
The Fairness Doctrine: A Solution in Search of a Problem

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Introduction

For most of this century, American broadcasters suffered from diminished First Amendment status in comparison with their brethren in the print media. Broadcasters' editorial judgments were subject to oversight and second-guessing by the Federal Communications Commission (FCC or Commission) under what was called the "Fairness Doctrine." In 1987, the FCC ceased to enforce the doctrine and in the following years, Congress tried several times to revive it. Many observers in the media and on Capitol Hill now insist the issue is at last dead. Rumors and speculation, though, continue to abound over an eventual revival of the Fairness Doctrine. Advocates of the doctrine's return are now looking to the courts to force the FCC to do what it has refused to do on its own initiative and what Congress has been unable to mandate.

This Article examines the history of the Fairness Doctrine and the more common arguments offered in support of it. If the Fairness Doctrine, as interpreted by the Commission, upheld by the courts, and encouraged by Congress([note 1](#)) were to be reinstated, it would actually decrease the likelihood of public exposure to varying viewpoints by discouraging broadcasters from covering controversial issues. Furthermore, market forces are achieving the intended effect of the Fairness Doctrine without directly restraining broadcasters. Today's media-rich environment and the concurrent evolution of individual media outlets catering to specific constituencies, has already allowed the "invisible hand" phenomenon to work in the marketplace of ideas, just as it does in the commercial marketplace. As a result, the marketplace is achieving the sort of diversity and access the Fairness Doctrine was designed to foster but could never

attain. Therefore, the Fairness Doctrine is not necessary in today's media, even though many commentators are trying to revitalize it.

The term "Fairness Doctrine" refers to a former policy of the FCC which, with certain minor exceptions, [\(note 2\)](#) mandated that a broadcast station which presents one viewpoint on a controversial public issue must afford reasonable opportunity for the presentation of opposing viewpoints. [\(note 3\)](#) The personal attack rule, an application of the Fairness Doctrine, required stations to notify persons when personal attacks were made on them in discussions of controversial public issues. [\(note 4\)](#)

The Fairness Doctrine has been both defended and opposed on First Amendment grounds. Backers of the doctrine claim that listeners have the right to hear all sides of controversial issues. They believe that broad-

casters, if left alone, would resort to partisan coverage of such issues. They base this claim upon the early history of radio. Opponents of the doctrine claim the doctrine's "chilling effect" dissuaded broadcasters from examining anything but "safe" issues. [\(note 5\)](#) Enforcement was so subjective, opponents argued, there was never a reliable way to determine before the fact what broadcasters could and could not do on the air without running afoul of the FCC. Moreover, they complain, print media enjoy full First Amendment protection while electronic media were granted only second-class status.

New York Governor Mario Cuomo opposes the Fairness Doctrine on First Amendment grounds. He said in 1987, and reiterated last year, how he has "never understood the distinction made between electronic and print media in terms of the reasons for the first amendment . . . and the basic rationale for freedom of speech." [\(note 6\)](#)

In the 1974 case *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court unanimously decided a newspaper is under no obligation to give any sort of equal time to matter what the paper's economic power. [\(note 7\)](#) If the *Miami Herald*, delivered to 37 percent of all households in its region, escapes any public service obligations, why should each of a dozen local television stations and forty local radio stations face the prospect of losing their licenses when disagreements arise over "fairness"? [\(note 8\)](#)

Cuomo blames broadcasters for much of their own problems. "A lot of the owners, a lot of the people who make profits in this business (broadcasting)," he said, "will sell freedom for fees; they will make deals with the Congress; they will accept regulation that they shouldn't be accepting all in exchange for an opportunity to make more money." [\(note 9\)](#) Commissioner Quello agrees with Cuomo. He complains broadcasters who "advertise products and do so much selling and are so influential in news are at their very worst in trying to promote their own interest to the public and the government." [\(note 10\)](#)

One other fact has exacerbated the situation: fairness, like beauty, is in the eye of the beholder. The necessarily subjective judgments imposed on the industry throughout the years led to a Kafkaesque situation in which broadcasters were never sure what was expected of them nor what they could be punished for. Rulings were made ad hoc and only after the fact resulting in what media critic and historian Les Brown calls "a tortured and complex series of regulations, legislation and litigation which many people, both within and outside the system, maintain undermines the journalistic integrity of broadcasting." [\(note 11\)](#) Former FCC Chairman Dean Burch put it nicely: "In the fairness area," he said, "the bond of theory and implementation has come unstuck and all the principal actors licensees, public interest advocates, the Commission itself are in limbo, left to fend for themselves." [\(note 12\)](#)

Underlying much of the concern over the Fairness Doctrine is an uneasy feeling among civil libertarians and some First Amendment advocates that the doctrine is yet another weapon for the federal government, a government which has never been comfortable with a broadcasting industry that it cannot control. [\(note 13\)](#) This concern has been validated by history. Bill Ruder, an Assistant Secretary of Commerce under President Kennedy, told how Kennedy's administration used the Fairness Doctrine to challenge and harass right-wing broadcasters, in the hope the challenges would be so costly that these broadcasters would find it too expensive to continue their broadcasts. [\(note 14\)](#) Those who recall the early 1970s are familiar with Spiro Agnew's heavy-handed and self-serving efforts to intimidate the press in general, and the broadcast media in particular. Kennedy and Agnew had ample precedent. As early as 1933, "a member of the Federal Radio Commission issued a formal statement in which he informed broadcasters that any

remarks made over their stations derogatory to or in criticism of his administration's program and policies would subject the offending station to a possible revocation of license."[\(note 15\)](#)

In August of 1987, the FCC, under Chairman Dennis Patrick, abandoned the Fairness Doctrine.[\(note 16\)](#) The political fallout was astounding. For more than three years, the Senate refused to confirm any nominees for seats on the FCC and severely restricted the Commission's budget. Since then, Congress has repeatedly tried to resurrect the Fairness Doctrine by legislative fiat but, so far, such efforts have been unsuccessful.

However, the specter of the Fairness Doctrine keeps coming back to haunt the dreams of First Amendment advocates.[\(note 17\)](#) In 1992, a coalition of activist groups and several individuals petitioned the FCC to reconsider the Fairness Doctrine.[\(note 18\)](#) On July 28, 1994, a number of those petitioners filed in the Court of Appeals for the Ninth Circuit for a writ of mandamus to force the FCC to act on their petition.[\(note 19\)](#)

Two weeks later, another coalition petitioned the Commission for an emergency ruling reinstating the Fairness Doctrine.[\(note 20\)](#) On the same day, this second coalition also petitioned for reconsideration of the doctrine as applied to ballot issues and sought to submit their own petition for consideration, although two years past the deadline for such petitions.[\(note 21\)](#) Ten days later, a group of media-related and First Amendment advocates filed pleadings opposed to the coalition's pleadings with the Commission.[\(note 22\)](#)

The political philosophy underlying the Fairness Doctrine not only provides a rationale for the exercise of governmental content regulation in over-the-air broadcasting, but also lays the groundwork for the expansion of governmental power into other electronic media, including cable, satellite, direct distribution systems, and future technologies. The Clinton administration's new information policy promises some protection for the media,[\(note 23\)](#) but worrisome First Amendment portents appear on the horizon.[\(note 24\)](#) Experience with the Fairness Doctrine in the context of broadcasting leads some to wonder if Congress will now try to impose such rules on the new media or, in the alternative, to pressure the FCC into reintroducing the doctrine as a regulatory policy.

I. A Historical Perspective of the Fairness Doctrine

The development of the Fairness Doctrine is intertwined with the history of American broadcasting. Early commercial uses of radio centered on maritime uses, "mainly for ship-to-shore and ship-to-ship communication."[\(note 25\)](#) An obstacle quickly developed when transmissions from one source interfered with another. Trying to outshout each other, early broadcasters responded to problems of interference by increasing the power of their transmitters which, of course, accomplished little except to increase the electronic cacophony. The first attempt by the federal government to deal with the confused clamor of competing voices on the airwaves was the Radio Act of 1912, which put the task of bringing order out of the electronic chaos in the hands of the Secretary of Commerce.[\(note 26\)](#) Secretary of Commerce Herbert Hoover tried to place conditions on licenses, but "his power to regulate radio stations in this way was destroyed by court decisions interpreting the 1912 Act."[\(note 27\)](#)

The tug of war between the government and the broadcasters for control of the airwaves continued in 1925, when the Senate responded to the general concern of whether broadcasters might exert some sort of squatters' rights over the frequencies. The Senate passed a resolution declaring the electromagnetic spectrum to be "the inalienable possession of the people of the United States."[\(note 28\)](#) A year later, Congress passed a joint resolution which required licensees to waive any right to the wavelength they used.[\(note 29\)](#) Even so, the system quickly developed so as to provide licensees with what amounted to de facto property rights. "Even before Congress passed the 1927 Act, most observers recognized that stations were being transferred from one owner to another at prices which implied the right to a license was being sold."[\(note 30\)](#)

Although few stations were on the air before 1920, by November 1922, 564 broadcasting stations were operating in the United States.[\(note 31\)](#) By 1927, the confusion of the airwaves had increased to the point where most parties involved agreed on the need for an impartial arbiter to assign frequencies, limit signal strengths, and set out geographical coverage areas.[\(note 32\)](#)

The chaos that developed as more and more enthusiastic pioneers entered the field of radio was indescribable.

Amateurs crossed signals with professional broadcasters. Many of the professionals broadcast on the same wave length and either came to a gentleman's agreement to divide the hours of broadcasting or blithely set about cutting one another's throats by broadcasting simultaneously. Listeners thus experienced the annoyance of trying to hear one program against the raucous background of another. Ship-to-shore communication in Morse code added its pulsing dots and dashes to the silly symphony of sound.

....

... Private enterprise, over seven long years, failed to set its own house in order. Cutthroat competition at once retarded radio's orderly development and subjected listeners to intolerable strain and inconvenience.[\(note 33\)](#)

But the Radio Act of 1927 went far beyond needed traffic-cop functions.[\(note 34\)](#) It supplanted the regulatory functions of the Secretary of Commerce with its new creation, the Federal Radio Commission forerunner of the FCC. Although in one breath the statute explicitly forbade program censorship,[\(note 35\)](#) it also gave the new Commission authority to regulate the programming of the stations it licensed.[\(note 36\)](#) The 1927 Act included a requirement that if a legally qualified candidate for public office was allowed to use a licensee's facilities, all other candidates must be allowed equal access.[\(note 37\)](#)

The federal government thereafter controlled the airwaves' content, and it was not long before the Commission exercised its newly-found power by denying a license renewal to an Iowa station owner.[\(note 38\)](#) The owner used his station to launch attacks on persons and institutions he disliked.[\(note 39\)](#) The FCC commented enigmatically, "Though we may not censor, it is our duty to see that broadcast licenses do not afford mere personal organs, and also to see that a standard of refinement fitting our day and generation is maintained."[\(note 40\)](#)

In 1940, Mayflower Broadcasting unsuccessfully attempted to apply for the license of a Boston station, WAAB.[\(note 41\)](#) While denying Mayflower the license and renewing the license in favor of the incumbent, the Commission criticized the incumbent licensee for editorializing about controversial public subjects and favoring certain political candidates.[\(note 42\)](#) The station's license was renewed only after it showed it was complying with a policy to stop editorializing.[\(note 43\)](#) The result was all too predictable: through the 1930s and early 1940s, broadcasters totally abandoned the practice of editorializing and dropped much programming that might have been thought controversial.[\(note 44\)](#)

Another important decision in the development of the Fairness Doctrine was *NBC v. United States*.[\(note 45\)](#) Writing for the Supreme Court, Justice Frankfurter spoke of the situation prior to 1927 as "confusion and chaos" which was attributable to certain basic facts about radio as a means of communications its facilities are limited; they are not available to all who may wish to *use* them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the *number of stations* that can operate without interfering with one another.[\(note 46\)](#)

Two FCC reports were important in early clarification of the Fairness Doctrine because they indicated the government's intent to strictly control content. In 1946, the Commission published the *Public Service Responsibility of Broadcast Licensees*, which warned that the Commission would thereafter pay closer attention to broadcasters' programming.[\(note 47\)](#) Moreover, in 1948, the Commission reexamined the *Mayflower* decision and issued another report, this time encouraging editorials, but requiring "overall fairness."[\(note 48\)](#)

In 1959, Congress amended Section 315 of the Communications Act of 1934 and included the phrase: "Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[\(note 49\)](#) The Commission chose to construe the added phrase as codification of the Fairness Doctrine by Congress,[\(note 50\)](#) although the Court of Appeals for the District of Columbia later rejected that decision.[\(note 51\)](#)

In 1967, the FCC created more specific rules insuring a right of reply to both *ad hominem* attacks on an identified person or group and to any position taken by a station for or against legally qualified candidates for any political

office.[\(note 52\)](#)

In 1969, the Supreme Court upheld the constitutionality of the Fairness Doctrine in the *Red Lion* decision.[\(note 53\)](#) The Court justified this result by noting that more individuals would like to broadcast their views than there are available frequencies, reaffirming the Court's reasoning in *NBC v. United States*.[\(note 54\)](#)

In response to this "scarcity" argument, broadcasters stressed that the requirements of the Fairness Doctrine had a subtle but powerful "chilling effect,"[\(note 55\)](#) leading many of them to abandon their coverage of controversial issues in favor of "safe" issues.[\(note 56\)](#) *Red Lion* noted the broadcasters' arguments, but the Court found the possibility of a chilling effect to be remote.[\(note 57\)](#) Nevertheless, the door was left open for further consideration: "[I]f experience with the administration of those doctrines, indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[\(note 58\)](#)

II. The Downfall of the Fairness Doctrine

In 1984, the Supreme Court invited an action which would give it a chance to reverse *Red Lion*. In *FCC v. League of Women Voters of California*, the Court said if the Commission were to show the "fairness doctrine [has] `the net effect of reducing rather than enhancing' speech," the Court would be forced to reconsider the doctrine's constitutional basis.[\(note 59\)](#) However, no test case appeared.

In August 1985, the FCC took the bait. The Commission issued a report concluding the doctrine no longer serves the public interest and, instead, chills First Amendment speech.[\(note 60\)](#) The Commission predicted that without the chilling effect of the Fairness Doctrine, it was reasonable to expect an increase in the coverage of controversial issues of public importance.[\(note 61\)](#) In 1987, the FCC formally renounced the Fairness Doctrine.[\(note 62\)](#) Events since then have confirmed the FCC's prediction of more, rather than less, coverage of controversial issues.[\(note 63\)](#) The amount of opinion-oriented programming "exploded" over the ensuing six years and the number of radio talk shows jumped from 400 to more than 900.[\(note 64\)](#) Many observers ascribe this growth directly to the absence of the inhibiting effect of the Fairness Doctrine.

Nonetheless, powerful congressional forces have dedicated themselves to reinstating the Fairness Doctrine and have tried to enact it into law.[\(note 65\)](#) Opposition by both Presidents Reagan and Bush kept it from happening during their terms.[\(note 66\)](#) With the election of President Clinton, though, such Capitol heavyweights as Ed Markey, Chairman of the House Telecommunications Subcommittee,[\(note 67\)](#) and John Dingell, Chairman of the House Energy and Commerce Committee,[\(note 68\)](#) viewed the new Democratic administration as unlikely to veto their attempts to bring the doctrine back.[\(note 69\)](#)

At first, little resistance was seen to a bill restoring the Fairness Doctrine. Some support for such a bill grew over the summer of 1993.[\(note 70\)](#) By the winter of 1993, however, talk show hosts, like Rush Limbaugh had generated nationwide publicity producing a large number of letters from listeners, opposing the doctrine at a two-to-one margin.[\(note 71\)](#) As a result, efforts to write it into law were abandoned.[\(note 72\)](#) Limbaugh and other talk show hosts assert that legislation to reinstate the Fairness Doctrine is an effort by liberal lawmakers to silence their conservative critics.

Still, considering the long history of the Fairness Doctrine and the determined attempts by some congressmen to resurrect it, it is reasonable to assume we have not seen the last of it.[\(note 73\)](#) Some speculate congressional pressure may prompt the FCC to reinstate the doctrine as a regulatory policy, while others suggest the current initiatives to rebuild our communications infrastructure may provide an opportunity for Fairness Doctrine backers to do surreptitiously what they have so far been unable to do openly.[\(note 74\)](#)

III. The Rationale behind the Rise and Fall of the Fairness Doctrine By contrasting the fifty years with the Fairness Doctrine in effect with the seven years since the FCC abandoned it, one must conclude that the Fairness Doctrine did not, in fact, increase the likelihood of public exposure to varying viewpoints. Rather, the Fairness Doctrine had exactly the opposite effect and, if reinstated, will not only act as an impediment to the public's right to know but will actually accelerate its negative effect on that right.[\(note 75\)](#)

A. Rationales for Governmental Control of Content<\H3> A frequently offered justification for governmental intrusion into the content of radio and television programming is the theory that broadcasters do not have any property rights in the narrow piece of frequency spectrum on which they broadcast.(note 76) Rather, the spectrum is supposedly public property, and each broadcaster has only a limited right to its assigned frequency, subject to whatever conditions the Commission may impose in the name of the public interest, convenience, and necessity.(note 77)

Under this theory, licensees can only use their frequencies as public trustees and must justify their use of the public spectrum by doing something for the "public" good. There are several flaws to this viewpoint. First, there is nothing inherent in the nature of the frequency spectrum which makes it "naturally" public property.(note 78) Although there has never been any serious consideration of the notion until lately, contemporary literature contains some interesting arguments to justify the assignment of a limited number of legally enforceable private property rights to spectrum users.

At the time the Communications Act of 1934 was drafted, little was said or written to provide a philosophical rationale for the concept of treating the spectrum as public property. It merely was presented as a self-evident, almost axiomatic, "given."(note 79) However, the concept of broadcaster as a public trustee is not carved in constitutional granite; it is the product of a congressional declaration. Even accepting the theory of public ownership of the airwaves, there is no automatic justification for the government's intrusion into the *content* of the individual licensee's programming, beyond the sort of regulation properly imposed upon printed material.

The Supreme Court has attempted to justify the Fairness Doctrine's conflict with broadcasters' journalistic First Amendment rights by simply declaring such constitutional rights to be subordinate to broadcasters' "trustee" obligations imposed in return for granting them the privilege of using "public" airwaves.(note 80) The Commission, however, pointed out, "It is well-established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right."(note 81)

Another frequently advanced justification for governmental intrusion into broadcast content looks to the medium's "pervasiveness." This argument, when reduced to its essentials, holds that the more effectively a medium persuades the public, the more it must be regulated. The corollary is that only completely ineffective media are entitled to full freedom from regulation. The "pervasiveness" rationale fails to account for the disparate treatment accorded to other equally or more pervasive media:

One can hardly argue a one-newspaper town is not "pervaded," "uniquely," by the orientation of its paper. A blockbuster motion picture, unlike a typical television or radio broadcast, is repeated for weeks on end in a community. Its exhibition is also more likely to pervade the community's consciousness than a single television . . . [or radio] broadcast.(note 82)

Furthermore, the "pervasiveness" argument could not have been one of the original justifications for the public trustee theory since, in its beginning, radio could *not* have been pervasive. Pervasiveness is a quality the electronic media developed slowly, and it would have taken quite a visionary to have foreseen, at the turn of the century, the vast system of broadcasting as it would evolve in the following eighty years.

Finally, the "pervasiveness" rationale exaggerates the effectiveness of individual stations and neglects to distinguish the effectiveness of those individual stations (which are regulated) from the effectiveness of the industry as a whole (which is what, arguably, is pervasive).

The FCC justified the continuation of the Fairness Doctrine by asserting that to achieve adequate coverage, opposing viewpoints must have essentially identical access to identical media.(note 83) The FCC rejected the argument that an adequate presentation of opposing viewpoints in print media or on another station is enough to achieve the goal of informing the public on important matters, although it "recognize[d] that citizens receive information on public issues from a variety of sources."(note 84) Instead, the FCC relied on three other contentions.

First, the Commission claimed that Congress, by amending Section 315(a) of the 1934 Communications Act, was giving statutory approval to the Fairness Doctrine.(note 85) However, the statutory language is highly ambiguous, and

even those sections that seem clear are constitutionally doubtful.[\(note 86\)](#)

Second, the FCC cited the relative ease of enforcing the doctrine. Without the doctrine "it would be an administrative nightmare . . . to attempt to review the overall coverage of an issue in all of the broadcast stations and publications in a given market."[\(note 87\)](#) The report seemed to assume that it would be necessary to affirmatively examine the entire marketplace of ideas, rather than to presume overall coverage to be adequate unless a complainant produced evidence to the contrary. Merely because it is possible or easy to do something, however, is no reason to infer it is right or even constitutionally permissible.

The third justification was the likelihood the doctrine would achieve its stated goal of exposing the public to varying points of view.[\(note 88\)](#) In what amounted to a statement that the end justifies the means, the Commission declared that "the requirement that *each* station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view."[\(note 89\)](#) However, as shown, the Fairness Doctrine has been unsuccessful in achieving its goals especially considering other, less intrusive ways to achieve the same objective.

B. The Scarcity Rationale The theoretical cornerstone for reducing broadcasters' First Amendment protection has always been spectrum scarcity.[\(note 90\)](#) The idea dates back to the early days of broadcasting when there were few stations on the air. Because stations were scarce, the government asserted, it could impose an obligation to serve all the needs of all potential listeners upon the few stations in existence. This scarcity theory began in 1929 when the Federal Radio Commission stated its policy was predicated upon the assumption that any given station had a duty to serve the *entire listening public* within the service area of a station.[\(note 91\)](#) This argument is still used today without change.

As late as 1969, when there were approximately 837 television stations and 6565 radio stations on the air in this country,[\(note 92\)](#) the Supreme Court was still saying *each* station must be perfectly balanced in its presentation of controversial issues because spectrum scarcity precludes a large enough number of diverse voices to yield aggregate balance.[\(note 93\)](#) The rejection of an overall market view of balance might have been justified in the early part of this century, but it has little factual support in today's abundant media environment.[\(note 94\)](#)

While the scarcity argument is no longer justified by current reality, it has been sustained through the semantic sleight-of-hand of switching, in mid-argument, between two meanings of the word "scarcity." In 1943, Justice Frankfurter gave his imprimatur to what has become an ongoing confusion between the use of a radio station and its ownership. His opinion in *NBC v. United States* referred to scarcity in two ways in the same paragraph: the number of people simply wanting to *use* a station and the number of frequency slots available for *operating* stations.[\(note 95\)](#) In *Red Lion*, Justice White perpetuated the fallacy by implying that every person who wants a broadcast license represents a different position on important issues.[\(note 96\)](#)

An article by former FCC Chairman Newton N. Minow superbly illustrates the confusion between those wanting a license and those with unique viewpoints.[\(note 97\)](#) In his article, Minow proclaimed the "proper test" for scarcity to be "the number of citizens who want a broadcast license and are unable to obtain one. At that point, a decision must be made as to who is to be allowed, and who denied, the exclusive license to use the channels."[\(note 98\)](#) To illustrate what he meant by "scarcity," Mr. Minow cited the RKO television channels which were opened to competitive application in the mid-1980s. The FCC, said Minow, "quickly got 172 applications, each applicant arguing, '[g]ive the license to me, and turn down the other 171.'" [\(note 99\)](#)

Minow declared, "Scarcity still exists when channels are not available to all."[\(note 100\)](#) Note carefully the shift in the meaning of the word "available." Traditionally, when speaking of controversial ideas, "availability" concerns only access to speak on some station or other. But, to portray what he meant by "availability," Mr. Minow cited the RKO television channels. Further, he pointed to the "almost 14,000 applications" for the new low-power television stations.[\(note 101\)](#) The implication is that in the case of RKO, 172 distinct points of view are clamoring to be heard; in the case of low-power television, almost 14,000. Of course, Minow's examples are not cases of people desperate for a broadcast license so they can espouse their unique political opinion. They are, rather, businesspersons who see a chance to acquire a valuable asset. There is no scarcity of outlets for differing viewpoints, only an overabundance of citizens who correctly see a broadcast license as a chance to make money.

The logical fallacy here is of mistaking those who want to use available frequency as a station owner for those who want to use the same frequency to express a particular viewpoint on a public issue. Don R. Le Duc of the University of Wisconsin wrote, "The U.S. legal system must develop the capacity to distinguish between *channels* and *content* as the source of communications competition, a distinction that has eluded the federal government for the past half-century." ([note 102](#))

IV. The Marketplace as an Alternative Solution

The latter part of the twentieth century has become an age of broadcast specialization. That was not the case, however, when the Fairness Doctrine was developed. In the early days of radio, it was not uncommon for a geographic area to have only one station. Therefore, with what amounted to a temporary monopoly on radio listeners, pioneer stations tried to serve as many of the varied tastes and needs of their audiences as possible. ([note 103](#))

Even when the radio industry had developed to the stage where two or three stations were serving most markets, stations would still vie with each other for the largest possible share of the potential audience. They did so by trying to serve, at one time or another in the programming day or week, as many listeners as possible. The result what came to be called "block" programming was a mix similar to today's network television fare, in that it was designed to develop listener preferences for particular *programs*, not necessarily for particular stations. Unlike today, early radio listeners probably never thought of preferring to listen to a particular radio *station*. Back then, a family might start an evening of radio listening with Jack Benny, then change stations to hear Edgar Bergen and Charlie McCarthy, then move to yet another station to end their evening with Burns and Allen or Fibber McGee and Molly.

A. Narrowcasting

With today's proliferation of radio and television stations, we have entered an era of what broadcasters call "narrowcasting." The term "narrowcasting" describes a business strategy by which each station selects a particular special-interest segment of the larger overall audience and aims its programming solely at that particular audience segment.

In radio, the shift to narrowcasting happened decades ago. Today, a typical radio market includes at least one talk station, a religious station, an all-news station, and some non-commercial stations. Some stations like NPR aim their programming toward an educated middle class. Some cater exclusively to a politically liberal audience (e.g., Pacifica stations), while others program for a conservative constituency. There are foreign-language stations and stations serving minority groups. Although most formats are musical, there is specialization in the kind of music played. There are classical stations, jazz stations, and country stations, while the general field of "popular" music is divided into subcategories: top 40, new age, heavy metal, oldies, middle of the road, and album-oriented rock. ([note 104](#)) There are some government-operated stations that broadcast nothing but time signals, and others that provide weather information, twenty-four hours a day. There is perhaps no more powerful refutation of the philosophy underlying the Fairness Doctrine than to compare today's radio reality with the *Red Lion* reasoning, mired as it was in the outmoded concept of every station having a duty to serve the entire listening public.

When commercial television began after World War II, the pattern of development from general to particular programming that occurred in radio repeated itself. At first, with only one or two television stations in any market, broadcasters felt they had to serve a wide variety of programming tastes by presenting a menu of program types designed to appeal to a variety of audience subgroups. ([note 105](#))

The first instance of stations devoting themselves to specialized programming in television was the 1950s development of educational TV stations, which evolved into what we now call public broadcasting. ([note 106](#)) The use of UHF channels led to more stations with varied programming, including some stations that adopted programming designed to serve minority interests, foreign-language viewers, or the religiously devout.

The large channel capability of cable television, coupled with the distributional ease afforded by satellites, has already produced not just stations, but entire television networks devoted to specialty concerns. ([note 107](#)) There are cable

networks exclusively devoted to news, sports, religion, public affairs,[\(note 108\)](#) minority interests, ethnic culture,[\(note 109\)](#) home shopping, new movies, old movies, erotic titillation, and weather.

Narrowcasting, both in radio and television, now provides an important service to the listening and viewing public. It provides predictability and continual availability of desired programming. A country music devotee knows where on the dial to tune at any time of the day or night to find the service he or she desires. No longer must one wait until the regular newscast to hear about the weather. It is there whenever it is needed.

A corollary advantage of such specialization of formats is that, because a given media outlet does not have to be all things to all people, it can deal with a specific subject in greater detail without fearing massive tune-outs. Weather channels give not only the daily local forecast, but also the national forecast, the marine forecast, the aviation forecast, and the long-range forecast. Classical music stations can devote a full day to a performance of Wagner's *Ring Cycle*. NPR's *All Things Considered* frequently spends the major part of an entire half-hour segment on an in-depth examination of a particular news story or public issue. C-SPAN, NPR, and CNN have provided live coverage of the Iran-Contra hearings, confirmation hearings for Judges Bork and Thomas, Lani Guinier, Zoe Baird, and the Whitewater hearings.

The radio industry is already dedicated to the programming philosophy of narrowcasting. Television is unquestionably headed in the same direction. With narrowcasting, market forces "move the key resourcetime on an exclusive broadcasting frequency toward its highest and best use."[\(note 110\)](#) Commercial broadcasters maximize profits by providing the service they believe consumers most desire.[\(note 111\)](#)

B.The Overall Market Concept

The phenomenon of narrowcasting leads us to look at the question of fairness as it applies to an entire medium in a given geographical market. In practice, an overall market paradigm has already largely replaced the outmoded requirement of the Fairness Doctrine that mandated complete balance in the programming of each individual station.

Development of the overall market paradigm supports an inescapable conclusion: The Fairness Doctrine approach is unnecessary and any residual attempts to revive it should be permanently abandoned.[\(note 112\)](#) Stations should further develop their distinctive programming personalities to appeal to specific listening constituencies. Choices should be made not only in the kinds of music or entertainment programs they broadcast, but also in whether or not they offer programming that delves into public controversies or features candidates for public office. Stations should be free to take a particular political posture without fear of coercion, constraint, intimidation, or reprisal.

Some stations will program no discussions of public issues at all. Nonetheless, that does not justify the Fairness Doctrine's paternalistic attitude of forcing such programming on listeners who have little or no interest in it. When listeners have unwanted programs thrust upon them, they "tune-out," either mentally by paying no attention, or literally by changing stations or simply turning the radio off. As former FCC Commissioner Mark S. Fowler and colleague Daniel L. Brenner stated, "The public's interest, then, defines the public interest."[\(note 113\)](#)

The possibility of some stations ignoring public issues is balanced by recent experience which shows that narrowcasting is also leading certain stations to air little else than issue-oriented programming. The proliferation of radio talk formats has already shown how stations in sufficiently large markets, when unfettered and uncontrolled, tend to develop programming that consistently appeals to particular political, ethnic, or economic partisans. The limiting factor is not availability of frequencies, but rather, the existence of enough listeners to justify a particular programming format. Granted, there may not be adequate listeners to justify accommodating every fringe or splinter faction. However, is it really necessary to the proper functioning of a democracy that the federal government assure platforms in every medium, in every community, for the rantings of bizarre conspiracy theorists, paranoid delusionists, flat-earthers, anarchists, and others without any significant constituency?

No responsible viewpoint is in danger of being stifled simply because it is denied access to a particular station so long as there are other available stations. If a demand for a product exists, someone will eventually undertake to cater to that demand. If all television stations in a given area shut out a specific viewpoint, there is always radio. In the even more

unlikely event that access to radio is denied as well, there are still newspapers, magazines, pamphlets, and billboards. As Philip B. Kurland writes, "If there is, in fact, an audience for the message, one form of the media or another can be counted on to exploit it. If there is no such audience, there is no need to compel one form of the media to be a voice crying in the wilderness."[\(note 114\)](#)

Conclusion

Allowing the "invisible hand" of market forces to operate in the marketplace of ideas accommodates all viewpoints with enough proponents to warrant attention, and achieves the goals of the First Amendment without intrusive governmental intervention. As predicted by the FCC's 1985 Fairness Doctrine Report, the dynamics of the information-services marketplace assures the public more than sufficient exposure to controversial issues of public importance.[\(note 115\)](#)

However, the matter is far from settled. Some desire a return to the Fairness Doctrine as a part of federal communications regulatory policy. Others fear those advocating such a policy change may seek to achieve their goal of media content regulation by using the issue of violence on television to open the door. Once the door is ajar, something looking very much like the Fairness Doctrine may be able to slip in unnoticed.

Rather than oppose a move to regulate program content, broadcasters are succumbing to federal intimidation. While the networks have agreed to "voluntary" advisories on violent programs, the American Civil Liberties Union (ACLU) opposes them because broadcasters accede to them under the threat of harsher governmental regulation. ACLU President Nadine Strossen says she is re-examining the ACLU's traditional position on the Fairness Doctrine

in light of the technological changes recently, the proliferation of channels of communication. My personal view has long been that we should oppose the Fairness Doctrine as being inconsistent with free speech principle. The reasons originally given for allowing that kind of regulation of television when nobody would allow it of the print media, if they were ever correct, they're certainly no longer correct.[\(note 116\)](#)

The ACLU is making sure it is up to speed on challenges presented by the race to the information superhighway.

With its information superhighway proposals, the Clinton administration has declared its intention to create an environment to stimulate a private system of free-flowing information conduits. The administration's proposals would add \$100 billion to the economy during the next ten years and would create 500,000 new jobs by the end of 1996.[\(note 117\)](#) Vice President Gore stated that the administration sees market forces replacing regulations and judicial models that are no longer appropriate. The administration's "goal is not to design the market of the future. It is to provide the principles that shape that market."[\(note 118\)](#) One of those principles should be to trust in an overall market concept in the coverage of public issues with the obvious First Amendment advantages it provides. However, some in the communications industry are uneasy with what they see as White House demands for excessive surveillance rights; "There's a lot of resentment and fear about government intrusion," said Paul Somerson, editorial director of *PC/Computing*.[\(note 119\)](#) Senate Minority Leader Bob Dole has questioned the FCC's regulation powers. He said the FCC could not be trusted to regulate the information superhighway. "I must question the Congress's judgment when it considers granting the FCC greater regulatory control of the communications industry, especially when the FCC doesn't seem to realize that it dropped the ball with the implementation of the Cable TV Act" [\(note 120\)](#)

In the end, it comes down to a matter of whether one believes that the principles underlying a free market economy are equally applicable to the marketplace of ideas. The alternative is to believe people must be spoon-fed whatever ideas the government decides are right. Some call it regulation, but in reality, it is censorship.

In 1644, electronic media did not exist. Still, John Milton was able to denounce the principle that government should be able to dictate what information and ideas could be disseminated.[\(note 121\)](#) He said:

Nor is it to the common people less than a reproach; for if we be so jealous over them, as that we dare not trust them with an English pamphlet, what do we but censure them for a giddy, vicious, and ungrounded people; in such a sick and weak state of faith and discretion, as to be able to take nothing down but through the pipe of a licenser?[\(note 122\)](#)

The American people are much the same as the English citizens of whom Milton spoke. [\(note 123\)](#) They have an almost intuitive feeling for what is fair and what is not. They neither need, nor deserve, governmental censorship masquerading in the guise of fairness.

Notes

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1. Professor William F. Baxter of Stanford University notes that "in various ways Congress has taken note of and ratified the Commission's `fairness' requirements." William F. Baxter, *Regulation & Diversity in Communications Media*, 64 *Am. Econ. Rev.* 392, 394 (1974). [Return to text](#)
2. Among the exceptions to the requirements of the Fairness Doctrine were bona fide news coverage of any legally qualified candidate. 47 U.S.C. 315(a) (1988). [Return to text](#)
3. *In re Inquiry into Section 73.1910 of the Commission's Rules and Regs. Concerning Alternatives to the Gen. Fairness Doctrine Obligations of Brdcst. Licensees*, *Report of the Commission*, 2 FCC Rcd. 5272, para. 2 (1987). [Return to text](#)
4. *Id.* paras. 89-90. The Fairness Doctrine is distinct from the equal time rule. Although the personal attack and equal time provisions are codified in 47 C.F.R. 73.123 (1967), "the more sweeping implications of the `fairness doctrine' cannot be found in any single written document but must be inferred from a series of rather obscure opinions." Baxter, *supra* note 1, at 394.

Albeit technically distinct, the two policies are similar in that they both stem from the same view of the airwaves as a scarce public resource, and, more often than not, are spoken of as though they were the same thing. Under Section 315 of the Communications Act of 1934, "[i]f 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." 47 U.S.C. 315(a) (1988).

Both concepts derived from similar attitudes and were developed over the years side by side, and, although they are distinct and separate, they both represent governmental intrusions into the programming content of broadcasting. [Return to text](#)

5. News reporter Bill Monroe told a Senate subcommittee:

[T]here are stations that don't do investigative reporting. There are stations that confine their documentaries to safe subjects. There are stations that don't editorialize. There are stations that do editorialize but don't say anything.

There are stations that do outspoken editorials but are scared to endorse candidates. My opinion is that much of this kind of caution, probably most of it, is due to a deep feeling that boldness equals trouble with Government, blandness equals peace.

Freedom of the Press: Hearings Before the Subcomm. on Const. Rts. of the Comm. on the Judiciary, 92d Cong., 2d Sess. 561 (1972) [hereinafter *Freedom of the Press Hearings*] (statement of Bill Monroe). [Return to text](#)

6. *If You Can't Stand on Principle, Think About the Money*, Broadcasting & Cable, Sept. 6, 1993, at 11, 11 [hereinafter *Think About the Money*]. [Return to text](#)
7. *Miami Herald*, 418 U.S. 241 (1974); see also Thomas W. Hazlett, *The Fairness Doctrine and the First Amendment*, Pub. Interest, Summer 1989, at 103, 108. [Return to text](#)
8. Hazlett, *supra* note 7, at 108. According to the FCC, the "*functional similarities*" between the two media lead to the conclusion that "the constitutional analysis of government control of content should be no different" for electronic media than for print media. In *Re Complaint of Syracuse Peace Council against TV Station WTVH Syracuse, N.Y., Memorandum Opinion and Order*, 2 FCC Rcd. 5043, para. 82 (1987) (emphasis in original) [hereinafter *Syracuse Opinion and Order*], *recons. denied*, 3 FCC Rcd. 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

Professor Coase likened the present American system of broadcast regulation to:

that which would be found if a commission appointed by the federal government had the task of selecting those who were to be allowed to publish newspapers and periodicals in each city, town, and village of the United States. A proposal to do this would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press. But the broadcasting industry is a source of news and opinion of comparable importance with newspapers or books and, in fact, nowadays is commonly included with the press, so far as the doctrine of freedom of the press is concerned.

R.H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 7 (1959). [Return to text](#)

9. *Think About the Money*, *supra* note 6, at 11. [Return to text](#)
10. Interview with James Quello, FCC Commissioner, in Washington, D.C. (May 5, 1994). [Return to text](#)
11. Les Brown, The New York Times Encyclopedia of Television 139 (1977). [Return to text](#)
12. Ford Rowan, Broadcast Fairness 163 (1984). [Return to text](#)
13. In its 1985 report, the FCC stated:

[T]he broadcast industry is one which is characterized by pervasive regulation. The fact of this pervasive regulatory authority, including the intrusive power over program content occasioned by the fairness doctrine, provides governmental officials with the dangerous opportunity to abuse their position of power in an attempt either to stifle opinion with which they disagree or to coerce broadcasters to favor particular viewpoints which further partisan political objectives.

In re Inquiry into Section 73.1910 of the Commission's Rules and Regs. Concerning the Gen. Fairness Doctrine Obligations of Brdcast. Licensees, Report, 102 F.C.C.2d 143, para. 74 (1985) (proceeding terminated) [hereinafter *FCC Fairness Doctrine Report*], *petition for review sub nom. Radio-Television News Directors Assoc. v. FCC*, 809 F.2d 860 (D.C. Cir.), *vacated*, 831 F.2d 1148 (D.C. Cir. 1987).

Professor William F. Baxter looked at the history of our governmental regulatory agencies: "Vigorous, purposeful intervention is a frightening prospect unless the levers are in the hands of saints with great wisdom, and such men are in very short supply, particularly in government agencies." Baxter, *supra* note 1, at 397. [Return to text](#)

14. Hazlett, *supra* note 7, at 112-13. [Return to text](#)
15. Edward W. Chester, Radio, Television and American Politics 235 (1969). [Return to text](#)
16. *Syracuse Opinion and Order*, *supra* note 8, para. 2. [Return to text](#)

17. Within the first month of the Clinton administration, Senator Ernest Hollings, chairman of the Senate Commerce Committee, introduced a bill (S. 334) to write the doctrine into law amid speculation the President might support the effort. *Fairness Doctrine, Quill*, Mar. 1993, at 7, 7. [Return to text](#)
18. In Re Arkansas AFL-CIO v. KARK-TV, Little Rock, Ark., *Petition for Reconsideration of Tracy Westen* (petition date Feb. 5, 1992) (copy on file with the *Federal Communications Law Journal*). [Return to text](#)
19. Tracy Westen v. FCC, *Petition for Writ of Mandamus* (9th Cir. July 28, 1994) (copy on file with the *Federal Communications Law Journal*). [Return to text](#)
20. *In re Enforcement of the Fairness Doctrine, Petition for Emergency Declaratory Ruling of the Coalition for a Healthy Cal.* (petition date Aug. 11, 1994) (copy on file with the *Federal Communications Law Journal*). [Return to text](#)
21. In Re Arkansas AFL-CIO v. KARK-TV, Little Rock, Ark., *Contingent Petition for Reconsideration of the Coalition for a Healthy Cal.* (petition date Aug. 11, 1994) (copy on file with the *Federal Communications Law Journal*). [Return to text](#)
22. *In re Enforcement of the Fairness Doctrine, Joint Opposition to Petition for Emergency Declaratory Ruling of Radio-Television News Directors Ass'n* (petition date Aug. 22, 1994); In Re Arkansas AFL-CIO v. KARK-TV, Little Rock, Ark., *Joint Opposition to Contingent Petition for Reconsideration of National Ass'n of Broadcasters* (petition date Aug. 22, 1994) (copies on file with the *Federal Communications Law Journal*). [Return to text](#)
23. The Clinton administration has called for elimination of many regulatory barriers and calls its proposals "the most major surgery on the Communications Act since it was enacted in 1934." Vice President Al Gore, Remarks at the National Press Club (Dec. 21, 1993) (copy on file with the *Federal Communications Law Journal*). [Return to text](#)
24. The Clinton administration recognizes that, just as new communications technologies transcend international boundaries, they also transcend other old boundary lines "which have long defined different sectors of the information industry." Vice President Al Gore, Remarks at the Television Academy at UCLA (Jan. 11, 1994) (copy on file with the *Federal Communications Law Journal*). [Return to text](#)
25. Coase, *supra* note 8, at 1. [Return to text](#)
26. Act of Aug. 13, 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 169, 44 Stat. 1162; *see also* Coase, *supra* note 8, at 2, 4. [Return to text](#)
27. Coase, *supra* note 8, at 4. [Return to text](#)
28. *Id.* at 6. [Return to text](#)
29. *Id.* at 5, 31-32. [Return to text](#)
30. *Id.* at 23. [Return to text](#)
31. *Id.* at 4. [Return to text](#)
32. Nicholas Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 *Law & Contemp. Probs.* 505, 505 (1969). [Return to text](#)
33. Charles A. Siepmann, *Radio, Television and Society* 5-6 (1950). [Return to text](#)
34. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 602(a), 48 Stat. 1064. [Return to text](#)

35. Part of the 1927 Act read:

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

Id. at 1172-73; *see also* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207, 217 (1982) ("The first amendment to the Constitution and section 326 of the Communications Act both forbid censorship of broadcasters."). [Return to text](#)

36. Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934). In 1921, long before there had been any consensus about the government's right to control broadcasting or the manner in which they could do it, Herbert Hoover, without any statutory authority, began to issue station licenses. What is little known is that Hoover allotted only a single frequency to all commercial broadcasters: 833 kilocycles. All stations were forced to occupy the same channel. There was bedlam as stations tried to drown each other out. While everyone looked to the government to impartially control the chaos, the government exacerbated the problem and then pointed to the result as justification for further governmental control of broadcasting. By either omitting or burying this critical piece of information, many broadcast historians including the respected but anti-corporate Erik Barnouw lead the unwary reader to assume there were as many frequencies to choose from then as there are today. The natural but incorrect inference is that chaos would result even now without benign governmental intervention to assign spectrum space. L.A. Powe, *American Broadcasting and the First Amendment* 58 (1987). [Return to text](#)
37. Radio Act of 1927, ch. 169, 44 Stat. 1162, 1170 (repealed 1934). [Return to text](#)
38. Coase, *supra* note 8, at 9. [Return to text](#)
39. *Id.* [Return to text](#)
40. *Id.* (quoting Edward C. Caldwell, *Censorship of Radio Programs*, 1 *J. Radio L.* 441, 473 (1931)). [Return to text](#)
41. *In re Mayflower Brdcast. Corp.*, *Decision and Order*, 8 F.C.C. 333 (1940). [Return to text](#)
42. *Id.* at 339-41. [Return to text](#)
43. *Id.* [Return to text](#)
44. Baxter, *supra* note 1, at 393. [Return to text](#)
45. *NBC v. United States*, 319 U.S. 190 (1943). [Return to text](#)
46. *Id.* at 213 (emphasis added) (footnote omitted). [Return to text](#)
47. FCC, Public Service Responsibility of Broadcast Licensees 55 (1946). The report became known as the "Blue Book" for the color of its binding. The Blue Book combined governmental concerns over service to local communities with a curious hostility to the profit motive. It cautioned that, thereafter, the Commission was going to look more closely at stations' programs and would view more favorably those stations that avoided "advertising excesses" and carried sustaining programs, local live programs, and discussions of public issues. The FCC suggested sustaining programs be used for:
- (a) maintaining an overall program balance, (b) providing time for programs inappropriate for sponsorship, (c) providing time for programs serving particular minority tastes and interests, (d) providing time for non-profit organizations religions, civic, agricultural, labor, educational, etc., and (e) providing time for experiment and for unfettered artistic self-expression.

- Id.*; see also Coase, *supra* note 8, at 1; Fowler & Brenner, *supra* note 35, at 215. These proposals were never actively enforced. [Return to text](#)
48. *In re* Editorializing by Brdcast. Licensees, *Report of the Commission*, 13 F.C.C. 1246, para. 7 (1949); see also Baxter, *supra* note 1, at 393-94; Coase, *supra* note 8, at 10. [Return to text](#)
 49. 47 U.S.C. 315(a) (1988). [Return to text](#)
 50. *In re* The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Stds. of the Comm. Act, *Fairness Report*, 48 F.C.C.2d 1, para. 28 (1974) [hereinafter *1974 Fairness Report*]. [Return to text](#)
 51. Telecommunications Research and Action Ctr. v. FCC, 801 F.2d 501, 517-18 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). [Return to text](#)
 52. 47 C.F.R. 73.123 (1968). [Return to text](#)
 53. Red Lion Brdcast. Co. v. FCC, 395 U.S. 367, 401 (1969); see Brown, *supra* note 11, at 359; Fred W. Friendly, The Good Guys, the Bad Guys, and the First Amendment 61-77 (1976). [Return to text](#)
 54. *Red Lion*, 395 U.S. at 388-90. The Supreme Court in *NBC* and *Red Lion* introduced a new principle into our First Amendment jurisprudence: When only a few interests control a major avenue of communication, those able to speak can be forced by government to share their access to that avenue. [Return to text](#)
 55. James Quello, veteran FCC Commissioner and former acting chairman, has consistently opposed the idea of the Fairness Doctrine. "It doesn't belong in a nation that is dedicated to freedom of speech and of press." His opposition to the Fairness Doctrine comes, at least in part, from his early experience as a broadcast executive where he encountered concrete examples of the doctrine's chilling effect. Interview with James Quello, *supra* note 10. [Return to text](#)
 56. See *Freedom of the Press Hearings*, *supra* note 5, at 560-61. [Return to text](#)
 57. *Red Lion*, 395 U.S. at 393. [Return to text](#)
 58. *Id.* [Return to text](#)
 59. *League of Women Voters*, 468 U.S. 364, 378-79 n.12 (1984) (quoting *Red Lion*, 395 U.S. at 393). [Return to text](#)
 60. *FCC Fairness Doctrine Report*, *supra* note 13, paras. 74-76. [Return to text](#)
 61. *Id.* para. 130. The Commission determined that the net effect of the Fairness Doctrine was to reduce coverage of controversial issues of public importance. *Id.* para. 29. [Return to text](#)
 62. *Syracuse Opinion and Order*, *supra* note 8, para. 2. [Return to text](#)
 63. Four years after the Commission ceased enforcing the Fairness Doctrine, the FCC made evidence public indicating that the marketplace was providing expanded choices of news and information and even more sources for such programming. *Broadcasters' Public Interest Obligations and S. 217, The Fairness in Broadcasting Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 9-14 (1991) (statement of Alfred C. Sikes, Chairman, FCC). [Return to text](#)
 64. Jim Cooper, *Talkers Brace for `Fairness' Assault*, Broadcasting & Cable, Sept. 6, 1993, at 44, 44. [Return to text](#)
 65. Some see overwhelming sentiment in Congress to bring back the Fairness Doctrine. As one communications lobbyist, Gigi B. Sohn, deputy director of the Media Access Project, put it, "What there isn't is the courage to do it. Basically they've been inundated by followers of conservative talk-show hosts who've been calling them up and telling them not to. And that's been enough." Rod Dreher, *Congress Cowers To Conservatives On Fairness*

Doctrine, Wash. Times, July 3, 1994, at A4. [Return to text](#)

66. Congress attempted to indisputably codify the doctrine with the Fairness in Broadcasting Act of 1987. H.R. 1937, 100th Cong., 1st Sess. (1987); S. 742, 100th Cong., 1st Sess. (1987). President Reagan vetoed it. 133 Cong. Rec. S8438 (daily ed. June 23, 1987). President Bush's threat of a veto caused a similar attempt to codify the Fairness Doctrine to fail in 1989. [Return to text](#)
67. Chairman Markey told reporters that he is committed to "putting fairness back on the books." He added that although Congress is currently preoccupied with the issue of cable rates, it will eventually focus on the issue of restoring the Fairness Doctrine. Kim McAvoy, *Who's to Blame for Cable Rereg Mess?*, Broadcasting & Cable, Oct. 4, 1993, at 60, 60. [Return to text](#)
68. "Both Telecommunications Subcommittee Chairman Ed Markey (D-Mass.) and Energy and Commerce Committee Chairman John Dingell (D-Mich.) are making the fairness bill a priority." Kim McAvoy, *Fairness Doctrine On a Roll*, Broadcasting & Cable, Aug. 2, 1993, at 39, 39. "And with Bill Clinton in the White House, they're no longer concerned about a presidential veto." *Id.* at 40. [Return to text](#)
69. "The presumption has been since 1987 that the next time we get a Democratic president, there is going to be a Fairness Doctrine," stated Thomas W. Hazlett, an economist at the University of California at Davis. Dreher, *supra* note 65, at A4. The question at hand is, will President Clinton follow in the footsteps of President Reagan and President Bush? David Bartlett, president of Radio-Television News Directors Association, was pessimistically watchful of the new administration. "While Mr. Clinton may not have content regulation at the top of his personal agenda, don't count on him to pick fights with the powerful Democratic congressional leaders who see it as their mission in life to control what goes out over radio and television." David Bartlett, *Monday Memo*, Broadcasting, Jan. 25, 1993, at 18, 18. [Return to text](#)
70. *Washington Watch*, Broadcasting & Cable, Sept. 20, 1993, at 44, 44. [Return to text](#)
71. *Id.* Limbaugh is, perhaps, the most recognizable of the talk show hosts who rail on the Fairness Doctrine. As evidence of Limbaugh's reputation for opposing the doctrine, attempts by Congress to codify the doctrine have been referred to in the popular media as "Hush Rush" legislation. Gigi B. Sohn & Andrew Schwartzman, *Fairness Not Silence*, Wash. Post, Jan. 31, 1994, at A21. In point of fact, though, a large number of other talk show hosts also helped to generate mail against the Fairness Doctrine. Former Watergate conspirator G. Gordon Liddy, now one of the country's top radio personalities said of attempts to reinstate the Fairness Doctrine, "If they did try to, Rush and I and [Pat] Buchanan would be all over them like a blanket." Dreher, *supra* note 65, at A4. [Return to text](#)
72. "I take my hat off to Rush Limbaugh and the other conservative talk-show hosts," said Gigi B. Sohn, deputy director of the Media Access Project. "I think they're absolutely wrong on the Fairness Doctrine, and I think they know it, but they've done a spectacular job of cowing Congress into not taking action."

Dreher, *supra* note 65, at A4.

Although most of the media attention seemed to center on talk radio, it should be noted that religious broadcasters also lobbied aggressively against such legislation. Harry Jessell, *Congress Urges FCC to Deal with Fairness Doctrine*, Broadcasting & Cable, Mar. 14, 1994, at 14, 14. [Return to text](#)
73. "Clinton advisor George Stephanopoulos assails radio's 'tear-it-down attitude' and calls for 'more of a balance.' The doctrine is 'not on the front burner right now,' he says. 'But there's always a chance that it's something people might want to look at.'" Amy Bernstein, *The Hush-Rush Law*, U.S. News & World Rep., June 27, 1994, at 12, 12. [Return to text](#)
74. It has been suggested by some that the Fairness Doctrine will pave its way back into the legislative arena masked behind politically correct movements concerned with "indecent programming" and "responsible journalism." Bartlett, *supra* note 69, at 18.

A few see a sinister government seeking more and more control of mass communications. Actor Michael Moriarty states that he quit NBC's *Law and Order* because he was being written out of the series due to his stand against the Clinton administration's efforts to halt TV violence. Moriarty claimed "[Attorney General] Reno wants to control mass communications using the oldest ploy the children." Joe Flint, *Moriarty Quits, Blames Violence Backlash*, Broadcasting & Cable, Feb. 7, 1994, at 22, 22.

Moriarty may be prescient, or he may simply be a good legal scholar. The Children's Television Act of 1990 forced the FCC to reinstate restrictions on advertising during programming aimed at children and imposed an obligation on broadcasters to provide programming that affirmatively addresses the "educational and information" needs of young viewers. Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. 303a-303b, 393a, 394 (Supp. IV 1992)).

The 1992 Petition for Reconsideration of the Commission's abandonment of the Fairness Doctrine filed by the Arkansas AFL-CIO and the Committee Against Amendment 2 points out the Children's Television Act "regulates broadcast content in a way that arguably requires much greater discretion than the fairness doctrine." They imply that, for this reason it would be fitting and proper to restore the doctrine. Some of the recent filings of August 1994, discussed *supra* notes 20-21, incorporate this argument. [Return to text](#)

75. The fairness doctrine works inherently to defeat its own purpose, for as soon as a broadcaster arouses public passion by covering a controversial issue, he will receive an avalanche of complaints alleging a fairness violation. Even if the complaints are invalid, the broadcaster is subject to costs of time, energy, and legal fees in order to answer the complaints. Such costs deter the small broadcaster from covering controversial issues; and it is the small broadcaster, not CBS, ABC, or NBC, who operates in small localities who must carry varying viewpoints if the United States is to make intellectual progress.

Bruce Fein, *First Class First Amendment Rights For Broadcasters*, 10 Harv. J.L. & Pub. Pol'y 81, 82 (1987). [Return to text](#)

76. *But see* Fowler & Brenner, *supra* note 35, at 247 ("[T]he reasonable expectation of license renewal enjoyed by broadcasters today comes close to a property right, in reality if not in name."). [Return to text](#)
77. Professor Coase traces the origin of the phrase "public interest, convenience, and necessity" to public utility legislation. He points to its lack of any definite meaning and suggests that "the many inconsistencies in Commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation." Coase, *supra* note 8, at 8-9. The phrase "means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority." *Id.* at 8 (quoting Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 Air L. Rev. 295, 296 (1930)). [Return to text](#)

78. Professor Baxter has pointed out how a

system of private ownership and private enforcement [similar to property rights in land] might have been adopted with regard to the radio spectrum, the initial allocation being made on the basis of historical priority as to use, unused portions being left subject to future private appropriation, as was done with the unclaimed lands of the Western territories.

Baxter, *supra* note 1, at 392. [Return to text](#)

79. "Support for the 1927 Act came, in part, from a belief that no other solution was possible, and, as we have seen, the rationale which has developed since certainly largely reflects this view." Coase, *supra* note 8, at 31. [Return to text](#)
80. *Metro Brcdst., Inc. v. FCC*, 497 U.S. 547, 567 (1990). [Return to text](#)

81. *Syracuse Opinion and Order*, *supra* note 8, para. 80. [Return to text](#)
82. Fowler & Brenner, *supra* note 35, at 228. [Return to text](#)
83. *1974 Fairness Report*, *supra* note 50, para. 28. It should be noted how philosophical disagreement rages over the relativistic concept that opinions on either side of any question are always equally valid. Commissioner Quello likes to suggest that under the Fairness Doctrine, any station that editorializes for God, Mother, and Country should give some response time to atheism, bastardy, and subversion. Interview with James Quello, *supra* note 10. [Return to text](#)
84. *1974 Fairness Report*, *supra* note 50, para. 28. [Return to text](#)
85. *Id.* [Return to text](#)
86. *See Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 517-18 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). [Return to text](#)
87. *1974 Fairness Report*, *supra* note 50, para. 28. [Return to text](#)
88. *Id.* [Return to text](#)
89. *Id.* (emphasis in original). [Return to text](#)
90. Fowler & Brenner, *supra* note 35, at 221. [Return to text](#)
91. *In re Application of Great Lakes Brdcast. Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd in part on other grounds*, 37 F.2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930). [Return to text](#)
92. Christopher H. Sterling & John M. Kittross, *Stay Tuned: A Concise History of American Broadcasting* 633 (2d ed. 1990). [Return to text](#)
93. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 389-90 (1969); *see also* Baxter, *supra* note 1, at 394. [Return to text](#)
94. A number of courts are now recognizing the profusion of media outlets available in almost all markets. In *Arkansas AFL-CIO*, the court predicted the Supreme Court would be likely to reconsider *Red Lion* "now that broadcast frequencies and channels have become much more available." *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 n.12, 1443 (8th Cir. 1993) (Arnold, J., concurring).

In a subsequent case, the Eighth Circuit quoted *Arkansas AFL-CIO* pointing out that "technological changes since the Supreme Court decided *Red Lion Broadcasting Co. v. FCC* in 1969 have largely undermined the basis for the existing pervasive federal regulation of the broadcasting industry as a whole and, as a result, `raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today.'" *Forbes v. Arkansas Educ. TV Comm. Network Found.*, 22 F.3d 1423, 1431 (8th Cir. 1994) (McMillian, J., concurring in part and dissenting in part), *reh'g denied*, 1994 U.S. App. LEXIS 14,717 (8th Cir. June 14, 1994).

The D.C. Circuit also invited the Supreme Court to revisit *Red Lion*, observing how such analysis "inevitably leads to strained reasoning" and concluding "the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference." *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). [Return to text](#)
95. *NBC v. United States*, 319 U.S. 190, 213 (1943). [Return to text](#)
96. *Red Lion*, 395 U.S. at 367.

[I]t is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 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.

Id. at 388-89. [Return to text](#)

97. Newton N. Minow, *Being Fair to the Fairness Doctrine*, N.Y. Times, Aug. 27, 1985, at A23. [Return to text](#)

98. *Id.* [Return to text](#)

99. *Id.* [Return to text](#)

100. *Id.* [Return to text](#)

101. *Id.* [Return to text](#)

102. Don R. Le Duc, *Deregulation and the Dream of Diversity*, J. Comm., Autumn 1982, at 164, 164 (emphasis in original). [Return to text](#)

103. The relationship between station and community envisioned in those early days is similar to the way the Armed Forces Radio Service (AFRS) now serves American military personnel overseas. In some foreign countries, the AFRS station may be the only source of information, education, and entertainment available by radio for those who do not speak the native language. Hence, the AFRS station must be "all things to all persons" by offering a wide variety of programs designed to appeal to all listener tastes. It is instructive to see how this programming philosophy parallels the duty imposed on 1930s broadcasters by the Federal Radio Commission.

[T]he tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports and news, and matters of interest to all members of the family find a place.

In re Application of Great Lakes Brdcast. Co., 3 F.R.C. Ann. Rep. 32, 34 (1929), *rev'd in part on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930). [Return to text](#)

104. *See I Broadcasting and Cable Y.B.* B-511 (1994). [Return to text](#)

105. *See generally* Erik Barnouw, The Sponsor 9-41 (1978) (tracing the development of radio and television). [Return to text](#)

106. Erik Barnouw, Tube of Plenty: The Evolution of American Television 140-43 (1975). [Return to text](#)

107. Pundits predict that compression techniques combined with fiber optics will result in exponentially greater channel capacity for cable systems. One figure frequently cited is 500 channels, although this is a totally arbitrary number that has caught the fancy of the popular media. Far more channel capacity than 500 is already possible with present technology. [Return to text](#)

108. One cable network, C-SPAN, provides continual live coverage of congressional hearings and floor debates. [Return to text](#)

109. It is interesting that although foreign-language stations do program for a specific audience, that audience itself is segmented by programming preference. Although the programs are all in, for example, Spanish, they run the gamut of programming types from music to drama to news. Foreign-language narrowcasting may be on the horizon. [Return to text](#)

110. Fowler & Brenner, *supra* note 35, at 233. [Return to text](#)

111. *See id.* at 241 ("In basing editorial and program judgments on their perceptions of popular demand, broadcasters enforce the paramount interests of listeners and viewers."). [Return to text](#)
112. The FCC said, "[T]he growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary." *FCC Fairness Doctrine Report*, *supra* note 13, para. 82. [Return to text](#)
113. Fowler & Brenner, *supra* note 35, at 210. [Return to text](#)
114. George H. Shapiro et al., 'CableSpeech': The Case for First Amendment Protection at xii (1983). [Return to text](#)
115. *See FCC Fairness Doctrine Report*, *supra* note 13, para. 5. [Return to text](#)
116. Jon Lafayette, *ACLU Chief Strossen Sees TV as Pre-eminent Battleground*, *Electronic Media*, Dec. 13, 1993, at 1, 54. [Return to text](#)
117. Harry A. Jessel, *Gore Stumps for Superhighway Bill*, *Broadcasting & Cable*, June 20, 1994, at 36, 36. [Return to text](#)
118. Vice President Al Gore, Remarks at the National Press Club, *supra* note 23. [Return to text](#)
119. *See April Fool's Day on the Data Superhighway*, *Wash. Post*, Mar. 30, 1994, at C3. [Return to text](#)
120. *Dole Questions FCC's Regulatory Prowess*, *Broadcasting & Cable*, Apr. 18, 1994, at 13, 13. [Return to text](#)
121. John Milton, Areopagitica, in Complete English Poems of Education, Areopagitica 573 (Gordon Campbell ed., 1990) (1644). [Return to text](#)
122. *Id.* at 601. [Return to text](#)
123. Americans take a dim view of governmental restrictions on news coverage. "[O]nly a minority (29%) said they favored restrictions on news organizations in response to the question: 'Generally, do you favor or oppose putting restrictions on what newspapers and TV news programs can report?'" Christopher Stern, *Viewers Trust TV News, Support Censorship*, *Broadcasting & Cable*, Mar. 21, 1994, at 32, 32. [Return to text](#)