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The Fairness Doctrine: Protection for a Scarce Public Resource Symposium - Selected Topics on Constitutional Law - Comment.

Constance Sheppard

The Fairness Doctrine: Protection for a Scarce Public Resource

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I. Introduction

The first amendment right to freedom of speech is one of the most cherished freedoms of the American people.[1] Framers of the first amendment intended it to foster debate arising from a free flow of diverse information and ideas.[2] The amendment's goal was to incite discussion of various topics of public importance, thereby promoting intelligent self-government.[3] Radio and television, in providing information to the public,

1. *See* U.S. Const. amend. I; *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 19 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

2. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969) (goal of first amendment to create informed public); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (function of free speech is to invite dispute). The Court in *Terminiello* suggested the first amendment may indeed be fulfilling its purpose when it "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

3. *See* United States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972) (widest possible dissemination of information from diverse sources essential to public welfare); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 19 (D.C. Cir. 1972) ("free and unfettered debate" cornerstone of Republic), *cert. denied*, 412 U.S. 922 (1973); *see also* Ervin, *Introduction to Media And The First Amendment In A Free Society*, 60 Geo. L.J. 871, 871 (1972) (free flow of information protects against "tyranny . . . of the mind"). The framers of

are clearly affected by first amendment interests although the extent of its effect remains unclear.[4] To preserve a free flow of information and ideas, government regulation is essential in the limited broadcast spectrum where the amount of radio and television frequencies are far outnumbered by the multitude of people wishing to use them.[5] Congress has chosen the Federal Communications Commission to promulgate rules and regulations, such as the equal time doctrine,[6] the personal attack rule,[7]

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the Bill of Rights believed uncensored thought stimulated debate of public issues which is essential to achieving the goals of a democratic society. *See* Ervin, *Introduction to Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 871 (1972).

4. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 909 (D.C. Cir.) (first amendment impact on broadcasting indeterminable), *cert. denied*, 409 U.S. 843 (1972); Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 649 (D.C. Cir. 1971) (nature of first amendment interests in broadcasting still developing), *rev'd on other grounds*, 412 U.S. 94, 132 (1973). It is clear, however, that the government cannot cut off discourse only to keep others from hearing it unless there is a showing that substantial privacy interests are being invaded in an intolerable manner. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 (1980) (public unable to escape unwanted messages). It is further understood that a less stringent analysis is applied when assessing the first amendment's role in providing the public access to dissemination of various experiences and ideas. *See id.* at 541. Factors considered in determining a medium's first amendment purposes include the availability of different forms of expression, the societal function served, and the uniqueness of the medium. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 557-58 (1981) (Burger, C.J., dissenting); *see also* Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1974) (ads on side of bus not first amendment forum). The Court in *Lehman* explained that although the first amendment carefully preserves access to public places for free speech purposes, the nature of the forum and the conflicting interests involved are important in determining the degree of first amendment protection of speech. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1974).

5. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 799 (1978) (government regulation of finite number of frequencies necessary); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 158-59 (1973) (radio subject to government regulation because of its unique characteristic of limited broadcasting frequencies); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969) (history of governmental control of broadcasting). The Supreme Court stated such control was necessary to prevent a medium made useless by "the cacaphony [sic] of competing voices, none of which could be clearly and predictably heard." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969).

6. *See* 47 U.S.C. § 315 (1976). Section 315 provides in pertinent part: "(a) if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ." *Id.* Bonafide newscasts are exempted from this provision. *See* CBS, Inc., 58 F.C.C.2d 601, 602 (1976) ("60 Minutes" program of interviews with candidates exempt as bonafide newscast under section 315 (a)(2)); *cf.* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 904 (D.C. Cir.) ("equal opportunities" applies to presidential addresses only where President is candidate whose speech is covered by section 315), *cert. denied*, 409 U.S. 843 (1972). *But see Hearing on H.R. 4780 Before the Subcomm. on Telecommunications, Consumer Protection, & Finance of the House Committee on Energy & Commerce*, 97th Cong., 1st Sess. 61 (1981) (FCC's recommendation of repeal of section 315 because it restricts broadcaster discretion).

and the fairness doctrine,[8] in an effort to enhance public awareness of important issues.[9] It is the stated purpose of the fairness doctrine to further first amendment goals by preserving an uninhibited marketplace of ideas in which truth will prevail, rather than by approving monopolization of that market by private licensees or the government itself.[10] De-

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7. *See* 47 C.F.R. § 73.1920 (1981). The rule provides in the case of a personal attack upon an individual or group's "honesty, character, integrity or like personal qualities" during expression of views on controversial issues of public importance, the broadcast licensee is required to extend a right of reply to the person attacked. *See id.* Within seven days after the attack is broadcast, the licensee must transmit "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. " *Id.* Bonafide newscasts, bonafide interviews, and on-the-spot coverage of bonafide news events are exempt from the reply requirements of the personal attack rule. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 32 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 922 (1973). Several factors are considered by the FCC in determining whether a program is a bonafide news program:

> (1) Whether it is regularly scheduled; (2) How long it has been broadcast; (3) Whether the broadcaster produces and controls the program; (4) Whether the broadcaster's decisions on the format, content and participants are based on his reasonable, good faith journalistic judgment rather than on an intention to advance the candidacy of a particular person; (5) Whether selection of persons to be interviewed and topics are based on their *newsworthiness.*

Complaint of Assemblyman Gerald Cardinale Against Television Station WNET, 88 F.C.C.2d 346, 347 (1981); *cf.* Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1011 (D.C. Cir. 1976) (rejected Commission's findings that licensee violated personal attack rule).

8. *See* 47 C.F.R. § 73.1910 (1981). The personal attack rule is a narrow corollary of the fairness doctrine, but varies in that the broadcaster cannot choose a third party to reply to the attack; rather, he must extend the right of reply to the person attacked. *See* M. Goldseker Real Estate Co. v. FCC, 456 F.2d 919, 920 (4th Cir. 1972). The fairness doctrine, however, does not require equal time. *See* Kennedy for President Comm. v. FCC, 636 F.2d 432, 452 (D.C. Cir. 1980) (fairness doctrine requires only reasonableness); Green v. FCC, 447 F.2d 323, 332 (D.C. Cir. 1971) (fairness doctrine issue is reasonableness of station's actions, not absolute equality in time allocation). Stringent analysis of the equal time doctrine and the personal attack rule are beyond the scope of this comment. For a general discussion in this area, see Kelso, *The Personal Attack Rule and Professional Occupations: Consistency in FCC Decision-Making,* 16 CAL. W.L. REV. 399 (1980).

9. *See* NBC, Inc. v. United States, 319 U.S. 190, 216 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

10. *See* CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981); Complaint of Minnesota Farmers Union, 88 F.C.C.2d 1455, 1463 (1982) (fairness doctrine to encourage robust debate); *see also* Special Project, *Media And The First Amendment In A Free Society,* 60 GEO. L.J. 871, 884 (1972). Broadcasting provides a forum in this "marketplace" through which the public may express its opinion. *See* Special Project, *Media And The First Amendment In A Free Society,* 60 GEO. L.J. 871, 884 (1972). This "marketplace theory" of broadcasting is dependent on direct involvement of citizens in government. *See id.* at 884. Because it is difficult in nations as large as the United States for many citizens to play significant roles in government, a free press is necessary to inform the public of governmental actions and events which affect them. *See id.* at 884. *But see* American Sec. Council Educ. Found. v. FCC, 607

spite that purpose, the doctrine has been repeatedly attacked as infringing upon constitutional rights.[11] A group of its latest critics, prominent media and news commentators, propose its abolition and advocate the passage of a twenty-seventh amendment to insure freedom of the press.[12]

This comment will analyze the fairness doctrine and respond to its critics in light of case law and opinions of the Federal Communications Com-

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F.2d 438, 459 (D.C. Cir. 1979) (Bazelon, J., concurring) (doubts that fairness doctrine promotes first amendment goals), *cert. denied*, 444 U.S. 1013 (1980).

11. *See* Special Project, *Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 887 (1972). The writer argues against governmental regulation of broadcasting per se, urging that electronic media was not envisioned by the framers of the Bill of Rights. *See id.* at 887; *see also* Menkes, *The Fairness Doctrine: Fair to Whom?*, 30 CLEV. ST. L. REV. 485, 488 & n.18, 519 (1981) (fairness doctrine violates first and fourteenth amendments). Ms. Menkes goes further and alleges the fairness doctrine has been arbitrarily applied and therefore fails to meet its legislative purpose. *See* Menkes, *The Fairness Doctrine: Fair To Whom?*, 30 CLEV. ST. L. REV. 485, 488 (1981). She proposes repeal of the "amorphous doctrine." *See id.* at 488, 521; *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 60 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (Walter Cronkite believes news is not free because "it is operated by an industry that is beholden to the Government"), *cert. denied*, 412 U.S. 922 (1972); Comment, *The Fairness Doctrine: Time For The Graveyard?*, 2 FORDHAM URB. L.J. 563, 586 (1974) (present state of communications industry does not justify need for regulation of broadcast medium). *See generally* Mickelson, *The First Amendment and Broadcast Journalism* in THE FIRST AMENDMENT AND THE NEWS MEDIA 54 (1973) (Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States)(recommendations concerning fairness doctrine and broadcast journalism); R. O'NEILL, RESPONSIBLE COMMUNICATION UNDER LAW 65 (1966) ("radio, television, and politics"); Note, *Broadcast Deregulation and the First Amendment: Restraints on Private Control of the Publicly Owned Forum*, 55 N.Y.U. L. REV. 517, 518 (1980) (possible consequences of withdrawal of broadcasters' obligations).

12. *See Hearings On Freedom Of Expression Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 1, 2 (1982) (Congress, Supreme Court, and FCC believe broadcasting media insufficiently protected by first amendment). Among those testifying before the Senate Committee were CBS News anchorman Dan Rather and NBC moderator Bill Monroe of "Meet the Press." *See id.* at 115, 123. The journalists said the fairness doctrine inhibits robust debate of controversial issues because stations fear a deluge of requests for free air time. *See id.* at 121. They believe that unless a constitutional amendment is passed abolishing the fairness doctrine, there will never be a truly free press. *See id.* at 127. These hearings were held in conjunction with Senator Bob Packwood's "freedom of expression proposal" which is currently developing. Within the next two years he hopes to introduce to Congress a resolution which will propose a constitutional amendment to "guarantee full first amendment rights to the electronic media." *See id.* at 2. This amendment, however, has not yet been formulated by Senator Packwood because he is waiting for support from Congress and the public. *See id.* at 87 ("There is not a wellspring of overwhelming demand from the public . . . "). The senator is certain of one thing, however, that simple abolition of the fairness doctrine and equal time provisions are not enough. *See id.* at 101; *see also Hearing on H.R. 4780 Before The Subcomm. on Telecommunications, Consumer Protection, & Finance of the Committee on Energy and Commerce*, 97th Cong., 1st Sess. 19 (1981) (proposals of two bills to alter broadcast license renewal process, abolish equal time rule, modify obligations under fairness doctrine).

mission. The contention of this comment is that the fairness doctrine, as applied by the courts and the Commission, has fulfilled its framers' goals and is a necessary means of enhancing first amendment protections. Finally, the comment will show that a twenty-seventh amendment would be not only unnecessary but also less protective of first amendment rights than the carefully developed fairness doctrine.

II. Development of the Fairness Doctrine

Following World War I, a chaotic race for domestic air space began.[13] Realizing the need for legislation to achieve a more orderly development of scarce broadcast frequencies, Congress enacted the Radio Act of 1927.[14] The legislative history of that Act reveals that Congress firmly rejected the argument that the airwaves should be open to all on a nonselective basis.[15] The Act established a five-member Radio Commission with the power to regulate broadcasting in the "public convenience, interest, or necessity . . . ."[16] Within seven years, national interest in the new science of broadcasting emerged and the Communications Act of 1934 was

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13. *See, e.g.*, CBS Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 104 (1973) (before Radio Act of 1927 broadcasting marked by chaos); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969) (allocation of frequencies left to private sector resulting in chaos); FCC v. RCA Communications, Inc., 346 U.S. 86, 89 (1953) (legislation before 1927 insufficient to prevent chaos in air waves).

14. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969) ("cacaphony [sic] of voices" result without governmental control); FCC v. RCA Communications, Inc., 346 U.S. 86, 89 (1953) (need for orderly development of air waves); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940) (detailed analysis of legislative intent); *see also* Radio Act of 1927, § 4, ch. 169, 44 Stat. 1163 (1927). The Court in *Red Lion* quoted a sponsor of the bill later enacted as the Radio Act: "If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 n.5 (1969); *cf. Hearing On Freedrom Of Expression Before the Senate Comm. On Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 76 (1982) (in 1927 "radio was thought to be a toy, a gadget, a gimmick . . . so naturally it was to be subject to a lot of regulation . . . ").

15. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973); H.R. Rep. No. 404, 69th Cong., 1st Sess. 18 (1927).

16. *See* Radio Act of 1927, § 4, ch. 169, 44 Stat. 1163 (1927); *see also* FCC v. RCA Communications, Inc., 346 U.S. 86, 89 (1953) ("Radio Act of 1927 created the Federal Radio Commission with wide licensing and regulatory powers"); Regents v. Carroll, 338 U.S. 586, 602 (1950) (public interest in effective use of channels); NBC, Inc. v. United States, 319 U.S. 190, 193-94 (1943) (radio regulations required in "public interest, convenience, or necessity"); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137, 138 (1940) ("public convenience, interest, or necessity" predicate for exercise of Commission's authority). The public convenience, interest, or necessity standard is not absolute when applied to broadcast stations; rather, it is a comparative standard with emphasis on needs of the listening public. *See* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138-39 n.2 (1940).

enacted.[17] The Communications Act created the Federal Communications Commission to regulate the limited facilities of radio under the same public interest standard as that followed by the earlier Radio Commission.[18] Congress gave the Commission a wide mandate to institute rules, regulations, and policies for broadcast licensees.[19] No regulation, however, was to interfere with the right of free speech since the aim of the Communications Act was to "secure the maximum benefits of radio to all the people of the United States."[20] Congress did not intend for the FCC to regulate content or to prejudge a licensee's position with respect to his programs.[21] The Communications Act, therefore, prohibits censorship of program content by the Commission.[22]

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17. *See* Communications Act of 1934, 47 U.S.C. § 315 (1976); *see also* NBC, Inc. v. United States, 319 U.S. 190, 216 (1942); *cf.* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (system of permits and licenses created because Congress feared subordination of public interest to monopolistic control).

18. *See* Communications Act of 1934, 47 U.S.C. § 303(g) (1976) (public interest is in effective use of radio); NBC, Inc. v. United States, 319 U.S. 190, 216 (1943) (element of public interest is licensee's best service to community).

19. *See* United States v. Midwest Video Corp., 406 U.S. 649, 661 (1972) (citing NBC v. United States, 319 U.S. 190, 219 (1943)) (broad mandate of broadcasters with "not niggardly but expansive powers"); *see also* 47 U.S.C. § 303 (1976). This section of the Communications Act provides the Commission shall, in the public interest, convenience, or necessity "[m]ake such regulations not inconsistent with law as it may deem necessary . . . to carry out the provisions of this chapter . . . ." 47 U.S.C. § 303(f) (1976). Walter Cronkite, CBS News correspondent, complains that the Commission's right to regulate has been stretched to include examination of a station's programming, requirement of a portion of broadcasting time to public affairs programming, and providing "rebuttal under the fairness and equal time doctrines." *See* Cronkite, *Introduction to Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 1005 (1972).

20. NBC, Inc. v. United States, 319 U.S. 190, 217 (1943); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 586 (1981) (noting aim of Act); Banzhaf v. FCC, 405 F.2d 1082, 1099 (D.C. Cir. 1968) (no regulation shall interfere with right of free speech), *cert. denied*, 396 U.S. 842 (1969).

21. *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 104-05 (1973) (quoting Secretary of Commerce that one person should not be placed in position of censoring what is broadcast to public); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 44 (D.C. Cir. 1972) (drafters' intent to require discussion of conflicting views), *cert. denied*, 412 U.S. 922 (1973); Ervin, *Introduction to Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 872 (1972) (violation of first amendment if FCC granted or refused broadcaster's license because of like or dislike of political views); *cf.* Elrod v. Burns, 427 U.S. 347, 386 n.9 (1976) (Powell, J., dissenting) (congressional action designed to improve overall political debate but adversely affects first amendment interests of individuals).

22. *See* 47 U.S.C. § 326 (1976). Section 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by Commission which shall interfere with the right of free speech by means of radio communication.

In 1943, the Supreme Court in *NBC v. United States,*[23] reviewed the Communications Act.[24] The Court upheld the FCC's right to regulate broadcasting, reasoning the limited facilities of radio are "too precious to be left to wasteful use without detriment to the public interest."[25] Justice Frankfurter, writing for the Court, cautioned that if FCC regulations were applied arbitrarily or not promulgated pursuant to congressional mandate, they would no longer be enforced by the Court.[26]

As the Communication Act's public interest standard developed, requirements of fairness on the broadcaster's part evolved from case law and Commission rulings.[27] Those requirements formed the "fairness doctrine" which was first defined in 1949 in the Commission's *Report on Editorializing by Broadcast Licensees.*[28] The doctrine requires first that broadcasters devote reasonable programming time to the discussion of controversial issues of public importance and, second, that they allow presentation of conflicting views on such issues.[29] The broadcast licensee is thereby required to take affirmative action to invite and encourage expression of contrasting views on those issues.[30] The requirements must be

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Id.; *see also* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 116 (1973) (loath of censorship led to enactment of section 316).

23. 319 U.S. 190 (1943).

24. *See id.* at 216. The Court later discussed the process by which it had found the regulations to have force of law: "[T]he Court probed the language and logic of the Communications Act and its legislative history. Only after this careful parsing of authority did the Court find that the regulations had the force of law and were binding on the courts . . . ." Chrysler Corp. v. Brown, 441 U.S. 281, 308 (1979).

25. NBC, Inc. v. United States, 319 U.S. 190, 216 (1943).

26. *See id.* at 224.

27. *See, e.g.,* Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850, 852 (D.C. Cir. 1932) (denial of license by Radio Commission in public interest), *cert. denied,* 288 U.S. 599 (1933); Mayflower Broadcasting Corp., 8 F.C.C. 333, 340 (1940) (broadcaster to refrain from expression of own viewpoint); Young People's Assoc. for the Propagation of the Gospel, 6 F.C.C. 178, 181 (1938) (denial of license renewal by FCC as public interest requires ample play for opposing views). *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969) (development of fairness doctrine).

28. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1246 (1949). The fairness doctrine was later codified in the Communications Act of 1959. *See* Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27, 27 (1970).

29. *See, e.g.,* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111 (1973) (broadcasters required to adequately and fairly present differing viewpoints); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969) (broadcasters obligated to present various sides of controversial issues); Complaint of Minnesota Farmers Union, 88 F.C.C.2d 1455, 1463 (1982) (broadcaster's affirmative duty to inform public and afford reasonable opportunity for contrasting viewpoints); Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949); *see also* 47 U.S.C. § 315(a) (1976) (codification of fairness doctrine).

30. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 35 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 922 (1973). In *Brandywine,* the appellate court upheld the Commission's ruling that Brandywine Radio's compliance with the fairness doctrine would not be

met at the broadcaster's expense if sponsorship of such a program is unavailable.[31]

Although broadcasters must grant air time to coverage of controversial issues, equal time is in no way required by the fairness doctrine.[32] The FCC's equal time doctrine requires licensees to treat equally all legally qualified candidates for public office.[33] In assessing a broadcast licensee's compliance with the fairness doctrine, however, it is the nature of the entire programming which is scrutinized, not just one program or one day's presentation.[34] In this regard, broadcasters are given journalistic discretion to make reasonable judgments in good faith.[35] The test, as formulated by the District of Columbia Circuit Court of Appeals, is whether the sum total of the broadcaster's programming constitutes a reasonable effort to present contrasting viewpoints.[36] In presenting conflicting viewpoints on controversial issues, the networks have discretion in selecting appropriate spokespersons.[37] Broadcasters do not enjoy the same discretion, however, if a particular person was attacked during a program in

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satisfied by merely leaving the discussion of controversial issues to happenstance, such as an anonymous caller on a phone-in program. *See id.* at 35. Nor would the station's duties be fulfilled by airing a general interview program without announcing it as dealing with a particular issue and without an invited spokesperson with a contrasting view. *See id.* at 35-36.

31. *See* 47 U.S.C. § 315(a) (1976) (licensee shall offer reasonable opportunity to respond over licensee's facilities free of charge). The licensee, furthermore, must initiate such programming if unavailable from another source. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 901 (D.C. Cir.), *cert. denied,* 409 U.S. 843 (1972).

32. *See, e.g.,* Kennedy for President Comm. v. FCC, 636 F.2d 432, 452 (D.C. Cir. 1980) (reasonableness is only requirement); Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 906 (D.C. Cir.) (requirement of mathematical equality nonexistent), *cert. denied,* 409 U.S. 843 (1972); Green v. FCC, 447 F.2d 323, 332 (D.C. Cir. 1971) (reasonableness of station's action required, not equality in allocation of time).

33. *See* 47 U.S.C. § 315 (1976) (if candidate uses broadcast facilities, licensee must give equal opportunities to all other candidates for that office).

34. *See* Kennedy for President Comm. v. FCC, 636 F.2d 432, 452 (D.C. Cir. 1980) (fairness deficiency on the whole required); Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1007 (D.C. Cir. 1976) (opposing views in same series or program not required).

35. *See, e.g.,* American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (maximum editorial discretion vested in broadcast licensees), *cert. denied,* 444 U.S. 1013 (1980); Neckritz v. FCC, 502 F.2d 411, 418 (D.C. Cir. 1974) (widely recognized principle that wide discretion afforded licensee under fairness doctrine); Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 906 (D.C. Cir.) (wide degree of discretion), *cert. denied,* 409 U.S. 843 (1972); *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 44 (D.C. Cir. 1972) (good faith and licensee discretion foundation of doctrine), *cert. denied,* 412 U.S. 922 (1973); Complaint of Minnesota Farmers Union, 88 F.C.C.2d 1455, 1455 (1982) (reasonable determination by licensee that union's use of tax-exempt fund not controversial issue of public importance).

36. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 902 (D.C. Cir.), *cert. denied,* 409 U.S. 843 (1972).

37. *See* Democratic Nat'l Comm. v. FCC, 481 F.2d 543, 547 (D.C. Cir. 1973).

which controversial issues were aired.[38] In that case the personal attack rule applies, which forbids broadcasters from choosing a third party to respond, but requires them to extend the right of reply to the person attacked.[39] The broadcaster is in no way a common carrier,[40] and in meeting his fairness doctrine obligations, he need only exercise his best judgment and good faith.[41]

Because of the limited number of broadcast frequencies, the Commission, like the broadcaster, is called upon to administer the fairness doctrine in good faith to enhance rather than inhibit first amendment rights.[42] The FCC is directed by Congress to respect licensee discretion and to overturn a licensee's discretion only when there is apparent abuse

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38. *See* 47 C.F.R. § 73.1920 (1968) (codification of personal attack rule).

39. *See* Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1008 (D.C. Cir. 1976) (rule applies when spokesperson attacked during expression of views on controversial issues of public importance); M. Goldseker Real Estate Co. v. FCC, 456 F.2d 919, 920 (4th Cir. 1972) (right of reply to attacked spokespersons).

40. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 588-89 (1981) (broadcaster not common carrier); FCC v. Midwest Video Corp., 440 U.S. 689, 705 n.14 (1979) (broadcaster not required to provide common carriage); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 108-09 (1973) (radio broadcasters not common carriers). If held to be common carriers, broadcast stations would be required to provide services at any reasonable request and could not exercise discretion in providing those services. *See* 47 U.S.C. §§ 153(h) (definition of "common carrier"), 201(a) (duty of common carrier to provide service when requested), 202(a) (unlawful for common carrier to discriminate); *see also* Complaint of National Conservative Political Action Comm., 89 F.C.C.2d 626, 628 (1982) (broadcast airwaves excluded from "common carrier status"). Because broadcasters are not common carriers, the Court has said they should not be similarly burdened to serve where abandonment of that service would undermine public convenience or necessity. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 588-89 (1981); Comment, *The Fairness Doctrine: Time For The Graveyard?*, 2 FORDHAM URB. L.J. 563, 570 (1973) (discussion of "common carrier" theory).

41. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 44 (D.C. Cir. 1972) (cornerstone of doctrine is good faith), *cert. denied*, 412 U.S. 922 (1973).

42. *See* Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1011 (D.C. Cir. 1976) ("reasonableness and good faith" standard). The *Straus* court noted this standard has been criticized as a "screen behind which the Commission shelters when it upholds licensee actions without being able to give adequate reasons." *Id.* at 1011. To avoid such misuse of the reasonableness standard, the Commission must elaborate its reasons for applying the standard not only when it finds a violation of the fairness doctrine, but also when it upholds the licensee's discretion. *See id.* at 1011. The Commission is forbidden to censor radio communications in any way. *See* CBS, Inc. v. FCC, 453 U.S. 367, 400 (1981); *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 60 (D.C. Cir. 1972) (discussion of public's "tremendous stake" in receiving information through broadcast medium), *cert. denied*, 412 U.S. 922 (1973). The *Brandywine* court, however, questioned the possibility of receiving varied information: "[H]ow can the citizenry remain informed if broadcasters are permitted to espouse their own views only without attempting to fully inform the public? This is the issue of good faith which, unfortunately, a small number of broadcasters refuse to exercise." *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 60 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

of that discretion.[43] Congress intended a governmental assertion of power only when the public interest outweighs broadcasters' private interests.[44] The paramount right of viewers and listeners to receive access to varying ideas and experiences may not be abridged by the Commission.[45] The Commission and the courts recognize a danger in unduly burdensome regulations and overly ambitious enforcement of the fairness doctrine.[46] Such onerous regulation, it is feared, would cause broadcasters to hesitate to cover controversial issues or to afford such issues only broad coverage in an attempt to avoid fairness doctrine assessment by the Commission.[47] To avoid such a "chilling effect," the Commission requires that a fairness doctrine complainant present a prima facie case before a broadcaster need respond.[48] Mere editing of material by the broadcaster is not a suffi-

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43. *See, e.g.*, Kennedy for President Comm. v. FCC, 636 F.2d 432, 453 (D.C. Cir. 1980) (fairness doctrine violation only if decision unreasonable or in bad faith); Public Media Center v. FCC, 587 F.2d 1322, 1328 (D.C. Cir. 1978) (editorial freedom violation only when actions unreasonable or in bad faith); NBC, Inc. v. FCC, 516 F.2d 1101, 1121 (D.C. Cir. 1974) (abuse of discretion if judgment unreasonable), *cert. denied*, 424 U.S. 910 (1976). In *NBC*, the district court reversed the FCC's decision because "the Commission undertook to determine for itself as a fact whether 'the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system.' " NBC, Inc. v. FCC, 516 F.2d 1101, 1120-21 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976); *cf.* Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. L. & ECON. 15, 38 (1967) (official lip service to freedom of press, but nothing Commission can do about it).

44. *See* 47 U.S.C. § 326 (1976); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973).

45. *See, e.g.*, CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (right of viewers and listeners, not broadcasters, paramount); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (broadcaster protected but right of viewers and listeners paramount); Kennedy for President Comm. v. FCC, 636 F.2d 417, 431 (D.C. Cir. 1980) (interest of public chief concern).

46. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969) (danger of overly ambitious enforcement); Kennedy for President Comm. v. FCC, 636 F.2d 432, 450 (D.C. Cir. 1980) (danger of unacceptable burden on Commission); American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (danger of unduly burdensome regulations), *cert. denied*, 444 U.S. 1013 (1980). In *American Security*, the court refused to elevate plaintiff's vague complaint to the status of a controversial issue. *See* American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 441 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

47. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392-93 (1969) (possible reduction of coverage of controversial issues); Kennedy for President Comm. v. FCC, 636 F.2d 417, 428 n.70 (D.C. Cir. 1980) (Commission not conduit for charges against broadcasters); American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (possible decrease in vigorous and effective coverage of issues), *cert. denied*, 444 U.S. 1013 (1980).

48. *See, e.g.*, Kennedy for President Comm. v. FCC, 636 F.2d 417, 428 n.70 (D.C. Cir. 1980) (prima facie case required before broadcaster response necessary); American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 453 (D.C. Cir. 1979) (Wright, J., concurring) (prima facie case formidable procedural barrier), *cert. denied*, 444 U.S. 1013 (1980); Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 906 (D.C. Cir.) (prima facie reason necessary for

cient complaint to trigger assessment of that broadcaster's compliance with the fairness doctrine.[49] The Commission requires that complainants specify:

> (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.[50]

The fairness doctrine, drawn directly from the first amendment, is based on the public's right of access to free and open debate.[51] Its goal, as defined by Congress, is to operate in the public interest to promote the free flow of information and expose varying viewpoints and societal attitudes.[52] The following discussion will rebut allegations that the fairness doctrine is no longer fulfilling its goals.

III. Red Lion Broadcasting Co. v. FCC: The First Attack

A. *Fairness Doctrine Upheld as Constitutional*

The fairness doctrine first came under constitutional attack in 1969 in *Red Lion Broadcasting Co. v. FCC*.[53] In that case, the Red Lion radio station refused author Fred J. Cook reply time to a "Christian Crusade" broadcast in which he allegedly had been personally attacked.[54] The FCC found that the broadcast had, in fact, constituted a personal attack upon Cook and that the Red Lion radio station had failed to meet its fairness

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Committee action), *cert. denied*, 409 U.S. 843 (1972). In *American Security*, the court held the complainant had not presented a prima facie case of a fairness doctrine violation by CBS in giving unbalanced coverage to "national security issues" in its news programming. *See* American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 441 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

49. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973).

50. The Handling of Public Issues Under the Fairness Doctrine, 58 F.C.C.2d 691, 696 (1976) (quoting Fairness Doctrine Primer, 40 F.C.C. 498 (1964)); *see also* Kennedy for President Comm. v. FCC, 636 F.2d 417, 450-51 (D.C. Cir. 1980) (lack of three requirements fatal to petitioner's complaint).

51. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973) (public interest standard necessarily refers to first amendment principles); Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949) (right of public to have different attitudes presented to it for acceptance or rejection); *see also* Healey v. FCC, 460 F.2d 917, 920 (D.C. Cir. 1972) (public right to information); Green v. FCC, 447 F.2d 323, 329 (D.C. Cir. 1971) (essential that Americans become informed).

52. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949); *see also* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973) (fairness doctrine's purpose to insure open forum for robust discussion same purpose as first amendment).

53. 395 U.S. 367 (1969).

54. *See id.* at 371.

doctrine obligations.[55] Red Lion challenged the FCC's right to regulate in this manner, alleging that the Commission's rules abridged their constitutional freedoms of speech and press.[56] The broadcasters believed the first amendment entitled them to broadcast whatever they chose from their allotted frequencies.[57] A unanimous Supreme Court upheld the Commission's application of the fairness doctrine, finding that it enhanced rather than abridged first amendment freedoms.[58] The Court reasoned that government control was necessary for fair allocation of scarce broadcast frequencies.[59]

Opponents, narrowly viewing this justification as the primary rationale for the doctrine's existence, argue that the doctrine's reason for being is no longer viable since the modern age has surpassed such limited technology.[60] They assert that technological advancements in the electronic me-

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55. *See id.* at 372.

56. *See id.* at 386. The petitioners also alleged the regulations were vague and therefore could not be applied fairly. *See id.* at 395.

57. *See id.* at 386.

58. *See id.* at 375. Justice Douglas did not participate in the Court's decision. He later indicated that he probably would not have concurred in the *Red Lion* decision: "The fairness doctrine has no place in our First Amendment regime. It 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." CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (1973). The *Red Lion* Court, in upholding the fairness doctrine, was careful to point out that its rejection of the broadcaster's claim was not absolute because there could be cases in which more substantial first amendment questions were raised. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969); *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 44 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

59. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969); *see also* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) (broadcasting subject to inherent physical limitation of frequencies); National Citizens' Comm. for Broadcasting v. FCC, 567 F.2d 1095, 1110 (D.C. Cir. 1977) (given scarce broadcast channels, impossible to allow all who desire to use this media), *cert. denied*, 436 U.S. 926 (1978).

60. *See Hearing on H.R. 4780 Before the Subcomm. on Telecommunications, Consumer Protection, & Finance of the House Committee on Energy and Commerce*, 97th Cong., 1st Sess. 67 (1981). Representative John Dingell, chairman of the House Energy and Commerce Committee, testified that although fairness doctrine opponents argue new technologies now provide sufficient diversity of viewpoints to justify repeal of the fairness doctrine, he has "yet to see this tremendous new diversity in video sources." *Id.* at 67. Dr. Solomon J. Buchsbaum, executive vice president of Bell Telephone Laboratories, alleges that new technology is opening up the broadcast spectrum. *See Hearings on Freedom of Expression Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 4 (1982). He explains that "digital technology" in particular is enabling the public to reduce their dependence on the spectrum. *Id.* at 5. Digital technology is "the ability to convert all signals into a digital bit stream" which can carry data and visual signals, as well as voice. *Id.* at 5. This expansion of the broadcast spectrum may indeed reduce our dependence on the limited broadcast frequencies, but this digital technology is not expected to be a significant mode of transmission until possibly the year 2000. *See id.* at 5 (digital

dia have made broadcasting even more accessible to the general public than newspapers.[61] What the critics overlook, however, are the numerous other reasons, first set forth in *Red Lion*, justifying control of the electronic media.[62] The Court in *Red Lion* stated that without the fairness doctrine, section 315 of the Communications Act, which provides for equal time for political candidates except on news programs, could be easily circumvented.[63] The application of the fairness doctrine to that provision in 1959 assured that broadcasters would understand their duty to "operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[64] The Court warned that absent the doctrine, broadcasters could present to the public only the candidates whom they supported without offering time to their opponents.[65] For that reason, explained the Court, Congress imposes upon broadcast licensees a fiduciary duty which obligates them to present important questions to the public without bias.[66]

The challengers in *Red Lion* charged that FCC regulations were too imprecise to be fairly applied.[67] The Court admitted that the Communi-

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technology expected to be important in next 10 or 20 years). Furthermore, at the present time digital technology is admittedly "very expensive." *Id.* at 6-7.

61. *See* Menkes, *The Fairness Doctrine: Fair To Whom?*, 30 CLEV. ST. L. REV. 485, 521 (1981) ("number of outlets for electronic broadcasts, . . . especially cable, far exceeds the number of daily newspapers"); Comment, *The Fairness Doctrine: Time For The Graveyard?*, 2 FORDHAM URB. L.J. 563, 584 (1974) (cable television eliminates technological rationale of fairness doctrine). *But see* Mickelson, *The First Amendment and Broadcast Journalism* in THE FIRST AMENDMENT AND THE NEWS MEDIA 54, 62 (1973) (Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States) ("there are only three national networks but there are likewise only three national weekly news magazines").

62. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 (1969).

63. *See id.* at 382.

64. *Id.* at 380. In 1959 Congress amended section 315 of the Communications Act and imposed a duty upon broadcasters to operate in the public interest and discuss various sides of controversial issues. *See* Act of September 14, 1959, § 1, Pub. L. No. 86-274, 73 Stat. 557 (1959) (amending 47 U.S.C. § 315(a)).

65. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382-83 (1969). The Court noted, "It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than section 315, which prohibits the broadcaster from taking such a step." *Id.* at 383.

66. *See id.* at 383; *see also* S. REP. No. 562, 86th Cong., 1st Sess. 8-9, 13 (1959) (specifically refers to FCC doctrine). Broadcasters have been described as "fiduciaries" of the people because as "permittees" of the national broadcasting resource they are bound to serve in the public interest. *See* Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543, 548 (D.C. Cir. 1969).

67. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385 (1969); *cf.* Menkes, *The Fairness Doctrine: Fair To Whom?*, 30 CLEV. ST. L. REV. 485, 493 (1981) (no guidelines to determine when FCC abuses its authority).

cations Act established somewhat imprecise standards, but the general "public interest" standard served as adequate guidance for broadcasters.[68] The Court reasoned that the more precise provisions of section 315 of the Act, such as the personal attack,[69] political editorials,[70] and fairness doctrine provisions,[71] cured this problem.[72] To repeal the fairness doctrine today would be to step back nearly fifty years and to eliminate these more explicit provisions of the Communications Act.

B. *Red Lion's Applicability Today*

Media experts and broadcast journalists challenge the fairness doctrine today on the same first amendment grounds broadcasters asserted in *Red Lion* in 1969.[73] They allege that the press will not be free until it is no longer regulated by an entity dependent upon the government for its right to exist.[74] For those critics who question government regulation of

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68. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385-86 (1969) (Act's standards not precise); *see also* FCC v. Pacifica Found., 438 U.S. 726, 742 (1978) (*Red Lion* held regulations not so vague as to inevitably abridge broadcasters' freedom of speech).

69. *See* 47 U.S.C. § 315 (1976). In case of a personal attack upon an individual during expression of views on controversial issues the licensee must extend right of reply to the person attacked. *See id.*

70. *See* 47 C.F.R. § 73.1930(a) (1981). This section provides that where a licensee endorses or opposes a qualified candidate, he must within twenty-four hours perform the following:

> transmit to, respectively, (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial, (A) notification of the date and the time of the editorial, (B) a script or tape of the editorial and (C) an offer of a reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities.

Id.

71. *See* 47 U.S.C. § 315(a) (1976).

72. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385-86 (1969) (provisions of section 315 including fairness doctrine more explicit than general "public interest" standard).

73. *See id.* at 386 (broadcasters challenge fairness doctrine on conventional first amendment grounds); *see also Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 115 (1982) (any government role in broadcasting prohibits free press). Prominent journalists and industry experts testifying before the Senate for abolition of the fairness doctrine included CBS News anchorman Dan Rather, NBC's "Meet the Press" moderator Bill Monroe, and Dr. Solomon J. Buchsbaum, executive vice president, Bell Telephone Laboratories. *See Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 3, 115, 123 (1982).

74. *See Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 117 (1982) (Dan Rather's testimony that "invaluable element of freedom has been lost"); *cf.* Walter Cronkite, *Introduction* to *Mass Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 1003 (1973) (news media not truly free).

any sort, no matter how slight or precise, the answer remains identical to that given in *Red Lion.*[75]

The Court in *Red Lion* explained that differences in media justify differences in first amendment treatment.[76] Broadcasting presents several problems impossible to alleviate by application of a simplistic first amendment formula or a rallying cry of "freedom of speech!"[77] Its basic problem is its inherent physical limitation; there are only a limited number of frequencies from which to broadcast.[78] Justice Frankfurter, writing for the Court in *Red Lion,* discussed broadcasting's unique dilemma:

> If 100 persons want broadcast licenses but there are only ten frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves.[79]

There are still more people wishing to broadcast than there are frequencies from which to speak.[80] This physical limitation creates an additional

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75. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 59 (D.C. Cir. 1972) (*Red Lion* definitive case in area), *cert. denied,* 412 U.S. 922 (1973).

76. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387-88 (1969); *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 557 (1981) (Burger, C.J., dissenting) (each medium assessed by standards suited to it).

77. *See* Kovacs v. Cooper, 336 U.S. 77, 96 (1949). *But see* Frank, *Introduction* to *Media And The First Amendment In A Free Society,* 60 GEO. L.J. 871, 935 (1972) (traditionally unacceptable control of content not permissible merely because "message moves from here to there by another method"). Frank, president of NBC News, believes it is unfair to grant an audience to someone who could not get one on his own. *See id.* at 935. In his words, "A person is not entitled to an audience; he is entitled only to the opportunity to fight for it." *See id.* at 935.

78. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) (uniqueness due to engineering and technical problems); Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) (scarcity of frequencies require government regulation); *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 43 (D.C. Cir. 1972) (finite number of broadcast frequencies considered "public trust"), *cert. denied,* 412 U.S. 922 (1973); *Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation,* 97th Cong., 2d Sess. 17 (1982) (Senior Vice President of Comsat Laboratories testified before Senate that broadcast media must make efficient use of "limited amount of spectrum" and "limited amount of orbit space"). The vice president of technology at CBS, Inc., Mr. Harry E. Smith noted, however, that the broadcast spectrum is limited only in the same sense as "trees from which newsprint is made are limited." *See Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation,* 97th Cong., 2d Sess. 22 (1982). Mr. Smith indicated that if the broadcast market is limited it is not because of a "a scarcity of spectrum" but because of economics. *See id.* at 22 (growth of radio limited by broadcaster's ability to obtain enough money and viewers to stay in business).

79. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 388-89 (1969).

80. *See id.* at 388. Although several media experts allege new technology is reducing the limited amount of spectrum space, such advances have not yet occurred and the results are

problem of interference between broadcast signals which limits the productive use of available frequencies.[81]

This "scarce resource" rationale has been attacked by those who submit that technological advancements, such as cable, have eliminated the need for regulation of broadcast frequencies.[82] Scarcity, however, is not entirely a thing of the past. The *Red Lion* decision continues to provide answers in this regard.[83] That Court pointed out, and it remains true, that portions of the broadcast spectrum are necessarily allocated to uses unrelated to human communications.[84] Although new uses for available spectrum space are being advanced, some radio and television waves must be reserved for public broadcasting, navigational aids, police, ambulance, fire department, and public utility communications systems.[85]

Despite technological advances, the great number of people creating new uses for spectrum space is difficult to determine.[86] The scarce resource rationale, justifying governmental regulation of broadcasting, does not mean it is necessary that every radio and television frequency be in use every minute.[87] What is essential is that the public's right to speak, to

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only speculation. *See Hearings on Freedom of Expression Before The Senate Comm. On Commerce, Science, And Transportation,* 97th Cong., 2d Sess. 1 (1982) (testimony of Dr. Solomon J. Buchsbaum, Dr. John V. Harrington, and Harry E. Smith in first hearings on communications technology). Dr. Harrington, vice president for research and development of Comsat Laboratories, testified Comsat is currently attempting to increase spectrum space through "reuse of spectrum" and "bandwidth compression through signal processing." *Id.* at 17. This is done by using spot beams which are "highly concentrated beams of energy" and "using techniques to transmit in the spectrum assigned to one voice channel a number of voice channels by taking advantage of either the redundance or certain predictable characteristics of speech." *Id.* at 17. Dr. Harrington does not deny, however, that there is still a limited broadcast spectrum. *See id.* at 17. He stated, "First, we have a limited amount of spectrum available to us that we must use efficiently; and second, we have a limited amount of orbit space that we must also use efficiently." *Id.* at 17.

81. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973); *see also* NBC, Inc. v. United States, 319 U.S. 190, 226 (1943) (freedom of speech of many abridged by limited facilities of radio).

82. *See* Menkes, *The Fairness Doctrine: Fair To Whom?*, 30 CLEV. ST. L. REV. 485, 521 (1981); Comment, *The Fairness Doctrine: Time for the Graveyard?*, 2 FORDHAM URB. L.J. 563, 586 (1974) (communications industry has outgrown fairness doctrine). The comment's author points out there are now three television networks with member stations, nine national radio networks, thousands of independent and affiliated stations, as well as cable and subscription television industries. *See* Comment, *The Fairness Doctrine: Time for the Graveyard?*, 2 FORDHAM URB. L.J. 563, 563 (1974).

83. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 397 (1969).

84. *See id.* at 397 (radio-navigational aids).

85. *See id.* at 397. The Court also noted that although there is a "citizen's band" apart from licensed radio operator's equipment, over five million people transmit from it. *See id.* at 397.

86. *See id.* at 399.

87. *See id.* at 399.

hear, and to know is protected.[88] That right is already jeopardized, as an FCC Commissioner noted, by the limited ways in which access is presently afforded people who wish to use the communications media:

> (i) buy a radio or television station; (ii) buy commercial space for promotion of goods and services; (iii) develop a situation worthy of news coverage (e.g., demonstrations, street marches, etc.); (iv) obtain the sympathy of an editorial staff member who will present one's views by "proxy"; (v) obtain rebuttal time under the fairness, personal attack, or equal time doctrines; or (vi) purchase time for non-commercial speech.[89]

As access to the air waves is increased by technological advancements, governmental protection remains necessary for those who are unable to gain access to frequencies on their own.[90]

The emphasis, then, is primarily on the right of the public to receive access to information rather than on the broadcast licensee's right to air whatever material he chooses.[91] The Court in *Red Lion* stated, "No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' "[92] The FCC is expressly forbidden to interfere with the right of free speech.[93] Broadcasters, likewise, have no right to engage in private censorship of broadcasting, as the Court in *Red*

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88. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 863-64 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969). The Court in *Red Lion* stated, "The right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others." *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1968).

89. *See* Special Project, *Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 885 n.66 (1972) (quoting Commissioner Johnson); *see also* Complaint by Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 263 (1970) (Johnson, J., dissenting).

90. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 399 (1969); *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 42 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (nation shifting emphasis from printed media to electronic media).

91. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969).

92. *See id.* at 389 (citing NBC, Inc. v. United States, 319 U.S. 190, 227 (1943)); *see also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 800 (1978) (to deny license unless shown it would aid public interest not denial of broadcaster's free speech, but aid to public's free speech); *cf.* R. POSNER, ECONOMIC ANALYSIS OF THE LAW 308 (1972) (broadcasters, unlike newspaper owners, enjoy monopoly position in dissemination of ideas due to limited electromagnetic spectrum). Senator Pressler of the Senate's Committee On Commerce, Science, and Transportation shares a very real concern which he calls "the growing monopoly trend." *See Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 9 (1982). By this he gave the example that only a couple of national newspapers determine what is important and that agenda is followed by most other papers. *See id.* at 9. ("so you have 10 voices, but they are all saying the same thing, or their source is the same").

93. *See* 47 U.S.C. § 326 (1976) (must not interfere with free speech by means of radio communication).

Lion made clear.[94] Without the fairness doctrine, however, licensees could prevent others from broadcasting on "their" frequencies. The personal attack provision precludes such dangers as networks having unlimited power to grant air time only to those most able to pay, to communicate only the broadcasters' views on public issues and candidates, and to allow only those sharing their views to speak from the network's station.[95]

The broadcast media serves an important function not only because it promotes the discussion of information concerning public affairs, but also because it serves as a "safety valve" for less powerful minority groups to air their beliefs and opinions.[96] As long as there are broadcasters, however, there remains the possibility of monopolization of a public resource truly not available to all.[97] This was the danger confronted by the Court in *Red Lion,* and it is still very real today.

IV. Recent Attacks Upon the Fairness Doctrine

A. *Broadcasters' Fear of Self-Censorship*

Should broadcasters refuse to air personal attacks or political editorials in an attempt to avoid obligating themselves to present conflicting viewpoints, the purpose of the fairness doctrine would indeed have failed.[98] The *Red Lion* Court did not find that possibility likely, however, as networks had consistently endeavored to present controversial issues in the past.[99] The Commission, furthermore, has power to insist that licensees fulfill their duty to operate in the public interest should they become timid in their coverage of important issues.[100] Today, several critics, including media experts and broadcast journalists, imply that the doctrine's purpose of promoting robust debate is not being fulfilled.[101] They allege

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94. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969). Nor does the first amendment prevent government from "requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

95. *See id.* at 392.

96. *See* Special Project, *Media And The First Amendment In A Free Society,* 60 Geo. L.J. 871, 885 (1972). This theory is explained as an off-shoot of the "marketplace of ideas" theory of broadcasting. *See id* at 885. By "safety valve," the writer explained that he meant broadcasting will provide the less powerful members of our community an outlet from which to air their views rather than resorting to other more violent means to gain attention. *See id.* at 885.

97. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

98. *See id.* at 393.

99. *See id.* at 393.

100. *See id.* at 393.

101. *See Hearings On Freedom of Expression Before The Senate Comm. on Commerce, Science, And Transportation,* 97th Cong., 2d Sess. 127 (1982) (to avoid opinionated

specifically that broadcasting has become a type of "play-it-safe journalism," where networks refuse to cover controversial topics for fear of a deluge of requests for free air time.[102]

Broadcasters' fears are easily allayed in light of rulings by the courts and the Commission that provide the broadcast-licensee shall have wide discretion in covering important controversial issues.[103] Broadcasters are allowed to determine which issues are important and deserve air time, which are controversial, which spokesperson shall address the issue, and how much time should be devoted to its coverage.[104] Broadcasters are called upon to exercise their discretion reasonably and in good faith, only obvious abuse of that discretion will result in a fairness doctrine violation.[105]

Broadcasters criticizing the fairness doctrine are mistaken if they fear they must respond to every person who requests reply time on their network.[106] Because of their discretionary powers, broadcasters are not re-

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broadcasts is to avoid controversy). *See generally* Menkes, *The Fairness Doctrine: Fair To Whom?*, 30 CLEV. ST. L. REV. 485, 488 (1981) (fairness doctrine violates constitutional rights); Comment, *The Fairness Doctrine: Time For The Graveyard?*, 2 FORDHAM URB. L.J. 563, 586 (1974) (due to technological advancement the doctrine has lost its *raison d'etre*).

102. *See Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 126 (1982); *see also* Cronkite, *Introduction to Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 1005 (1972) (proposes elimination of all government control of broadcasting).

103. *See, e.g.*, American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (maximum editorial discretion), *cert. denied*, 444 U.S. 1013 (1980); Neckritz v. FCC, 502 F.2d 411, 418 (D.C. Cir. 1974) (wide discretion); Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 910 (D.C. Cir.) (wide degree of discretion), *cert. denied*, 409 U.S. 843 (1972); *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 44 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (good faith and licensee discretion cornerstone of doctrine); Complaint of Robin Ficker, 88 F.C.C.2d 509, 511 (1980) (broadcasters required only to make "reasonable good faith judgment"). *But see* Menkes, *Fairness Doctrine: Fair to Whom?*, 30 CLEV. ST. L. REV. 485, 500 (1981) (discretion of "political appointees" endangers freedom of speech and press).

104. *See* Kennedy for President Comm. v. FCC, 636 F.2d 432, 452 (D.C. Cir. 1980) (no particular person entitled to air his views); American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (maximum editorial discretion of broadcast licensees includes right to choose issues aired), *cert. denied*, 444 U.S. 1013 (1980).

105. *See* NBC, Inc. v. FCC, 516 F.2d 1101, 1118 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). The court in *NBC* held that although the licensees may be mistaken, "the review power of the agency is limited to licensee determinations that are not only different from those the agency would have reached in the first instance but are unreasonable." *Id.* at 1118; *see also* Complaint by Accuracy in Media, Inc., 42 F.C.C.2d 426, 429 (1973) (licensee's judgment that interview with Alger Hiss not controversial issue of public importance reasonable and in good faith).

106. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 902 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972). If the sum total of the licensee's efforts constitutes a "reasonable opportunity" to inform the public on a contrasting viewpoint, the fairness doctrine is satisfied.

quired to present every view on every issue,[107] nor are they required to broadcast stories that are merely newsworthy.[108] Additionally, there is no requirement that contrasting views be aired in the same program.[109] It is sufficient if the broadcaster shows that another side of the issue has been or will be presented on his network.[110] Broadcasters should understand that advocates of particular viewpoints do not have a first amendment right to have their views presented on the air.[111] The licensee, therefore, is not required to present a particular spokesperson.[112] Broadcasters are engaging in unnecessary self-censorship by shying away from coverage of

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See id. at 902; *see also* Complaint of National Conservative Political Action Comm., 89 F.C.C.2d 626, 628 (1982) (Commission does not require stations to afford "affirmative right of access"). *But see Hearing on H.R. 4780 Before the Subcomm. on Telecommunications, Consumer Protection, & Finance of the House Committee on Energy & Commerce*, 97th Cong., 1st Sess. 62 (1981) (FCC chairman believes licensees exercise discretion "not to give or sell *any* time" as result of governmental regulations).

107. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 906 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972).

108. *See* Healey v. FCC, 460 F.2d 917, 922 (D.C. Cir. 1972) ("newsworthy" does not mean controversial issue of public importance). In *Healey*, the Los Angeles Times had printed a story on petitioner entitled "Patriot-Marxist-L.A.'s Number One Red Finds the U.S. Isn't All Bad." *See id.* at 918. The story discussed petitioner's arrest and prosecutions for her Communist activities and their effect on her son. *See id.* at 918. The following day, the licensee's news reporter expressed rage at the story, stating, "Dorothy Healey may be the *L.A. Times'* kind of exemplary American . . ., but she sure as hell is not mine . . . ." *See id.* at 919. Petitioner requested time to reply to the issue of her role in society as a Communist. *See id.* at 919, 921. The petitioner's claims were rejected by both the court and the Commission as merely newsworthy, not containing a controversial issue of public importance. *See id.* at 922-23. The court explained it was not controversial because petitioner had phrased it as her "role as a Communist in the community." *See id.* at 921. The court indicated that had she defined the issue as the role played by the communists of our society, or "guilt by association," the topic may have been controversial. *See id.* at 921.

109. *See* Kennedy for President Comm. v. FCC, 636 F.2d 432, 452 (D.C. Cir. 1980) (fairness deficiency on the whole required for valid complaint); Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1007 (D.C. Cir. 1976) (opposing views in same series or program not required).

110. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 902 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972).

111. *See* Kennedy for President Comm. v. FCC, 636 F.2d 432, 453 (D.C. Cir. 1980). The Committee asked the three major networks to provide Senator Kennedy an opportunity to speak on the economy after plans were announced to televise a speech by President Carter. *See id.* at 435. The district court upheld the networks' refusal to do so on the ground that the fairness doctrine did not give Senator Kennedy an individual right to present his views on those issues. *See id.* at 435.

112. *See* Reconsideration of the Fairness Doctrine Report, 58 F.C.C.2d 691, 698 (1976) (no private individual or group has right to communication and use of broadcast facilities); *see also* Green v. FCC, 447 F.2d 323, 328 (D.C. Cir. 1971) (no individual has right of access); *cf.* M. Goldseker Real Estate Co. v. FCC, 456 F.2d 919, 920 (4th Cir. 1972) (personal attack rule requires offer of right of reply to person attacked, not third party).

controversial issues. They are neglecting the intent of the framers of the first amendment that conflicting views be expressed, not suppressed.[113] They are wrong if they believe the fairness doctrine requires them to provide "common carrier" right of access to everyone wishing to address public issues on the airwaves.[114]

Broadcasters, aside from having much journalistic discretion, are further protected by a procedural barrier, the prima facie case.[115] The complainant must establish a prima facie case of a fairness doctrine violation before the broadcast-licensee is required to respond.[116] To constitute a prima facie case, the Commission requires the petitioner to present specific fact allegations supported by a sworn affidavit.[117] The FCC provides that fairness doctrine complaints must: "(a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advanced in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not at-

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113. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969). The FCC has the right to insure broadcasters fulfill their duty to give fair attention to public issues. *See id.* at 393.

114. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 588-89 (1981) (broadcaster not subject to common carrier duty to continue to provide service if abandonment of service would conflict with public convenience); FCC v. Midwest Video Corp., 440 U.S. 689, 705 n.14 (1979) (fairness doctrine requirement of licensee discretion, not common carriage); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 108-09 (1973) (radio broadcasters not common carriers); *see also* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949) (broadcaster not required to provide common carriage).

115. *See* American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (Wright, J., concurring), *cert. denied*, 444 U.S. 1013 (1980). In *American Security*, the complaint, based on a three-year study, alleged CBS network's news stories were slanted in the presentation of matters related to "national security." *See id.* at 442. The court affirmed the Commission's decision which ruled the complaint failed to present a prima facie case as it did not focus on specific, well-defined issues. *See id.* at 441; *cf.* Menkes, *The Fairness Doctrine: Fair to Whom?*, 30 CLEV. ST. L. REV. 485, 498 (1981) (*American Security* is "an example of the procedural straight-jacket that the FCC has devised"); Note, *Communications Law—FCC Fairness Doctrine Procedures—A Complainant Runs Aground on the Commission's Procedural Shoals*, 2 W. NEW ENG. L. REV. 775, 783 (1980) (prima facie burden extremely difficult to surmount).

116. *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,415 (1964). A "prima facie case" is made when evidence is put forth which "consists of specific factual information which, in absence of rebuttal, is sufficient to show that a fairness doctrine violation exists." *See* Otis & Co. v. SEC, 176 F.2d 34, 42 (D.C. Cir. 1949).

117. *See* Capital Cities Communications, Inc., 70 F.C.C.2d 2311, 2315 (1979) (petitioner failed to make prima facie case of program inadequacy or fairness doctrine violation by failing to present specific facts); Cyprus Health & Safety Comm., Memphis, Tenn., 69 F.C.C.2d 21, 24 (1978) (petitioner did not specifically state that stations presented only one side of controversial issue of public importance in their overall programming).

tempted to present opposing views on the issue."[118] Few complainants set out the prima facie case required by the Commission.[119] Broadcasters, therefore, should not be allowed to employ fear of fairness doctrine complaints as an excuse for avoiding their fairness obligations.[120]

The protections afforded by the fairness doctrine were intentionally designed to preclude the possibility of overburdening either broadcasters or the FCC with fairness doctrine complaints.[121] If a prima facie case is made against the broadcasting station, however, chances are the penalty will not be severe.[122] In one instance, the FCC renewed a broadcaster's license even though a valid complaint had been made against the station.[123] In most cases, the broadcaster had already changed his techniques or programming style to comply with FCC regulations.[124] Another FCC policy has been to "reprimand" the station by requiring it to afford cover-

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118. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,415, 10,415 (1964); *see also* Kennedy for President Comm. v. FCC, 636 F.2d 432, 450 (D.C. Cir. 1980). The court in *Kennedy* found three flaws in the complaint: it failed to specifically define the controversial issue, failed to present evidence that the broadcaster did not present contrasting views on the economy in its overall programming, and wrongly insisted upon Senator Kennedy as a spokesman. *See* Kennedy for President Comm. v. FCC, 636 F.2d 432, 450-51 (D.C. Cir. 1980); *see also* Complaint of Environmental Defense Fund, 90 F.C.C.2d 648, 659 (1982) (FCC would not accept allegation that licensee "neglected to present contrasting views in overall programming" because lacked specific showing).

119. *See* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 8 (1974). For instance, the FCC received about 2,400 fairness complaints in 1973. After initial scrutiny, only 94 required licensee response. *See id.* at 8. In 1976, 41,861 complaints were filed, 24 of which led to station inquiries. *See* Simmons, *The Fairness Doctrine: The Early History*, 29 FED. COM. B.J. 207, 210 (1976). Of the 24 inquiries, only 16 adverse rulings were made. *See id.* at 210.

120. *See* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 8 (1974); *see also* The Handling of Public Issues Under the Fairness Doctrine, 89 F.C.C.2d 916, 925 (1982) (complaint procedure unintrusive and effectively serves doctrine goals).

121. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969); American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (unduly burdensome regulations advance neither broadcasters' nor public's first amendment rights), *cert. denied*, 444 U.S. 1013 (1980). *But see* Menkes, *The Fairness Doctrine: Fair to Whom?*, 30 CLEV. ST. L. REV. 485, 494 (1980) (complaint procedure seriously endangers due process rights of complainant).

122. *See* KMAP, Inc., 72 F.C.C.2d 241, 254 (1979) (FCC renewed license despite 10 years of allegations against station); Patsy Mink, 59 F.C.C.2d 987, 997 (1976) (station found in violation of fairness doctrine required to inform Commission within 20 days how it would meet fairness obligations).

123. *See* KMAP, Inc., 72 F.C.C.2d 241, 254 (1979); Council on Religion and the Homosexual, Inc., 68 F.C.C.2d 1500, 1508 (1978) (note of doctrine violation placed in station's file).

124. *See* Capitol Broadcasting Co., 40 F.C.C. 615, 618 (1964).

age to the complainant's particular point of view if still timely.[125]

B. *Broadcast Media Treated Differently from Print Media*

Another point which is often made by those in the broadcast media is that there is no fairness doctrine imposed upon newspapers.[126] As one critic put it, "Interference that would never be tolerated in the print media has come to be accepted in broadcasting . . . ."[127] While it is true that broadcasting has received the most limited first amendment protection,[128] it must be remembered that because each medium of expression is unique, different standards apply to each.[129] As discussed previously, broadcasting is unique due to its inherent physical limitation.[130] Such is not the case with the print media wherein everyone who so desires may not only express his views in the local newspaper (i.e., in letters to the editor), but may also publish his own newspaper.[131] The Court in *Red*

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125. Patsy Mink, 59 F.C.C.2d 987, 997 (1976).

126. *See Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 124 (printed media free under first amendment). Law professor Thomas Krattenmaker of Georgetown University believes there is no justification for regulating broadcasters but not newspaper publishers. *See id.* at 69. His rationale is that it will soon be difficult to distinguish between the two mediums. *See id.* at 69 (line between broadcasting and print will be unintelligible in 10 years). In explanation, he submits that someday lines of script will appear on our screens which have been transmitted by satellite but edited by newspaper editors. *See id.* at 69. *But see* Yale Broadcasting Co. v. FCC, 414 U.S. 914, 916 (1973) (Douglas, J., dissenting) (television and radio stand in same protected first amendment position as do newspapers and magazines); Special Project, *Media And The First Amendment In A Free Society*, 60 GEO. L.J. 871, 905 (1972) (suggesting application of fairness doctrine to newspaper industry).

127. *See* Menkes, *The Fairness Doctrine: Fair To Whom?*, 30 CLEV. ST. L. REV. 485, 493 (1981).

128. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (each medium presents special problems).

129. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 557 (1981); *see also* NBC, Inc. v. FCC, 516 F.2d 1101, 1112 (D.C. Cir. 1974) (limitations on broadcasters' freedom, though unacceptable if imposed on other media, lawful to enhance public's right to information), *cert. denied*, 424 U.S. 910 (1976).

130. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 557-58 (1981) (limited first amendment protection due to uniqueness of broadcasting); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) (uniqueness due to engineering and technical problems); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (scarcity of frequencies require government regulation).

131. This agreement has met with much opposition in the recent Senate hearings on abolition of the fairness doctrine and all other government regulations of broadcasting. *See Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 78-79 (1982) (discussion of justification of different treatment afforded newspapers and broadcast media by Professor Krattenmaker and Senator Proxmire). The senator attempted to rebut the argument by the following:

Well, we hear the argument that anybody can start a newspaper but everyone cannot

Lion addressed this issue and noted, "[W]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[132] Scarcity of the airwaves, then, requires that broadcasting be afforded treatment different from that given other media.

Aside from the scarce resource rationale, courts reason that the broadcast media has become a pervasive force in American homes and that the audiences it serves are large.[133] It is emphasized that broadcast messages are "in the air" and "may be heard even if not listened to."[134] Written messages, on the contrary, must be read in order to be communicated.[135] One court, expressing concern about this phenomenon, noted that although it is difficult to calculate the subliminal impact of broadcast messages, it is no doubt greater than the impact of written messages.[136] Broadcasting is uniquely successful in effectively conveying ideas and information to the public through intense interviews, newscasts, and various other network programs.[137] As the emphasis of the nation's communi-

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> start a radio or television station. That is comparing apples and oranges. They say, well, anybody can get a mimeograph. You can roll off four pages. A four-page mimeograph is not the New York Times. That is not the same equivalent. Anybody can get into the broadcasting business if they want to get a CB radio. That is your better analogy to the mimeograph.

Id. at 79. Professor Krattenmaker answered, "That is funny." *Id.* at 79. Another witness, Mr. Karl Eller who sells media properties, testified that "[i]t is much easier to buy a radio and TV station than newspapers . . . ." *Id.* at 155.

132. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969).

133. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 653 (D.C. Cir. 1971), *rev'd on other grounds*, 412 U.S. 94 (1973). The court in *Business Executives'* noted the *Red Lion* opinion went well beyond the scarce airwaves reasoning and specifically invoked the public's constitutional rights which underlie and support the fairness doctrine. *See* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 650 (D.C. Cir. 1971), *rev'd on other grounds*, 412 U.S. 94 (1973).

134. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 128 (1973); Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (viewer is "captive audience"); *cf. Hearings On Freedom Of Expression Before The Senate Comm. On Commerce, Science, And Transportation*, 97th Cong., 2d Sess. 77 (1982) (both newspapers and television have pervasive force in some households).

135. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 128 (1972); Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

136. *See* Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *see also Hearing on H.R. 4780 Before the Subcomm. on Telecommunications, Consumer Protection, & Finance of the Committee on Energy & Commerce*, 97th Cong., 1st Sess. 67 (1981) (chairman testified broadcasting "is the most persuasive means of communications ever known").

137. *See* NBC, Inc. v. FCC, 516 F.2d 1101, 1133 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976).

cation shifts from print to radio and television, regulation of available frequencies becomes more important.[138] It is for these reasons that noncensorial government regulation of broadcasting in an effort to enhance public awareness is permissible where such regulation of the print media would not be.[139]

Although government regulation is permissible in the area of broadcasting, the government's authority over licensees and broadcasting stations is not absolute, as critics might have us believe.[140] Government surveillance is limited to interference only when the interests of the public outweigh the private interests of the broadcaster.[141] The Communications Act carefully circumscribes the government's power in this area.[142] The Act not only expressly forbids censorship of any kind,[143] but it also provides for licensee discretion which, if exercised reasonably and in good faith, is not to be overturned.[144] Courts have determined that regulations,

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138. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 42 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

139. *See* NBC, Inc. v. FCC, 516 F.2d 1101, 1110 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). The court insisted that because the medium is so unique, its effective enhancement of public awareness would be undercut by applying to broadcasting techniques congenial to newspaper journalism. *See id.* at 1133; *see also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 800 (1978) (regulation similar to fairness doctrine impermissible to regulate print media); Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973) (statutes regulate in shadow of first amendment in neutral manner).

140. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 104 (1973). The Court explained that broadcasters' use of a limited public resource required some degree of government surveillance, as is not true with respect to the print media. *See id.* at 104.

141. *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964) (Commission shall exercise substantial restraint in the area of licensee discretion); *see also* Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978). The Supreme Court noted in *Houchins* that channels of communication are entitled to some first amendment protections, but this protection is not for the members of the "press." *See* Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978). Rather, this protection is to "insure that the citizens are fully informed regarding matters of public interest and importance." *See id.* at 32.

142. *See* 47 U.S.C. § 326 (1976) (prohibiting censorship).

143. *See id.*; *see also* CBS, Inc. v. FCC, 453 U.S. 367, 400 (1981) (Congress explicitly provided Commission may not censor radio communications).

144. *See* NBC, Inc. v. FCC, 516 F.2d 1101, 1113 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976) (licensees' judgment not overturned unless it neglects standards of reasonableness and good faith). The court in *NBC* explained finding abusive unreasonableness of licensee discretion requires a finding that reasonable men viewing the program would not have concluded that its subject was as described by the licensee. *See id.* at 1121; *see also* Note, *Constitutional Law—First Amendment—A Newspaper Cannot Constitutionally be Compelled to Publish a Paid Advertisement Designed to Be an Editorial Response to Previous Newspaper Reports*, 64 MARQ. L. REV. 361, 368 (1980) (government interference limited to situations in which opportunity for expression of competing views not provided).

at a minimum, may determine time, place, and manner of speech.[145] Such regulations are not designed to stifle speech but to insure that too many people speaking at once do not drown out each other.[146]

V. Balancing First Amendment Interests: A Workable Compromise

Fairness doctrine critics, in their enthusiastic outcry for first amendment protection, forget that first amendment safeguards extend not only to the speaker but also to the speech and its listeners.[147] Safeguarding the first amendment interests of both broadcast licensees and the general public is a delicate balancing act.[148] The fairness doctrine works to harmonize the broadcaster's rights of freedom of press with the right of the public to be informed.[149] In achieving this goal, the doctrine requires that certain obligations be imposed upon each party involved.

Those who are fortunate enough to obtain an exclusive license to operate a limited portion of the broadcast spectrum automatically acquire certain responsibilities.[150] Broadcasters are to serve the public as trustees of

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145. *See* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 663 (D.C. Cir. 1971), *rev'd on other grounds*, 412 U.S. 94, 132 (1973); *see also* Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941) (city ordinance requiring license to speak in public park upheld as "reasonable restriction of the time, place, and manner of speech in pubic places").

146. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 900 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972) (not intention of Congress that fairness doctrine suppress broadcast of controversial views).

147. *See* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 756 (1976) (protection afforded communication, its source, its recipients); *cf.* Herbert v. Lando, 441 U.S. 153, 188 (1979) (first amendment guarantees not as much for benefit of press as for benefit of public).

148. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973). Because of the conflicting interests involved, the Court explained a regulatory system has been established to serve the interests of all concerned. *See id.* at 102; *cf.* CBS, Inc. v. FCC, 453 U.S. 367, 399 (1981) (White, J., dissenting) (inevitable tension between need to allocate scarce frequencies and importance of giving licensees broad discretion). *But see* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 402-03 (1973) (Stewart, J., dissenting). Justice Stewart expressed concern with this balancing of interests tactic: "[S]o long as members of this Court view the First Amendment as no more than a set of 'values' to be balanced against other 'values,' that Amendment will remain in grave jeopardy." *See id.* at 402-03.

149. *See* NBC, Inc. v. FCC, 516 F.2d 1101, 1111 (D.C. Cir. 1974) (need for reconciliation of fairness doctrine goal with tradition against inhibition of journalists' freedom), *cert. denied*, 424 U.S. 910 (1976). The court noted that the fairness doctrine is necessary even though the first amendment generally forbids government regulation of journalism. *See id.* at 1110.

150. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973) (discussing broadcasters' fairness doctrine obligations); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969) (broadcasters' right of free speech does not embrace "right to snuff out" free speech of others).

a scarce national resource[151] and to promote the public's right to be informed and to be exposed to varying viewpoints.[152] In fulfilling this important function, broadcasters are required to inform the public fairly and impartially.[153] They are forbidden from delegating their fiduciary obligations to others because they are held answerable if they fail to meet the needs of the public.[154]

The courts and the FCC are crucially involved in achieving the goal of balancing broadcasters' rights with those of the public. Guided by the fairness doctrine, they are to chart a workable course for broadcasters.[155] Their primary concern, however, is with the right of the public to be exposed to controversial speech and debate and not with broadcasters' social, political, or religious philosophies.[156] They put viewers' rights first because they are truly concerned with freedom of speech, not because they wish to circumvent first amendment protections. As one court noted, "The right of freedom of speech does not include . . . the right to use the

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151. *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (licensee as public trustee has duty to inform public fairly and impartially); American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 444 (D.C. Cir. 1979) (broadcasters as public trustees manage scarce national resource), *cert. denied*, 444 U.S. 1013 (1980); Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543, 548 (D.C. Cir. 1969) (broadcasters as temporary "permittees-fiduciaries"); *see also* NBC, Inc. v. FCC, 516 F.2d 1101, 1119 (D.C. Cir. 1974) (licensee is "free agent" with primary responsibility for achieving objectivity), *cert. denied*, 424 U.S. 910 (1976); *cf.* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 654 (D.C. Cir. 1971) (licensees are speakers, as well as administrators, of highly valuable communications resource), *rev'd on other grounds*, 412 U.S. 94, 132 (1973).

152. *See* American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 443 (D.C. Cir. 1979) (twofold requirement of broadcasters to cover controversial issues of public importance and allow presentation of conflicting views on such issues), *cert. denied*, 444 U.S. 1013 (1980); *cf.* NBC, Inc. v. FCC, 516 F.2d 1101, 1112 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). The court in *NBC* noted that fairness doctrine challenges by those who believe "no matter how slight, how narrow, or how precise, any limitation on the freedom of the licensee to broadcast what he chooses perforce violates the First Amendment" have been rejected by the Supreme Court. *See id.* at 1112.

153. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973); *see also* Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (impossible for individuals to acquire by themselves information necessary to fulfill political responsibilities).

154. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973). The Court reasoned journalistic freedom is concentrated in the licensee rather than diffused among others because it assures the public the broadcaster will be responsible for a failure to communicate information to the public. *See id.* at 125; *see also* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 31 (D.C. Cir. 1972) (fairness doctrine requirements of broadcasters may not be delegated), *cert. denied*, 412 U.S. 922 (1973).

155. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 n.32, 597 (1981) (Commission should keep private broadcast industry accountable to public).

156. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 31 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); Green v. FCC, 447 F.2d 323, 333 (D.C. Cir. 1971) (right of public more crucial than right of those with competing views to express opinions).

facilities of radio without a license."[157] Should the fairness doctrine be abolished, however, it is possible that broadcasters would have no affirmative duty to expose the various sides of an important issue. Instead, they would be able to leave critical and controversial debate to chance, which under present regulations is impermissible.[158] Broadcasters would no longer be answerable to the public for failing to cover issues fairly and could delegate their responsibilities to producers or sponsors leaving the viewer in a quandary. To allow this to happen is to reject the logic of many courts that the rights of viewers and listeners are paramount to those of the broadcaster.[159] The fairness doctrine acts as a workable solution to the problem of competing interests by requiring that broadcasters operate in the public interest; while also allowing them considerable latitude in fulfilling their obligations.[160]

VI. CONCLUSION

Freedom of speech is not an empty slogan or a rallying cry to be used by broadcasters to incite emotional indignation. It is a right cherished by the American people, which should not be seized from them by abolishing the fairness doctrine. While it is true that the first amendment is hostile to governmental control of speech, that is not to say that the fairness doctrine is necessarily an unreasonable regulation. On the contrary, it has enabled the broadcasting media to promote political debate and enhance public debate on major issues of importance. This progress would be eliminated if networks were able to determine which candidates would be

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157. *See* NBC, Inc. v. United States, 319 U.S. 190, 227 (1943) (valid denial of license does not deny right of free speech).

158. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 35 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). In *Brandywine*, the FCC concluded that Brandywine radio station had failed to comply with the fairness doctrine. *See id.* at 29. The court upheld the Commission's decision which reminded

> the licensee that its affirmative duties in the fairness arena would not be satisfied by leaving the expression of contrasting views to such happenstance as the remarks of an unknown person on a call-in program, or to the possibility that a pertinent question will be asked on a general interview program unannounced as dealing with any particular issue and not presenting a guest selected as a responsible spokesman of a contrasting view.

See id. at 35.

159. *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) (crucial right of public to receive access to ideas and experiences); Red Lion Broadcasting Co., 395 U.S. 367, 390 (1969) (broadcasters' rights subordinate to those of public); Kennedy for President Comm. v. FCC, 636 F.2d 417, 431 (D.C. Cir. 1980) (right of viewers is chief concern); *see also* Complaint of Minnesota Farmers Union, 88 F.C.C.2d 1455, 1464 (1982) (doctrine's purpose to ensure "public's paramount right to be informed").

160. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973).

given access to the air waves and which treatment would be given important issues. Those who have something to say would have a difficult time getting it said on radio or television if it runs counter to the ideas of the owners, broadcasters, sponsors, or popular prejudice. The fairness doctrine effectively enhances the first amendment rights of all concerned. Despite the arguments of those who insist there are technological advances in the broadcast media which make the fairness doctrine obsolete, such advances are not yet implemented. Until they are, it is important that the fairness doctrine survive. In the words of Justice Tamm, "The first amendment was never intended to protect the few while providing them with a sacrosanct sword and shield with which they could injure the many."[161]

161. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 62 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).