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“IN STARK CONTRAVENTION OF ITS PURPOSE”: FEDERAL COMMUNICATIONS COMMISSION ENFORCEMENT AND REPEAL OF THE FAIRNESS DOCTRINE*

The fairness doctrine¹ has long been a controversial feature of broadcast regulation. Attacked on constitutional grounds as an infringement of first amendment rights and on public policy grounds as poor law, the doctrine has now been abandoned by its enforcer, the Federal Communications Commission (FCC or Commission). In August 1987, the FCC concluded that the fairness doctrine “contravenes the First Amendment and thereby disserves the public interest.”² Although the Commission did not formally attempt to repeal the fairness doctrine until 1987, a review of FCC enforcement of the doctrine reveals that, beginning in 1981, the FCC restricted the use of the doctrine through

* “In stark contravention of its purpose, the Commission determined that the fairness doctrine in operation inhibited the presentation of controversial issues of public importance.” General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418, 35,418 (1985).

1. The doctrine creates two responsibilities for the broadcaster: (1) The broadcaster must devote a reasonable amount of broadcasting time to controversial issues of public importance; and (2) such broadcasting must include an opportunity for the presentation of contrasting points of view. The fairness doctrine is codified as a federal regulation at 47 C.F.R. §§ 73.1910, 76.209 (1986) and as federal law in the Communications Act of 1934, 47 U.S.C. § 315 (1982). The doctrine contains several subparts. One component is the personal attack rule, in which an individual attacked during the coverage of a controversial issue of public importance has the right to defend herself over the broadcaster’s airwaves. The “equal time” rule, a rule similar to and supported by the fairness doctrine, *see infra* note 36, also appears in § 315 of the Communications Act. Section 315 mandates that political candidates for federal office have equal opportunity to gain access to a broadcaster’s airwaves.

This Note deals only with the controversy surrounding the fairness doctrine and does not consider the broadcaster’s responsibilities to political candidates under § 315.

2. Syracuse Peace Council, 63 Rad. Reg. 2d (P & F) 541, 589, *appeal docketed*, No. 87-1516 (D.C. Cir. Sept. 14, 1987). *See generally* Geller v. FCC, No. 87-1544 (D.C. Cir. Oct. 5, 1987) (challenging FCC repeal of the fairness doctrine). The decision was preceded by the 1985 Fairness Report, General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (1985) [hereinafter 1985 Fairness Report], which came to similar conclusions but declined to repeal the doctrine, believing the doctrine was statutorily mandated.

changes in administrative procedures that amounted to a de facto repeal.

This Note analyzes current FCC policy to determine whether the agency violated its statutory purpose and acted unlawfully by restricting and later repealing the fairness doctrine. Because the Commission's attack on the doctrine has been based, in part, on conclusions drawn from the doctrine's history, Part I examines prior FCC enforcement of the fairness doctrine. Part II views the Commission's contemporary enforcement and repeal of the doctrine. Finally, Part III assesses Commission action in light of its legislative mandate and administrative law standards of judicial review to conclude that the FCC both violated its administrative responsibilities by deemphasizing enforcement of the fairness doctrine and acted illegally in repealing it.

I. TRADITIONAL FCC MANDATES AND METHODS

The agencies charged with enforcement of the fairness doctrine have always invoked it to serve the interests of the listening and viewing public. These interests, however, have been variously interpreted. The Commission, broadcast licensees, and the courts have taken different action over the years to follow and enforce the doctrine.

A. *Genesis of the Fairness Doctrine*

The fairness doctrine evolved from the administrative policies of the Federal Radio Commission (FRC) and its successor, the Federal Communications Commission. From its inception, the FRC conditioned issuance of broadcast licenses to applicants on their ability to meet the congressional standard of service to the public interest.³ The FRC interpreted the public interest rule to

3. 1927 Radio Act, Pub. L. No. 69-632, 44 Stat. 1162, incorporated in the Communications Act of 1934, 47 U.S.C. § 303 (1982 & Supp. III 1985) (section 18 of the Act empowered the Commission to act "as public convenience, interest, or necessity requires"). From very early on, the FRC enforced the public interest standard to include content restrictions mandating balanced broadcasting. *See, e.g.*, 1 FED. RADIO COMM'N ANN. REP. 159 (1927) (order concerning station WRAC); *id.* at 152 (order concerning station WCOT); *id.* at 154 (order concerning station WEVD).

Radio licensing actually began with the 1912 Radio Act, under which the Department of Commerce issued licenses. Radio Communications Act of Aug. 13, 1912, 47 U.S.C. § 51-60 (repealed 1927). A string of federal court rulings, however, held that the Act did not empower the Secretary of Commerce to refuse to issue licenses. *See, e.g.*, *Hoover v.*

require fair reporting of "public questions."⁴ This action created one prong of the current fairness doctrine: the requirement of balance. The Commission stated, "It would not be fair, indeed it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign [The] public interest requires ample play for the free and fair competition of opposing views"⁵ When the broadcaster did present an issue of public importance, opposing viewpoints on the matter had to be presented as well.

To enforce this rudimentary requirement of fairness, the FRC established logging requirements in 1931.⁶ By requiring radio

Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923); *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926). Moreover, these decisions prevented the Secretary from assigning frequencies to broadcasters and from mandating that broadcasters stay within their frequencies. The resultant cacophonous anarchy led the public and the industry to request, and the Congress to enact, the Radio Act of 1927. W. OVERBECK & R. PULLEN, *MAJOR PRINCIPLES OF MEDIA LAW* 248 (1982).

4. *Great Lakes Broadcasting Co.*, 3 *FED. RADIO COMM'N ANN. REP.* 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

5. *Id.* at 33. The Commission inferred that broadcasters were required to cover issues of public interest from § 18 of the Radio Act of 1927. Like § 315 of the 1934 Communications Act, §18 required equal opportunities for all political candidates to have access to the airwaves. "[T]he commission believes that the principle [of fairness] applies not only to addresses by political candidates but to all discussions of issues of importance to the public." *Id.*

In *Young People's Association for the Propagation of the Gospel*, 6 F.C.C. 178 (1940), the FCC rejected a license application from a religious group, the YPAPG, on the grounds that they would not present diverse viewpoints on religious issues and that this would violate the fairness requirement of the public interest standard. *See also Chicago Fed'n of Labor v. Federal Radio Comm'n*, 3 *FED. RADIO COMM'N ANN. REP.* 36 (1929) (rejecting a union's application for a broadcasting station due to the likelihood of biased coverage of industrial issues).

The FRC policy reversed the relaxed standards previously used by the Department of Commerce to allocate frequencies under the 1912 act. During the 1920's, the Department followed the accepted practice of allowing some interest groups to receive broadcast frequencies. For example, station WCBBD, which broadcast only the services and philosophies of Zion Temple from Zion, Illinois, received its broadcast license in 1924. By 1930, however, a restructuring of the frequencies in the Chicago area required the FCC to weed out stations and redistribute their frequencies. The Commission excluded WCBBD from the spectrum on public interest grounds due to its imbalanced programming. *Great Lakes Broadcasting Co. v. Federal Radio Comm'n*, 37 F.2d 993, 994 (1930), *rev'g on other grounds*, 3 *FED. RADIO COMM'N ANN. REP.* 32 (1929).

6. 5 *FED. RADIO COMM'N ANN. REP.* 96 (1931) (General Order No. 106). *But see* *Deregulation of Radio*, 84 F.C.C.2d 968, 1111 (1981) ("Comprehensive program logs similar to those kept today have been required since the beginning of radio regulation, but the official documents contain very little discussion of their regulatory purpose or effect.").

Yet, early FRC rules and practices show that the logs and logging procedures were an essential part of the Commission's attempt to uphold the public interest standard through content regulation. The rules and regulations of the FRC specifically required that logs include comments on the content of the broadcast. *FEDERAL RADIO COMM'N, RULES AND REGULATIONS* 46 (1931) [hereinafter *F.R.C. RULES AND REGULATIONS*]. For example, ¶ 172(A)(b) requires the broadcaster to log a description of the program broadcast

stations to keep records on the political backgrounds of speakers and the subjects of broadcasts, the FRC was able to monitor reports of unfair reporting and political bias.⁷ By reviewing these logs at the time of license renewal, the FRC decided whether the broadcaster had followed the public interest requirement of balanced programming.

In the 1940's, the FCC further defined the nebulous FRC fairness requirement through agency decisions. In *Mayflower Broadcasting Corp.*,⁸ for example, the Commission evaluated the actions of a Boston radio station that presented editorials supporting only those candidates who were friends of the broadcaster and only those issues favored by the broadcaster. The Commission ruled that "the broadcaster cannot be an advocate."⁹ To protect against political bias, the Commission outlawed all political editorializing by finding that such broadcasting violated the public interest standard of the Communications Act.¹⁰

The Commission extended their public interest requirements in *United Broadcasting Co.*,¹¹ adding a requirement that broadcasters present important public questions.¹² Broadcasters com-

particularly, "[i]f a speech is made by a political candidate, the name and political affiliations of such speaker shall be entered." *Id.* Paragraph 173 provides that the logs be made available upon the request of government representatives. *Id.* The Commission used logs in making decisions and in assessing services offered by different broadcasters. 5 FED. RADIO COMM'N ANN. REP. 40, 51 (1931) (using information from logs to examine emergency broadcasting services); *see also id.* at 60, 61 (report of the General Counsel discussing activities of the complaint and investigation subsection of the Commission legal department, work that appears to have required use of logs to judge program content); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 701 (1964) (reporting that the Federal Radio Commission based licensing decisions on program content information).

7. F.R.C. RULES AND REGULATIONS, *supra* note 6, ¶ 172(A).

8. 8 F.C.C. 333 (1940).

9. *Id.* at 340.

10. *Id.* A recent attempt to ensure fairness in broadcasting also involved a prohibition on editorializing. The Public Broadcasting Act of 1967 forbade any noncommercial educational broadcasting station that received federal funds from editorializing. Pub. L. No. 90-129, tit. II, § 201(8), 81 Stat. 365, 368 (codified as amended at 47 U.S.C. 399 (1982)). The Supreme Court struck down the act as unconstitutional on first amendment grounds in *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

11. 10 F.C.C. 515 (1945).

12. In *United Broadcasting Co.*, the FCC evaluated a policy of WHKC of Columbus, Ohio, which forbade the sale of time to programs that solicited membership, or discussed race, religion, or politics. At the time of the station's license renewal, unions complained to the FCC that the station discriminated in enforcing its policy and that the station used the policy to censor the voice of labor. The Commission ruled that the broadcaster's policy of refusing to sell time for the broadcast of controversial issues was "inconsistent with the concept of the public interest established by the Communications Act" because it excluded labor issues from the airwaves. *Id.* at 518; *see also* Scott, 3 Rad. Reg. (P & F)

plied with this duty only if they presented issues of public concern. The requirement to cover public issues, then, became the other prong of the fairness doctrine.¹³

These early decisions left broadcasters with a set of contradictory instructions for serving the public interest. The broadcaster had to present balanced reporting on controversial issues; indeed, the FCC mandated that these issues be covered. Yet, the FCC forced the broadcaster to stand mute in the controversy, forbidding her from expressing an opinion. The balanced viewpoint had to come from other sources who were allowed to speak over the station's airwaves.¹⁴

Broadcasters' problems in administering and interpreting the law led to the FCC 1949 Report on Editorializing by Broadcast Licensees.¹⁵ The report reaffirmed that the public interest standard announced by Congress in the Communications Acts of 1927 and 1934 demanded the fairness requirements that the Commission promulgated.¹⁶ Specifically, in digesting its earlier rulings on the public interest standard, the Commission found that the broadcaster could now present her own viewpoints in the form of editorials. This policy better served the Commission's requirement that broadcasters present a balanced view of issues.¹⁷ Emphasizing that the requirement of fairness rested

259 (1946) (extending the duty of coverage to all subjects of substantial importance to the community).

Many stations adopted the WHKC policy of restricting controversial issues to avoid "public interest" challenges brought when the FCC renewed station licenses. The National Association of Broadcasters (NAB) promulgated this policy in its Code. The Code provided that "[N]o time shall be sold for the presentation of public controversial issues, with the exception of political broadcasts and the public forum type of programs; and that solicitation of memberships in organizations, whether on paid or free time, should not be permitted." *United Broadcasting Co.*, 10 F.C.C. at 516. The NAB's reasoning, that the best way to avoid a challenge to the broadcaster's fair news coverage is to avoid any controversial issues, is precisely the type of reasoning cited by the FCC in its 1985 Fairness Report as evidence of a chilling effect. See *infra* notes 78-88 and accompanying text.

The Commission thus recognized "the duty [on the part of broadcasters] to be sensitive to the problems of public concern in the community." *United Broadcasting Co.*, 10 F.C.C. at 517.

13. This first prong is rarely enforced by the Commission. Only one case based on the first prong requirement that broadcasters present controversial issues has been decided against a broadcaster. In that case, *Patsy Mink*, 59 F.C.C.2d 987 (1976), a broadcaster failed to present any coverage of the issue of strip mining, an issue that was found to be of vital importance to the West Virginia community served by the broadcaster. The Commission's decision required that the broadcaster present to the Commission his plan for covering the issue.

14. See generally *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

15. *Id.*

16. *Id.* at 1248.

17. *Id.*

upon the licensee's good faith and discretion, the Report noted, "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues."¹⁸

By the late 1940's, the Commission had molded the fairness doctrine into its present form. By interpreting legislation, deciding administrative cases, and promulgating policy, the Commission had created a doctrine mandating that broadcasters (1) present controversial issues of public importance and (2) present such issues in a fair and balanced manner. The Commission enforced these policies by primarily relying on the broadcaster's good will and discretion.

B. *The Fairness Doctrine from 1959 to 1981*

Between 1959 and 1981 the fairness doctrine developed from an administrative guideline to a congressionally enacted rule of law. Supreme Court action validated this development of the doctrine. Further, in keeping with the more formal status of the fairness doctrine and the growth of the broadcast industry, the Commission refined its enforcement mechanisms to better adapt the doctrine to changing circumstances.

1. *Codification in the 1959 amendment*— In 1959, Congress enacted an amendment that most believe codified the fairness doctrine.¹⁹ The 1959 amendment read: "Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."²⁰ The legislative intent of the framers in regard to this provision is difficult to isolate. Most debate concentrated on

18. *Id.* at 1251.

19. *E.g.*, F. ROWAN, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 8 (1984); S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 46-53 (1978); H. ZUCKMAN & M. GAYNES, MASS COMMUNICATIONS LAW 370 (1977); Fein, *First Class First Amendment Rights for Broadcasters*, 10 HARV. J.L. & PUB. POL'Y 81, 81 n.1 (1987). *But see* S. SIMMONS, *supra*, at 52 n.223 (noting opponents to the codification argument). *See generally* 105 CONG. REC. 16,223-46 (1959) (House debate); 105 CONG. REC. 14,438-63 (1959) (Senate debate); 105 CONG. REC. 17,776-82 (1959) (House debate on Conference Report); 105 CONG. REC. 17,827-32 (1959) (Senate debate on Conference Report). For Commission acceptance of the 1959 amendment as codification, see *infra* note 30 and accompanying text. For judicial interpretation of the amendments as codification, see *infra* notes 34-40 and accompanying text.

20. 47 U.S.C. § 315(a) (1982).

other amendments to the Communications Act, not the fairness issue.²¹ The wording of the amendment either created and codified the Commission's fairness doctrine as a statutory obligation, or it ensured merely that the other amendment made to section 315, the political candidate clause, would be read consonantly with the Commission's discretionary fairness doctrine regulation.²²

The derivation of the ambiguous terms, however, indicates that the former interpretation is more correct. The section's language grew out of a House-Senate reconciliation of the House version of the bill, which dealt solely with the section 315 political candidate issue,²³ and the Senate version, which included an amendment by Senator Proxmire that was intended to codify the doctrine.²⁴ The Conference included Proxmire's amendment

21. The central issue in the debate was an amendment overruling the Commission's *Lar Daly* decision, 19 Rad. Reg. (P & F) 1104 (1960). See generally 1985 Fairness Report, *supra* note 2, at 35,449, 35,453 (discussing the original purpose of the 1959 Congress in amending § 315).

22. 1985 Fairness Report, *supra* note 2, at 35,448, 35,453.

23. Only two representatives referred to the fairness doctrine. Representative Celler expressed dissatisfaction with the media's coverage of controversial issues and stated, "That is why we want to enact a bill to insure there will be some restraint upon the networks and the broadcast stations to operate on the basis of fairness in presenting opposing points of view." 105 CONG. REC. 16,228 (1959). Representative Stratton discussed the Commission's public interest responsibility to present balanced reporting of controversial issues. *Id.* at 16,242.

24. Senator Proxmire's amendment stated:

[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible.

Id. at 14,457.

Proxmire described the amendment as requiring the broadcaster to "consider all sides of public controversies" *Id.* The sponsor of the original legislation, Senator Pastore, accepted the amendment as covering ground separate from the main issue of the legislation:

[The Proxmire] amendment has nothing to do with legally qualified candidates, but is merely a requirement that broadcasters shall live and abide by the rule of fairness in connection with all controversial issues, so as to bring them, insofar as possible, fairly to the attention of the public as a whole. Of course that is the law today.

Id. at 14,462; see also *Telecommunications Research & Action Center v. FCC*, 806 F.2d 1115, 1116-17 (D.C. Cir. 1986) (Mikva, J., dissenting from denial of rehearing en banc), *cert. denied*, 107 S. Ct. 3196 (1987). But see 1985 Fairness Report, *supra* note 2, at 35,449 n.363 (questioning whether the Proxmire amendment would indeed have codified the fairness doctrine).

with minor changes in the final version of the bill²⁵ such that Senators were able to state that Congress had adopted a policy "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."²⁶

Evidence supporting the view that the amendment was intended simply to preserve the Commission's version of the fairness doctrine against possible conflicts with the new political candidate section appears in the House debate on the Conference Report. Although debate concentrated on the political candidate rules, some representatives discussed whether the final version of the bill retained the fairness standard. They concluded that the bill retained the fairness doctrine.²⁷ Nothing in this exchange, however, indicates that the Conference Committee version of the bill did not go beyond simple retention of the fairness doctrine and codify the doctrine into law.²⁸ Later action by Congress supports this viewpoint.²⁹

25. H.R. CONF. REP. NO. 1069, 86th Cong., 1st Sess. 5, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2582, 2584. The conferees adopted the Proxmire amendment stating, "The conferees feel that there is nothing in this language which is inconsistent with the House substitute. It is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." *Id.* But see *infra* note 35 (the *Red Lion* Court noting that the Conference Committee altered the Proxmire amendment from a positive statement of the doctrine to mere approving language).

26. 105 CONG. REC. 17,831 (1959) (statement of Sen. Scott) ("We have maintained very carefully the spirit of the Proxmire amendment . . ."). Senator Case echoes Senator Scott. *Id.* at 17,832.

27. 105 CONG. REC. 17,778-79 (1959) (exchange between Reps. Avery and Harris).

28. The 1985 Fairness Report, *supra* note 2, at 35,450, argues that this exchange "lends support to the contrary position that Congress intended solely to preserve the fairness doctrine" rather than to codify it. The only other statements that would lend credence to this notion appear in statements made *before* the Proxmire amendment was presented and modified by the Conference Committee into the present statutory language. See 105 CONG. REC. 14,439 (1959) (statement of Sen. Pastore). No one in Congress spoke against codifying the fairness doctrine, but some did speak generally against broadcast regulation. See, e.g., *id.* at 17,781-82 (statements of Rep. Brown).

29. Due to the codification of the fairness doctrine in 1959, no attempt to codify the doctrine was made between 1959 and 1985. Only since the 1985 Fairness Report's conclusion that the doctrine's codification was uncertain has Congress attempted to recodify the doctrine. See *infra* Part II(D)(2).

Key participants in the 1959 proceedings have testified that their intent was to codify the fairness doctrine. 1985 Fairness Report, *supra* note 2, at 35,452 & nn.404-05 (citing *Equal Time: Hearings on S. 251, S. 252, S. 1696 and H.R.J. Res. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess. (1963); *Fairness Doctrine: Hearings on S. 2, S. 606 and S. 1178 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 13 (1975) (statements of Sens. Pastore and Proxmire)). But compare the 1985 Fairness Report, *supra* note 2, at 35,452 (citing the STAFF STUDY FOR HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 90th Cong., 2d Sess. (1968) [hereinafter the MANELLI REPORT] and concluding that Congress had no intent to codify the fairness doctrine in 1959) with *Red*

Commission reaction demonstrated its acceptance of the new statutory position of the fairness doctrine. From 1959 until the 1980's, the Commission based its actions directly on the congressional amendment of 1959, rather than the public interest standard of the Communications Act of 1934.³⁰ Far from being simply a showing of the consensus accepting the fairness doctrine codification within the 1959 amendments, the Commission's construction of the statute is considered binding in the absence of compelling indications that it is wrong.³¹ The Commission's continued acceptance of the fairness doctrine as a legislatively imposed responsibility, as shown by the Commission's general practice, gives that interpretation a patina of legitimacy that can become binding as law.³²

2. *Red Lion Broadcasting Co. v. FCC: Codification and constitutionality of the fairness doctrine*— The Supreme Court strengthened the interpretation that the 1959 amendment codified the fairness doctrine in the first challenge to the doctrine, the seminal case of *Red Lion Broadcasting Co. v. FCC*.³³ In *Red Lion Broadcasting Co. v. FCC*, a Pennsylvania broadcaster challenged the constitutionality of the personal attack component of the fairness doctrine.³⁴ The Supreme Court concluded that the 1959 amendments, although ambiguous, expressly recognized the

Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 n.11 (1969) (citing the MANELLI REPORT, *supra*, but reaching a different conclusion).

30. *Telecommunications Research & Action Center v. FCC*, 806 F.2d 1115, 1118 (D.C. Cir. 1986) (Mikva, J., dissenting from denial of rehearing en banc), *cert. denied*, 107 S. Ct. 3196 (1987); *see also* *Deregulation of Radio*, *supra* note 6, at 974; *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10,415, 10,416 (1964) [hereinafter the Primer]; *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 6 n.6 (1974) [hereinafter 1974 Fairness Report]. "The legislative history [of the 1959 amendments] establishes that this provision is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934. [Quoting the congressional debates] . . . Section 315 thus embodies both the 'equal opportunities' requirement and the fairness doctrine." *Id.* (footnotes omitted).

31. *Red Lion*, 395 U.S. at 381, 384 & n.9 (1969) (noting that courts should defer to an agency's construction of a statute especially when Congress has failed to overturn that construction). Although in *Red Lion*, the Court is discussing the Commission's early interpretation of the public interest standard, the same rule of deference would apply to the Commission's interpretation of the 1959 amendments. This is due in part to a reviewing court's deference to Commission authority in its field of expertise.

32. S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 417 (2d ed. 1985). This accretion of legitimacy surrounding agency acceptance of a certain policy is also evident in the fact that elimination of such a long-standing policy may cause a reviewing court to invoke the "hard look" doctrine. *See infra* note 192 and accompanying text.

33. 395 U.S. 367 (1969).

34. *See supra* note 1 (discussing the personal attack rule).

fairness doctrine in statutory law.³⁵ The Court, emphasizing the language and the legislative history of the amendment, determined that the fairness doctrine was essential to the workings of the rest of the statutorily enacted political candidate section.³⁶

The *Red Lion* Court also sustained the constitutionality of the fairness doctrine, basing its decision on the scarcity rationale³⁷ and the lack of any documented chilling effect from the operation of the doctrine.³⁸ The Court concluded that the fairness doctrine had no such chilling effect and, instead, served the public interest by ensuring the public discussion of controversial issues. Thus, the Court in *Red Lion* viewed the fairness doctrine

35.

This language [of the 1959 amendment] makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues Here the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.

Red Lion, 395 U.S. at 380. The conclusions of the Court on the 1959 amendment, however, are worded ambiguously. They could be read as concluding that the 1959 amendment either simply "supported," "acknowledged," "accepted," and "vindicated" the Commission's regulations, without specifically codifying them into congressional legislation, or that Congress did indeed give the doctrine "specific recognition in statutory form." Statements appear supporting both views. *See, e.g., id.* at 383-84 (noting that the Proxmire amendment "constituted a positive statement of doctrine and was altered to the *present merely approving language* in the Conference Committee," and reasserting the public interest standard of the 1934 Communications Act (emphasis added)).

36. *Id.* at 382-83. Justice White argued that § 315's "equal opportunity" provision for political candidates would be undermined without the fairness doctrine. The purpose of § 315 was to prevent broadcasters from becoming totally partisan in an election by requiring the broadcasters to give equal opportunities for appearances to both candidates. Justice White envisioned that, without the fairness doctrine, a broadcaster could exclude the candidates altogether and "deliver over his station entirely to the supporters of one state of candidates" *Id.* at 383. To prevent such a circumvention of the statute, Justice White inferred, Congress included the fairness doctrine in the provision.

37. The scarcity rationale justifies special regulation of the broadcast media due to the limited availability of broadcast frequencies in relation to the number of individuals who wish to broadcast. *See NBC v. United States*, 319 U.S. 190 (1943) (announcing the scarcity rationale for broadcast regulation). In the face of arguments that the proliferation of broadcast frequencies had destroyed the scarcity rationale, the Court reiterated, "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." *Red Lion*, 395 U.S. at 390.

38. To the broadcaster's argument that the fairness doctrine had a "chilling effect," deterring free speech by threatening government suppression, the Court responded, "[t]he fairness doctrine in the past has had no such overall effect." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1969). But the Court noted, "[I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Id.*; *see also FCC v. League of Women Voters*, 468 U.S. 364, 378 n.12 (1984) (reiterating that evidence of a chilling effect would justify a review of the fairness doctrine's constitutionality).

as being both based on congressional legislation and supported by a strong constitutional foundation.³⁹ Lower courts, although still using the ambiguous language of the *Red Lion* Court, have treated the 1959 amendments as a codification of the doctrine.⁴⁰

3. *FCC development of the fairness doctrine*— Even before the *Red Lion* decision, the FCC recognized the new status of the fairness doctrine. A 1964 FCC report, called “the Primer,”⁴¹ digested FCC rulings on the fairness doctrine, noting that the doctrine was now mandated by Congress.⁴² The Primer recognized that the 1949 Report on Editorializing by Broadcast Licensees remained the Commission’s basic policy statement on the doctrine, yet set forth new FCC procedures that enhanced the earlier guidelines for enforcing the fairness doctrine.

Although the Commission had previously considered fairness doctrine violations at licensing and license renewal times,⁴³ the Primer stated that the Commission would now accept complaints from the public at the time of the broadcast.⁴⁴ If the

39. The petitioners also challenged the fairness doctrine on the grounds that the regulations were unconstitutionally vague. The Court dismissed this argument, stating, “[W]e cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech.” *Red Lion*, 395 U.S. at 395.

40. *Telecommunications Research & Action Center v. FCC*, 806 F.2d 1115, 1117-18 (D.C. Cir. 1986) (Mikva, J., dissenting from denial of rehearing en banc), *cert. denied*, 107 S. Ct. 3196 (1987); 1985 Fairness Report, *supra* note 2, at 35,452; *see also* *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 129-30 (1973) (discussing the “independent statutory obligation to provide full and fair coverage of public issues . . . [that] Congress has imposed on all broadcast licensees”); *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 438 (D.C. Cir. 1980); *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1007 n.11 (D.C. Cir. 1976) (noting the fairness doctrine’s “explicit statutory enactment[] in the 1959 amendment”); *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971). *But see* *League of Women Voters*, 468 U.S. at 379 n.12 (1984) (“Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon [the fairness doctrine and its components], and we express no view on the legality of either course.”); *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

41. The Primer, *supra* note 30.

42. *Id.* at 10,416.

43. *See, e.g.*, *United Broadcasting Co.*, 10 F.C.C. 515 (1945) (fairness review applied at renewal time); *Young Peoples Ass’n for Propagation of the Gospel*, 6 F.C.C. 178 (1938) (fairness decision made at time of application); *see also supra* note 12 (discussing *United Broadcasting Co.*).

44.

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded or has plans to afford, an opportunity for the presentation of contrasting viewpoints. [The complainant can usually obtain this information by communicating with the station.]

complaint seemed well-grounded, the FCC would forward it to the licensee for a reply. If the reply was insufficient, the Commission would then begin a hearing on the complaint.⁴⁶ This new procedure increased the Commission's responsiveness to the public. Enforcement of the fairness doctrine would not occur at some random point, but rather, at the time when the damage was done and possibly still remediable.⁴⁶

In many ways, the Commission's standards, because inexact, were still difficult to apply.⁴⁷ Concrete definitions of public interest, controversy, and balance were not possible. The courts' traditional reluctance to pass judgment on subject matter added to the confusion.⁴⁸ Because of this, the Commission was unprepared to handle the "massive explosion" of fairness doctrine complaints that was ignited by the tumult of the late 1960's and early 1970's.⁴⁹ The Commission responded by improving procedures to provide petitioners more certainty in their claims. Among these procedures were new criteria for ascertaining controversial issues of public importance.⁵⁰ To allow members of the public to decide whether their claims against broadcasters had substance, the Commission decreed in 1974 that programming logs should be made available to the public so that individuals could determine whether a broadcaster's radio and television programs had been unfair.⁵¹ Like the changes brought about in

The Primer, *supra* note 30, at 10,416.

45. *See id.*

46. 1974 Fairness Report, *supra* note 30, at 18; Barrow, *The Equal Opportunities and Fairness Doctrine in Broadcasting*, 37 U. CIN. L. REV. 447, 493-94 (1968).

47. *See generally* Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974 (1970).

48. 1974 Fairness Report, *supra* note 30, at 3 ("At first appearance, this affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied absence of governmental supervision or control."); *id.* at 7 n.7 (comments of J. Skelly Wright); *see* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 120-21 (1973); Public Interest Research Group v. FCC, 522 F.2d 1060, 1067 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

49. Democratic Nat'l Comm. v. FCC, 460 F.2d 913, 915 (D.C. Cir. 1972); B. COLE & M. OETTINGER, *RELUCTANT REGULATORS* v (1978); J. TUNSTALL, *COMMUNICATIONS DEREGULATION* 29 (1986).

50. Ascertainment of Community Problems, 27 F.C.C.2d 650 (1971). These ascertainment procedures required broadcasters to survey thoroughly their community and its residents, meet with community leaders of all types, and decide what forms of programming would best serve the interests of the community. *Id.* at 683-87. *See generally* J. TUNSTALL, *supra* note 49, at 247 (discussing the complexity of the ascertainment procedures). Although not directly linked to the fairness doctrine, the ascertainment procedures did allow broadcasters to consider possible community issues that could constitute controversial issues of public importance that would have to be covered under the fairness doctrine. Deregulation of Radio, *supra* note 6, at 983 n.36.

51. Petition for Rulemaking to Require Broadcast Licensee to Maintain Certain Program Records, 44 F.C.C.2d 845 (1974).

the 1940's, the Commission reforms of the 1960's and 1970's increased the responsiveness of the Commission to the public's interest in fairness in broadcasting.

Recognizing the great changes since its last assessment of the fairness doctrine in 1949,⁵² the Commission, in 1974, launched a broad ranging inquiry into the success of the doctrine. The result was the 1974 Fairness Report,⁵³ presenting a classic statement of FCC policy on the fairness doctrine. The Report began with an invocation of section 315 of the Communications Act as a statutory codification of the fairness doctrine that prevented the Commission from abandoning the doctrine.⁵⁴ The Commission continued with a reassertion of the constitutionality of the doctrine on scarcity grounds and found the doctrine free from any chilling effect.⁵⁵ By the time of its 1974 Report, the Commission found the fairness doctrine recognized statutorily, justified constitutionally, and well supported on public policy grounds as a means to achieve robust debate over the broadcast airwaves.⁵⁶

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

53. 1974 Fairness Report, *supra* note 30.

54. "[I]n view of Sections 315(a) and 3(h) of the Communications Act, the Commission could not 'abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers.'" *Id.* at 1 (quoting the Notice of Inquiry, 30 F.C.C.2d 26 (1971)).

55. *Id.* at 6 ("We believe, however, that the problem of scarcity is still very much with us, and that despite recent advances in technology, there are still 'substantially more individuals who want to broadcast than there are frequencies to allocate.'" (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969)).

Rejecting the chilling effect argument, the Commission emphasized the lack of overly burdensome procedures involved in the doctrine's enforcement, the Commission's reliance on the good faith of the broadcaster, and the reasonableness of the doctrine's demands on the broadcaster. The Commission seemed incredulous that such a simple rule could be perceived as frightening broadcasters into timid programming. *Id.* at 8. The Commission concluded with the *Red Lion* court that "we have seen no credible evidence that our policies have in fact had 'the net effect of reducing rather than enhancing the volume and quality of coverage.'" *Id.* In fact, the Commission concluded that "[f]ar from inhibiting debate, however, we believe that the doctrine has done much to expand and enrich it [T]here is no doubt that 'it is a positive stimulus to broadcast journalism.'" *Id.* at 7 (quoting W. WOOD, *ELECTRONIC JOURNALISM* 127 (1967)).

56. The 1974 Fairness Report also discussed specific aspects of the fairness doctrine such as procedural definitions and standards, application of the fairness doctrine to advertising (*Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968)), public access, and political broadcasts. 1974 Fairness Report, *supra* note 30, at 9-33. A subsequent report echoed the conclusions of the 1974 Fairness Report. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 74 F.C.C.2d 163 (1979).

II. CONTEMPORARY FCC ENFORCEMENT OF THE FAIRNESS DOCTRINE

Fairness doctrine enforcement in the 1980's departed starkly from previous enforcement. FCC changes in logging and ascertainment procedures, used to enforce the fairness doctrine, demonstrated the deregulatory attitude of the Commission. The Commission's 1985 Fairness Report, however, expressed the most important difference in contemporary FCC interpretation of the doctrine. In the Report, for the first time, the Commission stated that the fairness doctrine undermined the public interest. This view rejected the fairness doctrine as law and has strongly influenced FCC case law. The philosophy of the 1985 Fairness Report finally was overtly adopted in 1987 when the Commission attempted to repeal the doctrine.

A. *Logging and Ascertainment Procedures*

The FCC directed its first deregulatory acts toward the radio industry. Beginning in 1981, the FCC no longer required radio broadcasters to follow public interest ascertainment procedures.⁵⁷ Nor would it continue to mandate that radio broadcasters present public interest programming beyond that deemed necessary by the "good faith discretion" of the broadcaster.⁵⁸ The Commission also eliminated the logging requirements that allowed citizens to check the amount of time and coverage given to a public issue.⁵⁹ The Commission replaced the logs with "public inspection files" that, instead of providing a comprehensive

57. Deregulation of Radio, *supra* note 6, at 971.

58. *Id.* Without the guidelines, the FCC reasoned, public interest programming would be ensured by the good faith of the broadcaster motivated by "marketplace forces." *Id.* at 978.

59. The FCC believed that because its deregulation had ended the FCC's need for the logs, the logs were unnecessary. In the same proceeding, the FCC abolished limitations on the amount of air time given to advertising and entertainment programming. These were both regulations that relied on logging as the prime means to monitor station compliance. *Id.* at 968. The Commission denied that the logs presented evidence of compliance with the fairness doctrine by pointing out that a satisfactory fairness doctrine complaint did not require the information within the logs: "The substance of a Fairness Doctrine complaint for example does not require complainants to present a comprehensive list of all programming potentially relevant to each complaint, even though such a requirement might not have been unreasonable given the past public availability of the logs." *Id.* app. H, at 1113. The FCC also justified the elimination of the program logs by stating that the program logs were not necessarily the most effective way to monitor station compliance with the fairness doctrine. *Id.*

listing of all programs presented, would provide a list of five to ten of the important issues in the broadcaster's service area, examples of its public service programs aired over the past year that responded to public issues, and related information.⁶⁰ Although the Commission stated that it had no intent to apply the 1981 ascertainment and logging deregulation to television, the Commission took similar deregulatory actions in that medium in 1984.⁶¹

The Commission appeared to recognize the inherent limits of its deregulatory actions in the broadcasting industry. Its abandonment of public interest and logging requirements "in no way [would] reduce our responsibility, ability and determination to provide a regulatory framework that assures radio broadcast programming in the public interest."⁶² The FCC assured the public that one other area of enforcement would also be preserved despite the wave of deregulation: "[M]any commentators feared that the Commission is proposing to eliminate the Fairness Doctrine. . . . [The doctrine is] mandated by statute and, again, such statutory requirements cannot be modified by the Commission. They simply are not subject to deregulation by the Commission."⁶³ This policy position was short-lived.

B. *The 1985 Fairness Report*

In 1985, the FCC radically departed from its previous position and found that the fairness doctrine failed to serve the public interest and violated the first amendment.⁶⁴ The 1985 Fairness Report concluded: (1) that the fairness doctrine was an unnecessary means to ensure the diversity of opinion in the media marketplace; (2) that the fairness doctrine unconstitutionally chilled broadcast speech; and (3) that the Commission had been wrong to accept unquestioningly the 1959 amendments to the Commu-

60. *Id.* at 1010.

61. "This proceeding does not contemplate the deregulation of TV in any regard and none of the actions taken herein apply to television." *Id.* at 974; see Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 49 Fed. Reg. 33,588 (1984) (to be codified at 47 C.F.R. pts. 0, 73); Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 49 Fed. Reg. 33,658 (1984) (to be codified at 47 C.F.R. pt. 73). See generally 48 Fed. Reg. 37,239 (1983) (notice of proposed rulemaking).

62. Deregulation of Radio, *supra* note 6, at 1011 (1981).

63. *Id.* at 974 (footnote omitted).

64. 1985 Fairness Report, *supra* note 2, at 35,418.

nications Act as a statutory codification of the fairness doctrine. Because the 1985 Fairness Report provided the basis for the Commission's 1987 repeal of the doctrine, a closer inspection of the report provides insight into the reasoning behind the Commission's abandonment of the fairness doctrine.

1. *Diversity in the media marketplace*— The 1985 Fairness Report ostensibly addressed the state of the "information marketplace" to show that the fairness doctrine was an unnecessary means to a more diverse coverage of controversial issues. The Commission documented the massive increase in new technologies that created more diverse and competitive voices among the media and greatly increased access to and for the public.⁶⁵ By showing that other media systems provided the public with balanced viewpoints, the Commission attacked the public policy underlying the fairness doctrine.⁶⁶

This same argument, however, also undermines the constitutional basis for the doctrine. The scarcity of the broadcast frequency is the basis for the constitutionality of broadcast regulation.⁶⁷ Although the Commission referred obliquely to the constitutional impact of its findings on the media marketplace,⁶⁸ the Commission disingenuously disclaimed any intent to comment on the validity of scarcity as a constitutional justification for continued enforcement of the fairness doctrine and broadcast regulation.⁶⁹ Only rarely did the 1985 Fairness Report link its factual conclusion on the state of the media marketplace to

65. Specifically, the Commission noted the emergence of cable television, low power television, multipoint distribution of broadcasts, various satellite technologies, videocassette recorders, subscription television, and the expansion of frequencies for radio and television broadcasting (AM and FM radio frequencies, UHF and independent television). *Id.* at 35,438-42. The Commission did not stop with the broadcast media, however, and pointed to the proliferation of newspapers and periodicals as alternative means of bringing controversial issues to the public. *Id.* at 35,443.

66. "[I]ncreases in signal availability from traditional broadcasting facilities—television and radio—by themselves attenuate the need for a government imposed obligation to provide coverage to controversial issues." *Id.* at 35,444.

67. See Note, *Expanding the Scarcity Rationale: The Constitutionality of Public Access Requirements in Cable Franchise Agreements*, 20 U. MICH. J.L. REF. 305, 324 (1986); *supra* note 37.

68. 1985 Fairness Report, *supra* note 2, at 35,420 (noting that the *Red Lion* Court based its constitutional decision on "the broadcasting marketplace as it existed more than sixteen years ago."); *id.* at 35,420-21 (pointing out dicta in *FCC v. League of Women Voters*, 468 U.S. 364, 378 n.12 (1985), indicating that the Court may be willing to reevaluate the scarcity rationale for broadcast regulation).

69.

We would agree that the courts may well be persuaded that the transformation in the communications marketplace justifies the adoption of a standard that accords the same degree of constitutional protection to broadcast journalists as currently applies to journalists of other media. We do not believe, however, that

the argument attacking the constitutionality of the fairness doctrine.⁷⁰

The danger in the Commission's argument on scarcity is not simply that its acceptance would weaken the constitutional basis for the fairness doctrine, but that the entire structure of broadcast regulation built upon that same basis would collapse as well. The scarcity rationale justifies not only the fairness doctrine, but all broadcast content regulation and much of the special regulation that treats broadcasting differently from the print media.⁷¹ The 1985 Fairness Report, then, constitutes more than an attack on the fairness doctrine; it is an assault on the very basis of broadcast regulation.⁷²

But the Commission misplaced the emphasis in its discussion of scarcity. The special regulations applied to the broadcast media have been predicated on the public control of the airwaves. Broadcasters, then, are merely proxies or fiduciaries for the public.⁷³ The FCC has traditionally considered scarcity to mean any

it is necessary or appropriate for us to make that determination in this proceeding.

Administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute.

Id. at 35,421.

But see the proceedings abolishing the fairness doctrine where the Commission considered the 1985 Fairness Report to have invalidated the scarcity rationale. *Fairness Held Unfair*, BROADCASTING, Aug. 10, 1987, at 27, 31 (printing a transcript of the proceeding abolishing the fairness doctrine).

70. See, e.g., 1985 Fairness Report, *supra* note 2, at 35,422 ("[W]hile we recognize that the United States Supreme Court found that the fairness doctrine was constitutionally permissible sixteen years ago, we believe that the transformation of the broadcast marketplace and the compelling documentation of the 'chilling effect' undermine the factual predicate of that decision."). The 1985 Fairness Report specifically notes that this change in the marketplace occurred after other reports and decisions upheld the doctrine's constitutionality. The Commission, thereby, prepared a rationale for distinguishing those earlier conclusions. The 1974 Fairness Report justified the fairness doctrine, despite its infringement on the freedom of the press, on the scarcity of airspace for potential broadcasters. The 1985 Fairness Report, on the other hand, found "the information marketplace of today different from that which existed in 1974." *Id.* at 35,436.

71. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969) ("[I]n terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules [components of the fairness doctrine] are indistinguishable from the equal-time provision of § 315 . . . to which the fairness doctrine and these constituent regulations are important complements."). Licensing regulations, for instance, are one aspect of the special set of rules applied solely to the broadcast media.

72. See 1985 Fairness Report, *supra* note 2, at 35,454 ("Today's report is an indictment of a misguided government policy. . . . Today's order is a statement by this Commission that we should reverse course, and head ballistically toward liberty of the press for radio and television.") (statement of FCC Chairman Mark Fowler).

73. *Red Lion*, 395 U.S. at 389; 1974 Fairness Report, *supra* note 30, at 4 n.4: "The true measure of scarcity is in terms of the number of persons who wish to broadcast and,

situation where demand for broadcast frequencies outstrips supply.⁷⁴ The role of the government is justified not by numerically few broadcast outlets, but rather, by many members of the public who wish to use those outlets. Put simply, the scarcity justification applies when "there are substantially more individuals who want to broadcast than there are frequencies to allocate."⁷⁵ If the scarcity of positions on the broadcast spectrum requires the FCC to choose between applicants rather than giving all who apply licenses, this scarcity justifies a special constitutional place for broadcast regulation.⁷⁶ According to this test, despite the recent increase in media outlets, broadcast scarcity remains a very real factor.⁷⁷

2. *Chilling effect*— Central to the Commission's doubts about the constitutionality of the fairness doctrine was the doctrine's chilling effect, repressing coverage of controversial issues.⁷⁸ The Commission premised its argument on a reiteration of the *Red Lion* Court's warning that any fairness doctrine-induced chilling effect on the first amendment rights of broadcast-

in Justice White's language, there are still 'substantially more individuals who want to broadcast than there are frequencies to allocate.'" (citing *Red Lion*, 395 U.S. at 388).

74. As early as 1925, the Secretary of Commerce, Herbert Hoover, whose department was then charged with broadcast regulation, justified regulation by stating, "We can no longer deal on the basis that there is room for everybody on the radio highways. There are more vehicles on the road than can get by, and if they continue to jam in all will be stopped." FOURTH NAT'L RADIO CONFERENCE, PROCEEDINGS AND RECOMMENDATIONS FOR REGULATION OF RADIO 6 (1925).

75. *Red Lion*, 395 U.S. at 388. Former FCC Commissioner Newton Minow agreed, suggesting, "The proper test is the number of citizens who want a broadcast license and are unable to obtain one." Minow, *Being Fair to the Fairness Doctrine*, N.Y. Times, Aug. 27, 1985, at A23, col. 1; see also S. REP. No. 34, 100th Cong., 1st Sess. 13 (1987); H.R. REP. No. 108, 100th Cong., 1st Sess. 16-17 (1987).

76. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 397 (1969). Comparative hearings for broadcast frequencies remain a mainstay of the Commission's docket. See Marks, *supra* note 47; *infra* note 77.

77. Minow, *supra* note 75. Minow points to the fact that when RKO's channels were made available for licensees, the FCC received 172 applications for the several stations. When the FCC announced new low power stations, the Commission was inundated with almost 14,000 applications. This supply versus demand approach appears to have been the traditional measure of scarcity. See *Great Lakes Broadcasting Co.*, 3 FED. RADIO COMM'N ANN. REP. 32, 33 ("[T]here is no way of increasing the number of stations without great injury to the listening public, and yet thousands of stations might be necessary to accommodate all the individuals who insist on airing their views through the microphone."). But see the FCC claim in the 1985 Fairness Report, *supra* note 2, at 35,439: "Currently there are a total of 54 vacant VHF channels and 462 vacant UHF channels. [O]f these vacant allocations, 34 are commercial VHF channels and 109 commercial UHF channels. These vacancies appear in both large and small markets." (footnotes omitted).

78. See 1985 Fairness Report, *supra* note 2, at 35,423-24.

ers would outweigh the state's justification for the regulation. On that basis, the Commission found that the fairness doctrine chilled free expression and violated the first amendment.⁷⁹ It noted that fear of enforcement actions, litigation costs in defending against fairness doctrine actions, and possibly negative public reaction to a suit caused broadcasters to avoid airing controversial issues.⁸⁰ That fairness doctrine violations were rarely found and that enforcement action was infrequently severe was considered irrelevant. The important fact, the Commission argued, was that broadcasters somehow perceived these penalties as being imminent if they broadcast controversial issues.⁸¹ These factors, taken together, motivated broadcasters to impose self-censorship and to schedule significantly less controversial issues programming.

The evidence relied upon by the Commission as empirical proof of a chilling effect is sharply deficient on several grounds. The Commission found this chilling effect through evidence submitted by interested individuals and groups,⁸² and particularly relied on the statements of individual broadcasters and the National Association of Broadcasters.⁸³ This evidence does not

79. The Commission found the roots of this chilling effect in the inequality of the two prongs of the fairness doctrine. *Id.* at 35,423-24. Because the first prong, requiring the coverage of controversial issues, was rarely enforced and the second prong, requiring balanced treatment of any controversial issues, was more often enforced, broadcasters could evade the doctrine by not presenting controversial issues programming at all. In this way, broadcasters avoided the balance requirement by quietly ignoring the dormant first prong. *Id.*

80. *Id.* at 35,423-26. In enforcing the fairness doctrine, the Commission is able to deny license renewal for violations of the doctrine, thereby ending the licensee's broadcasts.

81. *Id.* at 35,424 n.75.

82. Proof for these assertions was presented in the form of individual accounts, examples, and surveys submitted in response to the FCC's Notice of Inquiry, 49 Fed. Reg. 20,317 (1984), and the subsequent hearings. 1985 Fairness Report, *supra* note 2, at 35,418. The broadcasters' self-interest in being freed of the constraints of the regulation makes the evidence extremely biased. *See generally id.* at 35,430. The Commission responded that, in fact, the opposite was true. These admissions actually go against the interests of the broadcaster because the admissions expose the broadcaster to charges of unprofessional journalism and prosecution under the first prong of the fairness doctrine itself. *Id.*

83. *Id.* at 35,418. The National Association of Broadcasters documented 45 examples of a chilling effect induced by the fairness doctrine. Many of these examples had been previously presented to congressional committees considering repeal of the doctrine and had proven unpersuasive. S. REP. NO. 34, *supra* note 75, at 29 (1987) (citing Media Access Project Reply Comments). The Senate concluded that the examples, as offered by Chairman Fowler, "grossly distorted" the Report's portrayal of the fairness doctrine at work. *Id.* at 28.

withstand scrutiny.⁸⁴ Many of the statements are anonymous and anecdotal.⁸⁵ Some present nothing more than complaints about the nature of the justice system rather than complaints unique to the fairness doctrine.⁸⁶ Finally, some of the incidents cited by the FCC as examples of a chilling effect prove, instead, the success of the fairness doctrine in assuring balanced and unbiased broadcasting. The examples cited to show a quashing of "diverse" programming also show broadcasters deciding not to present unfair programs to the public.⁸⁷

Most importantly, the FCC's report reveals a basic reinterpretation of the purpose of the fairness doctrine. The Commission now believes that the goal of the doctrine is simply to preserve "controversial speech." The traditional view of the doctrine, however, places a higher value on the *fairness* of the broadcast, on its balance rather than its controversy.⁸⁸ By misconstruing the purpose of the fairness doctrine, the Commission emphasized the effect of the doctrine on the presence of extremes of

84. Ferris & Kirkland, *Fairness—the Broadcaster's Hippocratic Oath*, 34 CATH. U. L. REV. 605, 615 & n.69 (1985):

[I]n 1984, the National Association of Broadcasters, presumably after an exhaustive search, could produce only a few instances of a supposed chilling effect. . . . The NAB claimed to have documented 45 examples of a "chilling effect." . . . Even if all of these examples were valid, considering that the examples covered a 16 year period, and that there are approximately 10,000 broadcast licensees, this record hardly would be compelling. Even these few examples, however, have been extensively criticized.

85. S. REP. NO. 34, *supra* note 75, at 30 ("[N]o detailed and well documented evidence [is] presented, only isolated anecdotes."); *see, e.g.*, 1985 Fairness Report, *supra* note 2, at 35,427 n.101; "At least one broadcaster, however, has candidly admitted that 'his news staff avoids controversial issues as a matter of routine because of the Fairness Doctrine.'" Similarly: "Ms. Karen Maas, Vice President and General Manager of KIUP-AM and KRSJ-FM, in Durango, Colorado states that her stations 'think[] twice' about covering state ballot and related political issues." *Id.* at 35,428.

Ironically, the Commission dismissed the anecdotal evidence offered in submissions favoring the fairness doctrine by stating, "[W]e do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole." *Id.* at 35,431.

86. Examples include a radio station general manager who complained, "The simple fact that they accused us of violating this rule created the impression that we were wrong in undertaking the issue, even if that wasn't the case. Often the accused party suffers, whether right or wrong, only because they have been accused." *Id.* at 35,426.

87. S. REP. NO. 34, *supra* note 75, at 28. *See, for example*, the decision by a Pennsylvania station not to air a series on B'nai B'rith, 1985 Fairness Report, *supra* note 2, at 35,428, and stations' decisions not to broadcast various corporate advertisements on political issues. *Id.* at 35,428-29.

88. The FCC's error becomes clear when it offers radio station WXUR (Brandywine-Main Line Radio, Inc.), a station with programming so controversial and unbalanced it offended most listeners, as the paradigm of controversial broadcasting and hence, the fairness doctrine. *See infra* text accompanying notes 98-99.

controversy rather than on the balanced presentation of issues demanded by the public interest.

3. *Codification*— The Commission's report repudiated its previous stance that the fairness doctrine was a mandate solidly codified by Congress in the 1959 amendments to the Communications Act. Because of the findings on the doctrine's detrimental impact on broadcast freedom, the Commission now believed that the fairness doctrine did not inhere in the public interest standard. The 1959 amendments, on the other hand, were neither accepted nor rejected by the Commission as a codification of the fairness doctrine. Emphasizing the ambiguities in the legislative history, the Commission concluded that no evidence demonstrated any intent by Congress to codify the doctrine. *Red Lion* was also read with an emphasis on the ambiguities present in that decision.⁸⁹ After deemphasizing two decades of Commission interpretation and giving special emphasis to a House Staff Report that concluded that the doctrine was not codified in 1959,⁹⁰ the Commission decided that the uncertainty was too great for the Commission to repeal the doctrine on its own, at least at that moment.⁹¹ The Commission did, however, invite Congress to clear up the uncertainty by legislative action to repeal the fairness doctrine.⁹² By reaching the conclusion that the fairness doctrine held a doubtful statutory position, the Commission began to lay the basis for formally deregulating the doctrine without Congressional involvement.

The 1985 Report offers no explanation for the Commission's policy change from the 1974 Report. Only the scarcity section is based on a shift in the status of the marketplace from the time of the Commission's earlier conclusions. The other changes in policy and interpretation cannot be based on changed facts or

89. 1985 Fairness Report, *supra* note 2, at 35,451.

90. *Id.* at 35,452 (citing the MANELLI REPORT, *supra* note 29).

91. The Report's conclusion read, "[I]t would be inappropriate at this time to eliminate the fairness doctrine." 1985 Fairness Report, *supra* note 2, at 35,453.

92. *Id.* Commissioner Quello concurred with the Commission's opinion, but questioned the 1985 Fairness Report's conclusions regarding codification:

[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, and, thus, the burden of proof must rest with those who would urge that the agency itself has authority to eliminate the doctrine. In my view, nothing in the record contradicts the clear language of section 315(a).

Id. at 35,454-55 (footnote omitted).

situations⁹³ but, rather, on a changed political viewpoint—one supporting deregulation.

C. Contemporary FCC Case Law

An examination of Commission decisions in the area reveals that the Commission significantly curtailed enforcement of the fairness doctrine before it formally repealed the doctrine. From 1982 to 1986, the FCC reported twenty-four fairness doctrine cases on appeal⁹⁴ and decided against the broadcaster only

93. Indeed, much of the evidence for the chilling effect conclusions of the 1985 Report was identical to evidence presented to and rejected by the Commission in previous considerations of the fairness doctrine. SEN. REP. NO. 34, *supra* note 75, at 30.

94. The Commission hears appeals from the initial decisions of the Mass Media Bureau (formerly the Broadcast Bureau).

The following cases were reported during that period: Central Intelligence Agency, 58 Rad. Reg. 2d (P & F) 1544 (1985) (denying petitioner's fairness doctrine action by finding that the issue of CIA involvement in unlawful activity was not a controversial issue of public importance); Cattle Country Broadcasting Hearing Designation Order and Notice of Apparent Liability, 50 Fed. Reg. 7,272 (1985) [hereinafter Cattle Country] (discussed *infra* notes 100-05 and accompanying text); Syracuse Peace Council, 99 F.C.C.2d 1389 (1984), *rev'd sub nom.* Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), *on remand*, Syracuse Peace Council, 63 Rad. Reg. 2d (P & F) 541 (1987) (striking down the fairness doctrine as unconstitutional), *appeal docketed*, No. 87-1516 (D.C. Cir. Sept. 14, 1987) (discussed *infra* notes 121-25, 144-50, and accompanying text); RKO Gen., Inc. (WHBQ-TV), 49 Fed. Reg. 47,562 (1984) (denying a fairness doctrine complaint on the grounds that petitioners did not isolate a specific issue ignored by the broadcaster, did not prove that this issue was controversial, and did not prove that the broadcaster did not present sufficient programming on issues controversial in the black community); Yes to Stop Callaway Comm., 98 F.C.C.2d 1317 (1984) (denying petitioner's request for review of Bureau decision dismissing complaint because the petitioner did not demonstrate nuclear power plant construction in the community was a controversial issue of public importance) (*see infra* notes 107-08 and accompanying text); United Church of Christ, 97 F.C.C.2d 433 (1984) (holding that a broadcaster's charge that a church was doing the work of international communism did not constitute a controversial issue); Brent Buell, 97 F.C.C.2d 55 (1984) (denying review of Bureau decision because petitioner did not notify broadcaster of complaint and on procedural grounds); Ulster-American Heritage Found., 96 F.C.C.2d 1246 (1984) (denying reconsideration of a Bureau dismissal on grounds that Irish terrorist acts are not controversial issues of public importance in this country); Pacifica Found., 95 F.C.C.2d 750 (1983) (denying petitioner's request for review of dismissal for non-notification of broadcaster, lack of information on the broadcaster's total response to the controversial issue, and poor definition of that issue); CBS, Inc., 95 F.C.C.2d 1152, 1165 (1983) (confining special treatment of political advertisements to election periods); Florida Power & Light Co., 95 F.C.C.2d 605 (1983) (dismissing complaint requesting review of Bureau decision because broadcaster offered complainant time to respond to allegedly unfair broadcasts); Conservative Caucus, 94 F.C.C.2d 728 (denying review due to failure to adequately identify controversial issue of public importance) (1984); Accuracy in Media, 94 F.C.C.2d 501 (1984) (appeal from Mass Media Bureau dismissed due to untimely filing); Joint Council of Allergy & Immunology, 94 F.C.C.2d 734 (1984) (denying review based on failure to adequately identify controversial issue of public importance); American Sec. Council, 94 F.C.C.2d 521 (1984) (appeal by

once.⁹⁵ In comparison, in 1980 alone, the Commission heard twenty-eight cases and found against the broadcasters in six of them.⁹⁶ This drastic decline can only be explained by a change in the Commission's enforcement of the doctrine.⁹⁷

public interest group dismissed on issue of contrasting viewpoints); Eulogio Cardona y Beltran, 94 F.C.C.2d 146 (1984) (rejecting application for review of decision on petitioner's personal attack charge); Henry W. Maier, 93 F.C.C.2d 132 (1983) (rejecting personal attack petition because the broadcaster had provided rebuttal time to petitioner); Brother Rama Behera & Disciples of the Lord Jesus, 93 F.C.C.2d 7, 12 (1983) (rejecting application for reconsideration due to lack of new or additional information); United Broadcasting Co., 93 F.C.C.2d 482 (1983) (rejecting fairness doctrine claim against United on basis that no controversial issue of public importance had been isolated); Northern Television, 91 F.C.C.2d 305, 320 (1982) (finding broadcaster acted in good faith in presenting sufficient opposing viewpoint); Environmental Defense Fund, 90 F.C.C.2d 648 (1982) (dismissing petition for failure to define controversial issues of public importance and for insufficient proof of balance) (*see infra* notes 111-14 and accompanying text); George Miller, 90 F.C.C.2d 524 (1982) (denying reconsideration of personal attack case); Friendly Broadcasting Co., 90 F.C.C.2d 225 (1982) (dismissing case after death of licensee's principal); Democratic Nat'l Comm., 91 F.C.C.2d 373 (1982) (dismissing petition due to lack of proof that broadcasters did not offer opposing viewpoints in overall programming).

95. Syracuse Peace Council, 99 F.C.C.2d 1389 (1984) (finding a violation by the presentation of only one side of a controversy surrounding the economic soundness of nuclear power), *rev'd sub nom.* Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), *on remand*, Syracuse Peace Council, 63 Rad. Reg. 2d (P & F) 541 (1987) (striking down the fairness doctrine as unconstitutional), *appeal docketed*, No. 87-1516 (D.C. Cir. Sept. 14, 1987).

96. F. ROWAN, *supra* note 19, at 51

97. There was little decline in overall fairness doctrine complaints. Federal Communications Comm'n, FCC Total Complaints and Inquiries, 1970-1986 (unpublished, undated table of figures) (copy on file with U. Mich. J.L. REF.). The high number of complaints in 1980 and 1984 is due to the number of § 315 political candidate complaints filed during those election years.

Total Complaints and Inquiries

Fiscal Year	Fairness Doctrine	§ 315	Total
1977	3,692	2,329	6,021
1978	3,857	4,487	8,344
1979	4,490	4,365	8,855
1980	9,897	10,443	20,340
1981	5,932	4,800	10,732
1982	*	*	**
1983	*	*	*
1984	6,760	11,698	18,458
1985	7,296	1,348	8,624
1986	*	*	8,215

* - Not available.

** - Fiscal year 1982 figures are unavailable. Calendar year 1982 total fairness complaints and inquiries: 10,358.

These statistics do not necessarily represent formal actionable fairness doctrine complaints. The FCC figures do not distinguish between complaints and inquiries. Eighty to ninety percent of the complaints and inquiries represent phone calls and not formal letters of complaint. Those that are formal written charges go through a process of win-

The change in the FCC's level of enforcement of the fairness doctrine is also evident in the adjudication of individual cases. The Commission restricted enforcement by increasing the burden on fairness doctrine petitioners in several significant ways.

A comparison of two cases with similar facts provides a striking example of the Commission's manipulation of fairness doctrine standards. The FCC inflicted the strongest penalty yet imposed for a fairness doctrine violation, a denial of license renewal, in the 1970 case of *Brandywine-Main Line Radio*.⁹⁸ There, a station owned by a fundamentalist seminary in the small town of Media, Pennsylvania, broadcast a continuous stream of right-wing programming. Reviewing the Commission's handling of the case, the court held, "Brandywine's record is indicative of a lack of regard for fairness principles; at worst, it shows an utter disdain for Commission rulings. . . . This record is replete with example after example of one-sided presentation of issues of controversial importance to the public."⁹⁹ In a very similar 1984 case, the citizens of Dodge City, Kansas, lodged a fairness doctrine complaint against the broadcasters of Cattle Country Broadcasting (KTTL Radio) at the station's license renewal time.¹⁰⁰ The community based its complaint on a series of programs presenting the views of right-wing fundamentalist ministers.¹⁰¹ Despite the obvious lack of balanced programming on clearly controversial issues and the similarity of the case to *Brandywine*, the Commission granted the renewal petition and refused to prosecute the fairness doctrine challenge. In short, the situation in *Brandywine*, like *Cattle Country*, is exactly when enforcement of the fairness doctrine is traditionally most appropriate.¹⁰²

Although the facts of *Brandywine* are almost indistinguishable from those of *Cattle Country*,¹⁰³ *Brandywine* is not men-

nowing that drastically reduces the number of actual complaints acted upon by the Commission. F. ROWAN, *supra* note 19, at 52-53.

98. 24 F.C.C.2d 18 (1970), *rev'g* 24 F.C.C.2d 42, *aff'd*, 473 F.2d 16 (D.C. Cir. 1972).

99. *Brandywine-Main Line Radio*, 473 F.2d at 47.

100. Cattle Country Broadcasting, 50 Fed. Reg. 37,272 (1985).

101. KTTTL broadcasters aired 264 hours of this series attacking Catholics, Jews, blacks, other minorities, and government officials. For example: "If a Jew comes near you run a sword through him . . . Blacks and Brown are the enemy. Jesus Christ is a white man's God . . . Your citizen's posse will hang [a public official] by the neck and take the body down at dark" Minow, *supra* note 75, at A23, col. 1. Approximately 10 minutes of air time were given to opposing viewpoints. *Id.*

102. Krattenmaker & Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 175.

103. The only difference may be that the Brandywine-Main Line station aroused more controversy at the time of its broadcasts. Resolutions were passed in the Pennsyl-

tioned in *Cattle Country*. The petitioner's complaint fails due to a higher standard imposed on the petitioner by the FCC.¹⁰⁴ In *Cattle Country*, the Commission found that the petitioners failed to meet several of the newly restrictive criteria.¹⁰⁵ Hence, the Commission did not even move to consider the sixth requirement, that of balance.

Other, less dramatic, cases show the increasingly demanding requirements imposed on petitioners seeking to bring an action against broadcasters. The "controversial issue of public importance" requirement is one that has been significantly restricted in recent adjudications. In 1973, a public interest group challenged a broadcaster who had presented only those advertisements favoring a rate increase by a local power company. The Commission found that it was unreasonable for a broadcaster to conclude that the rate increase was not a controversial issue of

vania legislature and in the Media, Pennsylvania, town council condemning the broadcasts. The Commission found that this was one indicia of controversy missing from *Cattle Country*.

Specifically, a controversiality showing should include information concerning the degree of attention paid to an issue by government officials, community leaders, and the media at the time the subject material was broadcast; any controversy and opposition of a substantial nature concerning programs broadcast by a licensee (even where such "controversy and opposition" arises subsequent to the broadcast of the programming in question).

Cattle Country, 50 Fed. Reg. at 37,275 n.10.

Yet, *Cattle Country* was surrounded by national controversy of its own. The Commission itself recognized this controversy:

We consider this case against a background of unusually widespread publicity and political interest; the case has been the subject of many national and local news accounts, and, in fact, Mrs. Babbs was called to testify on the matter before the House Subcommittee on Telecommunications . . . We have been very conscious of the need to maintain impartiality against this highly charged background.

Id. at 37,272.

104. The petitioner did not adequately satisfy the criteria for a *prima facie* case. The criteria are:

(1) Identify the issues broadcast with specificity; (2) demonstrate by objectively quantifiable information that the issues were controversial; (3) demonstrate that the issues identified were of public importance; (4) demonstrate that the broadcasts addressed the issues identified by the petitioners; (5) demonstrate that the programs meaningfully discussed the identified issues of public importance; and (6) demonstrate that in its overall programming the licensee failed to present contrasting viewpoints sufficient to meet its fairness obligations.

Id. at 37,275.

105. The petitioners did not adequately show that the issues discussed on KTTL—race, economic distress, and criminal justice—were "the subject of vigorous debate with substantial elements of the community in opposition to one another" and were likely to have an impact on the community at large. *Id.* (quoting the 1974 Fairness Report, *supra* note 30). Petitioners also failed to show that the "incoherent monologues interspersed with occasional tirades . . . and fleeting offensive remarks" were part of a "meaningful discussion." *Id.* at 37,277.

public importance when public hearings were being held on the issue and many community groups opposed the increase.¹⁰⁶ The Commission required the broadcaster to remedy the situation by presenting opposing viewpoints.

This precedent carried little weight in 1984, however, when a similar case was heard.¹⁰⁷ The petitioner challenged a broadcaster who presented a series of electric company advertisements favoring the need for a nuclear power plant in the community. The petitioner pointed to public hearings on the matter of construction, newspaper articles and editorials discussing the matter, and statements of public interest groups both opposing and supporting the electric company. Nevertheless, the Commission sided with the broadcaster and decided that the need for a nuclear power plant was not a controversial issue in the community.¹⁰⁸ By restrictively applying the controversial issues standard, the Commission has removed previously actionable claims from its consideration.

The Commission has also restricted complaints by strictly construing its requirement that petitioners present their complaint to the broadcaster and obtain a response before going to the Commission.¹⁰⁹ Although the requirement of notice to the broadcaster has long been a part of Commission fairness doctrine adjudication, petitioners who choose not to wait for a broadcaster's response to that notice now face the strong probability that their claims will be dismissed by the Mass Media Bureau and, on appeal, by the Commission.¹¹⁰ Most members of the public are unable on their own, through complaints to the broadcaster, to enforce the fairness doctrine. As such, this requirement does not encourage settlement of petitions outside of FCC proceedings. Instead, it delays a petitioner's claim until the broadcaster responds.

Additionally, the Commission has mandated that a petitioner must specify his viewing of the broadcaster with particularity to ensure that the broadcaster presented imbalanced program-

106. Media Access Project, 44 F.C.C.2d 755, 760-61 (1973), *aff'd sub nom.* Georgia Power Project v. FCC, 559 F.2d 237 (5th Cir. 1977).

107. Yes to Stop Callaway Comm., 98 F.C.C.2d 1317 (1984).

108. *Id.* at 1322-27.

109. See American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); and the 1985 Fairness Report, *supra* note 2, at 35,431 n.150 for the dimension of the notice requirement.

110. See, e.g., Pacifica Found., 95 F.C.C.2d 750 (1983). Apparently, notice to the broadcaster had been sufficient to satisfy the Commission's requirement if the broadcaster did not make a good faith response.

ming.¹¹¹ One of several methods of proof required the petitioner to be a "regular viewer" who could say from experience that the broadcaster's overall programming was unfair.¹¹² The Commission, however, began to require the petitioner to document his viewing in detail, ignoring other, previously acceptable, evidence of broadcaster unfairness offered by the petitioner.¹¹³ By restricting this requirement, the Commission imposed upon petitioners the type of unduly burdensome requirement that the Commission had previously sought to avoid when it announced the criteria.¹¹⁴

These criteria, suddenly stringently applied, were one method used by the Commission to restrict the success of those petitioning against fairness doctrine violations. Through such decisions and through its initial review of petitions, the Commission, itself, long before it actually repealed the doctrine in 1987, limited the application of the doctrine without congressional approval or empowerment.

D. *Repeal of the Fairness Doctrine*

A number of factors coincided to allow the FCC to repeal the fairness doctrine. Court action, congressional failure, and FCC activism each provided a necessary prerequisite to the demise of the doctrine.

1. *The courts*— The 1985 Fairness Report was presaged by an indication that the Supreme Court might welcome the Com-

111. H.R. REP. No. 108, *supra* note 75, at 25 ("[M]ore recently, it appears that the Commission has been applying this policy in a way that holds complainants to an increasingly higher, and unfair burden as to their awareness of a broadcaster's programming."); *see, e.g.*, Environmental Defense Fund, 90 F.C.C.2d 648, 658 (1982).

112. John Howard, 55 F.C.C.2d 777, 780 (1975); 1974 Fairness Report, *supra* note 30, at 19 ("While the complainant must state the basis for this claim that the station has not presented contrasting views, that claim *might* be based on an assertion that the complainant is a regular listener or viewer . . .") (emphasis added).

113. In Environmental Defense Fund, 90 F.C.C.2d at 658, the Commission rejected the petitioner's charge of broadcaster unfairness because the petitioner did not document with particularity the petitioner's viewing habits. Yet, the petitioner had documented its charge of unfairness through other evidentiary bases, the broadcaster's program logs, and had assembled a "detailed and comprehensive analysis of station programming." *Id.* at 653, 658. The Commission also ignored its previous position that it assumed that a petitioner was a "regular viewer" and that the claim against a broadcaster was well founded if a group of viewers, rather than an individual one, petitioned against the broadcaster. *See* 1974 Fairness Report, *supra* note 30, at 19. The Environmental Defense Fund case involved just such a group of individuals. Environmental Defense Fund, 90 F.C.C.2d at 649 n.2.

114. 1974 Fairness Report, *supra* note 30, at 19.

mission's conclusions. The Court noted, in dictum, that any Commission evidence of a chilling effect would force it to reconsider the constitutional basis of the fairness doctrine.¹¹⁵ The Court also suggested that it might be willing to reconsider the scarcity justification for broadcast regulation if the FCC was to determine that technological change had invalidated that constitutional justification.¹¹⁶ By announcing these thoughts on the fairness doctrine, the Supreme Court implied that it would be ready to take up the issues of the 1985 Fairness Report and pass judgment on the fate of the fairness doctrine.

Prompted perhaps by the Supreme Court's apparent willingness to review the doctrine, *Telecommunications Research & Action Center v. FCC*¹¹⁷ (*TRAC*) provided the necessary basis for eventual FCC repeal. In *TRAC*, a public interest group challenged an FCC decision not to apply certain content regulations such as the fairness doctrine to the new technology of teletext.¹¹⁸ A District of Columbia Circuit panel, in an opinion by Judge Bork, joined by then-Judge Scalia, upheld the Commission's freedom to apply the fairness doctrine to whichever broadcast media it wished. The court noted, "We do not believe that language adopted in 1959 made the fairness doctrine a binding statutory obligation; rather, it ratified the Commission's longstanding position that the public interest standard authorizes the fairness doctrine."¹¹⁹ The court then read the *Red Lion* decision

115. *FCC v. League of Women Voters*, 468 U.S. 364, 378-79 n.12 (1984):

We note that the FCC, observing that "[i]f any substantial possibility exists that the [fairness doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chilling speech, do not serve the public interest, and has therefore proposed to repeal them. . . . 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.

See *Branch v. FCC*, 824 F.2d 37, 50 (D.C. Cir. 1987) (noting that the 1985 Fairness Report may signal the Court that the fairness doctrine is constitutionally suspect).

116. *League of Women Voters*, 468 U.S. at 377 n.11 ("We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.").

117. 801 F.2d 501, 508-09 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

118. The case involved two other political content rules, § 312(a)(7), requiring reasonable access to broadcasting stations for a candidate for federal office, and § 315, the equal opportunity rule for political candidates. See *supra* note 2.

Teletext is a broadcasting service that transmits textual and graphic material to the television screens of home viewers. *TRAC*, 801 F.2d at 502-03.

119. *TRAC*, 801 F.2d at 517. The *TRAC* court's approach was short and purely statutory. The court did not look to legislative intent. Judge Bork continued,

in concordance with its interpretation of the 1959 amendments. *TRAC*, then, allows the Commission to change its enforcement of the fairness doctrine provided that it justifies its actions in accord with administrative law.¹²⁰

What *TRAC* allowed, *Meredith Corp. v. FCC*¹²¹ demanded. In *Meredith*, the only broadcaster who was found in violation of the fairness doctrine since 1982 challenged the constitutionality of the fairness doctrine on first amendment grounds.¹²² The Commission, relying on the codification conclusions in its 1985 Fairness Report, refused to reconsider the constitutionality of the doctrine, deferring to the decisions of Congress and the courts on the matter.¹²³ The District of Columbia Circuit found the Commission's avoidance of the constitutional issue "the very paradigm of arbitrary and capricious administrative action" and remanded the case to the FCC.¹²⁴ The FCC now had the opportunity to conclude a seven-year weakening of the doctrine with its final abolition.¹²⁵

The language, by its plain import, neither creates nor imposes any obligation, but seeks to make it clear that the statutory amendment does not affect the fairness doctrine obligation as the Commission had previously applied it. The words employed by Congress also demonstrate that the obligation recognized and preserved was an administrative construction, not a binding statutory directive.

Id.

The petition for rehearing on the issue of codification was denied by a divided court. This division is highlighted by the dueling opinions of Judges Mikva and Bork on the statutory status of the fairness doctrine. Telecommunications Research & Action Center v. FCC, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1115 (1987).

120. *TRAC*, 801 F.2d at 518. The court also considered the Commission's argument that, due to teletext's similarity to printing, the new medium should be regulated as if it were a print and not a broadcasting medium. The *TRAC* court rejected the Commission's definition of scarcity as applying only to those broadcast media that had the "immediacy" of traditional broadcasting. *Id.* at 508. Although the court attacked the wisdom of the scarcity justification, the court resigned itself to following the Supreme Court position upholding the scarcity basis for the fairness doctrine stating, "neither we nor the Commission are free to seek new rationales to remedy the inadequacy of the doctrine in this area." *Id.* at 509.

121. 809 F.2d 863 (D.C. Cir. 1987). *Meredith* involved a challenge by the Syracuse Peace Council to a broadcaster's imbalanced presentation of interest group advertising in support of nuclear power plant development.

122. *Id.* at 865.

123. *Id.* at 868.

124. *Id.* at 874.

125. Surprisingly, the Commission was not enthusiastic about this prospect. The Commission actually objected to the *Meredith* court's hearing of the case on grounds of timeliness and standing of the petitioner. *Id.* at 868, 869. At the same time, before the same court, however, the Commission was advancing the standing of the Radio-Television News Directors Association to challenge the doctrine on the same grounds. Radio-Television News Directors Ass'n (RTNDA) v. FCC, 809 F.2d 860 (D.C. Cir.) (rejecting the Commission's position on standing), *vacated*, 831 F.2d 1148 (1987). The irony of the

2. *Legislative Response to FCC Action*— The congressional response may provide a basis for a new congressional mandate.¹²⁶ In late 1986, faced with the challenge of the FCC's 1985 Fairness Report and the D.C. Circuit's *TRAC* decision, Congress acted to protect the doctrine by passing an amendment preserving it.¹²⁷

On its face, the new legislation says very little. The Act reads simply, "[F]unds appropriated to the Federal Communications Commission by this Act shall be used to consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987."¹²⁸ Yet, several important conclusions may be drawn from the provision.

First, this Act evidences Congress' strong advocacy of the fairness doctrine. As a political warning to the Commission and its Chairman, Mark Fowler,¹²⁹ members continually asserted their

Commission's position was not lost on the court. *Meredith*, 809 F.2d at 868 n.3 ("We must admit that for the Commission to adopt such a cautious position on the propriety of judicial review here is somewhat puzzling in light of what it argued in *RTNDA*."); *RTNDA*, 809 F.2d at 862. The failure of the Commission to have the constitutional issues raised in *RTNDA* and their unwanted arising in *Meredith* put the Commission in a difficult political position. *RTNDA* involved a challenge to the FCC's 1985 Fairness Report. Because the Report concluded that the fairness doctrine unconstitutionally chilled free speech, the broadcasters argued, the FCC's refusal to eliminate the doctrine was arbitrary and capricious. *RTNDA*, 809 F.2d at 862. The goal of the litigants in *RTNDA* was to have the court declare the fairness doctrine unconstitutional. This would free the FCC from taking action on its own and protect it from the anger of Congress, which supported the fairness doctrine. *Meredith*, on the contrary, resulted in the court remanding the constitutionality issue to the Commission for its decision. The court chastised the FCC position stating, "[W]e are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward." *Meredith*, 809 F.2d at 874 (footnote omitted).

126. Members of Congress have had a long history of supporting the fairness doctrine. Many of them utilized the doctrine and the similar political candidate provision (§ 315) in their own campaigns.

127. See *Industry Turns Aside Hill Move to Codify Fairness*, BROADCASTING, Oct. 13, 1986, at 43 [hereinafter *Move to Codify Fairness*]. The Senate reflected its disagreement with the apparently imminent demise of the fairness doctrine by demanding that the Commission reopen the inquiry that produced the 1985 Fairness Report. The House went one step further and, in a move led by Speaker Thomas P. (Tip) O'Neill, Jr., attempted to reassert the doctrine's codification by reenacting it in statutory form. *Id.* The move was thwarted in part by the massive lobbying effort of the National Association of Broadcasters. *Id.* Also, some members felt that the complex, end-of-year appropriations bill, onto which the reenactment was attached, was an inappropriate piece of legislation in which to insert the doctrine. *Id.* The resulting compromise, very similar to the Senate's original version of the legislation, was passed and signed into law as part of the appropriations bill.

128. Continuing Appropriations for 1987, Pub. L. No. 99-500, 100 Stat. 1783, 1783-67 (1986).

129. Fowler (FCC Chairman, 1981-1987) was a dedicated opponent of the fairness doctrine. See Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60

dedicated support for the doctrine during the debates.¹³⁰

Second, Congress pointedly declared that the Commission could not repeal the fairness doctrine or materially change its enforcement of the doctrine. By directing FCC funding toward alternative means of administration and enforcement of the doctrine, the Act impliedly precluded the Commission from using appropriations to repeal or weaken the doctrine. This was the reading Congress gave the legislation. All speakers in the debates expressed agreement that the amendment completely prevented FCC repeal of the fairness doctrine.¹³¹ Some members of Congress went even further and proposed that any change in the material enforcement of the fairness doctrine while the Commission considered alternatives would be considered a violation of congressional intent.¹³² Congress unambiguously demanded that

TEX. L. REV. 207 (1982). Congressional opposition to any FCC repeal of the fairness doctrine may have been reinforced by Chairman Fowler's style and activities as head of the FCC. J. TUNSTALL, *supra* note 49, at 248-51; *Move to Codify Fairness*, *supra* note 127. Dennis Patrick replaced Fowler as Chairman in 1987.

130. See, e.g., 132 CONG. REC. S16,736 (daily ed. Oct. 16, 1986) (statement of Sen. Hollings); 132 CONG. REC. H11,075 (daily ed. Oct. 15, 1986) (statement of Rep. Dingell). During consideration of the amendments, no member spoke in opposition to either the amendment or the fairness doctrine itself. This suggests congressional support for the fairness doctrine as policy.

131. See, e.g., 132 CONG. REC. H11,075 (daily ed. Oct. 15, 1986) ("[T]he conferees do not intend this provision . . . to authorize or permit the FCC to repeal or materially revise the [fairness] obligation . . ." (statement of Rep. Dingell) (referring to the discussion of the amendment in the statement of managers)). This prohibition against repeal did not expire with the Commission's issuance of the required report. See, e.g., 132 CONG. REC. S16,736 (daily ed. Oct 16, 1986) ("It is not the intent of the conferees by the inclusion of this language to support or permit repeal of the fairness doctrine at any t[i]me, even after the required report is filed. In fact, just the opposite is the case. The conferees continue to strongly support the fairness doctrine." (statement of Sen. Hollings)). *But see* Meredith Corp. v. FCC, 809 F.2d 863, 873 n.11 (D.C. Cir. 1987) (noting that the Commission claimed that it was not legally bound by the statements in the Committee reports on the fairness doctrine legislation).

132. This position was stated most explicitly in the Statement of Managers of the Conference Report: "It is the intent of the conferees that the Federal Communications Commission shall not change the regulation concerning the Fairness Doctrine without submitting the required report to Congress on this matter." CONFERENCE REPORT MAKING CONTINUING APPROPRIATIONS, FOR FISCAL YEAR 1987, H.R. CONF. REP. No. 1005, 99th Cong., 2d Sess. 431 (1986); see, e.g., 132 CONG. REC. H11,075 (daily ed. Oct. 15, 1986); 132 CONG. REC. S16,736 (daily ed. Oct 16, 1986) (statement of Sen. Hollings) ("The FCC should not make any material changes in the regulation implementing the fairness doctrine. This would be counter to the direction of the conferees.");

The Members of the Senate-House conference were particularly concerned that during the pendency of the report required in this legislation that the FCC take no action to make material[] changes in regard to the fairness doctrine. The Members also believed the Commission should not even take such action after the report is required.

Id. (statement of Sen. Hollings).

the FCC maintain its traditional role as enforcer of the fairness doctrine.

Third, by declaring an intention to limit the FCC's ability to repeal the doctrine, Congress forcefully reasserted legislative control over the fairness doctrine. Finding the doctrine enacted into Section 315, members declared the FCC's opposition to the doctrine an usurpation of the role of Congress.¹³³ But the intent of Congress to claim control of the doctrine as a statutory enactment becomes most clear in the text itself. The final clause mandates that the Commission report back to Congress.¹³⁴ The implication of this language and its ostensible purpose is for Congress, not the Commission, to play its legislative role and make a decision on the worth of the fairness doctrine.¹³⁵ The rather simple wording of the resolution actually masks a clear congressional intent to support the fairness doctrine, to regard it as an enactment of Congress rather than a regulation of the FCC, and to prevent that agency from repealing or diminishing enforcement of the doctrine.

In this sense, the Act has a very material impact on the status of the fairness doctrine. As a congressional interpretation of the intent underlying a statute enacted by a previous Congress, the

133. 132 CONG. REC. H11,075 (daily ed. Oct. 15, 1986) (statement of Rep. Dingell that the fairness doctrine was found in § 315 of the Communications Act).

The very language of the debates indicates that the Members of both Houses believed that they were dealing with the fairness doctrine as a legislative mandate and not as a mere agency regulation. Members' speeches showed their belief that the FCC could not repeal the fairness doctrine under the Commission's own power. These same terms indicated that only congressional action could repeal the doctrine. Members stated that Congress would have to "authorize," "permit," and "support" any action taken by the FCC for that action to legally repeal the doctrine. *See, e.g.*, 132 CONG. REC. H11,075 (daily ed. Oct. 15, 1986) (statement of Rep. Dingell); 132 CONG. REC. S16,736 (daily ed. Oct. 16, 1986) (statement of Sen. Rudman).

One member seemed to consider that Congress' action in limiting the FCC was proof that the fairness doctrine "obligation [is] unambiguously part of the Communications Act." 132 CONG. REC. H11,075 (daily ed. Oct. 15, 1986) (statement of Rep. Dingell). This speech may have been part of Speaker O'Neill's attempt to codify the doctrine. *See supra* note 127.

134. The Commission announced the resulting report, *Fairness Doctrine Alternatives*, 63 Rad. Reg. 2d (P & F) 488 (1987), at the same meeting that it repealed the doctrine.

135. 132 CONG. REC. H11,075 (daily ed. Oct. 15, 1986).

[T]he provision in the bill merely directs the FCC to study alternative ways of administering and enforcing the doctrine, and to forward to Congress for its consideration any recommendations it may have for improving the manner in which the doctrine is administered and enforced. It was my personal understanding and intent that the FCC should do nothing to usurp the Congress' role in any reexamination of this doctrine.

Id. (statement of Rep. Smith).

joint resolution is entitled to great weight.¹³⁶ Congress expressed its disagreement with the *TRAC* decision and established a solid statutory position for the fairness doctrine by declaring that the fairness doctrine is found in section 315. Congress' action could very well be considered a binding affirmation of the legislative status of the fairness doctrine.

By prohibiting the Commission from revoking or weakening enforcement of the doctrine, the resolution presents a new standard against which to judge Commission action. Weakened enforcement of the fairness doctrine may be a violation of the Act. The legislation also establishes a new set of criteria for the FCC, severely limiting the discretion allowed the Commission.¹³⁷

In 1987, both Houses of Congress overwhelmingly passed legislation that would have codified the fairness doctrine.¹³⁸ President Reagan immediately vetoed the legislation.¹³⁹ The Fairness in Broadcasting Act reaffirmed that the fairness doctrine had

136. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 369, 380-81 (1969) (citing *FHA v. Darlington, Inc.* 358 U.S. 84, 90 (1958); *Alexander v. Mayor of Alexandria*, 5 U.S. (1 Cranch) 1 (1809)).

137. Administrative law formerly allowed the Commission to make any changes so long as they did not contravene the Commission's legislative duty. This discretion was such that the Commission could vary the level of enforcement due to the vagaries of the 1959 amendment. Now, under the Act, a weakening of the doctrine's enforcement violates the Commission's mandate.

But the legislative intent to prevent any reduction in enforcement of the doctrine presents some difficulties. No clear, adequate level of enforcement existed prior to passage. If judged against the level of enforcement at the time of passage, the requirement is nonsensical. The fairness doctrine was not being materially enforced in late 1986. The only possible meaningful interpretation is that members wished for the doctrine to be enforced at its traditional level. Such an interpretation would reasonably accord the congressional intent to support and protect the fairness doctrine with the actual wording of the statute. In light of this intent and its reflection in statutory form, the Commission is now bound to a more exacting standard of enforcement.

138. Fairness in Broadcasting Act of 1987, H.R. 1934, S. 742, 100th Cong., 1st Sess. (1987). The legislation passed both houses with heavy majorities. *Senate Votes Fairness Bill*, N.Y. Times, Apr. 22, 1987, at C26, col.5 (Senate vote 59-31 for passage); *House Approves Law on Fairness in Broadcasting*, N.Y. Times, June 4, 1987, at A1, col. 5 (House vote 302-102 for passage).

139. Veto of the Fairness in Broadcasting Act of 1987, Message to the Senate Returning S. 742 Without Approval, 23 WEEKLY COMP. PRES. DOC. 715 (June 29, 1987) [hereinafter Veto]. The President, in a statement reportedly written with the assistance of former FCC Chairman Mark Fowler, *Ghost*, BROADCASTING, June 22, 1987, at 7, found the doctrine unconstitutional because of the doctrine's repression of free speech, the disappearance of broadcast scarcity, and the intent of the first amendment framers. Veto, *supra*, at 715.

Congress referred the vetoed legislation to Committee to either preserve the option of overriding the veto or of attaching the bill to a "must pass" piece of legislation as a rider. *Reagan Vetoes Fairness Doctrine Bill*, BROADCASTING, June 29, 1987, at 27.

been codified in 1959 and then recodified the doctrine in section 315.¹⁴⁰

While enacting the legislation, Congress specifically attacked the 1985 Fairness Report. Finding that "the Commission's conclusions . . . are factually flawed, are based on erroneous legal analysis, and are entitled to no deference,"¹⁴¹ Congress reasserted its view that broadcast content regulation was necessary due to the scarcity of the airwaves, that the fairness doctrine had succeeded in bringing diverse viewpoints to broadcast listeners, and that the doctrine had been previously codified in 1959.¹⁴² For the first time, the Congress noted the newly restrictive standards used against petitioners making fairness doctrine claims and decried the unfair burden placed on broadcast petitioners.¹⁴³

3. *Formal Commission abolition of the fairness doctrine*—Freed from doubt about its ability to repeal the doctrine by the TRAC decision, assured of executive support by the presidential veto, and given the opportunity to act by the *Meredith* decision, the FCC Commissioners, on August 4, 1987, unanimously adopted a decision repealing the fairness doctrine.¹⁴⁴ The Commission's decision abolishing the doctrine rested predominately on the findings of the 1985 Fairness Report.¹⁴⁵ The Commission found the 1985 Report's conclusions determinative on the issue of a fairness doctrine-caused chilling effect.¹⁴⁶ Using the 1985 Report's analysis, the Commission concluded that the fairness doctrine was unnecessary as a means to promote diverse viewpoints due to the massive increase in media outlets.¹⁴⁷ But un-

140. Fairness in Broadcasting Act of 1987, H.R. 1934, S. 742, 100th Cong., 1st Sess. (1987).

141. S. REP. No. 34, *supra* note 75, at 4.

142. S. 742, 100th Cong., 1st Sess. (1987).

143. The House Report found the 1974 Fairness Report to be the defining statement of fairness doctrine enforcement criteria. H.R. REP. No. 108, *supra* note 75, at 25. "The Commission is not required under H.R. 1934 to impose burdens on complainants higher than those outlined in the 1974 Report." *Id.* at 26. Yet, the Act itself set the enforcement level "consistent with the rules and policies of the Commission in effect on January 1, 1987." S. 742, § 3, para. 2, 100th Cong., 1st Sess. (1987). See *supra* note 137 for a similar problem with previous fairness doctrine legislation.

144. Syracuse Peace Council, 63 Rad. Reg. 2d (P & F) 541 (1987), *appeal docketed*, No. 87-1516 (D.C. Cir. Sept. 14, 1987); see *Geller v. FCC*, No. 87-1544 (D.C. Cir. Oct. 5, 1987) (challenging FCC repeal of the fairness doctrine).

145. See, e.g., *Syracuse Peace Council*, 63 Rad. Reg. 2d (P & F) at 543-45, 565; *Fairness Held Unfair*, *supra* note 69, at 27, 29, 30 (transcript of FCC proceedings that repealed the fairness doctrine and based the decision on facts culled from the 1985 Report).

146. *Syracuse Peace Council*, 63 Rad. Reg. 2d (P & F) at 565-70.

147. *Id.* at 570-72.

like before, when the Commission had refused to extend the argument to attack the scarcity rationale,¹⁴⁸ this time, the Commission argued outright that "the scarcity rationale developed in the *Red Lion* decision . . . no longer justifies a different standard of First Amendment review for the electronic press."¹⁴⁹ The Commission's position justifies not only an attack on the constitutionality of the fairness doctrine, but also on broadcast content regulation in general.¹⁵⁰ The Commission had, apparently, achieved its goal in repealing the fairness doctrine formally and could now proceed to other aspects of broadcast regulation.

III. ASSESSMENT

The legality of the Commission's limited enforcement and repeal of the fairness doctrine depends on whether the Commission has violated the legislation creating the doctrine. When the Commission's actions are considered in light of its mandate, it becomes clear that the Commission acted illegally in covertly and, later, overtly, repealing the fairness doctrine.

148. See *supra* note 69.

149. *Syracuse Peace Council*, 63 Rad. Reg. 2d (P & F) at 574-75. The FCC also held that "the concept of scarcity . . . is irrelevant" as a constitutional principle. *Id.* at 581.

The Commission attempted to present this attack on scarcity as a reiteration of its conclusion in the 1985 Report. *Fairness Held Unfair*, *supra* note 69, at 30 ("[W]e reaffirm our finding in the 1985 report that scarcity is not a [constitutionally] valid distinguishing justification."). But the 1985 Fairness Report did not review the increase in media outlets to evaluate the scarcity rationale. Indeed, the Report refused to pass judgment on scarcity as a constitutionally justifying rationale for broadcast content regulation. 1985 Fairness Report, *supra* note 2, at 35,421 ("We do not believe that it is necessary or appropriate for us to make that determination in this proceeding.") Rather, the 1985 Fairness Report's conclusion on media availability went to the issue of whether the fairness doctrine was needed to increase the diversity of viewpoints broadcast consistent with the public interest standard. *Id.* at 35,440.

150. The Commission's public statements downplayed the significance of this finding: "[This decision] does not extend beyond the doctrine to codified laws like equal time. It does not rule on the commission's other content rules such as issue responsive programming and prime time access. And it leaves intact the Commission's ability to license and regulate in the public interest." *Fairness Held Unfair*, *supra* note 69, at 30. Although certainly, the *Syracuse* proceeding did not extend to other content laws, it did repudiate the constitutional basis that directly supports those laws. See *The Good, the Bad, and the Ugly*, BROADCASTING, Aug. 10, 1987, at 59 ("If the trend continues, and the FCC's radical constitutional analysis is pursued, we can anticipate the demise of candidate access to the airwaves and equal time requirements, as well." (statement of Rep. Dingell)).

The true assessment of FCC actions takes place in the courtroom.¹⁵¹ There, judicial review of FCC actions based on the Administrative Procedure Act¹⁵² provides several interconnected means to evaluate FCC regulation and deregulation of the fairness doctrine.¹⁵³ Under the Administrative Procedure Act, courts may find Commission action unlawful if it is: (1) arbitrary and capricious, (2) unconstitutional, (3) outside of statutory right; (4) violative of lawful procedure, (5) unsupported by substantial evidence, or (6) unwarranted by the facts.¹⁵⁴ Although the sections are listed separately, courts often read the statute such that categories two through six collapse into the first category of arbitrary and capricious action.¹⁵⁵ For instance, an agency may come to a reasonable, rational conclusion, but if the agency does not announce the evidence and reasoning supporting its conclusion, the agency action will be found arbitrary and capricious due to the court's inability to review the grounds for that decision.¹⁵⁶ Although the arbitrary and capricious standard appears to be a catch-all provision, it remains a provision into which various Commission abuses of discretion neatly fit and deserves to be considered separately from the more specific requirements. Likewise, the other standards of review also fulfill a unique and separable position in the courts' review of FCC enforcement of the fairness doctrine.

151. E. KRASNOW, L. LONGLEY & H. TERRY, *THE POLITICS OF BROADCAST REGULATION* 62 (3d ed. 1982); J. TUNSTALL, *supra* note 49, at 258.

152. Pub. L. No. 79-404, 60 Stat. 237 (codified in scattered sections of 5 U.S.C.).

153. These provisions of administrative law apply not only to agency action, but to agency inaction as well. 5 U.S.C. § 706(1) (1982); *see, e.g.*, *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 668 (D.C. Cir. 1970), *cert. granted*, 401 U.S. 973 (1971), *vacated as moot*, 404 U.S. 403 (1972). Thus, the void that constituted FCC enforcement of the fairness doctrine before the repeal is just as actionable and remediable by the courts as any rulemaking, adjudication, or affirmative action undertaken by the Commission.

154. 5 U.S.C. § 706(2) (1982).

155. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. Ruckelshaus*, 719 F.2d 1159 (D.C. Cir. 1983) (holding agency actions are arbitrary and capricious if they fail to meet statutory, procedural, or constitutional requirements or are unsupported by evidence); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir.) (holding inadequacy of explanation constituted arbitrary and capricious action), *cert. denied*, 423 U.S. 827 (1975); *Associated Indus. v. Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (Friendly, J.): "[I]n the review of rules of general applicability made after notice and comment rulemaking, the two criteria [the arbitrary and capricious standard and the substantial evidence test] do tend to converge"; *Calcutta E. Coast of India & E. Pakistan/U.S.A. Conference v. Federal Maritime Comm'n*, 399 F.2d 994 (D.C. Cir. 1968) (finding agency action arbitrary and capricious when it went beyond the scope of its statutory boundaries in making a decision without support in the record).

156. *See infra* note 198 and accompanying text.

A. *Judicial Review of Constitutional and Legislative Limitations and Mandates*

When a court reviews an administrative agency's decision, it first considers whether the agency followed its constitutional limitations and legislative mandates. The first amendment and various legislative acts offer grounds on which to challenge FCC nonenforcement and repeal of the fairness doctrine.

1. *The first amendment*—The *Red Lion* Court held that the first amendment right of the listener to hear programming in the public interest was paramount to the broadcaster's right to control his frequency.¹⁵⁷ Because the Court found that the fairness doctrine served the first amendment as an "affirmative promotion of the system of freedom of expression,"¹⁵⁸ Commission debilitation of that doctrine is arguably a restriction on listeners' first amendment rights.¹⁵⁹

The courts have rejected this first amendment argument. Courts have refused to find that the first amendment mandates rather than simply permits Commission enforcement of the fairness doctrine.¹⁶⁰ The courts fear that constitutionally requiring FCC determination of broadcast content would disturb the equipoise between public and private rights and interests in broadcasting and would result in the "frightening specter" of government censorship and control.¹⁶¹ Consequently, the Commission

157. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); Editorializing by Broadcast Licenses, *supra* note 14, at 1249.

158. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 660 (1970); see *Red Lion*, 395 U.S. at 393-94.

159. Such was the position of the plaintiffs in *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). In *Public Interest Research Group*, the court upheld the Commission's decision to exclude commercial advertisements from the fairness doctrine. The plaintiffs, an environmental group demanding response time to a set of snowmobile advertisements, charged that the Commission's exclusion violated the first amendment.

160. *Id.* at 1067-68 (discussing application of the fairness doctrine to product advertisements, "[W]e cannot say that the first amendment requires the Commission to force the presentation of alternate views.>").

161. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 120-21, 133 (1972) (stating that a rigid enforcement of the fairness doctrine and access requirements "in the name of the First Amendment would be a contradiction."); see *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981) (rejecting an argument that the first amendment requires Commission programming review); *Public Interest Research Group*, 522 F.2d at 1067-68; see also *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (striking down access requirements for the print media).

can diminish fairness doctrine enforcement without violating the first amendment.

2. *Legislation*— The courts must also review and strike down acts by the Commission that violate its statutory mandates.¹⁶² Three such mandates empower and restrict FCC action. Under each of these legislative requirements the courts would discern different mandates and would reach different conclusions about the Commission's weakened enforcement of the fairness doctrine.

The first mandate is the public interest standard announced in the Communications Act of 1934.¹⁶³ The Commission adopted the fairness doctrine under this general grant of power to serve the public interest. This broad and expansive standard by itself, however, simply allows the Commission to enforce the fairness doctrine. It does not mandate its enforcement.¹⁶⁴

Consequently, the public interest standard precludes Commission repeal of the fairness doctrine only if the Commission violates administrative law by failing to explain its changed interpretation of the public interest standard.¹⁶⁵ Due to the broad powers delegated to the Commission by that standard, however, a simple change in the level of enforcement of the doctrine would be well within the agency's discretion. If the public interest standard alone supported FCC enforcement of the fairness doctrine, this would be the limit of statutory review.

A second statutory mandate requires more than the public interest standard. The 1959 amendment, accepted by the Commission as an explicit codification of the doctrine, imposed new requirements on the Commission.¹⁶⁶ In so doing, Congress restated the fairness doctrine "far more explicit[ly] than the generalized 'public interest' standard."¹⁶⁷ Because the Commission obviously

162. 5 U.S.C. § 706(2)(C); *Public Interest Research Group*, 522 F.2d at 1060.

163. See *supra* note 3.

164. *United States v. Southwestern Cable*, 392 U.S. 157, 173 (1968); *NBC v. United States*, 319 U.S. 190, 219 (1943).

165. See *infra* notes 197-99 and accompanying text.

166. See *supra* notes 19-29 and accompanying text.

167. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 385-86 (1969):

The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of section 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before.

may not repeal statutory law,¹⁶⁸ the Commission's 1987 repeal is illegal. When the Commission quietly weakens enforcement of the doctrine, however, this explicit standard is of little use. The simple statement in Section 315, imposing an obligation on a broadcaster to afford a reasonable opportunity for discussion of conflicting views on issues of public importance, presents no specific obligation for the Commission. The Commission has long been allowed freedom and discretion in enforcing section 315 due to the simplicity of the statutory language.¹⁶⁹ With the discretion that the Commission holds, even under section 315, a change in enforcement of the doctrine would not contravene the legislative mandate.

Given the extent of the Commission's inactive enforcement of the fairness doctrine, though, to dismiss the Commission's policy shift as a mere change in the level of enforcement is difficult. The extreme reduction in enforcement action constituted virtual repeal of the doctrine, or at least a crippling of it to the point of a *de facto* repeal.¹⁷⁰ The Commission, therefore, has violated both the public interest standard and the section 315 obligation.¹⁷¹

The final statutory mandate overcomes the inadequacies of the other discretionary provisions. The 1986 budget amendment,¹⁷² most importantly, specifically limits discretion in enforcement by mandating that any material change in enforcement would be illegal. Moreover, through the provision, Congress rejected the *TRAC* court's dicta that the doctrine is a Commission creation subject solely to the broad mandate of the public interest standard. The Act reasserts the legislative view that the doctrine is a statutory creature subject to the explicit

168. See, e.g., 1974 Fairness Report, *supra* note 30, at 52 ("[I]n view of sections 315(a) and 3(h) of the Communications Act, the Commission could not abandon the fairness doctrine.").

169. *Id.* at 1. ("[W]e did emphasize that these statutory standards [§ 315(a)] were broad in nature and that therefore 'there can and must be considerable leeway in both policy formulation and application in specific cases.'"); see also Public Interest Research Group v. FCC, 522 F.2d 1060, 1066 (1st Cir. 1975) (finding that a complainant's attempt to read specific requirements into § 315 "assumes a degree of legislative specificity which simply does not exist"), *cert. denied*, 424 U.S. 965 (1976).

170. Some commentators have argued that this was in fact the case. E.g., J. TUNSTALL, *supra* note 49, at 4 ("Controls on content . . . were removed; radio station managers now had almost no formal obligations, and *de facto* fairly secure tenor."); Minow, *supra* note 75; Nossiter, *The FCC's Big Giveaway Show*, NATION, Oct. 26, 1985, at 402.

171. *But see* Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987); Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987) (discussed *supra* notes 117-25 & accompanying text).

172. See *supra* notes 126-38 and accompanying text.

mandates of section 315 and the budget provision itself. The bill codifying the fairness doctrine, even though vetoed by the President, constitutes a persuasive statement of belief that the fairness doctrine is a statutorily enacted law.¹⁷³ A court using these statutory provisions as a guide would find the Commission in violation of the intent of the Congress as expressed inherently in the language of the legislation.¹⁷⁴

B. Judicial Review Under the Arbitrary and Capricious Standard

The scope of judicial review under the arbitrary and capricious standard varies with the context of the case.¹⁷⁵ A review by the courts may be either extremely deferential, or searching and careful.¹⁷⁶ The courts have used both forms of review in the many challenges to FCC deregulation.¹⁷⁷ An evaluation of Com-

173. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 180-81 (1979) (stating that legislative statements unapproved of by the executive are a reliable basis for interpreting the intent of Congress).

174. *But see Meredith*, 809 F.2d at 873, n.11 (noting in dicta that the language of the Act does not appear to mandate the fairness doctrine). Although the language in the provision does not directly mandate enforcement, it does so indirectly by indicating that the doctrine is actually a codified law rather than an adopted regulation.

175. See *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981); *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1049-51 (D.C. Cir. 1979).

Sometimes, the form of agency action, whether adjudicatory or rulemaking, will determine the level of a court's review. At other times that level will be determined by the substance of an agency's action.

176. Compare *Georgia Power Project v. FCC*, 559 F.2d 237, 240 (5th Cir. 1977) (discussing Commission fairness doctrine action, "[I]t will be a rare case indeed when reversal is warranted.") with *NAACP v. Wilmington Medical Center*, 453 F. Supp. 280, 304 (D. Del. 1978) ("The arbitrary and capricious standard of review, however, is not a ritualistic procedure by which courts summarily endorse agency actions as correct."), *remanded on other grounds sub nom. NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979). Whatever the courts happen to call their review, be it traditional arbitrary and capricious or "hard look" arbitrary and capricious, the whole range of review can be collapsed into the simple standard of "reasonableness." B. SCHWARZ, *ADMINISTRATIVE LAW* § 10.37 (2d ed. 1984).

177. See, e.g., *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) (finding FCC explanations for the abandonment of children's programming regulations inadequate); *Telecommunications Research Action Comm. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) (challenging the nonapplication of the fairness doctrine to teletext); *National Black Media Coalition v. FCC*, 706 F.2d 1224 (D.C. Cir. 1984) (upholding ascertainment deregulation); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) (challenging changes in logging requirements); *Telocator Network of Am. v. FCC*, 691 F.2d 525 (D.C. Cir. 1982) (upholding FCC allocation of radio frequencies); *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) (striking down Commission cable regulations as arbitrary and capricious); *Action for Children's Television v. FCC*, 756 F.2d 899 (D.C. Cir. 1977) (challenging an end to children's programming require-

mission action under the different levels of review demonstrates that the FCC has acted arbitrarily and capriciously in its deregulation of the fairness doctrine.

1. *Adjudication*— The Commission's abandonment of fairness doctrine enforcement is most clearly apparent in the agency's case law, the actual application of fairness doctrine rules to broadcasting situations. The significant decline in the number of these cases provides the most dramatic indication that the Commission has changed its enforcement of the doctrine.¹⁷⁸ In fact, the Commission repealed the doctrine, not through rulemaking, but in case law. Yet, in reviewing agency action, courts show the greatest deference to agency adjudication.¹⁷⁹ By deferring to this type of agency decision, courts will overturn only those Commission decisions unsupported by substantial evidence.¹⁸⁰ For an FCC adjudication to be upheld, the decision must simply show some evidence supporting its holding.¹⁸¹ Under this test, only one court has overruled an FCC fairness doctrine decision as too lenient towards a broadcaster.¹⁸²

ments); *Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 529 (2d Cir. 1977) (finding Commission action lowering minority employment requirements arbitrary and capricious); *National Ass'n of Independent Television Producers & Directors v. FCC*, 516 F.2d 526, 542-43 (2d Cir. 1975) (finding restrictions on television broadcast of motion pictures to be arbitrary and capricious).

178. See *supra* note 94.

179. See, e.g., *Georgia Power Project v. FCC*, 559 F.2d 237 (5th Cir. 1979). The courts have ignored the change in fairness doctrine enforcement. E.g., *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987) ("It is patently obvious that because of non-legislative expressions of congressional concern, the Commission does not wish to weaken enforcement of the fairness doctrine . . ."). The courts' deferential standard derives from the belief that the adjudicatory proceeding is an arena of FCC expertise. See *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981); *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977); *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979). Furthermore, Commission actions represent the Commission's interpretation of its purpose as legislated by Congress. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *American Trucking Ass'n v. Atchison T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

180. 5 U.S.C. § 706(2)(E) (1982); see *Camp v. Pitts*, 411 U.S. 138 (1973); *Crowell v. Benson*, 285 U.S. 22 (1932); *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

181. K. DAVIS, *ADMINISTRATIVE LAW* 67 (5th ed. 1973). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

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

Then-Judge Burger found that the Commission's decision to grant a license to a broadcaster charged with fairness doctrine violations was unsupported by substantial evidence due to the biased and erroneous actions of the hearing examiner. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1008 (D.C. Cir. 1966). See generally F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 89-102

Application of the substantial evidence test to the Commission's fairness doctrine cases would inevitably result in the upholding of those decisions. Each case contains a sufficient recitation of facts and reasoning to satisfy the reasonable evidence test. The repeal, couched in the substantial evidence provided by the 1985 Fairness Report, would be met with the deference of a reviewing court because there is substantial, if unpersuasive, evidence supporting the Commission's decision. Because of this usual level of review, the Commission's departure from its traditional policy would remain invisible or permissible to the reviewing court. As a result the court would uphold the Commission's decision.

Not surprisingly, the Commission began to subtly repeal the fairness doctrine through case by case exaggeration of the standards rather than through outright, open rulemaking. The courts' deferential posture ensured that the judiciary would not step in to correct the Commission's emasculation of the fairness doctrine provision. The nature of the adjudicatory process, with scattered decisions announcing the demise of the fairness doctrine, allowed the Commission to conceal its policy without challenge from the courts or reaction from Congress until forced to act openly by *Meredith*.¹⁸³ Viewed individually, the decisions do not appear irrational or unreasonable. Each appears to base its decision on the traditional obligations of petitioner and broadcaster. Only when the Commission decisions are viewed as a whole, in the light of previous fairness doctrine rulings, and in the context of the Commission's campaign against the doctrine, do agency departures from its long-standing doctrine emerge.

The substantial evidence test does not preclude such a comprehensive review. Using a form of heightened arbitrary and capricious review, a court could compare present and prior cases and recognize the political goals of the Commission. Under this standard of review, courts may defer to agency decisions, but they are obligated to undertake a heightened scrutiny in the form of a "hard look" review.¹⁸⁴ A hard look review constitutes a

(1975) (recounting the full story of station WLBT, Jackson, Mississippi, the station involved in *United Church of Christ*).

183. *Meredith Broadcasting v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 588 (1965); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

184. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1424 (D.C. Cir. 1983); *Telocator Network of Am. v. FCC*, 691 F.2d 525 (D.C. Cir. 1982). Some have questioned the survival of the "hard look" doctrine since the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense*

more rigorous application of the arbitrary and capricious standard.¹⁸⁵ Courts using a hard look standard review agency decisions more broadly and inquisitively when the agency "has not really taken a 'hard look' at the salient problems and has not genuinely engaged in reasoned decision making."¹⁸⁶ This standard of review ensures that agencies follow procedures in a way that allows any reviewing court to assess the agency's actions. As such, the standard stops short of complete de novo review but does constitute a "substantial inquiry" into the decision of the agency.¹⁸⁷ Thus, the failure of an agency to take a hard look at an issue requires the courts to take a hard look at the agency.

Certain "danger signals," indicating agency abuse of discretion, alert courts to the need for a higher level of review.¹⁸⁸ Several such danger signals appear in the FCC's current fairness doctrine action.

The first of these is agency bias. If a court believes the Commission is engaging in biased and partial enforcement of the fairness doctrine, the court may choose to use the hard look

Council, 435 U.S. 519 (1978), which restricted judicial review of agency decisions to a review of the procedures mandated by the Administrative Procedures Act. S. BREYER & R. STEWART, *supra* note 32, at 616-17. Subsequent decisions, however, appear to have allowed the continued vitality of the "hard look" review. *See, e.g.,* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); *United Church of Christ*, 707 F.2d at 1413.

185. *United Church of Christ*, 707 F.2d at 1425 n.23 ("The heightened level of scrutiny is frequently referred to as the 'hard look' doctrine.")

186. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970); *see* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 416 (1970) (requiring "a thorough, probing, in-depth review," also "searching and careful"); *see also* Leventhal, *Environmental Decisionmaking and the Role of the Court*, 122 U. Pa. L. Rev. 509 (1974).

187. *Overton Park*, 401 U.S. at 415.

188. *Greater Boston*, 444 F.2d at 851; *United Church of Christ*, 707 F.2d at 1425. Courts have based their hard look reviews on other danger signals. *E.g.,* *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979) (finding the importance of the problem considered by the agency may necessitate a hard look review); *Standard Rate & Data Serv. v. United States Postal Serv.*, 584 F.2d 473 (D.C. Cir. 1978) (justifying judicial intervention when the agency based its decision on a judicial opinion that the courts are better suited to interpret); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597-98 (D.C. Cir. 1971) (finding agency decisions affecting "fundamental personal interests" will justify stricter judicial review); *Greater Boston*, 444 F.2d at 850 (holding the FCC's rejection of a hearing examiner's report may alert the court to the need for a hard look); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (finding perfunctory treatment of important issues justifies a hard look); *Rodgers, Judicial Review of Risk Assessments: the Role of Decision Theory in Unscrambling the Benzene Decision*, 11 ENVTL. L. 302, 301 (1981) (the reviewing court's opinion on the wisdom of the agency action may determine use of stricter review). *Compare* *NAACP v. Wilmington Medical Center*, 453 F. Supp. 280 (D. Del. 1978) (holding complex issues may allow courts to intervene) *with* *Rodgers, supra*, at 309 (the more complex an issue the less likely the courts are to review it intensely).

standard in its review.¹⁸⁹ Statements of the former Chairman,¹⁹⁰ the 1985 Fairness Report, and the political mood of the Commission reveal a definite Commission desire to do away with the fairness doctrine. The courts have, in fact, frequently rebuked the FCC for its dangerous overenthusiasm in deregulating the broadcast industry.¹⁹¹ At the time, these warnings urged the Commission to pay closer heed to the Commission's legislative purpose. Now, they stand as an indication of the courts' fear of agency bias and of the courts' predisposition to engage in a more searching review of Commission action.

Another danger signal, more often invoked by courts to justify a hard look review, is an agency's action eliminating a long-standing policy.¹⁹² The FCC underwent a hard look review when it eliminated ascertainment and logging procedures.¹⁹³ The District of Columbia Circuit upheld the deregulation of the ascertainment procedures under a traditional deferential review. Because the ascertainment procedures were promulgated only recently by the Commission, their repeal did not trigger a hard look. The court justified a "close scrutiny" review of the logging deregulation, on the other hand, because of the Commission's abrupt abolition of a traditional policy.¹⁹⁴ Elimination of the fairness doctrine, a doctrine followed since 1927, or even a sig-

189. *Central Fla. Enter., Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979); *see* *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979); S. BREYER & R. STEWART, *supra* note 32, at 285 (suggesting courts use a stricter standard of review when assessing agencies that have "tunnel vision" or are biased).

190. *E.g.*, 1985 Fairness Report, *supra* note 2, at 35,454 (concurrence by Chairman Fowler); Fowler & Brenner, *supra* note 129; *see* *League of Women Voters v. FCC*, 468 U.S. 364, 376-77 n.11 (1984) (noting Chairman Fowler's criticism of the fairness doctrine).

191. *See, e.g.*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1443 (D.C. Cir. 1983) (discussed *infra* text accompanying note 206); *Telocator Network of Am. v. FCC*, 691 F.2d 525, 549 (D.C. Cir. 1982) ("We think, however, that the Commission comes perilously close here to crossing the line between pursuit of a legitimate regulatory policy using competition to further the public interest and abdication of its regulatory duty.").

192. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 542 (1978) (stating in dicta, "It might also be true, although we do not . . . decide it, that a totally unjustified departure from well-settled procedures of long standing might require judicial correction."); *United Church of Christ*, 707 F.2d at 1439; *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir.) (engaging in a hard look when the FCC policy appeared to be manifestly in a "state of flux" and "evolution"), *cert. denied*, 403 U.S. 923 (1970).

193. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

194. "[A]brupt shifts in policy do constitute 'danger signals' that the Commission may be acting inconsistently with its statutory mandate." *Id.* at 1425; *cf. Greater Boston*, 444 F.2d at 852.

nificant change in its enforcement, would similarly trigger a hard look.¹⁹⁵

Considered in light of earlier decisions, the FCC's subtle changes in fairness doctrine requirements stand as genuine departures from *stare decisis*. The Commission increased the burden on complainants to the point that a successful fairness doctrine complaint became nearly impossible to bring. By this action, the FCC arbitrarily and capriciously departed from its previous holdings and from the purpose set for it by Congress.

Courts will uphold changes in an agency's policy if the agency explains its actions. These explanations enable the courts to review the underlying grounds for the Commission's decision and assess whether the Commission has followed its legislative purpose and has acted reasonably.¹⁹⁶ Courts have held unexplained departure from previous case law arbitrary, capricious, and an abuse of discretion.¹⁹⁷ In a review of FCC adjudication of a licensing petition,¹⁹⁸ the District of Columbia Circuit described the level of explanation required: "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior

195. Courts do not require the total elimination of a longstanding policy to invoke a hard look review. In *United Church of Christ*, 707 F.2d at 1413, the court invoked stringent review when the FCC replaced its traditional broadcast log books with a more relaxed form of broadcast recordkeeping. Because a significant lessening in the enforcement of a traditional agency responsibility is just as much of a signal that an agency is abusing its legislative purpose as a total repeal of that responsibility would be, a relaxation of the long-standing policy enforcing the fairness doctrine will also trigger a hard look review.

196. *Id.*

197. See *Barrett Line v. United States*, 326 U.S. 179 (1945); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary."); see also *NLRB v. Don Juan, Inc.*, 178 F.2d 625 (2d Cir. 1964). But see *FCC v. WOKO, Inc.* 329 U.S. 223 (1946) (allowing an unexplained deviation from precedent if the departure was reasonable and defensible).

Although this may seem to depart from the high level of deference usually accorded Commission decisions, applying the arbitrary and capricious standard in a strenuous review of agency decisions that break from precedent is, in fact, highly deferential to the Commission's previous position. The courts view an agency's settled course of behavior as the agency's interpretation of its responsibilities under its congressional mandate. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *American Trucking Ass'n v. Atchison T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). To swerve from this course is to depart from an interpretation of congressional intent to which the courts will hold the agencies.

198. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir.) (Leventhal, J.), *cert. denied*, 403 U.S. 923 (1970).

precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.¹⁹⁹

The intolerable muteness that accompanied the Commission's covert deregulation of the fairness doctrine would alone have been grounds for courts to demand that the Commission supply some findings of fact that the courts could review.²⁰⁰ In the absence of such an explanation, the courts may not simply suppose that the Commission's actions comport with the law. The law, in fact, demands that, when faced with the unexplained change in policy found in the fairness doctrine situation, the presumption is against the legitimacy of the agency's change, and the policy change would be considered arbitrary and capricious.

The Commission's repeal of the fairness doctrine in *Syracuse Peace Council* ostensibly supplies the reasoning to support the repeal.²⁰¹ Yet under a hard look review, the repeal and the factual material from the 1985 Fairness Report underlying the repeal are subject to the scrutiny of a reviewing court. In such a circumstance, the courts are able to look deeper, beyond the substantial evidence test, to the validity of the evidence used by the Commission. The factual weaknesses of the evidence used by the FCC to conclude that the fairness doctrine engenders a chilling effect and the legal errors found in the Commission's definition of scarcity provide sufficient evidence that the Commission acted arbitrarily and capriciously in finally repealing the fairness doctrine.

2. *Rulemaking*— Aside from being a matter of adjudication, FCC restriction of fairness doctrine enforcement also involves the rulemaking functions of the Commission. If the Commission were to have announced and explained its nonenforcement policy in a rulemaking proceeding, the departure from previous decisions evidenced by changes in the Commission's handling of fairness doctrine adjudications could have been reviewed by the courts, and the decisions of the Commission could have been found reasonable. Courts demand that agencies announce and explain changes in policy.²⁰² The courts then consider the adequacy of the explanation for the policy change and consider that explanation in light of the arbitrary and capricious standard.

199. *Id.* at 852 (footnotes omitted).

200. *Id.* at 850.

201. *Syracuse Peace Council*, 63 Rad. Reg. 2d (P & F) 541 (1987), *appeal docketed*, No. 87-1516 (D.C. Cir. Sept. 14, 1987).

202. 5 U.S.C. § 706(2)(F) (1982); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970).

The court's hard look review in *Office of Communications of the United Church of Christ v. FCC*²⁰³ examined the Commission's reasoning and analysis and found it inadequate because the Commission failed to sufficiently consider alternatives.²⁰⁴ The court remanded the FCC deregulation of logging²⁰⁵ and concluded with a stern rebuke to the Commission: "In these proceedings the Commission has on its own undertaken to enact a significant deregulation of the radio industry. In so doing it has pushed hard against the inherent limitations and natural reading of the Communications Act."²⁰⁶

In applying this same level of review to FCC fairness doctrine action, the courts would look for a justification of Commission rulemaking. Yet, the Commission's policy of ignoring fairness doctrine violations was unannounced and undefined in any Commission rulemaking. Nowhere in Commission regulations or policy statements were the prerepeal fairness doctrine standards described, or alternatives discussed, nor were explanations given for any change of policy. In fact, the regulations and Commission statements still contained the traditional FCC standards for enforcement of the doctrine. The Commission, then, failed to announce its shift in policy in any reviewable form.

The 1985 Fairness Report does not satisfy the requirement for a statement of policy. The process that produced the 1985 Report began as a notice of inquiry preliminary to the type of rulemaking necessary to officially announce and explain a change of policy.²⁰⁷ The resulting Fairness Report, however, does not stand as a reviewable explanation or justification for the FCC's de facto repeal of the fairness doctrine for two reasons. First, the report explicitly concluded that the FCC could not repeal the fairness doctrine on its own and would not modify or restrict the scope of the doctrine.²⁰⁸ The Commission chose not to proceed with rulemaking that could eliminate or modify the fairness doctrine because it was uncertain whether Congress had codified the doctrine. Rather, the FCC deferred to Congress.

203. 707 F.2d 1413 (D.C. Cir. 1983).

204. *Id.* at 1439-40.

205. *Id.* at 1443. Judge Bork concurred, "We remand on the issue of program logs so that the Commission may reexamine the matter and provide more thoughtful and detailed justification." *Id.* The FCC responded by increasing the content of the log replacements, the "issues program lists." Deregulation of Radio, 55 Rad. Reg. 2d (P & F) 1401 (1984).

206. *United Church of Christ*, 707 F.2d at 1443.

207. Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees, 49 Fed. Reg. 20,317 (1984).

208. 1985 Fairness Report, *supra* note 2, at 35,453.

Second, the 1985 Fairness Report does not announce a substantive rulemaking. The Report announces a general statement of policy. The 1985 Fairness Report is simply an announcement of facts that the agency would like the courts and Congress to consider in an FCC-recommended reassessment of the doctrine. As a general statement of policy, the Report does not represent an officially reviewable explanation of Commission action and has as much impact as a Commission press release.²⁰⁹ Without any explanation of its actions available, the Commission lacked the record necessary for courts to review the agency's actions. As such, those actions taken before the repeal were arbitrary and capricious.

CONCLUSION

Although the law allows the FCC a certain amount of discretion in interpreting and enforcing the fairness doctrine, the FCC has gone beyond its discretion and has violated its legislative mandate by feebly enforcing and finally repealing the fairness doctrine. The extreme decline in the number of cases enforced before the repeal and the repeal itself indicate this. The Commission's decisions increasing the burden on a fairness doctrine petitioner while eliminating broadcasting procedures that peti-

209. *Radio-Television News Directors Ass'n v. FCC*, 809 F.2d 860, 862 (D.C. Cir.) (“[T]he 1985 Fairness Report’s conclusions as to the constitutionality of the fairness doctrine do not constitute agency action subject to review”), *vacated*, 831 F.2d 1148 (1987); *see also* *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (“An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.”). A court could decide that the Commission acted reasonably in changing fairness doctrine policy because the doctrine deterred free speech. The court could not, however, use the 1985 Fairness Report to justify the decision. Although the 1985 Fairness Report proceeding involved a fairly sophisticated hearing process, the fact that the FCC announced that the Report was preliminary to a reconsideration of the fairness doctrine prevented the Commission from claiming that the Report was a binding statement. *See* *CBS v. United States*, 316 U.S. 407 (1942). If the Commission was to incorporate or refer to the 1985 Fairness Report in a later action, as the Commission did in *Syracuse Peace Council*, then the Report would constitute a reviewable document. *See* *Committee to Save WEAM v. FCC*, 808 F.2d 113, 118 (D.C. Cir. 1986).

Had the 1985 Fairness Report been a genuine rulemaking procedure, there would be a slight chance that the Commission could have been able to “freeze” enforcement of the doctrine during the proceedings. *See* L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTIONS* 588 & n.167 (noting *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963), in which the court upheld the Commission’s “freeze” on consideration of broadcast frequency applications while the Commission promulgated new rules that might affect the application process).

tioners could use to prove their case also prove that the agency violated its mandate. The repeal action, taken without the authorization of Congress and without sufficient justification, was arbitrary and capricious. Applying the standards of administrative law to the Commission's actions, the Commission has violated its statutory purpose under the public interest standard of the Communications Act of 1934, the 1959 amendments to that act, and the 1986 budget provision.

Altogether, when one views the FCC's responsibility for enforcement of the fairness doctrine, it becomes clear that the Commission has contravened its purpose of ensuring the fairness of the airwaves. The Commission has decided to engage in law-making, without the constitutional authority of the legislative process, by engaging in covert and overt deregulation of a significant piece of broadcast law. That law, the fairness doctrine, may be a flawed piece of public policy,²¹⁰ but if so, then one may conclude with the District of Columbia Circuit that, "It should thus be Congress, and not the unrepresentative bureaucracy and judiciary, that takes the lead in grossly amending [the broadcasting] system."²¹¹

—Michael J. Bolton

210. For an argument that the fairness doctrine, even as originally enforced, is completely unworkable, see Krattenmaker & Powe, *supra* note 102, at 157 ("[T]he Fairness Doctrine is . . . a glorious but futile symbol, full of wondrous pretension and promise, yet utterly devoid of performance.").

211. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1443 (D.C. Cir. 1983). But Congress is not quietly allowing the FCC to usurp its role. Congressional reaction to the repeal was furious. For FCC, 6-Year Fairness Struggle, N.Y. Times, Aug. 6, 1987, at A21, col. 1; *The Good, the Bad, and the Ugly*, *supra* note 150, at 59 (quoting Rep. Dingell). Much of the congressional anger was directed at the Commission for repealing the doctrine after formal and informal statements that it would not do so. *A Question of Priorities*, BROADCASTING, Aug. 10, 1987, at 28; *FCC Gets Earful at Telcomsubcom House Hearing*, BROADCASTING, June 1, 1987, at 33-34 (statement of FCC Chairman, Dennis Patrick, that the agency did not intend to change its enforcement of the doctrine).

Congress has reacted by attempting to recodify the fairness doctrine. See e.g., *Broadcasters Take the Offensive Against Fairness/Fees*, BROADCASTING, Nov. 2, 1987, at 34; *Fairness Update*, BROADCASTING, Nov. 2, 1987, at 12; Davis, *Fairness Doctrine Bill is Approved By Senate Panel*, Wall St. J., Oct. 22, 1987, at 12, col. 1; Fuerbringer, *Congress Passes Bill to Cut Deficit*, N.Y. Times, Dec. 22, 1987, at A1, col. 4 (attempt to pass fairness doctrine in 1988 budget bill fails); Rasky, *Stopgap Appropriation Bill Approved*, N.Y. Times, Dec. 21, 1987, at A17, col. 4; *supra* note 139. Congress has also begun exert pressure on the FCC as reprisal for the Commission's veto of the doctrine. See *Washington Wire*, Wall St. J., Feb. 12, 1988, at 1, col. 5.

Any legislation reinvigorating the fairness doctrine should not only remedy the Commission's overt repeal of the doctrine in 1987, but should also seek to prevent the covert repeal of the doctrine that occurred long before that time.

