community with its first local FM service. Accordingly, it is proposed to amend the FM Table of Assignments, Section 73.202(b) of the Rules, as concerns the community listed below:

| City | Channel No. | |
|---|---|---|
| | Present | Proposed |
| Vienna, W. Va. | | 261A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein.

Note.—A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

5. Interested parties may file comments on or before June 25, 1984, and reply comments on or before July 10, 1984, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows: Dennis F. Begley, Esq., Cheryl A. Kenny, Esq., Reddy, Begley & Martin, 2033 M Street, N.W., Washington, D.C. 20036 (Counsel to petitioner).

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Assignments, § 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend §§ 73.202(b), 73–504 and 73–606(b) of the Commission's Rules*, 46 FR 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634–6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 US.C. 154, 303)

Federal Communications Commission.

**Roderick K. Porter,**

*Chief, Policy and Rules Division, Mass Media Bureau.*

## Appendix

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended, and §§ 0.61, 0.204(b) and 0.283 of the Commission's Rules, it is proposed to amend the FM Table of Assignments, § 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed assignment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is assigned, and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See § 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in the *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to assign a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in §§ 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See § 1.420 (a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of § 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, NW., Washington, D.C.

[FR Doc. 84–12880 Filed 5–11–84; 8:45 am]

BILLING CODE 6717–01–M

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**47 CFR Part 73**

**[MM Docket No. 84–439; RM–4602]**

## Major Television Markets in Fresno-Visalia, California; Proposed Changes in Table of Assignments

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This action proposes to amend the Table of Major Television Markets by including Visalia, California, with Fresno, California, as a hyphenated market in response to a Petition for Rule Making filed by Pappas Telecasting, Inc.

**DATE:** Comments must be filed on or before June 28, 1984, and reply comments must be filed on or before July 13, 1984.

**ADDRESS:** Federal Communications Commission, Washington, D.C. 20554.

**FOR FURTHER INFORMATION CONTACT:** Joel Rosenberg, Mass Media Bureau, (202) 634–6530.

**List of Subjects in 47 CFR Part 73**

Television broadcasting.

## Notice of Proposed Rule Making

In the Matter of Amendment of § 76.51, Major Television Markets, (Fresno-Visalia, California) MM Docket No. 84-439, RM-4602.

Adopted: May 1, 1984.

Released: May 7, 1984.

By the Chief, Policy and Rules Division.

*Introduction*

1. Before the Commission is a petition for rule making filed by Pappas Telecasting, Incorporated ("petitioner") requesting that the Commission revise its list of the top 100 television markets set forth in § 76.51 of its cable television rules by including Visalia, California, in the market now designated Fresno, California (#72). Petitioner, licensee of Television Station KMPH, Visalia, specifically proposes a Fresno-Visalia hyphenated market designation.

2. Petitioner asserts § 73.658(m) of the Commission's Rules "unfairly and unintentionally" eliminates the exclusivity in the purchase of non-network syndicated programming in the Fresno-Visalia market which it is entitled to, as it can now obtain exclusivity only against other television stations in communities within 35 miles of Visalia. Fresno is said to be located "slightly more than 35 miles" from Visalia. According to petitioner, its station places a city grade signal "well beyond" Fresno, and it is authorized to use a dual-city "Visalia-Fresno" identification, but, nevertheless, because KMPH was not in operation when the top 100 markets were originally designated, Visalia was not combined with Fresno in a hyphenated designation. Petitioner claims that this situation is "particularly unfair," because its principal competitors, as network affiliates, are provided with "many hours" of programming, while petitioners must purchase programming "at great expense." Petitioner asserts that Visalia has "steadily increased" in stature in the economy of the San Joaquin Valley and has nearly doubled in population to over 50,000 between 1970 and 1980. Petitioner states that both communities share "a great deal" in common, and travel between them is an "everyday occurrance" via an interstate highway.

3. Petitioner states that Commission policy is to designate hyphenated markets where communities should be treated as one market because of their "proximity and common social, cultural, trade, and economic interests," citing *Hampton-Norfolk-Portsmouth-Newsport News, Virginia*, 53 R.R. 2d 53, 55 (Mass Media Bureau 1983), and *Lancaster-Lebanon, Pennsylvania*, 24 R.R. 564 (1962). Petitioner also cites *New York, New York-Linden-Paterson, New Jersey and Newark, New Jersey*, 47 F.C.C. 2d 752 (1974), wherein the Commission added a community to a hyphenated designation in response to a request based on a station's inability to secure non-network exclusivity and where there was a showing that the communities involved comprised a single market within which stations located therein competed. According to petitioner, the television industry recognizes the "singularity" of the Fresno-Visalia market. Petitioner states that the Neilson and Arbitron designations reflect that both communities are served by all stations within their combined designation, that all stations rely on both communities for advertising revenues, and that the Fresno stations "regularly" cover news and public affairs in both communities.

4. Petitioner further asserts that it is significant that the Commission previously recognized developments in the Fresno-Visalia market subsequent to adoption of the cable television rules, citing *Fresno Cable Television Company, Inc.*, 57 F.C.C. 2d 134 (1975), wherein Section 76.54 of the Rules providing for determination of significantly viewed signals was amended so as to require cable coverage of KPMH on a county-wide basis. According to petitioner, there is no reason why developments in the market should not similarly be acknowledged with respect to §§ 76.51 and 73.658(m).

*Discussion*

5. Hyphenated markets recognized for purposes of the rule against territorial exclusivity in non-network arrangements[1] are those specified in Section 76.51 of the Rules and other (below the top 100) markets contained in Arbitron's Television Market Analysis. The hyphenated market exception is based on the premise that markets are designated as hyphenated so as to reflect the fact that stations located therein are, in fact, competitors in the same market. *CATV-Non Network Arrangements*, 46 F.C.C. 2d 892, 898 (1974). The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different cities within the market area. *Cable Television Report and Order*, 36 F.C.C. 2d 143, 176 (1972). The Commission subsequently referred to this definition in *New York, New York-Linden-Paterson, New Jersey and Newark, New Jersey* cited by petitioner, wherein the Commission recognized that a showing had been made that Newark qualified for inclusion in the existing hyphenated major television market designation and, accordingly, amended § 76.51.

6. Petitioner's prima facia showing that its city grade signal reaches beyond Fresno, that both Visalia and Fresno are served by all stations in these communities, that these stations rely on both communities for advertising revenues, and that Fresno stations regularly cover news and public affairs in both communities indicates that Visalia and Fresno constitute a single television market. In light of this showing, the Commission will propose to amend § 76.51 by adding Visalia to the Fresno designation to create a Fresno-Visalia hyphenated market designation. As set forth below, comments in response to this proposal should, among other things, address the issue of whether, in fact, these two communities constitute a single television market.

7. Accordingly, the Commission proposes to amend the Table of Major Television Markets, § 76.51 of the Commission's Rules, as follows:

| Present | Proposed |
|---|---|
| (79) Fresno, Calif. | (72) Fresno-Visalia, Calif. |

8. *Regulatory Flexibility Act Initial Analysis*

I. *Reason for Action.* This action derives from a request for a rule making filed with the Commission. In this proceeding, we seek to develop a record and to elicit comments on a proposed rule. The proposed rule is part of the Commission's ongoing review and evaluation of its rules and policies.

II. (a) *Objective.* This proceeding will elicit comments on the public interest benefits of the proposed rule change in accordance with fulfilling the mandate of Section 309(a) of the Communications Act of 1934, as amended.

(b) *Legal Basis.* The legal basis for eliciting comments on this proposed rule is found in Sections 4(i) and 303(r) of the Communications Act.

III. *Description, Potential Impact and Number of Small Entities Affected.* The proposed rule change would have no significant impact on small entities.

[1] Section 73.658(m) of the Commission's Rules provide that a television station may not secure territorial exclusivity for non-network programming against another station whose community of license is more than 35 miles distant from its own community of license, except that such exclusivity is not prohibited where the other station is located in a designated community in the same "hyphenated market."

IV. *Recording, Record Keeping and Other Compliance Requirements.* There is no additional impact.

V. *Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rule Change.* There is no overlap, duplication, or conflict.

VI. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives.* There is no significant alternative.

**Filing Responses to This Notice**

9. Interested parties may file comments on or before June 28, 1984, and reply comments on or before July 13, 1984.

10. The action herein is taken pursuant to authority found in sections 4(i), 5(c)(1), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended, and §§ 0.281(b)(6) and 0.204(b) of the Commission's Rules.

11. *Showings Required*—Comments are invited on the proposal discussed in this *Notice of Proposed Rule Making.* The proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed amendment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings.

12. *Comments and Reply Comments: Service*—Pursuant to applicable procedures set out in §§ 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in this *Notice of Proposed Rule Making.* All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See § 1.420 (a), (b) and (c) of the Commission's Rules.)

13. *Number of Copies*—In accordance with the provisions of § 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

14. *Public Inspection of Filings*—All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, NW., Washington, D.C.

15. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of the proposed rule on small entities. Written public comments are requested on the IRFA. The comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as reponses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. 96–354, 94 Stat. 1164, 50 U.S.C. 601, *et seq.* (1981).

16. For further information concerning this proceeding, contact Joel Rosenberg, Mass Media Bureau, (202) 634–6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve amendments to the Commission's Rules. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment to which the reply is directed constitutes an *ex parte* presentation and shall not be considered in the proceeding.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

**Roderick K. Porter,**

*Chief, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 84–12884 Filed 5–11–84; 8:45 am]

BILLING CODE 6712–01–M

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**47 CFR Part 73**

**[Gen. Docket No. 84–282; FCC 84–140]**

## Inquiry Into the General Fairness Doctrine Obligations of Broadcast Licensees

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of inquiry.

**SUMMARY:** Action herein requests comment on the purposes, effects, relevancy, and legal aspects of the fairness doctrine referenced in § 73.1910 of the Commission's Rules and Regulations which imposes upon broadcasters the twofold obligation to cover controversial issues of public importance and to provide reasonable opportunities for the presentation of contrasting viewpoints on such issues. The purpose of the proceeding is to obtain as complete a record as possible to enable the Commission to recommend a firm course of action, if warranted, with respect to continued imposition of these obligations on broadcasters either through issuance of a notice of proposed rule making or, if more appropriate, submission of new legislative recommendations to Congress.

**DATE:** Comments are due by August 6, 1984 and replies by September 5, 1984.

**ADDRESS:** Federal Communications Commission, Washington, D.C. 20554.

**FOR FURTHER INFORMATION CONTACT:** Stephen A. Bailey, Office of General Counsel, (202) 254–6530.

**List of Subjects in 47 CFR Part 73**

Television, Radio broadcast.

**Notice of Inquiry**

In the matter of inquiry into § 73.1910 of the Commission's rules and regulations concerning the general fairness doctrine obligations of broadcast licensees; Gen. Docket No. 84–282.

Adopted: April 11, 1984.

Released: May 8, 1984.

By the Commission: Commissioner Quello issuing a separate statement; Commissioner Rivera concurring and issuing a statement at a later date.

**I. Introduction**

1. We are today initiating a notice of inquiry to reassess the wisdom of applying general fairness doctrine obligations to broadcast licensees. The fairness doctrine, which has been in effect for over thirty years, imposes upon broadcasters the obligation to cover controversial issues of public importance and to provide reasonable opportunities for the presentation of contrasting viewpoints on such issues.[1] A preliminary analysis indicates that significant new developments and changes in the electronic and print media over the past decade have

[1] The general fairness doctrine was officially incorporated into § 73.1910 of the Commission's Rules and Regulations by the Commission's action in *Order* (FCC 78–681) released October 16, 1978, 43 FR 45842, which further reorganized, restructured, and revised Part 73 of the Commission's Rules and Regulations applicable to broadcast licensees.

contributed to an extremely dynamic, robust, and diverse marketplace of ideas that may call into question the continued necessity of the doctrine as a means of ensuring the attainment of First Amendment objectives. In addition, recent developments in First Amendment jurisprudence and communications law in general raise questions as to whether our continued adherence to the doctrine might be contrary to the public interest and constitutional principles. Accordingly, we are hereby instituting this notice of inquiry to explore the question of the continued vitality of that doctrine.

2. At the outset, it is important that we dispel possible misconceptions that could arise in the public eye regarding the institution of this proceeding. First, we do not have any intention to alter or change any existing policies or laws relating to the fairness doctrine as the next procedural step following the submission of this round of comments. For this reason, we have decided to commence our examination of the fairness doctrine through institution of a notice of inquiry rather than notice of proposed rule making. Of course, it is possible that the comments could show that substantive changes relating to the doctrine should be made. If that proves to be the case, we shall institute a notice of proposed rule making. On the other hand, we may conclude that any proposed changes to the fairness doctrine we find to be appropriate should be accomplished only through congressional action. In that case, we shall consider submitting our proposals to Congress in the form of legislative recommendations. Finally, we may conclude based upon the evidence compiled in the proceeding that no further agency action is warranted. Should we so decide, then we are hopeful that our inquiry at a minimum will have served in providing a clearer, more accurate understanding of the fairness doctrine, its operation, and administration.

3. Similarly, we also wish to emphasize that institution of this proceeding is in no way intended to signal any relaxation of our administration and enforcement of fairness doctrine obligations applicable to broadcasters. We have previously stated our commitment to the vigorous enforcement of the fairness doctrine and its corollary obligations and we wish to reaffirm that commitment throughout the pendency of this proceeding. Accordingly, we expect broadcast licensees to comply with their fairness doctrine obligations as fully as before.

4. Our purpose in instituting this inquiry is to undertake the most searching and comprehensive reexamination of the fairness doctrine that this agency has ever had. Our goal is to obtain as complete a record as possible by inviting comment on all facets of the fairness doctrine, including its legal and policy justifications, its constitutional and statutory underpinnings, its purposes, effects, and relevancy. We are particularly interested in the impact the fairness doctrine has, or absence thereof might have, on broadcasters, government, but, most importantly of all, on members of the public. Indeed, in order to ensure that the record in this proceeding is as complete as possible, we intend, at a minimum, to provide an opportunity at some stage in this proceeding either thorough an *en banc* Commission meeting or some other oral proceeding for legal scholars, communications experts, government policymakers, and members of the public to discuss the profound First Amendment issues that are inherently involved in governmentally-imposed fairness doctrine regulation. Only after we have completed an exhaustive and thorough study of the doctrine, its aspects and many implications, will we then feel confident to recommend any firm course of action. In this connection, in an attempt to secure the widest possible comment and stimulate the widest exchange of ideas on the subject, we have set forth what we believe are some of the strongest arguments *against* retention of the fairness doctrine in the hope that, by proceeding in this fashion, this will in turn generate submission of the most compelling reason *for* its retention.

5. There are several reasons why we believe that an inquiry of this nature is particularly appropriate at this time. First, we have emphasized on previous occasions that we have a continuing obligation to re-evaluate our policies in light of changing circumstances; indeed, we have been reminded that a regulation that was reasonable when adopted may be most inappropriate if the problem addressed by the rule ceases to exist.[2] As intimated earlier, changes in the marketplace and the relevance of those changes to current First Amendment jurisprudence raise the question whether the aims of the fairness doctrine—"the right of the public to receive suitable access to political, aesthetic, moral and other ideas and experiences," [3] can be achieved without the necessity of governmental intervention. Second, we note that, very recently, the Senate Commerce Committee held hearings on S. 1917, the "Freedom of Expression Act of 1983," a bill introduced by Senator Robert Packwood intended to accord the broadcast media parity with the First Amendment Freedoms enjoyed by the print media.[4] Finally, we note that it was less than three years ago when we submitted a set of legislative proposals to Congress that included specific legislative recommendations that our statutory authority to impose fairness and equal time obligations on broadcast licensees be repealed.[5] Accordingly, we believe that this proceeding should prove instrumental in assuring that debate on these extremely important issues continues in a positive direction leading toward a fruitful and expeditious resolution either by this agency or, if more appropriate, by Congress.

6. We also believe that it bears emphasizing that the Commission has never undertaken a comprehensive analysis of the legal underpinnings of the fairness doctrine. While we have previously instituted exhaustive proceedings on the merits of the doctrine, including the possibility of alternatives "outside the Fairness Doctrine" such as access as a means of satisfying broadcast licensees' obligations, we have assumed that the statutory nature of the doctrine was a

[2] *See, e.g., Home Box Office, Inc.* v. *FCC*, 567 F. 2d 9, 36 (D.C. Cir. 1977), *cert. denied* 434 U.S. 829 (1977) ("regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist"); *see also Geller* v. *FCC*, 610 F. 2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears").

[3] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) (hereafter *"Red Lion"*). See also Report on the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 FCC 2d 1, 6 (1974) (hereafter "1974 *Fairness Report"*) ("The purpose and foundation of the fairness doctrine is therefore that of the First Amendment itself: 'to preserve an uninhibited marketplace of ideas in which truth will undoubtedly prevail, rather than to countenance monopolization of that market, whether by the Government itself or a private licensee' " (citation omitted)).

[4] In an effort to ensure further that the record in this proceeding is as comprehensive as possible, we are hereby incorporating by reference the materials and evidence adduced during the Senate Commerce Committee hearings on S. 1917.

[5] On September 17, 1981, the Commission approved certain proposals for amending the Communications Act, *see* "FCC Sets Forth Proposals for Amending Communications Act," Report No. 5068 (September 17, 1981). On October 2, 1981, the Commission, in a transmittal letter to the Vice President, forwarded these legislative proposals to the United States Senate.

"given." [6] Not until approximately seven years ago in the agency's review of the original 1974 *Fairness Report, supra,* was a serious question raised as to whether the doctrine and the obligations thereunder were statutorily required by the Communications Act.[7] In that proceeding, then Chairman Wiley, in a separate statement to the Commission's action, urged the Commission to initiate an inquiry into the basis and utility of the fairness doctrine:

> While I recognize the fact that there is room for debate concerning the meaning of the 1959 amendments to the Act, I nevertheless believe that it would be desirable for the Commission to initiate a public inquiry which would afford interested parties an opportunity to comment on our legal authority, and also examine the appropriate size and scope of an experiment. I am hopeful that, in the not too distant future, the Commission or the Congress will look more favorably on the idea of reforming the fairness doctrine so as to apply it only in circumstances where there is a realistic need for government regulation.[8]

Accordingly, in order to revisit the question of whether the fairness doctrine comports with the public interest, we believe it is also important that we explore the question of what legal authority Congress vested in us under the Communications Act of 1934, as amended, and, in particular, under the 1959 legislative amendments to section 315 of the Act,[9] to determine whether we have the agency discretion to significantly modify or even repeal the fairness doctrine.

7. The remainder of this notice is divided into three major sections. In section II (paras. 9–24) we provide a review of the regulatory genesis and evolution of the fairness doctrine. Section III (paras. 25–95) provides a current reappraisal of the doctrine including an examination of the mass media marketplace; an examination of the policy reasons underlying the doctrine; and an examination of constitutional considerations, i.e., whether the doctrine continues to retain its constitutional vitality in the light of developing First Amendment jurisprudence that suggests a developing disfavor toward application of analogous regulation and principles to other media and forms of expression.

8. In section III (paras. 96–120) we also provide an analysis of the legislative history relating to the fairness doctrine discussing several alternative interpretations of its intended binding effect. These include: (1) That Congress, by including in section 315 of the Act specific language referencing the fairness doctrine, sought to impose statutorily the fairness doctrine and its obligations upon broadcasters; (2) that Congress did not intend to impose statutorily such obligations on broadcasters but merely gave recognition to the fairness doctrine in Section 315 because it did not wish to disturb the regulatory *status quo* in any respect other than by creating news exemptions from section 315's equal opportunity ("equal time") requirements; or (3) that Congress meant to guarantee that the Commission would continue to apply the fairness doctrine to broadcast coverage of political news to ensure that broadcasters could not abuse the newly-created news exemptions to the equal time laws. Although our analysis suggests that Congress may not have intended to strip completely our discretion to modify the application of the doctrine but rather merely intended that we guard against abuse of the exemptions, we admit that the answer is by no means clear-cut and, accordingly, specifically invite comment on whether the 1959 amendments to section 315 should be read as stripping this agency of any discretion to modify or repeal the fairness doctrine under the public interest standard of the Communications Act. The final section IV contains principal questions upon which we seek comment, as well as filing deadlines and other procedural information.

## II. History of Fairness Doctrine

9. Before we proceed further, we shall first provide a summary review of the fairness doctrine, its constituent elements, and how they evolved under the public interest, convenience and necessity standard. Such a review is, in our estimation, extremely important to a full understanding of the fairness doctrine as well as of our decision to undertake a reappraisal of the doctrine.[10] an examination of the regulatory development and history of the doctrine reveals an evolutionary process,[11] spanning a considerable period of time, and marked by a considerable uncertainty as to the proper approaches and tools essential to insure that licensees operated in the public interest.

10. In *Great Lakes Broadcasting,* 3 F.R.C. Annual Rep. 32 (1929), *rev'd on other grounds,* 37 F. 2d 993 (D.C. Cir. 1930), *cert. denied* 281 U.S. 706 (1930), the first case to provide support for a fairness principle in broadcasting, the Federal Radio Commission struggled over the question of whether broadcast stations were public utilities. Although the FRC concluded that they were not public utilities in the same manner as telephone or telegraph companies that are required to accept and transmit for all persons on an equal basis, neither did it conclude that broadcasters were completely "out of the category of public utilities," *id.* at 33. Because broadcast frequencies were limited and not available to everyone as a matter of right, broadcasters were subject to a differing "standard of public interest, convenience, and necessity" based on their duties to listeners. *Id.* at 33.

11. In response to the argument that broadcasters were more like public utility common carriers, the FRC pointed out that the applicability of Section 18 of the Act which required equal opportunities for political candidates was not inconsistent with its own characterization of broadcasters because that section imposed no affirmative obligation to provide access to any particular political candidate. In this context, the FRC stated:

> [T]he emphasis is on the listening public, not on the sender of the message. It would not be fair, indeed it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public. *The great majority of broadcasting stations are, the commission is glad to say, already tacitly recognizing a broader duty than the law imposes upon them.* (emphasis added).

*Id.* at 33.[12]

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[6] *Study of Fairness Doctrine, Notice of Inquiry,* 30 FCC 2d 26, 27 (1971).

[7] *Reconsideration of Fairness Doctrine Report and Order,* 58 FCC 2d 691 (1976).

[8] 58 FCC 2d at 700–701.

[9] *See Act of September 14, 1959,* section 1, Pub. L. 86–274, 73 Stat. 556, amending 47 U.S.C. 315(a).

[10] This review is limited to the general fairness doctrine and, accordingly, does not include the personal attack and political editorializing rules. For a history of these rules and their evolution, *see Repeal or Modification of the Personal Attack and Political Editorial Rules, Notice of Proposed Rule Making in Gen. Docket 83–484,* 48 FR 28295 (June 21, 1983).

[11] The early evolution of the doctrine occurred primarily through case law rather than through the rule making proceedings that now characterize most major FCC policy initiatives and directives.

[12] In that same case, the FRC further observed that the public interest would not be served by persons engaged in broadcasting programs exclusively for the private interests of individuals or groups and, accordingly, propaganda stations "are not consistent with the most beneficial sort of discussion of public questions." *Id.* at 34. Instead, the FRC stated:

> As a general rule, postulated on the laws of nature as well as on the standard of the public interest, convenience, and necessity, particular

Continued

12. Subsequent decisions by the Federal Radio Commission reinforced the princple established in *Great Lakes* that the public interest standard did not encompass "operation of broadcasting stations exclusively by or in the private interests of individuals or groups so far as the nature of the programs are concerned, "*id.* at 34, but they did not articulate any clear obligation on the part of broadcasters to present controversial matters to the public. Thus, for example, in *Chicago Federation of Labor*, 3 F.R.C. Annual Rep. 36 (1929), *aff'd* 41 F.2d 422 (D.C. Cir. 1930), the FRC denied a licensee's application for modification on the grounds that its programming primarily focused upon the needs and interests of "labor", not the concerns of the general population, and as such did not serve the public interest. The FRC stated that "there are not enough frequencies within the broadcast band to give to each of the various groups of persons in the U.S. a channel on which to operate a broadcast station." *Id.* In finding that there was "no place for a station catering to any group," the FRC stressed that "all stations should cater to the general public and serve public interest as against group or class interest." *Id.*[13]

13. When the Federal Communications Commission was established by Congressional passage of the Communications Act in 1934, it followed the same regulatory philosphy as its predecessor agency. For example, in *Young People's Assoc. for the Propagation of the Gospel*, 6 FCC 178 (1938), the Commission denied an application for a new broadcast station that was intended to be used primarily to disseminate religious programs to advance a fundamentalist interpretation of the Bible.[14] The Commission held that facilities of a station "devoted primarily to one purpose" and serving "as a mouthpiece for a definite group or organization" could not be construed as "serving the public interest." *Id.* at 181. In addition, it specifically approved the principle enunciated in the *Chicago Federal* case that, under the public interests criterion, the interests of the listening public are paramount to the interests of the individual applicant." Thus, the new agency followed FRC decisions in requiring provision of program fare that appealed to the general public rather than a select few. Absent from these early FRC and FCC decisions, however, was any clearly expressed requirement that operation under the public interest standard campelled an obligation to provide contrasting viewpoints on controversial issues.

14. With the Commission's decision in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1940), however, came a new, more expansive meaning of the public interest standard and also a more restrictive view of broadcaster's latitude under that standard. In considering whether to renew the license of Yankee Network, the Commission frowned on the licensee's activities in broadcasting editorials urging the election of certain candidates for public office and supporting particular views on questions of public controversy. This, the Commission declared, "revealed a serious misconception of its duties and functions under the law." *Id.* at 339.[15] The Commission also said:

> Radio can serve an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be advocate.

*Id.* at 340. Thus, the Commission expanded its general prohibition against use of broadcast facilities for private or individual interests to include a specific ban forbidding editorializing broadcast licensees.

15. The *Mayflower* decision was important not only because the agency enacted a specific edict against broadcast editorializing but because it appeared to break new ground by announcing that, under the public interest standard, broadcast licensees had specific *affirmative obligations to cover public issues:*

> one licensed to operate in a public domain * * * has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias.

*Id.*[16] Thus, we see a considerable leap from *Great Lakes* and the early cases with their rudimentary notions of "fairness" to the subsequent Commission decision in *Mayflower* articulating a concept of "fairness" that encompassed broadcast coverage of controversial issues but not editorializing by licensees themselves.

16. As a result of the *Mayflower* decision, considerable controversy, confusion and uncertainty ensued, especially with respect to the nature and scope of broadcasters' obligations under the Act. In *United Broadcasting Co.*, 10 FCC 515 (1945), the Commission provided some guidance to one of the many questions surrounding this controversy by holding that a station could not adopt a general policy refusing to sell time for the discussion of controversial issues.[17] Although noting that broadcast stations are not common carriers under section 3(h) of the Act, the Commission held, as it had previously emphasized in *Mayflower*, that station licensees have "a duty to be sensitive to the problems of public concern in the community" and therefore must "make sufficient time available, on a nondiscriminatory basis, for full discussion thereof" without attempts by the licensee to impose its views through censorship of such matter. *Id.* at 517. According to the Commission, "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues" is "inconsistent with the concept of the public interest established by the Communications Act." *Id.* at 518.[18] Although *United* provided some further but limited guidance to broadcasters concerning their obligations under the Act, the controversy over the breadth of *Mayflower* and its policies did not abate.

17. In 1948, "in view of the apparent confusion concerning certain of the Commission's previous statements on

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doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public the microphone will undoubtedly be available. If it is not, a well-founded complaint will receive the careful consideration of the commission in its future action with reference to the station complained of.

[13] *See also Trinity Methodist Church*, 62 F. 2d 850 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932); and *KFKB Broadcasting Ass'n v. FRC*, 47 F. 2d 670 (D.C. Cir. 1931).

[14] The applicant stated that the broadcast of religious programs on its proposed facilities "would be extended only to those whose tenets and beliefs in the interpretation of the Bible coincide with those of the applicant." 6 FCC at 180.

[15] Indeed, the Commission further observed that "the station seems to have taken pride in the fact—that the purpose of these editorials was to win public support for some person or view favored by those in control of the station." 8 FCC at 339.

[16] 8 FCC at 140. The Commission added:

> The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation.

[17] The station's policy was modelled upon provisions in the code of the National Association of Broadcasters which recommended, with certain expections not germane here, that no time should be sold for the presentation of public controversial issues.

[18] The Supreme Court's decision in *Columbia Broadcasting System, Inc.*, v. *Democratic National Committee*, 412 U.S. 94 (1972) (hereafter "*CBS v. DNC*"), subsequently established that neither the Communications Act nor the First Amendment requires broadcasters to accept paid political advertisements thereby undermining, if not outrightly overruling, the principle established in *United*.

these vital matters by broadcast licensees and members of the general public," the Commission *sua sponte* held several days of hearings on "the obligations of broadcast licensees in the field of news, commentary and opinion," and, in the following year, issued a comprehensive policy statement, *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949) (hereafter *"Report on Editorializing"*). In this *Report*, which has served as the basis for all subsequent fairness rulings, the Commission not only reversed its policy on broadcast licensee editorializing but also framed for the first time that set of obligations which collectively are referred to as the fairness doctrine.[19] Expressing the view that "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is "one of the most vital questions of mass communication in a democracy," the Commission further stated:

> The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and disscussion of public issues of interest in the community served by the particular station. And we have recognized with respect to such programs, the paramount right of the public in a free society to be informed and have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.

*Id.* at 1249 (footnote omitted)[20].

Thus, in formalizing the fairness doctrine, the Commission explicity recognized a two part duty on the part of broadcasters (1) to devote a reasonable percentage of time for the coverage of controversial issues and (2) to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.

18. In reversing its prior directive against broadcast licensee editorializing, the Commission expressed the view that "a station's willingness to stand up and be counted" might contribute more readily toward "a climate of fairness and equal opportunity for expression of contrary views" since the public would have less reason to fear "the open partisan" than the "covert propagandist". *Id.* at 1254. The Commission added, moreover, that just as a mere prohibition of a strongly held belief by a licensee would not necessarily "insure fair presentation of that issue," neither would "open advocacy necessarily prevent an overall presentation of the subject." *Id.* In sum, an open-partisan approach by broadcasters was seen as preferable to and less dangerous than one that had inherent in it a tendency toward covert broadcaster favoritism. This philosophy, which in part underlies our decision to reassess the fairness doctrine, is thus not a new one. Finally, the Commission swept aside constitutional arguments of broadcastrs by stating that "a requirement . . . in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the first amendment" *Id.* at 1256.

19. For a substantial time afterwards, there were relatively few regulatory developments in this area.[21] In 1963, the Commission, in *Cullman Broadcasting Co.*, 40 FCC 576, established the principle that a station licensee must provide free time for the presentation of opposing views even if a paid sponsor was unavailable.[22] In 1964, the Commission adopted *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 FR 10415 (1964) (commonly referred to as the "Fairness Doctrine Primer"), which spelled out in somewaht more detail the obligations of broadcasters under the fairness doctrine.

20. In 1967, however, a new storm of controversy developed from a Commission decision in *WCBS–TV*, 8 FCC 2d 381, *stay and recon. denied*, 9 FCC 2d 921 (1967), *aff'd Banzhaf* v. *FCC*, 405 F.2d 1082 (1968), *cert. denied* 396 U.S. 842 (1969), to extend the doctrine to broadcast advertising. For the first time, the Commission applied the fairness doctrine to product advertising by ruling that the advertisement of cigarettes on broadcast stations raised a controversial issue of public importance. The Commission reasoned that cigarette smoking itself was a controversial health issue and, accordingly, required broadcasters to provide opportunities for contrasting viewpoints. However, cognizant that extension of the doctrine to ordinary product advertising could seriously undermine the commercial foundation of the nation's broadcasting system, the Commission specifically emphasized the uniqueness of this particular case because, among other reasons, cigarette smoking had been found by congressional and other government action to pose a serious threat to general public health, *see* 9 FCC 2d at 943.

21. In subsequent cases, the Commission found itself unable to articulate any satisfactory standard by which to judge what types of programming would trigger fairness obligations. The Commission attempted to limit its review of licensee judgments concerning public health and safety factors raised by products advertised on broadcast stations, but such attempts proved futile. For example, a Commission decision declining to hold that product advertisements promoting the sale of high-powered automobiles and lead gasoline triggered fairness obligations on the part of broadcast licensees was reversed on the basis that such advertisements invoked fairness obligations by raising issues concerning the controversial effect of such products on public health and safety and therefore were indistinguishable from the rationale previously applied to cigarette advertising.[23] Thus, notwithstanding efforts to limit the scope of the cigarette advertising ruling, the Commission was unable to extricate itself from this area.

22. The Commission continued to grapple with a practical and meaningful administration of the fairness doctrine and its principles. Experience with its application to product advertising had proven less than ideal and considerable controversy had been raised whether broadcasters could adopt a policy refusing to accept editorial advertisements discussing controversial issues of public importance.[24] As a

[19] In 1946, the Commission did adopt, however, *Public Service Responsibility of Broadcast Licensees* (commonly referred to as the "Blue Book"), which listed discussion of public issues by broadcast stations as one of the factors comprising the public interest standard applicable to broadcasters.

[20] Moreover, in language strikingly similar to that subsequently appearing in the Supreme Court's decision in *Red Lion, supra*, at 396, the Commission observed:

> It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation of the American system of broadcasting.

[21] There was, however, a significant legislative development. In 1959, Congress adopted amendments to section 315 providing exemptions to news type programs from the "equal time" provisions. These amendments are the ones considered central to the question of whether Congress statutorily imposed fairness doctrine obligations on broadcasters.

[22] This constituted a further agency extension of the doctrine because it represented not only a licensee obligation to provide an opportunity for contrasting opposing viewpoints but, if no persons willingly came forward to sponsor such programming, an obligation on his part to bear whatever expenses might be entailed in presenting contrasting viewpoints.

[23] *See Friends of the Earth*, 24 FCC 2d 743 (1970), *rev'd*, 449 F.2d 1164 (D.C. Cir. 1971).

[24] This stemmed in part from the Commission's decisions in *Democratic National Committee*, 25 FCC 2d 216 (1970), and *Business Executives' Move for Vietnam Peace*, 25 FCC 2d 242 (1970), which were initially reversed in *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), but later reinstated by the Supreme Court's decision in *CBS* v. *DNC, supra*.

result of continuing difficulties of this sort, in 1971 it instituted a wide ranging inquiry into the fairness doctrine and its efficacy "in the light of current demands for access to the broadcast media to consider issues of public concern." *Study of Fairness Doctrine, Notice of Inquiry, supra* n. 6.

23. Following this inquiry, in 1974, the Commission adopted the *1974 Fairness Report, supra,* which reaffirmed the earlier *Report on Editorializing* and upheld the application of a general fairness doctrine requirement for broadcast licensees on both statutory and constitutional grounds.[25] The Commission also rejected several alternative approaches toward satisfaction of fairness doctrine obligations including a system of mandated access on the basis that this regulatory option was neither practical nor desirable and could lead to excessive governmental intrusion into the journalistic discretion of broadcast licensees. In doing so, however, the Commission emphasized that it did not wish to discourage broadcasters from "experiment[ing] with new ways of providing for wide-open debate of public issues." [26]

24. The Commission's 1974 *Report* including its decision to narrowly apply fairness doctrine obligations to broadcast advertising, was generally affirmed in *National Citizens Committee for Broadcasting* v. *FCC,* 567 F.2d 1095, (D.C. Cir. 1977), *cert. denied,* 436 U.S. 926 (1978), but the court remanded the proceeding to the Commission "for further inquiry" concerning the right of access proposal as well as a proposal to require licensees to provide a numerical listing of controversial issues covered. *Id.* at 1115. In addition, the Commission was instructed to explore "other ways of achieving compliance with the Fairness Doctrine's first obligation." *Id.* This subsequently lead to *Report and Order in BC Docket No. 78-60,* 74 FCC 2d 163 (1979), *recon. denied,* 89 FC 2d 916 (1982), wherein the Commission declined to experiment further with new regulatory options, e.g., mandatory access to satisy fairness doctrine obligations, and thereby terminated furher deliberations concerning agency change of general fairness obligations applicable to broadcast licensees.[27]

### III. Reappraisal of the Fairness Doctrine under the Public Interest Standard

25. In our reappraisal section, we examine the legal and policy premises underlying the fairness doctrine, all of which leads us to ask whether the objectives sought to be attained can be achieved without the need for governmental intervention. This section consists of five parts. In the first part, we provide a description of the mass media marketplace in 1950 shortly after fairness obligations were formalized by the Commission in the *Report on Editorializing* as well as a description of the changes in the electronic and print media marketplace over the past decade. The second part addresses the question of whether, in view of the technological and growth patterns that have occurred leading to the present marketplace of information and ideas, the fairness doctrine is an indispensable tool to assure that the public has suitable access to diverse ideas and experiences from diverse and antagonistic sources. The third part is devoted to a discussion of the negative attributes that may be associated with the doctrine including the question of the desirability and, indeed, the apparent inevitability, of various degrees of governmental surveillance over broadcast program content. In the fourth part of our reappraisal, we examine whether the applicability of the doctrine to broadcasting is consistent in principle with current First Amendment jurisprudence. In the final part, we discuss the question of whether the fairness doctrine is required by section 315 and/or under the general public interest standard of the Act.

#### *A. The Mass Media Marketplace*

26. Today, there appear to be many substitutes for the traditional broadcast media, radio and television, in their roles as sources of information and, similarly, substitutes for the traditional print media. This substitutability or interchangeability among media is witnessed to some extent by consumer acceptance of different media to satisfy individual informational and entertainment needs. For example, some might rely on broadcast stations for breaking news stories and later turn to newspapers or magazines for more in depth coverage of the issues underlying these events whereas others might initially turn in the morning to pages of daily newspapers for recent news developments and at leisure moments in the evening capture more information on events of the day through television viewing or radio listening. In short, public consumption of news, public affairs, and other information is obtained or obtainable through a diverse and complementary set of media, both electronic and print.

27. Changes in communications technology are primarily responsible for dramatically increasing the means by which information reaches the public. As more fully described herein, distribution systems once thought to be quite different, such as broadcasting and print, are becoming interchangeable, merging into one mass media marketplace. The mass media that are defined here are those forms of communications which serve as daily information sources for the general public. These include but are not limited to daily newspapers, radio, television, cable television and other related new technologies such as subscription television and multi-point distribution services.

28. In the following paragraphs of this section, we analyze the mass media marketplace as it existed when the *Report on Editorializing* was issued and the marketplace as now extant. Although it is quite clear that a technological scarcity still exists in our society that precludes the right of every person to broadcast over the airwaves, nevertheless, the enormous increase in sources of information suggests that there may no longer be a scarcity of voices and views available to the public to justify the abridgement of broadcast expression which we brought about in the 1949 Report; accordingly, we invite comment on this question. We also describe the changes that have occurred in the mass media since 1970 and the prospects of new sources of information in the foreseeable future. We have included this latter period because it is characterized by new developments and continued growth of the electronic media and with them, a decline in, as well as the need for, the print media to

[25] In addition, the Commission held in this 1974 *Report* that it would not apply the doctrine to paid editorial advertisements unless, in the reasonable judgment of the licensee, such advertising "presents a meaningful statement which obiously addresses, and advocates a point of view on, a controversial issue of public importance." 48 FCC 2d at 23. It also indicated that it would refrain from applying the doctrine to ordinary product advertising stating that its previous "mechanical approach * * * represented a serious departure from the doctrine's central purpose * * * to facilitate 'the development of an informed public opinion.' " *Id.* at 24. "Standard product commercials, such as the old cigarette ads," the Commission explained, "make no meaningful contribution toward informing the public." *Id.* Moreover, continued application of this policy to normal product commercials would, at best, according to the Commission, "provide the public with only one side of a public controversy." *Id.* at 25. Instead, the fairness doctrine would be applied only to those 'commercials' "which are devoted in "an obvious and meaningful way to the discussion of public issues." *Id.* at 26.

[26] *Id.* at 30. *See also Reconsideration of Fairness Report, supra,* n. 7, at 699.

[27] Even though the Commission concluded against such options, including the possibility of access as a substitute for a licensee's fairness obligations it did not rule out the possibility of licensees adopting access plans as a supplement to and in furtherance of overall fairness doctrine obligations.

incorporate new technologies, such as satellites, into its process.

1. State of the Mass Media—1950

29. There were approximately 43 million households served by a total of 2,867 radio stations consisting of 2086 standard AM stations and 781 FM stations (733 commercial and 48 educational) in 1950.[28] At the time, television was in the embryonic stage of its development with only 98 commercial VHF television stations in operation serving approximately 5 million television households.[29] Of this total, 96 were network owned or affiliated and only 2 were independently owned and operated.[30] There were no commercial UHF, educational UHF or VHF stations in operation at the time. Indeed, the *Sixth Report and Order in Dockets 8736, 8975, 8976, and 9175, (Amendment of the Commission's Rules, Regulations, and Engineering Standards Concerning the Television Broadcast Service)*, 41 FCC 148 (1952), setting forth the Commission's Television Table of Allocations was not released until two years later. There were very few other electronic media outlets at that time. Cable television was also in the embryonic development stage. As of 1952, there were only approximately 70 cable systems serving a total of approximately 14,000 subscribers.[31] Auxiliary television and radio services ("boosters" and translators) were virtually non-existent at the time although, as a result of the limited number of conventional broadcast outlets available throughout the country, these services were to develop significantly in the following years as a means of retransmitting signals from radio and television stations to neighboring areas or communities with no or only limited television service.[32]

30. In 1950, there were approximately 1,772 daily newspapers with an estimated total circulation of 53,829,000.[33] Although exact figures for 1950 were not available, statistics for 1953 show 1,453 cities with daily newspapers but only 91 cities (6.3 percent of the total) with two or more daily newspapers. In addition, the total number of periodicals (weekly, semi-monthly, etc.) in 1950 was 6,960.

2. State of the Mass Media—1970

31. The nation's approximately 63 million households were served by 6,451 commercial radio stations (4,267 AM and 2,184 FM) and 438 educational radio outlets (25 AM and 413 FM) in 1970. At that time, there were 862 television stations, of which 190 were classified as educational. Of the 677 commercial television stations, 568 were affiliated with one of the three national television networks (ABC, CBS, NBC) while the other 109 were independents.[34] Only 50 percent of the nation's 59 million television households were served by these independent stations.[35] The average home received 6.8 television signals with 90 percent of all television viewing going to the network affiliates.[36] The network affiliated stations were generally profitable. The average independent station, however, was not profitable.

32. In 1970, cable television was still primarily a broadcast television retransmission service used as a means of either distributing signals from nearby broadcast television stations to areas where reception was poor or importing more distant stations' signals to areas where few local stations existed. At that time, there were approximately 2,490 cable systems serving a total of 4.5 million television households.[37]

33. In 1970, the number of newspapers totaled 1,748 with a combined circulation of 62,108,000. In 1973, there were 1,519 cities with daily newspapers, but only 37 cities (2.4 percent of the total) with two or more daily newspapers.[38] The total number of periodicals in 1970 was 9,573.

3. The Current State of the Mass Media

34. The past three decades and, in particular, the 1970's have been marked by a significant and dramatic increase in the number of electronic media outlets available to the public represented not only by conventional radio and television broadcast stations but by other new electronic media and technologies such as cable television, subscription television broadcasting, and multipoint distribution service. These new technologies are impacting not only on the delivery of traditional broadcast media services to the public but on the dissemination of information services by traditional print media as well. In the period from 1950 to the present, we see the growth in the number of radio stations from 2,867 stations to 9,282 stations, an increase of over 300 percent. Table I shows the number of radio stations, by type, in 1950, 1970, and as of July, 1983, the date of the most recently published FCC data.

TABLE I.—NUMBER OF RADIO STATIONS

| | 1950 | 1970 | 1983 |
|---|---|---|---|
| Total | 2,867 | 6,889 | 9,282 |
| Standard (AM) | 2,086 | 4,292 | 4,723 |
| AM Commercial | (*) | 4,267 | 4,679 |
| AM Educational | (*) | 25 | 44 |
| FM | 781 | 2,597 | 4,559 |
| FM Commercial | 733 | 2,184 | 3,458 |
| FM Educational | 48 | 413 | 1,101 |

Sources: 1950 and 1970 figures as of Jan. 1 from Sterling and Haight, *The Mass Media* at 43–44; 1983 figures as of July, 1983 from FCC Release No. 6466 (September 13, 1983). 1950 figures for commercial and noncommercial AM radio stations were not available from this data.

35. We also see a dramatic increase in the number and different types of conventional television stations available throughout the United States which is attributable in large measure to the Commission's establishment of the table of television station allocations in 1952. From 1950 to the present, the percentage increase in the total number of television stations alone is over 1100 percent. These stations presently serve almost 84 million television households in this country.[39] Table II gives the changes in the number of television stations by type.

[28] Sources: *Television Factbook*, Services Volume No. 40, at 75-a (1981–1982 ed.) and *Statistical Abstract of the United States*, U.S. Department of Commerce, Bureau of the Census (100th ed. 1979) at 587.

[29] *Id.*

[30] Christopher H. Sterling and Timothy R. Haight, *The Mass Media: Aspen Institute Guide to Communication Industry Trends* at 53 (Praeger Publishers, New York 1978) (hereafter "Sterling and Haight, *The Mass Media*").

[31] *Television Factbook*, Services Volume No. 40 (1981–1982 ed.) at 83-a.

[32] *See Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Report and Order*, 47 FR 21468 (1982) ("*Low Power Television Service*").

[33] Unless otherwise noted, sources for these and other statistics on newspapers and periodicals were obtained from Editor and Publisher, *Editor and Publisher International Year Book* (New York) (1973 and 1982 annual issues); Ayer Press, *Ayer Directory of Publications* (Bala Cynwyd, Pa. 1982); Sterling and Haight, *The Mass Media, supra*; B. M. Compaine, C. H. Sterling, T. Guback, and J. K. Noble, Jr., *Who Owns the Media?* (2d ed. 1982) (hereafter "*Who Owns the Media*").

[34] Sterling and Haight, *The Mass Media, supra*, at 53.

[35] Sources: Arbitron's *Television Markets and Ranking Guide* and *Statistical Abstract of the United States, supra*, at 587.

[36] *See Tentative Decision and Request for Further Comments, Amendment of 47 CFR 73.658(j)(1) (i) and (ii), the Syndication and Financial Interest Rules*, FCC 87–377 (adopted August 4, 1983) at para. 108.

[37] *Television Factbook, supra*, at 83-a.

[38] Sterling and Haight, *The Mass Media, supra*, at 60. Statistics for 1970 were not available.

[39] *See* "Arbitron's new ADI's, *Broadcasting* at 32 (October 17, 1983). Some of the other factors contributing to this growth, particularly that of UHF stations, were the enactment of All Channel Receiver Act, 47 U.S.C. 303(s) (1962), the detente tuning rules requiring all television receivers to have detente tuners, *see Report and Order in Docket 18433*, 21 FCC 2d 245 (1970), as well as the growth in cable systems as a result of the Commission's lifting of the "freeze" on cable carriage of broadcast signals in the *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

TABLE II.—NUMBER OF TELEVISION STATIONS

| | 1950 | 1970 | 1983 |
|---|---|---|---|
| Total | 98 | 862 | 1,140 |
| Commericial VHF | 98 | 501 | 536 |
| Commercial UHF | | 176 | 321 |
| Educational VHF | | 80 | 112 |
| Educational UHF | | 105 | 171 |

Sources: 1950 figures as of Jan. 1 from *Television Factbook*, Services Volume No. 40, 1970–71 Edition; 1970 figures as of Jan. 1 from *Television Factbook*, Services Volume No. 50, 1981–82 Edition; 1983 figures as of July 1983, from FCC Release No. 6468 (September 13, 1983).

36. A comparison of the mass media marketplace between 1970 and the present is also illustrative of significant change and growth. Approximately 180 of the commercial stations are independents serving 86 of the nation's 210 television markets, up from 43 markets in 1970.[40] These markets include 78 percent of all television households.[41] Over this period of time, independent television stations, virtually nonexistent in the 1950's, have become stronger players in the video marketplace and are generally profitable. The average home now receives 9.8 television signals, a 44 percent increase over 1970.[42] The networks attract about 80 percent of the total viewing audience, a noticeable decline from the 1970 figures.[43] Independent and educational stations receive about 17 percent of the total viewing audience, compared with 9 percent a decade earlier.[44] The remaining 3 percent of the television audience now views cable and pay channels which were not even available in 1950 and only limitedly available in 1970.[45]

37. The cable television industry of the 1980's has undergone a dramatic transformation from its early beginnings as solely a redistributor of broadcast signals to its new role as a provider of new, diverse nonbroadcast program and information services from national, regional, as well as local sources. Cable television now passes more than 52 million of the almost 84 million television households and of these close to 29 million homes subscribe to basic cable service, more than 5 times the number in 1970.[46] In 1969, only 1 percent of all systems had the capacity to carry more than 12 channels but the latest available data now indicate that 38 percent of all systems had channel capacities over 12 in 1981.[47] Aided by the launch of communications satellites[48] and the removal of several restrictions on the operation of earth stations, a wide variety of cable networks have come into existence and now provide a significant array of new and diverse program and information sources. Many of these new cable networks are highly specialized, offering news, sports, weather, health information, children's or cultural programming. For example, there are presently available several all-news channels (Cable News Network and Financial News Network), and a public affairs channel (C–SPAN), for satellite pick-up by cable systems. There are approximately 30 basic service networks supported either by advertisers or through basic subscriber fees. There are at least 10 pay cable networks, services virtually non-existent in 1970, that serve over 17 million homes.[49] In addition, at least 25 new cable networks have been announced. Cable television's rapid growth is also reflected in the industry's increasing revenues and income. For example, between 1977 and 1981, operating revenues tripled from $1.2 billion to $3.6 billion and operating income more than doubled from $500 million to $1.2 billion.

38. The print media stands in marked contrast to the continued proliferation of electronic media. Since 1950, there has been a decline in the number of daily newspapers from 1,772 to 1,712 in 1982. Indeed, between 1981 and 1982 alone there was a loss of 18 daily newspapers. As of November 1981, there were 1,534 cities with daily newspapers, but only 30 (or 2 percent) with more than one. Newspaper circulation now stands at 61,430,745, a decline of 1.1 percent from the 1970 figure. There has been, however, an increase in the total number of periodicals from 6,960 in 1950 to 10,688 in 1982.

39. The present period is also marked by the emergence of new technologies in the information distribution marketplace. Several are pay services. Subscription television broadcasting (STV) consists of a scrambled broadcast signal that is made available to those who pay for decoders. There are currently nineteen STV stations serving approximately 1 million subscribers.[50] Multipoint Distribution Service (MDS) is a common carrier service used primarily to provide subscription programming to consumers via microwave transmissions.[51] The first MDS service became available in 1974. There are approximately 530,000 subscribers currently served by MDS systems out of a potential subscriber base of over 15 million and the total of MDS pay television markets in operation has increased from 85 over a year ago to 103 as of June 30, 1983.[52]

40. The satellite master antenna system (SMATV), another participant in this evolving marketplace, is a service that is made available primarily to multiple dwelling units through the use of antenna systems (including satellite earth stations installed on buildings) that gather programming which is then fed to the building's occupants by cable. SMATV serves approximately 150,000 homes and is expected to expand rapidly. At present, it passes 500,000 homes but this figure is expected to double by 1984.[53]

41. Other, even newer, technologies just beginning to emerge as players in the information marketplace include low power television (LPTV). These stations, which are limited to 10 watts for VHF and 1,000 watts for UHF, were originally known as translators because they were only permitted to rebroadcast signals from full-service stations. They have principally served rural areas. In 1982 the FCC authorized these stations to originate programming.[54] Because they are, comparatively speaking, less expensive to operate than conventional broadcast stations, they are expected to serve areas with a limited number of television signals or communities which have been underserved in the past. The Commission has received over ten thousand applications for these stations. Thus far, approximately 356 applicants have been licensed or granted construction permits. Of the 206 stations

[40] Arbitron's *Television Markets and Rankings Guide, supra.*

[41] *See* n. 36 *supra*, at para. 112.

[42] *Id.*

[43] *Id.* and Nielsen Television Index.

[44] *Id.*

[45] *Id.*

[46] *Cablevision*, December 5, 1983, at 134.

[47] *Who Owns the Media, supra*, at 418.

[48] The first domestic communications satellite was launched in 1974. In 1975 there were 3 such satellites with 48 available transponders. In 1981, there were 8 communications satellites with 156 transponders.

[49] *Cablevision*, December 5, 1983, at 134.

[50] *See Broadcasting* at 36 (September 5, 1983), citing Paul Kagan Associates, Inc. data.

[51] Until recently, MDS operators were limited to one channel systems but, as a result of a recent Commission action, they are now allowed to operate multi-channel systems. *See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 48 FR 33878 (July 26, 1983) (hereafter "*MDS Reallocation*"). As a result of this action, approximately 15,000 multi-channel MDS applications were submitted to the Commission by September 9, 1983, the filing deadline established in that proceeding.

[52] Paul Kagan Associates, Inc., *Census of MDS Pay TV 6/30/83* (August 24, 1983).

[53] Paul Kagan Associates, Inc., *The Pay TV Newsletter*, Census Issue (1983) at 1 and *Multichannel News* at 21 (May 23, 1983).

[54] *See Low Power Television Service, supra.*

presently in operation, 164 operate on VHF frequencies and 42 on UHF frequencies.

42. Videotex and teletext are another two of the more recent technological entrants into the mass media marketplace. These technologies incorporate aspects of both the electronic and print media by enabling television broadcast stations, cable systems, or telephone systems to transmit textual or graphic information for display on video sets. These systems can offer a wide range of information including news, weather, and consumer advice. One advantage of these systems is that they can be continuously updated. While teletext is a one-way system, videotex systems have two-way capabilities allowing the consumer to transact business with banks or stores and engage in electronic messaging. Videotex and teletext systems have been successfully tested and are expected to become more commonplace in the future. In a number of ways, there are similarities between videotex and teletext systems and traditional newspapers. These systems can provide the same information that newspapers presently provide directly to the public. They can do so, however, with the advantage of potential savings on the cost of paper, print, and delivery and with the added benefit of providing updated information more readily than the once-a-day newspaper.[55]

43. One further distribution technology on the verge of entering the mass media marketplace is the direct broadcast satellite service (DBS) recently authorized by the Commission.[56] These systems will be capable of transmitting entertainment, news and information services including teletext from high-powered satellites directly to inexpensive home receivers as well as to cable systems, conventional and low power television broadcast stations, and other land-based communications facilities. DBS provides an economical and efficient means of distributing information over wide areas, including remote places where other communications technologies have not proved viable.[57]

44. In summary, the rapid growth of existing technologies, particularly throughout the 1970's, as well as the development of new ones that are or will soon be available throughout the remainder of the 1980's suggests that a proliferation of programming and information sources presently exists and will be even further augmented in the future.[58] Although the above information is based on media outlets nationwide, nevertheless, even the less densely populated areas of the country appear to have access to a variety of information sources, particularly, the electronic media.[59]

45. This overview of the electronic and print mass media marketplace indicates the existence of a plethora of print, video, and voice outlets and, through such outlets, the availability of large amounts of information to the public through these outlets. It also suggests that continued imposition of fairness doctrine obligations may be inappropriate when significant technological developments contributing to dynamic growth in the electronic media and to continued convergence between the print and electronic media appear to be undercutting what might have been at one time legitimate distinctions between the print and electronic media. In sum, this analysis leads us to ask whether the original underlying premises of the doctrine, namely, the scarcity of broadcast outlets and, with it, the possibility that the public might be left uninformed on public issues, can any longer be legitimately applied to the broadcast media regardless of whether the appropriate marketplace examined is that consisting wholly of broadcast media or, more appropriately perhaps, that comprising both the print and electronic media. Under either approach, the query is the same: whether the scarcity rationale and the attendant right of the public to have suitable access to a diverse marketplace of ideas continue to be appropriate justification for singling out broadcast media for that peculiar set of obligations that collectively comprise the fairness doctrine.

### *B. Necessity of Fairness Doctrine in Achieving First Amendment Goals*

46. As stated at the outset, the purpose of the fairness doctrine is the same as that of the First Amendment itself—"to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail * * *"[60] It is well established that, when regulations evince a governmental interest unrelated to the suppression of free expression, they must further an important or substantial governmental interest and, if, incidentally, they restrict First Amendment freedoms, they must be no greater than is essential to the furtherance of that interest.[61] Because the fairness doctrine is an exception to traditional First Amendment principles that bar government interference with the content of speech by the press, therefore, it must confer a benefit that cannot be achieved through the use of less drastic means. In view of the

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[55] The traditional print media are already utilizing electronic technology to enhance the efficiencies in the delivery process. For example, both *USA Today* and the *Wall Street Journal*, national daily newspapers, transmit their news by satellite from their national headquarters to local printing plants around the country for production and distribution.

[56] *See Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982), *Satellite Television Corporation*, 91 FCC 2d 953 (1982); and *CBS, Inc. et al.*, 92 FCC 2d 64 (1982).

[57] In addition, we note that video tapes and, to a less certain extent, video disk players are other new forms of visual product delivery that also compete with the older technologies. At present, they are primarily used to provide entertainment programming but, in the future, they might be more extensively used to further enhance the informational marketplace by allowing consumers the opportunity to view public affairs, documentary, and other types of information programming. For example, video tape recorders currently allow consumers to record news and public affairs programs aired when they are not at home thereby enabling the consumers to view programs and receive information they might otherwise miss or be available to them only at inconvenient times. This past year's sales of video cassette recorders were expected to reach approximately 3.6 million and, based on estimates made by Electronic Industries Association, it was anticipated that a total of 8.4 million recorders would be in use by the end of 1983. Paul Kagan Associates, Inc., *The Pay TV Newsletter* at 6 (July 12, 1983). Video disk players now are in 300,000 television households, and this number continues to grow as new titles become available. Although these technologies are not now heavily used to provide information services to the public, as their acceptance grows (as well as that of other potential information sources such as personal computer equipment and services), as too will the public's access to a increasingly divergent mix of viewpoints, ideas, and experiences. Thus, the appearance of these services on the informational marketplace horizon in the future may further tilt the balance toward relaxation of governmental controls over the electronic media.

[58] While it may be difficult to predict what the composition of the mass media marketplace will be in the future, it appears from the discussion above that there will be no scarcity of means for distributing information. The success of these individual technologies would apper to be dependent on consumer demand.

[59] *See, e.g., Print and Electronic Media: The Case for First Amendment Parity, National Telecommunications and Information Administration, Staff Report to the Chairman, Senate Committee on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. (Com. print 1983) (hereinafter *"Print and Electronic Media"*); *Deregulation of Radio, Notice of Inquiry and Proposed Rule Making*, 73 FCC 2d 457, 484, 492 (1979); *Deregulation of Commercial Television Stations, Notice of Proposed Rule Making in MM Docket No. 83-670*, 48 FR 37239 (adopted June 29, 1983); and K. Gordon, J. Levy, and R. Preece, *FCC Policy on Cable Ownership*, FCC Office of Plans and Policy (November 1981), all of which contain data for sample markets. Moreover, even among the smallest markets, those ranked 191–200 on the basis of television households, a median of 2 television and 5.5 radio stations are available over-the-air. In addition, an average of 54 percent of all households, more than twice the national average, have cable in these markets. *Who Owns the Media, supra*, at 469–70.

[60] *Fairness Report, supra.*

[61] *Home Box Office* v. *FCC, supra*, at 46.

electronic and general mass media marketplace described above and further detailed *infra*, however, a serious question is raised whether the doctrine, and the intrusions into journalistic freedom which it represents, remain essential to further the unquestioned governmental interest in an informed electorate.

47. In this section we will explore the goals of the First Amendment that the fairness doctrine was designed to foster and look at whether the doctrine remains necessary to achieve those goals in view of: the number of broadcast outlets available (especially in contrast to print outlets); the new broadcast and non-broadcast delivery services which the Commission has authorized; and the convergence of the print and electronic media which calls into question the distinction between them in terms of their constitutional treatment.

48. The concept that the competition between ideas that is fostered by the First Amendment will necessarily result in the ultimate triumph of truth is well-enshrined in our political philosophy and in our jurisprudence. Various formulations have been utilized in describing this principle. Thomas Jefferson stated that, "* * * the people * * * may safely be trusted to hear everything true and false, and to form a correct judgment." Justice Holmes wrote that:

> The ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our constitution.[62]

49. Similarly, the Supreme Court has proclaimed that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"[63] and other courts have proclaimed that the freedom of speech guaranteed by the First Amendment:

> Presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.[64]

*Red Lion* not only echoed this theory of the purpose of the First Amendment but, in addition, found in that amendment a "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[65]

50. In sum, the fairness doctrine has traditionally been viewed as implementing the First Amendment in the broadcast area by assuring that opposing sides of controversial issues are aired so that the truth would emerge and so that the public will have suitable access to ideas and experiences. Both parts of the fairness doctrine have been considered necessary—the first part to assure the mere presence on the airwaves of speech concerning controversial issues[66] and the second part to assure that all sides were expressed with regard to such issues so that a variety of points of view could compete in the arena with truth being the ultimate victor.

51. Given these First Amendment goals that the fairnes doctrine was intended to foster, the question is whether the doctrine remains necessary to achieve those ends. It would appear that the present broadcasting system is performing a vital role in providing for "dissemination of information from diverse and antagonistic sources" *Associated Press* v. *United States, supra*, together with other mass media services and technologies and far beyond what was envisioned when Congress enacted the Communications Act or when, in 1949, initial fairness doctrine obligations were fashioned by this agency. As of July 30, 1983, there were 4723 AM radio stations, 4559 FM radio stations, 857 commercial television stations and 283 educational television stations licensed in the United States.[67] Thus, a total of approximately 10,422 broadcast outlets currently serve the American people.[68] Without addressing the question of "technological" scarcity, it appears clear that there is no actual scarcity of broadcast voices in the United States. This argument is particularly supported by a look at the print media at the time the Constitution was adopted. When First Amendment freedoms were guaranteed the print media, the situation was far different and the media outlets far more scarce. In 1790, there were 8 daily newspapers, 70 weekly newspapers, 10 semi-weekly newspapers and 3 tri-weekly newspapers being published in America.[69] It should be remembered that while the coverage of public issues by broadcast stations today is augmented by that provided by other media, the converse cannot be said with respect to the situation existing in 1790. We therefore pose the question whether continuation of governmental intrusion upon the journalistic rights of broadcasters is needed to assure diverse and antagonistic points of view.

52. Some may say, however, that such significant differences existed between the societies of 1790 and 1983 that any comparisons are fallacious. Accordingly, we believe it would be worthwhile to look at the question of whether the fairness doctrine is necessary to assure that broadcasting the First Amendment objectives outlined above when contrasted with the print media (which operate without such intrusions) in the 1980's. Over 10,000 broadcast stations currently serve the American public, compared with only 1,712 daily newspapers and 6,806 weekly newspapers published in the United States.[70] From these statistics it is clear that there are more broadcast stations on the air today than the combined total of daily and weekly newspapers being published. Moreover, there are almost as many broadcast outlets as there are periodicals currently being published.[71]

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[62] *Abrams* v. *United States*, 250 U.S. 616, 630 (dissenting opinion by Holmes, J., joined in Brandeis, J.) (1919).

[63] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). *See also, Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 148–150 (opinion of Harlan, J.) (1967); *New York Times Co.* v. *Sullivan*, 376 U.S 254, 270 (1964); *NAACP* v. *Button*, 371 U.S. 415 429 (1963); *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

[64] *United States* v. *Associated Press*, 52 F. Supp. 263, 372 (L. Hand, C.J.) (S.D.N.Y., 1943), *aff'd* 326 U.S. 1 (1945). Judge Learned Hand added: "To many this is, and always will be, folly; but we have staked upon it our all." It is noteworthy that this and the analogous principles cited in notes 62 and 63, *supra*, evolved primarily from print cases but have since been used as support to justify the regulation of broadcasters that would clearly be impermissible if imposed on the print medium.

[65] *Red Lion, supra*, at 390.

[66] "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* citing *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1965). "[A] free press is a condition of a free society." *Associated Press* v. *US., supra.*

[67] *See* Tables I and II, paras. 34–35 *supra.*

[68] Contrast this with the 2,867 radio stations and only 98 television stations, all commercial VHF, that existed in 1950, the year following the release of the *Report on Editorializing*, formalizing the fairness doctrine and the obligations thereunder. Indeed, that period is characterized by the absence of any meaningful competition from other electronic media. At that time, there were no UHF television stations, educational television stations, very few auxiliary television and radio stations such as television translators or boosters, and the presence of only a limited number of cable systems.

[69] Lee, Alfred McClung, *The Daily Newspaper in America* (MacMillan, 1937), cited in Ernst, Morris L., *The First Freedom*, Exhibits A and I, McMillan, 1946.

[70] *See Statistical Abstract of the United States 1982–1983 at 561 (103rd ed. 1982)*, citing as source *Ayer Directory of Publications* (IMS Press annual ed.).

[71] Traditionally, the theory of scarcity as a justification for content regulation of the broadcast media has posited that different treatment could be accorded broadcasters because, "[u]nlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets." *Banzhaf* v. *FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied* 396 U.S. 842 (1969).

53. Therefore, even though technological considerations relating to the degree of electromagnetic radio spectrum assigned to broadcasting continue to constitute an entry barrier that precludes the possibility for each person to operate a broadcast station, nevertheless, it would appear that broadcast stations are not "scarce" in the commonly understood meaning of the word, at least as compared to the print media. Indeed, we note that the most significant barrier to entry in the broadcast field would appear to be financing or working capital, the very same entry barrier that exists in the newspaper publishing business or, for that matter, in most other businesses. Although some might argue that, with a relatively small sum of money, anyone could set up a printing press and be in the newspaper business,[72] nevertheless, when such factors as initial start-up costs, audience or circulation potential of the respective media, etc. are considered, it would appear that the costs of entry between the print and broadcast media are not that dissimilar as some might imagine. Moreover, because a broadcaster's initial start-up costs include the distribution system itself, generally a one-time expense, a broadcaster does not incur the distribution costs that a daily newspaper must underwrite, in terms of print, materials, and transportation costs, in the dissemination of its product on an every day basis.[73] Additionally, the freedom of transferability that exists in the newspaper publishing business is in large measure also present in broadcasting. Although on the one hand broadcasters must receive this agency's sanction before a sale or transfer of their property can be consummated, yet, on the other hand, they often do not have to contend with the union and management transition problems that so often accompany the sale of newspapers, especially in major cities.

54. We also note that there appears to be prevalent in our society today a diverse and rich mix of ideas and viewpoints on broadcasting stations which either resembles and parallels in a number of ways that found in the print media. Just as there is editorial diversity as between newspapers, there is, and will continue to be, editorial diversity as between different broadcasters. But should the print media or the broadcast media be considered mutually exclusive information sources? Individuals typically do not receive information from a single medium. Rather, they can be expected to consult a variety of sources in a wide array of media. Accordingly, we query not only whether a scarcity of information outlets exists but also whether it can be said that broadcast stations are not diverse when considered alone or in conjuction with other available media. Stated differently, is the fairness doctrine any more necessary to assure that the public will be exposed to varying points of view on public issues via the broadcast media than it is to assure such a result in the print media? Anything even approaching the intrusiveness of the fairness doctrine would not pass constitutional muster if applied to the print media. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Thus, we must ask whether such a doctrine remains appropriate to the broadcast media which appear more numerous and very diverse.

55. Additionally, we question whether it is equitable to place the broadcast media under the disadvantage of governmentally imposed journalistic obligations in view of the fact that the print media, with which it competes, is free of all such restraints. While newspapers and periodicals have the discretion to cover or not cover certain stories, i.e., controversial issues of public importance, the broadcasting element of the "press" is denied that discretion. Given that the print and broadcast media compete in the information distribution marketplace and in the business marketplace for consumers and advertising revenues, it may be inappropriate, indeed, unfair for the government to assume the role of handicapper of one media *vis-a-vis* another.[74]

56. As noted previously, the broadcasting industry appears to be diverse both in and of itself and in comparison to the print media. Additionally, the broadcast and other nonbroadcast electronic media, taken as an aggregate, have enhanced and will in the future further enhance the citizen's access to information to an extent previously unknown. For instance, this agency's inauguration of a new low power television service has the potential to bring new video services to large portions of the American public, including many who currently are unserved or underserved by broadcast outlets. In addition, our authorization of direct broadcast satellite service, the opening up for use of unoccupied and unapplied for Instructional Television Fixed Service frequencies for utilization by MDS operators, and the newly expanded potential for new FM radio outlets [75] will result in an even greater number of available sources of information and programming. Moreover, at present, cable television penetration reaches 37 percent of American television households and, by the end of this decade, is expected to reach some 62 percent of television households.[76] This Commission has additionally acted to enhance the information sources available to the public through the electronic media by permitting increased utilization of Subsidiary Communications Authorizations (SCA's) by both commercial and non-commercial radio licensees for providing informational, entertainment, and other services. Thus, our recently amended rules now allow non-commercial educational FM radio stations to use their SCA's for remunerative purposes including, especially, the delivery of various forms of information.[77] Similar steps have been taken to permit commercial FM broadcasters to utilize their SCA's for both broadcast and non-broadcast purposes.[78] Our action in that matter would permit FM broadcasters to engage in providing a variety of services to the public at large or to limited segments thereof. These include paging services, the distribution of inventory, price, and delivery information,

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[72] Although a limited amount of money may be all that is necessary to engage in pamphleteering or leafleteering, publishing enterprises of this sort can hardly be deemed the functional equivalent of owning or operating a major daily newspaper.

[73] On this point, one commentator has observed: [T]he physical resources that go into the production of the print media—newsprint, presses, distribution trucks, and so on—are scarce * * * once a message is printed it must be physically transported from the publisher to the readers to have any effect. Thus printed communications are as dependent upon channels of *transportation* as radio communications are dependent upon electromagnetic channels. Both kinds of channels are scarce, and for exactly the same reasons * * * Indeed, the rising price of energy and other raw materials make the distribution of printed matter more expensive and less accessible to the public than telecommunication, the price of which is rapidly falling.

*Print and Electronic Media, supra*, at 67 *quoting* M. Mueller, *Property Rights in Radio Communication: The Key to Reform of Telecommunications* at 11 (1982).

[74] In this regard, we note that several major newspapers have editorially questioned the need for the fairness doctrine. *See, e.g.*, "Fairness without Doctrine", *The Wall Street Journal*, August 30, 1983, p. 28 and "Fairness and Television", *The Washington Post*, September 21, 1981, p. A12.

[75] *See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 48 FR 29486 (1983).

[76] *Deregulation of Commercial Television Stations, Notice of Proposed Rule Making in MM Docket No. 83-313, supra*, at par. 27 and n. 17.

[77] *Amendment of Section 73.593 of the Commission's Rules*, 48 FR 28608, *as corrected* 48 FR 29872 (1983).

[78] *Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations*, 48 FR 39697 (1983).

transportation dispatch, narrowcasting and various other sorts of informational and instructional uses.

57. Thus, the electronic media taken as a whole appear to have an enormous and important presence in the marketplace.[79] Given this electronic environment, we question whether governmental intervention remains necessary to assure that any segment or segments of the electronic media present "diverse and antagonistic" points of view or provide "suitable access to social, political, esthetic, moral and other ideas and experiences." Indeed, because our ability to obtain such diversity and access via the electronic media continues to expand in what appears to be an almost limitless fashion, we believe it important to pose these questions now.[80]

58. Further grounds for initiating this inquiry at this time are found in the fact that distinctions between the printed and electronic media are becoming increasingly blurred. As Douglas R. Watts, legislative counsel for the American Newspaper Publishers Association, recently wrote:

> Further, technological developments are allowing one medium to adopt and utilize the techniques, processes, and functions of another medium. For example, television stations are beginning to use the new technologies to acquire an important characteristic of the print media—that of providing a message at whatever time is convenient for the consumer. Conventional distictions between telephone networks and cable television, or between cable television and broadcasting, or between broadcasting and newspapers and magazines no longer have clear meaning. Technological development once created compartments of activity; now that same technological evolution is breaking down those barriers.[81]

Watts argues that this convergence of technologies for the delivery of information will obscure the differentiating characteristics of the various media and will call for new constitutional analyses and approaches. This also has serious implications respecting the question of whether the fairness doctrine can continue to be justified. The intrusions into journalistic discretion represented by that doctrine are based upon the peculiar characteristics of the broadcast media—because it is a "unique medium."[82] Yet, if broadcasting is converging with other media, including the print media, in its techniques, processes, functions and important characteristics, then the *raison d'etre* of, and, indeed, the legal underpinnings for, the fairness doctrine are called into question.

59. Examples of how this convergence is occurring can be seen all about us. Perhaps the most pertinent example of this "convergence" is teletext.[83] We recently amended our rules to allow broadcasters to provide teletext services and defined teletext as a "data system for the transmission ot textual and graphic information intended for display on viewing screens."[84] Although examples of the uses to which teletext may eventually be put are legion, the Commission has identified what will likely be the primary purposes to which it will be put, particularly at the outset. These incude news, weather reports, comparative shopping prices, entertainment schedules, closed captions for the hearing impaired, and business oriented information. This service represents a "unique blending of the print medium with radio technology"[85] and, in fact, may become an alternative method for the delivery of newspapers and other print media to consumers. Clearly, the trend described by Douglas Watts is taking place and the distinctions between the print and broadcast media which once were clear are no longer easily discernable.

60. Therefore, given the multiplicity of broadcast outlets (especially when compared with print outlets), the creation of new broadcast or broadcast like delivery services, and the convergence of the print and the electronic media, we ask whether the fairness doctrine is essential to or consistent with achieving the First Amendment goals outlined above. As Judge Bazelon noted in his dissenting opinion in *Brandywine-Main Line Radio, Inc.* v. *FCC*,[86] it may well be that "[t]oday, our fears of a broadcasting monopoly seem outdated."[87] If this observation is correct, then is it possible that our concern in assuring diversity in the marketplace of ideas through the fairness doctrine may no longer be appropriate? In short, absent a fairness doctrine, would there be coverage of controversial issues of public importance? Given the nature of the issues to which the doctrine pertains, it seems likely that issues of this nature would be covered by broadcasters especially in view of the fact that the absence of a similar doctrine applicable to the print media reveals no dearth of print coverage of controversial matters.[88] Absent a fairness doctrine would the coverage of such issues be balanced on each station? Comparison with the print media suggests that this might not necessarily be so; but even though there is no requirement that the print media be "balanced", journalistic standards assure at least some measure of fairness. Indeed, many newspaper publishers have taken great pains to offset public perceptions of newspaper bias through publication of op-ed pages to provide contrasting viewpoints and through designation of ombudsmen to

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[79] While it has been suggested that the enormous presence or "pervasiveness" of radio and television upon society is itself a factor which justifies limited regulation of the First Amendment rights of broadcasters, it appears that newspapwers, and the news media in general, throughout this country's history often have been deemed to have a "pervasive" effect or undue influence on society. Yet this element or factor by itself has never provided a basis for governmental interference with newspapers' role in society nor has it been considered to have a detrimental effect on the functioning and well being of our democratic processes. In any event, we note that a recent newspaper article reporting that two out of three Americans read a newspaper on any given day provides evidence that would seem to contradict the pervasiveness of broadcasting theory as well as "widespread fears that television and other electronic media are undermining the influence of the written word," *see* "Americans in Electronic Era Are Reading as Much as Ever," *New York Times*, September 8, 1983, p. A1. As indicated later in this document, we invite on the "pervasiveness" theory of regulation.

[80] While we organize that many of the electronic media services are in their infancy, the very possibility of these services becoming additional information sources in the future would appear to strengthen the case for reexamination of the doctrine now before these and other new media subject to electonic distribution become enveloped under the fairness doctrine's mantle. *See, e.g., Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems*, 48 F.R. 26472 (1983). Notwithstanding these additional factors, the electronic media currently in place already provide the diversity necessary to warrant re-examination of the fairness doctrine. The new services referred to above can only further enhance this diversity.

[81] Watts, Douglas R., "A Major Issue of the 1980's: New Communication Tools," in *The First Amendment Reconsidered: New Perspectives on the Meaning of Freedom of Speech and Press* at 181–182 (1982).

[82] *Red Lion, supra*, at 390; *also see, CBS* v. *DNC, supra*, at 117–118 (1973).

[83] Videotex is a related service which can be provided by cable systems or telephone companies but, because it has interactive (two-way) capability, it can offer wider range of informtion services. *See Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems (Notice of Proposed Rule Making), supra*, at para. 46.

[84] *Amendment of Parts 2, 73, and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations*, 48 F.R. 27054 (1983).

[85] *Id.*

[86] 473 F.2d 17 (D.C. Cir. 1972).

[87] *Id.* at 75 (Bazelon, J. dissenting). "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *See also FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 and *National Broadcasting Company* v. *United States*, 319 U.S. 190, 219.

[88] Even if some broadcasters did not cover such issues, the plethora of electronic and media outlets currently available to the average citizen would appear to ensure exposure to such issues thereby guaranteeing both information from diverse and antagonistic sources and "suitable access," the twin goals of the First Amendment and the fairness doctrine.

serve in mediating allegations of unfairness. But even if some imbalance were to result, we question whether it would necessarily be harmful. It is possible that while some stations would likely be biased toward one side of an issue, other stations would likely favor the other side. Moreover, as indicated before, we question whether the broadcast media should be considered without reference to other sources of information and ideas. Therefore, even if some broadcast stations were "unbalanced" in their coverage, opposing points of view would in all likelihood still be available to the citizen on other stations or from other media. In addition, we raise the question whether lack of balance in itself is necessarily destructive of First Amendment values. For example, imbalance can have the positive effect of forcing the individual to bring his or her attention to the issue involved and can result in stimulating the individual to analyze his or her pre-existing beliefs. Such reassessment could result in beliefs being either altered or strengthened. Indeed, as suggested in our 1949 *Report on Editorializing*, the absence of challenge to an individual's beliefs can also be deleterious. As John Stuart Mill explained, when ideas are:

> Received passively, not actively—when the mind is no longer compelled, in the same degree as at first, to exercise its vital powers on the questions which its belief presents to it, there is a progressive tendency to forget all of the belief except the formularies, or to give it a dull and torpid assent, as if accepting it on trust dispensed with the necessity of realizing it in consciousness, or testing it by personal experience, until it almost ceases to connect itself at all with the inner life of the human being.[89]

In light of these theories, we ask commenters not to limit their focus to the question of whether any imbalance may result without the fairness doctrine, but also to address whether such an imbalance is necessarily counterproductive to First Amendment aims and goals that underlie the fairness doctrine.

61. It has long been recognized that even without a change in circumstances the Commission may reevaluate its requirements and what it believes is in the public interest.[90] The case for reevaluating our requirements in the face of changes of the magnitude of those which have occurred in the electronic media since *Red Lion* would appear to be stronger still and, accordingly, we hereby invite comment on the appropriateness of the fairness doctrine in light of those changes.

*C. Negative Attributes Associated with Fairness Doctrine*

62. If, as the preceding section indicates, the fairness doctrine may not be necessary to attain the very same objectives underlying the First Amendment itself—to insure the free flow of information and contribute to a climate that promotes vigorous and spirited debate on public issues of the day—then such regulation may not only be an unnecessary exercise of governmental regulation but also, and perhaps more importantly, may impermissibly tread not only on the First Amendment rights of broadcasters but also on those of the public, the intended beneficiary of the doctrine. In the case of *Cantwell* v. *Connecticut*, 310 U.S. 298, 304 (1940), the Supreme Court stated:

> The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom . . .

Similarly, in *NAACP* v. *Button*, *supra*, at 433, the Court stated:

> [B]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Because the fairness doctrine entails various degrees of governmental supervision and oversight of broadcast program content, the very nature of such regulation can lead to the possibility of governmental intrusions into the programming of broadcasters that may "unduly infringe" their protected freedoms and deny them the "breathing space" necessary for the healthy exercise of these freedoms.

63. In this section, we explore these possibilities by assessing the negative aspects attributable to the doctrine's operation in practice in order to elicit comment on whether the doctrine operates more as a disincentive rather than incentive to broadcast coverage of controversial issues. Even if we were again to find at the conclusion of this proceeding that the fairness doctrine does achieve to some degree its underlying purposes, we would still have to assess whether these positive benefits outweigh the negative elements. To do otherwise would be to ignore unwisely "the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.' "[91]

64. We believe that the costs borne by broadcasters and the public as a whole under this doctrine include the need for some degree of governmental oversight over the content of broadcasts to assure balanced programming, and concomitantly, the possibility that the surveillance required may lead to excessive and unnecessary interference with important editorial and journalistic functions performed by broadcast licensees. In this regard, we note that, in addition to the First Amendment restraint on speech, we are also bound by the prohibition in Section 326 from censoring or otherwise interfering with freedom of speech on radio communication.[92] We are concerned that the existence of the above possibilities may in turn generate more pernicious and expensive outlays to the public and broadcasters under the First Amendment. In sum, we query whether they can have the unintended effect of inhibiting or "chilling" the exercise of speech by broadcasters. If governmental censorship (or even the possibility thereof) leads to licensee self-censorship, then the benefits of diversity sought to be achieved by government regulation might well be outweighed by the detrimental effect upon the public and, under such circumstances, to paraphrase the Court in *CBS* v. *DNC*, the interests of the public sought to be achieved by governmental regulatory power over broadcasters' speech would not appear to outweigh the private jounalistic interests of broadcasters.[93] Additionally, because "inhibition as well as prohibition against the exercise of First Amendment rights is a power denied to government,"[94] such regualtion which has the undesirable effect of chilling the exercise of speech would also appear to be constitutionally suspect.

65. We previously have recognized that "there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast jounalism," 1974

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[89] J. S. Mill, *On Liberty* 286 (University of Chicago 1952).

[90] *Greater Boston TV Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[91] *CBS* v. *DNC*, *supra*, at 145 (Stewart, J. concurring).

[92] Section 326 of the Act specifically forbids agency censorship by providing: Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

[93] 412 U.S. at 110.

[94] *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J. concurring). Although this case did not involve the broadcast medium, nevertheless, the applicability of that general principle to broadcasting finds support in the *Red Lion* case for the reasons discussed in para. 66, *infra*.

*Fairness Report, supra.* We nevertheless found "no credible evidence" that our policies had had an inhibiting effect on coverage of controversial issues by broadcast licensees. *Id.* at 8. Despite this provious finding, however, it is evident that enough questions still persist in this area to warrant revisiting the issue. Both case law and the continuing attention paid to these issues by academicians, legal scholars, legislators, and others, continue to cast suspicion on this finding. [95] Moreover, the fact that these effects may be difficult to assess and are not subject to precise quantitative measurements should not lead to conclusions that they are not significant or do not exist. On the contrary, it suggests that, in the administration of regulations that touch upon First Amendment interests, we should tread slowly and cautiously. Therefore, we believe it is appropriate to consider anew the question whether there are any significant negative attributes associated with the doctrine that might well outweigh the positive attributes intended by the doctrine.

66. In addressing this issue, we first turn to *Red Lion* for it was in that case that the Supreme Court squarely recognized the possibility that the fairness doctrine might have a negative effect on broadcast coverage of public issues. The court admitted that, if this occurred, it would indeed be a "serious matter" because the "purposes of the doctrine would be stifled," at 393. Although the Court concluded that this concern "was at best speculative," it cautioned that:

> [I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.

*Id.* [96]

67. Five years later, the Court was presented with virtually the same set of issues but this time clothed in a newspaper, rather than a broadcast, context.[97] In *Miami Herald* the Court, in reviewing a right of reply statute not substantially dissimilar to the earlier reviewed personal attack and political editorializing regulations, reached a different conclusion than it had in *Red Lion*, finding that the statute plainly had a "chilling effect" on newspapers' right to publish. That the rule had a negative impact on the editorial freedom of the publisher was emphatically confirmed by the Court's following statement:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably "dampens the vigor and limits the variety of public debate."

*Id.* at 257.[98]

68. Because this later decision appears to suggest that regulation of this nature does have inhibitive effects, we question whether the two decisions are reconcilable on that point.[99] If a right of reply statute chills the speech of newspaper editors, then would the breadth of the obligations imposed under the general fairness doctrine not have at least as significant a chilling effect, especially in view of the Supreme Court's recognition that broadcasters are far more subect to the "finite technological limitations of time" than newspapers? [100] Although we recognize that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them," *Red Lion, supra*, at 386, these differences do not appear to explain adequately why a government mandated right of reply chills the speech of newspapers but not of broadcasters. As in *Tornillo*, fairness imposes a contingent obligation on a broadcaster to print, albeit in electronic mode, that which "reason" tells him should not be published based upon the content of programs initially broadcast. Consequently, even though the general fairness doctrine does not require a right of access to specific persons or groups, the obligations it imposes would appear to be as burdensome as the right of reply statute in *Tornillo* that was struck down as unconstitutional.

69. Moreover, the administrative difficulties inherent in the application of the fairness doctrine both for the Commission in enforcing the doctrine and for broadcasters in attempting to achieve compliance would appear to be considerably broader and more complex than those applicable to the relatively simple application of a right of reply statute. As discussed below, the general fairness doctrine entails a myriad of different considerations and factors that can lead to significantly greater governmental interference into the marketplace of ideas. In addition, under the fairness doctrine, we are placed in the position of being the national arbiter of fairness, a role government assumes in no other area of communications or the press. This inevitably leads to indirect, if not in some instances, direct, governmental involvement in program content.

70. We do accord broadcasters considerable discretion in meeting their fairness doctrine obligations and will not overturn their judgments unless we conclude that their exercise of discretion was unreasonable.[101] Nevertheless, in order to make such determinations, we come perilously close to governmental intrusion into the significant editorial autonomy of broadcasters that borders on government censorship prohibited under Section 326. Indeed, because the governmental regime required under the fairness doctrine can result in a degree of governmental supervision over broadcast program content, it is difficult to imagine that such oversight does not in some measure have an inhibiting

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[95] Most recently, the Senate Commerce Committee hearings on S. 1917, the "Freedom of Expression Act of 1983," introduced by Senator Packwood, has rekindled debate on this subject. *See, e.g.*, Simmons, *The Fairness Doctrine and the Media* (1978) (hereafter "Simmons"); Bazelon, "FCC Regualtion of the Telecommunications Press," 1975 *Duke Law Journal* 213; *also see generally Hearings on Freedom of the Press Before the Subcommittee on Constitutional Rights of the Senate Committee of the Judiciary*, 92d Cong., 1st and 2d Sess. (1971–1972) as well as *Hearings on Freedom of Expression Before the Senate Committee on Commerce, Science, and Technology*, 94th Cong., 2d Sess. (1976).

[96] Similarly, the Court stated: [W]e need not approve every aspect of the fairness doctrine to decide these cases and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan*, 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise.

*Id.* at 396. These statements clearly suggest that the Court did not intend to rule out further visitation of these important questions if at some later date circumstances so warranted.

[97] *Miami Herald Publishing Co.* v. *Tornillo, supra.*

[98] Although the Court observed that a "responsible press is an undoubtedly desirable goal," nevertheless it concluded that "press responsibility is not mandated by the Constitution and like many other virtues cannot be legislated." *Id.* at 256.

[99] For example, we note the fact that the court below discussed and relied upon the *Red Lion* decision in its analysis upholding the Florida statute, *see Tornillo* v. *Miami Hearld Publishing Co.*, 287 So. 2d 78 (1973), yet the Supreme Court, in reversing that ruling, did not even mention the *Red Lion* decision in its opinion. One commentator has labelled the apparent reluctance of the Court to discuss, let alone cite, *Red Lion* a "*sub silentio* acknowledgment of inconsistency" between the two decisions. *See* Powe, "or of the [Broadcast] Press," 55 *Texas L. Rev.* 39, 43 (December 1973).

[100] *Tornillo, supra*, at 257.

[101] On the opposite side of the regulatory coin, some have suggested that the "significant discretion" allowed broadcasters renders the efficacy of the doctrine a nullity.

effect on broadcast coverage of controversial issues.

71. For example, among the many factors we are compelled to consider are whether the broadcaster was reasonable in concluding or not concluding that a controversial issue of public importance was represented, whether reasonable opportunities for contrasting viewpoints were given, and whether the program formats utilized and spokespersons chosen for the presentation of these contrasting views were reasonable. In addition, our assessment inevitably must take into account the amount of time devoted to the subject on both sides (the "stopwatch" aspect), the frequency and degree of audience exposure to these broadcasts (e.g., one minute editorials in prime time versus half hour discussion in an afternoon public affairs program), the timeliness of initial coverage and of opportunities for contrasting viewpoints (e.g., contrasting viewpoints are of no value if presented after the issue becomes moot), and whether the broadcaster intends to present additional programming on the subject and, if so, when it will be presented (the "stoptime" or elapsed time aspect).

72. These are same but not all of the factors we must weigh in order to determine the reasonableness of a licensee's performance under the doctrine. The process is one which necessarily draws the agency into what can result in a detailed scrutiny of the content of a broadcaster's overall programming. If a simple right of reply statute can be deemed to have a chilling effect on newspapers, it is not difficult to imagine the pernicious effects this doctrine might have on a licensee's choice between assuming a vigorous role in coverage of controversial issues or engaging in "play-it-safe" journalism.

73. The pitfalls inherent in the application of the doctrine by this agency, in the role it assumes as a governmental arbiter of fairness, and for licensees, in their efforts to engage in broadcast journalism, are perhaps most vividly illustrated in *National Broadcasting Co.* v. *FCC.* ("*Pensions*" case).[102] In that case, the D.C. Circuit reversed an initial determination by this agency that NBC's network presentation of the documentary "Pensions: The Broken Promise," raised a controversial issue of public information and required opportunity for contrasting viewpoints by those stations airing the program.[103] The Commission initially held that the program did not deal merely with some abuses in pension programs as contended by the broadcast licensee but raised a controversial issue of public importance by addressing the overall performance and proposals for regulation of the private pension system. Agency resolution of the case appeared to turn on the basic question of whether the documentary presented a controversial requiring the opportunity for presentation of contrasting viewpoints.[104]

74. The court, however, reversed the Commission's determination holding that the proper standard of review by this agency was similar to that of a court in reviewing agency action: The agency, like a court, was not to disturb the licensee's "editorial judgment" unless it was clearly unreasonable or in bad faith. The court stated:

> Investigative journalism is a portrayal of evils, and there may be a natural tendency to suspect that the evils shown are the rule rather than the exception. But the question is not the Commission's view of what was broadcast and what would have been reasonable if it were the Commission's role to determine what should be broadcast, but whether the licensee, who had this role, had been demonstrated to have maintained an approach that was an abuse rather than an exercise of its discretion.

*Id.* at 1133. Moreover, the Court's opinion, while noting that the documentary was highly acclaimed by the press and was considered a critical success,[105] expressed concern that governmental interference in the journalistic function performed by broadcasters could have an inhibiting effect on future broadcast endeavors into investigative reporting and journalism.[106]

75. The *Pensions* case therefore exemplifies the substantial administrative, legal, and financial expense that can be incurred by networks and broadcast licensees in their efforts to engage in that type of broadcast journalism intended to inform the public.[107] In addition, it illustrates the difficulties that can be encountered by a network or broadcast licensee if it decides to appeal rather than accede to decisions of fairness made by the Commission and its staff even though it is successful in the end.[108] These costs might be considered inevitable expenses in the course of doing business but here, where they are the result of efforts to contribute to diversity in the marketplace of ideas which the First Amendment sanctions in theory, we question whether they are tolerable in circumstances where the net overall effect in the future may well be a diminishing return of information and viewpoints to the public. Finally, we note that the *Pensions* case reflects the many difficulties that can arise from the fairness doctrine duties that are imposed upon broadcaster alone.[109]

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[102] 516 F. 2d 1101, *reversal vacated and rehearing en banc granted,* 56 F. 2d 1155, *rehearing en banc vacated,* 516 F. 2d 1156, *second reversal vacated as moot and remanded with direction to vacate initial order and dismiss complaint,* 516 F. 2d 1180 (D.C. Cir. 1974). Indeed, inferences as to these difficulties can also be drawn from the checkered history of the case itself at both the agency and judicial levels.

[103] *Accuracy in Media, Inc.,* 40 FCC 2d 958 (1973), *application for review denied,* 44 FCC 2d (1974).

[104] Other factors that usually complicate analysis of fairness disputes were not present in this case. For example, evidence adduced in the case indicated that no previous programming on the subject in question had been broadcast and that the network had no intention of presenting future programmming that contained contrasting viewpoints on the subject.

In a somewhat similar vein, we note that the difficulties encountered by the Small Business Administration in the administration of its "opinion molder" rule, 13 C.F.R. 120.2, which generally prohibits governmental financial assistance to business operations relating to the communication of ideas on the basis that government should refrain from subsidization of particular views or ideas, has led the agency to reconsider the rule because it appears to have had the opposite effect of entangling, rather than extricating, government in speech matters due to the need for agency determinations of eligibility.

[105] The court was also quick to point out that the program was less than successful commercially, running a poor third against its network competition and because the network was able to sell only a portion of the advertising time available on the program. 516 F. 2d at 1108.

[106] Although the court noted that "there are areas where the Commission's duty of surveillance is considerable," it added: But we are here concerned with the area of investigative journalism, where there is greatest need for self-restraint on the part of the Commission and *for keen awareness of the inhibiting dimension of impermissible intrusion of a government agency* 516 F. 2d at 1133 (emphasis added). Indeed, the court noted earlier in its opinion that the Commission itself had previously recognized "the value of investigative reporting and of [its] steadfast intention to do nothing to interfere with or inhibit it." *Id.* at 1123.

[107] As indicated in n., 102 *supra,* the fairness complaint which originated the dispute was eventually dismissed. In Simmons, *supra,* at 217, the author reports that, based upon information furnished by a network official, the network "Paid well over $100,000 in legal expenses and thousands of hours in personnel time fighting a fairness complaint that it eventually won."

[108] Both Simmons, at 124–125, and Geller, *The Fairness Doctrine in Broadcasting* at 40–43 (Rand Corp. 1973), provide examples of the economic losses that can be incurred by broadcast licenses in defending against fairness doctrine complaints.

[109] The anomaly of the fairness doctrine is that if controversial subject matter is initially portrayed verbally, by print, or by motion picture, fairness obligations would not attach and difficulties of the above described nature would be avoided. However, once any of these forms is transmitted via conventional broadcast service, the immunity accorded to these differnt forms of speech is lost and the contingent obligations of fairness are triggered as well as the possibility of difficulties such as those presented in the *Pensions* case.

76. It would appear that encounters of this sort can result in broadcast licensees becoming fearful of the risks that can arise in defense and justification of their broadcast coverage as being fair. It also appears that it can cause licensees to become less willing to engage in uninhibited discussion of public issues for fear of invoking a government sanction, including the possibility of denying license renewal.[110] Indeed, as a result of conflicts of this nature, broadcast licensees might "find it expedient to avoid controversial matters which might give rise to difficulties with the government" [111] and, consequently, might "steer far wider of the unlawful zone" marked by the parameters of potential fairness doctrine controversy.[112] Rather than being motivated to provide such programming, they may well choose to avoid coverage of controversial material that might place them within the grasp of the fairness doctrine for fear that "the slightest perceived transgression of the doctrine might trigger a demand for a resource-consuming response on their part." [113] If this occurs, the unintended result might be that "[t]imidity might well supplant curiosity as the operative journalistic ethic in radio and television coverage of public events." [114] In such circumstances, even though a broadcast licensee might be cognizant of the fact that it cannot escape fairness doctrine obligations completely by avoidance of all controversial issue programming, nevertheless the licensee might screen out that controversial programming most likely to give rise to a fairness doctrine controversy.[115] Accordingly, we are concerned with the possibility that, although a licensee might be in literal compliance with the doctrine by minimally satisfying the obligation to cover controversial issues, the broadcasters in an effort to avoid controversy would present the material in a manner characterized by a blandness that robs the presentation of vitality or vigor. In the long run, such self-censorship would result not only in diminishment of the "significant editorial discretion" conferred upon and intended to be exercised by broadcasters under the Act, but it would deprive the public of the sort of robust, wide-open, uninhibited discussion of public issues intended to be fostered under the doctrine. While we recognize that evidence of these kinds of behavior may be hard to demonstrate, we nevertheless seek public comment as to whether they could and do result from the doctrine's existence.

77. We are also mindful of the dangers of abuse that can arise when government involves itself in the regulation of speech. As noted by Judge Leventhal in the *Pensions* case,

> In general, the evils of communcations controlled by a nerve center of Government loom larger than the evils of editorial abuse by multiple licensees who are not only governed by the standards of their profession but aware that their interest lies in long-term confidence.[116]

We are particularly concerned with the possibility that the fairness doctrine might be used to coerce or inhibit boardcast speech for partisan political gain as well as with the possibility that abuses might occur as a result of governmental pressure to influence coverage of particular matters. Indeed, it is possible that the mere perception of such attempts on the part of broadcasters, whether real or imagined, can influence them to become more sensitive to the wishes of the prevailing political forces and less sensitive to the needs and interests of the public.

78. That this possibility of danger is not speculative can be gleaned from some of the legislative measures introduced into Congress to provide the electronic media with the same degree of parity under the First Amendment as the print media enjoy. For example, Senator Hruska, in remarks accompanying the introduction of a 1975 legislative proposal [117] cited a New York Times story which described attempts of a previous administration to effectuate less critical behavior of broadcast licensees toward its policies. In it, the following statement was attributed to an official within that administration:

> Our massive strategy was to use the fairness doctrine to challenge and harrass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide it was too expensive to continue.

The official is alleged to have further stated that "over 1,700 free radio broadcasters" were granted to pro-administration spokesmen and *"even more important than the free radio time, however, was the effectiveness of this operation in inhibiting the activity of these right-wing broadcasts."* [118] Moreover, Senator Hruska emphasized in his remarks that these allegations were not confined to that particular administration but that "other examples of intimidation of the press by subsequent administrations relying on the 'fairness' approach" existed.[119] In addition, statements and information submitted in connection with other similar ligislative proposals mention these and other alleged instances of governmental or polilitical pressure exerted to diminish the exercise of speech rights of broadcasters.[120]

79. We readily concede that mere allegations of such activities, without more, do not rise to the level of placing "a pall of fear and timidity upon those who would give voice to public criticism," nor approach "an atmosphere in which First Amendment freedoms cannot survive." [120a] Nevertheless, these accounts do suggest that the possibility of such dangers are not so remote that they may be discounted entirely in our effort to create an environment in which First Amendment freedoms can flourish. Indeed as stated by the Supreme Court, these freedoms

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[110] As Judge Leventhal stated in the *Pensions* case: "The specter of renewal jeopardy for failure to comply fully with the fairness doctrine can have a serious inhibiting effect, as the Commission recognized . . ." 516 F. 2d at 1116.

[111] *See Fairness Reconsideration*, 58 FCC 2d at 708 n. 8 (dissenting statement of Commissioner Robinson). In that same statement, *d.* at 709, Commissioner Robinson observes that it is the broadcaster's perception of the risks involved that can lead to the "chill" on free speech and to a licensee's determination of "whether the marginal benefit of broadcasting matter bearing on a controversial public issue outweighs the possible battling with citizen groups, disgruntled viewers/listeners, and last, but not least, the FCC.

[112] *Speiser* v. *Randall*, 357 U.S. 513, 517 (1958).

[113] *American Security Council Education Foundation*, 607 F. 2d 438, 453 (D.C. Cir. 1979) (J. Skelly Wright, concurring).

[114] *Id.*

[115] This possibility is not remote for, as indicated by the court in the *American Security Council* case, "this obligation, however, is not extensive and is met by presenting a minimum of controversial subject matter." 607 F. 2d at 444 n. 16.

[116] 516 F. 2d at 1133.

[117] 121 Cong. Rec. 6458 (April 7, 1975).

[118] *Id.* (emphasis added).

[119] *Id.*

[120] *See, e.g.*, remarks of Senator William Proxmire relating to S. 22 ("The First Amendment Clarification Act of 1978"), 124 Cong. Rec. 16904, 16905 (June 8, 1978) ("I believe NBC executives should not have felt the hot breath of the FCC and its fairness doctrine on the backs of their necks. . . . I firmly believe that broadcast journalists would not be chilled into blandness and sameness if it were not for governmental controls as exercised through the FCC's fairness doctrine"); remarks of Congressman Robert Drinan relating to H.R. 7227 ("The First Amendment Implementation Act of 1975"), 121 Cong. Rec. 15897 (May 22, 1975). These dangers and their possiblity have been discussed elsewhere as well. *See, e.g.*, Bazelon, *supra*, as well as Bazelon, "The First Amendment and the 'New Media'—New directions in Telecommunications," 31 *Federal Communications Bar Journal* 201 (spring 1979); Simmons, *supra*, at 211–221; Friendly, *the Good Guys, Bad Guys, and the First Amendment* (Random House 1976).

[120a] *New York Times Co.* v. *Sullivan*, *supra* at 432.

"are protected not only against heavy-handed frontal interference." [121]

80. Accordingly, we invite comment on whether the dangers that appear to be ever present in the agency administration and enforcement of broadcasters' fairness—the possibility of excessive governmental intrusion into speech and of the chilling effects therefrom—are real and, if so, whether they are outweighed by the benfits that, theoretically at least, should accrue from the doctrine.

*D. Constitutional Law Developments*

81. In the following paragraphs we undertake as part of our inquiry and examination of the jurisprudential developments in the First Amendment area both generally and in the broadcast context to determine what bearing, if any, such developments might have on the continued application of our fairness doctrine policies. Because "the 'public interest' standard necessarily invites reference to First Amendment principles," *See CBS* v. *DNC, supra,* at 122, agency inquiry into this area is not only permissible but, indeed, may be clearly called for.

82. At the outset, we note that the very existence of government licensing and regulation of broadcast stations has some free speech implications. As former Commissioner Robinson has observed,

> no one would seriously contend today that the Commission is without constitutional power to license the use of radio frequencies, and, as part of such licensing scheme, to impose such technical restraints and limitations as are necessary to ensure a fair equitable, and efficient distribution and use of such frequencies. Minimum restraints through licensing are necessary in order that there be any effective radio communication, a fact made clear by the experience of the 1920's. To this extent the cliche that Commission regulation makes possible the exercise of free speech in radio communications is fair and accurate.[122]

However, the First Amendment implications that stem from a system of governmental licensing of the use of radio frequencies are considerably different and far less problematical than those that also involve government regulation of broadcast program content. As the Supreme Court stated in *CBS* v. *DNC, supra,* at 105, "the tightrope' aspects of Government regulation of the broadcast media," which were foreshadowed as early as the Congressional consideration of legislation leading up to the enactment of the Federal Radio Act of 1927, have constituted a difficult "problem [that] the Congress, the Commission, and the courts have struggled with ever since."

83. In the first case addressing the constitutionality of non-technical regulation of broadcasters by the FCC, *NBC* v. *United States, supra,* Justice Frankfurter sweepingly affirmed broad statutory and constitutional power in the FCC. He concluded:

> The [Chain Broadcasting] Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

*Id.* at 226–27. That case reaffirmed the principle set forth in *Associated Press* v. *United States, supra,* that communications media as commercial enterprises are no less subject to general economic and social regulation merely because they are in the business of dissemination of news and opinion than other commercial enterprises. *See, e.g., Minneapolis Star* v. *Minnesota Comm. of Rev.,* 75 L. Ed 2d 295, 302 (1983); *Associated Press* v. *NLRB,* 301 U.S. 103, 131–32 (1937). Although the issue before the Court in *NBC* involved essentially socio-economic regulation, nevertheless, the sweeping language of Justice Frankfurter's opinion has been subsequently construed to sanction the direct regulation of programming including the personal attack and political editorializing rules later upheld by the Supreme Court in the *Red Lion* case. This ready acceptance of the idea that government could engage in regulation of broadcast programming may be a reflection in part of the First Amendment climate that existed at the beginning of federal regulation of broadcasting.[123]

84. During the birth and infancy of federal regulation of broadcasting, First Amendment jurisprudence and its theoretical underpinning were relatively undeveloped. The judicial climate that prevailed at the inception of broadcasting was sympathetic to the idea that the government could punish, inhibit, or regulate speech that lawmaking bodies or courts believed might injure public morals, mislead the public, cast a cloud over judicial proceedings, judges or other public officials, or endanger obedience to law or public safety.[124] It is noteworth that

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[121] *Bates* v. *Little Rock,* 361 U.S. 516, 523 (1960).

[122] Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Televison Regulation,* 52 Minn. L. Rev. 67, 86 (1967). *See also National Ass'n of Theatre Owners* v. *FCC,* 420 F.2d 194, 208 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970) (upholding against First Amendment challenge FCC regulations restricting subscription television stations from broadcasting certain kinds of programs); *Lafayette Radio Electronics Corp.* v. *United States,* 345 F.2d 278, 281 (2d Cir. 1965) (upholding against First Amendment challenge FCC regulations prohibiting the use of Citizens Band radio as a "hobby" or diversion.").

[123] For example, as Judge Bazelon observed in his dissenting opinion in *Brandywine-Main Line Radio, Inc.* v. *FCC,* 473 F. 2d 17, 71–72 (D.C. Cir. 1972), "at the turn of the century there were doubts about whether the First Amendment even applied to radio. After all, radio came into the world as a magic box analogized to the telegraph. . . Broadcasters themselves were viewed as entertainers rather than responsible journalist; certainly they were not 'newsmen'. The Commission felt justified in imposing upon these neophytes a series of obligations to insure that they would act 'responsibly' in the public interest." *See* also Bazelon, *FCC Regulation of the Telecommunications Press, supra,* at 219–20.

[124] For example, in 1877 the Supreme Court maintained in *Ex Parte Jackson,* 96 U.S. 727, that Congress could exclude from the mails indecent publications or pamphlets giving information as to where articles intended for immoral use could be procured. The Court proclaimed that it had "no doubt" of the constitutionality of the exclusion. *Id.* at 737. *See also Patterson* v. *Colorado,* 205 U.S. 454 (1907) (criticism of public officials could be punished if deemed contrary to the public welfare, even if allegations of wrongdoing were true); *Lewis Publishing Co.* v. *Morgan,* 229 U.S. 288 (1913) (a federal postal statute that conditioned second class postal privileges for newspapers on marking any editorial or other reading material for which payment had been made as "advertisement" was held not to be unconstitutional); *Toledo Newspaper Co.* v. *United States,* 247 U.S. 402 (1918) (newspapers lack any First Amendment shield against a summary conviction for criminal contempt for publication of articles denouncing legal arguments of litigants in a pending civil suit); and *Gitlow* v. *New York,* 268 U.S. 652 (1925) (First Amendment does not enjoin the punishment of speech urging the unlawful overthrow of organized government if a legislature has a reasonable basis for believing that such speech would endanger the public peace and safety).

many of the cases that were instrumental in creating this climate have been overruled in form or substance by Supreme Court decisions of the contemporary era.[125]

85. The historical evolution of First Amendment doctrine, along with the different approach the Supreme Court has demonstrated to First Amendment questions in other areas and with respect to other media, raise questions whether the sharply divergent First Amendment treatment applicable to broadcasting and, more specifically, the constitutional considerations we have previously relied upon to justify the fairness doctrine's regulation of broadcast programming under the public interest standard of the Communications Act, should be reexamined in order to ensure that our regulation is not being gradually eclipsed by the underlying import of more recent Supreme Court First Amendment cases. In this regard, in conjunction with Congress' and this agency's efforts "to achieve reasonable regulation compatible with the First Amendment rights of the public and licensees," the Supreme Court has cautioned against "freez[ing what is a] necessarily dynamic process into a constitutional holding." *CBS* v. *DNC, supra,* plurality opinion at 133. Accordingly, just as the technological and marketplace changes discussed earlier suggest that it may be more difficult to justify the fairness doctrine on policy grounds, we query whether developments in First Amendment jurisprudence continue to support or appear to be eroding the constitutional pillars upon which the fairness doctrine rests.

86. As indicated earlier, the Supreme Court's decision in *Miami Herald* is completely silent about the dramatically different First Amendment Scheme that *Red Lion* had approved for broadcasters even though the parallels with and distinctions from *Red Lion* were prominently addressed in the briefs on both sides. Moreover, the sharply different treatment accorded print and broadcast journalists by *Miami Herald* and *Red Lion* appears particularly difficult to reconcile with much of the language of *CBS* v. *DNC, supra,* in which the Court concluded that neither the First Amendment nor the Communications Act compels broadcasters to present paid editorial announcements. In that case, the Court stated that Sections 3(h) and 326 of the Communications Act evince Congress' intent to "permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligation" by proscribing individuals' general right of access to the airwaves and by limiting government regulatory power over broadcasters' speech "only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters." *Id.* at 110. Accordingly, the Act envisioned and established a scheme where private broadcast journalism would flourish and be only "broadly accountable to the public interest standards." *Id.* at 120. The Court refused to find that broadcast licensees' utilization of the airwaves constitutes governmental action necessitating nondiscriminatory access to all those who wish to press their views. To hold otherwise, according to the views expressed by the Chief Justice Burger and joined in by Justices Stewart and Rehnquist, would be antithetical to the scheme of private broadcast journalism. *Id.* at 120–121. Moreover, the Court, in specifically rejecting the notion "that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views," stated:

> All journalisitc tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.[126]

87. The *CBS* v. *DNC* decision described the fairness doctrine as a regulatory measure which had evolved over the years and received statutory approval in 1959 and one which was designed to further both broadcasters' interests, by affording them wide discretion in implementing the doctrine's requirements, and the interest of the public by providing the public with reasonably balanced discussions on controversial public issues. *Id.* at 110–14. The Court recognized that "balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty." *Id.* at 102. Moreover, the Court observed that "the problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Id.* In view of the foregoing, if the overall thrust of the *CBS* v. *DNC* decision appears to be that the First Amendment seriously circumscribes governmental interference with journalistic function performed by the press, whether electronic or print, and if, therefore, significant parallels exist between that decision and the later *Miami Herald* decision, we question whether any of the constitutional considerations that led the Court to affirm this agency's rejection of a right of access to broadcast paid political advertisement and later reject the right of reply statute applicable to the print medium would also be germane to the fairness doctrine particularly as that doctrine has the potential for significant intrusion into the editorial functions performed by broadcasters.

88. Even if *CBS* v. *DNC* and the later *Miami Herald* decision can be read as signalling some degree of retreat from the broad language of *Red Lion,* which sanctioned the degree of content regulation of speech occasioned by the fairness doctrine, and as undercutting government intrusion into the editorial role performed by the press, whether broadcast or print, except in the presence of a compelling substantial and government interest, we query whether the "unique" characteristics of broadcasting would nevertheless continue to justify the degree of regulation required by the fairness doctrine. In this regard, we note that the Court did state in the *CBS* v. *DNC* case that "the Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a 'captive audience.' " 412 U.S. at 128. This particular aspect of broadcasting, the Court noted, was recognized as early as 1924 and agency reliance on it as a factor in formulating broadcast regulation, the Court further noted, received judicial recognition in *Banzhaf* v. *FCC,* 405 F. 2d 1082 (D.C. Cir.

[125] For example, the Supreme Court in the landmark case of *New York Times Co.* v. *Sullivan, supra,* declared that newspapers are endowed with immunity from defamation suits by public officials or public figures for speech assailing their offical conduct absent proof that alleged statments contained false assertions of fact and were published with malice. This so-called "actual malice" rule was held to be necessary to vindicate the foremost purpose of the First Amendment: assuring "unfettered interchange of ideas for the bringing about of political and social change desired by the people." 376 U.S. at 269. In subsequent decisions, the Court has acknowledged that broadcasters promote this purpose as well, and the Court has thus extended the "actual malice" rule to them. *See e.g., Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) and *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971).

[126] 412 U.S. at 125–126. The Court added: The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

1968), *cert. denied* 396 U.S. 842 (1969). In that case, Judge Bazelon, in upholding the Commission's ban on cigarette advertising, stated that:

> It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.

405 F. 2d 1100–1101. Moreover, the "captive audience" or "pervasive impact" theory of law received further judicial acceptance in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 749 (1977), where the Supreme Court held that "because the broadcast media have established a uniquely pervasive presence in the lives of all Americans," an individual's right to be left alone outweighs a First Amendment right to present "[p]atently offensive, indecent material over the airwaves." Although the Court emphasized "the narrowness of our holding," nevertheless, its ruling in *Pacifica* does pose the question whether the "pervasiveness" theory in its peculiar application to broadcasting is a factor entitled to such constitutional weight that it might nevertheless still result in a permissible overriding of the editorial discretion of broadcast licensees wrought by government regulation.

89. We also raise the question of what impact the Supreme Court's most recent decision in *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981), should have on our analysis. *CBS, Inc.* v. *FCC* upheld as constitutionally valid a limited right of access to the broadcast media by individuals seeking Federal elective office. The case reaffirmed that the broadcasting industry is entitled under the First Amendment to exercise "the widest journalistic freedom consistent with its public [duties]," *quoting CBS* v. *DNC*, but emphasized, as did the *Red Lion* case, the right of the viewers and listeners "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . is crucial here." *Id.* at 395. The Court reiterated the "importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day," 453 U.S. at 396, quoting *Buckley* v. *Valeo*, 424 U.S. 1, 52–53 (1974), and emphasized that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." 453 U.S. at 396, *quoting Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). The Court concluded that that "Section 312(a)(7) represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest." Id. at 397.

90. The *CBS* case suggests that the "scarce airwaves" rationale relied upon in *Red Lion* and traditionally set forth to justify program content regulation in general continues to be an appropriate basis for the differing treatment accorded broadcasting. Nevertheless, a question is still raised as to whether the fairness doctrine can be validly imposed if, in fact, there may not be any scarcity of voices and views available to the public via the airwaves. Although *Red Lion* and its progeny continue to rest in part on the inability of each member of the public to own and operate a broadcasting facility,[127] we query whether such a rationale can continue to be relied upon by us as a basis for imposition of fairness doctrine obligations if the public's constitutional right to a diversity of ideas and viewpoints from broadcast sources would not be endangered by the absence of such regulation and if the inability of the public to participate directly in our system of broadcasting rests equally as much on economic and other factors as on technological limitations. In the *CBS* case, the Supreme Court appears to have significantly relied on the principle recognized in First Amendment jurisprudence that access to political information is of extreme importance to the vital functioning of our democracy and, in recognition thereof, held that Congressional judgment was not misplaced in its desire to ensure the availability of such information through enactment of Section 312(a)(7) of the Act.[128] Accordingly, we query whether that particular factor was a critically important element and an important distinguishing factor in its decision to uphold the validity of the statute and whether it perhaps might set that decision apart from the question of the continued validity of the fairness doctrine.

91. We also invite comment on the question of to what extent First Amendment principles that undergird the fairness doctrine are consistent with developing First Amendment jurisprudence in other areas relating to speech and freedom of expression. For example, in 1975, the Court struck down as an unconstitutional abridgement of free speech a provision of the Federal Election Campaign Act of 1971 that limited expenditures by individuals or groups in support of candidates. *Buckley* v. *Valeo*, 424 U.S. 1 (1975). The Court rejected the argument that the provision served the government interest in "equalizing" individuals' and groups' ability to influence election outcomes:[129]

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to "serve 'the widest possible dissimination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

*Id.* at 48–49.[130] Although the Court dismissed the statute's supporters' reliance on *Red Lion* by setting out the scarcity argument, we question whether the Court's reliance on the proposition that the First Amendment protects eloquent and persuasive speech as well as unconvincing speech is an important factor we should carefully weigh in our analysis of the fairness doctrine and its implications for the exercise of First Amendment rights.[131]

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[127] As the Court in *Red Lion, supra*, at 388, stated: Where there are substantially more individuals who want to broadcast that 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.

[128] We note that, in general, the Court has indicated opposition to governmental attempts to impose restrictions on speech relating to governmental and public affairs as witnessed by such decisions as that in the *Miami Herald* case, *Mills* v. *Alabama*, 384 U.S. 214, 220 (1966) (state law prohibiting newspaper editorializing on election day conflicted with a "major purpose" of the First Amendment—"the free discussion of governmental affairs") *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1965) ([S]peech concerning public affairs is more than self-expression; it is the essence of self-government"); and *New York Times Co.* v. *Sullivan, supra*, at 74–75 ("[There exists] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

[129] One commentator has noted that the *Red Lion* decision was "caught in its own contradiction of general First Amendment interpretation. To refute the notion that licensees' rights are not superior to non-licensees', the Court at one point relied on the doctrine of equality of First Amendment rights: '[a]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.' The Court's recognition of that equality is obviously inconsistent with a theory that listeners' rights are paramount while licensees' rights are subordinated." Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 Geo. Wash. L. Rev. 974, 989 (1970).

[130] *See also Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530 (1981).

[131] Moreover, consideration of such a factor may be more compelling if there is any validity to the argument frequently proffered that "scarcity has afforded a convenient pretext for refusing to face the inconsistency between our treatment of broadcasting and our treatment of other media."

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92. Similarly, we also invite comment on what relevance, if any, the principle enunciated in *Associated Press, supra*,[132] and followed in more recent Supreme Court decisions,[133] which generally prohibits governmental action that compels persons to present views contrary to their own, might have in our examination of the fairness doctrine. The vitality of that principle was most firmly established in the Supreme Court's decision in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), where the Court struck down a state statute that permitted the use of non-union members' fees for the publication of views contrary to those members' views and unrelated to the collective bargaining process. Although noting that one of the principles underlying *Buckley* "was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment," the Court nevertheless held that "[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their contribution rights." 431 U.S. at 234. And the Court added, " 'If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' " *Id.* at 235, *quoting West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 642 (1943). Accordingly, to the extent that the fairness doctrine can be said to require broadcasters to present views with which they disagree in order to maintain "fairness" or "balance", we question whether such effects are not dissimilar from the effects of the statute found unconstitutional in the *Abood* case.[134]

93. In a similar vein, we note the Supreme Court's finding in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 735 (1978), that a state statute designed to curb corporate expenditures advocating support or defeat of referendum proposals was unconstitutional. Freedom of speech, the Court held, is not dependent upon the identity of the speaker, nor can it be defeated on the basis of the speaker's persuasive presence. *Id.* at 777, 790–91. The Court stated:

> The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.

*Id.* at 791. This holidng in *Bellotti* is consistent with other recent decisions of the Court rejecting the "highly paternalistic approach" of statutes or regulation that invade First Amendment interests because listeners or readers may form beliefs and take actions that, in the legislator's or regulator's view, are neither wise nor socially desirable. *See e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1975); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 95–98 (1977). To the extent that it can be said that a fundamental purpose of the fairness doctrine is to protect radio listeners and television viewers from biased or partisan or unbalanced broadcasting, we query what relevance these decisions may have on that aspect of the doctrine.

94. In his concurring opinion in *CBS* v. *DNC*, Justice Stewart concluded that the freedom that the First Amendment guarantees is freedom "from the intrusive editorial thumb of government. . . . Those who wrote our First Amendment . . . believed that 'fairness' was far too fragile to be left for government bureaucracy to accomplish." 412 U.S. at 145–46. The changing nature of technology and the marketplace, along with the Supreme Court's evolving First Amendment jurisprudence, suggest that the constitutional imprimatur originally placed on the fairness doctrine by *Red Lion* may be fading. Moreover, although the *NBC-Red Lion* constitutional tradition of government power over broadcast program content is so firmly established that it might seem pointless to dispute it further, one commentator has stated that the scarcity rationale on which it is based

> is too seriously defective to permit acquiescence. It is ironic that the Court would sustain a major regulatory incursion on the liberty of the broadcast press just as the theory on which the doctrine rests has fallen into ruins. Although no one seriously questions that there is a role for government to play in the regulation of broadcasting, there seems to be no persuasive basis for carrying regulation of this medium to anything like the lengths suggested by [47 U.S.C.] § 312(a)(7), the fairness doctrine, or other content-based legal rules.

Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 Sup. Ct. Rev. 223, 256.

95. In view of the fact that the Court in *Red Lion* did not foreclose the possibility that more experience with the fairness doctrine, constitutional developments, substantial growth in capacity for program transmission and further reflection might lead the Commission to reconsider whether the First Amendment goal might be better advanced and the public interest more completely vindicated without the degree of program content regulation epitomized by the fairness doctrine, we request that the comments in this proceeding address fully the constitutional considerations underlying the doctrine particularly in light of the related changes in technology and the marketplace and Supreme Court's treatment of First Amendment issues in other areas.

### *E. Agency Authority to Modify or Repeal the Fairness Doctrine*

96. Finally, we invite comment on the threshold question of to what extent the Commission is empowered to repeal or substantially modify the fairness doctrine. Because we question whether continued application of the fairness doctrine serves the public interest by furthering First Amendment values, we believe it is incumbent upon us to consider our authority to reevaluate the future application of these policies in order to ensure that we remain faithful to congressional intent. Accordingly, we have undertaken an extensive examination of all of the relevant statutory enactments, including the Federal Radio Act of 1927, the Communications Act of 1934, and especially the 1959 amendments thereto.

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Schenkkan, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 Texas L. Rev. 727, 750 (1974). In his view the Court's decisions in both *Red Lion* and *CBS* v. *DNC* make clear that "[s]carcity, it turns out, is not the problem that the fairness doctrine addresses, only an historical cause of the problem. The problem is licensee audience power. . . ." *Id.* at 744–45.

[132] That case held that government action relating to newspapers that "does not compel [the newspapers] to permit publication of anything which their 'reason' tells them should not be published" is not violative of their First Amendment rights. 326 U.S. at 20 n. 18.

[133] *See, e.g., Wooley* v. *Maynard*, 430 U.S. 705 (1977), where the Court declared that a state may not constitutionally require its citizens to bear automobile license plates that contain slogans contrary to their religions, moral or political beliefs. Citing *Tornillo*, the Court stated that the "right to freedom of thought protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714.

[134] In this regard, we also question whether the governmental role necessitated under the fairness doctrine, to the extent it may be viewed as requiring the Commission to set the bounds of "orthodoxy" relating to the discussion of controversial issues, is contrary to the principle enunciated in the *Barnette* case.

In the following paragraphs, we describe those circumstances and events which we believe are most germane to the question of whether Congress sought to impose by statute the fairness doctrine on broadcasters. Because it is by no means entirely free from doubt whether Congress intended to foreclose our discretion to administer the fairness doctrine either in whole or in part, we invite comment on the construction most reasonably deducible from the 1959 legislative amendments and the legislative history.

97. At the outset, we do not believe that any significant question exists that, prior to the 1959 amendments to Section 315, the fairness doctrine was not statutorily required by any express statutory provision or by the general public interest standard of the Communications Act. It has been generally conceded that, before those amendments, the fairness doctrine had evolved as an aspect of the Commission's discretionary authority to formulate policies consistent with the broad public interest. Indeed, many different authorities have recounted the various legislative efforts made to include language requiring fair treatment of public questions and how they were considered and rejected by Congress both prior to and subsequent to adoption of the Radio Act,[135] as well as when the Communications Act itself was enacted.[136] Thus, far from being a statutory requirement, these early expressions of legislative intent suggest that, prior to 1959, a serious question existed concerning whether the Commission possessed sufficient authority to enact any fairness-type obligations without express congressional authorization.[137]

98. For this reason, we believe that the appropriate focus for purposes of this inquiry turns on Congress' enactment of the *Act of September 14, 1959, supra,* which resulted in statutory amendment of section 315 of the Communications Act and, more specifically, inclusion of the statutory language at the end of that section which appears to reference the fairness doctrine. In undertaking this review, we note, at the outset, that the chief purpose of the 1959 amendments was to address, in an expedited fashion, a specific problem that was facing Congress at the time; namely, to correct an erroneous Commission interpretation of the equal opportunities requirement in section 315.[138] In its *Lar Daly* decision,[139] the Commission had ruled that the section 315 "equal opportunities" requirement should be applied to appearances of political condidates on newscasts. After the Commission's decision, however, Congress was warned by broadcasters that this novel interpretation could cause a virtual blackout of radio and television news covereage of political campaigns, including that of the upcoming national political conventions.[140] Determined to prevent such a result, Congress was forced to take swift action to provide legislative exemptions for news-type programming. Accordingly, Congress adopted legislation, remedial in nature, to amend section 315 for the express purpose of providing exemptions from the equal opportunities requirement for news casts, news interviews, news documentaries, and on-the-spot coverage of news events on broadcast stations.

99. At the end of the exemption language, Congress added a sentence that apparently references the second prong of the Commission's fairness doctrine. That sentence, which appears in the present version of the Act, reads as follows:

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

47 U.S.C. 315(a). This proviso contains the statutory language that raises the question whether Congress meant to impose statutorily on broadcasters the fairness doctrine in its entirety, meant to ensure by the statutory language that the Commission would apply the doctrine to issues concerning candidates in news programs exempted from the reach of the equal opportunities requirements, or merely meant to acknowledge but not disturb the Commission's existing regulatory efforts in this area. In the paragraphs below, we shall explore each of these alternative interpretations.

100. One construction of the effect of the 1959 amendments which, in our estimation, appears reasonable based upon an *overall* analysis of the legislative history is that Congress did not intend to strip this agency of complete discretion in this area but rather, by referencing the fairness doctrine obligations, merely intended to ensure that the Commission would continue to apply the fairness doctrine in the political broadcasting realm to ensure that the underlying purposes of the equal opportunities requirements would not be defeated by abuse of the newly created news exemptions. In support thereof, we note that, on its face, the statutory language appears to relate only to a possible misconstruction of the newly enacted news exemptions set forth in the main body of the 1959 amendments to section 315. This less restrictive statutory construction not only appears to comport with the literal language of the proviso but support for this view can also be found in the legislative history.[141]

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[135] *See, e.g., Staff Study of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine,* 90th Cong., 2d Sess. (Comm. Print. 1968) (hereafter "*Staff Study*"); *see also* Simmons, *supra,* at 50–53 (1978); and *Red Lion, supra,* at 381–82 n. 11, describing the pre-1959 legislative history as "inconclusive" with regard to whether the public interest standard during that period was broad enough to encompass fairness doctrine obligations. Moreover, a finding that the public interest standard expressly required this one set of obligations would appear to be at odds with the fact that this standard was intended to be flexible and, accordingly, had not been construed previously to mandate any other particular obligation on the part of broadcasters. *See, e.g., United States* v. *Southwester Cable Co.* v. *United States,* 392 U.S. 157, 180 (1968) ("This Court has recognized that 'the administrative process [must] possess sufficient flexibility to adjust itself' to the 'dynamic aspects of radio transmission,' *FCC.* v. *Pottsville Broadcasting Co., supra,* at 138, and that it was precisely for that reason that Congress declined to 'stereotyp[e] the powers of the Commission to specific details . . . . *National Broadcasting Co.* v. *United States, supra,* at 219."); *Computer and Communications Industry Assoc.* v. *FCC,* 693 F. 2d 198 (D.C. Cir. 1982) ("In designing the Communications Act, Congress sought to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications" (footnote omitted)).

[136] *See Staff Study, supra,* at 9–20.

[137] *Id.* at 13, concluding that "[t]hese legislative events would appear to cast serious doubt on the proposition that the Fairness Doctrine, at least in substance, is a necessary corollary of the 'public interest' standard contained in the Radio Act, and carried forward into the 1934 Communications Act."

[138] *See, e.g., S. Rep. No. 562,* 86th Cong., 1st Sess. 8–9 (1959); *H.R. Rep. No. 802,* 86th Cong., 1st Sess. 2–4 (1959).

[139] 26 FCC 715 (1959).

[140] *See, e.g.,* 105 Cong. Rec. 14447 (Remarks of Senator Hartke).

[141] As the United States Court of Appeals for the District of Columbia Circuit recently cautioned: Construing a statutory term, however, requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires us to examine the "context in which statutory words are set—the statute's purpose, structure, and history. . . ." (citations omitted).

*Multi-State Communications, Inc.* v. *FCC,* Case Nos. 83–1296 & 1325 (D.C. Cir. decided March 6, 1984), slip opinion at 6. In our estimation, this is especially the case here. *See also Viacom International Inc.* v. *FCC,* 672 F. 2d 1034, 1040 (2d Cir. 1982) ("While it is true that when clear and

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101. The legislative history, when viewed in the broader context of the fundamental objective of the 1959 amendments, does not suggest that Congress intended to focus its primary attention on the fairness doctrine. As indicated earlier, the legislative activity at the time was motivated by an equal time problem, not a fairness doctrine issue.[142] Congress was anxious to enact legislation as quickly as possible and, accordingly, concerted efforts were made to restrict the content of the amendments to the matter of immediate concern—the news exemptions—and to avoid forays into extraneous and sensitive programming issues that might delay the legislation by generating extensive controversy among the members.[143] Indeed, except for limited references to the "standard of fairness", there was very little discussion of the Commission's general fairness doctrine, or its legal and policy implications, in the hearings, the congressional debates or the legislative documents. These expressions of general concern about expediting the legislation by confining its scope, along with the absence of any significant discussion of fairness doctrine issues at the committee level, provide support for the view that an expansive interpretation of congressional intent is not warranted.

102. Moreover, both the original Senate and House bills (*i.e.*, as reported to the floor by committee) focused solely on providing news exemptions to the equal time provisions of section 315. Neither of these bills contained any language which suggested references to the fairness doctrine. The Senate Report did, however, contain some references to the Commission's existing policies in this area. In particular, the Senate Report, in an effort to address a concern that certain candidates could be favored as a result of the news exemptions, sought to clarify that the exemptions were not intended to

> diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy. This standard of fairness applies to political broadcasts not coming within the coverage of section 315 such as speeches by spokesmen for candidates as distinguished from the candidates themselves.

*S. Rep. No. 562,* at 13.

103. The Report further explained that its desire to clarify the import of the exemptions was largely in response to views expressed by the Department of Justice in a July 1, 1959, letter. Thus, the Report went on, "[i]nclusion of such language [i.e., the news exemptions] in any amendment to Section 315 *should not be construed as limiting the station's obligation to present conflicting views on public issues to the political situations covered in section 315 of the Act—those exempted via this legislation." Id.* at 13 (emphasis added).

104. Because the language finally adopted in the statute is substantially similar in content to that language emphasized above from the Senate Report, we believe that a close examination of its genesis may be especially relevant to an accurate understanding of the legislative intent behind the statute. The Department of Justice letter, which was the source of the Senate Report's language, was also appended to the Senate Report. That letter explained that

> *[i]n the area of newscasts treating political events,* the public interest, to our view, is best served, not by section 315's flat equal time stringencies, but by good-faith adherence to licensees' time-honored obligation of insuring fair and balanced presentation of programs where political or other controversial issues are treated (FCC Public Notice 6305, Oct. 1, 1958, p. 1) [3]
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> * * * * *
>
> [3] Should the Congress adopt the FCC proposal, care should be taken lest present requirements of fair treatment for public issues be weakened. Thus the FCC proposal specified that this proviso shall not exempt licensees who broadcast such news and special events from an objective presentation thereof in the public interest. However, under existing law, the Commission has held that a licensee's statutory obligation to serve the public interest includes the broad all-encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and other matters of controversy. *See FCC Report on Editorializing by Broadcast Licensees,"* 1 Pike & Fisher R.R. (pt. III), p. 91:201, et seq.). *This general fairness standard is presently applicable to political broadcasting not coming within the coverage of section 315 (such as speeches by spokesmen for candidates), as contrasted with the candidates themselves,* [citations omitted] *It would automatically be applicable to any additional types of political programming which might be exempted from the coverage of section 315. Inclusion of such language in any amendment to section 315 should not be construed as limiting the station's obligations to present conflicting views on public issues to the particular political situations covered in section 315 of the act, or those exempted via this legislation.*

*Id.* at 19 (emphasis added).

105. The foregoing suggests that the purposes of the Justice Department and FCC recommendations were merely to ensure that the news exemptions did not affect existing Commission policies that had prevented evasion of the equal opportunities requirements when programming fell outside the literal terms of section 315.[144] As the Justice Department letter makes clear, the Commission's ability to enact such safeguards stemmed, not from section 315 itself, but from its broad authority to enact regulations under the general public interest standard.[145]

106. As pointed out previously, the statutory language ultimately included in section 315 is substantially similar to the language in the Senate Report described above, which, in turn, stemmed from the views expressed by the Justice Department. Therefore, it appears that the purpose of the statutory language may have been to address the same concerns that had prompted inclusion of this language in the Senate Report; that is, to guard against any

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unequivocal, the language of a statute is the best and most reliable index of its meaning, it is also true that the surest way to misinterpret a statute or a rule is to follow its literal language without reference to its purpose") (citations omitted).

[142] *See, e.g.,* Simmons, *supra,* at 50–51.

[143] *See e.g.,* 105 Cong. Rec. 16228 (Remarks of Representative Harris) ["Now it is my hope that we can give our attention to the purposes of this bill and to what is involved. I hope that we will not get too far afield into some of the things that can easily arise in the consideration of a sensitive problem like this"]; *see also* 105 Cong. Rec. 16241 (Remarks of Representative Harris). It is also evident that House members had sharply contrasting views on such programming issues generally. Compare, for example, the views of Representative May, 105 Cong. Rec. 16232, who believed the news exemptions would be a step in the right direction to repeal of Section 315, thereby according broadcasters the same First Amendment freedoms as enjoyed by the press, with those of Representative Coad, who offered an amendment that would impose an equal opportunities requirement for "representatives of any political or legislative philosophy." 105 Cong. Rec. 16245. In his view, the Commission could implement the provision by enacting rules of "fair play," but, under those rules, "the extraneous and nuisance groups would be eliminated. The un-American groups would be eliminated." *Id.* This proposal was voted down after Representative O'Brien remarked that legislation as to such matters would be too complex and controversial. *Id.* at 16246. In his view it was sufficient that the FCC and the industry be on notice to "beware of blatant departure from objectivity, because everyone in this House, regardless of party, feels that the worst calamity which could happen to this Nation would be a one-party broadcasting industry. . . ." *Id.*

[144] This might occur, for example, by the broadcast of speeches by spokesmen for candidates, which technically were not broadcast "uses" covered by Section 315.

[145] Indeed, the very fact that the Department of Justice, in speaking of the "time honored obligations," merely referred to the Commission's 1949 *Report on Editorializing* and "the Commission's holding" concerning the statutory public interest obligation suggests that the referenced public interest obligations were apparently regarded as stemming from the Commission's own interpretation of the public interest standard and not viewed as deriving from an express mandate of Congress.

possible misinterpretation that the legislation would allow broadcasters to evade the equal opportunities requirements by presenting biased news coverage of favored candidates.

107. In addition, the Conference Committee Report, which briefly describes the statutory language, also appears to be supportive, rather than contradictory, of the foregoing interpretation.[146] That Report, which contains only a brief discussion of the provision in question, explains that the statutory language is not "inconsistent" with the bill passed by the House (which did not contain any similar fairness-type proviso) but merely is a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934."[147] The Conference Report's reference to the "standard of fairness" contained in the Statement by the House Managers, however, is the identical terminology used by the Commission in commenting upon an earlier House version of the bill and the problems that might arise if news exemptions were enacted. The context in which the term "standard of fairness" was used apparently stemmed from concerns relating to the equal opportunities requirements rather than concern that the fairness doctrine obligations apply beyond the realm of political broadcasts. In this regard, we note that the Commission had specifically recommended that, with enactment of the news exemptions, the "standard of fairness" imposed under section 315 should be supplanted by the less restrictive "fairness" standard.[148] According to the Commission, this approach would permit licensees a measure of judgment as to which candidates could participate in news programming within the exemptions, but would not permit broadcasters to engage in blatantly biased news coverage of particular candidates. More specifically, the Commission had stated:

[I]n reappraising the present standards of section 315 to determine whether those standards should be relaxed with respect to appearances on such programs, there are several factors which we feel Congress should take into consideration. Most obvious of these is the argument that in most cases, exposure of a candidate on radio or television can be extremely valuable to a candidate's prospects of success. Similarly, it has been argued that denial of equal opportunity in the use of a station after one's opponents have been exposed on such a station would place a candidate at a disadvantage.

* * * * *

Apparently in recognition of the value of broadcasting to political candidates, Congress determined in enacting section 18 of the Radio Act, the predecessor to section 315, that the *appropriate standard of fairness* was one which required a station to treat all candidates for the same office on equal terms. *This measure of fairness called for by the present standard of equal opportunities prevents a licensee from exercising its discretion in determining which candidates represent sufficiently important political views to merit the use of a broadcast station.* . . . Furthermore, over the years, in applying section 315 to new fact situations, the Commission has considered that the only way of carrying out the unconditional congressional mandate that all candidates for the same office shall be treated equally in terms of affording access to a station's facilities was by bringing under section 315 uses which, it has been argued, do not come within the intent of that section.

* * * * *

*As we understand it, if H.R. 7985 were enacted, it would relax the present standards of section 315 to provide that irrespective of whether or not participation in such a program by one candidate enhanced his prospects of success, it would still be permissible to deny other candidates for that office the same opportunity in procuring exposure via radio or television.* In other words, under the proposed standards, a station would not be required—as it must under the present wording of section 315(a)—to treat all candidates for the same office on the same terms when it came to appearances on programs of the type specified. Rather, *a licensee would be free to exercise its discretion regarding which candidates should be allowed to appear and participate in such programs. Thus, while a licensee could not, consistently with its statutory obligation to program in the public interest, limit itself to permitting the dissemination of only those selected political viewpoints it found unobjectionable, it would be free to exercise a measure of judgment as to which candidates could participate in programs of the type specified.*[149]

Since the FCC's recommendation had been included in the original House Report on the proposed legislation, it can reasonably be assumed that the House conferees were familiar with that recommendation. Thus, it appears that what the House conferees had in mind in their reference to the "standard of fairness" may have been the matters that had been earlier described by the Commission in its use of the identical language, namely, that the equal opportunities requirements not be subverted by creation of these new exemptions.[150]

108. This interpretation of the Conference Report language is also suggested by the earlier House Report. As noted earlier, the House version of the bill did not contain any fairness type language. The House Report did stress, however, that enactment of the news exemptions should nevertheless result in "substantial (as distinguished from absolute) equality of opportunity for qualified political candidates, with respect to appearances on radio and television . . .," *Report* at 4, and emphasized that "the Commission make every effort to protect candidates from manifestly unfair selective coverage." *Report* at 7. Again, this language in the House Report was apparently included in response to the FCC recommendation discussed above, which had reached a similar conclusion. In addition, we would note that the Conference Report's brief description of the statutory

[146] *H.R. Rep. No. 1069*, 86th Cong., 1st Sess. (1959). *But see* discussion *infra*, at ¶117.

[147] *Id.* at 5.

[148] *See H.R. Rep. No. 802, supra*, at 15.

[149] Also appended to the House Report was a Commission public notice which further explained the relationship between section 315 and "general public interest concepts of political broadcasts not falling within the provisions of section 315." This FCC public notice, which was also read into the Senate Record, 105 Cong. Rec. 14458, and was referred to in the Justice Department recommendation to the Senate, clarified that the issues relating to Section 315 discussed therein related: solely to obligations of broadcast licensees under section 315 of the Communications Act and is not intended to treat with the wholly separate question of the treatment by broadcast licensees in the public interest of political or other controversial programs or discussions not falling within the specific provisions of that section. With respect to the responsibilities of broadcast stations for insuring fair and balanced presentation of programs not coming within section 315, but relating to important public issues of a controversial nature including political broadcasts, licensees are referred to the Commission's Report, "Editorializing by Broadcast Licensees" (Vol. 1, Part 3 R.R. 91–201) and the cases cited therein. In this respect it is particularly important that licensees recognize that the special obligations imposed upon them by the provisions of section 315 of the Communications Act with respect to certain types of political broadcasts do not in any way limit the applicability of general public interest concepts of political broadcasts not falling within the provisions of section 315 of the Communications Act. On the contrary, in view of the obvious importance of such programming to our system of representative government is is clear that these precepts, as set forth in the Report referred to above, are of particular applicability to such programming.

*Id.* at 20–21. Therefore, it appears that virtually all of the documentation in support of both the Senate and House proposals focused exclusively on FCC interpretations of the general public standard as they related to political programming and the equal opportunities requirement in Section 315.

[150] We note that Representative Harris also strongly reiterated these same views on the House floor, observing that: Broadcasting facilities, and particularly television broadcasting facilities, are limited in number throughout the country and subject to Government licensing, and the limited facilities available play a vitally important role in our political life. For this reason, this has to be considered most carefully. Access of political candidates to these limited facilities should be governed by the rule of substantial equality of opportunity—and I repeat—should be governed by the rule of substantial equality of opportunity which is embodied in Section 315. 105 Cong. Rec. 16229 (emphasis added).

language as not being "inconsistent" with the House bill, also appears to comport with the view that the House conferees believed the statute merely restated the views previously expressed both in the House Report and the FCC recommendation relative to the broadcast of political matter.

109. The House and Senate debates, when read in their entirety, can also be viewed as generally supporting this interpretation. Although the debates contain virtually no mention of the actual paramenters of the fairness doctrine policy, the doctrine is obliquely referred to in several instances as "the standard of fairness" imposed by a broadcaster's obligation to operate in the public interest. In virtually all cases, however, the references to a "fairness standard" appear to have been made in response to the concerns expressed by those members who feared that enacting the news exemptions would allow broadcasters to present biased news coverage of candidates, thereby evading the equal opportunities requirement in Section 315 of the Act.[151] In every such instance, the fairness standard appears to be cited as the means by which the Commission could prevent such occurrences.

110. Indeed, we note that, in response to these concerns, the Senate had earlier adopted an amendment to the bill introduced by Senator Proxmire, which appeared to contain an affirmative statement of congressional intent to impose fairness type obligations on broadcasters.[152] Although Senator Proxmire may have intended his amendment to apply to a broader range of matters than those relating to political candidates and issues, it appears that what was foremost in the minds of most Senators during the debates was the applicability of the Proxmire amendment to political races and candidates. *See* 105 Cong. Rec. 14457. For example, Senator Hartke questioned

> Whether this can be a proper interpretation of section 315, when the amendment provides that all sides of the controversy shall be presented, and when section 315 itself does not go to all sides of a controversy, but has reference only to candidates?
>
> In my own mind, I do not think the amendment deals with the subject matter and in no way clarifies it. In my opinion, it serves only to confuse the issue even further . . . .

In response, Senator Proxmire assured questioners such as Senator Long that the intent of the amendment was merely to ensure that "news treatment by a television station should not be limited to one candidate when he was making news, as against another candidate who might also be making some news . . . having in mind . . . that at least there should be on the television station the burden and the duty of being fair in that connection." *Id.* at 14462. Proxmire also assured Senator Keating that the amendment was intended to be "a protection of substantial significance to a minor party candidate," *id.* at 14457, and Senator Javits that it was intended to protect Liberal Party candidates in New York. On the strength of this assertion, Senator Javits supported the bill, noting

> that the Liberal Party actually issues a statement of principles or precise policies upon specific pieces of proposed legislation. It represents a point of view or a side of a public issue. . . . I believe that is what the Senator from Wisconsin is trying to accomplish within a practical sense. This is experimental . . . and if we tried to be more specific we really would be lost. So I believe all of us would be wise to go along with the amendment of the Senator from Wisconsin.

*Id.* at 14458. Even though the language of the so-called Proxmire amendment was significantly modified by the Conference Committee (which proposed the existing statutory language),[153] it appears that the concerns which led to its adoption in the Senate may have been identical to those mentioned in the Senate Report; namely, to ensure fair new coverage of political candidates.

111. The vast majority of the debates which occurred when the Conference Report was submitted to the respective bodies of Congress also are consistent with a more limited interpretation of the statutory language. Although the conferees devoted significant attention to describing the statutory language at issue,[154] with one exception,[155] there was no meaningful or significant discussion of specific application of the standard of fairness other than in relation to political candidates.[156]

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[151] *See, e.g.*, 105 Cong. Rec. 14445, 14440 (Remarks of Senator Pastore); 105 Cong. Rec. 16227 (Remarks of Sen. Harris) [". . . broadcast licensees] would continue to remain subject to their present statutory obligation to operate in the public interest. Under this general, overall standard of licensee responsibility, the Commission requires a licensee to be fair in the presentation of opposing views on controversial public issues. This would mean that . . . a station still would not be free, under the proposed exemption of news programs, to present news regarding political candidates in a partisan manner."]

[152] *See* 105 Cong. Rec. 14462–3. As adopted by the Senate, the Proxmire amendment provided: but nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this Act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, all sides of public controversies shall be given as fair an opportunity to be heard as is practically possible.

[153] The *Staff Study, supra*, at 25–26, notes that there were significant differences between the Proxmire amendment and the language finally adopted by Congress, since the former referred to the "basic intent of Congress" whereas the latter referred only to "the obligations imposed upon them under this Act." In *Red Lion, supra*, the Court in dictum remarked upon this difference suggesting that the Proxmire amendment "constituted a positive statement of doctrine and was altered to the present merely approving language in the conference committee." 395 U.S. 383–84. The significance of this chaneg is unclear, but the Court's decision does suggest that the final amendments may have reflected only approval of the Commission's then-existing policies rather than constituting a mandate not to depart from those policies in the future. This additional ambiguity as to the legal effect of the Section 315 amendments, however, might appear to reinforce the view that the statutory language should not be broadly construed but should be read at most as encompassing only those matters upon which Congress had clearly focused during passage of the legislation.

[154] The rather substantial degree of attention given this part of the Section 315 amendments during the final debates is in marked contrast to the scant attention given to this language in the Conference Report. One possible explanation for this may be that the conferees sought to assuage the objections their fellow colleagues might have over the changes made to the respective bills to ensure that expeditious passage of the equal time exemptions would not be threatened. Therefore, in meeting these concerns, they may have attached more importance to the proviso's language than the Conference Committee report itself had accorded the language. Thus, for example, because the final legislation appeared to represent a retreat from the stronger language of the Proxmire amendment to the "merely approving" language ultimately enacted into law, Senators Scott and Pastore, in anticipating such concerns, explained that they had "insisted on" maintaining "the spirit" of the Proxmire amendment. Similarly, because the conferees had significantly expanded the scope of the news exemptions along lines recommended by the Senate rather than the House, Chairman Harris, in defense of the House conferees' action, indicated that the proviso's language was added in exchange for the expansion of the exemptions to provide additional safeguards against possible discriminatory news coverage candidates.

[155] That exception is found in the remarks of Senator Scott, 105 Cong. Rec. 17831. *See* para. 118, *infra*. Because no similar assertions regarding the broad scope of the legislation were made during the House debates on the final legislation, we have reservations whether these remarks should be construed as constituting persuasive evidence that Congress intended to mandate application of the Commission's fairness doctrine outside the political contexts that had preoccupied Congress prior to passage of this legislation.

[156] *Accord*, Staff Study, *supra*, at 26. *See* 105 Cong. Rec. 17829 (Remarks of Senator Engle) ("I propose to watch the administration of this act with great care, because I regard it as a matter of vital importance to the political situation in America that we have complete fairness, equality of treatment, and objective handling of the news and political candidates during periods of elections; *id.* at 17830 (Remarks of Senator Pastore) [(The provision) . . . "to be a continuing reminder to the Federal Communications Commission and to the broadcasters alike that we were not abandoning the philosophy that gave birth to section 315 . . ."]; *id.* at 17831 ["Section 315 was written into the law not to promote any one candidate . . . but . . . to give the public the advantage of a full, complete and exhaustive discussion, on a fair opportunity basis,

Continued

Moreover, Representative Harris cautioned during the House debates that guidance as to the meaning of the amendment should be derived chiefly from the Conference Report and not from any individual views and convictions expressed by the conferees.[157]

12. We further note that when the Commission's requirement of fairness was discussed, generally in connection with its application in a political context, some House and Senate members expressed their understanding that the Commission examined licensee compliance with such obligations only every three years when licenses were presented for renewal.[158] Indeed, Senator Moss expressed the belief that because an obligation of fairness could be tested only a renewal, the new statutory language was "virtually meaningless," and that the news exemptions had therefore resulted in a "backdoor repeal" of section 315.[159] Similarly, others expressed the opinion that the statutory language was little more than a "vague, general" requirement, or that it "was impossible to legislate fairness."[160] We query whether these statements are relevant to our inquiry into the Congressional intent in enacting the 1959 amendments.

113. The statutory interpretation that Congress intended to impose fairness doctrine obligations only in the political contexts that were the subject of the other section 315 amendments also appears to be in accord with the Supreme Court's decision in *Red Lion, supra*, at 382, where the Court, in upholding the personal attack and political editorializing rules, recognized that "the objectives of section 315 could readily be circumvented" by broadcasters banning all campaign appearances by candidates themselves while, instead, featuring the supporters of one candidate or slate of candidates to the exclusion of others. The Court observed that "the fairness doctrine as an aspect of the obligation to operate in the public interest rather than § 315" prohibits a broadcaster "from taking such a step" and, specifically stated that "[t]he legislative history reinforces this view of the effect of the 1959 amendment."[161]

114. The foregoing analysis of the legislative history suggests that we may indeed have the legal authority to substantially alter the fairness doctrine particularly with respect to its applicability to areas outside the political arena and, accordingly, we invite comment upon that authority. However, even assuming that we do have such administrative discretion, it would appear that, in exercising such discretion, we would still be required, at a minimum, to maintain adequate safeguards to ensure against the possibility of abuses in broadcast news coverage of political matters, e.g., by retention of the doctrine to political candidates and political issues in order to comport with section 315 of the Act. In this connection, in a presently pending rule making, we specifically requested comments "directed to the manner in which the Zapple doctrine might be applied to broadcasters if the political editorial rule is repealed."[162] Similarly, we invite comment on the most effective, but least restrictive, regulatory measures that would be required to ensure that Congressional intent is safeguarded consistent with the statutory analysis provided above.

115. By the same token, we are fully aware that support can be mustered for the opposite view that Congress did in fact intend to impose by statute general fairness doctrine obligations on broadcasters. Indeed, we have assumed, but without giving the matter extensive consideration, that our discretion was removed by enactment of the 1959 amendments. For example, in responding to an inquiry from Representative Harris, Chairman of the House Committee on Interstate and Foreign Commerce, concerning the Commission's practice of acting as promptly as possible on fairness complaints, we stated that "since 1959 the Communications Act imposes the specific obligation of fairness upon the broadcast licensee."[163] Similarly, the following year, in a public notice entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", we observed that "Congress recognized this [fairness doctrine] policy in 1959" and we expressed the view that "Section 315 thus embodies both the 'equal opportunities' requirement and the fairness doctrine."[164] In our previous

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to all legally qualified candidates . . .]: 105 Cong. Rec. 17778 (Remarks of Rep. Harris) ["The great problem is that on the local level a broadcaster might set up panel discussions or news interviews . . . which constitute an effort to take advantage of some political candidates. That is not . . . permitted. Such program has to be . . . bona fide . . . and regularly scheduled. Then we went further than that to be sure that there was no advantage taken by broadcasting industry or any one else and reaffirmed the "standard of fairness" established under the Communications Act."]; *id.* at 17778–79:

Mr. Avery. * * * I wondered, while the gentleman was in the well * * * if he would not address himself to the proposition that the test of the standards of fairness still prevails in the basic act irrespective of any changes that we have made in section 315; and it applies not only to political candidates, but issues and editorializing by licensees as well.

Mr. Harris. The gentleman is eminently correct. He will remember as he was one of the conferees, that we discussed this particular item and everyone agreed that the standard of fairness must prevail, and applies to the programs which will be exempted from the equal-time requirement of Section 315.

[157] 105 Cong. Rec. 17781. In this connection, it is also pertinent to note the views of Chairman Harris, expressed barely four years after passage of the 1959 amendments, that the fairness doctrine is not an express statutory requirement. *See Letter to Honorable Oren Harris*, 40 FCC 582 (1963). Since Rep. Harris played an instrumental role in securing passage of the 1959 legislation, his views on this issue are particularly enlightening.

[158] *See e.g.*, 105 Cong. Rec. 14445, wherein Senator Pastore responded to the concern of Senator McCarthy that enactment of the exemptions could result in biased coverage of candidates, by stating that

It is the firm conviction of the Senator from Rhode Island that irrespective of Section 315, if an act of that kind were deliberate in an effort to discriminate to the disadvantage of the cause of one candidate, in comparison to the cause of another candidate, those doing the broadcasting would be subject to a complaint and a protest being made at the time they went before the Commission for the renewal of their license, because under the law this medium is considered to be in the public domain. That is the other safeguard there would be.

Mr. McCarthy. What would happen? That would take place 2 or 3 years afterwards.

Mr. Pastore. That is correct. That is positively correct.

As against that situation, I suppose the Senator would recognize that there are many legitimate broadcasts in which the element of discrimination or disadvantage to an opposing candidate is not the feature.

The situation the Senate has presented today is with respect to a newspaper, as compared to television or radio. I am not saying that this abuse could not happen. I am not making that argument at all. The fact remains that there is a calculated risk involved, and we must weigh it.

[159] 105 Cong. Rec. 17779.

[160] 105 Cong. Rec. 17781 (Remarks of Rep. Brown); 105 Cong. Rec. 16246 (Remarks of Rep. O'Brien) [. . . 1 million words in a bill would not force anyone to be fair. We are going to have unfairness in this field no matter what we write. . . .].

[161] 395 U.S. at 382–383.

[162] *Repeal or Modification of the Personal Attack and Political Editorial Rules (Notice of Proposed Rule Making in Gen. Docket No. 83–484, supra.* Under the Zapple doctrine, if spokespersons for or supporters of one political candidate purchase air time for the broadcast of a discussion of the candidate or campaign issues, the station licensee cannot refuse to sell time to spokespersons or supporters of another candidate. *See Nicholas Zapple*, 23 FCC 2d 707 (1970).

[163] *See Letter to Honorable Oren Harris, supra*, at 586. As described by the Commission, Chairman Harris' letter had stated that: with specific statutory exceptions such as in the political broadcast field and section 317, the authority and responsibility of the Commission with regard to programs "is limited to determining periodically whether or not the licensee on an overall basis has performed in the public interest." [Because] the fairness doctrine [is] not one these specific statutory exceptions, [it] should be applied periodically [i.e., at the time of renewal] and upon an overall basis.

*Id.* at 583.

[164] 29 Fed. Reg. 10415, 10416 (July 25, 1964).

notice of inquiry into the fairness doctrine commenced in 1971, we expressed a similar view stating that the "Commission cannot abandon the fairness doctrine" because "[t]he Communications Act is explicit in th[is] respect[]." [165]

116. We also recognize that, at first blush, this interpretation may seem to be the one most readily drawn from a reading of the statute and its legislative history notwithstanding the statutory analysis provided above. It can be argued, for example, that the very inclusion in the statute of language referencing the Commission's fairness doctrine is itself considerable evidence of Congressional intent to make fairness doctrine obligations statutorily binding. In addition, it can be argued that, even though neither the original Senate nor House bill contained any explicit reference to the fairness doctrine, as indicated earlier, nevertheless, the fact that the final bill passed by both Houses specifically included a modified version of the Proxmire amendment referencing the fairness doctrine can be viewed as evidencing a Congressional intent to bind broadcasters to the tenets of the fairness doctrine.[166]

117. We are also aware that the Conference Committee Report and, in particular, the express statement of the Conferees explaining the statutory language in question, can be construed as evincing Congress' intent to impose the specific obligation of fairness on broadcasters rather than the more limited interpretation suggested in the previous paragraphs. In this regard, the Conferees stated:

> The conferees feel that there is nothing in this language which is inconsistent with the House substitute. It is a restatement of the basic policy of the "standard of fairness" which is imposed on broadcasters under the Communications Act of 1934.[167]

118. We also note that at least one statement made during the final Senate debate on the bill provides evidence that the language ultimately enacted was interpreted by at least some legislators as applying to all broadcasts concerning issues and controversies. In particular, we refer to following comments by Senator Scott relating to the bill eventually passed both the House and Senate:

> * * * I am very much concerned that in this limited area of the airwaves if we in Congress attempt to restrict too closely the freedom of the press, which already is more limited in that area than in any other of the media * * * in my judgment, the time will come when the Supreme Court will strike down whatever we have done in an attempt to bail out the Federal Communications Commission for some future unfortunate decision. Therefore, I think we ought to be exceptionally carefully to provide as much freedom of expression on radio and television as we possibly can.
>
> * * * * *
>
> If the decision were left to me alone * * * I should repeal section 315 entirely, but that is a minority point of view, and it arises entirely from my respect for the right of the people to be absolutely free in the expression of their point of view, subject only to protection of the criminal and the civil statutes against misuse and abuse of privileges.
>
> * * * * *
>
> We have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out what I do not think has yet been explained, that the phrase "To afford reasonable opportunity for the discussion of conflicting views on issues of public importance" does not refer merely to political discussions as such or to opposing views of political parties or of candidates. It is intended to encompass all legitimate areas of public importance which are controversial, and there are many, as we know, which pertain to medicine, to education, and to other areas than political discussion, and it is intended that no one point of view shall gain control over the airwaves to the exclusion of another legitimate point of view.
>
> * * * * *
>
> In other words, this amendment is designed to establish for future reference certain criteria as to equal time and a fair discussion of controvery * * * I believe that we have not in any sense dangerously or critically expanded the law. On the contrary, I think we have expanded the freedom of individuals and the freedom of this particular medium as contemplated in the first amendment to the Constitution.[168]

119. In addition, the Supreme Court's affirmance of the personal attack and political editorial rules in the *Red Lion* case can be viewed as adding weight to the view that Congress, by adding the proviso appearing at the end of section 315, intended to impose a statutory obligation of fairness on broadcasters. This view turns on the Court's references, in dicta, to the fairness doctrine as being "ratified", 395 U.S. at 382, and finding "specific recognition in statutory form," *id.* at 381. Similarly, the plurality opinion in *CBS* v. *DNC*, discussed more fully previously, states on two occasions that the 1959 amendments "give statutory approval" to the fairness doctrine, *id.* at 111 n. 8 and 114 n. 12, and Justice Stewart, in his concurring opinion in the case, notes that "[t]he basis for a fairness doctrine is statutory," *id.* at 142 n. 12.[169] For these reasons, we also invite comment on the interpretation that the 1959 amendment was intended to codify the second prong of the fairness doctrine as it applies to all controversial issues of public importance.

120. As indicated earlier, although support exists for the view that Congress *may* have intended to make the fairness doctrine a statutorily binding requirement on broadcasters, nevertheless, the legislative history does not evince a *clear* Congressional intent to foreclose our statutory discretion to modify or repeal general fairness doctrine obligations. What the legislative history does reveal very

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[165] *Study of Fairness Doctrine, Notice of Inquiry, supra*, at 26–27. As indicated previously, our position rested on the assumption that the statutory nature of the doctrine was a "given" and therefore never focused on the question. *See* n. 7 and accompanying text, *supra*. In recent proceedings, however, we have expressed considerably more reticence toward reliance upon that assumption. *See, e.g., Deregulation of Commercial Television Stations, supra*.

[166] This view arguably finds additional support in the following colloquy between Senators Douglas and Proxmire concerning the intended effect of the original Proxmire amendment:

> Mr. Douglas: As I see it, the wording of the amendment puts into the act the declaration which the committee itself made on page 13 of its report, but it reinforces that declaration by making it a part of the statute, and hence binding, whereas the report is merely of a persuasive nature but is not controlling.
>
> Mr. Proxmire: The Senator is exactly correct. The purpose is the same as expressed on page 13 of the committee report.

105 Cong. Rec. 14457. However, as noted in paragraph 102, the language from page 13 of the above-referenced report stemmed from concerns that broadcasters might favor certain candidates through the newly created exemptions.

[167] *See*, "Statement of the Managers on the Part of the House," *H.R. Rep. No. 1069*, 86th Cong., 1st Sess. 5 (1959).

[168] 105 Cong. Rec. 17831. As indicated earlier, however, Senator Scott's statement appears to be the only remarks made during the House and Senate debates that reflect a congressional intent to accord the statutory language in question an expansive meaning. Of interest here, we note that in 1971, Senator Scott introduced S. 956, the "Federal Election Reform Act of 1971" which, if enacted, would have, *inter alia*, unequivocally made the fairness doctrine a statutory requirement for broadcasters. That bill, however, was not enacted.

[169] However, the only unambiguous statement alluding to the effect of Section 315 appears not in *Red Lion* but in the dissent in *CBS* v. *DNC, supra*, at 385, by Justice Brennan with whom Justice Marshall (both of whom participated in the earlier *Red Lion* decision). Justice Brennan wrote:

> The Fairness Doctrine originated early in the history of broadcast regulation and,* rather than being set forth in any specific statutory provision, developed gradually in a long series of Commission rulings in particular cases.
>
> *the Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendment to § 315 of the Communications Act.

Although there are a number of post *Red Lion* decisions that contain dicta concerning the effect of the 1959 amendments, they do not squarely address the question and, therefore, do not appear to be determinative of the question. *See, e.g., Larus & Bros. Co.* v. *FCC*, 447 F. 2d 876 (4th Cir. 1971); *Public Interest Research Group* v. *FCC*, 522 F. 2d 1060 (1st Cir. 1975); *but see Straus Communications, Inc.* v. *FCC*, 530 2d 1001 (D.C. Cir. 1976); *Office of Communication of the United Church of Christ* v. *FCC, supra*.

clearly is that Congress' principal concern was that the Commission continue to ensure that possible abuses in broadcast coverage of political campaigns do not occur. In this regard, we note that the *Staff Study, supra,* at 8, takes the similar position that Congress' intent at most was to make "the new language added to section 315(a) by the 1959 amendments, to apply to political matters, and especially to the treatment of candidates for public office on news programs." Just as that study does not specifically rule out other "alternative hypotheses", *id.*, similarly, we also do not wish to foreclose in this proceeding consideration of possible alternatives and solutions besides those described above. In particular, we seek comment on the possible interpretation that Congress did not intend to impose by statute any part of the fairness doctrine and its obligations. In this regard, it bears repeating what the Supreme Court said in *Red Lion, supra,* at 383–384, about the original Proxmire amendment:

> Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine and was altered to the present merely approving language in the conference committee.

Accordingly, we also seek views on the possibility that Congress may not have intended any statutory codification of the fairness doctrine at all.

## IV. Conclusion

121. As observed earlier, the Supreme Court in *CBS* v. DNC, at 102, pointed out that "the broadcast industry is dynamic in terms of technological change," and, for this reason, "solutions adequate a decade ago are not necessarily so now and those acceptable today may well be outmoded 10 years hence." A preliminary analysis of the legal and policy underpinnings of the fairness doctrine and policy suggests that, while the imposition of these obligations on broadcasters may not have been an ill-conceived remedy for perceived First Amendment ills originally when the 1949 *Report on Editorializing* was adopted, continuance of these obligations now or in the future may be at odds not only with the very same First Amendment goals underlying their foundation but with other First Amendment principles in other areas of speech and expression. The mass media marketplace as presently constituted and as augmented in the future by entry of new and diverse program and information sources raises the question of the need for this doctrine in the broadcast area. In sum, questions exist over the need for continued governmental interference into the private journalistic discretion that the fairness doctrine occasions. For these reasons, we seek comment on the purposes, effects, relevancy and legality of continued imposition of the fairness doctrine including, but not limited to, the following questions:

(1) If a primary purpose of the fairness doctrine is, as pointed out in *Red Lion, supra,* at 390, to assure the public's access to diverse ideas, viewpoints, and experiences, is retention of the doctrine essential and desirable to achieving that end given the present mass media marketplace?

(2) In considering the primary purpose of the doctrine and the need for its retention, should we limit our focus to the broadcast media or should our examination include other electronic media such as cable television, multi-point distribution services, etc.? Should we consider information available from the print media as well?

(3) Should we be concerned that, without the fairness doctrine, broadcast licensee bias will result? If such occurs, is it necessarily inconsistent with the public interest? If the public has, in fact, access to diverse ideas, viewpoints, etc., would the availability of information sources, whether through broadcast media alone or through those and other nonbroadcast mass media as well, be sufficient to negate any possible ill-effects of individual broadcast licensee bias?

(4) Does the traditional basis for broadcast content regulation in general—that the airwaves are not available to all who wish to use them, i.e., the scarcity rationale—continue to be a justifiable basis for imposition of the fairness doctrine? What is the effect of the increasing decline in the number of the newspaper print media, i.e., daily newspapers, and expanding number of broadcast and nonbroadcast electronic media alike on this rationale?

(5) Is it appropriate to continue imposition of general fairness doctine obligations on broadcasters when other media, both electronic and print, are not hampered by such constraints in competing in the mass media marketplace?

(6) In view of the continuing convergence between traditional print media and electronic media through the development of such services as teletext, videotex, access to print media information through common carrier transmission facilities, cable facilities, personal home computers and in view of the traditional First Amendment freedoms accorded the print media, is retention of the fairness doctrine in the broadcast area constitutionally wise?

(7) Does the fairness doctrine contribute toward the First Amendment goal of encouraging "uninhibited, robust, and wide-open" debate on public issues, *New York Times* v. *Sullivan,* 376 U.S. 254, 270 (1964), or does it inhibit such exchange, i.e., what are the practical effects of administration of the doctrine on the public and on broadcast licensees?

(8) Is the Supreme Court's decision in *Miami Herald,* which held that a government mandated right of reply to newspaper editorials had an impermissible chilling effect on the exercise of a newspaper's editorial discretion, reconcilable with retention of general fairness doctrine obligations from the standpoint of the possible chilling effects of such obligations on broadcasters? From the standpoint of requiring broadcasters to present views "which their 'reason' tells them should not be published," *see Associated Press* v. *United States,* 326 U.S. 1, 20 n. 18?

(9) Because "the 'public interest' standard necessarily invites reference to First Amendment principles," *CBS* v. *DNC, supra* n. 13, is the fairness doctrine consistent with comtemporary First Amendment jurisprudence: which, for example, frowns generally upon government restricting First Amendment rights based upon the identity of the speaker, *see First National Bank* v. *Bellotti, supra?* which, in other areas, shows disfavor toward abridgement of First Amendment rights in order to enhance the First Amendment rights of others, *see Buckley* v. *Valeo, supra?* which disfavors government regulation of speech because such speech may be unduly persuasive or socially undesirable, *see Linmark Associates, Inc.* v. *Township of Willingboro, supra?*

(10) Is the fairness doctrine statutorily required under Section 315? under the general public interest standard of the Communications Act? If the fairness doctrine was codified, was it codified in its entirety or was only the second prong (balanced presentation) codified? If there is any limitation on the Commission's authority, is it solely related to remedying abuses arising from broadcast news coverage of political campaigns? arising from political news coverage in general?

(11) If the Commission does possess the statutory discretion to impose or not impose general fairness doctrine obligations on broadcast licensees, are there nevertheless public interest considerations that might militate against repeal or modification of the

doctrine? in favor of limited application of the doctrine, e.g., imposition of the *Zapple* doctrine, to ensure that the equal time provisions are not circumvented by broadcasters?

122. Authority for adoption of this notice of inquiry is contained in sections 4(i) and 403 of the Communications Act of 1934, as amended, and section 1.430 of the Commission's Rules and Regulations (47 CFR 1.430).

123. Pursuant to the applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before August 6, 1984 and reply comments on or before September 5, 1984. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and provided that the fact of the Commission's reliance on such information is appropriately noted in final action taken in this proceeding.

124. In accordance with the provisions of § 1.419 of the Commission's Rules and Regulations, 47 CFR § 1.419, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished by the Commission. Members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the hearing. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, NW., Washington, D.C.

Federal Communications Commission.

**William J. Tricarico,**

*Secretary.*

**Separate Statement of Commissioner James H. Quello**

Re: Section 73.1910 of the Commission's rules and regulations concerning the general fairness doctrine obligations of broadcast licensees, General Docket No. 84–282.

It is no secret that I have long advocated full First Amendment rights for the electronic media. I strongly endorse the thrust of this document which has many well-reasoned arguments and which should provoke thoughful comments. This Commission has an obligation to continually reexplore—for both its own benefit and for the benefit of Congress— any doctrine that precludes full exercise of journalistic rights by the electronic media. I think this is an extremely important initiative that the Commission has undertaken.

I would like to add that I shall be very interested in reviewing the comments concerning the Commission's statutory authority to revise the fairness doctrine. The Commission has long acquiesced in the view that the 1959 amendments to the Communications Act did effect a codification of the doctrine, and I believe that the burden of proof rests on those who seek to change this *status quo*. I trust that this issue will be addressed at length in the comments, and I look forward to examining the views of legal scholars on this issue.

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