

MORE FOLLY THAN FAIRNESS: THE FAIRNESS DOCTRINE, THE FIRST AMENDMENT, AND THE INTERNET AGE

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Not only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders. I can recall newsroom conversations about what the [regulatory] implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a Government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost.¹

INTRODUCTION

The above quotation is one would expect to hear from a dissident in Alexander Solzhenitsyn's *Gulag Archipelago*² or from Winston Smith, the protagonist in George Orwell's classic *Nineteen Eighty-Four*.³ Yet the above statement was uttered by none other than Dan Rather, then-managing editor and anchor of CBS News.⁴ He had submitted the comments on behalf of CBS Inc. to the Federal Communications Commission ("FCC").⁵ The FCC was reviewing the Fairness Doctrine, a policy that required all radio and television broadcasters to give adequate coverage to "all responsible positions" on controversial issues of public importance and mandated that coverage be fair and reflect opposing viewpoints.⁶ A unanimous U.S. Supreme Court upheld the Fairness Doctrine in the 1969 case of *Red Lion Broadcasting Co. v. FCC*.⁷ In breathtakingly broad language, the Court opined that the "mandate to the FCC to assure that broadcasters operate in the public

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¹ Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 171 (1985) (internal quotation marks omitted).

² ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO: 1918–1956* (Thomas P. Whitney trans., 1974).

³ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

⁴ Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d at 171.

⁵ *Id.*

⁶ Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1250 (1949). See Rex S. Heinke & Heather L. Wayland, *Lessons from the Demise of the FCC Fairness Doctrine*, 3 NEXUS, Issue 1 1998, at 3, 5–10, for a brief history of the Fairness Doctrine.

⁷ 395 U.S. 367, 400–01 (1969).

interest is a broad one, a power ‘not niggardly but expansive.’”⁸ Dan Rather and Bill Monroe would beg to differ.⁹ The FCC eventually thought so, too. It unanimously voted to abolish the Fairness Doctrine in 1987.¹⁰

Recently, some members of Congress have renewed attempts to reinstate the Fairness Doctrine.¹¹ Senator Trent Lott (R-MS), then-Republican Whip in the U.S. Senate, fumed, “Talk radio is running America. We have to deal with that problem.”¹² His counterpart, Senator Dick Durbin (D-IL), similarly supports reinstatement of the Fairness Doctrine,¹³ as do Senator Diane Feinstein (D-CA),¹⁴ and Senator Jeff

⁸ *Id.* at 380 (quoting *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943)). The vote to uphold the Fairness Doctrine was 8-0 because Justice Douglas did not participate in the decision. *Id.* at 401. He later wrote that he did not support the outcome. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring) (“I did not participate in th[e] [*Red Lion*] decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime.”).

⁹ *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 171. Bill Monroe was the moderator and producer of the popular television talk show *Meet the Press*. *Id.* at 171 n.102. Bill Monroe echoed Dan Rather:

Some years ago as a young man I worked for a newspaper. I was very impressed with the spirit of independence on the part of the editors of the newspaper. They didn’t care if something they put in the paper offended a major political figure. Later I went to a television station and slowly I discovered that the managers of the television station were a little afraid of [the] government. They were timid, conscious of [the] government looking over their shoulder in a way that the newspaper publisher and editor for whom I had worked had not been. I began to feel I was a little bit less than free, and it worried me.

Id. (citation omitted).

¹⁰ Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5057 (1987).

¹¹ *E.g.*, Media Ownership Reform Act of 2005, H.R. 3302, 109th Cong. § 3(2) (2005). Sponsored by Rep. Maurice Hinchey (D-N.Y.), the bill garnered sixteen cosponsors. *Id.* Rep. Hinchey’s official government website states: “Please note that Hinchey will be introducing an updated version of MORA in the coming weeks.” Congressman Maurice Hinchey, Issues and Legislation, <http://www.house.gov/hinchey/issues/mora.shtml> (last visited Apr. 19, 2010).

¹² *FOX News Sunday* (FOX News television broadcast June 24, 2007), available at <http://www.foxnews.com/story/0,2933,286442,00.html> (transcript of Senator Lott’s and Senator Feinstein’s television appearances).

¹³ Alexander Bolton, *GOP Preps for Talk Radio Confrontation*, THE HILL, June 27, 2007, <http://thehill.com/homenews/news/12407-gop-preps-for-talk-radio-confrontation> (“It’s time to reinstitute the Fairness Doctrine’ . . . ‘I have this old-fashioned attitude that when Americans hear both sides of the story, they’re in a better position to make a decision.”).

¹⁴ *FOX News Sunday*, *supra* note 12 (“Well, I’m looking at [reviving the Fairness Doctrine], as a matter of fact, . . . because I think there ought to be an opportunity to present the other side. . . . But I do believe in fairness. I remember when there was a Fairness Doctrine, and I think there was much more serious correct reporting to people.”). It is doubtful whether the media of yesteryear was any more responsible than the media of

Bingaman (D-N.M.).¹⁵ The Democrats' standard-bearer in 2004, Senator John Kerry (D-MA), also concurs.¹⁶ The most recent elected officials to join the chorus of voices advocating for reinstatement of the fairness doctrine are Senators Debbie Stabenow (D-MI)¹⁷ and Tom Harkin (D-

today. During the early years of the republic, President Thomas Jefferson bitterly complained:

[T]he man who never looks into a newspaper is better informed than he who reads them[,] inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors. He who reads nothing will still learn the great facts, and the details are all false.

Letter from Thomas Jefferson, President, to John Norvell (June 11, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON 222, 225 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Definitive ed. 1905). Jefferson further suggested that “[p]erhaps an editor might begin a reformation in some such way as this[:] Divide his [news]paper into four chapters, heading the 1st, Truths[:]; 2[n]d, Probabilities[:]; 3[r]d, Possibilities[:]; 4th, Lies.” *Id.*

¹⁵ Bruce Daniels, *Bingaman Still Getting Heat over ‘Fairness’*, ALBUQUERQUE J. ONLINE, Oct. 23, 2008, http://www.abqjournal.com/abqnews/index.php?option=com_content&task=view&id=9123&Itemid=2; Ken Shepard, *Sen. Bingaman (D-N.M.): Fairness Doctrine Would Help Radio Reach ‘Higher Calling’*, NEWSBUSTERS, Oct. 23, 2008, <http://newsbusters.org/blogs/ken-shepherd/2008/10/23/sen-bingaman-d-n-m-fairness-doctrine-would-help-radio-reach-higher-cal> (citing The Radio Equalizer: Brian Maloney, Dem Senator Outlines Vindictive Plan to Eliminate Talk Radio, <http://radioequalizer.blogspot.com/2008/10/new-mexico-democrat-will-push-to.html> (Oct. 22, 2008, 14:11 EST) (“I would want this [radio] station and all stations to have to present a balanced perspective and different points of view . . . I think the country was well-served [when the Fairness Doctrine was in force]. I think the public discussion was at a higher level and more intelligent in those days tha[n] it has become since.”). The NewsBusters website also has the audio of Senator Bingaman being interviewed by talk radio host, Jim Villanucci, of KKOB in which Senator Bingaman makes the comments quoted above. *Id.*

¹⁶ John Eggerton, *Kerry Wants Fairness Doctrine Reimposed*, BROADCASTING & CABLE, June 27, 2007, <http://www.broadcastingcable.com/article/CA6456031.html>. During Senator Kerry’s 2004 presidential campaign, Sinclair Broadcasting was planning to air a documentary, *Stolen Honor: Wounds That Never Heal*, critical of his service during the Vietnam War shortly before the election. Bill McConnell, *Activists Claim Sinclair Victory*, BROADCASTING & CABLE, Oct. 25, 2004, <http://www.broadcastingcable.com/article/CA474631.html?q=%22Equal+Time%22>. After a firestorm of controversy and threats of legal action from the Democratic National Committee, pressure from shareholders and legislators, and complaints to the FCC, Sinclair instead aired *A POW Story: Politics, Pressure and the Media*, which featured both pro- and anti-Kerry material. *Id.*

¹⁷ Posting of Michael Calderone to POLITICO, *Senator Stabenow Wants Hearings on Radio ‘Accountability’; Talks Fairness Doctrine*, http://www.politico.com/blogs/michaelcalderone/0209/Sen_Stabenow_wants_hearings_on_radio_accountability_talks_fairness_doctrine.html?showall (Feb. 5, 2009, 11:12 EST) (“I think it’s absolutely time to pass a standard. Now, whether it’s called the Fairness Standard, whether it’s called something else—I absolutely think it’s time to be bringing accountability to the airwaves.”). Michael Calderone’s blog also contains audio of Senator Stabenow making the comments in an interview with radio host Bill Press. *Id.* Notably, Senator Stabenow’s husband, Tom Athans, is the “co-founder and former CEO of the liberal-progressive Democracy Radio.” Jennifer Chambers, *Sex Case Warrant Issued*, DETROIT NEWS, Apr. 23, 2008, at 2B. After leaving Democracy Radio, Athans went on to lead programming at the liberal, now bankrupt, radio network Air America and started TalkUSA Radio in 2006. Korrie Wilkins

IA).¹⁸ Former President Clinton also recently voiced his support for reinstatement of the Fairness Doctrine.¹⁹ President Obama has not personally addressed the question of whether to reinstate the Fairness Doctrine, but he has sent a spokesperson to tell reporters he is opposed to the Doctrine's reinstatement in the wake of uncertainty fueled by comments his senior advisor and press secretary made.²⁰

Drawing on scholarship from the Fairness Doctrine's inception to its repeal over twenty years ago,²¹ this Article critically examines the rationales for the Fairness Doctrine's reinstatement in light of the massive technological changes that have taken place over the past generation. This Article begins in Part I by discussing the history of the Fairness Doctrine, focusing specifically on the seminal litigation in *Red Lion Broadcasting Co. v. FCC*. Part II discusses the Fairness Doctrine's chilling effects on broadcasters' speech from its inception in 1949 to its repeal in 1987. After a brief discussion in Part III of the Doctrine's abolition in 1987, Part IV examines the persuasiveness of the spectrum and numerical scarcity rationales used to justify lesser First Amendment protections for broadcast radio and television. Part V surveys the post-repeal media landscape and explains how the diversity of voices available today undermines the rationale for the Fairness Doctrine's reinstatement. Instead of reinstating the Fairness Doctrine, Congress should pass legislation to protect the First Amendment rights of

& Todd Spangler, *Stabenow: Work Is Focus, Not Sex Case: Husband's Action Now a Family Issue*, DETROIT FREE PRESS, Apr. 3, 2008, at A1.

¹⁸ Posting of Michael Calderone to POLITICO, Sen. Harkin: "We Need the Fairness Doctrine Back," http://www.politico.com/blogs/michaelcalderone/0209/Sen_Harkin_We_need_the_Fairness_Doctrine_back_.html (Feb. 11, 2009, 09:08 EST) ("By the way, I read [Bill Press's] Op-Ed in the *Washington Post* the other day. I ripped it out, I took it into my office and said 'there you go, we gotta get the Fairness Doctrine back in law again.'"). Michael Calderone's blog also contains audio of Senator Harkin making the quoted comments in an interview with radio host Bill Press. *Id.*

¹⁹ Posting of Michael Calderone to POLITICO, Clinton Wants "More Balance" on Airwaves, http://www.politico.com/blogs/michaelcalderone/0209/Clinton_wants_more_balance_on_the_airwaves.html (Feb. 12, 2009, 17:34 EST) ("Well, you either ought to have the Fairness Doctrine or we ought to have more balance on the other side . . ."). Michael Calderone's blog also contains audio of former President Clinton making the quoted comments in an interview with radio host Mario Solis Marich. *Id.*

²⁰ FOX News.com, White House: Obama Opposes 'Fairness Doctrine' Revival, <http://www.foxnews.com/politics/first100days/2009/02/18/white-house-opposes-fairness-doctrine/> (last visited Apr. 19, 2010). A senior advisor to Obama, David Axelrod, had said earlier on *FOX News Sunday*, "I'm going to leave th[e] [Fairness Doctrine reinstatement] issue to Julius Genachowski, our new head of the FCC[,] and the [P]resident to discuss. So I don't have an answer for you now . . ." *Id.*

²¹ Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5043 (1987).

broadcasters.²² This Article ultimately concludes in Part VI that, given the exponential growth in media sources and viewpoints available to the average American, “[t]ruth and fairness have a too uncertain quality to permit the government to define them.”²³

I. THE HISTORY OF THE FAIRNESS DOCTRINE

A. *History of the Fairness Doctrine from 1949 to Red Lion*

1. An Early History

Congress’s first foray into radio came with passage of the Radio Act of 1912, which required broadcasters to be licensed.²⁴ When the Secretary of Commerce sought to penalize the Zenith Radio Corporation under the Act for operating on an unauthorized frequency, the U.S. Court of Appeals for the District of Columbia held that the Radio Act did not give the Secretary any discretion to withhold a license from a broadcaster.²⁵ The U.S. Attorney General arrived at the same conclusion.²⁶ In response to the ineffective Radio Act of 1912, which had done little to control the cacophony of competing radio broadcasters that were making the airwaves virtually unusable, Congress passed the Radio Act of 1927.²⁷ The 1927 Act established a five-member Federal Radio Commission (“FRC”), and empowered it to allocate or renew broadcast licenses contingent upon broadcasters showing that their radio stations would serve the “public convenience[,] . . . interest[,] or . . . necessity.”²⁸ Section 18 required radio broadcasters to give legally

²² The Broadcaster Freedom Act of 2009, which would prohibit the FCC from reinstating (in whole or in part) the Fairness Doctrine, would ensure that broadcasters’ First Amendment rights are protected. H.R. 226, 111th Cong. (2009). Introduced on January 7, 2009, H.R. 226 has 183 cosponsors. THOMAS (The Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00226:@@P> (last visited Apr. 19, 2010).

²³ David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 236.

²⁴ Act of Aug. 13, 1912, Pub. L. No. 62-264, ch. 287, 37 Stat. 302 (repealed 1927).

²⁵ *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1007 (D.C. Cir. 1923).

²⁶ Fed. Regulation of Radio Broad., 35 Op. Att’y Gen. 126, 131 (1926) (citing *Hoover*, 286 F. at 1007; Radio Comm’n—Issuance of Licenses, 29 Op. Att’y Gen. 579, 580 (1912)).

²⁷ Radio Act of 1927, Pub. L. No. 69-632, ch. 169, § 39, 44 Stat. 1162, 1174 (repealed 1934). See generally W. Jefferson Davis, *The Radio Act of 1927*, 13 VA. L. REV. 611 (1927) (discussing the necessity for additional federal regulation of radio broadcasting).

²⁸ Radio Act §§ 3, 11, 44 Stat. at 1162–63, 1167. Senator Howell unsuccessfully attempted to require broadcasters to present both sides of public issues if requested to do so. 67 CONG. REC. 12,503 (1926) (statement of Sen. Howell) (“We recognized . . . that if a radio station allowed the discussion of a public question it must afford, if requested, an opportunity to present the other side. I think it was the view of the [C]ommittee [on Interstate Commerce] that if any subject was to be presented to the public by any of the limited number of stations, the other side should have the right to use the same forum; and if such privilege were not to be granted, then there should be no such forum whatever.”).

qualified candidates for public office “equal opportunities” to use broadcasting stations, but allowed station owners to refuse all political advertisements.²⁹ The FRC interpreted these standards to require radio broadcasters to devote “ample play for the free and fair competition of opposing views” on issues of public importance.³⁰ The public interest standard that the FRC applied is the forerunner to the Fairness Doctrine, and its application led the FRC to decline to grant or renew radio stations’ broadcasting licenses.³¹

Congress replaced the FRC with the FCC as part of a comprehensive overhaul of the regulatory scheme contained in the Communications Act of 1934.³² The public interest standard in section 18 of the Radio Act of 1927 was reenacted verbatim in the 1934 Communications Act,³³ and the FCC continued to enforce it.³⁴ Commentators disagree on whether the early decisions by the FRC and the FCC constituted the first enunciation of the Fairness Doctrine.³⁵ In 1941, the FCC forbade broadcast licensees from engaging in *any*

²⁹ Radio Act § 18, 44 Stat. at 1170.

³⁰ Great Lakes Broad. Co., 3 F.R.C. ANN. REP. 32, 33 (1929).

³¹ See, e.g., *Trinity Methodist Church, S. v. Fed. Radio Comm’n*, 62 F.2d 850, 852–53 (D.C. Cir. 1932) (stating that the FRC may refuse to renew a radio station’s broadcasting license if that station uses its power to “obstruct the administration of justice, offend the religious susceptibilities of thousands, [and] inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality”).

³² See Pub. L. No. 73-416, ch. 652, tits. I & VI, §§ 1, 602–04, 48 Stat. 1064, 1064, 1102–03 (repealed 1947, 1994, and codified as amended in 47 U.S.C. § 604 (2006)).

³³ *Id.* tit. III, § 309(a), 44 Stat. at 1085 (codified as amended at 47 U.S.C. § 309(a) (2006)).

³⁴ *Young People’s Ass’n for the Propagation of the Gospel*, 6 F.C.C. 178, 185 (1938).

³⁵ Compare Roscoe L. Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 462 (1968) (“Notwithstanding the substantial history of the [F]airness [D]octrine, some authorities date the [F]airness [D]octrine from 1941. . . .” (citing Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 132 (1967); John Paul Sullivan, *Editorials and Controversy: The Broadcaster’s Dilemma*, 32 GEO. WASH. L. REV. 719, 728 (1964)), with Jerome A. Barron, *The Federal Communication Commission’s Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 2 (1961) (“It was with the *Mayflowe* case of 1941 that the [F]airness [D]octrine received its first tentative formulation by the [Federal Communications] Commission.” (citing *Mayflower Broad. Corp.*, 8 F.C.C. 333 (1941))), and Jonathan D. Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor’s New Clothes*, 23 FED. COMM. B.J. 75, 79 (1969) (“The early Federal Radio Commission and FCC cases did not stand for a fairness principle or justify broad Commission regulation.”). The Supreme Court seemed to accept that Fairness Doctrine principles had been imposed by the FRC “since the outset.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377–78 (1969).

editorializing.³⁶ Nevertheless, the first “definitive and comprehensive statement o[f] the Fairness Doctrine” was the FCC’s 1949 report that sought to clarify the obligations of broadcast licensees.³⁷ The first prong of the Fairness Doctrine imposed upon licensees the affirmative obligation to adequately cover issues of public importance.³⁸ A licensee was required to broadcast views on public issues of “substantial importance” regardless of the licensee’s own beliefs or the possible unpopularity of the required viewpoints among a station’s audience.³⁹ This requirement extended to “all *responsible positions* on matters of sufficient importance to be afforded radio time.”⁴⁰

The second prong of the Fairness Doctrine required licensees to ensure that “the various positions taken by *responsible groups*” on controversial issues of public importance were broadcast.⁴¹ This requirement included an obligation to provide free airtime “on demand” to alternative viewpoints on controversial issues of public importance.⁴² Thus, the Fairness Doctrine required broadcasters to fulfill their Fairness Doctrine obligations at their own expense if sponsorship was unavailable for an alternative viewpoint.⁴³ Furthermore, even if no individual or group requested free airtime, licensees had to take the initiative to obtain programming to fairly cover a controversial issue of public importance.⁴⁴

³⁶ *Mayflower*, 8 F.C.C. at 339–40; see also Note, *The Mayflower Doctrine Scuttled*, 59 YALE L.J. 759, 759 (1950) (discussing the *Mayflower* Doctrine’s rationale and its demise in 1949).

³⁷ STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 41 (1978) (citing *Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1246 (1949)).

³⁸ *Editorializing by Broad. Licensees*, 13 F.C.C. at 1249; accord *United Broad. Co.*, 10 F.C.C. 515, 517 (1945).

³⁹ *Editorializing by Broad. Licensees*, 13 F.C.C. at 1249–50.

⁴⁰ *Id.* at 1250 (emphasis added). The FCC never defined what a “responsible position” was. Thus, if the FCC did not deem a person or a group’s views to be responsible, the FCC could hold that the Fairness Doctrine did not apply to the particular viewpoint of that person or group. One can easily imagine viewpoints on virtually every controversial issue from abortion to xenophobia not gaining airtime because the FCC could deem them “not responsible.”

⁴¹ *Id.* at 1251 (emphasis added). Thus, the FCC not only had the power to determine which viewpoints citizens should hear (“responsible viewpoints”), but also what “responsible groups” would be permitted to air those viewpoints.

⁴² *Id.*

⁴³ *Cullman Broad. Co.*, 40 F.C.C. 576, 577 (1963).

⁴⁴ *John J. Dempsey*, 40 F.C.C. 445, 445–46 (1950); see also *Metro. Broad. Corp.*, 40 F.C.C. 94 (1960) (requiring “continuing vigilance of management to see that [the Fairness Doctrine] policies are carried out”). This requirement seems unnecessary as one strains to think of *any* controversial issue of public importance that would not inspire some person or group to demand free airtime to present their viewpoint on the issue. One can make a strong argument that if no person or group demands free airtime, then the issue at stake is not one of *controversial* public importance.

2. The Personal Attack Rule

The FCC's 1949 Report stated that "elementary considerations of fairness" may require a broadcaster to provide airtime to a person or group attacked on the air.⁴⁵ As time progressed, the FCC developed the personal attack rule as "a remedy for personal attacks that resulted from broadcaster compliance with the [F]airness [D]octrine."⁴⁶ It was not until the early 1960s that the FCC fleshed out the scope of the personal attack rule in a trio of cases.⁴⁷ The FCC required any broadcast licensee whose facilities were used to attack a person or group to contact the person or group that had been attacked and give them a reasonable opportunity to reply.⁴⁸ In response to what it viewed as "flagrant personal attacks" on the part of broadcasters, the FCC formalized the personal attack rule in 1967.⁴⁹

At first blush, the Fairness Doctrine, despite its serious shortcomings, arguably represented a marginal improvement in the FCC's position, which, under the *Mayflower* Doctrine, had prohibited broadcast licensees from using their facilities for *any* editorializing.⁵⁰ Perceived noncompliance with the Fairness Doctrine resulted in FCC investigations, petitions by complainants to deny licensees' requests for license renewals, and even license nonrenewal.⁵¹ But, as over three decades of experience with the Fairness Doctrine would show, the doctrine and its corollaries, like the personal attack rule, proved onerous and entangled politicians, ideologues, interest groups, and a federal

⁴⁵ *Editorializing by Broad. Licensees*, 13 F.C.C. at 1252.

⁴⁶ Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557, 559 (2001).

⁴⁷ *Billings Broad. Co.*, 40 F.C.C. 518, 520 (1962); *In re Application of Clayton W. Mapoles*, 40 F.C.C. 510, 515 (1962); *Time Mirror Broad. Co.*, 40 F.C.C. 538, 539 (1962).

⁴⁸ *Billings*, 40 F.C.C. at 520.

⁴⁹ Amendment of Part 73 of the Rules to Provide Procedures in Event of a Personal Attack, 8 F.C.C.2d 721, 724 (1967). The personal attack rule was codified at 47 C.F.R. § 73.123. *Id.* at 723. It read as follows:

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 . . . [one] week after the attack, transmit to the person or group attacked[:] (1) notification of the date, time[,] and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

47 C.F.R. § 73.123 (1968).

⁵⁰ *Editorializing by Broad. Licensees*, 13 F.C.C. at 1259 (separate opinion by Comm'r Jones) ("[T]he *Mayflower* . . . decision . . . fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities [o]n behalf of any cause." (citing *Mayflower Broad. Corp.*, 8 F.C.C. 333 (1941))).

⁵¹ *See infra* Part III.

bureaucracy in continual disputes over which viewpoints received airtime.⁵²

3. *Red Lion Broadcasting Co. v. FCC*

The *Red Lion* saga began when author and journalist Fred J. Cook encountered difficulty publishing a book tentatively titled *Goldwater: Fanatic of the Right*.⁵³ Cook's agent approached Grove Press, which in turn wrote to Wayne Phillips, the Democratic National Committee's ("DNC") Director of News and Information, who offered to purchase 50,000 copies for twelve cents each on behalf of the DNC.⁵⁴ The DNC eventually purchased 72,000 copies of the highly partisan biography.⁵⁵ Cook collected between \$1,800 and \$2,000 in royalties.⁵⁶ Grove Press did not fare so well; it sold only 44,000 copies besides those ordered by the DNC and eventually had to turn to its lawyers when the DNC refused to pay for the copies it had ordered.⁵⁷

Shortly thereafter, Phillips spoke with Cook about writing an article criticizing right-wing broadcasters.⁵⁸ According to Cook, Phillips approached the editor of *The Nation*, and suggested that Cook be given an assignment to write about right-wing broadcasters.⁵⁹ Cook penned a blistering 4,000 word exposé, *Hate Clubs of the Air*, relying on the DNC's "vast files."⁶⁰ A key figure in the "blood brotherhood of fanaticism," according to Cook, was the Reverend Billy James Hargis, an anti-Communist broadcaster, whom Cook attacked for being against "communism, liberalism, the National Council of Churches, federal aid

⁵² *Id.*

⁵³ FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT* 35 (1976). Friendly's book provides an excellent in-depth discussion of *Red Lion*.

⁵⁴ *Id.* at 36.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 37.

⁵⁹ *Id.* After Fred W. Friendly wrote about Cook in an article in the *New York Times Magazine*, Fred W. Friendly, *What's Fair on the Air?*, N.Y. TIMES, Mar. 30, 1975, (Magazine), at 11, Carey McWilliams, editor of *The Nation*, wrote a letter to the editor of the *Times* claiming it was his idea to write a story about right-wing broadcasters and that the DNC had no involvement in the publication of "Hate Clubs on the Air," Carey McWilliams, Letter to the Editor, *Assigned, Not Arranged*, N.Y. TIMES, Apr. 27, 1975, at 70. Even if one chooses to believe that the DNC was not the driving force behind Cook's article in *The Nation*, Cook wrote in his article that "[a]ides of the Democratic National Committee . . . have been monitoring the [right-wing] broadcasts, [and] report that the attempts to paint [President] Kennedy with a Red smear . . . are now being transferred with equal virulence to President Johnson." Fred. J. Cook, *Radio Right: Hate Clubs of the Air*, THE NATION, May 25, 1964, at 523, 524–25. This is proof that the DNC was well aware of the right-wing broadcasters Cook excoriates in his article.

⁶⁰ FRIENDLY, *supra* note 53 at 37; *see also* Cook, *supra* note 59.

to education, Jack Paar [a popular radio and television talk show host], federal medical care for the aged, Ed Sullivan [a popular television talk show host], the Kennedy-Khrushchev meeting, Eleanor Roosevelt, disarmament, [and] Steve Allen [a popular television talk show host].”⁶¹

On November 25, 1964, WGCB, a radio station owned by the Red Lion Broadcasting Corporation, carried a fifteen-minute program in which Hargis spent two minutes accusing Cook, of, among other things working for the “left-wing publication, [*The Nation*],” and seeking to “smear and destroy Barry Goldwater.”⁶² The FCC’s personal attack rules, a corollary to the Fairness Doctrine, required broadcasters that aired an attack on a public figure during a discussion of public issues to give a tape, transcript, or summary of the broadcast to that public figure and offer that person a reasonable opportunity to reply—for free if necessary.⁶³ Cook asked the DNC for help in defending himself and demanded free airtime from more than 200 radio stations that had carried the broadcasts, including WGCB.⁶⁴ The Reverend John M. Norris, the feisty octogenarian who owned WGCB, refused Cook’s demand and sent Cook WGCB’s rate card, offering to run Cook’s reply if he would pay.⁶⁵ Cook turned to the FCC, which, eleven months after the broadcast aired, determined that “elemental fairness” required WGCB to provide free airtime to Cook.⁶⁶

Norris decided to sue the FCC and eventually convinced the National Association of Broadcasters (“NAB”) to support him.⁶⁷ The NAB had strongly urged Norris not to sue and even agreed to reimburse any legal fees Norris had incurred thus far because of the NAB’s strong misgivings about what it viewed as his weak case.⁶⁸ The U.S. Court of Appeals for the District of Columbia initially ruled that Norris lacked standing to sue because the FCC’s letter requiring him to provide airtime to Cook was not an appealable order.⁶⁹ The FCC petitioned for an

⁶¹ Cook, *supra* note 59, at 524–25.

⁶² Red Lion Broad. Co. v. FCC, 395 U.S. 367, 371–72 n.2 (1969); *see also* FRIENDLY, *supra* note 53, at 5.

⁶³ Billings Broad. Co., 40 F.C.C. 518, 520 (1962); FRIENDLY, *supra* note 53, at 35.

⁶⁴ FRIENDLY, *supra* note 53, at 10, 42. The help of the DNC also helps explain how Cook was able to identify WGCB as one of the more than 200 radio stations that had aired the offending broadcast given that at the time of the broadcast Cook lived in Interlaken, New Jersey—well outside of WGCB’s broadcast range. *Id.* at 10, 42. Cook claimed he simply sought the advice of his local attorney. *Id.* at 42.

⁶⁵ FRIENDLY, *supra* note 53, at 4, 44. WGCB was selling fifteen minutes of airtime for \$7.50; Cook could have purchased two minutes for \$1.00. *Id.* at 5.

⁶⁶ Letter from the FCC to John M. Norris (Oct. 6, 1965), in 1 F.C.C.2d 934 (1965).

⁶⁷ FRIENDLY, *supra* note 53, at 46–47, 49.

⁶⁸ *Id.* at 48.

⁶⁹ Red Lion Broad. Co. v. FCC, 381 F.2d 908, 910 (D.C. Cir. 1967).

en banc review, which was granted.⁷⁰ The full court vacated the three-judge panel's order and delivered the knock-out punch in favor of the FCC by upholding the Fairness Doctrine and the personal attack rule.⁷¹ Undaunted, Norris petitioned for certiorari, which the Supreme Court promptly granted.⁷²

Flush from victory, the FCC issued a Notice of Proposed Rulemaking to formalize the personal attack rule.⁷³ Realizing that their worst nightmare—a far-right broadcaster in the high court challenging the Fairness Doctrine on weak facts—was becoming reality and could lead to a dramatic defeat, the major broadcasters moved quickly.⁷⁴ The Radio Television News Directors Association filed suit at approximately noon on July 27, 1967, in the U.S. Court of Appeals for the Seventh Circuit, challenging the Fairness Doctrine.⁷⁵ CBS filed a similar lawsuit a few hours later in the U.S. Court of Appeals for the Second Circuit.⁷⁶ NBC also filed in the Second Circuit four days later.⁷⁷ Caught off guard, the FCC moved with speed not normally associated with the glacial pace of a regulatory agency and amended its proposed rules a mere five days after NBC filed suit to exempt “bona fide newscast[s] or on-the-spot coverage of a bona fide news event” from its proposed personal attack rules.⁷⁸

The U.S. Department of Justice still had concerns with the FCC's proposal,⁷⁹ and the Seventh Circuit, where the three suits had been transferred and consolidated, allowed the FCC to amend its regulations a second time to exempt “bona fide news interview[s] and news commentary or analysis in a bona fide newscast.”⁸⁰ The Seventh Circuit

⁷⁰ *Id.* at 910.

⁷¹ *Id.* at 910, 930.

⁷² *Red Lion Broad. Co. v. FCC*, 389 U.S. 968 (1967).

⁷³ Notice of Proposed Rulemaking, 3 F.C.C.2d 991 (1966), *adopted in* Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to a Political Candidate, 8 F.C.C.2d 721, 721, 727 (1967).

⁷⁴ FRIENDLY, *supra* note 53, at 50.

⁷⁵ *Radio Television News Dirs. Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968); FRIENDLY, *supra* note 53, at 53.

⁷⁶ FRIENDLY, *supra* note 53, at 53.

⁷⁷ *Id.*

⁷⁸ Amendment of Part 73 of the Rule to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to a Political Candidate, 9 F.C.C.2d 539, 539 (1967). An additional problem proponents of the reinstatement of the Fairness Doctrine face is that it is by no means certain what constitutes a “bona fide newscast or on-the-spot coverage of a bona fide news event” today. Would a blog, a Facebook status update, a tweet, or a student newspaper count? If so, which blogs, status updates, tweets, or students newspapers?

⁷⁹ FRIENDLY, *supra* note 53, at 54.

⁸⁰ *Radio Television*, 400 F.2d at 1008–09 (citing Amendment of Part 73 of the Rules Relating to the Procedures in the Event of a Personal Attack, 12 F.C.C.2d 250, 250, 252

invalidated the FCC's personal attack regulations as unconstitutional under the First Amendment.⁸¹ The Supreme Court granted certiorari to the Seventh Circuit decision and consolidated the suit with Norris's to decide the constitutionality of the personal attack rule and the Fairness Doctrine in light of the circuit split.⁸²

4. *Red Lion's* Rationale

The broadcasters' worst fears were realized when, in a sweeping opinion, the Court concluded that the Fairness Doctrine and the personal attack rule were not merely constitutional but "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."⁸³ The FCC had defended the Fairness Doctrine on the grounds that it was aimed at ensuring WGCB met its license requirement that obligated it to operate in the public interest.⁸⁴ The Supreme Court noted that Congress had given the FCC the statutory authority to make rules and regulations for broadcast radio insofar as "public convenience, interest, or necessity requires."⁸⁵ The FCC was explicitly required to take into account the "public interest" when making broadcast licensing decisions, including the renewal of licenses.⁸⁶ Given its previous expansive interpretation of public interest, the Court concluded that the Fairness Doctrine was a critical component of the public interest standard.⁸⁷ In a footnote, the Court noted that the FCC

(1968)). The definition of "bona fide news interviews" and "commentary or analysis in the course of bona fide newscasts" would likewise be difficult to define in a principled way. Would a popular blogger interviewing a politician be considered a "bona fide news interview?" Should it?

⁸¹ *Id.* at 1021. Shortly after the *Red Lion* litigation began, the FCC issued a Notice of Proposed Rulemaking to formalize the obligations of broadcasters in cases of personal attacks. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373 (1969) (citing Personal Attacks; Political Editorials: Notice of Proposed Rulemaking, 31 Fed. Reg. 5710 (April 13, 1966)). The FCC adopted the language without substantial changes. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1968).

⁸² *United States v. Radio Television News Dirs. Ass'n*, 393 U.S. 1014 (1969).

⁸³ *Red Lion*, 395 U.S. at 375.

⁸⁴ *Id.* at 386; *see also* 47 U.S.C. § 309 (a), (h) (2006) (codifying the standard by which station licenses were and are currently issued, the standard with which the FCC argued it complied).

⁸⁵ *Red Lion*, 395 U.S. at 379 (quoting 47 U.S.C. § 303, (r) (1964)). The Supreme Court also noted that "Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on 'public questions'" in a colloquy with Commissioner Robinson. *Id.* at 379 n.7 (quoting *Hearings Before the S. Comm. on Interstate Commerce on S. 6*, 71st Cong. 1616 (1930) (statement of Sen. Clarence Dill, Chairman, S. Comm. on Interstate Commerce)).

⁸⁶ *Id.* at 379–80 (citing 47 U.S.C. §§ 307, 309(a) (1964)).

⁸⁷ *Id.* at 380–81; *accord* *FCC v. RCA Commc'ns, Inc.*, 346 U.S. 86, 90 (1953); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943); *FCC v. Pottsville Broad. Co.*, 309

was proscribed from censoring radio communications,⁸⁸ essentially holding that enforcing the public interest standard did not constitute censorship in violation of the First Amendment, an outcome it had previously endorsed.⁸⁹

The Supreme Court next turned its attention to WGCB's argument for invalidating the fairness doctrine on First Amendment grounds.⁹⁰ Due to the reach of "new media" like broadcast radio, the Court held that First Amendment standards that differed from those applicable to traditional print media were justified.⁹¹ It analogized broadcast radio to the user of a sound truck who was not permitted to "snuff out the free speech of others."⁹² It also accepted the view that because a limited number of broadcasting frequencies were reserved for public use, the FCC should be permitted to stop a licensee from monopolizing a radio frequency to solely serve its own narrow interest.⁹³ The Court also countenanced holding licensees as proxies or fiduciaries who are required to present views representative of their communities because certain views would not otherwise be aired.⁹⁴ Under this public trust doctrine, "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount."⁹⁵ Justice Brennan, who joined the Court's opinion, had previously advocated the belief that while a licensee's speech was protected, the manner in which he chose to

U.S. 134, 138 (1940); *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

⁸⁸ *Red Lion*, 395 U.S. at 382 n.12 (citing 47 U.S.C. § 326 (1964)).

⁸⁹ *Nat'l Broad.*, 319 U.S. at 227 ("The standard [Congress] provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the [Federal Radio] Act, is not a denial of free speech."); *see also* *KFKB Broad. Ass'n v. Fed. Radio Comm'n*, 47 F.2d 670, 672 (D.C. Cir. 1931) (holding that the nonrenewal of a radio station's license by the FRC on public interest grounds was not censorship).

⁹⁰ *Red Lion*, 395 U.S. at 386. The Supreme Court had long held that the First Amendment applied to broadcasters. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

⁹¹ *Red Lion*, 395 U.S. at 386 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

⁹² *Id.* at 387 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

⁹³ *Id.* at 389; *see also* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 708–10, 713–14 (1964) (discussing the Fairness Doctrine as an example of the public interest requirement as well as the rationale for holding the Doctrine compatible with the First Amendment).

⁹⁴ *Red Lion*, 395 U.S. at 389, 394.

⁹⁵ *Id.* at 390; *accord* *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 362 (1955) ("Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece."); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("Plainly it is not the purpose of the [Communications] Act [of 1934] to protect a licensee against competition but to protect the public.").

exercise it might fall beyond the scope of the First Amendment's protection.⁹⁶

In *Red Lion*, the Court also raised the specter of a few licensees acting as "private censor[s]" by airing only views on public issues, people, or candidates for public office with which they agreed to the exclusion of every other viewpoint.⁹⁷ It agreed with commentators who argued that the Fairness Doctrine is constitutional because it expands public access to information concerning controversial issues, as opposed to government regulation, which deprives the public of information.⁹⁸

The Court rejected the view that the constitutionality of a government policy like the Fairness Doctrine turns on whether the policy has the purpose or effect of leading to the dissemination of diverse viewpoints.⁹⁹ Relying on long-standing administrative practice and its deferential prior decisions, the Court approvingly accepted the "congressional desires 'to maintain . . . a grip on the dynamic aspects of radio transmission.'"¹⁰⁰ The Court also brushed aside WGCB's concerns of the Fairness Doctrine's vagueness and accused the broadcaster of "embellish[ing] [its] First Amendment arguments."¹⁰¹

The Supreme Court rejected the notion that the scarcity of broadcast spectrum was no longer compelling due to technological advances like ultra high frequency television transmission, declaring that scarcity is "by no means a thing of the past."¹⁰² The Court also dismissed concerns that the Fairness Doctrine would lead to self-censorship by broadcasters in their coverage of controversial public issues to avoid having to air opposing viewpoints for free.¹⁰³ At its core, the Court viewed *Red Lion* as concerning "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas

⁹⁶ William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 5 (1965); accord Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666–67 (1967) [hereinafter Barron, *Access to the Press*] (arguing for a right of access to the press under the First Amendment to "produce meaningful expression despite the present or potential repressive effects of the mass media."). Justice Brennan presented his paper at Brown University on April 14, 1965, as the Alexander Meiklejohn Lecture. Brennan, *supra*, at 1.

⁹⁷ *Red Lion*, 395 U.S. at 392, 394.

⁹⁸ Barron, *supra* note 35, at 509; accord Barron, *Access to the Press*, *supra* note 96, at 1669 (arguing that the media should be considered a state actor and, therefore, the government restriction is justified when one restrains expression by not airing alternative views).

⁹⁹ See *Red Lion*, 395 U.S. at 395–96.

¹⁰⁰ *Id.* at 394–95 (alteration in original) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)).

¹⁰¹ *Id.* at 395.

¹⁰² *Id.* at 396, 398.

¹⁰³ *Id.* at 392–93. See *infra* Part III for a discussion of why the Court's assertion is questionable.

and experiences.”¹⁰⁴ But the Court agreed that if the Fairness Doctrine proved to reduce rather than enhance the quantity and quality of coverage of controversial issues of public importance, it would be a “serious matter” meriting reconsideration of the Fairness Doctrine’s constitutionality.¹⁰⁵

As for Norris, he complied with the Supreme Court’s decision and offered Cook free reply time.¹⁰⁶ Cook claimed he never knew his complaint to the FCC had resulted in a Supreme Court case and declined the offer of free time in light of the more than four and a half years that had passed since the date of the original broadcast attacking him.¹⁰⁷ Although *Red Lion* ended with more of a whimper than a roar, it became the definitive Supreme Court decision on the Fairness Doctrine—“a constitutional decision of the first order.”¹⁰⁸

II. 1949–1987: THE FAIRNESS DOCTRINE’S “CHILLING EFFECTS”

A. *The 1985 Fairness Report*

1. Evidence from Broadcasters

In 1985, the FCC studied the effects of the Fairness Doctrine and issued an extensive report that provided a wealth of data useful in an assessment of whether the “chilling effect” on free expression the Supreme Court had dismissed in *Red Lion* was occurring.¹⁰⁹ Over one hundred individuals, interest groups, broadcasters, corporations, and religious groups submitted formal comments to the FCC.¹¹⁰ The Tribune Broadcasting Company stated that licensees “are conscious of the probability that coverage of a highly controversial issue will trigger an

¹⁰⁴ *Id.* at 390.

¹⁰⁵ *Id.* at 393. The Supreme Court’s end-justifies-the-means analysis is highly suspect. The Court is obligated to uphold the First Amendment’s guarantee of free speech (or, for that matter, any other provision of the Constitution) regardless of *any* discernible benefit. U.S. CONST. art. VI, cl. 3 (“[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution”); accord 28 U.S.C. § 453 (2006) (prescribing the oath U.S. judges or justices must take); *Adamson v. Comm’r*, 745 F.2d 541, 546 (9th Cir. 1984) (“Federal courts cannot countenance deliberate violations of basic constitutional rights. To do so would violate our judicial oath to uphold the Constitution of the United States.” (citing 28 U.S.C. § 453)).

¹⁰⁶ FRIENDLY, *supra* note 53, at 74.

¹⁰⁷ *Id.* at 74–76.

¹⁰⁸ *Syracuse Peace Council v. FCC*, 867 F.2d 654, 674 (D.C. Cir. 1989); accord *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 4 (1974) (dubbing *Red Lion* a “landmark decision”).

¹⁰⁹ See Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 145 (1985).

¹¹⁰ See *id.* at 248–51.

avalanche of protests” and lead to demands for free airtime.¹¹¹

Even when a licensee ultimately prevailed, it seemed like a Pyrrhic victory.¹¹² A Spokane, Washington television station, KREM-TV, spent over \$20,000 defending a single Fairness Doctrine complaint regarding its coverage of a bond issue following a four-day field investigation that dragged into a twenty-month administrative process and ultimately consumed over 480 hours of KREM’s time.¹¹³ The \$20,000 KREM-TV spent defending a single Fairness Doctrine complaint is considerable given that all three television stations in Spokane reported a combined total profit of only \$494,000 in 1972.¹¹⁴ Unfortunately, KREM-TV’s situation was by no means unique.

NBC spent approximately \$100,000 over a four-year period in litigation and administrative proceedings to defend itself against a Fairness Doctrine complaint lodged against it because it aired an award-winning investigative documentary, *Pensions: The Broken Promise*.¹¹⁵ The FCC agreed with Accuracy in the Media Inc., a conservative interest group, that NBC had failed to fulfill its Fairness Doctrine obligations by failing to adequately present the viewpoint that the private pension system was, by and large, adequately funded and thus required no remedial legislation.¹¹⁶ The U.S. Court of Appeals for the District of Columbia initially reversed the decision and ultimately dismissed the complaint on mootness grounds.¹¹⁷ Though the broadcasters eventually

¹¹¹ *Id.* at 164 (internal quotation marks omitted).

¹¹² *Id.* at 164–65; see also *To Provide That the Federal Communications Commission Shall Not Regulate the Content of Certain Communications: Hearing on the Freedom of Expression Act of 1983 Before the S. Comm. on Commerce, Science and Transportation*, 98th Cong. 228 (1984) (testimony of Eugene W. Wilkin) [hereinafter *1983 Hearings*] (lamenting the cost of settling conflicts with the FCC).

¹¹³ *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 165 & nn.81–82 (citing Complaint by Sherwyn M. Heckt, 40 F.C.C.2d 1150, 1150–51, 1153 (1973)). According to the Federal Reserve Bank of Minneapolis’s Inflation Calculator, \$20,000 spent on goods or services in 1973 is equivalent to \$98,018.02 in 2010 dollars. Fed. Reserve Bank of Minneapolis, <http://www.minneapolisfed.org/> (last visited Apr. 19, 2010).

¹¹⁴ *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 165–66.

¹¹⁵ *Id.* at 166. NBC’s documentary won a Peabody Award, a Christopher Award, a National Headliner Award, a Merit Award of the American Bar Association, and was nominated for an Emmy Award. *Nat’l Broad. Co. v. FCC*, 516 F.2d 1101, 1106 n.1 (D.C. Cir. 1974). Of course, even an award-winning television or radio broadcast can be very one-sided and such an award would not, in and of itself, insulate the broadcast from the Fairness Doctrine’s requirements.

¹¹⁶ *Complaint by Accuracy in Media, Inc.*, 40 F.C.C.2d 958, 958, 967 (1973), *aff’d* *Complaint of Accuracy in Media, Inc. Against Nat’l Broad. Co.*, 44 F.C.C.2d 1027, 1044 (1973).

¹¹⁷ *Nat’l Broad.*, 516 F.2d at 1106, 1180. The Employee Retirement Income Security Act of 1974 (ERISA) was passed by Congress and addressed the concerns mentioned in *Pensions: The Broken Promise*. See Employee Retirement Income Security Act of 1974, Pub.

prevailed, the Supreme Court has recognized that financial considerations “may be markedly more inhibiting than the fear of prosecution under a criminal statute,” thus acting as a powerful restraint on the freedom of speech.¹¹⁸

After WNBC-TV aired a mini-series, *Holocaust*, a person filed a Fairness Doctrine complaint demanding the station’s license not be renewed on the grounds that the station had not provided a reasonable opportunity to present views “opposing the allegation [in *Holocaust*] of a German policy of Jewish extermination during World War II.”¹¹⁹ The complaint was pending for one year before the FCC eventually vindicated WNBC-TV.¹²⁰

KHOM in Houma, Louisiana, experienced a similar ordeal.¹²¹ It aired Ronald Reagan’s radio commentary program for eighteen months without receiving a single complaint from hearers in its listening area.¹²² One day KHOM received complaints from nine individuals and groups outside its listening area demanding free time.¹²³ Unsure of how to proceed, KHOM eventually decided to grant free airtime to satisfy the complainants on the advice of a Washington lawyer.¹²⁴

2. Evidence of Corporate Influence

Corporate interests have also used the Fairness Doctrine to stifle discussion of public issues. Florida Power & Light (“FP&L”) filed a Fairness Doctrine complaint against WINZ, a radio station in Miami, Florida, for participating in a petition drive with the Dade County Consumer Affairs Office to have the Florida Public Service Commission lower or deny a rate increase proposed by FP&L.¹²⁵ The FCC eventually vindicated WINZ, but the experience left the radio station’s manager with the impression that FP&L had filed the complaint merely to create negative publicity for WINZ and not to enhance coverage of an important

L. No. 93-406, §§ 1–2, 88 Stat. 829, 829, 832–33 (codified as amended at 29 U.S.C. § 1001 (2006)).

¹¹⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (citing *City of Chicago v. Tribune Co.*, 139 N.E. 86, 90 (Ill. 1923) (“A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions . . .”).

¹¹⁹ Application of Nat’l Broad. Co. for Renewal of License of Station WNBC-TV, 71 F.C.C.2d 250, 251 (1979) (internal quotation marks omitted).

¹²⁰ *Id.* at 250–52.

¹²¹ 1983 *Hearings*, *supra* note 112, at 125–26 (testimony of Raymond Saadi, Vice President & General Manager, KHOM).

¹²² *Id.* at 125.

¹²³ *Id.*

¹²⁴ *Id.* at 125–26.

¹²⁵ Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 168 (1985).

public issue.¹²⁶ Similarly, the manager of the Cornhusker Television Corporation stated that the sole reason he cancelled a series of public service announcements regarding inflation was out of fear of having to run additional announcements presenting an opposing viewpoint.¹²⁷ To avoid Fairness Doctrine complaints, the Meredith Corporation stated that one of its television stations had chosen not to editorialize on *any* matter of public importance.¹²⁸ This result was not atypical: a NAB survey conducted in 1982 found that fifty-five percent of responding stations had not editorialized at all during the preceding two years.¹²⁹

3. Evidence from the Doctrine's Proponents

Ironically, the strongest evidence of the Fairness Doctrine's chilling effect on broadcasters came from a vocal proponent of the Doctrine, the Public Media Center ("PMC").¹³⁰ In comments submitted to the FCC, the PMC noted a response from one coalition to advertisements from the beverage industry opposing a beverage deposit ballot initiative included writing a letter to all five hundred California broadcasters demanding double the amount of free airtime to counter the beverage industry's advertisements.¹³¹ The PMC candidly admitted that "the coalition urged broadcasters to refuse to sell airtime and therefore avoid a fairness situation at all."¹³² The tactics succeeded: less than one-third of the stations sold advertising time to the beverage industry coalition.¹³³ The Glass Packaging Institute confirmed that its members had difficulty purchasing airtime to present their views on ballot initiatives because the stations it approached either refused to sell time or demanded inflated advertising rates to cover the costs of the free airtime requests opponents would likely demand.¹³⁴ Similarly, the PMC recounted how an anti-smoking group successfully prevented the tobacco industry from buying airtime on ten Miami radio stations by preemptively mailing letters to every local broadcast station, mentioning a pending vote and

¹²⁶ *Id.* (citing 1983 Hearings, *supra* note 112, at 129 (testimony of Stan Cohen, General Manager, WINZ-AM)).

¹²⁷ *Id.* at 172-73.

¹²⁸ *Id.* at 174; *see also* Maier v. FCC, 735 F.2d 220, 234 n.19 (7th Cir. 1984) (upholding the refusal of WTMJ-TV to sell airtime to Public Employees' Union Local No. 61 because the station's policy stated that "[t]ime is not sold for the discussion of controversial issues" (internal quotation marks omitted)).

¹²⁹ *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 174.

¹³⁰ *Id.* at 176.

¹³¹ *Id.* at 176-77.

¹³² *Id.* at 177 (internal quotation marks omitted).

¹³³ *Id.*

¹³⁴ *Id.* at 175-76.

asking to be contacted once the tobacco industry bought airtime.¹³⁵

One of the most disturbing examples of Fairness Doctrine abuse occurred when COND, an anti-nuclear coalition, notified broadcasters it would file a Petition to Deny License Renewal if its Fairness Doctrine concerns were not resolved.¹³⁶ COND ultimately prevailed upon the broadcasters to allow it to run specific anti-nuclear advertising spots that it had produced.¹³⁷ The PMC candidly admitted that “[t]he implied threat of a license renewal challenge increased the stations’ desire for a negotiated settlement.”¹³⁸

In the case of WXUR and WXUR-FM, the FCC refused to renew their licenses to broadcast due to Fairness Doctrine and personal attack violations after a four-year process.¹³⁹ This result was not surprising given the FCC’s assertion that “adherence to the [F]airness [D]octrine is a *sine qua non* of every licensee.”¹⁴⁰

Courts recognized the tremendous potency of the sanction of license nonrenewal that the FCC was increasingly being pressured to employ.¹⁴¹ Representative Patsy Mink (D-HI) demanded that WHAR, a radio station in Clarksburg, West Virginia, air an eleven-minute broadcast she had produced discussing anti-strip mining legislation she was sponsoring in Congress in order to counter the views of a pro strip-mining U.S. Chamber of Commerce spot she alleged WHAR had aired.¹⁴² The station denied it had played the Chamber’s programming,¹⁴³ claimed

¹³⁵ *Id.* at 177.

¹³⁶ *Id.* at 162–63 n.73.

¹³⁷ *Id.* at 163 n.73.

¹³⁸ *Id.* (internal quotation marks omitted).

¹³⁹ *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18, 34 (1970); *accord* Comment, *The Fairness Doctrine and Broadcast License Renewals: Brandywine-Main Line Radio, Inc.* 71 COLUM. L. REV. 452, 460 (1971). For example, the FCC found that WXUR had asserted that “the Flushing Branch of the Women’s International League for Peace and Freedom was a commie group.” *Brandywine-Main Line Radio*, 24 F.C.C.2d at 26 (internal quotation marks omitted).

¹⁴⁰ *Office of Comm’n of United Church of Christ v. FCC*, 359 F.2d 994, 1009 (D.C. Cir. 1966); *accord* *Office of Comm’n of United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969). The FCC also adopted this position. *Complaints of Committee for the Fair Broad. of Controversial Issues*, 25 F.C.C.2d 283, 292 (1970) (citing *United Church of Christ*, 425 F.2d at 548; *Brandywine-Main Line Radio*, 24 F.C.C.2d at 21–22).

¹⁴¹ *Bus. Executives’ Move for Vietnam Peace v. FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971) (McGowan, J., dissenting), *rev’d sub nom.* *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973); *see also* KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 92 (5th ed. 2007) (“The ‘death sentence’ for broadcasters is license revocation.”).

¹⁴² *Complaint of Representative Patsy Mink*, 59 F.C.C.2d 987, 987 (1976).

¹⁴³ *Id.* at 989. The proceedings do not include a finding or otherwise indicate that WHAR aired any of the Chamber’s programming. Of course, this does not necessarily mean that WHAR did not air the Chamber’s spots. It may simply mean that the complainants

it had met its Fairness Doctrine obligations, and refused to air the complainants' tape, but the FCC still determined that WHAR had failed to adequately cover the issue of strip mining.¹⁴⁴

B. Bipartisan Political Meddling

1. Democratic Interference

Politicians have not remained immune from the temptation to silence critics and amplify the voices of those who support them.¹⁴⁵ President Kennedy was concerned that opposition from radio broadcasters would hinder Senate ratification of the Nuclear Test Ban Treaty of 1963.¹⁴⁶ At Kennedy's direction, his political allies formed the Citizens' Committee for a Nuclear Test Ban Treaty and sent letters to stations demanding free reply time whenever broadcasters like Hargis denounced the treaty.¹⁴⁷ Assistant Secretary of Commerce Bill Ruder explained, "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."¹⁴⁸ Wayne Phillips candidly wrote in a report to the DNC, "Even more important than the free radio time was the effectiveness of this operation in inhibiting the political activity of these right-wing broadcasts"¹⁴⁹

Arthur Larson, a prominent liberal Eisenhower Republican recruited by the DNC, headed a bipartisan front group, the National Council for Civic Responsibility ("NCCR"), to attack broadcasters hostile to Democrats.¹⁵⁰ Speaking at a news conference in New York's Overseas Press Club, Larson insisted that NCCR's "formation had nothing to do with the [p]residential campaign or with the right-wing views of the Republican candidate, Senator Barry Goldwater."¹⁵¹

2. Republican Machinations

Democratic politicians were not the only ones who succumbed to the siren song of effectively silencing their political foes and attempting to

were unable to obtain a proof of the radio spots or simply forgot to include them in the administrative proceedings before the FCC.

¹⁴⁴ *Id.* at 987, 989, 997.

¹⁴⁵ FRIENDLY, *supra* note 53, at 32–35, 38–42.

¹⁴⁶ *Id.* at 34.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 39 (internal quotation marks omitted).

¹⁴⁹ *Id.* at 41 (internal quotation marks omitted).

¹⁵⁰ *Id.* at 39.

¹⁵¹ *Anti-Birch Group Presses an 'Exposé'*, N.Y. TIMES, Oct. 18, 1964, at 78.

amplify allies' voices.¹⁵² In a September 15, 1972, meeting in the Oval Office, President Nixon, his Chief of Staff, H.R. Haldeman, and his White House Counsel, John Dean, discussed how to silence the *Washington Post*:

PRESIDENT: The main thing is the [*Washington Post*] is going to have damnable, damnable problems out of this one. They have a television station . . . and they're going to have to get it[s license] renewed.

HALDEMAN: They've got a radio station, too.

PRESIDENT: Does that come up [for renewal], too? The point is, when does it come up?

DEAN: I don't know. But the practice of non-licensees filing on top of licensees has certainly gotten more . . . active in . . . this area.

PRESIDENT: And it's going to be God damn active here.

DEAN: (Laughter) (Silence)

PRESIDENT: Well, the game has to be played awfully rough.¹⁵³

And play rough Nixon did. Nixon was obsessed with press coverage from the outset of his administration and requested that aides contact newscasters, networks, and magazines to take "specific action relating to what could be considered unfair news coverage."¹⁵⁴ J.S. Magruder, deputy director of White House communications, suggested to Haldeman that when Dean Burch was confirmed as FCC Commissioner, he should "[b]egin an official monitoring system through the FCC" to document cases of unfavorable coverage and then "make official complaints from the FCC."¹⁵⁵ Nixon's allies outside of Washington also harassed broadcasters; the head of the finance chairman for the Florida Nixon Re-election Committee challenged WJXT, a radio station in Jacksonville, and another Nixon confidante challenged WPLG in Miami.¹⁵⁶

In a memorandum to Haldeman labeled "FYI—Eyes Only, Please," Chuck Colson, special counsel to Nixon, recounted a meeting he had with the network executives of ABC, CBS, and NBC.¹⁵⁷ Colson wrote that

¹⁵² See WILLIAM EARL PORTER, *ASSAULT ON THE MEDIA: THE NIXON YEARS* (1976) for an excellent compilation of reprints of most of the significant documents detailing Nixon's assault on the press.

¹⁵³ JOSEPH E. SPEAR, *THE PRESIDENT AND THE PRESS: THE NIXON LEGACY* 133 (1984) (alterations in original) (quoting Thomas Whiteside, *Annals of Television*, *NEW YORKER*, Mar. 17, 1975, at 62).

¹⁵⁴ Memorandum from J. S. Magruder to H. R. Haldeman (Oct. 17, 1969), in PORTER, *supra* note 152, at 244 (listing twenty-one instances in a thirty-two day period that Nixon asked aides to take "specific action").

¹⁵⁵ *Id.* at 244–45.

¹⁵⁶ RODGER STREITMATTER, *MIGHTIER THAN THE SWORD: HOW THE NEWS MEDIA HAVE SHAPED AMERICAN HISTORY* 220 (2d ed. 2008); Editorial, *A Bill of Complaint*, *BOSTON GLOBE*, Jan. 21, 1973, at A6.

¹⁵⁷ Memorandum from Charles W. Colson to H. R. Haldeman (Sept. 25, 1970), in PORTER, *supra* note 152, at 274.

“[t]he networks are terribly nervous over the uncertain state of the law, i.e., the recent FCC decisions” and were “startled . . . from the way in which we have so thoroughly monitored their coverage.”¹⁵⁸ He went on to note that two of the three television network executives (ABC and CBS) agreed that the Fairness Doctrine did not apply to Nixon when he spoke as President and that all three executives were “damned nervous and scared and we should continue to take a very tough line, face to face, and in other ways.”¹⁵⁹ Most ominously, Colson wrote that he would “pursue with Dean Burch the possibility of an interpretive ruling by the FCC on the role of the President when he uses TV.”¹⁶⁰

In light of the persuasive evidence of politically-motivated meddling spanning multiple administrations, Justice Douglas remarked that the Fairness Doctrine “puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends.”¹⁶¹

3. Political Appointees as FCC Commissioners

Even if presidents and national political parties could resist the temptation to directly misuse the FCC for partisan purposes—and history is not encouraging in this regard—the fact remains that the five FCC Commissioners are political appointees.¹⁶² The *Los Angeles Times* compared current FCC Commissioner Michael J. Copps to a revivalist preacher and quoted him as saying that the Republican-led FCC was so feckless that “unless you’re a child abuser or a wife beater,” getting a television station’s license renewed was “a slam-dunk.”¹⁶³ DSLReports.com, a consumer-oriented broadband online community,¹⁶⁴ blasted former telecommunications lobbyist and current FCC Commissioner Robert McDowell for arguing in a *Washington Post* opinion editorial that “[t]he Internet might grind to a halt” if the FCC chose regulation over collaborative, private-sector group decision making.¹⁶⁵

¹⁵⁸ *Id.* at 274–75.

¹⁵⁹ *Id.* at 275, 277.

¹⁶⁰ *Id.* at 277.

¹⁶¹ *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring).

¹⁶² 47 U.S.C. § 154(a) (2006).

¹⁶³ Jim Puzanghera, *Copps, a Liberal Voice on the FCC, Knows How to Get His Message Out*, L.A. TIMES, Nov. 5, 2007, at C1 (internal quotation marks omitted).

¹⁶⁴ DSLReports.com, About Us, <http://www.dslreports.com/about> (last visited Apr. 19, 2010).

¹⁶⁵ Karl Bode, *FCC’s McDowell: The Internet Will Stop if you Regulate Comcast*, DSLREPORTS.COM, July 28, 2008, <http://www.dslreports.com/shownews/96484> (quoting Robert M. McDowell, *Who Should Solve This Internet Crisis?*, WASH. POST, July 28, 2008, at A17).

C. Responses of 1985 Fairness Report Critics

Despite numerous examples of individuals, interest groups, politicians, and corporations of all political persuasions attempting to use the fairness doctrine to suppress otherwise lawful speech, several groups, including the American Civil Liberties Union (“ACLU”), contended that the testimony of broadcasters used in the 1985 Fairness Hearings consisted of “self-serving” statements of personal beliefs and was therefore of little probative value—much less proof of a chilling effect.¹⁶⁶ Far from being self-serving, the broadcasters’ statements could be viewed as statements against interest given the Court’s warning in *Red Lion* that the FCC had the power to sanction broadcasters for failing to adequately and fairly present issues of public importance, especially those that admit they are afraid to air or editorialize on *any* issue of public importance.¹⁶⁷

As a practical matter, any statement by a licensee or other stakeholder before the FCC could be viewed as self-serving, including the PMC’s or the ACLU’s statements, and viewing all stakeholders’ comments as lacking probative value would make it virtually impossible for the FCC to decide any issues raised before it.¹⁶⁸ Proponents have no qualms pointing to the FCC’s conclusion in the 1974 Fairness Report that it saw “no credible evidence that our policies have in fact had ‘the net effect of reducing rather than enhancing the volume and quality of

¹⁶⁶ Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 180 (1985). The ACLU’s position on the Fairness Doctrine seems to have shifted from strongly in favor to taking no official position on the issue. In a 1994 interview, then-ACLU President Nadine Strossen stated,

We have historically supported the Fairness Doctrine, although I’ve dissented from that position, as have other prominent people within the ACLU. Our basis for supporting it was so narrow and so historically contingent that I really have my doubts as to whether even the Fairness Doctrine itself would be reaffirmed if the ACLU National Board took another look at it. It was based on the notions of spectrum scarcity and of government having conveyed a public trust, if you will, to the broadcasters. Both facts have changed substantially.

Cathy Young, *Life, Liberty, and the ACLU: An Interview with Nadine Strossen*, REASON, Oct. 1994, at 32, 35. The ACLU’s current position remains similarly nuanced:

There continues to be discussion within [the] ACLU about the relevant circumstances that served as the basis for our support of the Fairness Doctrine in years gone by. . . . We didn’t take an active position on the recent efforts to bar reinstatement of the Fairness Doctrine. . . . As a practical matter, the doctrine was abandoned during the Reagan years and the effort to bar its reinstatement seemed truly superfluous, particularly in light of the current [Obama] [A]dministration’s stated intention not to revive the doctrine.

E-mail from Michael W. Macleod-Ball, Chief Legislative & Pol’y Counsel, Am. Civil Liberties Union, to Dominic E. Markwordt (Mar. 18, 2009, 13:56 EST) (on file with author).

¹⁶⁷ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393 (1969).

¹⁶⁸ Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d at 181.

coverage.”¹⁶⁹ The FCC’s bare, conclusory assertion in its 1974 Fairness Report is devoid of any empirical or even anecdotal data and can likewise be viewed as self-serving.¹⁷⁰

Advocates of the Fairness Doctrine also claimed broadcasters simply misunderstood their obligations, and that this led to the Doctrine’s allegedly inhibiting effects.¹⁷¹ Determining whether a chilling effect did occur is difficult; one commentator even believes it is “almost impossible to determine.”¹⁷² Even if this assertion is correct, the Supreme Court has consistently recognized that when a person is unsure of what is lawful because standards are uncertain, citizens will “steer far wide[] of the unlawful zone” to avoid potentially violating the law.¹⁷³

Even the FCC, charged with administering the Fairness Doctrine, admitted that one of the most difficult decisions to make was the initial determination of whether a licensee had raised the specific issue about which someone had complained.¹⁷⁴ Courts also found that the ambiguity inherent in determining when an issue had been raised for purposes of the Fairness Doctrine chilled speech, leading to a lessening of the free flow of information.¹⁷⁵ At least one court was “especially hesitant” in deciding when a public issue became “controversial” and deferred to the FCC, thus making it unlikely licensees would prevail in lawsuits alleging violations of their First Amendment rights.¹⁷⁶

Proponents of the Fairness Doctrine claimed that the relatively small number of complaints the FCC forwarded to broadcasters was

¹⁶⁹ Handling of Pub. Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 8 (1974) (quoting *Red Lion*, 395 U.S. at 393). The 1974 Fairness Report was the FCC’s first comprehensive inquiry into the effectiveness of the Fairness Doctrine after the *Red Lion* decision. *Id.* at 1.

¹⁷⁰ *Id.* at 8 (“In evaluating the possible inhibitory effect of the [F]airness [D]octrine, it is appropriate to consider the *specifics of the doctrine* and the *procedures employed* by the Commission in implementing it.” (emphasis added)).

¹⁷¹ *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 167.

¹⁷² Roland F.L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 736 (1994).

¹⁷³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

¹⁷⁴ *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 12; see, e.g., *Who Decides Fairness?*, TIME, Feb. 4, 1974, at 59, 59 (reporting that NBC contended its documentary, *Pensions: A Broken Promise*, did not implicate the Fairness Doctrine “because the existence of some inadequate pensions—the program’s subject—is a fact, not a controversial issue” (internal quotation marks omitted)); see also SIMMONS, *supra* note 37, at 146–88 (devoting an entire chapter to the difficulty of determining when an issue has been raised that implicates the Fairness Doctrine).

¹⁷⁵ *Am. Sec. Council Educ. Found. v. FCC*, 607 F.2d 438, 458 (D.C. Cir. 1979) (Wright, C.J., concurring); *Cnty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

¹⁷⁶ *Meredith Corp. v. FCC*, 809 F.2d 863, 871 n.9 (D.C. Cir. 1987).

evidence that the Doctrine did not have a chilling effect on speech.¹⁷⁷ Cataloguing the number of complaints the FCC forwarded to broadcasters is the wrong metric by which to measure any chilling effect because the chilling effect is concerned with what action a licensee reasonably thinks the FCC might take, not with what action the FCC ultimately takes.¹⁷⁸ Thus, even if the FCC only intended to conduct a field investigation in response to a Fairness Doctrine complaint, if the broadcaster believes the FCC will refuse to deny his license and acts accordingly, a chilling effect has taken place. The chilling effect is premised on the notion that powerful sanctions, like license nonrenewal or long administrative proceedings—even if they eventually result in vindication for the broadcaster—are so distasteful to licensees that it is enough to change their overall behavior, even if only a relatively small number of complaints are forwarded to broadcasters.

One proponent of the Fairness Doctrine even claimed that responsible journalists should present opposing viewpoints on controversial issues and, therefore, only irresponsible broadcasters not acting in the public interest would be subject to a chilling effect.¹⁷⁹ The FCC's own admission that it did not "expect a broadcaster to cover each and every important issue which may arise in his community" best encapsulates the uncertainty and chilling effect broadcasters inevitably felt when attempting to decide whether to cover particular issues or risk having to give free airtime to complainants.¹⁸⁰

Ultimately, the debate over whether the Fairness Doctrine chills broadcasters' speech is largely academic given the Supreme Court's observation that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"¹⁸¹ The quote refers to newspapers, but editors decide on content, the depth and length of coverage, and perform the same function regardless of whether they work for a broadcaster or a newspaper publisher.¹⁸² The Supreme Court concluded that any government regulation of a newspaper's editorial process is incompatible with the First Amendment.¹⁸³ Because the Court

¹⁷⁷ Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 185 (1985).

¹⁷⁸ *Cnty.-Serv. Broad. of Mid-Am.*, 593 F.2d at 1116.

¹⁷⁹ Mark A. Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COMM. L.J. 161, 190 (1989) ("An administrative rule requiring broadcasters to exercise such judgment cannot serve to chill the speech of a broadcaster who is acting responsibly and in the public interest.").

¹⁸⁰ *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 10 (1974).

¹⁸¹ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)). See *infra* notes 206–210 for a fuller discussion of *Tornillo*.

¹⁸² *Tornillo*, 418 U.S. at 258 (discussing the function of newspaper editors).

¹⁸³ *Id.*

held that government-mandated access chills speech,¹⁸⁴ the question is not whether the Fairness Doctrine chills speech, but whether broadcasting is sufficiently different than the newspaper industry to justify the Doctrine's chilling effect. It is not.

III. THE FCC'S REPEAL AND SUBSEQUENT REINSTATEMENT EFFORTS

Despite the strong evidence indicating that the Fairness Doctrine chilled speech, the FCC deferred to Congress and the legislative process, which, in 1985, chose to maintain the status quo instead of abolishing the Doctrine.¹⁸⁵ The FCC continued to enforce the Fairness Doctrine leading to a court challenge in *Meredith Corp. v. FCC* in which a broadcaster contested the FCC's adverse Fairness Doctrine determination on freedom of speech grounds.¹⁸⁶ A panel of the U.S. Court of Appeals for the D.C. Circuit noted that the FCC's 1985 Fairness Report "eviscerate[d] the rationale" for the Doctrine and remanded the case to the FCC for it to consider the broadcaster's First Amendment arguments.¹⁸⁷

On remand, the FCC, relying heavily on its 1985 Fairness Report, voted 4-0 to abolish the Fairness Doctrine.¹⁸⁸ The FCC decided that the Doctrine no longer served the public interest because it decreased coverage of controversial issues of public importance.¹⁸⁹ As such, the Doctrine was presumptively unconstitutional under *Red Lion's* framework.¹⁹⁰ In *Syracuse Peace Council v. F.C.C.*, a separate panel of the D.C. Circuit upheld the FCC's decision to administratively abolish the Fairness Doctrine, stating it was within the FCC's discretion to do so.¹⁹¹ The D.C. Circuit declined to reach Meredith's First Amendment challenge to the Fairness Doctrine.¹⁹² Judge Starr merely concurred in the judgment because he believed Meredith's constitutional claim should have been decided.¹⁹³ An outraged Congress immediately passed

¹⁸⁴ *Id.* at 257 (quoting *N.Y. Times*, 376 U.S. at 279).

¹⁸⁵ Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d, 142, 142 (1985).

¹⁸⁶ 809 F.2d 863, 865 (D.C. Cir. 1987).

¹⁸⁷ *Id.* at 873-74.

¹⁸⁸ Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5043 (1987). The FCC had the authority to administratively repeal the Fairness Doctrine if it no longer served the public interest because *Red Lion* did not mandate the Fairness Doctrine, but merely permitted it. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393 (1969).

¹⁸⁹ *Complaint of Syracuse Peace Council*, 2 F.C.C.R. at 5043.

¹⁹⁰ *Id.*

¹⁹¹ 867 F.2d 654, 669 (D.C. Cir. 1989).

¹⁹² *Id.* at 657-58.

¹⁹³ *Id.* at 674 (Starr, J., concurring).

legislation mandating the Fairness Doctrine.¹⁹⁴ President Reagan vetoed the legislation.¹⁹⁵

Politicians have periodically called for the Fairness Doctrine's reinstatement despite the 1985 Fairness Report's documentation of its chilling effect on speech. In 1989, reports surfaced that members of Congress supported the Fairness Doctrine because they were upset that radio talk show hosts were channeling opposition to a congressional pay raise.¹⁹⁶ In 1993, Representative Bill Hefner (D-N.C.), sponsor of House Resolution 1985, The Fairness in Broadcasting Act of 1993, issued a flyer stating, "TV and Radio talk shows [] often . . . make inflammatory and derogatory remarks about our public officials. THE FAIRNESS DOCTRINE IS URGENTLY NEEDED."¹⁹⁷ Senator Dianne Feinstein (D-CA) recently echoed this sentiment when she stated that "talk radio tends to be one-sided. It also tends to be dwelling in hyperbole. It's explosive. It pushes people to, I think, extreme views without a lot of information."¹⁹⁸ Rhetoric like this provided ample basis for detractors of the Fairness Doctrine to conclude that proponents merely desired to muzzle them regardless of statistical studies showing that the Doctrine chilled speech.¹⁹⁹ One need not be a cynic to believe that much of the desire for reinstating the Fairness Doctrine comes from what politicians perceive as an effective mechanism to silence critics. In any case, a rigorous statistical study published in 1997 confirmed the 1985 Fairness Report's conclusion and found a significant expansion in news, talk, and public affairs formats that coincided with the Doctrine's repeal in 1987.²⁰⁰

¹⁹⁴ Fairness in Broadcasting Act of 1987, S. 742, 100th Cong. (1987). House Commerce Committee Chairman John Dingell called the FCC "lickspittles" and Ernest Hollings, Senate Commerce Committee Chairman, called the repeal "wrongheaded, misguided and illogical." Nicholas Johnson, *With Due Regard for the Opinion of Others*, CAL. LAW., Aug. 1988, at 53, 53, available at <http://www.uiowa.edu/~cyberlaw/LRevArt/8CalL52.html>.

¹⁹⁵ 133 CONG. REC. 16,989 (1987).

¹⁹⁶ *Hill Steamed over Radio's Tea Time*, BROADCASTING, Feb. 13, 1989, at 29, 30 ("House Telecommunications Subcommittee Chairman Ed Markey (D-Mass.), in a humorous vein, said it would be 'very easy for us to separate our deep bitterness about the media's treatment of the pay raise' when considering the [broadcast] industry's legislative agenda.").

¹⁹⁷ Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"?* *Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 301 (1997).

¹⁹⁸ *FOX News Sunday* (FOX News television broadcast June 24, 2007), available at <http://www.foxnews.com/story/0,2933,286442,00.html> (transcript of Senator Lott's and Senator Feinstein's television appearance).

¹⁹⁹ Hazlett & Sosa, *supra* note 197, at 301.

²⁰⁰ *Id.* at 279. *But see* Project, *The Impact of the Deregulation of the Fairness Doctrine on the Broadcast Industry and on the Public*, 47 ADMIN. L. REV. 625, 633-36,

IV. FLAWED FIRST AMENDMENT JUSTIFICATIONS²⁰¹A. *The Scarcity Rationale*

1. Spectrum Scarcity

The Supreme Court in *Red Lion* recognized that the First Amendment applied to broadcasting, but held that broadcast radio and television possessed unique characteristics—spectrum scarcity—that justified a different First Amendment standard than the standard applied to traditional print media.²⁰² In the words of the Court in *Red Lion*, “Because of the scarcity of radio frequencies, the [g]overnment is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”²⁰³ That decision is in conflict with the general rule that content-based restrictions on speech are subject to strict scrutiny.²⁰⁴ There is no doubt that the Fairness Doctrine is a content-based restriction on speech.²⁰⁵

Miami Herald Publishing Co. v. Tornillo, decided just five years after *Red Lion*, involved a Florida “right of reply” statute.²⁰⁶ The Supreme Court unanimously held that a newspaper could not be forced

640 (1995) [hereinafter Project] (arguing that the Fairness Doctrine did not greatly hamper broadcasters because the FCC investigated comparatively few broadcasters relative to the number of complaints it received). See *supra* Part II.C. for an explanation of why this reasoning is unpersuasive.

²⁰¹ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

²⁰² *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–76, 386, 388–89 (1969); accord *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (reiterating the view that different First Amendment standards should be applied to broadcasting because its frequencies are a scarce resource (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 101 (1973))).

²⁰³ *Red Lion*, 395 U.S. at 390.

²⁰⁴ See, e.g., *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (plurality opinion); see also *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (requiring that “a facially content-based restriction on political speech in a public forum . . . be subjected to exacting scrutiny”); *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987) (same); *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985) (same); *United States v. Grace*, 461 U.S. 171, 177 (1983) (same); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (same). Justice Kennedy believes that content-based restrictions are per se invalid. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“[C]ontent-based speech restrictions that do not fall within any traditional exception [for example, obscenity, defamation, child pornography, etc.] should be invalidated without inquiry into narrow tailoring or compelling government interests.”).

²⁰⁵ See Cass R. Sunstein, *Free Speech Now*, 50 U. CHI. L. REV. 255, 280 (1992) (“The restrictions of the [F]airness [D]octrine, or any similar alternative, are content-based.”).

²⁰⁶ 418 U.S. 241, 244 (1974). Commentators find it remarkable that the *Tornillo* opinion does not once reference *Red Lion* despite the fact that the Court essentially decided the same issue. See, e.g., Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 4 (1976).

to run a free reply to an attack on a political candidate because such a content-based burden “intrud[es] into the function of editors.”²⁰⁷ The Court agreed that newspapers were not limited by technological obstacles like spectrum scarcity, but focused on the economic realities that restricted newspapers from simply adding pages to provide room for statutorily-mandated replies to attacks.²⁰⁸ Theoretically, newsprint is virtually unlimited, but economic considerations do not make it feasible for publishers to profitably increase the size of a newspaper absent additional advertising revenue.²⁰⁹ Even if newspapers faced no costs in complying with the compulsory access law, the Court held that at its core the First Amendment protects the exercise of editorial control and judgment over the contents of a newspaper.²¹⁰

In *Red Lion*, the Court justified the FCC’s regulations of broadcasters’ content through the Fairness Doctrine by holding that because more people wanted to broadcast than there were frequencies on which to broadcast, the FCC could allocate licenses in a manner that maximized access to the scarce resource.²¹¹ But it does not automatically follow that spectrum scarcity should give the FCC authority to regulate the content of otherwise lawful broadcast speech.²¹² Congress has consistently provided by statute that broadcasters are not common carriers.²¹³ Subsequent Supreme Court opinions grappling with the underlying meaning of *Red Lion* focused on the desire to “preserve an uninhibited marketplace of ideas,”²¹⁴ and rejected the view that

²⁰⁷ *Tornillo*, 418 U.S. at 258.

²⁰⁸ *Id.* at 256–57.

²⁰⁹ See Kenneth A. Weiss, Note, *Constitutional Law—Freedom of the Press—Florida Statute Requiring Equal Space Reply to Be Printed by Any Newspaper Attacking Political Candidate Held Constitutional*, 48 TUL. L. REV. 433, 438 (1974).

²¹⁰ *Tornillo*, 418 U.S. at 258.

²¹¹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391, 400–01 (1969); accord *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 4 n.4 (1974) (adopting the view that the Court in *Red Lion* relied on the “scarcity principle” in reaching its decision); Milda K. Hedblom, *Returning Fairness to the Broadcast Media*, 7 LAW & INEQ. 29, 40 (1988) (contending that only the scarcity viewpoint provided the rationale for the outcome in *Red Lion*). Although there is no doubt that the Fairness Doctrine is a content-based regulation, it should be noted that the FCC’s licensing requirements are not per se controversial. Indeed, even critics of the Fairness Doctrine accept the FCC’s role if it merely allocates and polices the spectrum but does not interfere with broadcasters’ editorial decisions. See Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 312 (1989).

²¹² *Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (1989) (Starr, J., concurring); Ferris & Leahy, *supra* note 211, at 312. Nor does a licensing requirement *ipso facto* allow the government to justify less First Amendment protections for broadcasters. Bruce Fein, *First Class First Amendment Rights for Broadcasters*, 10 HARV. J.L. & PUB. POLY 81, 84 (1987).

²¹³ See, e.g., 47 U.S.C. § 153(10) (2006).

²¹⁴ *Red Lion*, 395 U.S. at 390.

broadcasters' speech was state action and, therefore, that it could be regulated as such.²¹⁵ Nonetheless, the Court held that the "[FCC] was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the [Communications Act of 1934] nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees."²¹⁶

The flaw in using spectrum scarcity as the determinative analytic factor to justify a lower level of First Amendment protection for broadcasting is that all economic goods, including newsprint, ink, printing presses, and delivery trucks, are scarce.²¹⁷ In the American economic system, a pricing mechanism is usually used when the demand for goods exceeds their supply.²¹⁸ Newspaper publishers, moreover, depend upon a government-run postal service, government-provided streets maintained by the government, and government-provided traffic and safety regulations to ensure they can deliver their products to customers.²¹⁹ During the Second World War and the post-war period, the government rationed newsprint.²²⁰ This made entry into the newspaper business more difficult, thus protecting existing publishers.²²¹ It did not, however, lead to government content-regulation based on the scarcity rationale.²²²

The federal government even grants newspapers the opportunity to apply for limited antitrust immunity to form "joint operating agreements," allowing cooperative advertising, printing, circulation rates, and distribution schemes.²²³ Both federal and state governments

²¹⁵ *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121 (1973); see also *id.* at 140–41 (Stewart, J., concurring) (rejecting the state action rationale for government regulation of broadcasting).

²¹⁶ *Red Lion*, 395 U.S. at 395 (citing *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215–16 (1943)).

²¹⁷ *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).

²¹⁸ R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

²¹⁹ *Telecomm. Research & Action Ctr.*, 801 F.2d at 509.

²²⁰ See SUBCOMM. ON NEWSPRINT OF THE S. SELECT COMM. ON SMALL BUS., 82D CONG., SUPPLIES FOR A FREE PRESS: A PRELIMINARY REPORT ON NEWSPRINT 1–4 (Comm. Print 1951) (discussing newsprint scarcity throughout the history of the United States). Of course, newsprint is not inherently scarce, but this does not explain why even temporary scarcity would not justify content regulation, especially during wartime.

²²¹ *Id.* at 3.

²²² See *id.* at 17–19 (listing potential legislative remedies for the newsprint shortage problem—none of which include content-regulation).

²²³ Newspaper Preservation Act of 1970 §§ 2, 3(2), 4–5, 15 U.S.C. §§ 1801, 1802(2), 1803–04 (2006). See generally Mark Fink, *The Newspaper Preservation Act of 1970: Help for the Needy or the Greedy*, 1990 DET. C.L. REV. 93 (discussing the negative effects of the Newspaper Preservation Act of 1970).

have histories of accommodating the printed media with special privileges such as reduced second-class postage rates.²²⁴ Some states even protect newspaper publishers by making it a crime to steal a newspaper with the intent to prevent people from reading it.²²⁵ Despite the many advantages the government grants newspaper publishers, no court has suggested that it is also acceptable for the government to regulate the content of newspapers.²²⁶

Commentators who argue that content regulation is permissible because broadcast frequencies are scarce and effective broadcasting requires government regulation concede that this principle would logically apply to newspapers as well.²²⁷ The natural outgrowth of this view is that the government may employ “mild regulatory efforts” with respect to newspapers or any other expressive medium if the aim is to “promote quality and diversity.”²²⁸ Stated more generally, when the government regulates in a way that “might promote free speech, [that regulation] should not be treated as an abridge[ment] [of free speech] at all.”²²⁹

Yet the Supreme Court took a very protective view of speech, stating that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”²³⁰ It endorsed this view despite recognizing that the primary purpose of the First Amendment is to provide for the dissemination of a wide range of views from “diverse and antagonistic sources.”²³¹ *Red Lion* represents a constitutional anomaly in free speech jurisprudence in that it allows the

²²⁴ Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 811 n.206 (1999).

²²⁵ *E.g.*, MD. CODE ANN., CRIM. LAW § 7-106(b) (LexisNexis 2002) (“A person may not knowingly or willfully obtain or exert control that is unauthorized over newspapers with the intent to prevent another from reading the newspapers.”).

²²⁶ *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986).

²²⁷ *E.g.*, Sunstein, *supra* note 205, at 267.

²²⁸ *Id.* at 294.

²²⁹ *Id.* at 267; accord ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–17 (Lawbook Exchange, Ltd. 2004) (1948) (“Legislation which abridges that freedom [of speech] is forbidden, but not legislation to enlarge and enrich it.”).

²³⁰ *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam); accord *Roth v. U.S.*, 354 U.S. 476, 484 (1957). In *Buckley*, a campaign finance case, the Supreme Court permitted Congress to limit contributions to candidates for public office. *Buckley*, 424 U.S. at 58. But this was only because the Court viewed Congress’s desire to “safeguard[] the integrity of the electoral process” as a “basic governmental interest.” *Id.* One reads the *Red Lion* opinion in vain in an attempt to discern any clearly enunciated “basic governmental interest” that would justify a reduction in a broadcaster’s First Amendment rights.

²³¹ *Buckley*, 424 U.S. at 49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

government to indirectly suppress lawful speech by content regulation because the ends (allegedly, more diversity) justify the means (suppression of some otherwise-lawful speech).²³²

The FCC's "command-and-control spectrum allocation process[]" led to an inefficient use of spectrum, making the broadcast spectrum appear even more scarce than it actually is.²³³ Even before *Red Lion*, the FCC had, on several occasions, declined to license a broadcaster because the FCC determined the licensee had not met the FCC's programming requirements or because allocating a license would harm the economic interests of existing broadcasting stations.²³⁴ For instance, the FCC refused to grant a license to Suburban Broadcasters even though it was "legally, technically and financially qualified" and the *only* license applicant.²³⁵ The FCC determined Suburban had not researched the community in which it wanted to broadcast.²³⁶ It is difficult to fathom how a town that previously had no radio station could be worse off with a station, even if that station had not completed a demographic study of the town to prove an "earnest interest in serving a local community."²³⁷

Suboptimal use of a broadcasting spectrum is by no means a thing of the past; the Government Accountability Office ("GAO") recently found that "during a [four]-day period in New York City, only [thirteen] percent of spectrum between 30MHz and 2.9GHz was occupied at one time or another."²³⁸ FCC policy typically has been more concerned with minimizing interference than with the efficient use of spectrum.²³⁹ For decades, observers have been urging the FCC to encourage the more efficient use of spectrums by transitioning to a more market-based system.²⁴⁰

From 1934 to 1984, the FCC allocated broadcast licenses principally

²³² *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969).

²³³ See U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-06-212R, RADIOFREQUENCY SPECTRUM MANAGEMENT: BRIEFING FOR CONGRESSIONAL COMMITTEES 18, 21 (2005) [hereinafter 2005 GAO REPORT], available at <http://www.gao.gov/new.items/d06212r.pdf>. Interestingly, at least one commentator in favor of the Fairness Doctrine seems to think that the then-current FCC allocation procedure, comparative hearings, was not a "command-and-control regulation." Sunstein, *supra* note 205, at 279.

²³⁴ *Bollinger*, *supra* note 206, at 9 (citing *Henry v. FCC*, 302 F.2d 191, 193 (D.C. Cir. 1962)).

²³⁵ *Henry*, 302 F.2d at 192.

²³⁶ *Id.*

²³⁷ *Id.* at 194.

²³⁸ 2005 GAO REPORT, *supra* note 233, at 32.

²³⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-04-666, SPECTRUM MANAGEMENT: BETTER KNOWLEDGE NEEDED TO TAKE ADVANTAGE OF TECHNOLOGIES THAT MAY IMPROVE SPECTRUM EFFICIENCY 17 (2004) available at <http://www.gao.gov/new.items/d04666.pdf>.

²⁴⁰ See, e.g., Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 231 (1982).

through quasi-judicial comparative hearings in which potential licensees argued why they should be given a license.²⁴¹ Critics contended that the comparative hearings were resource intensive, time-consuming, led to protracted litigation, lacked transparency, and favored large companies.²⁴² From 1984 to 1993, the FCC allocated licenses solely by a random lottery from among qualified applicants.²⁴³

After Congress eliminated the FCC's authority to conduct lotteries in 1997,²⁴⁴ it gave the FCC the authority to conduct auctions.²⁴⁵ Despite beginning to auction off licenses in 1994, the FCC auctioned off only two percent of the total licenses it granted.²⁴⁶ Contrary to critics' fears, the nonpartisan GAO found that the market-based auction mechanism produced "little or no negative impact on end-user prices, investment, and competition."²⁴⁷ The FCC's authority to conduct competitive auctions was set to expire in 2007, but twenty-one of the twenty-two panelists surveyed by the GAO supported extending the FCC's authority to conduct auctions.²⁴⁸ Congress subsequently extended the FCC's authority to conduct spectrum auctions until 2011.²⁴⁹

2. Numerical Scarcity

While *Red Lion* is premised partly on spectrum scarcity, the Supreme Court also based its decision on the "present state of commercially acceptable technology."²⁵⁰ This hints at the view that the Court was not only concerned with the number of broadcast frequencies available but also with numerical scarcity—the actual number of

²⁴¹ 2005 GAO REPORT, *supra* note 233, at 11.

²⁴² *Id.*

²⁴³ *Id.* at 12.

²⁴⁴ 47 U.S.C. § 309(i)(5) (2006).

²⁴⁵ 47 U.S.C. § 309(j)(2) (2006). *See generally* Peter Cramton, *The Efficiency of the FCC Spectrum Auctions*, 41 J.L. & ECON. 727 (1998) (discussing the FCC's spectrum auctions).

²⁴⁶ 2005 GAO REPORT, *supra* note 233, at 14.

²⁴⁷ *Id.* at 26. The fifty-nine auctions the FCC conducted in the period covered by the GAO report raised over \$14.4 billion for the federal treasury. *Id.* at 14. Of course, any system of allocating licenses, including auctions, can be abused. *See, e.g.*, *Star Wireless, LLC v. FCC*, 522 F.3d 469, 471 (D.C. Cir. 2008) (denying a petition for review where the FCC had imposed a monetary forfeiture on a wireless company for violating spectrum auction anti-collusion rules).

²⁴⁸ Letter from JayEtta Z. Hecker, Dir., Physical Infrastructure Issues, U.S. Gov't Accountability Office, to Senator Ted Stevens et al. 4 (Nov. 10, 2005), *available at* <http://www.gao.gov/new.items/d06212r.pdf>. The panelists represented a cross-section of stakeholders including government agencies, academics, and wireless spectrum users. 2005 GAO REPORT, *supra* note 233, at 41–42.

²⁴⁹ 47 U.S.C. § 309(j)(11) (2006).

²⁵⁰ *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 388–89, 400–01 (1969).

broadcasters broadcasting.²⁵¹ The Court stated that “[s]carcity is not entirely a thing of the past,”²⁵² but noted that the demand for broadcast frequencies had recently been so high that the FCC had decided to suspend new applications for broadcast licenses to revise the rules governing how it allocated most broadcast radio licenses.²⁵³ The Court knew that the demand for broadcast licenses was still very strong; therefore, the only logical conclusion is that the Court’s understatement regarding scarcity must have been a reference to numerical scarcity and not merely spectrum scarcity.²⁵⁴

The view that *Red Lion* also addresses the number of broadcasters is buttressed by the Court’s assertion that “[i]t is the right of the public to receive suitable *access* to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”²⁵⁵ As early as 1973, Justice Douglas noted, “It has been predicted that it may be possible within [ten] years to provide television viewers 400 channels through the advances of cable television.”²⁵⁶ In a later case, the Supreme Court likewise recognized that the spectrum scarcity rationale relied upon in *Red Lion* might become obsolete due to advances in telecommunications technology—like cable and satellite television—that made diverse viewpoints more easily accessible to the average consumer.²⁵⁷ The court in *Meredith* also latched onto the Supreme Court’s admonition that the state of commercially-available technology is an important factor undergirding the Fairness Doctrine.²⁵⁸

If the underlying purpose of *Red Lion* was to ensure that citizens could access diverse viewpoints, the spectrum scarcity rationale is obsolete if citizens can readily access a panoply of different perspectives.²⁵⁹ Numerous broadcast stations do not guarantee

²⁵¹ *Id.* at 396.

²⁵² *Id.*

²⁵³ *Id.* at 398; *see also* Kessler v. FCC, 326 F.2d 673, 678 (D.C. Cir. 1963) (discussing the FCC’s “freeze” on applications for broadcast licenses pending rule revisions).

²⁵⁴ *Red Lion*, 395 U.S. at 396; *see also* Sunstein, *supra* note 205, at 278 (“One reason for the [Fairness D]octrine was the scarcity of licenses.”).

²⁵⁵ *Red Lion*, 395 U.S. at 390 (emphasis added).

²⁵⁶ Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring); *see also* Brandywine-Main Line Radio, Inc. v. FCC., 473 F.2d 16, 75 (D.C. Cir. 1972) (Bazelon, J., dissenting) (“But *Red Lion* cannot be read as the final word on scarcity: the cable technology of the future was not even mentioned in the Court’s decision.”).

²⁵⁷ FCC v. League of Women Voters of Cal., 468 U.S. 364, 376–77 n.11 (1984).

²⁵⁸ *Meredith Corp. v. FCC*, 809 F.2d 863, 866–67 (D.C. Cir. 1987) (citing *Red Lion*, 395 U.S. at 388).

²⁵⁹ *Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J., concurring).

diversity,²⁶⁰ but they do make it more likely that a listener will hear more than one viewpoint. This reasoning led Justice Douglas to conclude that broadcasters could not constitutionally be treated differently from newspapers for First Amendment purposes.²⁶¹

3. Practical Considerations

There are a number of practical pitfalls that cast doubt on whether even a perfectly-implemented Fairness Doctrine could “produc[e] an informed public capable of conducting its own affairs.”²⁶² The Fairness Doctrine is a broadcast-centric regulation that implicitly assumes that most consumers receive the majority of their news from broadcast television or radio.²⁶³ The fewer broadcasters there are and the more consumers rely on only a few stations, the greater the Fairness Doctrine’s appeal and vice versa.²⁶⁴ Even if there are relatively few broadcasters, the Doctrine’s rationale weakens in proportion to the number of non-broadcast sources from which consumers can obtain their news.²⁶⁵

As historically implemented, it is not likely that the Fairness Doctrine can fulfill its stated purpose of exposing listeners and viewers to multiple sides of a controversial issue.²⁶⁶ A licensee is not required to present opposing positions on a controversial issue “on that same program or series of programs,” but must only “make a provision for the opposing views in his *overall programming*.”²⁶⁷ As applied in the complaint alleging an unbiased view of the presentation of the mini-series *Holocaust*, the FCC found that WNBC-TV had fulfilled its Fairness Doctrine obligations because its overall programming was balanced.²⁶⁸

²⁶⁰ Thomas S. McCoy, *Revoking the Fairness Doctrine: The Year of the Contra*, 11 COMM. & L. 67, 82 (1989).

²⁶¹ *Columbia Broad. Sys.*, 412 U.S. at 150 (Douglas, J., concurring).

²⁶² *Red Lion*, 395 U.S. at 392.

²⁶³ See *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 11 (1974).

²⁶⁴ Hall, *supra* note 172, at 746.

²⁶⁵ *Id.* at 746 & 746 n.252.

²⁶⁶ *Red Lion*, 395 U.S. at 390; see also *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“For speech concerning public affairs is more than self-expression; it is the essence of self-government.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .”).

²⁶⁷ *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 8 (alteration in original); see also Thomas G. Krattenmaker & L. A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 157 (declaring the Fairness Doctrine, “[a]t best, . . . a glorious but futile symbol”).

²⁶⁸ *Application of Nat’l Broad. Co., Inc. for Renewal of License of Station WNBC-TV*, 71 F.C.C.2d 250, 251 (1979).

A broadcaster could run a one-sided series on a controversial issue and still fulfill its Fairness Doctrine obligations of providing balanced programming by airing another program presenting a different viewpoint.²⁶⁹ The FCC's logic fails to take into account that even regular viewers or listeners of a particular station may not hear or watch enough of that station to be exposed to the different viewpoint.²⁷⁰ For example, a broadcaster could run a mini-series on Monday nights during primetime for three weeks and then present a program with an opposing viewpoint during the next three Friday evenings. In November 1969, NBC's program, *Huntley Brinkley Report*, aired a show entitled *Air Traffic Congestion and Air Safety* alleging that private pilots and general aviation were the principal cause of midair collisions due to lack of training.²⁷¹ The FCC stated that NBC had not violated the Fairness Doctrine because, overall, its coverage of the entire issue of congestion over airports was fair even if its coverage of this sub-issue may not have been fair.²⁷² Despite its public declaration that only overall fairness is required, James McKinney, Chief of the FCC's Media Bureau, explained that "when it comes down to the final analysis, we take out stopwatches and we start counting seconds and minutes that are devoted to one issue compared to seconds and minutes devoted to the other side of the issue."²⁷³

Even with its stopwatches, the FCC had difficulty administering the Fairness Doctrine because major controversial issues frequently have more than two sides.²⁷⁴ The FCC itself admitted that there may be several different opinions on a given topic that warrant coverage but that "[i]n many, or perhaps most, cases it may be possible to find that only two viewpoints are significant enough to warrant broadcast coverage."²⁷⁵ Many, if not most, of the controversial public issues of our time are multifaceted and cannot appropriately be analyzed in a binary fashion.²⁷⁶

The aim of *Red Lion* was to provide a forum to representative

²⁶⁹ See *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 19.

²⁷⁰ Congress or the FCC could, of course, require that every program discussing a controversial issue of public importance be scrupulously fair to account for the fact that even devoted viewers of a particular radio or television station do not listen to all of a station's programming. But this would lead to even more intrusion by the FCC into radio and television programming, further exacerbating the chilling effect the Fairness Doctrine would have on broadcasters. See *supra* Part II.

²⁷¹ *Nat'l Broad. Co.*, 25 F.C.C.2d 735, 735 (1970).

²⁷² *Id.* at 737.

²⁷³ Krattenmaker & Powe, *supra* note 267, at 164 n.60 (internal quotation marks omitted).

²⁷⁴ *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 14.

²⁷⁵ *Id.* at 15.

²⁷⁶ Krattenmaker & Powe, *supra* note 267, at 161.

community views “which would otherwise, by necessity, be barred from the airwaves.”²⁷⁷ In practice, the Fairness Doctrine has reinforced the tendency to think of issues as two-sided and has predictably led to views being characterized as either “Republican” or “Democratic.”²⁷⁸ The holders of the two most commonly-held viewpoints on perennially controversial issues like abortion and euthanasia do not need judicial solicitude in the form of the Fairness Doctrine to propagate their agendas.²⁷⁹

With the explicit blessing of the FCC, broadcasters could fulfill their Fairness Doctrine obligations by airing the perspectives of the two most common viewpoints on controversial issues, which, incidentally would likely have been heard anyway.²⁸⁰ Despite the Fairness Doctrine, Dr. Benjamin Spock, the People’s Party’s candidate for president in 1972, received no coverage from the three major television networks (ABC, CBS, and NBC) during the last three weeks of the 1972 election—despite being on the ballot in ten states.²⁸¹ The FCC denied Dr. Spock’s Fairness Doctrine complaint, finding that Dr. Spock’s lawyers had not provided enough information to prove the “substantiality” of his candidacy.²⁸² Commissioner Nicholas Johnson pointed out in his lengthy dissenting opinion that it was uncontroverted that Dr. Spock was a presidential candidate who was on the ballot in ten states, and it was unclear what additional information he could have provided the FCC to prove he had been “waging an extensive national campaign.”²⁸³ On one of the most important and controversial issues facing the American public—who should be elected President in 1972—the Fairness Doctrine provided little help for a non-mainstream candidate with a significant following.

Perversely, the Fairness Doctrine provided incentives to ignore non-mainstream or even minority establishment viewpoints because airing them would elicit requests from other minority groups for free responses.²⁸⁴ It was not particularly risky for a broadcaster to ignore a non-mainstream view because the FCC’s guidelines stated that a licensee should make a “good faith judgment” as to whether a minority view on a particular issue needed to be aired.²⁸⁵ Given the practical realities of day-to-day Fairness Doctrine enforcement, it is not clear why Justice Burger’s insight that “[a] responsible press is an undoubtedly

²⁷⁷ *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 389 (1969).

²⁷⁸ *Krattenmaker & Powe*, *supra* note 267, at 161.

²⁷⁹ *See id.* at 161–62.

²⁸⁰ *Id.*

²⁸¹ *SIMMONS*, *supra* note 37, at 191.

²⁸² *Complaint by Dr. Benjamin Spock*, 38 F.C.C.2d 316, 318 (1972).

²⁸³ *Id.* at 320 (Johnson, Comm’r, dissenting).

²⁸⁴ *Krattenmaker & Powe*, *supra* note 267, at 161–62.

²⁸⁵ *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 13 (1974).

desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated,”²⁸⁶ appears to be falling on deaf ears.

V. THE POST-REPEAL MEDIA LANDSCAPE

A. Network Television

Even if the Fairness Doctrine’s chilling effects can be dismissed as insufficiently weighty to merit declining reinstatement, proponents would be hard-pressed to justify reinstatement based upon the scarcity rationale, the *raison d’être* of *Red Lion*.²⁸⁷ Less than thirty years ago, a *U.S. News & World Report* article provocatively asked, “Is TV News Growing Too Powerful?”²⁸⁸ Readers and viewers need not have worried; over the past twenty-five years ABC, CBS, and NBC, the three broadcasters with the most-viewed nightly newscasts, lost viewers at a rate of approximately one million per year.²⁸⁹ The networks’ nightly newscasts lost half their viewers in the period from 1980 to 2009.²⁹⁰

More importantly, the network anchors have lost their influence over the American public.²⁹¹ After CBS Evening News anchor Walter Cronkite declared the Vietnam War a lost cause, President Lyndon Johnson famously remarked to aides, “If I’ve lost Cronkite, I’ve lost middle America,” and thus decided not to run for reelection.²⁹² Katie Couric, CBS’s current anchor, is no Walter Cronkite. A 2007 survey by the respected Pew Research Center for the People and the Press found that only five percent of respondents named her as their favorite journalist—and this was the highest percentage among journalists named.²⁹³ As recently as 1987, eleven percent of respondents named CBS

²⁸⁶ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

²⁸⁷ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–389 (1969). The Court even went so far as to include a table listing FCC statistics on various commercial channels allocated to the top one hundred television stations to bolster its scarcity argument. *Id.* at 398.

²⁸⁸ Alvin P. Sanoff, *TV News Growing Too Powerful?*, U.S. NEWS & WORLD REP., June 9, 1980, at 59, 59–60.

²⁸⁹ PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2010: NETWORK TV—AUDIENCE (2010), http://www.stateofthemediamedia.org/2010/network_tv_audience.php [hereinafter PROJECT FOR EXCELLENCE IN JOURNALISM, NETWORK TV]. The rate of decline in the networks’ newscast viewership has recently slowed, but it is still prominent. The three nightly network newscasts had about 22.3 million viewers in 2009, a drop of about two and a half percent, or 565,000 viewers, compared to 2008. *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*; see also Al Neuharth, *What Iraq Needs Is a Walter Cronkite*, USA TODAY, June 30, 2005, at 13A (lamenting that “there is no [Walter] Cronkite to call Bush’s bluff”).

²⁹² Neuharth, *supra* note 291.

²⁹³ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, TODAY’S JOURNALISTS LESS PROMINENT 3 (2007), <http://people-press.org/reports/pdf/309.pdf>. *But see* PROJECT FOR

Evening News anchor Dan Rather as their favorite journalist.²⁹⁴

NBC Universal Chief Executive Officer Jeff Zucker recently raised the possibility of NBC reducing the nights per week it broadcasts.²⁹⁵ In fact, many media insiders believe that the days of signature evening newscasts are numbered.²⁹⁶

B. Cable and Satellite Television

While the networks' primetime audience has been declining for decades, cable news became an important source of news for roughly 3.88 million Americans per night in 2009.²⁹⁷ More people now report regularly watching cable news programs on CNN, FOX News, or MSNBC, than report regularly watching one of the three broadcast networks.²⁹⁸ Wired cable penetration was about sixty-one percent of all households with television in February 2010.²⁹⁹

In 2006, a survey reported that one-third of Americans thought of cable or satellite television as a necessity they could not live without—more than the percentage of people who thought high-speed Internet was a necessity (twenty-nine percent).³⁰⁰ The survey also reported that half of the viewers who were older than sixty-five considered cable or satellite television a necessity.³⁰¹ Justice Douglas, who envisioned the possibility of consumers receiving 400 channels,³⁰² would be pleased to learn that consumers living in the same zip code as the FCC in Washington, D.C., can receive over 600 channels from the local cable provider, Comcast

EXCELLENCE IN JOURNALISM, NETWORK TV, *supra* note 289 (reporting that Couric still lost significant viewership).

²⁹⁴ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 293.

²⁹⁵ Paul J. Gough, *NBC Might Scale Back Hours*, HOLLYWOOD REP., Dec. 9, 2008, <http://www.thrfeed.com/2008/12/nbc-might-scale.html>.

²⁹⁶ Brian Stelter & Bill Carter, *Network News at a Crossroads*, N.Y. TIMES, Mar. 1, 2010, at B1.

²⁹⁷ PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2010: CABLE TV—AUDIENCE (2010), http://www.stateofthedia.org/2010/cable_tv_audience.php. The networks reported on were CNN, FOX News, and MSNBC. *Id.*

²⁹⁸ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT: KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES 13 (2008), <http://people-press.org/reports/pdf/444.pdf>.

²⁹⁹ TELEVISION BUREAU OF ADVER., TV BASICS: ALTERNATE DELIVERY SYSTEMS—NATIONAL (2010), http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/12_ADS-Natl.asp.

³⁰⁰ PEW RESEARCH CTR., LUXURY OR NECESSITY? THINGS WE CAN'T LIVE WITHOUT: THE LIST HAS GROWN IN THE PAST DECADE 1 (2006), <http://pewresearch.org/assets/social/pdf/Luxury.pdf>.

³⁰¹ *Id.* at 4.

³⁰² *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring).

Corporation.³⁰³

Satellite television and video on-demand are rapidly making inroads and challenging cable television's dominant market position.³⁰⁴ Satellite television alone had a market penetration rate of approximately twenty-six percent in 2007³⁰⁵ and offers consumers hundreds of channels from which to choose.³⁰⁶ Consumers now have access to an unprecedented number of information sources. In 2007, consumers spent an average of 19.4 hours per week viewing cable or satellite television compared to just thirteen hours viewing broadcast television.³⁰⁷

C. Radio

In recent years AM and FM stalwarts have been joined by satellite, HD Radio,³⁰⁸ and Internet radio as well as podcasting and even cell phone radio.³⁰⁹ Currently, approximately ninety-three percent of people over age twelve listen to traditional terrestrial broadcast radio, despite radio having been part of the media landscape for decades.³¹⁰ Upstart satellite radio company SIRIUS XM offers its 20 million subscribers³¹¹ over 200 channels³¹² ranging from *Blue Collar Radio*, promising "all-

³⁰³ See Comcast, Channel Lineup, <http://www.comcast.com/Customers/clu/ChannelLineup.ashx?area=0> (last visited Apr. 19, 2010). Indeed, nationally, the average American household receives 118.6 channels. News Release, The Nielsen Co., Average U.S. Home Now Receives a Record 118.6 Channels, According to Nielsen (June 6, 2008), available at http://en-us.nielsen.com/etc/content/nielsen_dotcom/en_us/home/news/news_releases/2008/june/average_u_s_home.mbc.53397.RelatedLinks.62970.MediaPath.pdf.

³⁰⁴ MOTION PICTURE ASSOC. OF AM., INC., ENTERTAINMENT INDUSTRY MARKET STATISTICS: 2007, at 19 (2008), <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf>.

³⁰⁵ *Id.*

³⁰⁶ See, e.g., DISH Network, America's Everything Pak, <http://www.dishnetwork.com/packages/detail.aspx?pack=AEP> (last visited Apr. 19, 2010); DIRECTV, Great Offers for New Customers, <https://www.directv.com/DTVAPP/wizard/buildYourSystem1.jsp?footer navtype=-1> (last visited Apr. 19, 2010).

³⁰⁷ MOTION PICTURE ASSOC. OF AM., INC., *supra* note 304, at 24.

³⁰⁸ HD Radio is a registered trademark of iBiquity Digital Corporation. iBiquity Digital Corp., Trademarks, http://www.ibiquity.com/about_us/trademarks (last visited Apr. 19, 2010).

³⁰⁹ PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2008: RADIO—INTRO (2008), http://www.stateofthemediamedia.org/2008/narrative_radio_intro.php?media=10.

³¹⁰ News Release, Arbitron, Inc., More Than 239 Million Listen to Radio Every Week According to the Arbitron Radar 104 Report (Mar. 15, 2010), <http://arbitron.media room.com/index.php?s=43&item=673>.

³¹¹ Tim Arango, *Satellite Radio Still Reaches for the Payday*, N.Y. TIMES, Dec. 28, 2008, at BU1.

³¹² SIRIUS Satellite Radio, Channel Guide, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=ChannelLineup&cid=1218563499691&o=> (last visited Apr. 19, 2010).

American comedy with universal appeal,”³¹³ to *Cosmo Radio*, for everything the “fun, fearless, female” needs “to be the most informed girl at the water cooler.”³¹⁴ Subscribers can also listen to over half of SIRIUS’s programming online.³¹⁵

According to a joint 2008 study by ratings companies Arbitron Inc. and Edison Media Research, about thirteen percent of the U.S. population older than twelve listens to Internet radio weekly.³¹⁶ Online radio attracts a wide range of ages with no single demographic cohort dominating the audience.³¹⁷ Sixteen percent of the listeners are over age fifty-five, disproving the notion that only young people listen online.³¹⁸ Contrary to what one might expect, listeners of digital radio platforms do not spend less time listening to traditional terrestrial broadcast radio.³¹⁹

Podcasting is also growing in popularity. In 2008, nearly four out of every ten Americans—and almost three-quarters of teenagers ages twelve to seventeen—owned a portable MP3 player such as Apple’s iPod.³²⁰ Again, contrary to popular assumptions, only ten percent of portable MP3 player owners reported listening less to broadcast radio as a result of owning an MP3 player.³²¹ Given the increasing ubiquity of portable MP3 players, it is no surprise that nearly one out of ten Americans age twelve or older listened to an audio podcast during the last month of the Arbitron-Edison study—an estimated twenty-three million listeners age twelve or older.³²²

D. Internet

Any discussion of the twenty-first century media landscape would be incomplete without delving into the Internet’s impact on how

³¹³ SIRIUS Satellite Radio, Blue Collar Radio, <http://www.sirius.com/bluecollarcomedy> (last visited Apr. 19, 2010).

³¹⁴ SIRIUS Satellite Radio, Cosmo Radio, <http://www.sirius.com/cosmoradio> (last visited Apr. 19, 2010).

³¹⁵ SIRIUS Satellite Radio, SIRIUS Internet Radio, <http://www.sirius.com/siriusinternetradio> (last visited Apr. 19, 2010).

³¹⁶ ARBITRON, INC. & EDISON MEDIA RESEARCH, THE INFINITE DIAL 2008: RADIO’S DIGITAL PLATFORMS 5 (2008), available at http://www.arbitron.com/downloads/digital_radio_study_2008.pdf.

³¹⁷ *Id.* at 6.

³¹⁸ *Id.*

³¹⁹ *Id.* at 19.

³²⁰ *Id.* at 10; see also MARY MADDEN & SYDNEY JONES, PEW INTERNET & AM. LIFE PROJECT, PEW INTERNET PROJECT DATA MEMO (2008), available at http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Podcast_2008_Memo.pdf (providing an in-depth discussion of recent trends in podcast downloading).

³²¹ ARBITRON, INC. & EDISON MEDIA RESEARCH, *supra* note 316, at 12.

³²² *Id.* at 14.

Americans consume news and public affairs programming.³²³ A 2008 report indicated that eighty percent of people older than seventeen view the Internet as an important source of information—significantly higher than all other information sources, including television (sixty-eight percent), newspapers (sixty-three percent), and radio (sixty-three percent).³²⁴ Sixty percent of internet users go online to seek out news on a weekly basis.³²⁵ Thirty-seven percent of people go online for news at least three days per week—far more than those who watched the nightly network newscasts (twenty-nine percent).³²⁶ Young (eighteen to twenty-four year olds) and middle-aged (fifty to sixty-four year olds) Americans were almost equally as likely to use the Internet as a news source.³²⁷

Not only are Americans accessing news online, they are also reading and being exposed to more news sources.³²⁸ A full eighty-three percent of online news consumers use search engines to find stories that interest them.³²⁹ Sixty-four percent of online news users younger than twenty-five report more often following links to news websites rather than going directly to news organizations' homepages.³³⁰ No single news website or set of news websites has a large market share.³³¹

The news website with the highest market share is Yahoo! News, with a share of just 6.64% for the week ending March 20, 2010, according to the online ratings company Hitwise.³³² The fifth and seventh most-visited news websites for that week were Google News (2.80%) and Drudge Report (1.62%).³³³ This is particularly noteworthy because both Google News and the Drudge Report do not produce their own content; they merely link to other online news sources throughout the world.³³⁴

³²³ See generally PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 298 (providing a detailed and comprehensive 127-page report on how Americans consumed news during 2008).

³²⁴ CTR. FOR THE DIGITAL FUTURE, ANNUAL INTERNET SURVEY BY THE CENTER FOR THE DIGITAL FUTURE FINDS SHIFTING TRENDS AMONG ADULTS ABOUT THE BENEFITS AND CONSEQUENCES OF CHILDREN GOING ONLINE 2 (2008), *available at* <http://www.digitalcenter.org/pdf/2008-Digital-Future-Report-Final-Release.pdf>.

³²⁵ *Id.* at 4.

³²⁶ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 298, at 4.

³²⁷ *Id.* at 8.

³²⁸ See *id.* at 22–23.

³²⁹ *Id.* at 23.

³³⁰ *Id.* at 24.

³³¹ HITWISE, HITWISE NEWS AND MEDIA CATEGORY WEEKLY REPORT BASED ON US INTERNET USAGE FOR THE WEEK ENDING MARCH 20, 2010, at 1 (2010) *available at* <http://www.drudgereport.com/hit.pdf>.

³³² *Id.*

³³³ *Id.*

³³⁴ See Drudge Report, <http://www.drudgereport.com/>; Google News Home Page, <http://news.google.com/>.

E. Numerical Scarcity

The number of broadcast radio and television stations has also increased markedly since 1949,³³⁵ the first time the Fairness Doctrine was officially promulgated.³³⁶ The more than twelvefold increase in broadcast radio and television stations since 1949 likely significantly understates the number of radio stations a person can currently listen to compared to a citizen in 1949 because advances in technology have greatly increased broadcast signal strength. An FCC employee at the FCC's headquarters in Washington, D.C., for example, can hear over ninety-five terrestrial radio stations.³³⁷

In the face of overwhelming evidence that calls both spectrum and numerical scarcity into question, even vocal proponents of the Fairness Doctrine who provide intellectual fodder for the pro-reinstatement camp appear to have largely abandoned the scarcity rationale.³³⁸ The scarcity rationale is now even more untenable because of the recent government-mandated switch to digital television from analog broadcasting.³³⁹ The digital switchover freed up a large chunk of broadcast spectrum that the

³³⁵ Compare 18 FCC ANN. REP. 121 (1952) (listing 2,353 licensed broadcast radio and television stations) and Press Release, Fed. Comm'n's Comm'n, Broadcast Station Totals for January 1969 (Feb. 20, 1969), available at <http://www.fcc.gov/mb/audio/totals/pdf/19690131.pdf> (listing 7,411 broadcast radio and television stations the year *Red Lion* was decided), with Press Release, Fed. Comm'n's Comm'n, Broadcast Station Totals as of December 31, 2009 (Feb. 26, 2010), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0226/DOC-296538A1.pdf (listing 30,503 broadcast radio and television stations).

³³⁶ See SIMMONS, *supra* note 37, at 41 (citing Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1246 (1949)).

³³⁷ VSoft Comm'n's, Zip Code Signal, <http://www.v-soft.com/ZipSignal/> (enter zip code 20554) (last visited Apr. 19, 2010).

³³⁸ See, e.g., Bollinger, *supra* note 206, at 2 (“[T]he Court’s attempt [in *Red Lion*] to distinguish broadcasting on the basis of its dependence on scarce resources . . . is unpersuasive; moreover, whatever validity the distinction may once have had is now being undercut by the advance of new technology in the form of cable television.”); Sunstein, *supra* note 205, at 278 (“One reason for the [Fairness D]octrine was the scarcity of licenses, but licenses are no longer scarce; indeed, there are far more radio and television stations than major newspapers.”); Roy J. Thibodaux III, Comment, *Is It Time to Revisit the Fairness Doctrine in Response to the Federal Communication Commission’s Proposed Media Ownership Rules?*, 15 SETON HALL J. SPORTS & ENT. L. 337, 358 (2005) (“Technology has made the scarcity of airwaves no longer an issue since the FCC can now assign more channels to broadcasters than it could in the past.”); Irving R. Kaufman, *Reassessing the Fairness Doctrine*, N.Y. TIMES, June 19, 1983, (Magazine), at 17 (arguing technological advances in communications have weakened the Fairness Doctrine’s scarcity justification). Of this list, Bollinger’s article is especially noteworthy because it was published in 1976, well before new technologies like the Internet and satellite radio became available to the average American.

³³⁹ DTV.gov, The Digital TV Transition: What You Need to Know About DTV, <http://www.dtv.gov/> (last visited Apr. 19, 2010).

FCC was required to auction off.³⁴⁰

Not surprisingly, commentators against reinstatement of the Fairness Doctrine agree that spectrum scarcity no longer exists.³⁴¹ The American public largely agrees: by an overwhelming margin of seventy-four percent to nineteen percent, Americans believe “it is already possible for just about any political view to be heard in today’s media.”³⁴² Professor and noted technologist Lawrence Lessig has even gone so far as to advocate scrapping the FCC and replacing it with an “Innovation Environment Protection Agency,” which would maintain a policy of “benign neglect.”³⁴³

By listening to the rhetoric from our elected officials in Washington, D.C., one might get the mistaken impression that American consumers are clamoring for reinstatement of the Fairness Doctrine.³⁴⁴ Fortunately, not all politicians are cheerleaders for reinstatement; radio host and then-Democratic Governor of New York Mario Cuomo penned an opinion editorial in the *New York Times* entitled *The Unfairness Doctrine*, strongly urging his fellow elected officials to refrain from reinstating the Fairness Doctrine.³⁴⁵ Alan Colmes, a liberal political commentator and former co-host of the now-defunct FOX News show *Hannity & Colmes*, is similarly against reinstatement of the Fairness Doctrine.³⁴⁶ Even Jon Sinton, the founding President of Air America Radio, a nationwide progressive radio network that went bankrupt in 2006, is against reinstatement of the Fairness Doctrine.³⁴⁷

³⁴⁰ 47 U.S.C. § 309(j)(15)(C)(v)–(vi) (2006).

³⁴¹ See, e.g., BRIAN FITZPATRICK, CULTURE & MEDIA INST., UNMASKING THE MYTHS BEHIND THE FAIRNESS DOCTRINE 3–6 (2008) (debunking the scarcity argument by demonstrating the vast news sources available to Americans), available at http://www.cultureandmediainstitute.org/specialreports/2008/Fairness_Doctrine/CMI_FairnessDoctrine_Single.pdf; Heinke & Wayland, *supra* note 6, at 8 (“As an empirical matter today, however, the assumption of broadcast spectrum scarcity has become increasingly unsound.”).

³⁴² *47% Oppose Fairness Doctrine, But 51% Think Congress Likely to Bring It Back*, RASMUSSEN REP., Feb. 15, 2009, http://www.rasmussenreports.com/public_content/politics/general_politics/february_2009/47_oppose_fairness_doctrine_but_51_think_congress_likely_to_bring_it_back.

³⁴³ Lawrence Lessig, *Reboot the FCC*, NEWSWEEK, Dec. 23, 2008, <http://www.newsweek.com/id/176809>.

³⁴⁴ See *supra* notes 11–19, *infra* note 349 and accompanying text.

³⁴⁵ Mario M. Cuomo, Op-Ed., *The Unfairness Doctrine*, N.Y. TIMES, Sept. 20, 1993, at A19 (“[A]s policy, the [Fairness D]octrine is unwise. Precisely because radio and TV have become our principal sources of news and information, we should accord broadcasters the utmost freedom in order to insure a truly free press.”).

³⁴⁶ Youtube, Alan Colmes Is a Punk, <http://www.youtube.com/watch?v=kkhrdpuywQw> (last visited Apr. 19, 2010).

³⁴⁷ John Sinton, Op-Ed., *Limbaugh Is Right on the Fairness Doctrine*, WALL ST. J., Dec. 22, 2008, at A17 (“As the founding president of Air America Radio, I believe that for the last eight years Rush Limbaugh and his ilk have been cheerleaders for everything

Despite this overwhelming evidence, absence clearly makes the heart grow fonder in the case of the Fairness Doctrine, especially with members of Congress.³⁴⁸ Instead of letting an outdated regulatory concept like the Fairness Doctrine rest in peace in its shallow administrative grave, Representative Anna Eshoo (D-CA) wants to resurrect the Fairness Doctrine and extend it to cable and satellite television programming.³⁴⁹ Because the FCC repealed the Fairness Doctrine administratively, all that would be necessary is for three of the five FCC Commissioners to vote for reinstatement.³⁵⁰ Given that the Supreme Court has never overruled *Red Lion*, as long as the FCC's actions do not violate the highly-deferential arbitrary or capricious standard under the Administrative Procedure Act, reinstatement could take place without congressional action.³⁵¹

wrong with our economic, foreign and domestic policies. But when it comes to the Fairness Doctrine, I couldn't agree with them more. The Fairness Doctrine is an anachronistic policy that, with the abundance of choices on radio today, is entirely unnecessary.”). Sinton's editorial is especially noteworthy because reinstatement of the Fairness Doctrine would have given his progressive radio network a guaranteed market because conservative talk radio broadcasters would have been required to present alternative progressive viewpoints.

³⁴⁸ See *supra* notes 11–19, *infra* note 349 and accompanying text for a list of politicians who have recently publicly pined for the “fairer” days of yore. Senator Charles Schumer (D-N.Y.) complained that the same people who approve of the FCC regulating pornography were against the Fairness Doctrine and that this argument was logically inconsistent. Bob Cusack, *Schumer on Fox: Fairness Doctrine 'Fair and Balanced'*, THE HILL, Nov. 4, 2008, <http://thehill.com/homenews/news/16881-schumer-on-fox-fairness-doctrine-fair-and-balanced>. Of course, content-based restrictions are not always unconstitutional, but any governmental content-based restriction must serve a compelling government interest and be narrowly tailored to achieve that interest. See *supra* note 204. It is much easier to fulfill the narrow tailoring prong if the government is merely seeking to regulate one small sliver of content (for example, pornography) as opposed to when it is attempting to regulate *all* broadcast content via the Fairness Doctrine. See *FCC v. Pacifica Found.*, 438 U.S. 726, 745, 750–51 (1978) (holding the FCC may regulate the broadcast of a patently offensive monologue containing sexual and excretory language).

³⁴⁹ Rep. Eshoo to Push for Fairness Doctrine, <http://sfppc.blogspot.com/2008/12/rep-eshoo-to-push-for-fairness-doctrine.html> (Dec. 16, 2008, 00:05 PST) (“I’ll work on bringing [the Fairness Doctrine] back. I still believe in it It should and will affect everyone [T]here should be equal time for the spoken word.”). Think of this as the Fairness Doctrine on steroids.

³⁵⁰ See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 657 (D.C. Cir. 1989) (holding that the FCC had the authority to reject the Fairness Doctrine if it did so without being arbitrary or capricious and if it concluded that the Doctrine no longer served the public interest). If the FCC has the plenary authority to reject the Fairness Doctrine, it could certainly reenact the Doctrine if it so desired.

³⁵¹ Pub. L. No. 79-404, ch. 324, § 10, 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 706(2)(A) (2006)); Conrad, *supra* note 179, at 194 (“[E]ven if Congress is unable to pass legislation codifying the [Fairness] Doctrine, it may be resurrected by a new FCC . . .”). Of course, as Conrad notes, Congress could always pass a law mandating the Fairness Doctrine as it has attempted to do in the past. *Supra* note 194 and accompanying text.

As the Fairness Doctrine's rationale becomes weaker and weaker due to technological change, proponents are left making internally-contradictory arguments supporting its reinstatement.³⁵² A 1995 American Bar Association Study concluded that the Fairness Doctrine "came to be a regulation with little practical remedial effect[s]" and "had [a] minimal effect when enforced, causing merely a ripple in an ocean of thousands of broadcast licensees."³⁵³ Professor Leweke undertook an exhaustive study of every single personal attack and political editorial complaint filed with the FCC since their codification in 1967, and concluded that the justification for reinstating the Fairness Doctrine is meager.³⁵⁴ Even one of the largest progressive media advocacy groups, the Center for American Progress, agrees that "[s]imply reinstating the Fairness Doctrine will do little [to ensure presentation of all viewpoints]."³⁵⁵

Paradoxically, proponents of the Fairness Doctrine argue that precisely *because* the FCC took so few enforcement actions, no chilling effect was taking place and therefore the Doctrine is constitutional.³⁵⁶ This begs the question: If a regulation, like the Fairness Doctrine, is so infrequently enforced, is it even necessary? The stock answer is that the Doctrine's very existence causes broadcasters subject to it to conform; but this is simply another name for the constitutionally-impermissible chilling effect.³⁵⁷ The Fairness Doctrine's proponents cannot afford to admit that the Doctrine has chilling effects, because the Doctrine's stated purpose is to encourage the discussion of controversial public issues.³⁵⁸

³⁵² Conrad, *supra* note 179, at 190 ("Broadcasting, especially television, is the most powerful communications force ever devised, a medium that many Americans rely upon *exclusively* for information and analysis of public issues." (emphasis added) (citing Andrew Radolf, *Television News Rates High*, EDITOR & PUBLISHER, Apr. 13, 1985, at 9, 9)). This may have been true in 1985, but it is certainly not true today. See *supra* Part V.A–D.

³⁵³ Project, *supra* note 200, at 629, 641.

³⁵⁴ Leweke, *supra* note 46, at 576 ("[T]he FCC may reinstate either [the personal attack or the political editorial] rule through a rule-making proceeding if it deems the public interest requires them. The recent case history of the rules does not lend strong support for the need to do so." (footnote omitted)).

³⁵⁵ CTR. FOR AM. PROGRESS & FREE PRESS, THE STRUCTURAL IMBALANCE OF POLITICAL TALK RADIO 7 (2007), available at http://www.americanprogress.org/issues/2007/06/pdf/talk_radio.pdf.

³⁵⁶ *Supra* note 177 and accompanying text.

³⁵⁷ See *supra* note 178 and accompanying text.

³⁵⁸ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392–93 (1969) ("[I]f political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective.

A realization that reinstatement of the Fairness Doctrine would still not satisfy their desire to control the airwaves has led to a call for even more intrusive government regulation of broadcasting.³⁵⁹ The Center for American Progress recommends reducing broadcasting licenses from eight-year³⁶⁰ to three-year terms, subjecting broadcasters to comparative hearings, requiring broadcast licensees to periodically prove they are operating in the public interest by providing documentation, and mandating that the FCC run a website to “conduct on-line discussion and facilitate interaction with the public about licensee conduct.”³⁶¹ The think tank recommends that any broadcaster not meeting the recommended requirements be charged a “spectrum use fee.”³⁶² This fee is expected to raise \$100 to \$250 million and should go directly to the Corporation for Public Broadcasting to ensure balanced and fair coverage of controversial political issues.³⁶³ The debate over the constitutionality of the Fairness Doctrine seems almost quaint when considering this panoply of proposed broadcast regulations. Amid widespread availability of news sources and viewpoints, calls for reinstatement of the Fairness Doctrine and even tighter government oversight and control of the airwaves border on the absurd.

CONCLUSION

The FCC’s Fairness Doctrine is a policy whose time—if it ever was justified—has come and gone. Despite the Supreme Court blessing the Faustian bargain of access to broadcast frequencies in return for partial government content regulation in *Red Lion*, Congress and President Obama should continue to refrain from succumbing to the temptation to reinstate the Fairness Doctrine. Justice Stewart, who joined *Red Lion*, later reconsidered his position and ultimately concluded that “‘fairness’ [is] far too fragile to be left for a Government bureaucracy to accomplish.”³⁶⁴ Politicians and policymakers would do well to heed his advice and pass legislation protecting the First Amendment rights of broadcasters.

Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the [D]octrine would be stifled.”).

³⁵⁹ See, e.g., CTR. FOR AM. PROGRESS & FREE PRESS, *supra* note 355, at 2, 6, 9–11.

³⁶⁰ 47 U.S.C. § 307(c)(1) (2006).

³⁶¹ CTR. FOR AM. PROGRESS & FREE PRESS, *supra* note 355, at 11.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Columbia Broad. Sys. Inc., v. Democratic Nat’l Comm.*, 412 U.S. 94, 145–46 (1973) (Stewart, J., concurring).