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SUBSTANTIVE MEDIA REGULATION IN THE TWENTY-FIRST CENTURY: A FAIR LOOK AT THE FAIRNESS DOCTRINE

JUSTIN FISHER*

Those who won our independence believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

— Justice Brandeis1

I. MEDIA OUTLETS AND THE MARKETPLACE OF IDEAS

The words of the First Amendment are among the most iconic in our nation’s celebrated history. With a certain enthusiasm that was characteristic of the time, our founding fathers, with one swipe of the pen, permanently enshrined the American ideal of free speech at the forefront of the Bill of Rights.

Surely the framers of the Constitution did not believe such a broad statement would resolve all freedom of speech issues from that point forward. The founders could not have foreseen the rapid technological advances that have occurred during the last century.2 Consequently, attempts to reconcile the realities of modern day broadcasting with the sweeping provisions of the First Amendment continue to this day.

At the moment, the field of substantive media regulation sparks numerous questions, but yields few answers. Should the government be concerned with substantive media regulation? Should the government regulate the media in any capacity? If so, what is the government’s role? Should the marketplace of ideas remain free to self-govern, or does the government have a


2. See generally Geoffrey R. Stone, Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century, 56 Pepp. L. Rev. 273, 273–74 (2009) (describing how the United States judiciary has developed a complex free speech jurisprudence over the past century, despite the fact that such a body of law was largely unsettled at the turn of the twentieth century).
responsibility, to any degree, to oversee the content of the media landscape?

These are difficult questions, and as such do not lend themselves to straightforward solutions. Heavy regulation of the marketplace might stifle the free exchange of ideas; however, little to no regulation might similarly result in the inability of minority viewpoints to gain meaningful public exposure. As with most matters where competing interests weigh against each other, the optimal amount of government involvement likely rests between the extremes of too much and too little regulation.

This Note explores the constitutional right to free speech in light of the fairness doctrine—the longstanding policy of the Federal Communications Commission regulating broadcast media—by examining (1) the historical context from which the fairness doctrine developed, (2) the reasons for its demise, and (3) the major policy concerns of substantive media regulation, both modern and historical. After considering what the doctrine might look like if resurrected, the discussion contends that the Commission should reenact the fairness doctrine as a policy because it will (1) diversify the news media landscape, (2) impose a meaningful standard of journalistic accountability on broadcasters, and (3) prevent individual voices from dominating the marketplace of ideas.

II. THE FAIRNESS DOCTRINE: AN HISTORICAL OVERVIEW

A. The Early Years and the Limited Spectrum

The Federal Communications Commission, officially created by the Communications Act of 1934, has historically been responsible for developing and implementing the communication policies of the United States. The airwaves have traditionally been viewed as a public resource that must be subjected to rules and regulations to ensure efficient usage. The Federal Communications Commission has been concerned with broadcasting fairness since its inception. The concern originally stemmed from the limited spectrum available in the early days


5. Id.


7. "The electromagnetic spectrum is a unique natural resource. . . . [Its] value . . . lies primarily in its use for conveying a wide variety of information at varying speeds over varying distances: in other words, for communication. . . .
of radio and the reality that every broadcaster could not possibly have its own separate broadcasting station. The solution to spectrum scarcity was the fairness doctrine.

"The [fairness] doctrine evolved through case law until it became the subject of a major [Commission] report in 1949." It imposed upon broadcast licensees a two-part requirement to (1) cover "vitally important controversial issues of interest in their communities," and (2) provide "a reasonable opportunity for the presentation of contrasting viewpoints on those controversial issues of public importance." A later formulation of the requirements provided more detail:

[T]he licensee, in applying the fairness doctrine, is called up on to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and

The radio spectrum resource itself has three dimensions: space, time, and frequency. . . . The spectrum is subject to the phenomenon of interference. . . . That is, two signals of the same frequency that occupy the same physical space at the same time will interfere with each other (co-channel interference). Signals on adjacent channels may also interfere with each other. Interference usually obscures or destroys any information that either signal is carrying . . . ." Carter et al., supra note 6, at 42. To make the electromagnetic spectrum useful for communication purposes, it must be organized accordingly. Id. at 42–44. The spectrum is first allocated (i.e., divided) into "blocks of frequencies," which are then assigned to various services or users (i.e., certain frequencies are allocated for television use, radio use, etc.). Id. at 44. The rights to these blocks are then allotted to users in different geographical areas. Id. Lastly, these blocks are assigned to various end users in their respective geographic areas. Id.

8. Id. at 194. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Supreme Court noted that it was apparent in the early days of radio that "broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government." Id. at 376. The Court went on to reason that "[w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." Id. See also 67 Cong. Rec. 5479 (1926) (statement of Congressman White) ("The . . . radio conference . . . recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art.").

9. Carter et al., supra note 6, at 194. For the report, see In re Editorializing by Broad. Licensees, Report, 13 F.C.C. 1246 (1949) [hereinafter Editorializing by Broad. Licensees].

10. Jung, supra note 4, at 1.
spokesman to present the viewpoints, and all the other facets of such programming.\textsuperscript{11}

The doctrine thus allowed for some "discretion on the part of the licensee" on how to best implement the requirements.\textsuperscript{12}

Congress officially acknowledged the fairness doctrine in 1959\textsuperscript{13} while amending a provision that required broadcasters to give equal airtime opportunities to political candidates,\textsuperscript{14} stating that "[n]othing [here] shall be construed as relieving broadcasters . . . from the obligation to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."\textsuperscript{15} With this language, Congress reaffirmed and established the fairness doctrine by statute.\textsuperscript{16}

B. Red Lion Broadcasting Co. v. FCC: 
\textit{The Supreme Court Weighs In}

At its core, the fairness doctrine was created to protect individuals' First Amendment rights. The purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."\textsuperscript{17} In 1969, the Supreme Court of the United States upheld the constitutionality of the fairness doctrine in \textit{Red Lion Broadcasting Co. v. FCC}.\textsuperscript{18}

In \textit{Red Lion}, broadcasters challenged the fairness doctrine on "conventional First Amendment grounds, alleging that the

\begin{itemize}
  \item \textsuperscript{11} In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964) [hereinafter 1964 FCC Report] (citing Editorializing by Broad. Licensees, 13 F.C.C. at 1251).
  \item \textsuperscript{12} Id. at 599.
  \item \textsuperscript{13} Id. at 598.
  \item \textsuperscript{14} See Jung, supra note 4, at 9–10.
  \item \textsuperscript{15} Act of Sept. 14, 1959, Pub. L. No. 86-274 § 1, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a) (2006)).
  \item \textsuperscript{16} See Jung, supra note 4, at 10. This interpretation was the majority view among federal courts until 1986, when the District of Columbia Court of Appeals held that the fairness doctrine was not codified in the Communications Act. \textit{Id.} at 135–34; see also Red Lion Broad. Co. v. FCC, 395 U.S. 368, 368 (1969) ("This language makes it very plain that Congress, in 1959, announced that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard.").
  \item \textsuperscript{17} \textit{Red Lion}, 395 U.S. at 390.
  \item \textsuperscript{18} 395 U.S. 368 (1969).
\end{itemize}
rules abridge[d] their freedom of speech and press." The broadcasters argued that "the First Amendment [protected] their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."\(^{20}\)

The Court conceded that broadcasting is indeed a medium subject to the First Amendment,\(^2^{1}\) but stated that the "differences in the characteristics of new media [of that time] justified differences in the First Amendment standards applied to them."\(^2^{2}\) The opinion then compared the use of broadcasting equipment to the use of sound-amplifying equipment, reasoning that, just as the Government can limit the use of the former to prevent it from being so noisy that it drowns out private speech, the Government may likewise limit the use of the latter to prevent the loss of free speech.\(^2^{3}\)

Justice White, writing for the unanimous Court, reasoned that "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology."\(^2^{4}\) Justice White went on to explain that, given the finite range of broadcasting frequencies, it is untenable "to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish . . . . [T]o deny a station license because 'the public interest' requires it 'is not a denial of free speech.'"\(^2^{5}\) Regarding the First Amendment issue, the Court reconciled the apparent tension between the First Amendment and the reality of spectrum scarcity:

\[\text{[T]he Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium[,][b]ut the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the}\]

\(^{19}\) Id. at 386. Specifically, the broadcasters challenged the doctrine's manifestations in the personal attack and the political editorial rules. Id.

\(^{20}\) Id.

\(^{21}\) See id.

\(^{22}\) Id. at 386–87.

\(^{23}\) See id. at 387 ("The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.").

\(^{24}\) Id. at 388. The Court also reiterated that it was this "chaos" that originally led to the enactment of the Radio Act of 1927 and the Communications Act of 1934. Id. (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 210–14 (1943)).

\(^{25}\) Id. at 388–89 (quoting Nat'l Broad., 319 U.S. at 227).
ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.\textsuperscript{26}

The opinion then cast the fairness doctrine in a different light, explaining that the absence of the fairness doctrine would allow a small number of station owners and networks to "sell" their limited number of available time slots to those groups or individuals willing to pay the most money for them.\textsuperscript{27} Here, the Court touched on the heart of the issue—that the doctrine does not necessarily deal with government regulation of speech, but instead broadly addresses one of the conduits of speech.\textsuperscript{28} The fairness doctrine is therefore largely in accord with the spirit of the First Amendment. "There is no sanctuary," said the Court, "in the First Amendment for unlimited private censorship operating in a medium not open to all."\textsuperscript{29} Later in the opinion, Justice White summarized the holding:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of the press.\textsuperscript{30}

Over and above that, the opinion pointed out that the statute\textsuperscript{31} in question authorized the issuance of broadcasting "licenses if the 'public convenience, interest, or necessity [would] be served thereby.'"\textsuperscript{32} At that time, the Commission used programming proposals as a factor for determining to whom it should grant

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at 390 (citing FCC v. Allentown Broad. Corp., 349 U.S. 358, 361–62 (1955); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); 2 Zechariah Chafee, Government and Mass Communications 546 (1947)).
\item \textsuperscript{27} \textit{See id.} at 392. The Court also pointed out that such a scheme would allow these broadcasters to only air opinions with which they agreed. \textit{Id.}
\item \textsuperscript{28} \textit{See id.} at 390–92. The Court, of course, does not deny that a certain degree of friction exists between the First Amendment and the Commission’s need to regulate broadcast frequencies. \textit{Id.}
\item \textsuperscript{29} \textit{Id.} at 392. The Court also noted that "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." \textit{Id.} (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
\item \textsuperscript{30} \textit{Id.} at 394.
\item \textsuperscript{31} 47 U.S.C. § 307(a) (1964).
\item \textsuperscript{32} \textit{Red Lion}, 395 U.S. at 394 (quoting 47 U.S.C. § 307(a) (1964)).
\end{itemize}
licenses. The Court then cited its own jurisprudence in National Broadcasting Co. v. United States, where it held that "the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees."

The petitioners in Red Lion contended that the regulations of the fairness doctrine were too vague and that their duties as licensees were "impossible to discern." Justice White readily dispensed with this argument, however, noting that past decisions of the Commission provided clarity to the regulations and that, in any case, the applicability of past Commission decisions to new cases was questionable and licensees would not suffer sanctions in these situations without prior warning.

The petitioners' final attempt to challenge the fairness doctrine's validity was to assert that the problem of spectrum scarcity no longer existed at that time. In response, the opinion stated that "scarcity is not entirely a thing of the past" because, although technology had increased the ability of the Commission to use the spectrum efficiently, the number of uses for the spectrum had also grown. Having disposed of this last-ditch effort, the Court went on to uphold the doctrine's constitutionality.

C. The Fairness Doctrine Post-Red Lion

In the years following the Red Lion holding, the Commission continued to monitor the fairness doctrine's regulatory function. In 1974, the Commission conducted an investigation and subsequently released a report detailing the operation of the fairness

33. Id.
34. 319 U.S. 190 (1943).
36. Id.
37. See id. at 395-96 (citing Personal Attacks; Political Editorials, 32 Fed. Reg. 10303, 10304 n.6 (July 13, 1967)). The Court did, however, concede that it need not and would not approve every aspect of the fairness doctrine, but rather, that it would address specific applications of the doctrine when and if they came before it. Id. at 396.
38. See id. at 396.
39. Id. at 396-97.
40. See id. at 400-01. The Red Lion holding has received some criticism, but remains good law today, despite the fact that the Commission has not enforced the fairness doctrine since 1987.
doctrine. This report reiterated the fairness doctrine’s two basic requirements: “(1) the broadcaster must devote a reasonable percentage of time to coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.” The 1974 Report, however, went on to explain that the requirements of the fairness doctrine were not altogether unreasonable:

When a licensee presents one side of a controversial issue . . . [h]e is simply expected to make a provision for the opposing views in his overall programming. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to the licensee’s discretion subject only to a standard of reasonableness and good faith.

The 1974 report also alleviated some of the administrative concerns of the fairness doctrine, explaining that the Commission does not actively monitor the airwaves in search of violations, but instead acts based on complaints it receives. Rather, the Commission would only forward complaints to licensees if they presented a prima facie case in support of a violation, thus preventing the licensees themselves from sifting through inordinate amounts of dubious claims. Moreover, the Commission had already set out to reduce the number of cases by publishing interpretative rulings “to advise broadcast licensees and members of the public of the [licensees’] rights, obligations, and responsibilities . . . .”

According to the 1974 Report, “the public’s need to be informed [could] best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government’s role is limited to a determination of whether the licensee has acted reasonably and in good faith.” The wording of the Report, therefore, suggests that the Commission and courts should apply the fairness doctrine leniently. The Commission conceded that this remedial approach might permit

42. See Carter, supra note 6, at 195.
44. Id. at 8.
45. Id.
46. Id. (citing Allen C. Phelps, 21 F.C.C. 2d 12 (1969)).
47. Id.
48. See 1964 FCC Report, supra note 11, at 598.
49. Id. at 9.
some "questionable decisions by broadcast editors [to] go uncorrected," but concluded that "this approach represent[ed] the most appropriate way to achieve 'robust, wide open debate' . . . while avoiding 'the dangers of censorship and pervasive supervision' . . . ."\textsuperscript{50}

D. A Look at Red Lion in Light of the First Amendment

With so much focus geared toward its enforcement, the fairness doctrine's purpose was often overlooked. How exactly did the fairness doctrine's requirements enhance freedom of speech? Legal scholars have debated this question at length.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."\textsuperscript{51} The opening words of the Bill of Rights\textsuperscript{52} invoke a certain romanticism, as Professor Jerome Barron puts it, that resonates strongly with prevailing American ideals of freedom and liberty.\textsuperscript{53} Scholars and judges have often understood the First Amendment to protect a "marketplace of ideas" analogous to our nation's free economic markets.\textsuperscript{54} In his 1967 article entitled Access to the Press—A New First Amendment Right, Professor Barron cites Justice Douglas' dissent in Dennis v. United States to describe the popular "marketplace of ideas" theory:


51. U.S. Const. amend. I. See Stone, supra note 2, at 274–76, for a discussion of some of the basic interpretative problems raised by the First Amendment.

52. The First Amendment's placement at the beginning of the Bill of Rights was in fact by chance, as the first two of the original twelve amendments were not ratified. However, the originally proposed second amendment was eventually ratified in 1992 as the Twenty-Seventh Amendment. Akhil Reed Amar, America's Constitution: A Biography 315 (2005); The Original Bill of Rights—Text Version, Early Am., http://www.earlyamerica.com/earlyamerica/freedom/bill/text.html (last visited Feb. 12, 2011).

53. See Barron, Access to the Press, supra note 1, at 1642–43; see also id. at 1641 ("Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum—unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in poor position to compete with those aired as a matter of grace.").

54. See id. at 1642 (quoting Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting)).
When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. *Full and free discussion has indeed been the first article of our faith.*

Professor Barron points out that a necessary assumption of Justice Douglas' understanding of the First Amendment is that a free marketplace of ideas can and does exist without government intervention. Nevertheless, he notes that despite such a strong inclination to keep the government out of the marketplace of ideas, constitutional jurisprudence has been largely unconcerned with the possibility of private interference, stating that "[t]his indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability . . . ."

While a plain reading of the First Amendment's text would seem to preclude any government policy purporting to restrict or control speech, the aim of the fairness doctrine was, in fact, very much consistent with the spirit of the First Amendment. In the years following *Red Lion*, the Commission affirmed this goal, stating that "in view of the profound, unquestioned national commitment embodied in the First Amendment, our goal in this area must be to foster 'uninhibited, robust, wide-open' debate on public issues." The Commission itself acknowledged this "striking paradox" in its 1974 Fairness Report:

> At first appearance, this affirmative use of government power . . . would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision . . . . However, the continuing evolution of the media of mass communications . . . has led

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55. *Id.* (quoting Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting)).
56. *Id.* at 1642-43 ("Justice Douglas's position expresses the faith that, if government can be kept away from 'ideas,' the self-operating and self-correcting force of 'full and free discussion' will go about its eternal task of keeping us from 'embracing what is cheap and false' to the end that victory will go to the doctrine which is 'true to our genius.'" (quoting Dennis v. United States, 341 U.S. 494, 584-85 (1951) (Douglas, J., dissenting)).
57. *Id.* at 1643.
gradually to a different approach to the First Amend-
ment . . . [t] one [that] recognizes the responsibility of gov-
ernment in maintaining and enhancing a system of
freedom of expression.60

Such attacks were not unprecedented. In the 1974 Report, the
Commission affirmed61 its long held position on the matter, pre-
viously stated in its 1949 Report on Editorializing:

The freedom of speech . . . does not extend [the] privilege
to government licensees . . . to exclude the expression of
opinions and ideas with which they are in disagree-
ment . . . [The] requirement that broadcast licensees util-
ize their franchises in a manner in which the listening
public may be assured of hearing varying opinions . . . is
within both the spirit and letter of the [F]irst
[A]mendment.62

The Commission went on to explain that, while the freedom of
the radio is protected under the First Amendment,63 "this does
not mean that the freedom of the people as a whole to enjoy the
maximum possible utilization of this medium of mass commu-
ication may be subordinated to the freedom of any single person
to exploit the medium for his own private interest."64 It also
added that the fairness doctrine was "a necessary and constitu-
tional abridgement in order to prevent chaotic interference from
destroying the great potential of this medium for public enlight-
enment and entertainment."65

To be sure, fairness alone is not enough. The doctrine
requires that broadcasters first be compelled to cover issues of
public importance.66 With such issues, therefore, the fairness
doctrine does not excuse licensees from airing unpopular or con-
troversial sides of the debate simply by avoiding the issue
altogether.67

60. Id. at 3 (citing T. Emerson, The System of Freedom of Expression
(1970)).

61. Id. at 2.

62. Editorializing by Broad. Licensees, supra note 9, at 1256.

63. Id. at 1257 (citing United States v. Paramount Pictures, Inc., 334 U.S.
131, 166 (1948)).

64. Id.

65. Id. (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 296
(1943)).

66. Carter, supra note 6, at 195 (citing 1974 FCC Fairness Report, supra
note 41).

67. See Jerome A Barron, An Emerging First Amendment Right of Access to the
Media] ("The argument has often been made that [the fairness doctrine] leads
to less rather than more discussion, for if the price of airing controversy is that
Professor Barron has commented on a distinct but related First Amendment paradox, stating that “[t]here is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression.”68 In response, Barron has developed his own hypothesis, known as “access theory,”69 which takes the notion of substantive media regulation one step further. Access theory asserts that the First Amendment, in addition to protecting the press itself, ensures access to the press.70 Viewed from within this framework, the fairness doctrine deals less with the substantive content of what members of the press can say, and more with who is permitted to have a voice.71

III. A FAIR LOOK: WHY THE COMMISSION SHOULD RESURRECT THE FAIRNESS DOCTRINE

As one of the most prolific writers in our nation’s history, Thomas Jefferson had much to say on the topic of the media, and on June 14, 1807, offered the following assessment:

[As to] the manner in which a newspaper should be conducted, so as to be most useful, I should answer, 'by restraining it to true facts & sound principles only.' Yet I fear such a paper would find few subscribers. It is a melancholy truth, that a suppression of the press could not more compleatly [sic] deprive the nation of it's [sic] benefits, than is done by it's [sic] abandoned prostitution to false-

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68. Barron, Access to the Press, supra note 1, at 1641.
69. See Gregory P. Magarian, Substantive Media Regulation in Three Dimensions, 76 GEO. WASH. L. REV. 845, 853–54 (2008) [hereinafter Substantive Media Regulation] (“The regulatory concept of fairness was narrower, and less onerous for regulated media, than Barron’s ideal of access.” (citing Barron, Access to the Press, supra note 1, at 1648)).
70. Barron, Access to the Press, supra note 1, at 1648. (“A realistic view of the [F]irst [A]mendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications.”). See also id. at 1656 (“The constitutional admonition against abridgement of speech and press is at present not applied to the very interests which have real power to effect such abridgment. . . . What is required is an interpretation of the [F]irst [A]mendment which focuses on the idea that restraining the hand of government is quite useless in assuring free speech if a restraint on access is effectively secured by private groups. A constitutional prohibition against governmental restrictions on expression is effective only if the Constitution ensures an adequate opportunity for discussion.”).
71. See generally id. (arguing for an “access theory” approach to the First Amendment).
hood. Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle.\footnote{72}

Jefferson's analysis revolves around the problematic existence of a free press in a free market capitalist economy; when consumers are, in large part, paying for the news they receive, the possibility exists that they will simply pay for what they wish to hear, with little regard for whether or not the "news" they are receiving is fact or fiction.\footnote{73} Jefferson's cynicism about the state of the media still rings true today because it echoes the philosophical issues with which we still struggle: the need for a press that is free from government control, but the reality that, absent some effective means of regulation, the press might devolve into disrepute.\footnote{74}

A. The First Amendment at a Crossroads

So where does this leave us? The First Amendment ensures the freedom of the press, but is freedom of the press truly free if only a select few have access to it?

On Tuesday, August 4, 1987, the Commission declared it would no longer enforce the fairness doctrine.\footnote{75} This was a natural move at the time, as the original purpose of the doctrine had long since become a moot point.

In the years that followed the fairness doctrine's repeal, the media landscape continued to evolve. Among these changes was the advent of opinion-based talk radio, which has prompted

\footnote{72. Letter from Thomas Jefferson to John Norvell (June 11, 1807), in 9 THE WRITINGS OF THOMAS JEFFERSON 73 (Paul Leicester Ford ed., 1892) [hereinafter WRITINGS OF THOMAS JEFFERSON].}

\footnote{73. See Letter from Thomas Jefferson to John Norvell (June 14, 1807), in 10 THE WRITINGS OF THOMAS JEFFERSON 357 (Albert Ellery Bergh ed., 1905) ("Perhaps an editor might begin a reformation in some such way as this. Divide his paper into 4 chapters, heading the 1st, Truths. 2nd, Probabilities. 3d, Possibilities. 4th, Lies. The first chapter would be very short, as it would contain little more than authentic papers, and information from such sources, as the editor would be willing to risk his own reputation for their truth. The 2d would contain what, from a mature consideration of all circumstances, his judgment should conclude to be probably true. This, however, should rather contain too little than too much. The 3d & 4th should be professedly for those readers who would rather have lies for their money than the blank paper they would occupy.").}

\footnote{74. Jefferson seemed to allude to this possibility in his letter to John Norvell with his cynical speculation that a newspaper which "[restrained itself] to true facts [and] sound principles only . . . would find few subscribers." Letter from Thomas Jefferson to John Norvell (June 11, 1807), in WRITINGS OF THOMAS JEFFERSON, supra note 72, at 73. See also id. (referring to a newspaper as a "polluted vehicle").}

\footnote{75. JUNG, supra note 4, at 1.
some in Congress to discuss the possibility of bringing the fairness doctrine back as part of the Commission’s regulatory scheme. Partisan politics, however, have largely eclipsed meaningful discourse on the matter. Professor Magarian described the partisan dynamics of the debate during recent years:

Since the Democrats took over Congress [in 2007], calls to revive the fairness doctrine have grown louder . . . . Democrats and liberals, in advocating a fairness doctrine revival, routinely target conservative talk radio’s one-sided attacks on Democrats and liberals. The transparency of their self-interest has allowed Republicans and conservatives to conflate their own self-interest with libertarian free speech pieties in warning that renewed regulation would lay waste not merely to broadcasting but to the First Amendment.

Despite the self-seeking political motives behind some of the fairness doctrine’s proponents, the Commission should indeed reconsider it for inclusion in its regulatory policy going forward. The need for a press that is both substantially free from government manipulation and sufficiently restrained so as to preclude free market abuse necessarily requires a compromise.

At this juncture, it bears mentioning that the fairness doctrine itself is, in fact, a compromise of sorts. Compared to Professor Barron’s “access theory,” which asserts that the First Amendment should protect meaningful access to the press, the fairness doctrine is narrower and more attenuated. Professor Magarian explains these differences:

Access connotes an obligation to admit not just divergent ideas but particular divergent speakers who specifically

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77. See Magarian, Substantive Media Regulation, supra note 69, at 847–48.

78. Id. (citing Jim Puzzanghera, Democrats Speak Out for Fairness Doctrine, L.A. TIMES, July 25, 2007, at C1, C3; George F. Will, Fraudulent Fairness, NEWSWEEK, May 7, 2007, at 72.).

79. See id. at 853.

80. See Barron, Access to the Press, supra note 1.

81. Magarian, Substantive Media Regulation, supra note 69, at 853–54 (“Given Barron’s charge that First Amendment doctrine ‘protects expression once it has come to the fore’ but ignores the importance of ‘creating opportunities for expression,’ the fairness doctrine represented only a limited step in the right direction.” (citing Barron, Access to the Press, supra note 1, at 1641)).
demand a platform, and not just two opposing positions, but the widest possible range of opinions that bear on important public issues. In addition, the fairness doctrine operated in a reactive manner, requiring some action or willful inaction by broadcasters to trigger any liability; in contrast, the access principle reflects a proactive and instrumental effort to deepen and broaden public debate.82

Thus, the aim of the fairness doctrine is relatively modest; it seeks to apply a meaningful standard of accountability, but because of its reactionary enforcement mechanism, it is predominantly unobtrusive.

Likewise, some oppose the return of the fairness doctrine.83 Even some of its proponents, such as Professor Barron, have acknowledged its shortcomings.84 One criticism of Red Lion centers on its use of the scarcity of the electromagnetic spectrum to distinguish the fairness doctrine from other First Amendment violations.85

B. The "New" Fairness Doctrine

Both the news and media landscapes have changed drastically since the fairness doctrine was last used in 1987. With the advent of the Internet, radio and television no longer dominate as they did during most of the twentieth century. As Guylyn

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82. Id. at 853–54 (citing Jerome A. Barron, Freedom of the Press for Whom?: The Right of Access to Mass Media 150–51 (1973)); see also Barton, Access to the Press, supra note 1, at 1664; Barton, Access to the Media, supra note 67, at 489–90.


84. Barton, Access to the Press, supra note 1, at 490.

85. L. A. Powe, Jr., Red Lion and Pacifica: Are They Relics?, 36 Pepperdine L. Rev. 445, 447 (2009). Professor Powe takes issue with the Court's use of scarcity as a distinguishing factor, pointing out that "all resources are scarce, albeit some more so than others." Professor Powe is also apparently frustrated by the specific facts of the case, noting that Red Lion was an AM radio station in rural Pennsylvania, which would seemingly make scarcity less of a problem in that specific context. He seems to suggest that scarcity was merely a reason the Court gave for applying a different set of rules because "[i]t was sure broadcasting was different." The Court posited in Red Lion that the fairness doctrine was, in fact, consistent with the spirit and purpose of the First Amendment. See supra Part II.B.
Cummins notes, “the spectrum of scarcity on which the fairness doctrine was premised does not exist for the Internet, cable television, and collectively, the conventional mass media at large.”

The fairness doctrine, however, was not merely a mechanism for allocating the limited spectrum among licensees; it imposed an affirmative duty on the licensees to "provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues . . . ." Therefore, it was not sufficient to simply allow everyone who would like to speak the opportunity to do so, nor was it enough for a licensee to present both sides of any issue that it broadcast. Presumably, there were certain issues that licensees were affirmatively obligated to cover, and they could not evade their responsibilities under the second prong of the fairness doctrine by refusing to honor their obligation under the first.

C. Dual Arenas

With spectrum scarcity no longer a dire concern, what reason could there possibly be for resurrecting the fairness doctrine nearly a quarter century after its repeal? Ironically, the lack of spectrum scarcity perhaps offers the most compelling argument in favor of the fairness doctrine's return.

As a Commission policy, the fairness doctrine only applied to the media subject to Commission regulation: programming on public airwaves. It did not, for instance, apply to programming on cable television. A resurrection of the fairness doctrine would

86. Guylyn Cummins, The Fairness Doctrine Redux?, 26 COMM. LAW. 2, 4 (Mar. 2009). But see Red Lion Broad. Co. v. FCC, 395 U.S. 368, 380 (1969). The petitioners in Red Lion put forth a similar argument when that case was decided in 1969. The Court responded that scarcity at that time was "not entirely a thing of the past[,]" noting that, while advances in technology at that time allowed for more efficient use of the frequency spectrum, the potential uses of the spectrum had also grown significantly since the fairness doctrine was first put into use. See generally supra Part II.B. An argument asserting spectrum scarcity as a thing of the past would probably have a greater chance of success today, but the electromagnetic spectrum is nonetheless a limited resource. See CARTER, supra note 6, at 42–43.

87. Editorializing by Broad. Licensees, supra note 9, at 1249. The Report went on to explain that "this duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full disclosure thereof." Id. (citing United Broadcasting Co., 10 F.C.C. 515 (1945)).

88. There is, however, presumably some room for disagreement as to what some of these issues might have included.

89. Barron, Access to the Media, supra note 67.
thus leave a large portion of the media and news landscape undisturbed.90

This revived fairness doctrine would consequently create two separate media arenas, one subject to the fairness doctrine, and the other not. These separate spheres would result in two different media markets driven by different principles. On one side, there would be the media not subject to the fairness doctrine. Here, opinion-based news personalities such as Glenn Beck and Keith Olbermann would be free to run their programming as they wish. On these channels, the "marketplace of ideas" would be free to thrive, unscathed by government influence. The channels under the Commission's umbrella, however, would boast a different purpose and mission. Commission-regulated channels could commit themselves to covering important public issues and giving fair coverage to each side of any debate.91 The result would be a greater variety of news coverage.

D. Advantages of Dual Arenas

The dual arena system offers several advantages over the current regulatory scheme. The first advantage is that it would help to diversify the news media landscape. The current market consists of one large, homogeneous sphere of news programming, where participants compete amongst themselves for ratings and corporate sponsorships. Generally speaking, corporations pay the largest amounts of money to advertise during programs with high ratings. Broadcasters, who need to turn a profit, thus have an incentive to maximize their ratings by catering to consumer demands, often leaving substantive content subservient to the broadcaster's bottom line. Subjecting the public airwaves to the requirements of the fairness doctrine will help push back on moneyed interests by allowing the regulated class of broadcasters to pursue fair and honest programming, insulated from the Darwinian impulses of the free market.

90. The resurrection of the fairness doctrine would at least not affect these media channels directly. This shift could affect these channels indirectly, however, as a result of changes in channels under the Commission's regulation. Personality- and opinion-based talk shows, such as those hosted by conservative commentators like rush Limbaugh and Glenn Beck, might choose to move their radio shows to private broadcasters not subject to regulation by the Commission; one such alternative that was not available when the Commission effectively repealed the fairness doctrine in 1987 is satellite radio. Acclaimed liberal talk show host Alan Colmes, for example, has already taken advantage of this new alternative. See Radio Bios, LIBERALAND, http://www.alan.com/radio-bios/ (last visited Feb. 12, 2011).

91. See Carter, supra note 6, at 195 (citing 1974 FCC Fairness Report, supra note 41).
A second advantage of the dual arena system is that it would provide a level of accountability that currently does not exist in the news media. Meaningful accountability is essential to ensuring journalistic integrity and public confidence in the news media. As Jefferson’s outlook illustrates, an absence of accountability undermines journalists’ credibility and eventually reduces the news media to mere fictional status. The fairness doctrine provides a way for the Commission to impose a moderate level of restraint on its broadcasters without ruining their journalistic freedom. Because private broadcasters would, of course, not be subject to the fairness doctrine’s requirements, the cumulative effect would likely be insubstantial. Nonetheless, reimplementation of the fairness doctrine would provide some meaningful degree of accountability, even if only symbolic.

A third advantage of the dual arena system is that it would help prevent a small number of large participants from dominating the news media marketplace. Given the prosperity the United States has enjoyed under a capitalist regime, the temptation to decide controversial matters by relinquishing them to the irrefutable wisdom of the free market is one to which our nation often succumbs. With so much success, however, it is easy to forget the vices of capitalism that appropriate legislation must hold in check. One of the most obvious examples is the Sherman Antitrust Act, which prohibits mercantile trusts. The “marketplace of ideas” is no different. While the government can facilitate meaningful public discourse through a hands-off approach, limited restrictions are necessary to prevent market cannibalism and monopolistic consolidation. The fairness doctrine provides one such protective measure. With an affirmative duty to (1) cover issues of public importance, and (2) present both sides of issues, stations broadcasting on the public airwaves would have limited commercial and editorial appeal. That is to say, wealthy and influential broadcasters hoping to exploit

92. See Letter from Thomas Jefferson to John Norvell (June 11, 1807), in WRITINGS OF THOMAS JEFFERSON, supra note 72, at 73.
93. Id. (“Nothing can now be believed which is seen in a newspaper. Trust itself becomes suspicious by being put into that polluted vehicle.”).
94. The broadcasting industry is, of course, very much a part of the United States’ free market economy.
97. JUNG, supra note 4, at 1.
competitors by means of acquisition or consolidation will have less incentive to engage in such practices.

E. Potential Problems

As with any idea, the proposal to resurrect the fairness doctrine is not without its potential drawbacks. The result of introducing (or reintroducing) a rule to a new and unfamiliar environment naturally carries with it some uncertainties. The potential problems with the fairness doctrine are too numerous and complex to detail in this Note, but I will briefly address a few of them here.

One potential problem with dividing the media into two separate spheres is that it might encourage a "smoke screen" of sorts. A benefit of resurrecting the fairness doctrine is its potential to restore the public's faith in the news media. The catch, however, is that only broadcasters on the public airwaves would benefit from this "restored trust." Increased confidence in the public broadcasters could potentially encourage fraud in the sense that some individuals (e.g., pundits, politicians, etc.) might try to toe the fairness line in an attempt to gain access to the public airwaves so they could take advantage of this increased credibility. 98 Deceitful efforts to gain a platform on the public airwaves could admittedly lead to a myriad of problems if self-seeking parties attempted to appear fair and meet the two prongs of the fairness doctrine without actually having any intention to honor its spirit.99

Another potential problem of the dual arena system is that it might encourage an unhealthy level of competition between the two spheres. In other words, having two different sets of rules might pit the two sides against one another. This problem could manifest itself in multiple ways, but one scenario that might play out is if two broadcasters, one in each sphere, began to compete over programming. The legitimacy advantage discussed above could allow public broadcasters to attract programming at a lower cost, assuming, of course, that the subject of the programming, whoever it might be, desired to have this perceptive advantage. Though not inherently problematic, such a scenario might result in lower quality programming if public networks

98. This type of behavior would essentially treat the fairness doctrine as a government "seal of approval" of sorts.

99. This burden of government oversight is an inevitable weakness of the fairness doctrine. As a practical matter, the Commission or another agency would need to install policies to help ensure that the costs of enforcing the fairness doctrine would not outweigh its benefits.
were able to attract top talent without making competitive investments in their own resources. If a private broadcaster attempted to compete in such a scenario, similar sacrifices in quality by the non-regulated party might occur as resources are reallocated toward attracting programming, resulting in a "race to the bottom" in terms of overall quality.

Potential problems are naturally speculative and difficulties are unavoidable. In the end, the most effective safeguard against these drawbacks will likely be the size of the market; both private and public broadcasters are more numerous than ever before, and there is more than enough quality programming to go around. These factors, together, will help protect the market from an unhealthy level of competitive animosity between the two spheres.

IV. Conclusion

The Federal Communications Commission should strongly consider reintroducing the fairness doctrine as part of its regulatory scheme. Given the doctrine’s limited reach and reactionary enforcement procedures, this is a modest proposal. With the expansive media landscape available in the modern market, the once unassailable predicament of spectrum scarcity no longer imposes a significant barrier for those who wish to speak. Reintroduction of the fairness doctrine presents a workable occasion for the Commission to (1) diversify the news media landscape, (2) reestablish a meaningful level of accountability, and (3) prevent market crowding, without disrupting the "marketplace of ideas" as a whole.

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100. A related topic is the networks’ abilities to attract sponsors and advertising. Paid advertisers might gravitate toward or away from one of the two arenas, thus creating an inequality of resources. This could be particularly problematic if advertising dollars began to influence programming (i.e., a moral hazard might result if Commission broadcasters were encouraged to push the limits of the fairness doctrine in an effort to please paid sponsors). Sufficient financial resources would likely be necessary to insulate Commission broadcasters from private influence.

101. See supra Part II.C.