1-1-1988

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May It Rest in Peace: Public Interest and Public Access in the Post-Fairness Doctrine Era

by Richard E. Labunski*

Introduction

The broadcasting industry has been subject, almost from birth, to technical and content regulations imposed on no other media. The primary justification for federal regulation was the physical limitation of the electromagnetic spectrum, which can accommodate only a fixed number of frequencies. Because there are substantially more individuals who want to broadcast than frequencies to allocate, complex rules were developed that require those fortunate enough to be granted a license to operate in the public interest.1

For more than half a century, the “scarcity” rationale justified extensive governmental intrusion into broadcast journalists’ first amendment rights—a level of intrusion that would never be permitted if imposed on print organizations.2 In re-

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1. The “public interest” standard was first applied to broadcasting in the Federal Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927), and was incorporated in the Communications Act of 1934, 47 U.S.C. § 303 (1982 & Supp. III 1985). Section 18 of the Act empowered the Federal Radio Commission and its successor, the Federal Communications Commission, to act “as public convenience, interest, or necessity requires.” See infra note 251 (suggestion by an influential broadcasting trade journal that the public interest standard technically requires only the FCC, and not broadcasters, to operate in the public interest).

2. Shortly after Congress passed the Federal Radio Act, the Federal Radio Commission issued a statement advising licensees how to comply with the public interest standard. Statement Made by the Commission Relative to Public Interest, Convenience or Necessity, 2 F.R.C. Ann. Rep. 166 (1928). Other early regulatory policies and court decisions relating to content included: In the Matter of the Application of Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929) (clarifying the public interest standard in a comparative hearing proceeding); KFBK Broadcasting Association v. Federal Radio Commission, 47 F.2d 670 (D.C. Cir. 1931) (first judicial affirmation of the FRC’s right to consider a station’s programming when deciding whether or not to renew a license); Trinity Methodist Church, South v. Federal Radio Commission, 62 F.2d 850 (D.C. Cir. 1932) (upholding FRC decision of denial of license renewal because of objectionable programming); In the Matter of The
cent years, critics of the scarcity rationale have argued that the theory, which forces broadcasters to accept second-rate first amendment status, is obsolete because there is now a diversity of electronic media outlets. Proponents of deregulation argue that content regulations violate the Constitution, fail to serve their intended goals, and induce self-censorship. These proponents recommend that “marketplace” forces, not government, regulate the industry.

Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941) (statement interpreted by broadcasters as a ban on editorializing); In re United Broadcasting Co., 10 F.C.C. 515 (1945) (extending public interest requirements); In the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (clarifying Mayflower to permit editorializing, and definitively stating Fairness Doctrine obligations).

3. In Red Lion Broadcasting Co. v. FCC, the Supreme Court identified scarcity of resources, as well as other factors, in upholding regulations that affect the content of broadcasting programs. 395 U.S. 367, 376-77 (1969). The Court came to the opposite conclusion in a case involving a newspaper. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Some commentators, including a former FCC chairman, argue that Red Lion was not based on a scarcity rationale, and, therefore, changing conditions in the media marketplace, namely the increase in broadcast outlets, are irrelevant to content regulation. See Hyde, FCC Action Repealing The Fairness Doctrine: A Revolution in Broadcast Regulation, 38 Syracuse L. Rev. 1175, 1178-80 (1987). Although scarcity and diversity are largely policy and not legal principles, they have become an essential part of the case law related to the constitutional rights of broadcasters. If there is now diversity of electronic media, then the very foundation of broadcast regulation has been undermined, and all regulatory policies are vulnerable to attack. See Bolton, In Stark Contravention of Its Purpose: Federal Communications Commission Enforcement and Repeal of the Fairness Doctrine, 20 U. Mich. J.L. Ref. 799, 814-15 (1987). In FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984), the Supreme Court indicated a willingness to reconsider regulation of the industry in light of changing conditions. Justice Brennan wrote in a footnote that

[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity rationale is obsolete. 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.

Id. at 376-77 n.11.


5. For a detailed discussion of the marketplace theory by a former FCC chairman, see Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207 (1982). One of the few programming areas the Reagan administration’s FCC has not left to the marketplace is control of indecent programming. See In re Infinity Broadcasting Corp., In re Pacifica Foundation, Inc., In re Regents of
Of all the content regulations, the most despised by broadcasters and those proposing deregulation has been the Fairness Doctrine.\textsuperscript{6} Its deceivingly simple language does not suggest the controversy it provoked for forty years. The Doctrine imposed a two-pronged obligation: "Broadcast licensees are required to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."\textsuperscript{7}

\textsuperscript{6} The Fairness Doctrine is codified as a federal regulation. 47 C.F.R. §§ 73.1910, 76.209 (1987). Other content regulations, such as the personal attack rules, 47 C.F.R. § 73.1920, and political editorial rules, 47 C.F.R. § 73.1930, adopted in 1968, are subsections of the Fairness Doctrine. Personal attacks: "(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 . . . transmit to the persons or group attacked: (1) Notification of the date, time and identification of the broadcast; (2) A script or tape . . . of the attack; and (3) An offer of a reasonable opportunity to respond over the licensee's facilities." \textit{Id.} at § 73.1920 (a). The regulation allows exceptions for legally qualified candidates, foreign public figures, and attacks during bona fide newscasts, news interviews, and on-the-spot coverage of bona fide news events. \textit{Id.} at § 73.1920 (b). Political Editorials: "Where a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall . . . transmit to . . . other qualified candidate or candidates for the same office or the candidate opposed in the editorial . . . an offer of reasonable opportunity . . . to respond over the licensee's facilities." \textit{Id.} at § 73.1930. See Public Media Center v. FCC, 587 F.2d 1322 (D.C. Cir. 1978) (applying the Fairness Doctrine to ballot advertising). Related regulations include 47 U.S.C. § 315(a), the equal opportunity requirement: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate." \textit{See} Branch v. FCC, 824 F.2d 37 (D.C. Cir. 1987) (upholding constitutionality of the equal-time rules); 47 U.S.C. § 312(a)(7) (revocation of station license for failure to give "reasonable access" to federal candidates). \textit{See also In re} Request by Nicholas Zapple, Communications Counsel, Comm. on Commerce, 23 F.C.C.2d 707 (1970) [hereinafter Zapple] (applying equal time rules to appearances of supporters of candidates); Letter from Ben F. Waple, Secretary, to Cullman Broadcasting Co., 40 F.C.C. 576 (1963) [hereinafter Cullman] (creating the Cullman Doctrine, which requires broadcasters to present opposing views when a controversial issue of public importance is presented in sponsored programming).

The goal of the Fairness Doctrine was to provide diversity of opinion on controversial subjects by requiring broadcasters to ascertain what issues are important in their community and to air differing viewpoints on programs dealing with those issues. The Doctrine's constitutional basis was the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . .".

The Federal Communications Commission (FCC) abolished the Fairness Doctrine on August 7, 1987. For much of its history, the Fairness Doctrine was treated like an illegitimate child no one wanted. Broadcasters, who viewed it as a symbol of their second-rate first amendment status, either ignored or vilified it. The FCC enforced it unevenly or not at all, while

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Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974) [hereinafter 1974 Fairness Report], provided a slightly different summary of the Fairness Doctrine:

Stripped to its bare essentials, the Fairness Doctrine involves a two-fold duty: (1) the broadcaster must devote a reasonable percentage of broadcast time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.

Id. at 7. It is significant that in each report, the Commission referred to a single Fairness Doctrine with dual obligations, rather than separate policies. This issue became important when the Commission eliminated the Fairness Doctrine, and some argued that the part one requirement should have been retained. See Syracuse Peace Council, Memorandum Opinion and Order, 2 F.C.C. Rcd. 5043, at paras. 33-35.

8. An important principle in the public interest standard is "localism," namely that broadcasters must air programs dealing with the issues in their community. See National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Today, the relationship between networks and their affiliates undermines the principle of localism. See Nader & Riley, Oh, Say Can You See: A Broadcast Network for the Audience, 5 J.L. & POL. 1, 48 n.246, 55 n.292 (1988). Also note that the Doctrine implicitly requires broadcasters to ascertain what issues are important in their community.

9. Red Lion, 395 U.S. at 390. Krattenmaker and Powe attack the notion that the first amendment can be applied this way: "No principle could be more at odds with the bulk of first amendment jurisprudence, for it would justify any governmental rule that told a speaker what to say on the ground that the government had determined the public should hear it." Krattenmaker & Powe, supra note 4, at 155.


11. Broadcasters' criticism of the Doctrine was often hyperbolic, for the FCC granted them wide discretion in fulfilling the Doctrine's requirements. For example, the Commission almost always accepted the licensee's assertion that it made a "reasonable" effort to present contrasting viewpoints even when it was unsuccessful in doing so. Since 1981, the FCC has upheld only one out of the tens of thousands of Fairness Doctrine complaints filed against broadcasters and sustained that complaint only to provide a test case for challenging the constitutionality of the doctrine. Bolton, supra note 3, at 820-21 n.97. See Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir.
Congress, which claimed parentage based on the assumption that the Doctrine had been codified into statute in a 1959 amendment to the Communications Act, insisted that the FCC enforce it.\textsuperscript{12}

Few public policy or constitutional questions are more important or perplexing than how to regulate the industry which sixty to seventy percent of the American people claim is their primary source of news.\textsuperscript{13} The prominent role broadcasting has assumed in disseminating information could hardly have been envisioned by its pioneers.\textsuperscript{14} At the same time that over-the-air broadcasting has prospered and new technologies, such as cable, have provided more outlets for information, the newspaper industry has undergone changes resulting in increased concentration of ownership and the closing of newspapers in several major cities.\textsuperscript{15} Continued regulation of broadcasting in a changing media marketplace, while no simi-

\textsuperscript{12} The FCC has occasionally enforced the Fairness Doctrine with a vengeance, making all the clearer the difficulty of enforcing the Doctrine without violating the first amendment rights of broadcasters. In Brandywine-Main Line Radio, 24 F.C.C.2d 2218 (1970), aff'd, Brandywine-Main Line Radio v. FCC, 473 F.2d 16 (D.C. Cir. 1972), the FCC revoked the license of Philadelphia radio station WXUR for deviating from promises to obey the Fairness Doctrine by airing one-sided religious programs. WXUR has the dubious honor of being the only station to lose a license primarily on Fairness Doctrine grounds. In In re Complaint of Accuracy in Media Against National Broadcasting Co., 44 F.C.C.2d 1027 (1973), the FCC upheld a complaint against the NBC television network that it had failed to properly balance a documentary on private pension plans. The FCC was reversed in National Broadcasting Co. v. FCC, 516 F.2d 1101 (D.C. Cir. 1974). The case represents the most startling misuse of the Fairness Doctrine and demonstrated the Doctrine's fundamental constitutional flaws. See generally F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT 142-66 (1977).

\textsuperscript{13} Television Information Office/Roper, America's Watching: Public Attitudes Toward Television (1987) (The report states that 66% of Americans mention television as a main news source, compared to 36% who mention newspapers, 14% who cite radio, and 4% who say magazines. Id. at 4.).

\textsuperscript{14} As of February 20, 1989, there were 11,626 radio stations and 1,675 full-power television stations operating in the United States. In addition, there were 1,814 low-power television stations, and 8,000 cable TV systems serving nearly 49 million subscribers. By the Numbers, BROADCASTING, Feb. 20, 1989, at 12.

\textsuperscript{15} In 1982, only 35 cities were served by two or more competing daily newspapers. In contrast, very few American cities have only one radio or television station. Fowler & Brenner, supra note 5, at 225 n.82. The comparison to newspapers is appropriate because those who argue that there is no longer scarcity in broadcasting point to the newspaper industry, with only 1,735 daily papers, as an example of real scarcity.
lar regulations apply to newspapers, raises important and difficult issues.

The Fairness Doctrine was not subject to more exacting judicial scrutiny because the scarcity rationale underlying regulation of the industry was thought sufficient to justify the application of lower standards for measuring constitutionality. Yet, as the scarcity rationale is undermined, it is increasingly difficult to argue for retaining the Fairness Doctrine on either constitutional or policy grounds. That the Fairness Doctrine is impossible to comprehensively enforce, and violates constitutional rights when it is applied, makes the argument for abolition stronger. If the scarcity rationale is obsolete, it is unlikely that the government will be able to demonstrate a compelling need for such a restriction on first amendment rights.

The “scarcity-diversity” question is, however, more complex than proponents of deregulation are willing to concede. While there may be “macro” diversity in the aggregate number of


Because the first amendment is in a “preferred position,” any law restricting free speech must be justified by a compelling governmental interest. For development of the “preferred position” theory, see Thomas v. Collins, 323 U.S. 516, 530 (1945) (presumption supporting legislation must be weighed against preference given to freedoms of the first amendment); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (it is immaterial that ordinance is nondiscriminatory because first amendment rights stand in preferred position and cannot be easily restricted); Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) (noting that the Constitution places freedom of expression in a preferred position), vacated, 319 U.S. 103 (1943) (per curiam) (reaffirming reasoning in Murdock); United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938); Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (stating that freedom of expression is essential to all other freedoms). See generally R. Labunski, Libel and the First Amendment: Legal History and Practice in Print and Broadcasting (1987).

17. In Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), Judge Bork wrote: “Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.” Id. at 508.
communication outlets, there is still "micro" scarcity in that only one broadcaster at a time occupies a frequency. Without some content regulation or mandated access, a licensee given exclusive use of a valuable channel could exclude all viewpoints with which it does not agree. While a broadcaster must make a commitment to serve the public interest, which presumably would not be served by partisan use of a frequency, such a standard is so loosely defined that only the most egregious noncompliance would result in FCC sanctions.

Scarcity, therefore, is not dead, and while past content regulations have not been effectively enforced, it does not follow that broadcasters' use of a limited public resource should be completely unregulated.

No new Fairness Doctrine, no matter how creatively written, will be able to achieve its stated goals. If Congress were to pass a new Fairness Doctrine, it would inevitably become mired in the constitutional and policy issues that plagued the original Fairness Doctrine throughout its forty-year history. The question of how to require broadcasters to serve the public interest by presenting contrasting viewpoints on controversial issues, without violating their first amendment rights, has never been, and cannot be, satisfactorily answered.

Even if the constitutional obstacles could be overcome, the FCC would still be unable to successfully enforce the Doctrine. With its relatively small budget and staff, the FCC is not only concerned with broadcast programs, but also regulates the entire electromagnetic spectrum, all interstate tele-

18. Proponents of the "marketplace" theory argue that if there is strong public demand for balanced news and public affairs programming, broadcasters would always provide programs on important community issues, even in the absence of FCC requirements. See Dyk, Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer, 5 YALE J. ON REG. 299, 317 (1988). Some evidence suggests that deregulation has negatively affected news and public affairs programming. See Stone, RTNDA Communicator, Apr. 1987, at 9.

19. See National Ass'n of Indep. Television Producers & Distributors v. FCC, 516 F.2d 526 (2d Cir. 1975) (holding that allowing broadcasters to determine what constitutes the public interest poses an inherent conflict of interest).

20. The Communications Act specifically prohibits the government from imposing censorship: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications." 47 U.S.C. § 426 (1987).
phone and telegraph service, all American satellites, and all the technical operations of its broadcast licensees. With so many radio and television stations broadcasting hundreds of news and public affairs programs each year, it is impossible for the FCC to regulate the industry except by singling out for punishment on an ad hoc basis an extremely unlucky broadcaster whose transgressions are so egregious that they result in sanctions.\footnote{21}

The solution to accommodating both the broadcasters' and the public's rights may lie not in any of the traditional arguments either for or against content regulations, but in a new approach. This Article proposes a regulatory scheme by which Congress would amend the Communications Act to grant those denied a license access to the public airwaves for one hour per week to present contrasting points of view on important issues and to criticize the performance of the incumbent broadcaster. Such a forum currently does not exist.\footnote{22}

Broadcasters, in return for surrendering control for one hour per week of their frequencies, will be granted, on an experimental basis, full first amendment parity with print journalists during their allotted time period. This accommodation of interests will give broadcasters the freedom they have long sought, while still recognizing the public's interest in maintaining access to a limited resource.\footnote{23}

\footnote{21. See Krattenmaker & Powe, supra note 4, at 164; Chamberlin, Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard, 60 N.C.L. REV. 1057 (1982).}

\footnote{22. Although developed independently, this proposal shares some characteristics with Ralph Nader's "Audience Network," a non-profit membership organization that would be granted one hour of prime-time television and one hour of drive-time radio on every commercial station each day. Audience Network would also represent broadcast consumer interests before the FCC, Congress, and the courts. See Nader & Riley, supra note 8. When compared with Nader's Audience Network, the proposal in this Article is much more modest in nature, beginning, for example, with one hour per week, as opposed to one hour each day. See infra text accompanying notes 296-312.}

\footnote{23. In several non-first amendment areas, broadcasters have already won substantial victories against the FCC. The Commission, for example, increased the number of stations that any one broadcaster could own from seven AM, seven FM, and seven TV, to twelve AM, twelve FM and twelve TV, provided that their signals do not reach more than 25 percent of all households. 47 CFR § 73.3555(d)(1)-(2) (1987). Congress increased the length of the license terms from three years for both radio and TV, to five years for TV and seven years for radio. 47 U.S.C. § 307(c) (West Supp. 1988). The Commission also repealed the rule that required broadcasters to keep their licenses for at least three years before selling their stations, to prevent "trafficking" of broadcast properties. Amendment of the Commission's
Part I of this Article traces the development of the Fairness Doctrine and other content regulations. Part II describes how the Fairness Doctrine has been interpreted and applied by the Federal Communications Commission and the courts. Part III examines the FCC reports and court cases that led to the demise and abolition of the Fairness Doctrine. Part IV considers the regulatory environment in the post-Fairness Doctrine era. Part V, which fully explains the above proposal, suggests changes in the Communications Act that would allow access to the public airwaves by those who do not have a broadcasting license. The Article concludes that, after sixty years of regulating broadcasting, no workable method has yet been found which accommodates the public’s interest in a scarce resource while respecting the first amendment rights of broadcasters.

I

Evolution of the Fairness Doctrine

The Fairness Doctrine began as vague language related to the public interest standard in the Radio Act of 1927,24 which was carried forward verbatim to the Communications Act of 1934.25 The public interest standard of the Act evolved following enactment of the Radio Act through statements and rulings by the Federal Radio Commission (FRC). In a 1929 decision,26 the FRC discussed the broadcasters’ obligation to

24. Pub. L. No. 69-632, 44 Stat. 1162 (1927). The Doctrine’s genesis is found in § 9: “The licensing authority (FRC), if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore a station license provided by this Act.” Section 11 stated that a license should be renewed if the broadcasters had served the “public interest.” Section 18 was the equal time provision that was transferred to the Communications Act of 1934. Section 29, which became § 326 of the Communications Act of 1934, denied the FRC the “power of censorship over radio communications,” and provided that “no regulation . . . shall interfere with the right of free speech by means of radio communications.” 47 U.S.C. § 326 (1982 & Supp. III 1985). The FRC considered the public interest standard to include the presentation of balanced programming. See 1 F.R.C. Ann. Rep. 159 (1927); 2 F.R.C. Ann. Rep. 166 (1928) (FRC discusses the public interest standard).


provide equal time to political candidates, as set forth in section 18 of the Act.27 The FRC noted:

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. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussion of issues of importance to the public.28

In 1940, the FCC, as the FRC’s successor, further defined the fairness requirement in In the Matter of Mayflower Broadcasting Corporation.29 In finding that a broadcaster violated the public interest standard by presenting editorials only on issues and candidates he supported, the FCC used language that broadcasters interpreted as an absolute ban on editorializing.30

The requirement that broadcasters present programs dealing with controversial issues was developed in In re United Broadcasting Company.31 In that case the Commission held

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27. The FRC noted that in § 18 the Act stated that “no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.” Federal Radio Act of 1927, supra note 1.

28. Great Lakes Broadcasting Company, 3 F.R.C. Ann. Rep. at 33. To enforce this “fairness” requirement, the FRC required broadcasters to keep detailed logs that included information about the political backgrounds of those who appeared on radio programs, and the subjects of the broadcasts. 5 F.R.C. Ann. Rep. 96 (1931). The FRC reviewed the logs at the time of license renewal to monitor the program performance of stations. The logging requirements were ended in 1981 as part of the deregulation of radio. See In re Deregulation of Radio, 84 F.C.C.2d 968 (1981).

29. 8 F.C.C. 333 (1940).

30. The Commission wrote:

[T]he public interest can never be served by a dedication of any broadcast facility to the support of [the broadcaster’s] own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

Id. at 340.

Because the radio station had discontinued the practice of editorializing, and for other reasons, the FCC renewed the station’s license. In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Supreme Court struck down provisions in the Public Broadcasting Act of 1967 that prohibited any noncommercial educational broadcasting station that received funds from the Corporation for Public Broadcasting to engage in editorializing.

31. 10 F.C.C. 515 (1945).
that the refusal of an Ohio radio station to sell time to groups that wanted to discuss race, religion or politics was "inconsistent with the concept of the public interest."  

The Doctrine in its modern form became an FCC policy in 1949. The Commission became concerned that broadcasters had overreacted to Mayflower and misunderstood their responsibilities to serve the public interest. The confusion was understandable because, while the Commission mandated that broadcasters cover important issues and present balanced reporting of such issues, it also prohibited them from advocating positions in editorials. These and other problems led to the Commission's report in In the Matter of Editorializing by Broadcast Licensees that firmly established the Fairness Doctrine as FCC policy.

The Editorializing report reversed the Mayflower decision by holding that broadcasters could editorialize. The FCC considered advocacy to be "just one of several types of presentation of public issues." More importantly, the Commission also specifically reaffirmed the public interest standard in the Communications Act that required broadcasters to present balanced coverage of important issues.

Ten years later, Congress amended section 315 of the Communications Act to exempt newscasts from the equal time pro-

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32. Id. at para. 6. The part one requirement of the Fairness Doctrine has rarely been invoked by the Commission. See Complaint of Patsy Mink, Environmental Policy Center and O.D. Hagedon v. WHAR, 59 F.C.C.2d 987 (1976), discussed infra text accompanying notes 137-48.


34. Id.

35. Id. at paras. 11-17.

36. Id. at para. 14. The Commission added:

We do not believe that programs in which the licensee's personal opinions are expressed are intrinsically more or less subject to abuse than any other program devoted to public issues. . . . Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

Id.

37. The report held that broadcasters have "an affirmative responsibility . . . to provide a reasonable amount of time for the presentation . . . of programs devoted to the discussion and consideration of public issues . . . ." Id. at para. 7. It further held that the public has a "paramount right . . . to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues . . . ." Id. at para. 6.
visions and included language which seemed to codify the Fairness Doctrine.

II
Implementation of the Fairness Doctrine

Although it created the Fairness Doctrine, the Commission found it difficult to develop standards by which to evaluate whether broadcasters were fulfilling their fairness obligations. Eventually, formal and informal rules and practices developed that revealed the Commission's uneasiness in strictly enforcing the Doctrine. The FCC largely ignored the Fairness Doctrine for long periods of time, then suddenly used it to strip the license of a broadcaster with a poor record of public service, and applied it under the wrong circumstances in attempting to correct what it perceived to be "imbalances" in a network documentary. The result has been a policy that satisfies neither broadcasters nor those who want the industry to be closely monitored and regulated.

The Fairness Doctrine's bark, when it was heard at all, was much worse than its bite. A literal reading of the Doctrine could lead to the conclusion that it was a serious menace to broadcasting. The image conveyed was that of a federal agency which, after evaluating the programs of thousands of

38. Unlike the Fairness Doctrine, which applies to a broadcaster's overall programming and allows substantial discretion in how its obligations are to be fulfilled, the equal time provisions relating to political campaigns impose strict requirements that include a one-to-one balance of airtime for candidates. The 1959 amendment exempted from § 315 an appearance by legally qualified candidates on any: (1) bona fide newscast; (2) bona fide news interview; (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto). Pub. L. No. 86-274, 73 Stat. 557 (1959).

39. Following the changes to the equal time provision was the following paragraph: "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentations of newscasts, news interviews, news documentaries, and on-the-spot news 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." Id.

40. See Krattenmaker & Powe, supra note 4, at 157-62.

41. See Bolton, supra note 3, at 812-25.

42. Id. at 820-25 & nn.94-97.


44. See NBC v. FCC, 516 F.2d 1101 (D.C. Cir. 1974).
radio and television stations, ordered nervous broadcasters to correct perceived programming imbalances based on government-imposed standards of fairness. The potential sanctions available to the FCC, including the most serious penalty of license revocation, were thought by some to induce timidity and self-censorship.

Apparently because the Commission disliked the Fairness Doctrine, it gave broadcasters substantial discretion in fulfilling its requirements. Broadcasters usually needed to do nothing more than assert that they made a "reasonable" effort to comply. A 1964 FCC report, called the "Primer," outlined the procedures to be followed by a party bringing a Fairness Doctrine complaint and effectively ensured that all but a few complaints would be dismissed. According to the Primer, the complainant was 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 had 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 first and third requirements were easily satisfied. The second, however, was more difficult for the complainant than it may first appear because the Commission accepted a broadcaster's response that a program was neither controversial nor a matter of public importance, unless there was evidence that the broadcaster's determination was arbitrary or capricious. As long as the broadcaster made a good-faith judgment that the issue was not controversial, the FCC usually accepted that decision.

45. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,415, 10,416 (1964). Prior to the "Primer," the Commission considered Fairness Doctrine complaints only at license renewal time. The Primer stated that the FCC would consider complaints from the public at the time of the broadcast. Id.

46. Id. Approximately 99% of Fairness Doctrine complaints are rejected outright because the complainant did not provide the necessary information. D. PEMBER, MASS MEDIA LAW 591 (1987).

47. See infra notes 131-32 and accompanying text.


49. One observer wrote that only when the "station's position is so 'off the wall' that no reasonable person could accept it" will the FCC question the broadcaster. F. ROWAN, supra note 47, at 65. For example, in 1980, the FCC requested only 28
The fourth and fifth requirements were the most difficult for the complainant because the Fairness Doctrine did not apply to a particular program, but rather to a broadcaster's overall programming. Thus, to satisfy requirement five, the complainant would either have to know, or learn from the licensee, whether the licensee had ever presented, or was going to present, contrasting viewpoints on the issue.\textsuperscript{50} Considering the burdens placed on a viewer or listener who attempted to bring a Fairness Doctrine violation to the attention of the Commission, it is remarkable that any complaint was upheld. Despite the obstacles that had to be overcome, broadcasters argue that the Fairness Doctrine presented a dangerous threat to their industry.

The Fairness Doctrine has not been used to strip broadcasters of their licenses.\textsuperscript{51} In only one case has the Fairness Doctrine formed the basis for revocation of a license,\textsuperscript{52} and even then the court tried to avoid the constitutional issues by holding that "misrepresentations" to the Commission about how the licensee would fulfill its fairness obligations, rather than violation of the Doctrine itself, led to the revocation. Those few who have lost licenses have been guilty of other serious transgressions.\textsuperscript{53}

\textsuperscript{50} See In re Complaint of Diocesan Union of Holy Name Societies, 43 F.C.C.2d 548 (1973) (N. Johnson, Commissioner, dissenting) (suggesting that complainant must do extensive monitoring of the station to bring a successful Fairness Doctrine complaint). See also In Re Complaint of Accuracy in Media, Inc., 44 F.C.C.2d 958, 960 (1973) (NBC, in responding to a fairness complaint against a documentary, told the Commission that it had "formulated no definite plans to present further programming related to the subject [private pension plans] . . . in the future." Id. at 967).

\textsuperscript{51} For example, out of the tens of thousands of Fairness Doctrine complaints filed with the Commission in the period 1982-1986, only twenty-four cases made it to the appeals process at the Commission, and only one was decided against the broadcaster, largely for the purpose of providing a test case for challenging the doctrine in court. See Bolton, supra note 3, at 820. See generally F. Rowan, Broadcast Fairness: Doctrine, Practice, Prospects (1984); S. Simmons, The Fairness Doctrine and the Media (1978); L. Powe, Broadcasting and the First Amendment (1987).


\textsuperscript{53} The Commission has denied license renewal for a station's abdication of control over programs, In re Application of Trustees of the Univ. of Pa., WXPN (FM), 71 F.C.C.2d 416 (1979); for persistent violation of operating rules, In re Applications of United Television, 53 F.C.C.2d 416 (1975); and for not carrying network programs to insert local advertising and thereafter misrepresenting this conduct to the FCC,
The FCC has been reluctant to strip incumbent broadcasters of their licenses because of the severe economic ramifications of such an action. Broadcasters claim that license revocation creates instability and uncertainty in the industry. Because investment in a station is high, broadcasters must expect license renewal except in the most unusual cases. The FCC has re-


For cases in which the FCC refused to renew a broadcaster’s license for serious violations of the Commission’s rules, see, e.g., Federal Radio Commission v. Nelson Brothers, 289 U.S. 266 (1933); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) (upholding decision to deny license to applicant whom the Commission found to be unqualified financially); FCC v. WOKO, 329 U.S. 223 (1946) (upholding decision of FCC to deny license to station that had concealed the identity of a major stockholder who was trying to secure affiliation with the CBS Radio Network for the station). The FRC refused to renew licenses in the early days of radio on the basis of content. See Trinity Methodist Church, South v. Federal Radio Commission, 62 F.2d 850 (D.C. Cir. 1932) (court of appeals upheld FRC’s decision not to renew license of a station whose owner broadcast attacks against religious and governmental institutions). Compare Near v. Minnesota, 283 U.S. 697 (1931) (holding that prior restraint will be permitted only under the most limited circumstances) with KFBK Broadcasting Ass’n v. Federal Radio Commission, 47 F.2d 670 (1932) (upholding denial of license renewal to Kansas doctor who used station as part of his practice by diagnosing and treating medical cases from letters sent to the station).

54. Fowler & Brenner, supra note 5, at 209, 212. Termination of a broadcast license is economic and constitutional capital punishment, and must be reserved for only the most serious cases. Broadcasting properties have become so valuable that removing the license of a good-sized station may be the equivalent of imposing a fine as large as hundreds of millions of dollars. In most cases, the punishment seemingly exceeds the crime.

Although broadcasters do not own their licenses, when they sell their stations, the sale is always contingent upon the FCC approving the license transfer, which it almost always does. Thus, a broadcaster has free, exclusive use of a public resource which may be worth millions of dollars. When sold, the broadcaster keeps the profits. See infra notes 245-50 and accompanying text.

55. Justice Frankfurter wrote in 1940:

It is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of “public convenience, interest or necessity.”


Under the Communications Act, broadcasters acquire no ownership rights to their frequencies. 47 U.S.C. §§ 301, 209(h)(1) (1982). They are licensed for a fixed period of time—seven years for radio and five years for TV—after which they must seek renewal of that license on the basis of their record of serving the public interest. 47 U.S.C. § 307(c) (1982) (license renewal); §§ 303, 307(a) (1982) (public interest standard). The process by which broadcasters have their licenses renewed has been the
sponded to broadcaster pressure on comparative renewal by

subject of much controversy. Although the Communications Act does not require the FCC to favor existing licensees over challengers, the industry's renewal record is almost perfect. It is virtually impossible for a challenger to win the license of an incumbent broadcaster. No television station has ever lost a license on comparative grounds. In Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), the U.S. Court of Appeals upheld the Commission's decision to award the license of WHDH-TV in Boston to a competing applicant. While the issue of who was to operate the station had been clouded because four mutually exclusive applications were filed in 1954, one reason for the decision to award the license to a competing applicant was improper ex parte contacts between a station employee and the chairman of the FCC. As a result, the station was stripped of any advantage of incumbency. Id. at 845. In the last forty years, only two television broadcasters have lost licenses through petitions to deny. See Office of Communication of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969), discussed infra notes 84-105 and accompanying text; and Alabama Educational Television Commission, 50 F.C.C.2d 461 (1975) (both cases involved overt racial discrimination on the part of the stations).

When a challenger seeks the license of an incumbent broadcaster, the Commission is supposed to compare the promises of the challenger with the record of the incumbent in a comparative renewal proceeding. However, in 1965, the Commission, recognizing that those seeking licenses made programming promises they could not keep, decided that, except in unusual circumstances, it would not consider proposed programming by new applicants as a basis for preferring one applicant over another. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 397 n.9 (1965). To save time, the Commission has developed its own standards by which it grants "renewal expectancy" (virtually assuring renewal) to a broadcaster if during the past license period it has broadcast some minimum amount of programming "responsive to community needs and interests" and if they have not committed a serious violation of Commission rules. In the past, the Commission counted the quantity of news, public affairs, and other informational programming in determining renewal expectancy. In 1984, the Commission changed the standard from the absolute quantity of informational and local programming, to the nature of programming that has been responsive to the problems, needs, and interests of the community. A renewal expectancy is granted when a licensee demonstrates that it has "ascertained" in some way important problems in the local community and has broadcast programs dealing with the community's problems, needs, and interests. Revision of Programming & Commercialization Policies, Ascertainment Requirements & Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1092 (1984), rev'd in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987). See Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413, 1432-34 (D.C. Cir. 1983). Broadcasters are required to keep public files listing important community issues and programs dealing with those issues. 47 C.F.R. § 73.3526(a)(8) (1987).

refusing to revoke the licenses of even those broadcasters with a poor record of public service. Because revocation inflicts such a huge penalty, it is virtually useless as an FCC tool to force compliance with Commission rules and, therefore, must be changed.

That the license renewal process does not work well is not, however, an argument for granting broadcasting licenses in perpetuity. On the contrary, failure to serve the public interest, including serious Fairness Doctrine violations, should be sufficient for license removal. Forty years of experience with the Fairness Doctrine, however, has raised the nagging question of whether a license can be revoked for violating the Doctrine without abridging the first amendment rights of broadcasters. An examination of the cases where program content resulted in serious FCC sanctions provides further evidence that the Doctrine may be incompatible with traditional first amendment values.

56. See infra notes 84-92 and accompanying text.

57. Broadcasters find themselves in a difficult situation where first amendment rights clash with their desire to keep their licenses. Program content is the key element in renewal expectancy. If it is determined that the first amendment prohibits consideration of content, broadcasters may have a much weaker case when being compared to a competing applicant who receives credit for integration (active participation in management of the station by the owners); diversity (those having significant media holdings will not be considered as favorably as those without or with fewer media holdings); and minority and female ownership. Broadcasters would lose the tremendous advantage they currently enjoy by presenting a record of service to the Commission. The courts, however, would not likely allow the Commission to renew licenses merely on the basis that there was compliance with Commission rules, without programming being an important factor. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

58. The U.S. Court of Appeals for the District of Columbia briefly held the view that a licensee's programming should be "superior" and not just "substantial" in order to win renewal expectancy. Central Florida Enterprises v. FCC, 598 F.2d 37, 56-58 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979). In an appeal from a second Commission decision, the Court modified its opinion and held that "substantial" or "meritorious" programming would be sufficient. Central Florida Enterprises v. FCC, 683 F.2d 503, 506 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983). In Central Florida the Court was concerned that an "incumbent television licensee has never been denied renewal in a comparative challenge." Id. at 510 (emphasis in original). The Commission has refused to adopt a quantitative standard for measuring meritorious performance. See National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978).
A. The Fairness Doctrine and License Revocation: Capital Punishment in Broadcasting

A Philadelphia radio station has the dubious honor of being the only licensee to lose its license largely for Fairness Doctrine violations. The controversy began on March 17, 1965, when the FCC, over the objections of various religious and civic organizations, approved the sale of WXUR-AM and WXUR-FM in Media, Pennsylvania, to the Reverend Carl McIntire.\(^5\) The FCC granted McIntire a one-year license. When he sought a routine three-year license renewal, the same organizations protested.\(^6\) This time, however, they cited specific instances in McIntire's first year of broadcasting which indicated that WXUR's programming was "one-sided, unbalanced, and weighted on the extreme right radicalism."\(^6\)

Despite the protests and offensive nature of the programs broadcast by the station, an FCC hearing examiner concluded that religion in general, and conservative fundamentalist religion in particular, was underserved in the area\(^6\) and held that WXUR should keep its license.\(^6\) The Commission criticized and reversed the hearing examiner's opinion, and did not re-

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59. Those groups included the National Council of Churches, the Urban League, and others who denounced McIntire's history of "intemperate attacks on other religious denominations, various organizations, government agencies and political figures." The groups claimed McIntire was using the airwaves to "help create a climate of fear, prejudice and distrust of democratic institutions." Brandywine-Main Line Radio, 24 F.C.C.2d 18, at para. 1 (1970).

60. Id. at 18-19, para. 1, 55-58, paras. 48-58.

61. Among the more offensive programming was a nightly talk show hosted by Tom Livezey, a man described as possessing "a special talent for attracting those citizens of the City of Brotherly Love who stayed up late worrying about Jews, blacks, radicals and Billy Graham." The following is a segment from Livezey's show:

   Woman Listener: About this B'nai B'rith Anti-Defamation League . . . why don't they get upset at all these smut and filth that's going through the mails?
   Livezey: And who do you think is behind all this obscenity that daily floods our mails, my dear?
   Listener: Well, frankly, Tom, I think it is the Jewish people.
   Livezey: You bet your life it is.

   On another occasion Livezey encouraged a listener to read a poem about his desire to be a dog so that he could desecrate the graves of such people as Franklin D. Roosevelt and Martin Luther King, Jr. See id. at 58-70, para. 65 (hearing examiner's report on Livezey's program).

62. Id. at 103-04, paras. 212-15. He also noted that the "entire broadcasting format over the license period and since has been one which welcomed opposing viewpoints." Id.

63. Id. at 42, para. 2.
On appeal, it was unclear to the court of appeals whether the FCC's decision not to renew was based on Fairness Doctrine violations or on misrepresentations by the station as to how the Fairness Doctrine obligations would be met. Writing for the court, Judge Tamm, in Brandywine-Main Line Radio, Inc. v. FCC, stated that WXUR's record was bleak in the area of good faith, and that "at best, [its] record is indicative of a lack of regard for fairness principles; at worst, it shows an utter disdain for Commission rulings and ignores its own responsibilities as a broadcaster . . . ."

The court was especially disturbed by WXUR's misrepresentations to the Commission when it applied for the license, about the station's programming plans, and by Brandywine's response to criticism of "Interfaith Forum," a half-hour show broadcast on Sunday that purported to make time available "equally to all faiths."

The court of appeals, relying on the Supreme Court's deci-

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64. Id. at 34-35, paras. 38-39.
66. Id. Brandywine-Main Line Radio was the licensee of WXUR.
67. Id. at 46-47.
68. Within days of the license transfer, the operators of WXUR immediately replaced programs that were "predominantly entertainment oriented" with shows characterized as "Hate Clubs of the Air." Id. at 51. The court added:

The speed with which these changes took place can lead the court to one conclusion and one conclusion only—Brandywine intended to place these controversial programs on the air from the first but feared to so inform the Commission lest the transfer application be denied. . . . Brandywine sought through subterfuge to gain its license and then proceed to broadcast the type of material it believed to be most suitable—the type of material which would forward the ends of the fundamentalist movement—in utter disregard for either the public or their earlier representations to the Commission.

69. Id. at 23. In its license application, Brandywine claimed that:

Every effort will be made to obtain varied participation from week to week to assure the greatest possible balance of views on the subjects of discussion. . . . The transferee will . . . make sincere efforts to obtain participation by individual churches and faiths in a manner which will assure . . . fair and equal representation of varying views.

Id. After local criticism of the show's one-sided nature, Brandywine changed the program, but in the court's opinion, the content remained "without resemblance to those representations made to the Commission." Id. at 51. The court added: "This was never an interfaith dialogue but rather an interview program of students and faculty at the Faith Theological Seminary . . . . We fail to see how it complies with Brandywine's representations for dialogue between the faiths." Id.
sion in *FCC v. WOKO Inc.*, 70 suggested that the fact that Brandywine concealed information "may be more significant than the facts concealed." Further, the court condemned Brandywine's behavior during the license period:

These men, with their hearts bent toward deliberate and premeditated deception, cannot be said to have dealt fairly with the Commission or the people in the Philadelphia area. Their statements constitute a series of heinous misrepresentations which, even without the other factors in this case, would be ample justification for the Commission to refuse to renew the broadcast license. 71

Relying on the Supreme Court's decision in *Red Lion*, 72 the court found that the FCC's refusal to renew Brandywine's license was consistent with the first amendment. 73 Judge Tamm noted that the law requires licensees to act as fiduciaries:

Failure to live up to the trust placed in the hands of the fiduciary requires that a more responsible trustee be found. This is not the public's attempt to silence the trustee—it is the trustee's attempt to silence the public. This is not the public censoring the trustee—it is the trustee censoring the public. 74

Initially, Chief Judge Bazelon concurred in the decision, but "solely on the ground that the licensee deliberately withheld information about its programming plans." 75 When Judge Bazelon issued an opinion forty days later, he dissented, stating that removal of Brandywine's license was a "prima facie violation of the First Amendment," 76 and suggested that

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70. 329 U.S. 223, 227 (1946). The court of appeals quoted the Supreme Court's opinion: "The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *Brandywine-Main Line*, 473 F.2d at 51.
71. *Brandywine-Main Line*, 473 F.2d at 52.
72. Id. at 45, 49, 56-59.
73. Id. at 60. The court added: "This is not a case in which the Commission is acting on an isolated mistake or two, in the course of a three year license period. This is a case of deliberate and continuing disregard in a short time period . . . ." Id.
74. Id. at 60-61.
75. Id. at 63.
76. Id. Judge Bazelon stated:
The Federal Communications Commission has subjected Brandywine to the supreme penalty: it may no longer operate as a radio broadcast station. In silencing WXUR, the Commission has dealt a death blow to the licensee's freedom of speech and press. Furthermore, it has denied the listening public access to the expression of many controversial views. Yet, the Commission would have us approve this action in the name of the fairness doctrine, the constitutional validity of which is premised on the argument that its
merely because the airwaves belong to the public does not give government the right to "place restraints upon the First Amendment rights of those who use this property." Judge Bazelon asserted that the scarcity argument was obsolete and described his original concurrence as resting on the "narrow ledge of Brandywine's misrepresentations under the Supreme Court's ruling in FCC v. WOKO Inc." But he added that it is "abundantly clear that the Fairness Doctrine is the 'central aspect' of this case .... I have therefore concluded that the great weight of First Amendment considerations cannot rest on so narrow a ledge."

Provoked by Judge Bazelon's statements, Judge J. Skelly Wright responded in a separate statement that "the court's judgment in this case is not based on the Fairness Doctrine," and insisted instead that his concurrence was based "solely on the deception ground" and not on Fairness Doctrine violations. He reasoned that because Judge Tamm would affirm on that rationale, "that ground, and that ground alone, forms the basis of our judgment."

Judge Tamm had identified Brandywine's deception. But what is largely missing from both the court's opinion and Judge Bazelon's dissent is recognition of the fact that any applicant for a license will promise the FCC that it will abide by provisions of the Fairness Doctrine and other rules when operating the station. Without such a commitment, the license would be awarded to another applicant. It is unclear, therefore, whether WXUR was punished for deceiving the Commission at the initial phase when it promised to fulfill its Fairness enforcement will enhance public access to a marketplace of ideas without serious infringement of the First Amendment rights of individual broadcasters.

Id. (emphasis in original).

77. Id. at 68.
78. Id. at 73-77.
80. Brandywine-Main Line, 473 F.2d at 80. Judge Bazelon added:
The point to be made is simply that I had originally thought that the alleged misrepresentation could be considered separately from the other issues in the case. But upon closer consideration, it became clear to me that the subject matter of the so-called "deception" is inextricably bound up in the considerations underlying the fairness doctrine.

Id.
81. Id.
82. Id. at 81 (emphasis in original).
83. Id.
Doctrine obligations or for actually violating the Doctrine. It appears that the court relied on the misrepresentation ground, but implicitly recognized that the Fairness Doctrine was violated (while explicitly avoiding the first amendment issues).

The court’s position, however, does not change the fact that an applicant who promises to abide by the Fairness Doctrine cannot lose a license for “deception” unless it also violates the Fairness Doctrine during the license period. Creating a distinction between misrepresentations and actual violations of the Doctrine obscures the constitutional issues which a license revocation under such circumstances invariably raises. Although the court and the Commission condemned WXUR for its misleading statements about its programming plans, the station seemingly lost its license because of its failure to abide by provisions of the Fairness Doctrine. An applicant who promised to obey Fairness Doctrine obligations in one way, but ended up fulfilling them in another, would not likely find itself the subject of severe FCC sanctions.

B. A Reluctant FCC: WLBT-TV and the Failure to Serve the Public Interest

The Commission’s imposition of the death penalty on WXUR was an aberration. Broadcasters who actively and effectively lobby the Commission through various organizations have convinced the FCC that license revocation is harmful to the industry and not in the best interests of the public.84 This has meant that even blatant violations of the Fairness Doctrine, such as those of WLBT-TV in Jackson, Mississippi, have proved insufficient as grounds for license removal.

WLBT-TV had such a despicable record of public service that the U.S. Court of Appeals for the District of Columbia, in an unprecedented action, ordered the Commission to remove the license and, in the process, sharply criticized the ability of the FCC to regulate broadcasting in the public interest.85 The case is one of the clearest examples of why broadcasters cannot be granted unbridled discretion to do as they please with their stations.

In the midst of this nation’s civil rights movement, the own-

84. See Dyk, supra note 18, at 305-08, 314-16; Fowler & Bremner, supra note 5, at 209 n.10.
ers of WLBT-TV did all they could to preserve a segregated society. The station's record was clear: over a period of nearly a decade, since 1955, it had consistently broadcast anti-integration and anti-black programs and remarks and had refused to allow spokesmen to challenge those comments. Despite the fact that blacks constituted forty-five percent of the viewing audience, there were apparently only two occasions on which blacks had ever been allowed on any Mississippi television station.

Two local civil rights leaders, Dr. Aaron Henry and Robert Smith, both associated with the United Church of Christ, petitioned the FCC to deny WLBT's license renewal for violation of the Fairness Doctrine. The petitioners argued that by failing to provide for appearances by blacks while presenting controversial issues of public importance, WLBT had crossed the line drawn by Congress when it enacted the Fairness Doctrine.

The FCC ruled that Henry, Smith, and the United Church of Christ lacked standing to bring the action. The Commission, however, decided that it should further investigate WLBT's broadcast policies. In the interim, and without holding any hearings to resolve the issues, the Commission granted WLBT a one-year renewal, finding that the Jackson area was

86. The station broadcast announcements urging resistance to integration because "Communists were behind" the effort. F. Friendly, supra note 12, at 90. The station swore that James Meredith would never be admitted to the University of Mississippi; whenever a black was featured on a network program, WLBT-TV would interrupt with a slide that said, "Sorry, Cable Trouble." Id. See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966). The station also refused to sell time to groups seeking to respond to WLBT's position on integration. Id.

87. F. Friendly, supra note 12, at 92.

88. The U.S. Court of Appeals recognized that the intervenors were petitioning for nonrenewal of the license on Fairness Doctrine grounds and more general grounds of failure to serve the public interest. Office of Communication, 359 F.2d at 998-99. It is interesting to note that the court of appeals concluded that Congress had codified the Fairness Doctrine in the 1959 amendments: "This policy [the Fairness Doctrine] received Congressional approval in the 1959 amendment of Section 315 . . . ." Id. at 999 n.5.

89. To establish standing, Dr. Aaron Henry and Robert Smith alleged that they represented individuals and organizations that were denied a reasonable opportunity to be heard. Id. at 998-99. The Church eventually spent more than $240,000 in legal expenses.

90. Id. at 999-1000.

91. The FCC had granted the station a three-year license renewal in 1958. Id. at 998. The court described the FCC's reason for denial of standing:

The . . . denial . . . was based on the theory that, absent a potential direct,
entering a critical period in race relations and that the station could make a contribution to resolving problems related to those issues.\textsuperscript{92}

The United Church of Christ and Reverend Everett Parker, a minister of the church in New York City, appealed the Commission's decision on standing, precipitating a six-year battle and demonstrating the difficulty of removing an incumbent broadcaster's license, even in the face of overwhelming evidence that the licensee had violated Commission rules and failed to serve the public interest.

Eventually, the D.C. Circuit court held that the grant of renewal of WLBT's license for one year was erroneous and directed the Commission to conduct hearings on the renewal application. The court said the Commission must allow appellants, as responsible representatives of the listening public, to intervene.\textsuperscript{93}

Judge Warren Burger wrote a unanimous opinion criticizing the FCC's decision to deny standing to spokesmen for television viewers. He found "no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist."\textsuperscript{94} He added that "after nearly five decades of operation, the broadcast industry does not seem to have grasped the simple fact that a broadcast

\begin{quote}
substantial injury or adverse effect from the administrative action under consideration, a petitioner has no standing before the Commission and that the only types of effects sufficient to support standing are economic injury and electrical interference. It asserted its traditional position that members of the listening public do not suffer any injury peculiar to them and that allowing them standing would pose great administrative burdens.
\end{quote}

\textit{Id.} at 1000.

\textsuperscript{92} \textit{Id.} The Commission stated that "[a] contribution is needed now—and should not be put off for the future. We believe that the licensee, operating in strict accordance with the representations made and other conditions specified herein, can make that needed contribution, and thus that its renewal would be in the public interest." \textit{Id.} at 1007 n.27.

\textsuperscript{93} \textit{Id.} at 1009.

\textsuperscript{94} \textit{Id.} at 1002. The opinion of the court on the issue of standing had significance far beyond the WLBT case. It opened the door to a new era in which public groups could have standing to petition the FCC. See E. Krasnow, L. Longley & H. Terry, \textit{The Politics of Broadcast Regulation} 54-62 (1982).
license is a public trust subject to termination for breach of duty."  

It took the FCC more than two years to determine whether WLBT should continue to hold the license, during which time WLBT began to improve its record. On June 27, 1968, deciding the case on remand, the Commission renewed WLBT's license for a full term of three years, convinced of the station's good faith effort to improve coverage of the black community. The Commission ruled that Smith, Henry, and the United Church of Christ had failed to meet the burden of proof that the alleged violations occurred, and noted that recent "marked improvements" in the station's programming helped justify renewal.  

When the court of appeals reviewed the FCC action for the second time, it suggested that the Commission had intentionally ignored instructions of the court to treat the representatives of the audience fairly. Judge Burger expressed anger because the FCC had shown such hostility toward the efforts of the public intervenors who were required to satisfy "a sur-

95. 359 F.2d at 1003. The court quoted at length from a 1963 congressional report on broadcasting:

Under our system, the interests of the public are dominant. The commercial needs of licensed broadcasters and advertisers must be integrated into those of the public. Hence, individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of the television service which stations and networks provide and which, undoubtedly, has a vast impact on their lives and the lives of their children. Nor need the public feel that in taking a hand in broadcasting they are unduly interfering in the private affairs of others. On the contrary, their interest in television programming is direct and their responsibilities important. They are the owners of the channels of television—indeed, of all broadcasting.


96. See F. Friendly, supra note 12, at 99.

97. As five of the seven commissioners explained:

We caution . . . against any conclusion that WLBT's performance . . . was spotless, or a model of perfection to be emulated by other stations. . . . We only conclude that the intervenors have failed to prove their charges and that the preponderance of evidence before us establishes that station WLBT has afforded reasonable opportunity for the use of its facilities by the significant groups comprising its service area.


98. Id. at paras. 20-21.

prisingly strict standard of proof." The court added that "the Commission exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Intervenors and their efforts."

Judge Burger denied the Commission another opportunity to implement the court's holding in the case, concluding that no useful purpose would be served by asking the Commission to reconsider its decision under a correct allocation of the burden of proof. In June 1971, sixteen years after the station's poor record of public service first came to the attention of the FCC, the license of Lamar Life Broadcasting to broadcast over station WLBT was revoked. While its overall record of public service was the most significant issue in the denial of license renewal, the failure to fulfill Fairness Doctrine obligations was a key factor in the court's decision.

C. The "Pensions" Case: The Danger of the Fairness Doctrine

Those favoring elimination of all content regulations, especially the Fairness Doctrine, can point to the FCC's action in a case involving an NBC documentary as the most indefensible application of the Fairness Doctrine in the Commission's history. While the FCC demonstrated a rare willingness to rule against an important broadcaster, the case illustrates the potential danger posed by the Fairness Doctrine. It also demonstrates how part one of the Fairness Doctrine can be used as a

100. Id. at 550.
101. Id. at 549-50.
102. Id. Burger concluded: "The administrative conduct reflected in this record is beyond repair." Id. at 550. In describing the Commission's treatment of the intervenors as "interlopers," the Court likened a public intervenor who is seeking no license or private right to "a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts." Id. at 546.
103. Interestingly, when the Commission invited applications for WLBT following the court's opinion, it allowed Lamar Life Broadcasting to be one of the applicants, which had been suggested by the court: "We do refrain, however, from holding that the licensee be declared disqualified from filing a new application." Id. at 550. In denying a petition of the FCC for the court to hear the case en banc, Judges McGowan and Tamm wrote that the "ineptitude of the Commission was as much, if not more, to blame for this scandalous delay than was the licensee. For this reason [the court] was not disposed to declare the licensee ineligible to seek new authority to use the channel." Id. at 551.
105. 359 F.2d at 998; 425 F.2d at 545.
shield by broadcasters to avoid the responsibility to cover controversial issues.

On September 12, 1972, the NBC Television Network broadcast *Pensions: The Broken Promise.* The program dealt with abuses in the private pension system and concluded that paying into a pension plan for years was no guarantee that an individual would receive benefits. The broadcast included interviews with aging workers who described firsthand experiences with pension plan abuse. While there were interviews with some individuals who made positive statements about private pension plans, a majority of the hour was devoted to the critical comments of those for whom the system had failed. NBC claimed it had been unsuccessful in its attempts to interview more individuals who would praise pension plans.

On November 27, 1972, Accuracy in Media (AIM), a media watchdog group, filed a complaint with the FCC charging NBC with presenting a one-sided picture of private pension plans. The group argued that the network violated the *Fairness Doctrine* by failing to provide a reasonable opportunity for the presentation of contrasting views. AIM demanded that NBC grant it reply time to counter the negative impression of pension plans left by the documentary.

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106. For a transcript of the documentary, see *NBC v. FCC*, 516 F.2d 1101, 1135-46 (D.C. Cir. 1974).

107. *Id.* Some individuals lost their pensions when their employer went out of business. Others lost pensions when they changed union locals and did not spend enough time in the second local to qualify for the pension program. In all the cases described in the program, the worker had expected the pension plan to pay benefits at retirement.

108. *Id.*

109. Narrator Edwin Newman summed up the documentary's findings: "This has been a depressing program to work on, but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said." *Id.* at 1146. Newman then urged individuals enrolled in private pension plans to take a close look at their own situation, and he ended the documentary by saying:

> Our own conclusion about all of this is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved. The situation, as we've seen it, is deplorable.

*Id.* See also F. FRIENDLY, supra note 12, at 142-66.


111. *Id.* at paras. 10-13.

112. The documentary won both an American Bar Association Award and the George Foster Peabody Award. Some consider the Peabody award to be "broadcast-
In a 5-2 decision, the FCC agreed that the network had violated the Fairness Doctrine.113 Applying the Doctrine to a network documentary for the first time, the Commission, while commending NBC for a “laudable journalistic effort,”114 nevertheless ordered the network to “submit a statement within twenty days indicating how it intended to fulfill its Fairness Doctrine obligations.”115

NBC appealed the Commission’s decision.116 In NBC v. FCC,117 the U.S. Court of Appeals for the District of Columbia determined that the Commission’s action constituted unconstitutional censorship.118 NBC claimed its attempt to find individuals who would make positive comments about pension plans had been mostly unsuccessful.119 NBC maintained that not every issue had exactly proportional opposing views and that the essence of journalism was editorial decision-making concerning the program’s content.120

Frank, A Fairness Doctrine for Journalists?, N.Y. Times, July 20, 1975, at 21, col. 3. Frank distinguished journalism from discussion:

Journalism is a recognizable sort of activity, certainly to other journalists. So long as it is confused with discussion, we’re going to have a rhetorical muddle. . . . The “Pensions” program was not a discussion; it was a job of reporting. Having it subject to reply as though it were one side of a discussion damages journalism. Debating is not the journalist’s job; reporting is.  

Id.
After an expedited hearing, the court agreed with NBC that the Commission had exceeded its authority and misapplied the Fairness Doctrine. The court held that NBC's failure to provide reasonable opportunity for the presentation of contrasting views remained unproven. The court, noting that the Fairness Doctrine is "an instance of a necessary control in the public interest," nevertheless found that investigative reporting, like that in the Pensions broadcast, often uncovers "presumed evils in society," and that requiring a balancing in such broadcasts would negate the value of such reporting. The court concluded that the FCC needed to restrain itself in such cases.

On December 13, 1974, the court granted an en banc review. However, in a strange twist, two weeks before the case was to be heard, the circuit reversed itself and decided not to hear the case. Apparently, the FCC, unhappy with the Pensions case as a test of the Fairness Doctrine, convinced enough members of the court that Congress' passage of the Employment Retirement Income Security Act of 1974,

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121. NBC v. FCC, 516 F.2d 1101, 1132-34 (D.C. Cir. 1974). During oral argument, Judge Leventhal expressed concern about allegations from NBC's attorney, Floyd Abrams, that no one at the FCC had ever actually seen the program and that the Commission's decision was based entirely on a written transcript. F. FRIENDLY, supra note 12, at 154.

122. NBC, 516 F.2d at 1133.

123. Id. at 1132. The court continued:

The broadcaster cannot assert a right of freedom of [the] press that transcends the public's right to know. But application of the [fairness] doctrine must still recognize the enduring values of wide latitude of journalistic discretion in the licensee. And when a court is called on to take a "hard look" whether the Commission has gone too far and encroached on journalistic discretion, it must take a hard look to avoid enforcing judicial predilections.

Id.

124. For example, in a broadcast story about corrupt policemen, "[i]f an equivalent weight or time must be given to policemen who are not on the 'take,' the whole campaign becomes so unwieldy and pointless as to be useless." Id. at 1124. The court included comments from veteran correspondent David Brinkley about a program he narrated on highway construction: "I did not think at that time that I was obliged to recite (or find someone to recite) that not all highway construction involves corruption, that many highways are built by honorable men, or the like." Id. at 1124 n.76.

125. Id. at 1123-24.

126. Id. The en banc court sustained Judge Leventhal's order staying the Commission's order until the en banc judgment was rendered.

127. Id. at 1156.

128. F. FRIENDLY, supra note 12, at 162-63.
correcting abuses revealed in the NBC documentary, rendered the case moot.\textsuperscript{129}

When the en banc hearing was vacated, the case was remanded to the original panel for a ruling on the mootness question. The panel, in a 2-1 decision, remanded the case to the Commission, which agreed to drop all proceedings.\textsuperscript{130}

\textsuperscript{129} NBC, 516 F.2d at 1180-1201.

\textsuperscript{130} Judge Leventhal wrote:

\begin{quote}
The Commission seeks remand on the theory of mootness. It is clear, however, that this theory is simply the medium advanced by the Commission to enable the case to be ended without a definitive decision on the merits. The essence of the matter is that the Commission seeks permission to vacate its order. \textit{Id.} at 1182.

Judge Bazelon, who had been anxious for the en banc arguments to proceed so the court could squarely decide the issue of the constitutionality of the Doctrine, wrote a blistering attack against the eight judges who had vacated the en banc hearing. He was especially incensed over the NBC argument, largely accepted by the court, that the documentary did not involve a controversial issue of public importance. The court had attempted to draw a distinction between subjects that were merely "news-worthy," and those that were "controversial issues of public importance," based on NBC's argument that the program exposed individual cases of pension plan abuse without enlarging the issue to include criticism of the pension plan system. The court accepted NBC's assertion that, because it was well known that there were bad private pension plans, the documentary did not identify a controversial issue:

\begin{quote}
The point is fundamental. In a case where NBC has made a reasonable judgment that a program relates to, and the public has an interest in knowing about, the "broken promise" abuses that its reporters have identified in various private pension plans, and there is no controversy concerning the existence in fact of abuses, then the balancing of the fairness doctrine cannot permit the intrusion of a government agency to make its own determination of the subject and thrust of the program as a report that such abuses feature private pensions generally, and with such enlargement to a controversial status to burden the reporting with the obligation of providing an opposing view of the escalated controversy. \textit{Id.} at 1125. NBC also claimed, and the court accepted, that because the program did not advocate specific legislative remedies, it was not controversial: "There are controversies as to specific proposals, but they were not the subject of the Pensions broadcast." \textit{Id.} at 1133.

Judge Bazelon denounced the court's acceptance of NBC's position that the documentary did not involve a controversial issue of public importance. He wrote:

\begin{quote}
I wonder what the professional journalists who prepared the "Pensions" program think about NBC's litigation position in this case that their program was not really controversial. My own thought is that NBC has by its litigation position done more to attack and undercut the "Pensions" program than anything AIM could have done through the FCC. This is the saddest commentary of all.

\textit{Id.} at 1179.

In essence, Judge Bazelon feared that the court's decision would lead to the manipulation of programming in a manner designed to avoid the Fairness Doctrine through contortions in the subject matter of the program. If this occurs, we would be faced with the ironic consequences of the court's
What could have been an important constitutional test of the Fairness Doctrine fizzled out when the court, reaching the first amendment issues, merely accepted NBC's assertion that the program was not controversial.  

131

Broadcasters won a moral victory because the court determined that the FCC action constituted impermissible censorship.  

132

Because NBC never complied with the FCC request to provide information on how it would balance the documentary, it is difficult to assess the problems that would be associated with a "reply" documentary or some other forum for balancing the Pensions broadcast. The Commission offered NBC wide discretion to correct imbalances in the original documentary.  

133

The splintered opinions of the D.C. bench show how ill-equipped and hesitant even the court of appeals is to deal with the constitutional issues surrounding the Fairness Doctrine. The Commission's eventual decision to abolish the Doctrine action having a greater chilling effect on broadcasters than a forthright, open application of the Fairness Doctrine. The court will have granted the broadcaster the right to make non-controversial speech and in the name of the First Amendment, broadcasters may seek to embrace this "right." I seem to recall that it is controversial speech and not the right to assert that one's speech is not really controversial which should be protected.

Id.

131. Id. at 1125.

132. NBC's victory was not without cost. It spent well over $100,000 in legal expenses and thousands of hours in personnel time fighting the Fairness complaint. S. SIMMONS, supra note 47, at 217. See 1985 Fairness Report, supra note 7, at para. 36.  

133. The Commission ruled that:

neither the staff's ruling nor our affirmance of its decision holds that NBC must now produce and broadcast another one-hour documentary "dealing with happy pensioners" or portraying the pension system as "a success." As we have stated, NBC's obligation is to afford a reasonable opportunity in its overall programming for the public to be informed as to the views of groups or individual spokesmen opposed to the viewpoint that the private pension system has performed poorly . . . . Just as NBC was not required to present those views in its "Pensions" documentary, it is not now required to present them in any particular program or format. There is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented . . . are left to NBC's discretion subject only to a standard of reasonableness and good faith.  


Charles Ferris, FCC Chairman from 1977 to 1981, argues that the Fairness Doctrine asks nothing more than good journalism: "These responsibilities, which critics of the fairness rules claim to be so onerous, are no greater than those required by journalistic ethics and sound journalistic practice." Ferris & Kirkland, supra note 49, at 613.
was predictable, given the inability of the courts to formulate workable rules for its enforcement.

D. Part One of the Fairness Doctrine: The Neglected Responsibility

Much of the litigation and controversy surrounding the Fairness Doctrine centered on part two of the Doctrine, which required balanced presentations of controversial issues. Throughout the Doctrine's development, the FCC repeatedly stated that a broadcaster's public service responsibilities under part one included an affirmative obligation to cover controversial issues in its community.\textsuperscript{134} The first prong of the Doctrine was rooted in the Radio Act of 1927, relating to broadcasters' duty to serve the public interest, and was more clearly stated in the Commission's opinions in \textit{In re United Broadcasting Co.} in 1945,\textsuperscript{135} and \textit{In the Matter of Editorializing by Broadcast Licensees} in 1949.\textsuperscript{136}

Despite its long history, the FCC virtually ignored part one of the Fairness Doctrine. Only one case based on the Doctrine's first requirement, \textit{Patsy Mink v. WHAR},\textsuperscript{137} was decided against a broadcaster. In this case, a West Virginia radio station refused to air an eleven-minute commentary by Congresswoman Patsy Mink on the environmental effects of strip-mining.\textsuperscript{138} The petitioners stated that during a four-month pe-
period when Congress was considering strip-mining legislation, the radio station failed to air any programming on the existing controversy. The petitioners further argued that the issue was "of extreme importance to the economy and environment of the area" served by the radio station, and thus constituted an issue of public importance under part one of the Fairness Doctrine.

The station argued that its subscription to the Associated Press and the ABC Radio Network, both of which had broadcast stories about strip-mining, constituted sufficient coverage to satisfy the Fairness Doctrine requirement. The station further suggested that, even if it had failed to "adequately cover the strip-mining controversy, it doubted whether the licensee is answerable to the Commission for selection of those issues to be broadcast, and therefore whether it would be proper for the Commission to take any action in view of such apparent failure."

Concluding that strip-mining was a matter of extreme importance, the Commission found that the station's failure to cover the issue was a violation of the Fairness Doctrine. The FCC then reminded broadcasters "that it regards strict adherence to the Fairness Doctrine—including the affirmative obligation to provide coverage of issues of public importance—as the single most important requirement of operation in the public interest." The Commission ruled that the radio station's actions were unreasonable, and requested that the licensee inform the Commission within twenty days as to how it intended to meet its statutory obligations.

Although the Commission scolded the radio station for failing to meet its obligations under part one of the Doctrine, it stated that it would not frequently punish broadcasters for failure to air programs dealing with controversial issues.

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139. The petition was filed by Media Access Project on behalf of Congresswoman Mink, the Environmental Policy Center, and a citizen of Clarksburg. Id. at para. 1.
140. Id. at para. 3 (quoting the complainants).
141. The station provided a list of stories about strip-mining from the AP and ABC, but the FCC rejected the evidence on the grounds that the radio station was not certain the news items were aired by the station. Id. at paras. 26, 28.
142. Id. at para. 8 (quoting WHAR's argument).
143. Id. at para. 30.
144. Id. at para. 19 (citing Complaint of Comm. for the Fair Broadcasting of Controversial Issues v. CBS, Memorandum Opinion and Order, 25 F.C.C.2d 283 (1970)).
146. In a concurring opinion, Commissioner Glen O. Robinson noted that the FCC
When the FCC ceased enforcing the Fairness Doctrine in August of 1987, it eliminated not only the more controversial and heavily litigated part two, but also the non-threatening part one obligation as well. The repeal of the Fairness Doctrine means that a broadcaster's record in identifying and airing programs related to important local issues will be judged by the vague public interest standard, rather than the more specific part one requirement of the Fairness Doctrine. Under such circumstances, it is unlikely that a broadcaster's failure to cover such issues would be so obvious that it would come to the attention of the Commission and result in sanctions.

Broadcasters who commit insufficient resources to news and public affairs programming fear neither punishment under the now defunct part one requirement, nor retribution by a public expected to effectively communicate its feelings merely used the term “critical issues” to describe strip-mining and its relationship to the community served by the station. He concluded that this usage meant that “not every issue of public importance or controversy whose presentation might trigger an obligation under part two of the Fairness Doctrine is sufficient to create an affirmative obligation for coverage by the station under part one.” Id. at 998. Recognizing that this was the first time the FCC had ever found that a “particular issue of public controversy was so important that a licensee was compelled, under the first part of the fairness doctrine, to offer at least some programming addressing it,” id., Robinson suggested that such action constituted a “somewhat greater degree of government interference than enforcement of the second [part of the fairness doctrine] inasmuch as it is not triggered by the licensee's program choice.” Id. He noted that the Commission was “compelling a licensee to carry some program which it has chosen not to air,” and that such action seemed to be a part of requiring a licensee to present balanced coverage. Id. He also expressed concern that the Commission would now find itself “involved more deeply in program judgments than it presently desires or even foresees.” Id. at para. 30. He added: “If and when that happens, present distress about the fairness doctrine will almost certainly become . . . more widespread—perhaps even to the point where the courts, if not Congress, direct the abolition of this mischievous doctrine.” Id.

147. The marketplace theory of deregulation suggests that the part one requirement is unnecessary. The argument is that broadcasters, to attract and maintain an audience for its news and public affairs programs, will identify controversial issues and air programs about them without any encouragement from the Fairness Doctrine or the FCC. See Fowler & Brenner, supra note 5. Although outside the scope of this Article, the marketplace theory is beset with problems. For example, if a station refused to air programs dealing with controversial issues, as was “required” by part one of the Fairness Doctrine, it would be very difficult for the audience to know enough about the day's events to realize what is missing. The marketplace theory also assumes that by exercising its options to watch one program over another, the audience will influence not only programming decisions, but also regulatory decisions such as who should own broadcasting stations, how long a broadcaster must own a station before selling it, and other regulatory policy decisions that those proposing deregulation of the industry believe the public is capable of making or influencing merely by switching channels and writing letters.
through its program choices. Because of these problems, any new solution needs to ensure adequate presentation of important issues.

III
From Constitutional to Unconstitutional: The Demise of the Fairness Doctrine

The FCC's decision to abolish the Fairness Doctrine followed years of reports, public hearings, and seemingly endless discussion of the Doctrine's constitutionality and effectiveness. For many years, the Commission accepted two precepts that severely limited its ability to modify or abolish the Doctrine: first, that the Fairness Doctrine was constitutional and thus could not be abolished on first amendment grounds; and second, that since Congress codified the Doctrine in a 1959 amendment to the Communications Act of 1934, only Congress could repeal it. Whatever misgivings the FCC had about the constitutional and policy issues, it made no overt effort to eliminate the Doctrine until several court decisions provided the opportunity.

A. The Supreme Court Upholds the Content Regulations

In its most important pronouncement on broadcast regulation...
tion, the Supreme Court upheld the constitutionality of the personal attack component of the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC.* The Court's approval of the Fairness Doctrine as necessary to regulate a scarce resource proved a formidable barrier for deregulation proponents to overcome. For almost twenty years, the Doctrine stood for the principle that broadcasters are not entitled to the same first amendment rights as the print media.

When radio station WGCB in Red Lion, Pennsylvania, played a tape of Reverend Billy James Hargis delivering a stinging personal attack against Fred J. Cook, an investigative reporter and the author of a book on Barry Goldwater, the seed for the *Red Lion* decision was planted. Shortly after Cook complained to the FCC, the Commission ordered the radio station's owner, Reverend John Norris, to comply with the personal attack rules by providing reply time to Cook. Norris refused to comply and appealed the decision.

Writing for a unanimous Supreme Court, Justice White declared that the Fairness Doctrine and other content regulations "enhance rather than abridge" freedom of speech and press. He also determined that the 1959 amendment effectively included the Fairness Doctrine in the "public interest"

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153. *Red Lion* was the only case considered by the Supreme Court that comprehensively examined the Fairness Doctrine's relationship to the first amendment, and has been widely cited as justification for content regulation of the broadcasting industry.

154. See supra note 6.


156. The book was entitled *Goldwater: Extremist on the Right.* Hargis called Cook a "professional mudslinger," and accused him of dishonesty, of falsifying stories, and of defending Alger Hiss. F. FRIENDLY, supra note 12, at 5.

157. 1 F.C.C.2d 934 (1965); 395 U.S. at 372.

158. See F. FRIENDLY, supra note 12, at 46. The National Association of Broadcasters (NAB) and other groups did not think that *Red Lion* made a good case in which to test the constitutionality of the content regulations. On July 27, 1967, the NAB, along with the Radio-Television News Directors Association (RTNDA), filed a separate action challenging the Fairness Doctrine in the U.S. Court of Appeals for the Seventh Circuit in Chicago. On the same day, CBS filed its challenge to the Fairness Doctrine in the U.S. Court of Appeals for the Second Circuit in New York. NBC filed a similar suit a few days later. Those suits were consolidated and the Seventh Circuit, where the first suit was filed, was awarded jurisdiction. Thus, the Supreme Court in *Red Lion* considered two cases: *Red Lion* and RTNDA-NBC-CBS. The U.S. Court of Appeals in *Red Lion* was affirmed, while the Seventh Circuit in RTNDA-NBC-CBS was reversed and remanded. See F. FRIENDLY, supra note 12, at 53-59.

159. Justice Douglas did not participate in the 8-0 decision.

standard established in the Communications Act.\textsuperscript{161}

The Court dismissed the argument that broadcasting and print should be treated the same way: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."\textsuperscript{162} The Court recognized that the first amendment was not irrelevant to broadcasting, but determined that broadcasters must allow their facilities to be used by those denied a license, based on a scarcity rationale.\textsuperscript{163}

Justice White dismissed concerns that the Fairness Doctrine and personal attack rules induced self-censorship as speculative,\textsuperscript{164} stating that the Fairness Doctrine in the past had no such effect.\textsuperscript{165} He noted that if experience indicates that the Doctrine has the "net effect of reducing rather than enhancing

\textsuperscript{161} Id. at 380. Justice White also stated:

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the \textit{Red Lion} case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

\textit{Id.} at 375.

\textsuperscript{162} Id. at 388.

\textsuperscript{163} Id. at 390-92. The Court stated:

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. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

\textit{Id.} at 390. The notion that the first amendment protects the right of the listener or viewer to receive information, as well as the right of the broadcaster to air it, is extremely controversial. In \textit{Red Lion}, Justice White wrote: "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. That right may not constitutionally be abridged by Congress or by the FCC." \textit{Id.} Krattenmaker and Powe criticized this aspect of \textit{Red Lion} by writing: "No principle could be more at odds with the bulk of first amendment jurisprudence." Krattenmaker & Powe, \textit{supra} note 4, at 155. The Court has applied this principle in "commercial speech" cases. \textit{See Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council}, 425 U.S. 748 (1976).

\textsuperscript{164} 395 U.S. at 392-93.

\textsuperscript{165} Justice White added:

[The rules] assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. . . . The First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an uncondi-
the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.\textsuperscript{166}

Linking the Fairness Doctrine and other content regulations to the public interest standard was significant. While the Court seemed to accept that Congress had given statutory approval to the Doctrine in 1959,\textsuperscript{167} it did not stop there. It specifically held that the obligations imposed by the Doctrine were part of the public interest standard:

This language 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. In other words, the amendment vindicated the FCC's general view that the Fairness Doctrine inhered in the public interest standard.\textsuperscript{168}

The implication was that unless the public interest standard itself, which is the foundation of broadcast regulation, was altered, the Fairness Doctrine, and the content regulations subsumed under it, could not be altered or eliminated. In order to terminate the Fairness Doctrine without disturbing the public interest standard, the Commission eventually determined that conditions in the media marketplace had drastically changed since \textit{Red Lion}, and therefore, the Fairness Doctrine no longer served the public interest.\textsuperscript{169}

\section*{B. Support of the Fairness Doctrine: The FCC's 1974 Report}

In 1974, recognizing the changes in the media marketplace since its last assessment of the Fairness Doctrine and the controversy that continued after \textit{Red Lion}, the Commission undertook a wide-ranging inquiry into the Fairness Doctrine.\textsuperscript{170} After receiving numerous comments and proposals, the Commission reaffirmed its existing policy that the Fairness Doctrine was consistent with the principle of uninhibited debate, did not have a chilling effect on broadcasters, and was compati-

\textsuperscript{166} Id. at 391.
\textsuperscript{167} Id. at 393.
\textsuperscript{168} The Court wrote: "[T]he Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation." Id. at 381-82.
\textsuperscript{169} Id. at 380.
\textsuperscript{170} See 1987 Syracuse, supra note 10, at paras. 72-78.
\textsuperscript{171} See 1974 Fairness Report, supra note 7.
ible with the public interest.\footnote{171}

The 1974 Fairness Report concluded that the scarcity basis of broadcast regulation was still valid, and that the "effective development of an electronic medium with an abundance of channels . . . is still very much a thing of the future."\footnote{172} The Report also supported the Fairness Doctrine on constitutional and policy grounds and recognized the first amendment rights of the audience: "[W]e do not believe that it would be appropriate—or even permissible—for a government agency charged with the allocation of the channels now available to ignore the legitimate First Amendment interests of the general public."\footnote{173} The 1974 Fairness Report also accepted that Congress had codified the Doctrine in the 1959 amendment.\footnote{174} In sum, the Commission found that the Fairness Doctrine was recognized in statute, justified on constitutional grounds, and served the public interest by furthering robust debate over the airwaves.\footnote{175} But the 1974 Fairness Report did little to satisfy critics who intensified their efforts to abolish the Doctrine.\footnote{176}

\footnote{171. The Commission wrote that, in the years since \textit{Red Lion}, "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.'" \textit{Id.} at para. 17 (quoting \textit{Red Lion}, 395 U.S. at 393). The Commission expressed surprise at the claim that the Fairness Doctrine prevented broadcasters from covering controversial issues. It noted the lack of burdensome procedures involved with enforcement of the Doctrine, and its reliance on broadcasters' good-faith effort to fulfill its obligations. The Commission added that "[f]ar from inhibiting debate . . . we believe that the Doctrine has done much to expand and enrich it." \textit{Id.} at para. 14.

\footnote{172. \textit{Id.} at para. 13. The Commission determined that "scarcity is still very much with us, and . . . despite recent advances in technology, there are still 'substantially more individuals who want to broadcast than there are frequencies to allocate.'" \textit{Id.} (quoting \textit{Red Lion}, 395 U.S. at 388).

\footnote{173. \textit{Id.} The 1974 Fairness Report stated that if broadcasters avoid controversial issues because the presentation of opposing viewpoints is "too offensive" or "too disruptive to their broadcast schedules" or "simply too much trouble," such an attitude is "completely inconsistent with the broadcaster's role as a public trustee." \textit{Id.} at para. 17.

\footnote{174. "In 1959, Congress specifically amended the Communications Act so as to vindicate the Commission's view that fairness inhered in the general public interest standard of the Act." \textit{Id.} at para. 12 n.6.


\footnote{176. Two years after the 1974 Fairness Report, the Commission issued the Reconsideration of the 1974 Fairness Report, The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Memorandum Opinion and Order, 58 F.C.C.2d 691 (1976). In the 1976 Reconsideration, the FCC chairman suggested in a separate statement that Congress and the}
Ten years later, based upon the need to reassess the impact of technological changes on the media marketplace and developments in first amendment law, the Commission again initiated inquiry proceedings.\footnote{Inquiry into the General Fairness Doctrine Obligations of Licensees, 49 Fed. Reg. 20,317 (1984).} The 1985 Fairness Report came to very different conclusions about the Fairness Doctrine and began the process that led to its abolition.


By 1985, the composition and philosophical outlook of the Commission had radically changed from that of the 1974 Commission. The Commission of the mid-1980's operated in a regulatory environment that promoted, and largely accepted, the theory that the marketplace, not intrusive government policies, should regulate the broadcasting industry.

The 1985 Fairness Report\footnote{See 1985 Fairness Report, supra note 7.} paved the way for the demise of the Doctrine two years later by attacking it on three grounds. First, the Commission determined that the scarcity rationale was no longer viable because broadcast outlets were no longer scarce.\footnote{For a detailed description of new technologies, see id. at paras. 81-122, 138.} The existence of new technologies such as cable, low-power television, and satellites, as well as the proliferation of print media such as newspapers and magazines, provided diverse and competitive sources of information; thus, the scarcity rationale could no longer be relied on to provide a constitutional basis for the Fairness Doctrine.\footnote{See id. at paras. 123-31 for discussion of the availability of print sources of information.}

Second, the Commission held that the Fairness Doctrine violated the first amendment rights of broadcasters and had a chilling effect on their ability to disseminate news and information.\footnote{Id. at paras. 19, 139-40.} The Commission, mindful that the Supreme Court had found the Fairness Doctrine to be constitutional in Red Lion, did not directly challenge its constitutional basis.\footnote{See id. at para. 6. The Commission wrote: “Administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute.” Id. at para. 18.}


\footnote{See id. at 700-01. See Morton, \textit{From Fair to Unconstitutional: The History and Future of the Fairness Doctrine}, 18 \textit{CUML. L. REV.} 743 (1988).}
Rather, the 1985 Fairness Report attacked the Doctrine indirectly by finding that the marketplace had changed dramatically: "[I]n the intervening sixteen years [since Red Lion] the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas."

Because the Supreme Court held in Red Lion that promotion of diverse opinions was the constitutional basis of the Doctrine, the Commission deftly challenged the constitutionality of the Doctrine, while denying it was doing so, by asserting that the Doctrine inhibited, rather than encouraged, the dissemination of information. By determining that the Doctrine no longer served the public interest, the Commission avoided the appearance that it was usurping the authority of the Supreme Court. The Commission, however, could not avoid rejecting Red Lion's conclusion that the Doctrine was part of the public interest standard and thus could be abolished only if the public interest standard were changed. The Commission challenged this interpretation, but was unwilling to unilaterally abolish the Doctrine.

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183. Id. at para. 6.
184. Id. at para. 21. The Commission wrote:

While we do not believe that the Fairness Doctrine is a necessary component of the general "public interest" standard in the Communications Act, the question of whether or not Congress in amending Section 315 in 1959 codified the Doctrine, thereby requiring us to retain it, is more problematic. . . . [W]e believe that it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the Doctrine.

Id. at para. 7. The Commission's strategy to avoid directly confronting the constitutional status of the Fairness Doctrine with changes in the media marketplace was surprising in light of the Supreme Court's apparent willingness to reconsider scarcity. In FCC v. League of Women Voters, 468 U.S. 364 (1984), Justice Brennan recognized that the scarcity rationale had come under attack in recent years, but said the Supreme Court would reconsider it as the underlying principle of regulation only after the FCC or Congress determined that changes in the marketplace warranted such a reexamination. Id. at 376-77 n.11. If, however, the Commission did show that the Fairness Doctrine had the effect of reducing, rather than enhancing, speech "we would then be forced to reconsider the constitutional basis of our decision [in Red Lion]." Id. at 378-79 n.12. In responding to the dicta in League of Women Voters, the Commission wrote:

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 it is necessary or appropriate for us to make that determination in this proceeding.
On the central question of whether the Fairness Doctrine chilled the presentation of contrasting points of view on controversial issues, the Commission accepted as empirical proof examples of the chilling effect that were supplied by broadcasters. The Commission also indicated that the paucity of cases arising from part one of the Fairness Doctrine evidenced a chilling of broadcasters by the Doctrine. The Commission held that because part one, mandating coverage of controversial issues, was rarely invoked, broadcasters consciously refrained from presenting programs on controversial subjects. The Commission concluded that broadcasters avoided potential trouble under part two by ignoring their responsibilities under part one. The Commission also recognized broadcasters’ fear that a failure to abide by the Fairness Doctrine could

185. The forty-five examples cited in the 1985 Fairness Report were supposedly instances where broadcasters were either inhibited from covering controversial issues or were punished by having to expend financial and human resources to defend Fairness Doctrine complaints. The Commission’s acceptance of these examples in the 1985 Fairness Report has been severely criticized. See S. Rep. No. 34, 100th Cong., 1st Sess. 29 (1987). See also Bolton, supra note 3 (finding the examples deficient on several grounds). The Commission relied on evidence submitted by interested individuals and groups, and particularly relied on the statements of individual broadcasters and the National Association of Broadcasters. Bolton noted that many of the statements were anonymous and anecdotal, that some presented nothing more than complaints about the “nature of the justice system rather than complaints unique to the Fairness Doctrine,” and some examples cited by the Commission “actually showed the Fairness Doctrine to be working when broadcasters refrained from airing one-sided programs.” Id. at 817-18. Ferris and Kirkland also criticized the data used by the Commission: “In 1974, after two years of study consuming thousands of staff hours, the FCC concluded that there was ‘no credible evidence of a chilling effect.’ Again, in 1984, the National Association of Broadcasters, presumably after an exhaustive search, could produce only a few instances of a supposed chilling effect.” See Ferris & Kirkland, supra note 49, at 615.


188. Ferris and Kirkland are critical of broadcasters who ignored part one: By saying they are “chilled,” broadcasters, in effect, admit noncompliance with this part of the doctrine. It is also strange that critics of the fairness rules believe that a pattern of violation of one part of the rules is a good argument for repeal of all of the fairness rules. In any event, it is more probable that if any chilling effect is present, it results from economic incentives and not from the minimal standards of fairness imposed by the Fairness Doctrine. The simple fact is that coverage of controversial issues is not as profitable as airing “sitcoms” or blooper shows, and advertisers are reluctant to support controversial programming. If anything, the Fairness Doctrine and political broadcasting rules provide an antidote to this chilling effect.

See Ferris & Kirkland, supra note 49, at 615.
result in license revocation, and that, because of the value of a license, a “raised eyebrow” was sufficient to force otherwise “intrepid” broadcasters to run “for the cover of conformity.”

Finally, the Commission concluded that Congress had not codified the Doctrine in the 1959 amendment to section 315. Nevertheless, it decided that the ambiguity was too great for the Commission to repeal the Doctrine on its own, at least for the time being.

D. The One-Two Punch: TRAC and Meredith and the Death of the Fairness Doctrine

Shortly after the Commission issued the 1985 Fairness Report, the U.S. Court of Appeals for the District of Columbia, in Telecommunications Research and Action Center v. FCC (TRAC), held that Congress had not codified the Doctrine in its 1959 amendment to section 315 of the Communications Act, and thus gave the Commission ammunition to wrestle the Doctrine away from Congress and eventually abolish it.

In TRAC, a public interest group appealed an FCC ruling that certain content regulations, including the Fairness Doctrine, did not apply to teletext. According to the court, the


191. Id. at paras. 174-76. The Commission stated:

The doctrine has been a longstanding administrative policy and a central tenet of broadcast regulation in which Congress has shown a strong although often ambivalent interest . . . . Because of the intense Congressional interest in the fairness doctrine and pendency of legislative proposals, we have determined that it would be inappropriate at this time to eliminate the fairness doctrine.

Id. at para. 176.


193. The two statutes related to access to broadcasting by qualified candidates for public office: 47 U.S.C. § 312(a)(7) (1982) required broadcasters to “allow reasonable access . . . for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy”; and 47 U.S.C. § 315(a) (1982) stated that if the licensee “permit[s] any person who is a legally qualified candidate for any public office to use a broadcasting station,” the broadcaster incurs the additional obligation of “afford[ing] equal opportunities to all other such candidates for that office.” TRAC, 801 F.2d at 502.

194. Teletext “provides a means of transmitting textual and graphic material to
Commission, in exempting teletext from the Fairness Doctrine, "premised its decision on the fact that Congress never actually codified the Commission’s Fairness Doctrine, and that the Commission, therefore, had no obligation to extend its own policy to new services like teletext." 195

The court began by asserting that the Fairness Doctrine did apply to teletext because it imposed obligations on licensees in the use of their "broadcast time." Teletext, Judge Bork wrote, is broadcast time. "We find it clear, therefore, that the Fairness Doctrine by its terms applies to teletext; no extension is necessary." 196 In fact, the court noted that the Commission decision was an "affirmative departure" from precedent because it stated that a licensee’s fairness obligations "apply only to a part of its broadcast time." 197

The key question was whether the Commission had the authority to make such a departure, or whether only Congress could authorize such a drastic change in policy. Judge Bork, concentrating exclusively on the language of the 1959 amendment, rejected it as a codification of the Fairness Doctrine. He wrote:

[W]e do not believe that the 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. 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. 198

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195. TRAC, 801 F.2d at 502. Teletext is often transmitted over an unused portion of the television broadcast signal. To receive the images carried over that portion of the signal, viewers must purchase decoders from retail stores.

196. Id. at 516-17. The petitioners, TRAC and the Media Access Project, disputed this interpretation, arguing that the Fairness Doctrine "is a statutory obligation that requires all broadcasting services to provide reasonable opportunities for the presentation of contrasting viewpoints on controversial matters of public importance." Id. at 517 (quoting Brief for Petitioners at 34-35).

197. Id.

198. Id. The court held, therefore, that because the Fairness Doctrine derives from the mandate to serve the public interest, the "Commission is not bound to adhere to a view of the Fairness Doctrine that covers teletext." Id. at 518. See Greater
The FCC probably could have abolished the Doctrine on the basis of the *TRAC* decision alone. But the Commission, fearing congressional reprisals, instead relied on the strategy recommended in its 1985 Fairness Report and urged congressional repeal of the Doctrine. The Fairness Doctrine may well have survived *TRAC* were it not for another court of appeals decision that, in effect, gave the Commission the opportunity it had long sought to declare the Doctrine unconstitutional and abolish it.

The Doctrine's death knell began in 1984 when a citizens group complained that a Syracuse television station violated the Fairness Doctrine by airing advertisements promoting a nuclear power plant without presenting opposing viewpoints. After the Commission upheld the challenge (the first such ruling by the FCC since President Reagan began appointing its members in 1981), the television station's parent company, Meredith Corporation, appealed the decision to the U.S. Court of Appeals for the District of Columbia.

In *Meredith Corp. v. FCC*, the court of appeals ruled that the Commission had failed to adequately consider the issue of the Doctrine's constitutionality, which Meredith had raised as a defense. The court accepted Meredith's argument that even if the Commission was not obligated to address the general constitutionality of the Doctrine, it "clearly had to respond to Meredith's claim that the Doctrine could not constitutionally be applied in this case." While the court understood that the Commission was in the unenviable position of having to examine the Doctrine's constitutionality—and that a finding that the Doctrine was unconstitutional would

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Boston Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (recognizing the right of an administrative agency to change its view of what is in the public interest, with or without a change in circumstances).

199. 102 F.C.C.2d 143, 156 (1985).

200. Complaint of Syracuse Peace Council v. WTVH, Memorandum Opinion and Order, 99 F.C.C.2d 1389 (1984). WTVH (Meredith) had broadcast a series of editorial advertisements advocating the construction of the Nine Mile Point II nuclear plant as a sound investment for New York. The Commission determined that those ads presented a controversial issue of public importance, and concluded that WTVH, by refusing to broadcast ads challenging those by advocates of the nuclear plant, had not met its obligations under the Fairness Doctrine. See also 1987 Syracuse, supra note 10, at para. 7.

201. 809 F.2d 863 (D.C. Cir. 1987).

202. Id. at 872.

203. Id. at 873-74.

204. Id. at 874 n.12.
infuriate key members of Congress—nevertheless, it found the Commission’s failure to face the issue “the very paradigm of arbitrary and capricious administrative action.”

The court further noted that the constitutional issue might have been avoided if the Commission had found that the Doctrine violated the public interest standard of the Communications Act. However, the court added that it was “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.”

Adding to the Commission’s problems, while Meredith was being considered, various broadcasting organizations sought judicial review of the 1985 Fairness Report on the grounds that the Commission’s failure to institute rule-making proceedings to eliminate the Fairness Doctrine was arbitrary and capricious. Therefore, the D.C. Circuit Court was asked, in Radio-Television News Directors Association v. FCC (RTNDA), to declare the Fairness Doctrine unconstitutional and, in Meredith, to hold that the Commission’s failure to consider the constitutional issues was arbitrary and capricious.

When the court vacated RTNDA and remanded Meredith with instructions that the Commission consider the constitutional question, the FCC must have felt that its strategy had backfired. It had advanced RTNDA because the Commission, and broadcasters, had hoped that the court of appeals would declare the Fairness Doctrine unconstitutional, thus sparing the Commission the wrath of Congress. Instead, the court of appeals vacated RTNDA and remanded Meredith for a determination on the constitutionality of the Doctrine, which is precisely what the Commission wanted to avoid.

The FCC seized the opportunity presented by Meredith to review the constitutionality of the Doctrine and on August 7, 1987.

205. Id. at 874. The court noted: “Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it . . . . To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath.” Id.

206. Id.

207. Id.


209. The Meredith court added: “Of course, the Commission need not confront that issue if it concludes that in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest.” Id. at 874.
1987, concluded that the "Fairness Doctrine, on its face, violates the first amendment and contravenes the public interest." 210

In 1987 Syracuse, the Commission reaffirmed the findings of the 1985 Fairness Report. 211 The Commission reiterated its view that the Fairness Doctrine chills speech. 212 The FCC determined that, although the Supreme Court upheld the Doctrine in Red Lion Broadcasting Co. v. FCC, the underlying factual predicates for that decision had been eroded. 213

The Commission rejected Syracuse Peace Council's recommendation that the FCC avoid considering the constitutional question by resolving the case on the narrow factual issue of whether Meredith had violated the Fairness Doctrine. 214 The Commission, recognizing that the Court had expressly affirmed its finding that WTVH had violated the Doctrine, refused to "revisit" that determination and found that part of the case was final. 215 Thus, the Commission considered the larger issue of whether the Doctrine is "consistent with the guarantees of the First Amendment ... and comports with the public interest." 216 In the Commission's view, those two issues were "inextricably intertwined," and the policy considerations could not be isolated from the constitutional aspects underlying the Doctrine. 217


211. Id. at paras. 52-61. For a discussion of the 1985 Fairness Report, see supra notes 178-91 and accompanying text.

212. See generally 1987 Syracuse, supra note 10, at paras. 42-51.

213. See generally id. at paras. 37-51. The Commission repeated its reasons for not abolishing the Doctrine at the time of the 1985 Fairness Report. It expressed concern about "intense Congressional interest in the Fairness Doctrine" and "uncertainty as to whether the doctrine was in fact codified ..." Id. at para. 6.

214. Id. at paras. 17-18.

215. See id.

216. Id. at para. 19.

217. Id. The Commission identified three reasons why the policy and constitutional issues cannot be considered separately. First, it has been well established that first amendment considerations are an integral component of the public interest standard. See CBS, Inc. v. Democratic National Comm., 412 U.S. 94, 122 (1973); Associated Press v. United States, 326 U.S. 1, 20 (1945). In the Commission's words: "A meaningful assessment of the propriety of the doctrine ... necessarily includes an evaluation of its constitutionality." 1987 Syracuse, supra note 10, at para. 19. Second, the Commission held that promotion of first amendment principles was the "core policy objective in establishing and maintaining the doctrine." Id. at para. 21. The Commission added: "if the doctrine fails to further First Amendment principles, it necessarily follows that the doctrine does not achieve the specific purpose for which it was intended and can no longer be sustained." Id. Third, the Commission held that the courts have found the FCC's long experience in regulation of broad-
The Commission carefully reviewed *Red Lion* in light of what it considered to be the changing conditions of the marketplace and found that the Fairness Doctrine disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. The Commission further noted that the Doctrine's chilling effect thwarts its intended purpose and results in excessive and unnecessary intervention into the editorial processes of broadcast journalists. The Commission concluded "that under the constitutional standard established by *Red Lion* and its progeny, the Fairness Doctrine contravenes the First Amendment and its enforcement is no longer in the public interest."

The Commission further noted that, although there are physical differences between electronic and print media, "their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both."

To the disappointment of broadcasters, the Commission attempted to preserve the public interest standard, while maintaining that print and electronic media should be treated equally. The Commission made it clear that, while part one casting "informative" and have recognized that "in evaluating . . . First Amendment claims . . . we [courts] must afford great weight to the decisions of Congress and the experience of the Commission." *Id.* at para. 22.


219. *Id.* at paras. 42-61.

220. 1985 Fairness Report, *supra* note 7, at para. 61. The Commission rejected criticism that it should eliminate only part two of the Doctrine, since part one presented so few problems for broadcasters and broadcasters should be required to present programs on controversial issues. The Commission wrote:

"The Fairness Doctrine, although consisting of two parts, is a unified doctrine; without both parts, the doctrine loses its identity. . . . [I]f the constitutional infirmity of the doctrine arises from the enforcement of one of its parts, we do not believe it appropriate to sever that part of the doctrine and to continue enforcing only the other part."

*Id.* at para. 83.

221. 1987 Syracuse, *supra* note 10, at para. 99. The Commission expressed the concern that its members, who had taken an oath to support and defend the Constitution, could not enforce a policy that the Commission itself believed to be unconstitutional. It concluded that the Constitution prevents the Commission from enforcing the Fairness Doctrine against station WTVH. *Id.* at para. 98.

222. *Id.* at paras. 80-81. The Commission wrote that "the fact that government may not impose unconstitutional conditions on the receipt of a public benefit does not preclude the Commission's ability, and obligation, to license broadcasters in the public interest, convenience and necessity." *Id.* at para. 81. The opinion added: "The Commission may still impose certain conditions on licensees in furtherance of this public interest obligation. Nothing in this decision, therefore, is intended to call
of the Fairness Doctrine was no longer in effect, broadcasters were still required to observe the "responsive" programming obligation.\textsuperscript{223}

Contemporaneous with the issuance of the Memorandum Opinion and Order abolishing the Doctrine, the Commission released its report on alternatives to the Fairness Doctrine, prepared at the request of Congress.\textsuperscript{224} That report concluded that the public interest would be best served by an "unregulated marketplace of ideas," similar to the print media, with no requirement that all sides of an issue be presented.\textsuperscript{225}

Broadcaster reaction to abolition of the Doctrine was swift and enthusiastic,\textsuperscript{226} while some members of Congress expressed disappointment.\textsuperscript{227} For broadcasters, victory meant not only liberation from the obligations imposed under the Doctrine, but a signal that the basis of repeal had undermined all content regulations and, therefore, may portend a day in which broadcasters are free from such regulations.

The Commission's repeal of the Doctrine was appealed by Syracuse Peace Council. The challengers argued that, contrary to the TRAC decision, the Doctrine was mandated by section 315 of the Communications Act, and that the FCC had into question the validity of the public interest standard under the Communications Act." Id. The Commission made it clear, however, that it will not second-guess broadcasters' ascertainment or fault a broadcaster for failing to address a particular issue in its programming. Id. at para. 59.

\textsuperscript{223} Id. at para. 34.


\textsuperscript{225} 1987 Fairness Report, \textit{supra} note 224, at para. 171. The Commission rejected a number of alternatives to the Fairness Doctrine, including proposals that access for differing viewpoints on controversial issues be guaranteed. Id. at paras. 54-88.

\textsuperscript{226} \textit{See} Fairness Held Unfair, \textsc{Broadcasting}, Aug. 10, 1987, at 27. The article began: "The FCC shattered last week the symbol of broadcasting's second-class First Amendment status, declaring unconstitutional its 38-year old Fairness Doctrine requiring broadcasters to air all sides of controversial public issues." Id. FCC Chairman Dennis Patrick was quoted as saying "our action today should be cause for celebration, because by it we introduce the First Amendment into the 20th Century." Id.

neither the authority to repeal it, nor an adequate basis for doing so. The U.S. Court of Appeals for the District of Columbia recently rejected the challenge, holding that the Commission’s determination that the Doctrine did not serve the public interest was supported by its record in the proceeding.‡228 But broadcasters’ celebration has been tempered by efforts on the part of Congress to restore the Doctrine.‡229

IV
Scarcity and Diversity in the Post-Fairness Doctrine Era

The Commission relied heavily on the increase in the number of radio and television stations since Red Lion Broadcasting Co. v. FCC and the 1974 Fairness Report as justification for abolishing the Fairness Doctrine.‡230 The Commission argued that if the scarcity rationale ever justified content regulation, conditions in the media marketplace had changed to the extent that such regulation is now unnecessary, counterproductive, and harmful to the first amendment.‡231

The Commission’s reliance on Red Lion was largely misplaced. While the Supreme Court made reference to scarcity of resources,‡232 its Red Lion decision was based on the principle that restricted access entitles the government to regulate


‡230. For example, the Commission reported that in 1985, the number of television stations overall was 1,208, an increase of 44.3% since Red Lion and 28% since the 1974 Fairness Report. By August 1987, that number had increased to 1,315, a 57% increase since Red Lion. The Commission noted that the number of UHF stations had increased by 113% since the Red Lion decision and 66.4% since the 1974 Fairness Report. While the Commission held that over-the-air broadcasting signals would be enough to provide the public with access to diverse sources of information, the growth of cable television had enhanced significantly the amount of information available to the public. The Commission also discussed new technologies such as low-power television, videocassette recorders, and satellite systems. 1987 Syracuse, supra note 10, at paras. 78-82.

‡231. Id. at para. 61.

‡232. The court observed:

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. But the people as a whole retain their in-
the channels by which ideas are communicated.\textsuperscript{233} Although related to the issue of scarcity, \textit{Red Lion} approved the Fairness Doctrine because it protected "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences."\textsuperscript{234} Some commentators have suggested that governmentally-forced speech is contrary to first amendment jurisprudence.\textsuperscript{235} Nevertheless, this principle is at the heart of the regulation of broadcasting in the public interest.

If the goal of the first amendment is to remove barriers that interfere with communication, then the concern is not with the number of radio and television stations currently on the air, but instead with the availability of differing ideas. Development of sources of electronic communication has meant an increase in channels without a concomitant growth in diverse opinions on important public issues.\textsuperscript{236} Emancipating broadcasters from content regulation in an environment rich with channels of electronic communication may seem entirely consistent with the principles of the first amendment. Upon close examination, however, the regulatory environment reveals the need for continued supervision by the federal government, although along different lines from previous efforts.

A. "Micro" Scarcity v. "Macro" Diversity

Today in the United States, there are an enormous number of outlets of communication. Thousands of books, magazines, and newspapers are published each year.\textsuperscript{237} Additionally, there are thousands of radio and television stations, low-power TV stations, cable systems bringing up to 100 channels or more into the home, along with teletext, videotext, and other communication systems.\textsuperscript{238}

Despite the large number of total outlets, entrance into broadcasting markets is still severely limited. Regardless of

\textsuperscript{233}See Hyde, \textit{supra} note 3, at 1188; see also Ferris & Kirkland, \textit{supra} note 49, at 611.

\textsuperscript{234}395 U.S. at 390.

\textsuperscript{235}See Krattenmaker & Powe, \textit{supra} note 4, at 155.

\textsuperscript{236}See Hyde, \textit{supra} note 3, at 1190.


\textsuperscript{238}Id. at paras. 84-122.
the total number of outlets, as long as a broadcaster is granted a license to operate on a certain frequency, all others are denied use of that frequency. 239 There are numerous cities in the United States where there are no available frequencies and thus no access to the market. 240

Proponents of deregulation, in arguing that broadcasting channels are no longer a scarce resource, mistakenly assume that every "channel" of communication is of equal value. 241 Thus, independent television stations and cable shopping channels, which may offer no news or public affairs programming, are equated with network-affiliated full-service VHF stations. Yet, neither the independent station without a news department, nor the cable shopping channel provides ideas that further the goals of self-government and the first amendment. It is misleading to suggest that an obscure public access channel or a cable shopping outlet equals a full-power, over-the-air television station affiliated with one of the major networks.

Proponents of deregulation are fond of pointing to the cities that have only one or two daily newspapers but several dozen radio and television stations. 242 If there is any scarcity, the argument goes, it is clearly in the print industry, not in broadcasting. 243

While there may be macro diversity in the aggregate number of total communication outlets, there is still much micro scarcity. A licensee, at no cost other than an application fee, receives exclusive use of a communication channel from the public domain. With the exception of a few limited access requirements mandated by the Communications Act, a licensee, especially in today's deregulatory environment, may oper-

239. The Communications Act expressly denies any right of access to use the channel licensed to a broadcaster except for equal time rules that apply to political campaigns, rules guaranteeing reasonable access for federal political candidates, political editorial rules, and the right of reply under the personal-attack rules. 47 U.S.C. § 151 (1987).

240. The FCC, in its 1985 Fairness Report, argued that there are frequencies that remain vacant and for which there has been no demand. See 1985 Fairness Report, supra note 7, at paras. 103-04. See also Fowler & Brenner, supra note 5, at 224-25. These frequencies, however, are often undesirable for either technical or financial reasons (i.e., poor signal quality or small market).

241. See Ferris & Kirkland, supra note 49, at 611.

242. See Fowler & Brenner, supra note 5, at 225 n.82.

ate the station in almost any way it sees fit. These minimal access provisions are all that stand between the broadcaster's unabridged right to exclude all other voices from the airwaves and the public's right to hear differing opinions.\textsuperscript{244}

It is unreasonable to suggest that if the public cannot hear discussion of important issues on a given broadcasting station, or gain access to the frequency it uses, it should turn to one of the other dozens of outlets in that market for discussion. Many of the other outlets are neither equipped, nor commercially able, to provide programs on vital local issues. If they are devoted to home shopping, movies, syndicated game shows, and reruns of old network shows, they cannot provide alternative sources of information anywhere equal to that of a major station.

B. The Cost of Stations

The clearest evidence that scarcity still exists, and that diversity of electronic outlets may be years away, is the extraordinary financial value of broadcasting stations. Broadcasting continues to be one of the most profitable businesses.\textsuperscript{245} The escalating price of stations, while leveling off recently, is testimony to the confidence of investors in the industry and to the recognition that very few good frequencies are ever available.

A station's value lies almost entirely in its license. A few years ago, a Los Angeles TV station was sold for $510 million, after having been purchased for $245 million only two years earlier. The station's value increased at a daily rate of $285,000.\textsuperscript{246} During its battle to retain its license, a Chicago television station owned by CBS was estimated to be worth

\textsuperscript{244} The audience would most probably have little trouble identifying a broadcaster who consistently aired programs promoting a single point of a view on an important issue and excluding all others. What would be much harder for the public to discern, and, therefore, potentially more harmful to its interests, is a station that ignored an important issue. It is expecting a lot from average viewers that they be so well informed as to know when coverage of an issue is lacking. The suggestion that they may learn about such issues from print media does not relieve broadcasters of their responsibility to serve the public interest by airing programs dealing with important local problems.


\textsuperscript{246} \textsc{Broadcasting}, May 20, 1985, at 39.
between $500 and $600 million dollars.  

A broadcaster can have a mediocre or even poor record of public service and still keep the profits from “selling” its government license. RKO, a company whose record of deceiving the FCC, violating securities laws, and poor public service was so horrendous it was one of the few broadcasting companies ever to lose a major television license, was able to sell its Los Angeles station in 1988 for $324 million. The FCC claimed this was appropriate punishment because that figure represented only about two-thirds of its market value. Even after the company was determined by an administrative law judge to be unfit to be a licensee, the Commission allowed RKO to sell its stations for huge profits.  

It is inconceivable that broadcast licenses would be worth such gigantic sums, and would appreciate in value at such a fantastic rate, were it not for their scarcity. Broadcasters who pay large sums for stations, sometimes as much as twenty times cash flow, take on huge debts that can only be paid with high advertising revenues or by reducing expenses. News and public affairs departments may be the first place new owners look to save money. Even employees previously thought to be performing essential tasks in news and public affairs may be fired. 

C. The End of Regulation 

The public interest standard that has governed broadcasting

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248. Hershey, FCC Approves 2 Settlements by Gencorp, N.Y. Times, July 21, 1988, at 27, col. 3. An FCC administrative law judge had ruled that RKO was unfit to be a licensee because of violations of FCC rules, including fraudulent billing and misrepresentations to the Commission. FCC to Approve Settlement Transferring KHJ-TV to Disney, Broadcasting, July 18, 1988, at 32. In 1980, RKO lost its license to operate a Boston station, WNAC-TV, estimated to be worth around $450 million. Hershey, supra, at 27, col. 3. See RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981).  
250. There was some evidence in 1988 that the rapid appreciation of broadcast properties was slowing down. Nevertheless, in the first half of 1988, 23 TV stations were sold for a total of $365 million. TV Station Sales: The List Grows Longer, Broadcasting, July 18, 1988, at 32.
The stalemate over how broadcasting should be regulated will continue. The public, represented either by members of Congress or by one of the few public interest groups that covers the broadcasting industry, finds it difficult to convince the Commission to enforce, and broadcasters to accept, regulation of the industry. As long as broadcasters believe they may op-

251. Broadcasting magazine has suggested that because the Communications Act refers to the obligation of the FCC to regulate broadcasting in the public interest, broadcasters are not necessarily bound by the public interest standard. At a minimum, they are entitled to interpret for themselves how the public interest is to be served. In an editorial, the magazine echoed the sentiments of many broadcasters:

As for the so-called public interest standard itself, few seem aware that it does not apply to broadcasters at all. Yes, the phrase 'in the public interest, convenience and necessity' does appear repeatedly in the Communications Act, but it is imposed on the FCC, not on the constituents it licenses.

Hanging in There for the First Amendment, BROADCASTING, July 25, 1988, at 114. The editorial added: “Should broadcasters operate in the public interest? Without doubt; should and do. But . . . [a public interest standard is] not a quantifiable thing. It’s what every broadcaster does in his own special way.” Id.

252. See R. Labunski, supra note 148, at 91-116. See also Nader & Riley, supra note 8, at 66-67.

253. The Commission is considering changes in the comparative renewal process that would have the effect of granting a license in perpetuity. The Commission is checking broadcaster reaction to a proposal to accept the public interest standard in return for changes in comparative renewal. See Between a Rock and a Hard Place, BROADCASTING, June 20, 1988, at 98. For an excellent discussion of how hard the Commission tries to please broadcasters, and other problems of the FCC, see Johnson, A New Fidelity to the Regulatory Ideal, 59 GEO. L.J. 884 (1971); see also Johnson & Dystel, A Day in the Life: The Federal Communications Commission, 82 YALE L.J. 1575 (1973).

254. It is hard to imagine an FCC more solicitous of the broadcasting industry than that of the past few years. With the possible exception of the FCC’s belated enforcement of indecency rules (related to the broadcasting of sexually-explicit movies on TV and disc jockeys who exceed the bounds of good taste), the Commission has done much to satisfy the demands of broadcasters for deregulation of their industry. The FCC fined a Kansas City television station $2,000, which it is appealing, for showing an R-rated movie. See Halonen, FCC Fines K.C. Station $2,000 for Broadcasting “Indecent” Film, ELECTRONIC MEDIA, June 27, 1988, at 3.
erate their stations subject only to marketplace limitations, they will not accept the government's authority to enforce the Fairness Doctrine. On the other hand, broadcasters currently lack the clout in Congress to force repeal of the other content regulations.

The unsuccessful efforts to rewrite the Communications Act of 1934 clearly demonstrate the impasse. In the late 1970's, several bills were introduced in Congress to comprehensively revise the Communications Act. One provided what some thought was a workable compromise on the content regulations. In return for modification of the Fairness Doctrine and equal time rules and repeal of other content regulations, broadcasters would be asked to pay a "spectrum-use" fee based on the value of their frequency. Despite the opportunity to be freed of content regulations, broadcasters denounced the fee as a tax on their business and as a "form of double liability" because some money would go to finance "competitive government programs," that is, public broadcasting.

The long impasse over the regulation of broadcasting requires some innovative measures. The solution to the problem of how to regulate broadcasting in the public interest without impairing the constitutional rights of broadcasters may lie in amending the Communications Act by designating a public access period of one hour per week, and by granting broadcasters full first amendment rights during their time period. This

256. Section 434(a) of H.R. 13015 would have abolished the Fairness Doctrine immediately for radio. For television, the Doctrine would be changed to require broadcasters to "(1) provide news, public affairs, and locally produced programming [including news and public affairs] throughout the broadcast day; and (2) treat controversial issues of public importance in an equitable manner." The bill would have freed radio from equal time rules and freed television from such rules in all national and statewide election campaigns. Id.
257. Under the proposed bill, a small commercial radio station would be expected to pay $200 to $800 annually, while a high-power, "clear-channel" radio station would pay as much as $40,000. The assessments for VHF television stations would generally begin in the six-figure range. In the New York metropolitan area, for example, which has the greatest number of viewing households in the country, each network-owned station would pay about $7 million. The money would go into a telecommunications fund which would pay for a newly proposed regulatory commission (replacing the FCC), for the development of programming on public broadcasting, to stimulate minority ownership of stations, and to improve rural telecommunications. Id. at § 413.
The proposal would accomplish the dual goals of providing broadcasters first amendment parity with print media, while retaining mandated access for discussion of contrasting points of view on controversial issues.

V
The Public Interest and Public Access: After the Fairness Doctrine

The Fairness Doctrine was a failure. While the Commission recently rendered the Doctrine virtually useless through neglect, previous Commissions violated the first amendment rights of broadcasters by misapplying it, as in the Pensions case. Content regulations, in the wrong hands, can be used to intimidate broadcasters. Even part one of the Doctrine, which seems so noble in its efforts to compel broadcasters to air programs dealing with important community issues, has been used as an excuse for not covering controversial issues.

With the limited resources the Commission has available, and the large number of broadcasting stations that must be monitored, it is impossible for even the most dedicated Commission to enforce the Doctrine fairly and comprehensively. The situation is further exacerbated by a Commission which states its opposition to the Doctrine and enforces it half-heart-

259. See supra notes 106-33 and accompanying text. Krattenmaker & Powe, supra note 4, at 155-62, identify four cases as the best examples of the failure of the Fairness Doctrine: 1) American Sec. Council Educ. Found. (ASCEF) v. CBS, 63 F.C.C.2d 366 (1977), aff’d en banc sub nom. American Sec. Council Educ. Found. v. FCC, 607 F.2d 438 (D.C. Cir. 1979), in which ASCEF presented the FCC with a study of CBS News’ handling of national security issues. It charged that CBS violated the Fairness Doctrine by presenting stories suggesting the Soviet threat was less serious than the Nixon administration perceived. The FCC declined to hold a hearing on the issue, and dismissed the complaint for failure to present a well-defined issue. Apparently, the Commission found that the issues presented by ASCEF were “too big” and “too amorphous.” Krattenmaker & Powe, supra note 4, at 169-70; 2) In re Petition by NBC, 25 F.C.C.2d 735 (1970), in which the Commission came to the opposite conclusion where the issue presented was apparently of de minimis importance. A private pilots association protested an NBC news report that suggested that pilots of small planes were a danger in the crowded skies around major airports. The Commission agreed with NBC that the program had been about “air traffic,” but determined that the problem of private pilots was a “sub-issue” and a broadcaster need not be fair on each sub-issue. Krattenmaker & Powe, supra note 4, at 170-71; 3) the Pensions case, discussed supra at text accompanying notes 106-33; and 4) the WXUR case, discussed supra at text accompanying notes 59-83.

260. See R. LABUNSKI, supra note 148, at 134-37, for a discussion of Nixon administration efforts to intimidate broadcasters. See also 1985 Fairness Report, supra note 7, at paras. 74-76.
edly, if at all. Even if the Fairness Doctrine was enthusiastically supported by the Commission, and applied in appropriate cases, it would never achieve its stated goals. The Commission is hampered because it is forced to either impose small monetary fines or revoke a broadcaster's license. Thus, the Commission must choose between slapping a licensee's wrist or slitting its throat. Furthermore, courts, while they have some supervisory responsibility over the FCC, cannot regulate broadcasting on a day-to-day basis.

Because of proposed changes to the comparative renewal process and the Commission's reluctance to enforce content regulations, some alternative plan is necessary to preserve the public's interest in broadcasting. Although controversial and a departure from past policies, the creation of a mandated public access period is worth serious consideration. Its adoption on an experimental basis may provide a solution to the stalemate over regulation of broadcasting.

A. Access Proposals: Rejection by the FCC

The Communications Act of 1934 specifically states that a broadcasting station is not "a common carrier," as is a telephone company, whose facilities are available to all who want to use them. Broadcasters who are granted an exclusive license to use their frequency currently cannot be forced to

261. Today's FCC would probably not have revoked the licenses of WLBT-TV and WXUR Radio. Those revocations involved unusually extreme circumstances in a different era of regulation. In 1984, citizens of Dodge City, Kansas, lodged a Fairness Doctrine complaint against KTTL-FM. The complaint was based on a series of programs presenting the views of right-wing fundamentalist ministers. Some of the programs attacked Catholics, Jews, blacks, and other minorities. Despite the similarity to WXUR, the Commission refused to consider the Fairness Doctrine challenge, imposing strict requirements on those who brought the fairness complaint. See Cattle Country Broadcasting, 50 Fed. Reg. 37,272 (1985).


263. Section 3(h) of the Communications Act states that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. § 153(h) (1987). See FCC v. Midwest Video Corp., 440 U.S. 689, 699-702 (1979) (holding that the FCC exceeded its authority under the Communications Act in requiring certain cable systems to provide access to facilities). Congress has since authorized cities to require access channels. See Cable Communications Act, 47 U.S.C. §§ 521-611 (1984); see also Nader & Riley, supra note 8, at 79. In CBS, Inc. v. Democratic National Comm., 412 U.S. 94 (1973), the Court held that the broadcasters' policy of not selling advertising time to individuals or groups wishing to address issues of importance to them did not violate the Communications Act or the first amendment. Id.
make their channels available to others, save for the limited exceptions under the remaining content regulations.

The FCC has considered and rejected a number of proposals that would guarantee access to broadcasting channels for those denied a license. The access proposals were discussed at length in the 1974 Fairness Report, in a 1979 Report and Order, and more recently in a Report of the Commission that accompanied the Memorandum Opinion and Order abolishing the Fairness Doctrine.

The Committee for Open Media (COM) suggested a voluntary plan under which broadcasters would be required to provide one hour per week for access programming, of which thirty-five minutes would be set aside for spot messages and the remaining twenty-five minutes would be reserved for program-length presentations. According to COM, the proposal would be less restrictive than the more content-oriented approach of the Fairness Doctrine.

The Media Access Project (MAP) and the Telecommunications Research and Action Center (TRAC) jointly proposed establishing three categories of access users and requiring broadcasters to set aside 259 minutes per week, or 3.4% of the broadcast time for a station that broadcasts eighteen hours a day, for access use.

The MAP/TRAC proposal called for the establishment of an

264. Some have suggested an access system for the print media. See Barron, Access to the Press—A New First Amendment Right, 80 HARV. L. REV. 1641 (1967).
265. 1974 Fairness Report, supra note 7, at paras. 72-83.
266. In Re 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) [hereinafter 1979 Fairness Report].
267. 1987 Fairness Report, supra note 224, at paras. 55-100. Access proposals have not been considered by the Commission since the elimination of the Fairness Doctrine.
268. One half of the time slots would be offered on a first-come, first-serve basis, and the other half would be offered on a "representative spokesperson" basis, the choice of which would be left to the broadcaster's discretion on "predetermined, content-neutral grounds." An important feature of the COM proposal was that a broadcaster who chose the access option would be in presumptive compliance with the Fairness Doctrine. Under the COM plan, the Commission would be limited to examining the adequacy and compliance of a station's access policy. Id. at paras. 55-62.
269. Id. at para. 55.
270. Under the MAP/TRAC proposal, the following would be entitled to use public access: "(1) partisan access users (representatives of established political parties); (2) nonpartisan access users (representatives of established community and issue-based organizations); and (3) direct citizen access users (individual citizens)." Id. at para. 57.
"access center" in each market to ensure "high-production quality, effective distribution, and marketwide co-ordination." The center would be funded by broadcasters and would relieve them of much of the burden of providing access users with the resources they need to produce programming.

The system proposed by MAP/TRAC would not be mandatory. A broadcaster could comply with either current Fairness Doctrine requirements or with the proposed access rules. If a broadcaster chose the access option, the "presumptions in favor of the broadcaster in a fairness proceeding would be strengthened."

The American Civil Liberties Union (ACLU) proposed an access plan whereby the licensee would annually determine ten controversial issues of public importance and provide reply time on a first-come, first-serve basis to any individual or group representative who wanted to discuss one of the ten issues. According to the ACLU, this plan would create an "obligation for the broadcaster to spend a reasonable amount of time on public issues and, in a nondiscriminatory manner, provide an incentive for members of the public to air their views."

The Commission also considered several proposals that suggested access as a supplement to, rather than a replacement for, the Fairness Doctrine. One plan would create a non-profit corporation chartered by Congress that would be granted sixty minutes of time on each commercial broadcast station each day during prime-time television and drive time radio. The corporation, funded by membership dues, would be run by a board of directors elected by the membership.

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271. Id.
272. Id. at para. 58.
273. Id. The MAP/TRAC plan would be a substitute for Fairness Doctrine requirements, but not for other content regulations, including § 315, Zapple situations (appearance by supporters of qualified candidates), political endorsements, and paid editorial advertising. Id. at para. 59.
274. Id. at para. 62.
275. The nonprofit corporation, called "Audience Network," was suggested by TRAC in supplementary comments. The New York State Consumer Protection Board (NYCPB) suggested the adoption of a "free programming" requirement to supplement the Fairness Doctrine. Id. at para. 65. See supra note 22 for a discussion of Nader's expanded proposal for Audience Network. Geller and Lambert, two individuals active in regulatory issues, proposed a plan of access that would allow the public to discuss issues that might be overlooked by the licensee, and permit issues
Beginning with the 1974 Fairness Report, the Commission rejected the access proposals because they would increase the role of government in determining broadcast programming. The Commission also held that a system of access on a first-come, first-serve basis may decrease government involvement, but could not assure discussion of important issues on a timely basis.

The Commission's rejection of the various access proposals was sharply criticized by the U.S. Court of Appeals for the District of Columbia in 1977. The court held that the Commission had not given serious consideration to the COM proposal which, in the court's opinion, had "desirable aspects that the Commission may have overlooked." The court remanded the case to the FCC for a better explanation of why the COM proposal was rejected.

Upon remand, the FCC again rejected the access proposals in the 1979 Fairness Report. The Commission said it had carefully studied the proposals, including that of COM, but concluded that "while the proposal potentially offered a format which could serve to supplement a licensee's Fairness Doctrine obligations, no reasonable assurance had been provided that its implementation could serve as a substitute for

of public importance to be "presented in a partisan fashion." 1987 Fairness Report, supra note 224, at paras. 63-64.

276. The Commission noted some of the problems:
If the access were free, the government would inevitably be drawn into the role of deciding who should be allowed on the air and when. This governmental involvement in the day-to-day processes of broadcast journalism would, we believe, be antithetical to this country's tradition of uninhibited dissemination of ideas. With regard to . . . paid access, . . . the public interest in providing access to the marketplace . . . would scarcely be served by a system so heavily weighted in favor of the financially affluent . . .

1974 Fairness Report, supra note 7, at para. 79 (emphasis in original). See Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971). Broadcasters must provide free time to those opposed to the views expressed in paid ads on controversial issues if no sponsor can be found. See Cullman, supra note 6.

277. Having determined in the 1974 Fairness Report that it had not found any "scheme of government-dictated access" which it considered "both practical and desirable," the Commission concluded that the public interest would best be served through "continued reliance on the fairness doctrine which leaves questions of access and the specific handling of public issues to the licensee's journalistic discretion." 1974 Fairness Report, supra note 7, at para. 78.


279. Id. at 1113.

280. Id. at 1113, 1116.

281. 1979 Fairness Report, supra note 266.
the Fairness Doctrine."\textsuperscript{282}

In 1985, the Commission, even as it began the process of abolishing the Fairness Doctrine, concluded that forced access would not work:

>[E]ven though all of these proposals are intended to advance the First Amendment goals underlying the doctrine and designed to alleviate problems we have found to be associated with the fairness doctrine itself, each of them has drawbacks and shortcomings that, in our opinion, makes access as an alternative even less attractive than the existing fairness doctrine.\textsuperscript{283}

The Commission's rejection of access proposals was supported by observers who believe that the government has no business telling journalists, whether print or broadcast, what should or should not be disseminated.\textsuperscript{284} Former FCC Chairman Mark Fowler recognized that the courts would not compel commercial broadcasters to allow public access,\textsuperscript{285} but made the controversial argument that public broadcasting stations can be forced to air programs on controversial issues because they are government entities (by virtue of receiving public money), and because they have deviated from their intended purpose by too closely resembling commercial networks in the type of programming they offer.\textsuperscript{286} Fowler argued that because public stations are granted use of frequencies that would otherwise go to commercial broadcasters, they have special obligations to provide programming that differs significantly from that offered by commercial networks.\textsuperscript{287}

\textsuperscript{282} Id. at para. 7. The Commission noted that broadcasters were almost universally opposed to the idea that access could be used successfully as a substitute for the Fairness Doctrine. Id. at para. 14.

\textsuperscript{283} 1987 Fairness Report, supra note 224, at para. 76. The Commission was convinced that increasing the government's role in the access proposals was contrary to the public interest and would be a further step removed "from according broadcasters the same journalistic freedoms under the First Amendment that are enjoyed by other private communications media." Id. at para. 88.

\textsuperscript{284} Krattenmaker & Powe, supra note 4, at 156, cites the Supreme Court decision in Miami Herald v. Tornillo, 418 U.S. 241 (1974), as a point-by-point refutation of Red Lion Broadcasting Co. v. FCC. Tornillo invalidated a Florida statute that granted political candidates a right to equal space to reply to criticisms and attacks by a newspaper. In Tornillo, the Court held: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many virtues it cannot be legislated." Id. at 256.

\textsuperscript{285} Fowler & Brenner, supra note 5, at 254.

\textsuperscript{286} Id. at 250-55.

\textsuperscript{287} Id. at 252.
Fowler believes that besides experimental or specialized programming, public television "can also become a forum for individual access denied by commercial outlets. Because public broadcasters are government funded, it is more likely that their denial of access to individuals would constitute state action for first amendment purposes."288

Although rejection of the access proposals appears in the Commission's report suggesting alternatives to the Fairness Doctrine,289 they have not been formally considered since the elimination of the doctrine in August 1987. In the current era in which broadcasters are no longer required under the Fairness Doctrine to present contrasting viewpoints on controversial issues, the debate over access should be renewed. As long as broadcasting remains a scarce resource, those fortunate enough to have a license must occasionally "share" their frequency with others.

B. Amending the Communications Act

Since regulation began, a single broadcaster has been able to operate a station for every hour that it is on the air.290 Congress, in the Radio Act of 1927 and Communications Act of 1934, chose from a number of alternatives in designing a system of broadcasting where an individual frequency would not be shared among various parties.291 While Congress clearly had the right to choose this method of operation for broadcasting, it is equally clear that Congress could have chosen a system of enforced sharing.292

The authority of Congress to amend the Communications

288. Id. at 254. The authors' proposal is fraught with problems, not the least of which is that in Muir v. Alabama Educ. Television Comm., 688 F.2d 1033 (1982), the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, held that viewers may not force a public television station to air a program that the station had decided to cancel. The court distinguished "typical state regulation of private expression" and the "exercise of editorial discretion by state officials responsible for the operation of public television stations." Id. at 1044.

289. 1987 Fairness Report, supra note 224, at paras. 54-62.

290. This discussion makes no distinction between stations operating 24 hours a day and, for example, an AM radio station that operates only during daylight hours.


292. This concept was specifically stated in Red Lion. See infra notes 293-95 and accompanying text. The Commission authorized voluntary frequency sharing by separate broadcast licensees. 47 C.F.R. § 1573.17 (1987).
Act to grant broadcasters less than one hundred percent exclusive use of a frequency is found in its inherent ability to regulate interstate commerce and was confirmed in *Red Lion Broadcasting Co. v. FCC*. Justice White wrote that the first amendment would not prevent Congress from forcing broadcasters to share their frequencies.

Just as Congress has the power to set aside time for contrasting points of view under the Fairness Doctrine, equal time for candidates under section 315, and reply time under personal attack and political editorial rules, Congress can amend the Communications Act to require an access period. The fundamental difference between the proposal discussed below and previous access programs is that this proposal would not force access upon broadcasters during their time period. In fact, this proposal would grant them the first amendment rights they have long sought.

C. Abolishing the Content Regulations and Providing “Public Access”

Under the “public access” proposal, Congress would amend the Communications Act to grant broadcasters a license to operate on an assigned frequency for all but one hour per

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294. Justice White wrote:

[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves . . . . Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.


week.\textsuperscript{296} This hour would be reserved by the government for public access, and thus, a broadcasting license would not include that one hour period.

The license granted to broadcasters to operate all but one hour per week would be virtually equal in value to their current license. Therefore, in return for the exclusive use of a valuable public resource for all but one hour per week, broadcasters would be required to assist those who produce programs for the public access period. Although a broadcaster’s involvement in public access would require some costs, these costs would be in lieu of a spectrum-use fee that, in all likelihood, would have been significantly higher.\textsuperscript{297}

What broadcasters gain from such a plan is what they have sought for many years: full first amendment parity with print journalists during their time period. Although the elimination of the Fairness Doctrine and equal time rules can probably be compensated for in a public access period, some of the other content regulations, such as the obligation of broadcasters to make time available to respond to paid editorial announcements, pose more serious problems. Therefore, this proposal should be instituted for a three-year experimental period and would have to be renewed by Congress at that time.

Under such a system, if broadcasters during the time period covered by the license (all but one hour per week) did not want to present controversial issues of public importance, and refused to air contrasting points of view on those issues, the government would have no authority to require them to do so as it did under the Fairness Doctrine and other content regulations. Marketplace forces, despite their many deficiencies, would be the sole guarantor that broadcasters act responsibly. If broadcasters are correct in their assertion that marketplace competition is sufficient to ensure a commitment to public ser-

\textsuperscript{296} Compare this with Nader and Riley’s proposal that requires one hour of access per day. See supra note 22.

\textsuperscript{297} Broadcasters claim that a spectrum-use fee is an unlawful tax on the press. See Arkansas Writers’ Project v. Ragland, 107 S. Ct. 1722 (1987) (unconstitutional for state to impose tax on general interest magazines but not on religious, professional, trade, and sports journals); Minneapolis Star & Tribune Co. v. Minnesota Comm. of Revenue, 460 U.S. 575 (1983) (unconstitutional for state to impose tax that, among other things, singles out a few members of the press). See also H.R. 3333, § 414(a), 96th Cong., 1st Sess., 125 CONG. REC. 6,849 (1979); S. 611, 96th Cong., 1st Sess., 125 CONG. REC. 4,628 (1979); S. 622, 96th Cong., 1st Sess., 125 CONG. REC. 4,887 (1979).
vice, then those concerned about the potential of broadcasters to abuse the public trust have little to fear.

In return for being freed from the content regulations, broadcasters must give up the one hour per week and assist those who produce programs for the access period. The public access hour could be modeled after the Cable Communications Policy Act of 1984, which allows franchising authorities to require cable operators to provide channels for public access on both a paid and nonpaid basis and to assist in the training of those who produce public access programming. The Act replaced FCC rules seeking many of the same goals that were struck down by the Supreme Court. Such a scheme, which has worked fairly well in cable, can be adapted to over-the-air broadcasting.

Broadcasters, in responding to this proposal, will undoubtedly decry the loss of advertising revenue that results from surrendering one hour per week. Before they can success-


299. Section 531 of the Act allows state and municipal franchisors to require the cable operator to give public, educational, and governmental, programmers access to the cable system (public access). Section 532 mandates access to certain cable systems by commercial programmers not affiliated with the cable operator (leased access). See Nader & Riley, supra note 8, at 63.

300. In FCC v. Midwest Video Corp., 440 U.S. 689 (1979), the Supreme Court overturned FCC rules that required cable operators with more than 3,500 subscribers to make available certain channels for access by the public, educational, local governmental, and leased-access users, and to furnish equipment and facilities for access purposes. Justice White wrote:

In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded those limits in promulgating access rules. The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress.


301. Broadcasters will cite every possible legal argument in fighting such a proposal. They may not, however, claim that such a regulatory proposal would be the
fully make such an argument, however, broadcasters will have to explain recent changes in the marketplace that suggest they could give up an hour a week without suffering dire financial consequences.

In June 1988, ABC television network executives informed their affiliates that ABC was considering offering one less hour of programming each week. The proposal was a reaction to the network's unhappiness that many affiliates were carrying only twenty-one of the twenty-two hours of programming provided by the network each week. The network argued that in an era of declining revenues, it no longer made financial sense for the network to maintain its current level of programming if the affiliates were not going to carry all of it. The response by the affiliates, who wanted the network to continue to pay them to run its programs, was unenthusiastic. Affiliates do not want to compete in the open marketplace by having to purchase expensive syndicated programming.

ABC appeared most interested in cutting back on its Saturday night programming, when so many viewers are apparently watching programs on VCR's that it is difficult for the networks to make a profit. If 8:00 p.m. on Saturday is the hour equivalent of taking property without compensation in violation of the Fifth and Fourteenth Amendments. Broadcasters do not own the frequencies they use, and the costs involved for them (loss of revenue and cost of production for public access) can be imposed in lieu of a spectrum-use fee. The loss of advertising revenue and costs associated with assisting with production for the public access period will not materially affect the value of a broadcaster's license. It is hard to imagine that a television station worth hundreds of millions of dollars would be worth significantly less because of this proposal.

302. ABC-TV to Affiliates: Use Us or Lose Us, BROADCASTING, June 13, 1988, at 27.
303. The network was especially unhappy about affiliates who preempt network programs during prime time and in the 6 to 7 a.m. time slot when affiliates replace network shows with local news programs. Id.
304. One executive estimated the loss to the network because of the preemptions in the "10's of millions" of dollars. Id. The combined audience share for the three major networks has dropped from over 90% of television homes to 75%. Ratings Down 10%, Shares Off Four Points, BROADCASTING, November 9, 1987, at 35.
305. To Give or Take an Hour, ELECTRONIC MEDIA, June 20, 1988, at 12.
306. Left on their own, local stations would undoubtedly fill that extra hour with game shows and other syndicated programming fare. As the editors of Electronic Media noted: "Certainly the stations would survive having an extra hour to program and, indeed, they would probably thrive. The history of the prime-time access period indicates that the availability of profitable syndicated programming expands to fill the available time slots." Id.
that neither networks nor local affiliates especially want to program, it may be the perfect time for public access.

While the public access hour will vary significantly from one community to another, several purposes seem most suited to a public access system. The first purpose is to provide a forum for discussion of issues not covered during the licensee's portion of the week and to present contrasting viewpoints on those issues not aired during that time period. The similarity to the Fairness Doctrine is obvious, but the fact that the Doctrine no longer exists does not make its goals any less important. The public access period would allow those who feel a station is ignoring important issues, or presenting them unfairly, to offer that perspective to the public. It would allow more detailed inquiry into issues covered only superficially by a broadcasting station in news or public affairs programming.

The second purpose is to create a forum for examining the performance of the licensee, facilitated through an ombudsman or a program that offers the equivalent of a "Letters to the Editor" section of a newspaper. Broadcasting historically has done an extremely poor job of examining itself. With the exception of an occasional program that offers some self-criticism, most stations and networks do not provide a forum for complaints about their programming. If the public, for example, is dissatisfied with a station's news coverage, it should be provided an opportunity to air those views and criticize both the overall news philosophy of the station and individual stories.

The third purpose, although there would have to be some limits, is to provide access to groups that wish to purchase time for the presentation of issues. It will have to be decided whether those paying for time during the access period will be chosen on a first-come, first-serve basis, or on some other basis. While there is always the danger that the most affluent groups will dominate the access hour, some method must be developed that will provide a balance between individual citizens and well-funded groups.

As with cable operators under section 351(e) of the Cable Policy Act, those controlling public access would not be able to censor programs, with the exception of obscene material. 307

307. "[Except for control over obscenity], a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section." For the definition of obscenity, see Miller v.
decision would have to be made whether a program that is potentially libelous could be censored. If no censorship was allowed, producers of public access programming would have to be protected from suits for defamation or invasion of privacy.

D. Implementation of Public Access

The public access proposal suggested here is obviously very controversial. It will be difficult for even its strongest proponents to get Congress to approve such a fundamental change in the way broadcasting frequencies are allocated. Once enacted, numerous problems will have to be solved before an access system will work.\footnote{Under the Communications Act, broadcasters may not censor material submitted under § 315 (equal time rules). See Farmers Educ. and Coop. Union of Am. v. WDAY, 360 U.S. 525 (1959).} Broadcasters could not, however, object to this proposal on constitutional grounds because the one hour per week access period does not belong to them. In fact, their constitutional rights will be enhanced by the elimination of some or all of the content regulations during the time covered by their license.

Among the most difficult problems to solve in implementing public access will be:

1) Should all stations be required to relinquish one hour per week for public access? Some might argue that stations in the largest broadcasting markets should be exempt on the grounds that there are enough stations to offer discussion of all important community issues. They would assert that markets with fewer stations, which may have closer ties to local political and business interests, are most in need of a public access period where controversial issues can be considered. Others might argue that because all stations need ratings to survive financially and thus want to offend the fewest viewers, public access is needed for the discussion of provocative ideas that would not otherwise be aired.

2) What limits should there be on the costs that broadcasters incur for loss of revenue for the public access period and the cost of providing production help?\footnote{It is beyond the scope of this Article to provide a detailed plan for implementation of the public access period. Nevertheless, if Congress were determined to provide a system, it is likely that implementation problems could be solved.} Because programs

\begin{footnotesize}
\footnote{Under the Communications Act, broadcasters may not censor material submitted under § 315 (equal time rules). See Farmers Educ. and Coop. Union of Am. v. WDAY, 360 U.S. 525 (1959).}
\footnote{It is beyond the scope of this Article to provide a detailed plan for implementation of the public access period. Nevertheless, if Congress were determined to provide a system, it is likely that implementation problems could be solved.}
\footnote{Production costs could easily be tied to market size. The larger the broadcast market, the larger the limit on costs for preparing public access programs. This cost would, in any case, be significantly less than what would have been required if Con-}
\end{footnotesize}
produced by experienced broadcast professionals are generally far superior to those produced for cable public access, it is essential that there be some incentive for broadcasters to cooperate in producing access programming.

3) Who determines what is aired during the public access period? This would clearly be the most difficult issue. The access proposals submitted by several public interest groups and individuals310 provide a number of ideas for a system to allocate the public access period. Those ideas, or some combination thereof, would lead to an access system that could be tried on an experimental basis. A board composed of individual citizens responsible for public access on each station could be elected to serve on a rotating basis to decide what issues will be presented during the public access period. If there is no citizen board for a particular station, or if the board chooses not to air programs for that particular week, the hour reverts to the licensee to be used in whatever way it chooses.

4) What hour should broadcasters give up? If left to them to decide, each will undoubtedly give up its least valuable hour, meaning the hour when fewest people are listening or watching. This would result in the public access hour being aired in the middle of the night or the early hours of the morning when the audience is smallest, thus defeating the purpose of providing the public with access to controversial issues of public importance. If all broadcasters give up the same hour each week, listeners and viewers will be limited to only one hour of access programming. Ideally, each broadcaster in a market will surrender a different hour during a time of the week when a large portion of the public will be able to tune in.

An important element in this access proposal is the cooperation of broadcasters. Such cooperation is not likely to be purely voluntary, but will instead require encouragement from the FCC. The Commission is considering changes to the comparative renewal process to insulate broadcasters from challenges to their licenses.311 Under this access proposal, one

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310. See supra notes 263-89 and accompanying text.
311. Broadcasters argue that the comparative renewal process subjects them to harassment, if not extortion, by those filing renewal challenges with the FCC. The
criterion for license renewal should be the extent to which a broadcaster has cooperated with public access authorities. If the broadcaster has made an affirmative effort to provide assistance to those using public access, that should reflect positively on the broadcaster at the time of renewal.

The quality of the public access programming will obviously vary greatly. Currently, much public access programming on cable is unwatchable. The quality of the video is often poor, and audiences are not attracted to programs that offer nothing more than two individuals sitting around a table with a green plant discussing community problems. In order to attract an audience, the public access production must include high-quality video shot outside the studio, which may require the active involvement of the TV station. When high-quality video is combined with interesting in-studio guests, the program is more likely to attract a loyal audience.

Broadcasters who strenuously object to this proposal need to be reminded that they do not own the frequencies they use, and if Congress believes a public access period should be tried, broadcasters will have to learn to cooperate with those programming the public access hour.\(^{312}\)

There is much in this proposal for broadcasters. They would finally be freed of the content regulations they have despised for so long. They could be given financial incentives that compensate for loss of revenue and the cost of assisting those producing public access programming. The frequency would remain theirs to use for all but one hour per week when they would suspend normal programming to provide a forum for viewers to criticize or praise the station, discuss im-

\(^{312}\) It would be wrong to underestimate the ability of broadcasters to defeat proposals they do not consider to be in their interest. Broadcasters are well financed and often well organized. The National Association of Broadcasters, for example, had a budget of $13.4 million in 1987, *Closed Circuit*, BROADCASTING, Aug. 31, 1987, at 7, and along with cable and motion picture political action committees, handed out $1.1 million in 1986. *PAC's Dole Out $1.1 Million in 1986*, BROADCASTING, May 4, 1987, at 64.
portant issues, and explore unorthodox ideas. Considering the suspicion with which some people hold broadcasting, embracing the public access proposal may enhance the industry's public image. The criticism of the station that may be aired during the public access period may at times be painful for the broadcaster, but could in the long run improve the image of the industry in the eyes of a public that has, for too long, felt excluded from using broadcasting frequencies that they own.

**Conclusion**

Sixty years of experience have demonstrated the difficulty of regulating broadcasting in the public interest without abridging the constitutional rights of broadcasters. The Fairness Doctrine, the most controversial of all content regulations, is clearly unworkable. Even when the FCC is determined to actively regulate in the public interest, the Fairness Doctrine cannot achieve its intended goals. During the past eight years, the FCC has demonstrated how meaningless the Doctrine is in the hands of those who believe the marketplace, and not government, ought to regulate broadcasting.

There is no reasonable method by which the Fairness Doctrine can be fairly and uniformly enforced. At the same time, broadcasters are not entitled to monopolistic use of a valuable frequency, with its potentially large commercial value, to the exclusion of all other voices.

Congress is faced now with an opportunity to change the way broadcasting is regulated. It should abandon efforts to enact the Fairness Doctrine, and should instead amend the Communications Act to create a public access period. While such a proposal raises many difficult issues and cannot be easily implemented, it has the potential to provide broadcasters with the full first amendment rights they have long sought, while at the same time protecting and enhancing the public's interest in broadcasting.