1989

Resurrecting the Fairness Doctrine: The Quandary of Enforcement Continues

Robert D. Richards
Pennsylvania State University

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

Part of the Communications Law Commons

How does access to this work benefit you? Let us know!

Recommended Citation

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
RESURRECTING THE FAIRNESS DOCTRINE: THE QUANDARY OF ENFORCEMENT CONTINUES

ROBERT D. RICHARDS

INTRODUCTION

Despite its repeal in 1987,1 the fairness doctrine remains one of the most controversial issues in broadcast regulation today. Since the doctrine's demise, Congress has tried twice unsuccessfully to revive this content-specific regulation which required broadcasters to actively search for controversial issues of importance and present a balance of viewpoints in programming exploring those issues.2 The 101st Congress has once again entertained a bill to codify broadcast fairness,3 H.R. 315, “The Fairness in Broadcasting Act of 1989,” with a companion bill in the Senate,4 was introduced “to clarify the congressional intent concerning, and

---

1 The Federal Communications Commission repealed the fairness doctrine on August 4, 1987. In an unofficial announcement of its decision, the Commission reported that the doctrine had actually "'chilled' the speech of broadcasters and could no longer be considered' narrowly tailored to achieve a substantial government interest." The procedure through which the Commission ended enforcement was by vacating a 1984 Order which found WTVH-TV in Syracuse had violated the fairness doctrine. [Report No. MM-263]

2 The first attempt to revive the doctrine was S. 742, the "Fairness in Broadcasting Act of 1987." On June 19, 1987, President Ronald Reagan vetoed the measure saying, "S. 742 simply cannot be reconciled with the freedom of speech and the press secured by our Constitution." Later that year proponents of the doctrine attached a rider to the appropriations bill.


to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance.5 The House measure, introduced by Rep. John D. Dingell of Michigan, was cleared for consideration by the Full Committee on Energy and Commerce on April 5, 1989,6 and placed on the House Union Calendar on July 19, 1989.7

Much of the controversy surrounding the doctrine arises from the belief on the part of broadcasters that any such content-specific regulation is violative of their First Amendment rights. The Supreme Court rejected that argument in 1969.8 Five years later, however, the Court struck down similar content regulation affecting newspapers.9 The latest political maneuvering over the doctrine has breathed new life into this First Amendment argument and prompted a proliferation of purportedly less “chilling” alternatives. Most of what has been posited is familiar territory. Among the alternatives most often discussed are abandoning the case-by-case evaluation in favor of a review at license renewal time and assuring access to broadcast media for discussion of controversial issues.10

While access may be a solution to the immediate fairness doctrine dilemma, the problems associated with requiring broadcasters to relinquish time, coupled with determining which groups obtain access, are arguably more restrictive than the fairness doctrine itself. Consequently, it can hardly be purported that such a requirement is less violative of the First Amendment.

The renewal proposal holds more promise of resolving the quandary over broadcast fairness. This article suggests a new standard of reviewing fairness complaints at renewal time which creates a strong presumption in favor of the broadcaster. Part I of the article focuses on the development of the fairness doctrine throughout its short history. In particular, it traces the historical underpinnings of broadcast regulation examining the intent and purpose of the fairness provision. Part II analyzes the judicial and quasi-judicial enforcement of this regulation, particularly with respect to political broadcasting. Part III traces the demise of the Doctrine and the attempts to revive it. Part IV outlines the presumption in favor of the broadcaster at license renewal time and concludes that this alternative essentially frees broadcasters from defending their records, yet still provides a window of opportunity for groups validly claiming biased broadcasting.

---

7 Id.
Although the fairness doctrine was officially "codified" in 1959 when Congress made some changes to Section 315 of the Communications Act of 1934, the concept of fairness in broadcasting dates back much further. Some members of Congress tried unsuccessfully to include a version of a fairness doctrine in the Federal Radio Act of 1927 and again in the Communications Act of 1934. It was during the twenties when broadcasters were calling on the federal government to regulate the industry because of chaos on the airwaves. Virtually any citizen could obtain a broadcast license, and so many did that the spectrum became crowded.

The scarcity of spectrum space convinced lawmakers that a more discriminating licensing procedure was needed. The government decided that the spectrum was akin to a natural resource that belonged to the public. For that reason, Congress placed no monetary value on it, but rather told broadcasters they were public trustees, and as such had to operate in the "public interest, convenience, and necessity."

A. The Acts

The Senate debates leading to the Federal Radio Act of 1927 included discussion about the issue of fairness in broadcasting, particularly as it related to public questions. This notion is illustrated by the exchange between Senator Howell and Senator Dill on the Senate floor July 1, 1926: "Senator Howell: The Senator from Washington has left in the bill a provision respecting candidates. It is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions." Howell was concerned with the far-reaching effect broadcasts could have on molding the views of the younger generation. Senator Dill espoused a wait-and-see attitude.

I sympathize with a great deal of what the Senator is saying, but I want to remind the Senator of the danger of having the words "public questions" in the bill. That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could

---

11 As this article will later explore, it is unclear whether the Doctrine was ever codified. In fact, a finding to the contrary by the United States Court of Appeals paved the way for the Federal Communications Commission to repeal the fairness doctrine on August 4, 1987.
13 44 Stat. 1162 (1927).
14 See supra note 12.
16 Id.
17 See generally, 67 CONG. REC. 5478 (1926).
19 67 CONG. REC. at 12504.
20 Id.
demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely that they would have to give all this time to that kind of discussion or no public questions would be discussed . . . opposition to [the public question provision] was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time and to await developments, and get this organization to function, and the bill can be amended in the future. 21

Meanwhile in the House, Representative Wallace White put forth his own proposal:

We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the reputation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any to use the either . . . If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served. 22

The legislators eventually compromised by eliminating specific language about public questions and instead opted for the broader "public interest, convenience, and necessity" standard.

The result was the Federal Radio Act of 1927 which provided for a five-member overseeing board, called the Federal Radio Commission. 23 The Commission had operated for only seven years when President Franklin D. Roosevelt called upon Congress to create a new "umbrella" agency for all communications technology. 24 Up until this point, the Interstate Commerce Commission and the Federal Radio Commission shared some degree of control over communications in the United States. In a brief message to Congress in 1934, Roosevelt made his request.

I recommend that Congress create a new agency to be known as the Federal Communications Commission, such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission—the services affected to be all of those which rely on wire, cables, or radio as a medium of transmission. 25

Roosevelt insisted upon an organization with broad authority, not merely an advisory board. "The new body should, in addition, be given full power to investigate and study the business of existing companies

---

21 Id.
22 67 CONG. REC. at 5479.
23 44 Stat. 1162 (1927).
24 President's Message to Congress that it Create a New Agency to be known as the Federal Communications Commission, Doc. No. 144 (February 26, 1934).
25 Id.
and make recommendations to the Congress for additional legislation at the next session."^{26}

A bill changing some aspects of radio regulation had been passed by both Houses of Congress in 1933, but did not receive the President's signature and consequently died with the end of the session.^{27} Nevertheless, during the following session the Senate adopted some sections of the previous bill in Senate Bill 3285.^{28} Also included in the package was Roosevelt's request for creation of the Federal Communications Commission, as was announced to his colleagues by Senator Clarence Dill.^{29}

During this Seventy-third Congress, debate concerning how the communications field should be regulated continued, and there was renewed interest in the fairness concept. Some members of the Senate pushed for inclusion in the Communications Act of a version of what would later become the fairness doctrine. The result was a provision which passed the Senate but was later rejected by the House-Senate Conference Committee.^{30} The provision read:

> [I]f a licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in presentation of views or a public question to be voted upon in an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate or for presentation of opposite views on such public questions.^{31}

Consequently, when the Act passed, no formal fairness doctrine was included.

The early years of broadcast regulation, however, did not pass unscru- tinized by the courts. Although no fairness doctrine as such existed, the obligation to operate in the public interest, as public trustees, played a pivotal role in determining which broadcasters obtained renewal of their licenses. Just two years after passage of the Federal Radio Act, the Commission denied a request for license modification by WCBD, a religious station, to enable it to broadcast on a clearer frequency and for more hours each day. The station unsuccessfully appealed the decision in Great Lakes Broadcasting Co. v. F.R.C.^{32} The United States Court of Appeals upheld the Federal Radio Commission's denial in an opinion by Chief Judge Martin who wrote: "[i]t is our opinion that WCBD's application was rightly denied. This decision is based upon the comparatively limited public service rendered by the station . . . ."^{33}

---

^{26} Id.

^{27} H.R. 7716, 73rd Cong., 1st Sess. (1933).

^{28} S. 3285, 73rd Cong., 2nd Sess. (1934).

^{29} 78 CONG. REC. 8822 (1934).

^{30} Hearings on S. 2910: Hearings before the Senate Committee on Interstate Commerce, 73rd Cong., 2nd Sess. (1934).

^{31} Id.


^{33} Id. at 995.
The public interest obligation continued to occupy a high place in the minds of lawmakers and judges, and a year after *Great Lakes*, the standard was a ground for outright denial of license renewal. Such was the case for KFKB and Dr. J.R. Brinkley.

Brinkley had obtained the license for the station in 1923. The entrepreneurial physician quickly realized the commercial potential of this young industry. Brinkley himself took to the airwaves to prescribe elixirs to listeners who wrote him. It was no coincidence the "medication" prescribed was readily available through the Brinkley Pharmaceutical Association and the Brinkley Hospital. The Commission denied Brinkley's renewal application saying:

[T]he practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest.

The appellate court upheld the Commission's decision to deny renewal of Brinkley's license, reasoning:

When Congress provided that the question whether a license should be issued or renewal should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character.

Throughout this germination period, the Commission and the courts expressed concern over the imbalance of programming on radio. The issue was complicated, however, and still is, because it treads on the First Amendment's protection of free speech and free press. Delving into programming, as opposed to mere technical proscriptions, would necessarily require the Commission to exercise some degree of editorial control. The extent of that control, if not its very existence, provides the basis for continued debate over the fairness doctrine and the First Amendment. Yet, in broadcasting's early years, a Commission decision and discussion on content stopped many stations from exercising a valuable public function.

### B. Mayflower Decision

In the late thirties WAAB, a Boston radio station, adopted a policy in which the station aired its views on political candidates and other controversial public questions. A former employee of the Yankee Network, Inc., which owned WAAB, complained about the policy at a license re-

---

35 Id. at 672.
36 Id.
37 Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940).
newal hearing in November 1939. Curiously, Lawrence Flynn, the former employee, was also at that time one of the owners of the Mayflower Broadcasting Corporation, which was vying for a permit to broadcast on WAAB’s frequency.38

Mayflower Broadcasting provided false financial information on its application, causing the Commission to deny its request. Yet, the proceeding provided the Commission the opportunity to scrutinize the Yankee Network’s editorial policy and release some tough language which was later considered a ban on editorializing.39

The Commission claimed that the system of broadcasting as it had developed in the United States embraced the concept of public interest, and stations must dedicate themselves to it. The Mayflower decision favorably considered the fact that the Yankee Network had not acted in such a way since September 1938 and thus had rescinded its [WAAB’s] earlier editorial policy. As a result, WAAB was granted renewal of its license.40 In granting the renewal, the Commission noted that the First Amendment rights of broadcasters are subordinated to those of the listening public. “Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of important public questions, fairly, objectively, and without bias. The public interest—not the private—is paramount . . . .”41

The importance of the Mayflower decision did not lie in the renewal of WAAB’s license, but rather in the future of editorializing in broadcasting. At the time, the case had little impact on the broadcasting industry because so few stations editorialized. Yet, those broadcasters whose insight helped them to connect editorializing with public service were stifled by the decision. Six years later the whole notion of public service and public interest was called into question with the issuance of the so-called “Blue Book,” which also served to rejuvenate the concept of editorializing.

C. Blue Book

The Commission in 1946 released an essay on the public service responsibilities of a broadcast station. The document, which became known as the “Blue Book”42 because of the color of its cover, grew out of the Commission’s realization that broadcasters, in many cases, were not living up to the programming promises they had listed in their license applications.43 When the Commission looked at what licensees proposed to broadcast when they filed applications and what they had actually programmed, it found a number of discrepancies between promise and performance.44 As a result, temporary renewals were handed out by the Commission in 1945 when it outlined preferred programming standards for licensees.

38 DOCUMENTS OF AMERICAN BROADCASTING, 120 (Kahn, ed., 1984).
39 8 F.C.C. at 340.
40 Id. at 333.
41 Id. at 340.
43 Id.
Broadcasters were enraged by the "Blue Book," viewing it as both censorship and authoritarian rule over the industry. The Commission stated that in issuing and renewing broadcasting licenses, appropriate weight would be given to program service factors relevant to the public interest, including the elimination of excessive ratios of advertising time to program time. Broadcaster opposition made the "Blue Book" ineffective, although it never was officially repudiated by the Commission. Yet, on the positive side, broadcasters also became concerned again about the potential to editorialize, and more and more saw it as a part of public service.

D. The Doctrine Emerges

The concept of prescribed fairness in broadcasting surfaced again in 1949 when the Commission issued a report entitled "In the Matter of Editorializing by Broadcast Licensees." This report resulted from hearings held in 1948 because of the Commission’s belief that further clarification was needed with respect to the obligations of licensees to broadcast news, commentary, and opinion. Through the hearings the commissioners sought to determine two specific matters:

1. Whether the expression of opinions by licensees on matters of public interest and controversy is consistent with obligations to operate their stations in public interest.
2. The relationship between any such editorial expression and the affirmative obligation of the licensees to ensure that a fair and equal presentation of all sides of a controversial issue is made.

Representatives from the broadcasting industry as well as special interest groups testified at these hearings. After hearing various sides of the issues, the Commission reached some conclusions as to the future handling of controversial issues. It noted the importance for the general public to hear contrasting opinions from responsible elements of the community. The Commission knew that in order for the needs and interests of the public to be met, some conflict had to be examined, but this posed the problem of ensuring fairness during such presentations.

The life of each community involves a multitude of interests, some dominant and all pervasive, such as interest in public affairs, education and similar matters and some highly specialized and limited to few. The practical day-to-day problem with which every licensee is faced is one of striking a balance

---

46 Meyer, Reaction to the 'Blue Book', 6 J. Broad. 295 (1962).
47 13 F.C.C. 1246 (1949).
48 Id.
49 Id.
50 Id.

https://engagedscholarship.csuohio.edu/clevstlrev/vol37/iss4/5
between these various interests to reflect them in a program service which is useful to the community, and which will in some way fulfill the needs and interests of many.\textsuperscript{51}

Nonetheless, the Commission understood that the final choice had to lie with the licensee. The broadcaster must decide which issues are controversial and thus warrant the presentation of conflicting views. The Commission's report lifted an eight-year ban on editorials that broadcasters had imposed on themselves.\textsuperscript{52}

The report was clear in outlining the Commission's concern for fairness. The Commission required an affirmative responsibility on the part of broadcasters to devote a reasonable amount of time to the discussion of public issues.\textsuperscript{53} Not all of the Commissioners felt the Editorializing Report was valid.\textsuperscript{54} Commissioner Edward Webster said the report "still leaves a licensee in a quandary and a state of confusion in that he must follow with his own interpretation of an involved academic legal treatise to determine what he can or cannot do in his day-to-day operation."\textsuperscript{55} Commissioner Robert Jones issued a separate opinion that to grant true editorial privilege, there must be a reversal of the \textit{Mayflower} decision "which fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities in behalf of any cause.\textsuperscript{56} Commissioner Frieda Hennock dissented from the Commission's decision.\textsuperscript{57} She agreed with the concept of fairness in the presentation of controversial issues, but said "the standard of fairness as delineated in the report is virtually impossible of enforcement by the Commission with our present lack of policing method and with the sanctions given us by law."\textsuperscript{58}

Broadcasters, on the other hand, generally praised the report. CBS Board Chairman William S. Paley looked upon it as a great advancement for broadcasting.\textsuperscript{59} The misgivings of the Commissioners aside, the report was the first step in the development of the fairness doctrine. Some fifteen years after the issuance of the Editorializing Report, broadcasters still had questions about the function of the editorial in the context of public service. In a 1964 report on the issue,\textsuperscript{60} the Commission briefly noted, "the licensee is not required to editorialize . . . is free to do so, but if he does, he must meet the requirements of the fairness doctrine."\textsuperscript{61}

\textsuperscript{51} \textit{Id.} at 1247.
\textsuperscript{52} Houser, \textit{The Fairness Doctrine - An Historical Perspective}, 47 NOTRE DAME L. REV. 550, 558 (1972).
\textsuperscript{54} Houser, \textit{supra} note 52, at 559.
\textsuperscript{55} Editorializing by Broadcast Licenses, 13 F.C.C. at 1258.
\textsuperscript{56} \textit{Id.} at 1259.
\textsuperscript{57} \textit{Id.} at 1270.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} Houser, \textit{supra} note 52, at 560.
\textsuperscript{61} \textit{Id.} at 10,421.
E. Congress Amends Section 315

It was not until 1959, however, that Congress amended Section 315\footnote{47 U.S.C. § 315(a) (1982).} of the Communications Act and included language that for the next twenty-eight years would provide the basis for the Commission's enforcement of the fairness doctrine. Section 315 is popularly known as the equal opportunity rule. The provision requires a broadcast station which allows a legally qualified candidate for public office to use its facilities to afford an equal opportunity for use to all other legally qualified candidates for that office.\footnote{Id.} This is true not only in special programming but also in advertising time. Read in conjunction with Section 326, this section further provides that broadcasting stations cannot censor paid political advertisements. On behalf of the broadcaster, the provision releases the station from any liability for defamation that might arise from any such advertisement. This release from liability was tested and upheld by the Supreme Court in \textit{Farmers Educational and Cooperative Union of America v. WDAY}.\footnote{360 U.S. 525 (1959).}

As might be expected, the drafters of the Section 315 carved out some exceptions to the equal opportunities provision. The rule does not apply to the appearance of a candidate in a bona fide newscast, news interview program, news documentaries or coverage of a bona fide news event. The latter part of the exception sheltered broadcasters from claims of minor parties when they covered a debate sponsored by someone other than the station itself. Although often misconstrued as such, the fairness doctrine...
was not an equal time provision. It was a loosely defined, difficult-to-enforce standard aimed primarily at news and public affairs programming and controversial public issues, and the much debated language purportedly codifying the doctrine appears in the closing sentence of 315(a). The actual language is ambiguous in its directive to broadcasters:

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

Interpretation of this sentence has resulted in a two-fold obligation: First, broadcasters must devote a reasonable amount of their broadcast time to coverage of controversial issues of public importance, and second, they must ensure that the coverage of these issues is fair in the sense that an opportunity for contrasting points of view is provided. After twenty-eight years of operation under this accepted wisdom, the Commission challenged the validity of the Act's language as actual codification of the fairness doctrine, and subsequently repealed the doctrine.

PART II

From the very outset of broadcast regulation, lawmakers expressed concern over the relationship between politics and the media. During the debates about the Federal Radio Act, Senator Howell observed, "if all candidates can not be heard, none should be heard. If both sides of a question can not be heard over a particular radio station, none should be heard. I can not emphasize this too strongly." This political rhetoric furnished results. Congress created the "equal opportunities" doctrine designed to provide candidates for public office with an equal opportunity for "using" a broadcast station.

The so-called equal opportunities rule, or Section 315, carries with it the above restrictions, most notable of which are the exceptions of applicability to newscasts, news interviews, news documentaries (where the candidate's appearance is incidental to the subject matter) and on-the-spot coverage of news events. These exceptions were added in 1959 when Congress also added language which seemingly codified the fairness doctrine. The importance of the rule can be measured by its application to appearances wholly unrelated to a candidate's bid for public office, such as former President Ronald Reagan's movies made several years before his presidential campaign.

---

66 67 Cong. Rec. 12,504.
68 See supra note 62.
A. Political Editorials, Zapple, and the Personal Attack Rule

The Commission has promulgated numerous rules and regulations to enhance the fairness doctrine. One such regulation is the political editorial rule. This rule is reminiscent of the legislative discomfort over editorializing illustrated in the Mayflower decision; yet, it is far less inhibitive. Despite the repeal of the fairness doctrine, the political editorializing rule remains in effect. Its future is uncertain. The Commission refused to abolish the rule in the Meredith Broadcasting Corp. case. The intention to keep the political editorializing rule alive, along with the personal attack rule and the Zapple Doctrine, was made clear in a letter dated September 22, 1987, from F.C.C. Chairman Dennis R. Patrick to Representative John D. Dingell, Chairman of the House Committee.

70 47 C.F.R. § 73.1930 (1986):
(a) Where a licensee, in an editorial,
1) endorses or,
2) Opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial transmit to, respectively,
   (i) The other qualified candidate or candidates for the same office or,
   (ii) The candidate opposed in the editorial,
    (A) Notification of the date and time of the editorial,
    (B) A script or tape of the Editorial and,
    (C) An offer or a spokesman of the candidate to respond over the licensee's facilities. Where such editorials are broadcast on the day of the election or within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and present it in a timely fashion.
   (subsection (b) omitted)

71 Meredith Corp. v. F.C.C., 809 F.2d 863 (D.C. Cir. 1987). The U.S. Court of Appeals remanded an appeal from a finding by the F.C.C. of a fairness doctrine violation by WTVH in Syracuse, New York. The language used by the court in this case can be read in tandem with a decision by the court the previous year in Telecommunications Research and Action Center v. F.C.C., 801 F.2d 501 (D.C. Cir. 1986), which gave the Commission the support it needed to abolish the fairness doctrine.

72 47 C.F.R. § 73.1920 (1980):
(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the persons or group attacked:
   (1) Notification of the date, time and identification of the broadcast;
   (2) A script of tape (or accurate summary if a script or tape is not available) of the attack; and
   (3) An offer of a reasonable opportunity to respond over the licensee's facilities.
   (b) The provisions of paragraph (a) of this section shall not apply to broadcast material which falls into one or more of the following categories:
      (1) Personal attacks on foreign groups or foreign public figures;
      (2) Personal attacks occurring during uses by legally qualified candidates;
on Energy and Commerce. The letter reads, in pertinent part:

Hence, because the enforcement of the political editorial rules, the personal attack rules, the Zapple Doctrine, or the application of the fairness doctrine to ballot issues were not before it in the Meredith remand, the commission did not make any specific decision on August 4 regarding these issues. Consequently, broadcasters still must provide response air time to any opponents of candidates they endorse in an editorial. 74

In 1970 the Commission further limited the licensee’s discretion in the political broadcasting arena by announcing what would be called by some a “quasi-equal opportunity rule” or the Zapple Doctrine. 75 The rule is named for Nicholas Zapple, then communications counsel to the Senate Commerce Committee. In a letter to the Commission dated May 6, 1970, Zapple requested an interpretive ruling on fairness doctrine application in situations involving the purchase of broadcast time by supporters of political candidates. Specifically, where a candidate or his supporters purchase time and the broadcast includes a discussion of issues in the campaign, contains criticism of the opponent, or discusses the qualifications of the candidate, the other candidates or supporters must be allowed to purchase a comparable amount of time if they desire. 76

Here the Commission essentially designed a hybrid between the equal opportunities rule and the fairness doctrine. Under the fairness doctrine as normally applied, comparable time allotments are not required. Under Section 315, the candidate must appear to constitute a “use.” Yet, this is not a requirement under a Zapple application. In similar fashion, if one candidate’s supporters receive free time, so must the other candidate’s supporters, if they request it. However, there is no obligation to provide free time to one candidate’s supporters where the opponent’s supporters have purchased time. “Any such requirement would be an unwarranted and inappropriate intrusion into the area of political campaign financing.” 77

The Zapple Doctrine deviates somewhat from the Cullman Doctrine 78

---

74 Correspondence dated September 22, 1987, from Dennis R. Patrick, Chairman of the Federal Communications Committee to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce.
75 See supra note 73.
76 Id.
77 Id. at 708 [footnote omitted].
where the Commission held "it is clear that the public's paramount right to hear opposing views on controversial issues of public importance cannot be nullified . . . by the inability of the licensee to obtain paid sponsorship of the broadcast time." Yet, the logic is inconsistent. The Commission's view is that it would be inappropriate to require licensees to, in effect, subsidize the campaign of an opposing candidate by providing free time. However, under the Cullman Doctrine, other public issues had to receive such treatment.

Both these doctrines passed scrutiny in the First Fairness Report. The Commission called the Zapple Doctrine "a common sense application of the statutory scheme." In other words, Zapple was a logical outgrowth of Section 315, rather than an extension of the fairness doctrine as it would be if the Cullman Doctrine were applied. In fact, all the exceptions to Section 315 have been held to apply equally to the Zapple Doctrine; the fairness doctrine fully applies to such programs, including general news coverage of candidates. "The controversial public issue in a political race is who among the competing candidates for nomination or election to an office should be chosen. The individual candidates represent 'contrasting viewpoints' on the overall issue of which should be elected . . . ."

The broadcaster is afforded wide discretion in determining how much coverage to allot each candidate, but the coverage must be reasonable. Minor party candidates need not receive as much coverage as the major parties do, yet the disparity must also be reasonable. The Cullman Doctrine, however, was repealed along with the fairness doctrine.

To aid enforcement of the fairness doctrine, the Commission in 1967 promulgated the personal attack rule. The rule provides access to those individuals whose reputation has been attacked during a broadcast. These regulations, along with this parent fairness doctrine faced scrutiny by courts and the Commission itself in the 1970s.

B. Quasi-Judicial and Judicial Review

In 1971 the Commission decided once again to study the efficacy of the fairness doctrine. This time the report was prompted by increased demand for access to broadcast media and discussion of public issues. The report looked into four broad categories: "1) the fairness doctrine generally, 2) access to broadcast media as a result of the presentation of

---

79 Id. at 577.
80 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (First Report - Handling of Political Broadcast) 36 F.C.C.2d 40 (1972).
81 Id. at 49.
86 See supra note 72.
87 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (Notice of Inquiry), 30 F.C.C.2d 26 (1971).
product commercials, 3) access generally for the discussion of public issues and 4) application of the fairness doctrine to political broadcasts."

Twenty-two years had passed since the 1949 Editorializing Report, and in part one of the study the Commission noted that it had not been necessary to "formulate detailed and definitive guidelines for licensees applying the fairness doctrine in their day-to-day operations," excepting, of course, the personal attack and political editorializing rules. Consequently, the Commission saw this to be the time to test whether it was necessary to formulate such guidelines and perhaps more important to determine if the doctrine did not "promote the fundamental purposes of the First Amendment."

The second area of inquiry had its origin in the courts. The issue concerned the application of the fairness doctrine to product advertising. Products, such as cars, detergents, and those packaged in non-biodegradable containers, posed serious environmental questions. Echoing the sentiment of the courts, the Commission observed "that product commercials can carry implicit messages and that pertinent national policies should be taken into account." Some of the concern in this matter at the time could be attributed to the recent Banzhaf decision from the court of appeals.

Any restrictions in this area could have serious consequences for both the broadcaster and the advertiser. Simultaneously, First Amendment scholars were watching this area carefully as the F.C.C. called for "comment, pro and con, on the policy implications and the pragmatic effects of this equation."

Only brief attention was given to a general right of access to broadcast facilities for discussion of public issues. While some have argued, fairness doctrine aside, those wishing to express a particular viewpoint may always purchase access to broadcast media, the Commission has held to its position that "there is neither Constitutional nor statutory right for any individual or group to present their views, and that as a matter of policy it would not serve the public interest to act as if there were."

In the area of political broadcasting, the Zapple Doctrine led the discussion. The critical question focused on what, if any, changes should occur with this quasi-equal opportunities doctrine, particularly when balanced with Section 315. One year later, political broadcasting became the main subject of another F.C.C. report. In it, the Commission again ex-

---

88 Id.
89 Id. at 28.
90 Id.
91 Id. at 30.
92 Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). The Commission ruled that the fairness doctrine is applicable to cigarette advertisements, and thus stations airing such commercials must also provide free anti-smoking public services messages.
93 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (Notice of Inquiry) 30 F.C.C.2d at 32.
94 Id. at 33.
95 See discussion supra p. 17.
96 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (First Report - Handling of Political Broadcast) 38 F.C.C.2d 40 (1972).
plained the Zapple Doctrine as a “particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in [the equal opportunities rule].”

During the following year, the Commission resurrected its political broadcasting policy in the midst of pending court cases and the impending general election. The Commission had solicited comments from various factions involved in political broadcasting. “Two commentators, Democratic National Committee (DNC) and American Civil Liberties Union (ACLU) suggest[ed] that the Commission extend the fairness doctrine or adopt a specific rule that would require licensees to broadcast the opposing views of appropriate spokesmen following the appearance of a public official.”

DNC voiced considerable concern about appearances made by the President and the lack of comparable access by members of its organization. Of course, DNC members appeared on other news interview programs where they could respond to questions about the President’s message. However, no opportunity existed for “a reasoned and uninterrupted presentation of the issues.” Under the pattern presented by the DNC, licensees were, in fact, following the mandate of the fairness doctrine. The doctrine requires a balance in the overall programming of the licensees, not a one-for-one response ratio. On the other hand, the National Broadcasting Company (NBC) sharply criticized ACLU/DNC’s call for a right to reply to appearances of public officials. NBC maintained that “[c]reation of an equal or quasi-equal time right to reply to all public official addresses would, as a practical matter, inhibit the appearance of public officials . . . .” WGN Broadcasting Company sided with NBC and added, “that the F.C.C. would be inexorably involved in politically sensitive adjudications . . . .”

While the Commission urged broadcasters “to make maximum possible contributions to the nation’s political process,” it found that “it would not be sound policy to adopt the DNC or ACLU proposals.” The Commission urged broadcasters “to make maximum possible contributions to the nation’s political process,” and noted that “it would not be sound policy to adopt the DNC or ACLU proposals."

---

97 Id. at 49.  
98 Id. at 40.  
99 Id. at 43.  
100 Id.  
101 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (First Report - Handling of Political Broadcast), 36 F.C.C.2d 40, 43 (1972).  
102 Id. at 44.  
103 Id.  
104 Id.  
105 Id. at 54.  
106 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (First Report - Handling of Political Broadcast), 36 F.C.C.2d 40, 48 (1972). It is important to note here that the Supreme Court rejected an individual right of access approach in CBS v. DNC, 412 U.S. 94 (1973) and warned that “[i]f the fairness doctrine were applied to editorial advertising, there is also substantial danger that the effective operation of the doctrine would be jeopardized.

The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not.” 412 U.S. at 124.
mission did, however, again urge Congress to enact its earlier proposal setting forth another exemption to 315(a).\footnote{107}

The following year the Commission readdressed the concern arising over product advertising and the fairness doctrine.\footnote{108} The report looked at two main types of advertising: 1) editorial advertisements; and 2) advertisements for commercial products and services.\footnote{109}

"Some 'commercials' actually consist of direct and substantial commentary on important public issues."\footnote{111} The Commission ruled that the fairness doctrine applies to such advertisements. Yet, commercials that are designed to promote a positive public image of a corporation or industry generally constitute "a legitimate commercial practice and ordinarily does not involve debate on public issues."\footnote{111}

Commercials promoting controversial products or services will invoke the fairness doctrine only when they are "devoted in an obvious and meaningful way to the discussion of public issues."\footnote{112} This finding marked a change from the impetus for the \textit{Banzhaf} decision in 1967.\footnote{113}

The 1974 Report angered and confused some members of the Commission and the community, so much so that the F.C.C. needed to reconsider it just two years later. On March 24, 1976, the Commission released the Memorandum Opinion and Order on Reconsideration of the Fairness Report.\footnote{114} "The petitions for reconsideration present a vigorous disagreement with the Report's position on applying the doctrine to standard product commercial advertising . . . ."\footnote{116} The Commission declared "that the public interest would be served best by not applying the doctrine to standard product commercials."\footnote{116} The petitioners, differing with the F.C.C.'s position, suggested the Commission was "without power to effect such a change, and that it failed to articulate sufficient grounds for the policy."\footnote{117}

\begin{footnote}
(5) any other program of a news or journalistic character-
(i) which is regularly scheduled; and
(ii) in which the content, format and participants are determined
by the licensee or network; and
(iii) which explores conflicting views on a current issue of public
importance; and
(iv) which is not designed to serve the political advantage of any
legally qualified candidate.


109 Id. at 22.

110 Id.

111 Id. at 23.

112 Id. at 26.


115 Id.

116 Id. at 697. Footnote 10 defined standard commercials as "[c]ommercials which simply sell a product and do not deal meaningfully with a controversial issue of public importance." Id. at n.10.

117 Id. at 698.
\end{footnote}
The Commission reaffirmed its conviction that it indeed had the authority to make such changes and that it adequately explained its position in the 1974 Report. To this end, it further noted the United States Court of Appeals decision in *Public Interest Research Group v. F.C.C.*, where the judges in the First Circuit found "the Commission had acted within its statutory authority when it 'with appropriate notice and ... sufficient clarity' concluded that it was in the public interest to 'abandon [its] earlier precedents and frame new policies.'" Relying on this decision as well as *CBS* where the Supreme Court dubbed the Commission the "overseer and ultimate arbiter and guardian of the public interest," the Commission denied the petitions for reconsideration.

The question of the constitutionality of the fairness doctrine reached the United States Supreme Court in 1969 in *Red Lion Broadcasting Co. v. F.C.C.* This landmark decision struck a blow to broadcasters and First Amendment devotees who viewed the regulation as violative of the constitutionally mandated freedoms of speech and press.

*Red Lion* actually involved two cases which made their way to the Supreme Court. The first, *Red Lion*, questioned the legality of applying the fairness doctrine to a particular program. The second, brought by the Radio Television News Directors Association (RTNDA), arose "as an action to review the F.C.C.'s 1967 promulgation of the personal attack and political editorializing regulations ... ." The facts of *Red Lion* arguably constitute a personal attack, however, the rule was not in existence at the time the original case was filed.

*Red Lion Broadcasting Company* operated radio station WGCB in Red Lion, Pennsylvania. The station carried a program called "Christian Crusade," hosted by the Reverend Billy James Hargis. During one of the broadcasts, Hargis discussed a book entitled *Goldwater—Extremist on the Right*, written by Fred J. Cook. Hargis said the book was designed "to smear and destroy Barry Goldwater." He also asserted that its author, Cook, had worked for a communist publication (*The Nation*), been fired from the *New York World Telegram* for making false accusations against a New York City official, sympathized with Alger Hiss and attacked the FBI and the Central Intelligence Agency.

WGCB refused to provide Cook with free air time in which to respond to the charges made by Hargis. The Commission viewed the station's decision as a violation of the fairness doctrine, and the Court of Appeals for the District of Columbia Circuit, after initially dismissing the case, upheld the Commission's position.

---

118 522 F.2d 1060, 1062 (1st Cir. 1975).
122 *Id.* at 371.
123 *Id.*
124 *Id.*, n.2.
125 *Id.* at 372.
In the RTNDA suit the news directors challenged the personal attack and political editorializing rules as an abridgement of free speech and free press. The Court of Appeals for the Seventh Circuit held the rules unconstitutional,\(^{127}\) causing a split on the intermediate appellate level on the question of the fairness doctrine’s constitutionality. The Supreme Court answered the constitutionality question in the affirmative. In writing the majority opinion, Justice White wrote:

> Believing that the specific application of the fairness doctrine in Red Lion, and the promulgation of the regulations in RTNDA, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional \(\ldots\)^{128} [W]e think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority.\(^{129}\)

The Court’s opinion indicated the Commission merely enforced congressional policy, and did not “[embark] on a frolic of its own.”\(^{130}\) To justify the Commission’s authority to make such regulations, the Court quoted the language of 47 U.S.C. § 303, which in pertinent part, states, the “‘Commission from time to time, as public convenience, interest, or necessity requires’ [may] promulgate ‘such rules and regulations and prescribe such restrictions and conditions \(\ldots\) as may be necessary to carry out the provisions of this chapter \(\ldots\)’”\(^{131}\)

Perhaps most important in light of recent developments in the controversy over the fairness doctrine\(^{32}\) is the Court’s careful scrutiny of the legislation intending to codify the doctrine. The opinion quotes the 1959 Amendment which includes broad language that has, through the Commission’s enhancement, become the fairness doctrine.\(^{133}\) The Court read the statute as announcing a “public interest” standard, and then asserted that “the amendment vindicated the F.C.C.’s general view that the fairness doctrine inhered in the public interest standard.”\(^{134}\) And in support of the doctrine’s congressional codification, rather than citing abuse of authority by the Commission, the opinion stated, “the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.”\(^{135}\)

### C. First Amendment Complications

The main thrust of the broadcasters’ argument against the fairness doctrine is that it violated their rights of free speech and press under the

---

\(^{127}\) RTNDA v. United States, 400 F.2d 1002 (7th Cir. 1968), cert. denied, 89 S. Ct. 631 (1969).

\(^{128}\) 395 U.S. at 375.

\(^{129}\) Id. at 385.

\(^{130}\) Id. at 375.

\(^{131}\) Id. at 379.

\(^{132}\) See infra p. 34.

\(^{133}\) See n. 62, supra.


\(^{135}\) Id. at 381-82, (footnote omitted).

Published by EngagedScholarship@CSU, 1989
First Amendment.\textsuperscript{136} In the third part of its opinion, the Court explicitly faced this issue: "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of news media justify differences in the First Amendment standards applied to them."\textsuperscript{137}

In crushing the broadcasters' contention, the Court observed, "[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . .\textsuperscript{138} Thus, there is an obligation on the part of broadcasters to act as a "fiduciary" with respect to the views of the community.\textsuperscript{139} "[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused."\textsuperscript{140}

To this end, the Court resurrected the scarcity argument, the time-honored rationale behind broadcast regulation in the late twenties. "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."\textsuperscript{141} Despite advancement in technology creating new frequency allocations, the Court held steadfast to its view that "[s]carcity is not entirely a thing of the past."\textsuperscript{142} Although frequency allocation has increased, "uses for that spectrum have also grown apace."\textsuperscript{143}

The Court's insistence on considering broadcast media different from other forms manifested itself again in \textit{Miami Herald Publishing Co. v. Tornillo}.\textsuperscript{144} Here, the Court struck down a state's "right-of-reply" statute which closely resembled the personal attack and political editorializing rules, but for its application to newspapers.\textsuperscript{145}

\begin{flushright}
\textsuperscript{136} \textit{Id.} at 386. \\
\textsuperscript{137} \textit{Id.} (citations omitted). \\
\textsuperscript{138} \textit{Id.} at 389. \\
\textsuperscript{139} \textit{Red Lion Broadcasting Co. v. F.C.C.}, 395 U.S. 369, 389 (1969). \\
\textsuperscript{140} \textit{Id.} \\
\textsuperscript{141} \textit{Id.} at 388. \\
\textsuperscript{142} \textit{Id.} at 396. \\
\textsuperscript{143} \textit{Id.} at 397. \\
\textsuperscript{144} 418 U.S. 241 (1974). \\
\textsuperscript{145} \textit{Id.} at 244-45, n.2. \\
\end{flushright}

[Fla. Stat. §] 104.38 [(1973)] \textit{Newspaper assailing candidate in an election; space for reply—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in [§ 775.082] or [§] 775.083.
Ironically, the Court also recognized a developing scarcity in the newspaper industry, yet it still managed to reach a conclusion opposite from Red Lion. "[T]he same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers have made entry into the marketplace of ideas served by the print media almost impossible." The Court was responding to the theory that anyone can start a newspaper as long as he or she has the financial resources, while the spectrum is limited. In fact, the economic reality of the newspaper publishing business has effectively foreclosed most from engaging in that enterprise and thus has created an environment resembling that of the broadcaster.

Nevertheless, according to the Court, government should not regulate editorial content. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." "A responsible press is an undeniably desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."

Thirteen years after Miami Herald and two decades since Red Lion, the number of newspapers in the United States is still declining while advancement in broadcast technology continues to create new channel capacity. The double standard announced by the Court several years ago is now outdated, and in need of serious rethinking. Perhaps this is the reason Justice White in the majority opinion left open the possibility of change: "And if 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."

PART III

A. The Doctrine at Death's Door

On October 20, 1981, two bills were introduced into Congress to deregulate broadcasting. H.R. 4780 was designed to "modify requirements under the fairness doctrine applicable to broadcasters," while H.R. 4781 would have repealed the equal opportunity rules. These changes would have eliminated the requirement of carrying out the obligation specified in the [Communications Act of 1934], to permit any person desiring to present conflict-

146 Id. at 251 (footnote omitted).
147 Id. at 258.
148 Id. at 256.
151 H.R. 4780 at 1.
152 H.R. 4781.
ing views on issues of public importance to use the broadcast station facilities upon terms and conditions which are different from the terms and conditions made applicable by such broadcasters to other persons presenting their views on such issues.\textsuperscript{155}

This bill, in effect, would release broadcasters from the obligations of giving free time to respond to a controversial paid advertisement, which was the situation in the \textit{Banzhaf} case.

The justification statement for H.R. 4781 claimed that Section 315 imposed a “hierarchy of speech values which unnecessarily and impropervly restricts the discretion of broadcasters in fulfilling their public interest obligations and journalistic responsibilities.”\textsuperscript{154}

One of the principal figures responsible for stopping this legislation from becoming law was Representative John Dingell of Michigan. Dingell serves as chairman of the House Energy and Commerce Committee, and in testifying before the Telecommunications Subcommittee, he said the efforts to abolish the fairness doctrine and equal opportunity rules clearly indicate that “deregulation fever has reached epidemic proportions.”\textsuperscript{156}

In response to the argument that the broadcasting industry no longer experiences spectrum scarcity in light of advancing technology, Dingell countered:

\begin{quote}
[A] tremendous new diversity in video resources is on the horizon, but the availability of new technologies is still a tantalizing promise to the overwhelming majority of our citizens. And I would point out that many of the same people who seek relief from the equal time and fairness doctrines will be those who will own and control these new technologies and one must question how there will be any significant increase in diversity or any assurance that all views will be fairly presented.\textsuperscript{156}
\end{quote}

Dingell added that he realized broadcasters would be unhappy with his stance, but, he said, scarcity would continue, and the public would continue to need the protection of the fairness doctrine and equal opportunity provision. He subscribes to the philosophy that free and open discussion is essential to democracy, and that protecting discussion is the responsibility of the government.\textsuperscript{157}

Representative James Collins of Texas, the prime sponsor of H.R. 4780 and H.R. 4781, defended his bills by saying they would remove significant regulatory burdens from broadcasters.\textsuperscript{158} He believed it was unfair for

\begin{thebibliography}{10}
\bibitem{153} H.R. 4780 at 1, 2.
\bibitem{155} \textit{Id.} at 64.
\bibitem{156} \textit{Id.}
\bibitem{157} \textit{Id.} at 65.
\bibitem{158} \textit{Id.} at 71.
\end{thebibliography}
broadcasters to provide free air time to someone who wished to respond to a controversial viewpoint expressed in a commercial or some other form of paid programming. As for the equal opportunity rules, Collins argued that the broadcaster should be allowed to use his own judgment in deciding to air programs where political candidates appear. Collins was convinced that in the "competitive information services market...all candidates will be able to find outlets on which to express their opinions."

In October 1983, Senator Robert Packwood of Oregon, chairman of the Senate Commerce Committee and long-time broadcasting advocate, introduced legislation that would repeal both the fairness doctrine and the equal opportunity rules. The bill, labeled the Freedom of Expression Act, faced considerable opposition in Congress and eventually fell to defeat. Yet with the machinery in Congress beginning to move in the direction of deregulation, the Commission seized the opportunity to use the momentum in its favor.

It was no secret that former Commission Chairman Mark Fowler, a Reagan appointee, strongly supported deregulation of the broadcasting industry. Fowler had often asserted that the television industry owed no debt of social responsibility for using the airwaves, in fact according to Fowler, "television is just another appliance. It's a toaster with pictures." Consequently, it came as no surprise when Fowler's Commission issued a Notice of Inquiry in 1984 designed to "reassess the wisdom of applying general fairness doctrine obligations to broadcast licensees."

The Notice came in the wake of a Commission proposal a year earlier to repeal both the personal attack and political editorializing rules since they appeared "contrary to First Amendment precepts." The rationale relied upon by the Commission sounded much the same as that touted by deregulation advocates in Congress and the broadcasting industry.

A preliminary analysis indicates that significant new developments and changes in the electronic and print media over the past decade have contributed to an extremely dynamic, robust, and diverse marketplace of ideas that may call into question the continued necessity of the doctrine as a means of ensuring the attainment of First Amendment objectives.

After a year of hearings on the matter the Commission decided as a policy matter the fairness doctrine no longer serves the public interest. The study had uncovered several problem areas, and although the Commission clearly favored repeal of the doctrine, it recognized:

[T]here are viable arguments on both sides of the issue concerning whether or not the doctrine is codified, that various

159 Hearing, supra note 154, at 71.
160 Id. at 72.
legislative proposals concerning the doctrine are before Congress and the Congress has expressed intense interest in the doctrine, [therefore] the Commission chose not to eliminate or alter the fairness doctrine.\textsuperscript{166}

Nevertheless, the Commission offered the results of its study to Congress to give it the "opportunity to review the doctrine in light of the record compiled."\textsuperscript{167}

The report attacked the constitutionality of the fairness doctrine. Although it had been upheld since \textit{Red Lion}, "the constitutional permissibility of the fairness doctrine [was] predicated upon a factual presumption that the doctrine has the effect of enhancing the coverage of controversial issues available to the viewing and listening public."\textsuperscript{168}

What the Commission study found was, in fact, the opposite result.\textsuperscript{169} Broadcasters viewed the doctrine as burdensome and consequently sought mostly to avoid its application altogether. In doing so, stations avoided airing controversial issues of public importance.\textsuperscript{170} The effect of this was obviously that the fairness doctrine was undermining itself and, in the process, undermining the First Amendment. Through negative enforcement, broadcasters were programming to avoid governmental interference. Accordingly, the fairness doctrine, instead of promoting the interest of the First Amendment, ran contrary to the relationship between government and media envisioned by the founders of the republic. "The framers of the First Amendment proscribed the government from placing its official imprimatur on any particular viewpoint; they presumed that the marketplace of ideas would flourish best without the necessity or danger of governmental intervention."\textsuperscript{171}

Perhaps the most significant aspect of the Commission's report, was the controversy surrounding codification. A legitimate dispute exists about whether the language in Section 315(a) was actually intended to embody the fairness principle of the Commission. "[O]pponents... argue that if Congress had intended this language to codify the fairness doctrine, it would have made its intent clear, as it has done in many other enactments."\textsuperscript{172}

The Court of Appeals, in dicta, in a case to determine the applicability of broadcast regulation to teletext, found no evidence of congressional intent to codify the fairness doctrine.\textsuperscript{173} In examining the 1959 Amendment to the Communications Act, the Court disagreed with the petitioner's suggestion that the language in Section 315 amounted to codification of the doctrine.

We do not believe that language adopted in 1959 made the fairness doctrine a binding statutory obligation; rather, it ra-
tified the Commission's longstanding position that the public interest standard authorizes the fairness doctrine. 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.\textsuperscript{174}

As further support for this position, the court focused on the amendment's speaking to an obligation imposed "under the Act." The suggestion was made that this phrase, as opposed to "by the Act," clarified Congress' intention that the doctrine was effected by authority conferred under the Act rather than a specific provision in the Act.\textsuperscript{175} The decision paved the way for the Commission to abolish the doctrine because the force of the fairness doctrine rested with Commission authority rather than congressional enactment. The mechanism through which the Commission could abolish the doctrine also came from the District of Columbia Circuit in Meredith Corp. v. F.C.C.\textsuperscript{176}

Meredith was an appeal from a Commission finding that Meredith Corporation's television station WTVH of Syracuse, New York violated the fairness doctrine in 1982 when it broadcast three commercials sponsored by the Energy Association of New York.\textsuperscript{177} The controversy stemmed from allegations made within the advertisements that a nuclear power plant was a "sound investment for New York's future."\textsuperscript{178} Syracuse Peace Council challenged the lack of opposing viewpoints.\textsuperscript{179}

The Court remanded the case to the Commission for consideration of the argument that the doctrine was unconstitutional in general and as applied to Meredith Corporation.\textsuperscript{180} On remand the Commission abolished the fairness doctrine.\textsuperscript{181} The commission reported,

the doctrine's infirmity of impermissibly chilling and reducing the discussion of controversial issues of public importance is not an infirmity resulting from the enforcement of the doctrine in this particular case or in particular markets, but is an infirmity that goes to the very heart of the enforcement of the fairness doctrine as a general matter.\textsuperscript{182}

Consequently, the Commission used the broad sweep of free speech grounds to abolish a doctrine whose original intent was to promote diversity of opinion.

Syracuse Peace Council appealed the Commission's decision.\textsuperscript{183} The Court concluded the Commission's decision to abolish the fairness doc-

\textsuperscript{174} Id.
\textsuperscript{175} Id. at 518.
\textsuperscript{176} 809 F.2d 863 (D.C. Cir. 1987).
\textsuperscript{177} Id. at 865.
\textsuperscript{178} Id. at 866.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 874.
\textsuperscript{181} In re Complaint of Syracuse Peace Council, 2 F.C.C. 5043, 5057-58 (1987).
\textsuperscript{182} 2 F.C.C. at 5047.
\textsuperscript{183} Syracuse Peace Council v. F.C.C., 867 F.2d 654 (D.C. Cir. 1989).
trine was not "arbitrary, capricious nor an abuse of discretion." Therefore, once again, the court was able to purposely evade the constitutional issue.

The issue resurfaced in Congress in 1986 when the Commission was directed to examine alternatives to enforcing fairness. After the remand by the District of Columbia Circuit, then F.C.C. chairman Mark S. Fowler told members of the Senate Appropriations Subcommittee on Commerce, Justice and State the Commission would not decide the Meredith case until it reported to Congress on alternative measure of enforcement. That report was released on August 4, 1987, the very day the Meredith decision was handed down.

Prior to the doctrine's regulatory demise, the Senate passed S.742 codifying the fairness doctrine. The accompanying report concluded that scarcity of broadcast frequencies remains, and thus the Supreme Court's decision in Red Lion Broadcasting Co. v. F.C.C. is still good law. On June 3, 1987, the House passed similar legislation. Sixteen days later President Reagan vetoed S.742 saying, "[t]his type of content-based regulation by the Federal Government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment." The President opined that the fairness doctrine was unconstitutional. Instead of attempting override, the Senate referred the President's veto to the Commerce Committee.

Subsequent to the doctrine's repeal, Congress attempted passage once again. A few weeks before the Christmas recess in 1987, the House adopted a rider amendment to the fiscal 1988 omnibus appropriation bill. The amendment, sponsored by the Commerce Chairman Dingell, was dropped after President Reagan threatened an eleventh-hour veto.

**PART IV**

During its life, the fairness doctrine did not provide the public with an opportunity for access. The broadcaster might be sanctioned only after a
showing that the station reneged on its duty to cover controversial issues of importance to the community, or more commonly, if in the process of such coverage failed to present a balance of opposing viewpoints. Difficulty in enforcement rendered the doctrine ineffective. Nonetheless, broadcasters claimed the fear of FCC reprisal kept them from covering controversial issues (which, in itself, was enough to levy sanctions under the doctrine). Broadcasters argue this matter under the penumbra of the First Amendment, and there is where the solution to this problem is found.

Fairness complaints should arrive to the Commission and subsequently the courts with a strong presumption against validity. To mount a fairness case against a broadcast station, a complainant would be required to present clear and convincing evidence of a violation. The complainant must also provide the Commission with a detailed tracking of programming during the period of the requisite controversy. Such evidence would necessarily include proof that a controversial issue exists. For guidance, courts could look to the standard set forth in *Gertz v. Robert Welch, Inc.* wherein limited purpose public figure status does not attach without evidence of an existing public controversy. Moreover, if the station could show that avenues for access exist, such as outside editorials on some regular basis, the broadcaster would be entitled to summary dismissal of the complaint.

Presumptions in favor of the media are part of a long First Amendment tradition. In 1931, the Supreme Court ruled that prior restraints against the press are presumptively unconstitutional. To restrain publication or broadcast of information and thus overcome the presumptions, the government has to meet a heavy burden of proof.

A similar burden could be adopted in fairness doctrine cases because sanctions for not airing material are as heinous as restraints against publishing materials in the context of the First Amendment. In any event, all complaints not summarily dismissed for failure to meet the heavy burden of proof would be held for review by the Commission at the station's license renewal time. This method of reviewing fairness complaints would essentially free the broadcaster from defending its broadcast record during the license term. By placing a heavy burden on the complainant, this alternative would allow for expedient Commission dismissal of all but the most highly documented claims. Moreover, by holding valid complaints until the renewal process, the Commission can consider them in light of the station's overall public service record.

---

CONCLUSION

Whatever the outcome of the current attempts to legislate a fairness doctrine, ultimate enforcement rests with the Federal Communications Commission. The Commission's view toward prescribed fairness has been made clear over the past few years. Yet the discomfort with the doctrine by previous Commissions is shown by the inability to decide precisely how the doctrine should function in the broadcast marketplace. Most would agree that broadcasters should fairly cover controversial issues, yet not everyone can agree on a method for ensuring such coverage. The proposal outlined above gives broadcasters solace in knowing they occupy a preferred position while, at the same time, affords the audience a narrow spectrum of opportunity to correct deliberate and valid violations.