather than resolving the access and diversity concerns reflected in the Fairness Doctrine, the multiplication of outlets and media system may, under certain circumstances, increase them. If each person obtains information from dozens of media sources, and if all operate without a public interest standard of unbiased presentation of public issues, the chances of arriving at a decision on public issues which has been informed by unbiased information are porportionately lessened.[65] Whether or not one accepts the view that increase of media outlets can potentially increase the injury to citizens from biased information, this analysis shows that numerical scarcity should still be a matter of concern to Congress or to future courts considering the fate of the Fairness Doctrine.

Another form of spectrum scarcity is allocation scarcity,

63. Thomas I. Emerson, The System of Freedom of Expression 661-62 (1970).

64. *See id.* at 661-64.

65. Senate Comm. on Commerce, Science, and Transportation, Fairness in Broadcasting Act of 1987, S. Rep. No. 34, 100th Cong. 1st Sess. 14-15 (1987) [hereinafter Senate Comm. Rep.].

which refers to the number of available licenses relative to demand. Numerical scarcity analysis examines the number of broadcast outlets to which viewers have access. Allocation scarcity analysis considers whether demand for spectrum space by those financially and technically equipped to use the airwaves exceeds supply. At any given point in time, access to the electromagnetic spectrum must necessarily be allocated to some but denied to others in order for communication to take place at all, due to the physical limitations of the electromagnetic spectrum.[66] Whatever principle of allocation is adopted, some people in a community will have access to the airwaves to amplify and extend the range of their messages, while others will not. The need for allocation means spectrum scarcity exists, and will persist.

A direct measure of demand is the economic value of the license reflected in the prices paid for broadcast properties. Major market television stations with VHF licenses sell for half a billion dollars.[67] These prices include a huge premium resulting from the scarcity of spectrum space.

A different indicator of scarcity is the existence of intense competition among applicants when hearings are held for granting new station licenses. The FCC claim in the *1985 Fairness Report* that vacant channels prove a lack of scarcity is not supported by analysis of its own data on competition among applicants for licenses.[68] Further, in other contexts the FCC itself has agreed that there is a scarcity of spectrum. In a proceeding on FM subsidiary allocation, a type of allocation which would allow FM stations to re-cycle some of their assigned but unused spectrum area for special services such as private beepers, the Commission stated "[T]he public's need for new or additional services must be balanced against the limited spectrum available."[69] Other examples

66. "Nevertheless we recognize that technological achievements and the transformations of the telecommunications market described above have not eliminated spectrum scarcity." Syracuse Peace Council v. Television Station WTVH, Syracuse, 2 F.C.C. Rcd. 5043, (1987).

67. House Comm. on Energy and Commerce, Fairness in Broadcasting Act of 1987, H.R. Rep. No. 108, 100th Cong., 1st Sess. 13 (1987) [hereinafter House Comm. Rep.].

68. *Id.* at 13, 15. In November 1986, the Commission had 142 pending comparative proceedings involving multiple applicants for broadcast facilities. Moreover, many of these proceedings, particularly those for facilities in major markets involve large numbers of applicants. For example, there were 47 applicants for a single FM radio channel in Orlando, Florida. The claim that large numbers of FM radio channels were vacant rested largely on the creation of 689 new channels in 1985.

69. Senate Comm. Rep., *supra* note 65, at 21 (quoting FM Subsidiary Communications Authorizations, 55 RR 2d (P&F) 1607, 1613 n.19 (1984), *rev'd sub. nom. on other grounds*, California v. F.C.C., No. 85-1112 (D.C. Cir. 1986).

of spectrum shortage are the fierce battles before the FCC among competing claims for the same spectrum space by cellular radio users, land mobile service providers, public safety officials, and proponents of a mobile satellite service.[70]

Ironically, the very same broadcast industry that argues unblushingly against spectrum scarcity in Fairness Doctrine battles, vigorously contends on other issues that spectrum space is scarce. They make such a claim in connection with their demand that no further allocation of UHF frequencies to land mobile services should be made because the expected development of an improved television signal capable of producing a vastly sharper screen image. The broadcast industry argues that this new technology, known as "high definition television" or HDTV, will require large amounts of new spectrum space.[71]

The remarkably durable nature of allocation scarcity can be illustrated with an example which shows that even with unlimited economic resources the problem of making room for everyone on an inherently limited spectrum of airwaves requires a standard of allocation and assignment of specific frequencies for particular uses. Assuming that all economic barriers to acquiring the basic resources needed to publish a newspaper were removed, everyone who wanted to publish would be able to do so. Conversely, assuming that all economic barriers to acquiring the basic resources needed to broadcast were removed, not everyone who wanted would be able to broadcast. The Washington, D.C. area provides a demonstration of the difference at issue. A major new daily newspaper, the *Washington Times*, began publication within the last few years. Other than finances, no barriers stood in the publisher's way. At the same time it was not possible to start a television station in Washington, D.C. since no vacancy existed in the broadcast market.

The type of scarcity involved in allocation scarcity is non-economic and cannot be solved merely by introducing more economic goods of one kind or another, a solution that works for many other types of scarcity. The non-economic nature of allocation scarcity was misunderstood by Judge Robert Bork in *Telecommunications Research & Action Center*[72]:

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are

70. *Id.* at 22.
71. Broadcasting, October 12, 1987, at 36.
72. 801 F.2d 501 (D.C. Cir. 1986).

> scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.
>
> The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[73]

This opinion attempts to use a general economic principle as a solution to a non-economic problem, which leads to analytical confusion. Allocation scarcity is not an economic problem; it is a problem about reciprocal obligations among those who have, in principle, an equal claim to community resources, once the decision is made to hold those resources outside the private property system. The problems of allocation scarcity and sorting out the mutual obligations between licensees and non-licensees arises from the decision to retain the airwaves as a community resource.[74]

The claim made in the *Telecommunications Research & Action Center* opinion, that spectrum scarcity does not justify different first amendment treatment of broadcasting because it is like scarcity of all other economic goods, fails because, as shown above, the spectrum is unavoidably scarce. Yet that decision is the only clear statement from a court supporting the FCC's determination that the spectrum scarcity rationale is no longer a basis for distinguishing the print and broadcast media under the first amendment. Both congressional committees reporting bills in 1987 to make the Fairness Doctrine law specifically rejected the spectrum scarcity view in *Telecommunications Research & Action Center*.[75]

In summary, there is serious doubt cast on the claim that in the 1980s spectrum scarcity is insufficient to justify the goals of the Fairness Doctrine. Allocation scarcity is genuine and inherent in broadcasting. Multiplication of the number of broadcaster voices does not itself produce diversity of viewpoints in presentation of controversial public issues. Therefore, the number of outlets is irrelevant to the goals of the Fairness Doctrine. Treating the broadcast industry differently under the first amendment is a reflection of continuing real differences between print and broadcast media.

The Public Interest Standard and the Fairness Doctrine

The essential basis of broadcasting is that broadcasters receive the license to broadcast for free even though a license is a

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73. *Id.* at 508.

74. *See* Powe, *supra* note 14, at 201.

75. Senate Comm. Rep., *supra* note 65, at 3; House Comm. Rep., *supra* note 67, at 5.

valuable public resource, on the strength of which broadcast facilities acquire market value. It is well-established that, as a consequence, licensees may constitutionally be required to act in the public interest.[76] The Fairness Doctrine has been widely viewed as a reasonable condition to impose on the use of that valuable public resource.[77] The interests to be served by the doctrine are those of the public. These interests include the right to be reasonably provided with unbiased information on controversial public issues. A clear judicial expression of the public interest standard is found in the 1969 *Office of Communication of United Church of Christ v. F.C.C.* case:

> By whatever name or classification, broadcasters are temporary permittees—fiduciaries—of a great public resource and they must meet the highest standards which are embraced in the public interest concept. The Fairness Doctrine plays a very large role in assuring that the public resource granted to licensees at no cost will be used in the public interest.[78]

It is reasonable for the government to establish expectations of broadcasters, such as the public interest standard and the concomitant Fairness Doctrine, because the government played the crucial role in the first instance to insure that airwave use would be immensely profitable. The extremely high profitability of broadcasting in the United States depends on the authorization of only a limited number of full power stations. Congress could have chosen other plausible options. One example is providing broadcast rights and access to a far greater number of people. Each broadcaster, however, would have a much smaller audience and margin of profit. Another option is to create a common carrier video programming service with no licensee control of content, similar to telephone service.[79] The decision instead to award free licenses to a few who control most program content in order to maximize profit became a valuable privilege, but one which is conditioned on reciprocity with the public. "The doctrine serves as a surrogate for other methods of licensing that would have permitted more people to own stations. . . By codifying the Fairness Doctrine, the Committee intends to preserve this original allocation of rights and responsibilities."[80] The Fairness Doctrine expresses

76. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

77. Congress has repeatedly expressed this view, most recently in the 1987 passage of the bill intending to make the Fairness Doctrine law. Judicial approval for this core concept of fairness was first expressed in Great Lakes Broadcasting Company, Federal Radio Commission Third Annual Report 33 (1929).

78. Office of Communication of the United Church of Christ v. F.C.C., 425 F.2d. 543, 548 (D.C. Cir. 1969).

79. Senate Comm. Rep., *supra* note 65, at 13.

80. *Id.* at 13. Under a common carrier approach, broadcasters could own facili-

reciprocity.

The reciprocal relationship between the broadcast public and the broadcaster raises some distinctive first amendment rights concerns in light of the public interest standard in broadcasting. These concerns were analyzed in *Red Lion*, the case in which a unanimous court upheld the constitutionality of the Fairness Doctrine.[81]

By *Red Lion* analysis, governmental rules can promote rather than inhibit free speech, and sometimes government action is permissible to preserve attributes of the marketplace of ideas. The view that the goals of the first amendment in the area of broadcasting might be realized through affirmative action by public authority on behalf of the public reflects a rich, complex view of speech rights in a democratic society.[82]

The philosophical strands in the analysis include, but go beyond, the process of balancing one citizen's claims against those of another. The analysis asserts a link between preservation of an open, non-monopolistic marketplace of ideas and a permissible role for government in maintaining access to a variety of viewpoints in the media. It asserts a first amendment free speech interest in the conditions which support and/or limit debate and discussion of public issues. It allows for the possibility that there is an important "community interest" in free speech, as well as an individual interest, to be protected under the first amendment.[83]

Another intriguing implication of the first amendment analysis in *Red Lion* is that it suggests that the meaning of the first amendment for broadcasting needs to be assessed according to characteristic aspects of the medium. The characteristic aspect of the medium of particular concern in *Red Lion* is spectrum scarcity and the obstacles it poses to those who might wish to use the airwaves. Later, in *F.C.C. v. Pacifica Foundation*,[84] a different characteristic of broadcasting was emphasized by the suggestion that

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ties but use of them would be determined by some combination of price and queue principles, and, except for decency standards, broadcasters would have no choice among users or responsibility for the content, as now happens with telephone use. A limited analogy would be to the public access channels of the cable-casting system.

81. 395 U.S. at 367.

82. "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Red Lion*, 395 U.S. 367, 389. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

83. Thomas I. Emerson, The System of Freedom of Expression 627-29 (1970).

84. 438 U.S. 726 (1978).

the pervasiveness and high impact of broadcaster messages may be a basis for limitation to some extent of broadcaster first amendment rights.[85] This approach suggests that messages from all forms of media are not equal; the potential impact of those from broadcast media are greater than others. Therefore, broadcast media may require treatment different from the press under the first amendment in order to protect some important first amendment rights of the public intended to receive those messages.

Fairness: Does It Serve Or Disserve Access and Diversity?

The Fairness Doctrine aims to enhance access for public issues and diversity of opinion by requiring broadcasters to provide contrasting viewpoints on controversial issues of public importance. The FCC contends in its *1985 Fairness Report* that the Fairness Doctrine disserves the interests of the public by failing to enlarge access and diversity. At the same time, it perversely chills the speech of broadcasters through inhibiting broadcasters from airing material because they would then have to permit others to respond.[86]

The policy aims of the Fairness Doctrine were not developed in a vacuum. As discussed above, the aims were to some extent inherent in the public interest standard and a subject of congressional discussion on broadcasting from the inception of broadcast regulation. However, experience with broadcaster behavior has also provided a basis for development of the idea that the Fairness Doctrine has a role to play in fostering responsible broadcaster behavior. The most well known cases of extreme abuse stem from the early history of broadcasting when ideas among broadcasters regarding responsibilities of broadcast ownership or editing were undeveloped.[87] Broadcasters and the FCC maintain that the industry is now mature and that its own standards protect the interests to be served by the Fairness Doctrine goals.

Perhaps it is unlikely that a completely deregulated broadcasting mileau would allow a modern day equivalent of Dr. J. R. Brinkley, who tempted the male public with an irresistible offer of renewed sexual potency from transplanted goat gonads, an offer which made him a wealthy man by the late 1920s.[88] Fairness Doctrine complaints now are likely to involve more sophisticated is-

85. *Id.* at 748.

86. *Hearings on H.R. 1934*, *supra* note 24, at 181.

87. Powe, *supra* note 14 at 30.

88. *Id.* at 22-27.

sues such as those in *Meredith Corporation v. FCC*[89] in which the FCC found a violation of the Fairness Doctrine.[90] The station, WTVH in Syracuse, New York, had accepted and aired 187 minutes of paid commercials supporting the building of a controversial nuclear power plant, but had played only 22 minutes opposing its construction.[91] This was a violation under the Cullman rule of the Fairness Doctrine requiring free response time for paid commercials on controversial public issues when no other balancing programming is intended. The broadcaster behavior in that case illustrates one type of disparity the Fairness Doctrine is designed to correct.

The *1985 Fairness Report* is the key building block of the current effort to put an end to the doctrine. While this report does not stand alone as a critique of the doctrine or some of its aspects,[92] it does stand alone in the extreme, negative character of its conclusions. This is especially true in view of the tenuous factual base supporting those conclusions. Both the Report from the Senate Committee on Commerce, Science and Transportation prepared in conjunction with its 1987 Fairness in Broadcasting Act and by the Report from the House Committee on Energy and Commerce prepared in conjuction with its 1987 Fairness in Broadcasting Act, directly challenge the validity of the evidence and conclusions of the *1985 Fairness Report*.[93]

The persuasiveness of the FCC document depends upon the evidence offered in support of its conclusions. Both congressional committees reject the evidence, not only as to its weight, but also as to its probative value and, in some cases, its veracity. The House Committee Report says "[T]he Committee has fully considered the Commission's Report and find that the Commission's conclusions are factually flawed, are based on erroneous legal analysis, and are entitled to no deference."[94]

The Senate Committee Report referred to Chairman Fowler's "grossly distorted" testimony regarding the Fairness Doctrine at work.[95] It also referred to the lack of "detailed and well-documented evidence" to support the alleged chilling effect of the doctrine and asserted that the Commission in its *Report*, "failed to

89. Meredith Corporation v. F.C.C., 809 F.2d 863 (D.C. Cir. 1987).

90. *Id.*

91. House Comm. Rep., *supra* note 67, at 22-23.

92. Daniel L. Brenner and William L. Rivers, Free But Regulated: Conflicting Traditions in Media Law 55-60 (1982).

93. Senate Comm. Rep., *supra* note 65; House Comm. Rep., *supra* note 67.

94. House Comm. Rep., *supra* note 67, at 5.

95. Senate Comm. Rep., *supra* note 65, at 28.

discuss realistically, much less weigh, evidence" in its own record demonstrating the positive use of the Fairness Doctrine.[96]

One of the key conclusions of the FCC *1985 Fairness Report* is that the Doctrine overall lessens the flow of diverse viewpoints. Several factors brought forward by the congressional committees undermine this conclusion. Charles Ferris, FCC Chairperson from 1977-1981, testified that he found "no credible evidence of a chilling effect" during his tenure.[97] Yet much of the evidence cited by Chairperson Fowler as examples of intimidation of broadcasters through use of Fairness Doctrine rules spanned the fifteen years proceeding 1980 and Mr. Fowler's tenure as chair.

Arguing against the recent FCC conclusion is the fact that similar major reports on the Fairness Doctrine were undertaken in 1974[98] and 1979,[99] and both found that the Doctrine substantially increased opportunities for speech through the broadcast media.[100] The *1985 Fairness Report* simply ignored previous findings and investigations, and its failure to indicate in what way conditions had changed to produce such stark differences in less than five years contributes to the flaws in the report.

One of the most peculiar aspects of the use of evidence in the *1985 Fairness Report* is that numerous groups and individuals provided testimony that the Fairness Doctrine had provided significant opportunities for insuring coverage of contrasting viewpoints on controversial public issues, especially through informal negotiations with broadcasters.[101] Through such negotiations, groups secured free and paid advertising time, as well as opportunities to appear on news programs and talk shows for viewpoints which broadcasters had not previously covered or did not intend to cover. This process and its result is consistent with the policy goals of the Fairness Doctrine. In fact, the groups and individuals who testified before the Commission praised both the Fairness Doctrine and broadcasters for the mutual success in making the policy work.[102]

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96. *Id.* at 30.

97. *Fairness in Broadcasting Act of 1987: Report From the House Committee on Energy and Commerce*, *supra* note 67 at 19.

98. Fairness Report, 48 F.C.C.2d 1 (1974).

99. Report & Order, 74 F.C.C.2d 163 (1979).

100. Fairness Report 48 F.C.C. 2d 1, 28-29 (1974); Report and Order 74 F.C.C.2d 163, 170-71 (1979).

101. Senate Comm. Rep., *supra* note 65, at 27-28.

102. *Id.* at 28. *See, e.g.*, Comments of Media Access Project and Telecommunications Research and Action Center (in Gen. Docket 84-282) filed September 6, 1984; Comments of Henry Geller and Donna Lambert (in Gen. Docket 84-282) filed September 6, 1984. *See also* Letter to Chairman Mark Fowler from Safe Energy Communication Council, March 4, 1987 (describing case histories involving stations in over 14 states showing how "smoothly the Fairness Doctrine operates in practice").

Yet the *1985 Fairness Report* took precisely that testimony and, in the view of the Senate Committee, "twisted those comments to turn them into instances of alleged 'intimidation' of the broadcasters by the very public the broadcasters are licensed to serve."[103] From this same testimony the report claims seventy-five anecdotes about shake-down and intimidation.[104] These claims have been widely disseminated in subsequent Commission statements and reports, as well as in litigation briefs.[105]

The last major claim of the Commission is that the Fairness Doctrine produces a chilling effect on the activities of broadcasters. The evidence for this effect derives from anecdotal claims by broadcasters about avoiding controversial material they claim they otherwise would have broadcast in order to avoid incurring an obligation for reply time for contrasting viewpoints.[106] This is a complaint that makes a case for maintaining rather than eliminating the Fairness Doctrine since the obligation to provide reply time only arises if the coverage has been biased. If broadcasters have avoided airing controversial material, a question the *1985 Fairness Report* did not investigate, it is more likely a result of competitive pressure for more profitable use of time or a wish to avoid irritating viewers or listeners.[107]

Another way in which the Fairness Doctrine is alleged to chill broadcaster coverage is the claim that broadcasters' fear forced expenditure of large sums of money and time handling Fairness Doctrine complaints. Therefore, in an effort to avoid such possible costs, broadcasters claim they actively avoid controversial material.[108] To put that claim into perspective, it is helpful to consider the actual number of Fairness complaints which reach broadcasters from the FCC.

During the six years that Chairperson Fowler has been at the Commission, only one Fairness decision resulted in litigation, the now famous *Meredith* case.[109] In 1984, 1985, and 1986, somewhere between five thousand to seven thousand complaints arrived at the FCC, and typically six (as in 1986) were passed on to the broad-

103. Senate Comm. Rep., *supra* note 65, at 28.

104. *Id.*

105. *See* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligation of Braodcast Licensees, FCC Mass Media Docket No. 87-26 (August 4, 1987) par. 151; Brief for Petitioners at 38-39, R.T.N.D.A. v. F.C.C., 809 F.2d 860 (D.C. Cir. 1987).

106. *Hearing on H.R. 1934*, *supra* note 24 at 124-25.

107. *Id.* at 117-18.

108. House Comm. Rep., *supra* note 67, at 23.

109. Meredith Corp. v. F.C.C., 809 F.2d 863 (D.C. Cir. 1987).

casters.[110] The evidence offered to support the claim of a significant chill consisted *solely* of broadcaster anecdotes.[111] There was no detailed or documented evidence presented. Furthermore, problems with the broadcaster anecdotes in the hearing record undermined the Commission's own position.

The chill evidence relies heavily on anecdotes from one source, the National Association of Broadcasters, who alleged forty-five such examples.[112] Comments by other groups in reply to the NAB evidence indicated numerous, serious flaws in it including: eighteen of the forty-five examples had been raised previously in Senate or House hearings where they had been rejected as unpersuasive; five other examples were taken out of context from published books and articles; three of the examples actually referred to the same case; relevent "examples" were not actual examples, but were policy illustration cases; fifteen examples were intended to demonstrate administrative and legal costs of Fairness Doctrine complaints, but in reality the cost was either a postage stamp or a phone call; numerous examples were vague, anonymous claims that, for example, the Fairness Doctrine caused them to avoid controversial issues.[113] The House Report summarized its view of the chill claim by stating that "The Chill argument that the Fairness Doctrine chills speech is thus an attempt to clothe in first amendment language a refusal on the part of broadcasters to fulfill the commitments they gave in return for the free grant of a valuable public privilege."[114] Similar anecdoctal claims of a chilling effect were presented in *Red Lion*.[115] The Commission report did not discuss why it found that evidence more persuasive now than the Supreme Court had found it earlier.[116]

On balance, the *1985 Fairness Report* is seriously flawed. In the opinion of the House Committee, "[T]he Commission based its criticism of the Fairness Doctrine more on a general desire to remove the government from the communications market and a philosophical antipathy to the system of broadcast regulation laid down by the 1934 Communications Act . . . rather than on an empirical analysis of the broadcasting marketplace."[117] The conclusion that the Fairness Doctrine disserves the public interest

110. House Comm. Rep., *supra* note 67, at 23.
111. *Id.* at 20-21.
112. *Id.* at 20-22.
113. *Id.*
114. Senate Comm. Rep., *supra* note 65, at 32-33.
115. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 392 (1969).
116. House Comm. Rep., *supra* note 67, at 21.
117. *Id.* at 6.

requires evidence other than the *1985 Fairness Report* to be convincing.

Broadcasting and Press: Functional Equivalents?

The FCC's recent first amendment argument against the Fairness Doctrine concludes that broadcasting should be treated as the functional equivalent of the press under the first amendment. It argues that the standards of professionalism in broadcast journalism are equal to those of the print media.[118] Thus, the Commission believes that the public interest in diverse, contrasting viewpoints would be better served by a broadcasting industry no longer subject to the Fairness Doctrine.[119]

Broadcasters want status equal to the print media. It is difficult to assess whether industry hostility to the Fairness Doctrine emanates from its genuine burdens or from broadcasters' powerful sense that they are being treated as second-class professionals under the first amendment. This ambiguity is illustrated by the results from a recent state-by-state survey of broadcast managers' and professionals' responses to the announced ending of the Fairness Doctrine.[120] A large majority described its value in symbolic terms, citing it as a seal of approval on their view of themselves as deserving equal status.[121] Far fewer cited the doctrine as a practical burden to their daily work.[122]

It is important to note that *Red Lion* has not been taken as a reference point by the Supreme Court in its resolution of a similar issue in the press. In a 1974 landmark case, *Miami Herald Publishing Company v. Tornillo*,[123] the Supreme Court refused to let stand a Florida statute requiring equal space in the press to political candidates to reply to "criticism and attacks on his record."[124] The Court took the position that any regulation of editorial content, even regulation intended to increase accountability to the public, was an unacceptable encroachment on the publisher's individual right to expression.[125] Standing on its own, *Tornillo* gave the individual owner's speech rights via the printed word a powerful free speech value when set against the access the statute

118. Syracuse Peace Council v. Television Station WTVH, Syracuse, 2 F.C.C. Rcd. 5043, 5047 (1987) (memorandum opinion and order).

119. *Id.* at 5052.

120. *Official Reaction to Fairness Doctrine Repeal: The Good, The Bad, and The Ugly*, Broadcasting, Aug. 10, 1987, at 60, 61.

121. *Id.*

122. *Id.*

123. 418 U.S. 241 (1974).

124. *Id.* at 244.

125. *Id.* at 258.

sought to compel. The broadcast industry argues for application of *Tornillo* standards to broadcaster speech.

The critical difference between *Tornillo* and *Red Lion* is that the government does not play a large, affirmative role in creating the conditions of the print industry as it necessarily does in broadcasting. In print journalism there are powerful inhibitions against breaching the wall separating the state from the editorial function. The relationship of broadcasting to the state is fundamentally different. This difference was recognized by then Circuit Judge Warren Burger in *Office of Communications of United Church of Christ v. F.C.C.*:[126]

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can only be operated at the whim or caprice of the owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.[127]

Apart from broadcasting's fundamentally different relationship to the state, other differences distinguish broadcasting from newspapers. The primary purpose of broadcasting content is to entertain; the primary purpose of the newspaper is to carry news. Admittedly, newspapers increasingly attempt to entertain, but they are still identified by "harder," more extensive, public issues content.[128] Broadcasting is dominated by its need to perform as an entertainment venture, a need which sharply limits on-air time for news content.[129] This difference affects the presentation of news content and professional standards in broadcast journalism. The place of news and public issues presentation is far less secure in broadcasting than in print journalism, not because the public issues broadcast professionals lack professional commitment, but because the function of the broadcast outlet is fundamentally different from print.[130]

An interesting illustration of the different commitment to the news function is the fact that newspapers have accepted a reg-

126. 359 F.2d 994 (D.C. Cir. 1966).

127. *Id.* at 1003.

128. Donald L. Shaw and Maxwell E. McCombs, The Emergence of American Political Issues: The Agenda Setting Function of the Press 89-106 (1977).

129. *Id.*

130. Edward Jay Epstein, News From Nowhere: Television and the News 267-69 (1974).

ulation that news content must make up 25% of total newspaper space in exchange for the second-class postage rate for their papers.[131] No similar proportion has ever been set in broadcasting, and, if proposed, would be resisted for its interference with superior profits from entertainment. Since the news function is less secure in broadcasting than in print journalism, the application to broadcasting of the Fairness Doctrine expectation that controversial public affairs be given adequate, unbiased coverage, is justified.

Journalistic standards and editorial integrity are also important elements in assessing the equivalence of broadcast and print journalism. Journalistic standards and editorial integrity are recognized by the Supreme Court as powerful protective factors in helping to secure the first amendment right of the public to be informed.[132] However, only some broadcast outlets meet the standard envisioned by the Supreme Court. As a result, the protection afforded by the standard to any particular sector of the public may not actually serve the first amendment purpose. Where the broadcaster for one reason or another fails to meet that standard, the Fairness Doctrine was specifically formulated to provide one means by which broadcasters could be required to provide access for contrasting viewpoints on controversial public issues. Such access helps to satisfy the first amendment interest in an informed public.

It cannot be a legitimate first amendment intention that people who find themselves in the ambit of the less professional media operation should enjoy lesser first amendment rights to provision of public information. To accept a lesser provision of information for the reason that some broadcasters may fail in professional standards is to accept a lesser level of citizenship for those listeners or viewers.

This is a particularly repugnant form of inequality since the ability to act to correct other forms of inequality depends most directly upon informed consciousness.[133] To say this is not to deny that other additional factors contribute to different levels of public awareness among people. Those differences require their own analysis and solution. Nor does this deny that people rely upon other sources of broadcast media for public information.

The view that unequal first amendment rights to public information as a result of varying professionalism among broadcasters

131. Senate Comm. Rep., *supra* note 65, at 25 n.10.

132. F.C.C. v. League of Women Voters of California 468 U.S. 364, 381-82 (1984).

133. *See* Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 25-28 (1960).

is particularly injurious and repugnant to democracy recognizes that broadcast media plays an extraordinary role in the provision of public information. To give it pride of place with concern to its impact on public information is to recognize its empirical importance.[134]

Legitimate Regulatory Aims

Retention of the Fairness Doctrine itself remains a legitimate policy goal. It is unlikely that the new leadership at the FCC will be as ideologically driven as the leadership during these years of attack on the Fairness Doctrine. The intense debate over the whole regulatory framework characteristic of this period of leadership should have laid the groundwork for a more coherent approach by the FCC in its administration of the Fairness Doctrine. The likelihood is very great that access and diversity problems will seek resolution before the FCC, regardless of the formal existence of the Fairness Doctrine. As a result there are public participation and administrative benefits to maintaining a familiar policy framework within which reconstruction can take place, rather than construction of a new one under the public interest standard.

The public participation benefit lies in the fact that many public issues interest groups and many individuals are familiar with the outlines of the Fairness Doctrine process. If the policy goal is broadened public participation in the discussion of the media, then retention of Fairness Doctrine framework will contribute to that goal. Similarly, administrative benefits result from the experience within the FCC in its handling of the Fairness Doctrine process.

Retention of the Fairness Doctrine promises some benefit to the broadcaster as well. A legitimate complaint of the broadcast industry has been lack of guidelines by which to help them judge the unusual situations, even though most of the time the work of the broadcast journalist will proceed on the basis of professional journalistic standards. In fact, the FCC did prepare a new *Primer on Fairness* which was virtually ready for distribution in 1981.[135] It has never been distributed. The *Primer on Fairness* clearly outlines in ordinary language Fairness Doctrine principles along with practical examples.[136] It indicates to the public when and how to register a complaint, and indicates to the broadcaster the steps that can be taken in order to respond to Fairness Doctrine requests.

134. Richard Joslyn, Mass Media Elections 190-91 (1984).
135. Senate Comm. Rep., *supra* note 65, at 32.
136. *Id.* at 110-161.

Full circulation of it without further delay would do much to lower the level of uncertainty, and legitimate level of irritation, among broadcasters.

If retention of the Fairness Doctrine becomes impossible, what is likely to emerge to address the disparities inherent in the licensing system? The public interest standard in broadcasting still stands as the beginning point for discussion of the relationship among broadcaster, the state and the public. The opponents of the Fairness Doctrine have gone to great lengths to point out that the removal of the doctrine is not intended to remove the underlying notion of a public interest obligation.[137] It is unlikely that the problems the Fairness Doctrine sought to cure will disappear with the disappearance of the Doctrine. Instead, it is likely that issues involving access and bias will seek solution under the broad public interest standard of the 1934 Communications Act.[138] In a recent submission to the FCC, the NBC network has discussed precisely that possibility.[139] In an even more explicit move, the American Civil Liberties Union specifically proposed an expansion of the public interest standard in response to the threatened full demise of the Fairness Doctrine.[140]

Conclusion

The Fairness Doctrine is a broadcasting regulatory policy which evolved through actions of the FCC, Congress, the President, and the courts. The doctrine sets out a two-part standard of public accountability for broadcasters based on a government grant of license to use the airwaves. First, it asks that broadcasters devote a reasonsable amount of time to controversial public issues, and second, that they present conflicting viewpoints about those issues.

The Doctrine derives from the fundamental inequality between those who control access to the airwaves and those who are denied access, and inequality which arises from scarcity of spectrum space. Those who are denied access have interests in access

137. "I would remind all licensees that our obligation to serve the public interest through programming remains. . . . This decision [to abolish the Fairness Doctrine] did not remove the bedrock trustee obligation; in fact, it's implicitly stated in our document [spelling out the end of the Fairness Doctrine]." FCC Commissioner Tony Quello, Proceedings, FCC, Aug. 4, 1987, cited in Special Report, "*The Decline and Fall of the Fairness Doctrine*" Broadcasting, Aug. 10, 1987, at 23, 33.

138. 47 U.S.C. 307(a). The relevant language describing a public interest standard is the "public convenience, interest, or necessity."

139. *See* Hearings on H.R. 1934, *supra* note 24, at 67.

140. *See id.* at 66.

to information on public issues and to hear diverse viewpoints on those issues. The Doctrine aims to assure those interests.

This article has examined some aspects of the recent attack on the Fairness Doctrine, particularly the claims that the idea of spectrum scarcity is not now a valid description of airwave use, that the Fairness Doctrine actually subverts its own policy goals, and that broadcast journalism dealing with public issues should have first amendment protections equivalent to the print press.

This analysis concludes that scarcity of spectrum does exist. The main argument against the existence of scarcity—that broadcaster voices have multiplied substantially over the last twenty-five years—is irrelevant since multiplication does not itself produce diversity of viewpoints. The underlying policy goal is to set a public standard for license holders, whatever their number, so as to discourage biased presentation of public issues. That goal still requires the Fairness Doctrine or its equivalent.

The claim that the Fairness Doctrine subverts its own policy goals is drawn largely from a single FCC document, the *1985 Fairness Report*. That document is seriously flawed, relying mainly upon undocumented, anecdotal broadcaster claims about problems with implementation of the doctrine. The conclusion that the Fairness Doctrine disserves the public interest requires evidence other than the *1985 Report on Fairness* to support its case.

Another strand in the attack on the Fairness Doctrine is the argument that broadcasting should be treated as the functional equivalent of the press under the first amendment for the reason that professionalism among broadcast journalists is at the same level as the print press. It is argued that those standards of professionalism will assure that controversial issues will be covered in an unbiased way. This analysis concludes otherwise.

Broadcasting has some things in common with newspapers, but stands in a different relationship to the public through its use of a limited public resource. Therefore, standards for broadcast operations can legitimately be drawn from sources other than professional codes developed from private newspaper operations. An equally important distinction justifying non-equivalence is the different role of news and public affairs coverage in broadcast operations compared to newspapers. The place of news and public affairs coverage is less secure in broadcasting than in print journalism because the primary function of broadcasting is entertainment. Reliance on professional standards alone to assure unbiased coverage of controversial public issues is inappropriate in view of the public obligation of broadcasters and unmindful of the greater in-

security of news and public affairs programming in broadcasting compared to newspapers.

The Fairness Doctrine, or an equivalent, remains a legitimate policy goal. It is a familiar and useful way to express the idea that broadcasters are meant to serve the public interest as well as their own interests while in possession of a publicly granted right to broadcast. The problems addressed by the Fairness Doctrine are not created by it. Rather, they are created by the unequal relationship between those who control access to the airwaves and those who do not. Greater equity is needed in that relationship. The Fairness Doctrine attempts to do that through its emphasis on the obligation of the broadcaster to pay attention to controversial issues and on the obligation to provide free access for viewpoints it fails to present. The Fairness Doctrine should be reexamined and reinstated as a framework for coping with the difficult issues of equal access, as well as for diversity in broadcasting.