THE REGULATION OF COMPETING FIRST AMENDMENT RIGHTS: A NEW FAIRNESS DOCTRINE BALANCE AFTER CBS?

[T]he Law is unknown to him that knoweth not the Reason thereof and the knowne Certainty of the Law is the Safety of all.

Sir Edward Coke*

The Federal Communications Commission's fairness doctrine holds radio and television broadcasters responsible for presenting full and fair discussions of controversial issues of public importance.¹ This requirement has generated intense disputes among three distinct groups: broadcast licensees, who desire to present material of their own choice;² individual members of the public, who wish to speak out on the airwaves;³ and the FCC, the protector of the public's right to be fully and fairly informed,⁴ which seeks to assure balanced treatment of controversial issues.

There are three primary issues in dispute: What is an issue of public importance? What is a fair presentation of differing viewpoints? and Whose differing viewpoint is to be presented?

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¹ Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949) [hereinafter cited as Report]; see Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111 (1973) (the fairness doctrine "imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints").

² Broadcasters tend to find that few issues are controversial, that an adequate balance has been achieved, and that, therefore, no other viewpoints need be presented. It must be noted, however, that the reported cases are naturally biased to reflect only those instances in which the licensee was claiming to have met its fairness doctrine obligation.

³ Individual members of the public tend to find almost any issue to be controversial. See, e.g., Jack Baker, 41 F.C.C.2d 727 (1973) (were arsonists angry homosexuals and frustrated married persons?); American Vegetarian Union, 38 F.C.C.2d 1024 (1972) (virtues of meat versus a vegetarian diet); Mrs. Fran Lee, 37 F.C.C.2d 647 (1972) (were dogs really man's best friend?).

In refereeing these disputes the FCC attempts to achieve a position somewhere between the two extremes presented by the other parties. Thus far, this middle position has been achieved by the Commission without identifiable standards which would aid individuals and broadcasters in predicting FCC decisions. The conflict among the asserted first amendment rights of the broadcasters, individual citizens, and the general public (represented by the FCC) is, therefore, no closer to being resolved through an agency "common law" than it was twenty-five years ago when the fairness doctrine was first systematized by the FCC. The FCC is not unaware of these problems. In a notice of inquiry the Commission has instituted "a broad-ranging inquiry into the efficacy of the fairness doctrine . . . . to determine whether the [Commission] policies derived largely from [its] rulings should be retained intact or, in greater or lesser degree, modified."

It is the purpose of this Comment to propose standards which could aid the Commission in reaching principled decisions, while simultaneously protecting the first amendment rights of all the affected parties. Before such proposals can be offered, however, it is necessary to understand how the fairness doctrine has been justified under the first amendment by the Supreme Court, and how it has been applied by the FCC.

I. THE FAIRNESS DOCTRINE

The regulation of the broadcast media is based upon the "scarcity" of broadcast frequencies and the cacophony which prevailed prior to regulation. Congress believed that communication would be enhanced if the number of broadcasters

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5 The type of problem that can result from the difficulty in predicting FCC reaction to a particular broadcast was illustrated recently when ABC refused to air a particular program in which Dick Cavett interviewed several members of the "Chicago 7." Although this dispute involved the interpretation of a term of Mr. Cavett's contract with ABC, the underlying cause of the dispute was ABC's fear of disciplinary action by the FCC if the program were to be held out of balance. See N.Y. Times, Feb. 9, 1974, at 58, col. 6; The Wall Street Journal, Feb. 11, 1974, at 12, col. 2. Such problems would be greatly reduced by clear standards of controversiality.

6 Report, supra note 1.


8 Notice of Inquiry, 30 F.C.C.2d 26 (1971).

9 The "scarcity" of radio frequencies is the result of the natural limit on the number of discrete channels that can be squeezed into any given frequency band, and the reservation of much of the broadcast spectrum for government use.

10 The noise before regulation was the result of interference between stations close to each other in radio frequency and geographic location.
permitted to use the public’s air waves within a given geographic area were limited.

The Federal Radio Commission was therefore established to assign frequencies, oversee station operations, and consider the public interest in the granting and renewal of broadcast licenses. The FRC and its successor, the FCC, interpreted the public interest standard of the statute as imposing an affirmative duty upon the licensees to present issues of public importance fully and fairly. The fairness doctrine remained an agency creation until 1959, when it was given legislative endorsement in the amendments to section 315 of the Federal Communications Act.

Under the doctrine, a licensee who presents one side of a controversial issue has an affirmative duty to make reasonable efforts to find appropriate spokesmen to present opposing viewpoints. If such spokesmen cannot or will not pay for air time, the licensee must provide free time. If an appropriate spokesman cannot be found, the licensee may be compelled to present the opposing views himself. The balancing presentation need not be as long as the original presentation, nor is there any requirement that the licensee balance audience size, identity, or other factors. The Commission, in reviewing any licensee action, is not to consider the merits of the claim de novo, but will examine the licensee’s decision to determine if it was reasonable. Finally, the complainant must comply with rather stringent “pleading” requirements specifying the precise matter that is alleged to be a controversial issue of public importance.

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11 The public nature of the airwaves was first asserted legislatively in the Radio Act of 1912, ch. 287, § 1, 37 Stat. 302, and does not appear to have been questioned since.


13 Congressman White, a sponsor of the Radio Act of 1927, stated:

67 CONG. REC. 5479 (1926).


17 Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 2 P & F RADIO REG. 2d 1901, 1911 (1964) [hereinafter cited as Fairness Primer].

18 Cf. Report, supra note 1, at 1250.

19 Fairness Primer, supra note 17, at 1904.

II. THE CONSTITUTIONALITY OF THE FAIRNESS DOCTRINE

The limitations imposed by Congress on the rights of individuals to speak out via radiowaves were held to be constitutional in *National Broadcasting Co. v. United States.* However, it was not until *Red Lion Broadcasting Co. v. Federal Communications Commission* that the fairness doctrine, and the rules adopted to effectuate that doctrine, were upheld as constitutional by the Supreme Court.

A. Red Lion

In *Red Lion* the Court upheld against constitutional attack those FCC regulations arising under the fairness doctrine which require a station to offer reply time to the subject of a personal attack or political editorial.

The broadcasters in *Red Lion* asserted an unqualified first amendment right that would have allowed the FCC to exercise technical but not substantive control over licensees. Had the broadcasters prevailed, the FCC would have been limited to

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21 *Id.* at 13.
22 319 U.S. 190 (1943).
24 The applicability of the personal attack elements of the fairness doctrine, contained in past FCC rulings, to a single broadcast of a licensee was one of the issues presented to the court. *Id.* at 370-73. The rulings in question provided that when a licensee’s broadcast attacked an identified individual’s or group’s character, integrity, honesty, or similar characteristics, the licensee must within one week notify the victim that the attack had occurred; provide him with a tape or transcript of the attack; and offer free air time for a reply. Times-Mirror Broadcasting Co., 24 P & F RADIO REG. 404 (1962). The Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the FCC’s action in the face of a first amendment attack by Red Lion Broadcasting Company, Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), and Red Lion petitioned for certiorari.
25 While the *Red Lion* case was pending in the court of appeals, *see* note 24 supra, the FCC initiated a rule making procedure for the purpose of promulgating the personal attack and political editorial elements of the fairness doctrine as FCC regulations. The personal attack rules were to incorporate the provisions outlined in note 24 supra. *See* 47 C.F.R. §§ 73.123, .300, .598, & .679 (1971) (these regulations are identical but each is applicable to a different segment of the broadcast media). The political editorial rules were very similar to the personal attack rules; any broadcaster that either endorsed or urged the defeat of a candidate for political office was to notify the disadvantaged candidate or candidates within 24 hours of the broadcast that the political statement had been made; was to provide the candidate with a tape or transcript of the statement; and was to offer free reply time. *Id.*

After the rule making procedure was completed, and the rules were adopted, the Radio Television News Directors Association brought suit to have the rules declared
enforcement of frequency assignments, power levels, and technical quality standards, and would have been without authority to curtail attacks on individuals or groups; one-sided or slanted news presentations, or outright fabrications. The Court in *Red Lion* reacted to this view of the broadcasters' first amendment right subordinating the licensees' freedom of speech to the public's right to be informed, characterized also as a first amendment right. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopoliza-

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26 The FCC claims not to examine the truthfulness of any facts presented in a broadcast. The Commission will act on an accusation of inaccuracy only where there is evidence extrinsic to the broadcast to document that the licensee has fabricated or manipulated what is represented to be an objective report. *E.g.*, Mrs. J.R. Paul, 26 F.C.C.2d 591 (1969).

27 Writing for the Court, Mr. Justice White said the broadcasters' "contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency." 395 U.S. at 386.

28 Looking to the technological peculiarities of the "new media," Justice White mentioned other authority for qualifying first amendment rights in the public interest. Citing *Kovacs v. Cooper*, 336 U.S. 77 (1949) and *Associated Press v. United States*, 326 U.S. 1 (1945), he gave this example:

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. 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. *Id.* at 386-87. After reviewing the scarcity doctrine basis of federal regulation of the broadcast industry, he then indicated the limits on the first amendment rights of broadcasters:

No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." [Citation omitted]

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. . . . There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and
tion of that market, whether it be by the Government itself or a private licensee. The Court's reasoning was fairly straightforward. Technological considerations demand that the number of persons permitted to use the radio bands be limited. Given the congressional decision not to assume direct government control over this scarce resource, those persons who are licensed to use the airwaves must operate in the public interest. Though the application of this public interest standard may infringe upon the licensees' first amendment rights, the superior right of the public to be fully and fairly informed legitimizes that infringement. The FCC, in whom Congress has placed the responsibility for protecting the public's right to be informed, has the authority, under the statute and the constitution, to make such rules and decisions as are necessary to give effect to this right of the public.

B. The Immediate Impact of Red Lion

Commentators discussing the Red Lion opinion saw quite clearly that the FCC, as the protector of the public's right to be informed, had been given a broad constitutional mandate to assure "fairness" in the broadcasts of its licensees. Most of these commentators found that mandate to be somewhat alarming. It seemed that despite the tempering language in Red Lion, the rights of the broadcasters were heavily qualified, and the FCC review of any program material, so long as it did not amount to censorship, was to be permitted.

A second, more favorably regarded, line of argument was developed from some of the broad dicta contained in the Red

voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Id. at 389.

19 Id. at 390.


31 See, e.g., Note, 72 Colum. L. Rev. 746, supra note 30. For an excellent criticism of the constitutional theory upon which regulation of the broadcast medium is based, and the particular dangers of the fairness doctrine, see Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967).

32 395 U.S. at 395-96.

33 Censorship, in the context of FCC regulation, seems to mean only the imposition of prior restraints on speech. Thus, the FCC cannot prevent the broadcast of a particular program, but it could revoke the license of the broadcaster as punishment.
Lion opinion. That line of argument was that there was a constitutional right of individual access to the airwaves.\textsuperscript{34} This right was perceived both in the qualifications on the broadcasters' first amendment rights (that they must operate in the public interest) and in the FCC's power to compel presentation of individual responses to personal attacks and political editorials.\textsuperscript{35} It seemed a modest extension of Red Lion to hold that individuals having minority views on issues of public importance had the "right" to make those views known via the broadcast media. If the result in Red Lion (granting a governmental agency great control over the substantive content of broadcasts in the name of the public's right to be informed) could also be used to create an individual right of access, the potential threat of government control of unpopular ideas would be greatly reduced.

The Democratic National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM), an anti-war group, tried to establish the existence of such a constitutional right. The holding in the resulting litigation, Columbia Broadcasting System, Inc. v. Democratic National Committee,\textsuperscript{36} foreclosed hope for a constitutional right of individual access and foreshadowed a more vigorous first amendment right in the broadcasters.

C. Columbia Broadcasting System, Inc. v. Democratic National Committee

The issue presented in CBS was whether "responsible" groups have a constitutional right under the first amendment to purchase time for the presentation of advertisements and programs in order to air their views about controversial issues of public importance.\textsuperscript{37} The Supreme Court split seven to two in holding that there is no such constitutional right. The large majority was not unanimous, however, on the grounds for the decision.


\textsuperscript{35}That is, the attacked individual has a regulatory right to access to rebut the licensee's presentations. 47 C.F.R. § 73.679 (1972).

\textsuperscript{36}412 U.S. 94 (1973).

\textsuperscript{37}The two groups claiming the right, BEM and DNC, were challenging decisions of the FCC which, in the case of BEM, held that a radio station acted within its authority in refusing to air BEM's spot advertisement, and in the case of DNC, held
Six Justices agreed that the first amendment would not require the sale of time to responsible groups, even if state action was involved. Three Justices (the Chief Justice and Justices Stewart and Rehnquist) further opined that state action was not involved. Justice Douglas concurred in the result, interpreting the majority opinion to mean that state action was not involved. While he tended to disagree with such a holding, he said that accepting it necessarily implied that the first amendment protected the broadcasters from any order of the government telling them what to broadcast. Justice Brennan, joined by Justice Marshall, dissented on the ground that the FCC violated the first amendment rights of the public by permitting licensees to refuse to sell time to groups or individuals solely because they wanted to speak out about controversial issues of public importance.

In concluding that regulation of the broadcast industry is not so pervasive as to make the industry's actions state action, Chief Justice Burger's separate opinion favored striking a new balance of competing constitutional rights in broadcasting. His argument belittled the extent of FCC intervention in the day-to-day affairs of its licensees and emphasized the amount of journalistic discretion left to the broadcasters:


The Court of Appeals for the District of Columbia Circuit reversed the FCC, holding that responsible groups did have a first amendment right to purchase broadcast time, and remanded the case to the FCC for consideration of rules and regulations to give effect to its opinion. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

The majority opinion consisted of Parts I, II, and IV of Chief Justice Burger's opinion, which Justices Rehnquist, White, Blackmun, and Powell joined. The latter three emphasized in their concurring opinion, 412 U.S. at 146-48, that the state action question had not been decided.

Id. at 114-21. This was Part III of the Chief Justice's opinion. Justice Stewart also wrote a separate concurring opinion, id. at 132-46.

Id. at 148-70. Justice Stewart indicated his empathy with Justice Douglas' opinion, id. at 132.

Id. at 170-204. The dissenters argued, first, that the requisite state action may be found in the government's permitting the state-created monopoly of broadcasters to do that which the government could not do directly, id. at 172-81; and second, that the first amendment public interest in "uninhibited, robust and wide-open" debate held to be of prime importance in Red Lion mandated the individual right of access to the Broadcast medium urged by BEM and the DNC, id. at 182-204. They compared the situation to that in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), where the Court had emphasized that the unavailability of editorial advertisements in newspapers would serve to "shackle the First Amendment." 412 U.S. at 192.

Part III of the Chief Justice's opinion, 412 U.S. at 114-21, was joined only by Justices Stewart and Rehnquist. See note 38 supra.
[The Commission acts in essence as an "overseer," but the initial and primary responsibility for fairness, balance, and objectivity rests with the licensee. This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests.43

... Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard.44

After developing the separate identities of the government and the broadcasters for first amendment purposes,45 and thereby demonstrating that BEM and DNC had no first amendment claim, the Court's opinion nevertheless discussed whether the first amendment mandated a right of access. The Court looked to the requirements of the first amendment for two reasons—first, there was no majority opinion on the state action issue; and second, the public interest standard of the Federal Communications Act necessarily incorporated some first amendment interests which had to be explicitly addressed.

In an opinion in which four of his brethren concurred, the Chief Justice balanced the first amendment rights of the broadcasters against a first amendment right of access, and found a

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43 412 U.S. at 116-17.
44 Id. at 120 (emphasis added).
45 This was the holding of the Chief Justice and Justices Stewart and Rehnquist. Justice Brennan's dissent drew a very different picture of the extent of FCC regulation of the broadcast industry and the degree to which broadcasters are currently compelled to be fair than did the majority opinion of the Chief Justice. Justice Brennan stated that when regarding FCC regulation of the broadcast industry, one is "confronted, not with some minimal degree of regulation, but, rather, with an elaborate statutory scheme governing virtually all aspects of the broadcast industry. Indeed, federal agency review and guidance of broadcaster conduct is automatic, continuing and pervasive." Id. at 176-77 (footnotes omitted).

Discussing the effectiveness of the FCC and the fairness doctrine in bringing controversial issues before the public, he then noted:

In fulfilling their obligations under the Fairness Doctrine . . . broadcast licensees have virtually complete discretion, subject only to the Commission's general requirement that licensees act "reasonably and in good faith," "to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format." . . . As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation, and, perhaps most important, who shall speak. Given this doctrinal framework, I can only conclude that the Fairness
greater risk to first amendment rights in a constitutionally mandated right of access—"the risk of an enlargement of Government control over the content of broadcast discussion of public issues." He continued:

Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when.

Justice Stewart, who concurred on the state action issue, found a similar threat to first amendment rights in the then-current "surveillance" of the broadcast medium by the FCC. And Mr. Justice Douglas, concurring in the result, found that government had no power to order broadcasters to carry any particular material. He would, therefore, find no place in our system Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited, robust, and wide-open" exchange of views to which the public is constitutionally entitled. 

Id. at 185-87 (footnotes omitted).

The Chief Justice called attention to what he regarded as the desire of the dissent "to have it both ways" on the related issues of pervasive control and discretion left in the licensee manifested in the above two quoted sections. Id. at 116 n.15. He indicated thereby that he found pervasive control by the regulatory agency to be conceptually inconsistent with broad discretion being vested in the regulated industry. Such a conjunction of conditions is not at all difficult to understand in light of the identity of the views of the regulator and the regulated. It is likely that the agency has a great deal of power that it uses only occasionally because the regulated industry is able to exercise its discretionary power in such a manner as will almost surely meet with agency approval.

46 Id. at 126.
47 Id. at 127 (footnote omitted).
48 Id. at 145-46 (Stewart, J., concurring):
Those who wrote our First Amendment... [b]elieved that "fairness" was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.

This Court was persuaded in Red Lion to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly or wrongly, we there decided that broadcasters' First Amendment rights were "abridgeable." But surely this does not mean that those rights are nonexistent. And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment "values" alone, I could not agree with the Court of Appeals. For if those "values" mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.

49 Id. at 150-51.
for the fairness doctrine, because he concluded that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines."50

It can be seen that CBS presented a very different judicial picture of how broadcaster-FCC relations should be shaped than did Red Lion. Where CBS drew an expansive licensee first amendment right, Red Lion drew an expansive regulatory power lodged by Congress, with constitutional sanction, in the FCC. In CBS five Justices subscribed to a description of FCC substantive review of broadcaster performance as one designed "to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest . . . ."51 This is not the description of an expansive agency power to regulate the affairs of its licensees, but rather a description of a power to act in the face of consistently and persistently poor performance.

Justice Stewart, concurring in the state action issue in CBS, and Justice Douglas, concurring in the result, indicated that they had serious doubts about the result reached in Red Lion, and that the current impairment of the broadcaster's first amendment rights rested, in their view, on shaky constitutional ground. Thus all of the Justices who concurred in the CBS result indicated that the broadcaster enjoys a substantial first amendment right to control the content of his broadcasts, and that the FCC review of that content is not to be on a case by case standard, but rather on an overall good faith effort standard. The five Justices who concurred on the first amendment issue52 also indicated that the FCC, through its application of the fairness doctrine, is serving the public's right to full and fair discussion of issues of controversy sufficiently well that an individual right of access is at best not needed53 and at worst counterproductive.54 A brief examination of some of the FCC fairness doctrine rulings between Red Lion in 1969 and CBS in 1973 will show that there is substantial room for disagreement with both of these representations.

III. FCC Decisions

Before undertaking a review of the FCC's recent decisions, a description of the framework within which the Commission

50 Id. at 148.
51 Id. at 127.
52 Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist.
53 412 U.S. at 118.
54 Id. at 120-21.
operates would be useful. The FCC has broad power to discipline licensees for fairness doctrine violations. It has exercised this power by ordering the presentation of balancing programming\(^5^5\) and by refusing to renew licenses.\(^5^6\) Under the Act, it also has the power to impose fines,\(^5^8\) issue cease and desist orders,\(^5^9\) give probationary license renewals,\(^6^0\) order comparative hearings,\(^6^1\) and revoke the license immediately.\(^6^2\) However, few of these latter sanctions are ever imposed for fairness doctrine infractions.

Most fairness doctrine discipline is imposed by means of a letter and "the lifted eyebrow," a technique that relies upon the threat of action, rather than upon action itself. The "lifted eyebrow," a phrase first applied to FCC procedures by Commissioner Doerfer,\(^6^3\) is the warning that a copy of the letter notifying the licensee that he has violated the fairness doctrine will be attached to his file for consideration at renewal time. The licensee's fear is not that his license renewal will be denied, but that he will be forced into a comparative hearing.\(^6^4\) Such a hearing entails great expense and effort, as well as the risk that some aspect of his operation other than the alleged violation of the fairness doctrine will be found wanting.\(^6^5\)

Even though only one license renewal has been denied recently for a fairness doctrine violation,\(^6^6\) the mere threat of nonrenewal is powerful. However, the effectiveness of the potential nonrenewal sanction will inevitably decrease if it is fre-

\(^{55}\) E.g., Accuracy in Media, Inc., 40 F.C.C.2d 958, 967 (1973).
\(^{56}\) Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18, 35 (1970), petition for reconsideration denied, 27 F.C.C.2d 565 (1971), aff'd, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973). This case is the only one in which a station has been denied a license renewal since the publication of the Report, supra note 1, in 1949, and the denial followed persistent and willful violations. Nevertheless, the FCC resorted to procedural as well as substantive bases for denying the renewal.
\(^{58}\) Id. § 502 (providing a maximum fine of $500 per day).
\(^{59}\) Id. § 312(b).
\(^{60}\) Id. § 307(d).
\(^{61}\) Id. § 309(e).
\(^{62}\) Id. § 312(a).
\(^{63}\) Miami Broadcasting Co., 14 P & F RADIO REG. 125, 128 (1956) (Doerfer, Comm'r, dissenting).
\(^{64}\) A comparative hearing is an adversary proceeding in which the current licensee must prove that he can give better service to the listening or viewing public than any other applicant for the license. This involves elaborate and expensive audience surveys and other proofs of serving the actual needs of the public. Total costs for each party in a comparative hearing can easily reach into six figures. See generally Robinson, supra note 31, at 115-18.
\(^{66}\) See note 56 supra.
The failure of the FCC to deny the renewal of a license more frequently may result from the Commission's reluctance to force a court test of its power to deny renewal based upon an isolated fairness doctrine infraction. As indicated above, the Red Lion holding could be defended in straight broadcaster-individual first amendment terms. Therefore, being unable to predict the judicial response to an expansive fairness doctrine power, the FCC may be content to leave that power unconfirmed, undefined, and undenied.

The reluctance of the FCC to impose harsh sanctions for fairness doctrine violations may also result from the Commission's understanding of the financial importance of commercial advertising to the continued "success" of the communications industry. The significance of advertising affects the viability of the fairness doctrine in two ways. First, the only product that radio and television stations have to sell is air time, the value of which is determined by the size of the audience. Part of that audience and, as a result, needed commercial advertisers, may be driven off by the broadcasting of controversial material. Second, and more directly, if a television advertiser sees his own message extolling the virtues of his product or service followed by a fairness message pointing out why consumption of the product may be unwise from a personal or societal viewpoint, he may well choose to advertise in a less "fair" forum.

For all of these reasons, the FCC and the broadcasters have a common interest in keeping the number of fairness doctrine violations as small as possible. The examples which follow illustrate the doctrines and policies that have been developed by the FCC to minimize the necessity for disciplinary action and at the same time to maximize the power to impose such discipline should the commissioners find it necessary.

A. What Is an Issue of Public Importance?

The FCC's procedure for determining what constitutes an issue of public importance can best be described as one of "gut reaction." The Commission has relied on licensee discretion to

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68 That is, permitting the licensee to attack a person in his programming and then to deny the attacked person an opportunity to respond in an effective manner could be seen as a denial of the attacked individual's first amendment right to free and effective speech. But note the state action problem with this theory.
avoid the necessity of having to make these decisions itself. As a result of this situation, program material and commercials which could arguably be said to present one side of an issue of public importance are held not to warrant issuance of a fairness complaint on many grounds, none of which serve the public's right to be informed.

The reluctance of the FCC to promulgate easily applied criteria for determining what issues are of public importance and the readiness with which the Commission will rely on the licensee's judgment to that effect was reasonable when a fundamentalist complained about the failure of a television program concerning the Darwinian theory of evolution to present the Biblical story of creation. However, the presence of two pieces of legislation on gun control, whose difference was precisely that urged by the complainant as an issue of controversy (short-barrelled handguns as distinguished from "cheap, Saturday night special[s]"), was not sufficient either to create an issue of public importance or to overturn the licensee's judgment that no controversial issue had been presented.

The most frequent bases for rejecting complaints are that the licensee has exercised reasonable judgment in finding that he has not presented an issue of public controversy; that the

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70 Mrs. H.B. Van Velzer, 38 F.C.C.2d 1044 (1973). In deciding not to issue a complaint in this case, the FCC staff denied that evolution was a controversial issue of public importance, saying:

None of the material which you have furnished the Commission indicates that at the time of the broadcast of the programs in question, the theory of evolution was the subject of any legislative bill or debate, or other public action or inquiry such as would demonstrate that evolution was a controversial issue of public importance. Absent any substantial evidence of public controversy and importance, the licensee's judgment in this matter stands uncontradicted and may not be overturned.

71 David I. Caplan, 38 F.C.C.2d 1027 (1973). In this case, the complainant requested balancing time to correct the statement in an editorial by the station that Arthur Bremer had used a "cheap, Saturday night special" in his attempt on the life of Governor Wallace. Complainant urged that his information was that the handgun used by Bremer cost eighty dollars, which did not qualify it as a "cheap, Saturday night special." The complainant further urged that this was an important issue since there were two pieces of legislation pending in Congress, one that would ban all short-barrelled handguns and one that would ban only the "Saturday night specials"—guns that did not meet standards of price and quality. The FCC decided that the "issue with which [Caplan's] complaints against [the licensees] are concerned is gun control." Id. at 1030. It went on to say:

In regard to your complaints against WCBS you allege that the station has used the term "cheap, Saturday night special" to mobilize public opinion behind gun control and that contrasting views are necessary to distinguish between the various types of handguns. . . . We agree with WCBS that the programs which it broadcast dealt with gun control legislation; that any con-
"issue" was presented in a commercial for which the Commission has created a general, though qualified, exception; or that one of the presumptions of noncontroversiality has not been overcome in the complaint filed with the Commission.

1. The Reasonableness of the Licensees' Judgment

The licensee's judgment has been upheld as reasonable in situations ranging from the trivial to the most serious. For example, the licensee judgment that dog food commercials and representations of dogs as faithful companions did not raise the controversial issue whether dogs are man's best friend was upheld as reasonable. When a slightly more weighty issue was raised by a vegetarian who sought programming to balance a broadcast in which Dr. Maxwell Stillman and Adele Davis made generally unfavorable comments about an all vegetable diet, the FCC upheld as reasonable the licensee's judgment that the merits of vegetarian (as opposed to omnivorous) diets were not an issue of public importance. Given the widespread discussion of conservation and gun control, however, the FCC decision upholding a licensee judgment about the controversiality of the program *Say Goodbye* is more troublesome. This program represented that certain species of animals were being hunted to extinction; nevertheless, the Commission determined that the program did not present the controversial issue of hunters' contribution to and impairment of the conservation of animal species. Similarly troublesome was the FCC decision that Planned Parenthood Association spots discussing the "problem of overpopulation" did not raise an issue of public importance because there was no public controversy about overpopulation as a problem or about family planning as a proposed remedy.

Id. at 1031.

72 The commercial exception is discussed at length in Section IV, infra (notes 147-92 and accompanying text).

73 Mrs. Fran Lee, 37 F.C.C.2d 647 (1972).

74 American Vegetarian Union, 38 F.C.C.2d 1024 (1972). A similar example of a complaint that appeared to be properly denied was a claim that an issue of public importance was presented by a newscaster's report that a fire department official had asserted that most arsonists were "angry homosexuals and frustrated married partners." Jack Baker, 41 F.C.C.2d 727 (1973).


76 Dr. John H. DeTar, 32 F.C.C.2d 933 (1972).
2. Sub-Issues and Alternate Issues

In addition to insulating itself from direct determination of issues of public controversy via the licensee judgment procedure, the FCC has managed to complicate the area by creating a category called sub-issues which need not be fairly treated. The FCC decision in National Broadcasting Co.\(^7\) is cited for this doctrine.\(^8\)

In November of 1967, the National Broadcasting Company presented a series of reports, as part of the Huntley Brinkley Report, entitled Air Traffic Congestion and Air Safety. During one of these reports the network presented two “typical” pilots: an extremely competent, professional pilot flying for a commercial airline, and a happy-go-lucky private pilot for whom flight plans were rough estimates of where he was going and how he was going to get there. The reporter did not comment on the relative qualifications of the two pilots, but it was implied that the private pilot, who admitted to actions which violated many FAA regulations, was a potential hazard. NBC did emphasize that such private pilots were major contributors to air traffic congestion. The Aircraft Owners and Pilots Association filed a complaint urging that NBC had presented one side of the controversial issue of the relative safety of private versus commercial pilots in congested airlanes. The Commission responded that the issue complained about, the safety of private pilots, was subsidiary to the central concern, congestion over airports,\(^9\) and therefore could not properly be reviewed as a distinct issue.

If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness requirement, the doctrine would be unworkable. More important, as we have pointed up recently in an analogous situation . . . such a policy

\(^7\) 25 F.C.C.2d 735 (1970).

\(^8\) See, e.g., David I. Caplan, 38 F.C.C.2d 1027, 1030-31 (1973).

\(^9\) The broadcasts in question dealt with the issue of congestion over airports and the hazards raised by such congestion. Spokesmen for both the commercial and private (general) air interests were given a reasonable opportunity to address themselves to this congestion issue . . . . We have examined the November 5th broadcast, with a view to the charge that it also raised the issue that the private pilot is a hazard because of the nature of his training. But no NBC personnel or other person so stated. On the contrary, the thrust of the program is the congestion over large airports . . . .

The case thus really turns on inferences which are drawn by complainants from presentation of two typical pilots—one a commercial and the other a private pilot.

25 F.C.C.2d at 737.
of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism.80

The Commission was careful to indicate the limits of the sub-issue exception to the fairness doctrine: "the licensee could not cover an issue, making two important points in his discussion of that issue; afford time for the contrasting viewpoint on one of these two points; and on the other point, reject fairness requests on the ground that it is a 'sub-issue.'"81 In limiting its holding to the facts of the case,82 the FCC failed to justify its decision. Two grounds might be suggested: that sub-issues need not be fairly treated, or, in the alternative, that sub-issues are not issues of public importance.83

The strategy of defining an issue differently than the complainant does is frequently used by the FCC. For example, the natural mother of a child which had been placed in a foster home filed a complaint with the FCC, alleging that station WNEW-TV had violated the fairness doctrine in its coverage of the legal proceeding84 which she had instituted to obtain custody of her son. Of thirty-three minutes of coverage, only four-and-one-half were favorable to the complainant, while views favorable to the adoptive parents were presented for twenty-two minutes.85 However, the Commission, apparently relying on six-and-one-half minutes of coverage of the efforts to change New York's adoption laws, denied the complaint, stating:

Although the licensee covered in some detail the case of Ferro v. Bacile, including the interviews with the foster parents to which you refer in your complaint, it does not appear to have been unreasonable for the licensee to determine that the controversial issue of public importance discussed in the broadcasts was the state of the adoption laws in New York and not the particular case of Ferro v. Bacile.86

80 Id. at 736.
81 Id. at 737.
82 Id. at 736.
83 The FCC decision itself is not clear. The normal procedure in an opinion seems to be to cite several grounds for a decision, emphasize none, and then announce a result.
85 Bernard T. Callan, 30 F.C.C.2d 758, 759 (1971).
86 Id. at 760-61. The FCC then found that the presentation on the "issue" of the state of New York's adoption laws had been balanced, despite the fact that no presentation asserting the continuance of the status quo had been made. Id. at 761.
A somewhat similar situation resulted from the FCC's denial of a complaint which alleged that the WNET program, *Hunger: A National Disgrace*, had unfairly presented the issue whether hunger in this country was a national disgrace. The FCC found that the program dealt with the solutions of the hunger problem and not with whether it was a national disgrace, thereby finding that the title of the program had nothing to do with its content.87

3. The Foreign Affairs Exception

The FCC has developed an exception to the requirements of the fairness doctrine for coverage of foreign affairs, by interpreting the phrase "issue of public importance" to include only those issues that have a direct bearing on events affecting the United States. The FCC gave voice to this policy in *J.F. Branigan*, 88 when it held that the conflict in Northern Ireland was not a controversial issue of public importance. The Commission reasoned:

[U]nless events in a foreign country involve the question of United States relations or involvement with respect to that country, and in the absence of evidence that a controversial issue of public importance exists in this country regarding such matters, it would not be unreasonable for a licensee to conclude that its coverage of such events does not present a controversial issue of public importance within the meaning of the fairness doctrine.89

The FCC thus seems to have ruled that an issue involving foreign affairs is not controversial unless it is controversial in the United States or it implicates United States foreign policy. Given the apparent circularity of the first test, 90 it seems that the second test is going to be the sole touchstone of when fairness is required for news coverage of foreign events.

The significance of the boundaries of the foreign events exception becomes clear in the context of the Arab-Israeli conflict in the Middle East, a foreign event about which broadcast

89 Id. at 491.
90 It is arguable, of course, that this test refers to a level of controversiality which would cause rifts in the United States parallel to the events abroad; e.g., in *J.F. Branigan*, if the Northern Ireland conflict became an issue of significant dispute between American Protestants and Catholics.
programming must be balanced. This conflict has been held to be a controversial issue of public importance in recent years, but, again, only as it implicates United States foreign policy in that region. However, the background and causes of this conflict, which is currently an important aspect of United States involvement overseas (and therefore an appropriate subject for application of the fairness doctrine) was not an issue that was required to be fairly treated for an extended period of time. Thus, most of the average television viewer's information about the Mideast conflict is the result of programming which was not required to be fair, and may potentially have been one-sided. Similar exceptions presumably exist for the news treatment of the Greek and Chilean juntas, the Filipino suspension of civil rights, the war in Bangla-Desh, and other "foreign" events.

In an age of international interdependence, and in a nation that rightly or wrongly regards itself as an international policeman, balanced information about foreign events, even if those events do not directly concern United States policy, would seem to be an essential part of the public's right to be fairly and fully informed. By creating a presumption that foreign events do not raise controversial issues of public importance, the FCC is catering to administrative convenience at the cost of serving its highest duty—seeing that the public has the information necessary to make intelligent decisions.

4. Private Disputes

With the backing of the Court of Appeals for the District of Columbia Circuit, the FCC has carved out another "exception" to the general requirements of the fairness doctrine—news coverage of essentially private disputes need not be "fair" unless there is evidence that the dispute is a controversial issue of public importance. The reasoning in support of this exception is that treatment of an event as newsworthy does not, in and of itself, indicate that the issue involved is important or controversial in the public's eyes. However, the exception should not be read as holding that an issue is never controversial when it involves two private parties engaged in a private dispute. It has been held, for example, that commercials advertising goods for sale at retail stores which are engaged in a

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91 See, e.g., Federated Organizations on American-Arab Relations, 30 F.C.C.2d 892 (1971) (discussing complaint about the news coverage of the Mideast war as if it were a subject that should be balanced).
93 Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972).
labor dispute with their employees may raise a controversial issue of public importance. Labor disputes are certainly private disputes, normally involving relatively few employees and little disruption of the local economy, and an advertisement does not carry the implications of controversiality and public importance inherent in a news report. Once again, the distinctions drawn by the FCC are hazy ones.

5. Summary

This survey of some of the difficulties in merely determining whether an issue which was unequivocally presented in a broadcast is subject to the fairness doctrine illustrates how little the FCC has done to formalize its decision rules. The judgment of the licensee will be upheld in most cases unless some particular fact indicates to the FCC that it should not be; licensee definition of sub-issues and alternate issues will be upheld unless the Commission finds cause to disagree; foreign events are generally exempt from the requirements of the fairness doctrine unless United States foreign policy is involved; private disputes need not be fairly reported unless the Commission decides that they are not really private.

A recent FCC decision, Accuracy in Media, Inc., illustrates the difficulties of attempting to predict how these "rules" will apply in any specific case. NBC, the defendant broadcaster, urged that its program Pensions: The Broken Promise did not discuss the broad subject of the private pension system in this country, but rather addressed the problems experienced by the beneficiaries of some plans. The complainant argued that the tenor of the program was generally critical of the private pension plan system and that the implication was that controls were needed. The FCC reviewed the program and determined that it was not restricted to the problems of the pension system, but was represented as being an overview of the system as it then existed. The criteria by which NBC's judgment in this case was found to be unreasonable were not specified.

Citing the absence of newspaper, magazine, political, or broadcast discussion of pension plans, NBC further urged that

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94 Retail Store Employees, Local 880 v. FCC, 436 F.2d 248 (D.C. Cir. 1970); accord, National Ass'n of Gov't Employees, 39 F.C.C.2d 1019 (1973).
96 40 F.C.C.2d at 959.
97 Id. at 963-66.
the subject of pension plans was not a controversial issue of public importance. The broadcaster maintained that the program was newsworthy but not controversial.\textsuperscript{98} The FCC disagreed, but for reasons that seemed to be inconsistent with its previous decisions:

[Y]our argument [that the absence of public discussion of the issue indicates that it is not an issue of public importance] misinterprets the definition of a "controversial issue of public importance" as it pertains to the applicability of the fairness doctrine. As both the Commission and the courts have stated, underlying the fairness doctrine is "the paramount right of the American public to be informed as to events and issues of public importance." . . . This right would be obviously vitiated if a broadcaster presenting one side of an issue of public importance could avoid his fairness obligations on the ground that members of the general public had little knowledge of the subject and hence were not engaged in any discussion of or debate on that issue.\textsuperscript{99}

The FCC then cited Congressional hearings and proposals for the regulation of the pension system, and the opposition to such proposals by most of the organizations currently operating private pension plans, as evidence of controversy sufficient to hold the licensee's judgment to have been unreasonable.\textsuperscript{100}

A comparison of this decision with cases previously discussed indicates the extent to which FCC decisionmaking is one of gut reactions. The program on pensions is arguably similar to the program on hunger\textsuperscript{101} in that \textit{Pensions} can be said to have presented the issue of the existence of problems in the private pension system and to have suggested one method (regulation) of curing those problems; the extent of such problems in the system would then be a sub-issue. The absence of discussion of the private pension system in any public forum, which was so important in the evolution,\textsuperscript{102} foreign event,\textsuperscript{103}

\textsuperscript{98} Id. at 966.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 966-67.
\textsuperscript{101} Note 87 supra & accompanying text. Note also that \textit{Hunger} was broadcast on the eve of the White House Conference on Hunger and Nutrition.
\textsuperscript{102} Mrs. H.B. Van Velzer, 38 F.C.C.2d 1044 (1973) (discussed at text accompanying note 70 supra).
\textsuperscript{103} J.F. Branigan, 31 F.C.C.2d 490 (1971) (discussed at text accompanying notes 88-89 supra).
and population cases, was dismissed as meaningless by the FCC in Pensions. Finally, the presence of legislative hearings and proposals, held implicitly to be meaningless in the handgun case, was dispositive in Pensions. While all of the above cases can be distinguished from Pensions, it is important to note that those differences can hardly be said to outweigh the similarities.

It is not asserted that Pensions is "wrong," or that the other cases are "right," in some absolute sense; but, surely, it is desirable to allow persons outside of the FCC to be able to predict the outcome of disputed cases and to be able to discern those differences between cases that are crucial and those that are not. At present this is not possible. The regulatory agency apparently possesses absolute discretion. Maximum power is retained in the FCC because it must, in the absence of standards, resolve every dispute. As a result of the Commission's apparent reluctance to have this discretionary system tested in court, the FCC does not generally use that discretion to bring more complete information to the viewing and listening audiences. This discretionary system is carried out in both of the other two disputed areas—balanced presentations and who should balance.

B. What Is a "Fair" Presentation of Differing Viewpoints?

The question of what constitutes a fair presentation of differing viewpoints must be considered by the complainant almost before he knows that he is going to complain. Although there does not appear to be any information about the genesis of a fairness complaint, one would expect that such a complaint is normally sparked by a program that has, in the opinion of the complainant, presented only one side of a controversial issue. It is unlikely that most complainants would have scanned all of the licensee's broadcasts for a reasonable time, perhaps as long as three to six months before the offending program, in the expectation that they would see a one-sided presentation; yet this seems to be an essential part of making an honest complaint.

The Commission has placed the burden of going forward with a complaint on the complainant. He must therefore pro-

104 Dr. John H. DeTar, 32 F.C.C.2d 933 (1972) (discussed at text accompanying note 76 supra).
105 David I. Caplan, 38 F.C.C.2d 1027 (1973) (discussed at text accompanying note 71 supra).
107 This reluctance is discerned in the large number of rejected complaints as compared with the very small number of complaints resulting in FCC action.
vide "the Commission with . . . information which indicates that the licensee in its overall programming has failed to present contrasting views on the" controversial issue. This statement was made in a case in which the complainant had asked the licensee to provide information concerning any additional related controversial programming. Upon the licensee's refusal to do so, the complainant requested the FCC to compel disclosure of the requested information. The FCC responded to this request as follows:

Although you request that the Commission "order" the licensee [to] furnish information concerning timing, frequency, duration, complete texts, etc. of the [controversial] commercials, we do not require licensees to furnish material absent some such showing [of overall imbalance]. Thus a complainant must "(a) specify the particular broadcast in which the controversial issue was broadcast, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in its overall programming has not attempted to present opposing views on the issues." To meet this burden, either a complainant must be prescient, or he must have been planning to lodge a complaint for some period of time and have systematically monitored the licensee's broadcasts.


109 Although it appears reasonable to question the good faith of a station that refuses to cooperate with a request for information that is more easily available to it than to the individual viewer or listener, the FCC clearly does not do so. The inconsistency of the FCC's notion of good faith and reasonableness can be appreciated by comparing the facts in the Peter C. Herbst decision with Accuracy In Media, 40 F.C.C.2d 958, 966 (1973) (Pensions):

Serious questions as to the reasonableness of your judgment are raised, first, by the previously cited evidence [quotes from the transcript of the program] that the program . . . went considerably beyond a mere presentation of "the fact that problems exist with some private pension plans." . . . More importantly, however, your argument misinterprets the definition of a "controversial issue of public importance" as it pertains to the applicability of the fairness doctrine. As both the Commission and the courts have stated, underlying the fairness doctrine is "the paramount right of the American public to be informed as to events and issues of public importance."

As discussed above, the indicia of controversiality are not well spelled out, but to find that misunderstanding those already unclear standards is evidence of unreasonableness is rather harsh. Notice also the circularity of the offered indicia of controversiality.

110 40 F.C.C.2d at 117 (quoting Allen C. Phelps, 21 F.C.C. 12 (1970)).
Assuming that the complainant has the information necessary to have his complaint investigated, he must still demonstrate that the issue has not been presented in a balanced fashion. This is not a burden easily carried. The FCC has not, in the thirty-nine years of its existence, defined a ratio of majority to minority viewpoint air time which will be considered balanced for fairness doctrine purposes. It has, in fact, diligently avoided even the appearance of defining such a ratio.

In addition to the pleading and numerical ratio problems of balance, there are problems of audience size and identity, the formatting of the balancing presentation, and the sufficiency of an offered but unused opportunity to appear on a broadcast. The FCC will normally look only to the time devoted to the two sides of an issue to determine if it has been balanced—for example, an interview with a party representing one side of a controversial issue which is broadcast as part of a prime time newscast can be balanced by a Sunday morning interview of the other side. Thus, spot announcements by the Planned Parenthood Association were held to have been balanced, so far as they advocated some form of birth control, by panel discussions and talk shows that presented, as one of many others, the views of the Catholic Church on family planning.

There are, however, serious weaknesses in the FCC’s approach. It is quite clear that the number and the identity of the people in the audience will vary enormously between the two

111 Ad Hoc Committee to Defeat the Transportation Bond Issue, 32 F.C.C.2d 458, 459 (1971).

112 See Complaint of Wilderness Society, 31 F.C.C.2d 729, 737 (1971) (Burch, Chairman, concurring):

[It is . . . necessary to ask “what do past Commission precedents tell us about [the proper ratio of commercials to counter-commercials]?” And I am forced to conclude that the answer, after twenty years of administration of the doctrine, is “virtually nothing” . . . .

And I strongly suspect that the issue has not been resolved precisely because it is so thorny. I for one find it impossible to feel very confident or secure about a process that relies on the stop-watch approach—that is, making judgments, and then quantifying the category into which each presentation falls. And this is only the beginning. There are such additional ramifications as the time and style of the various presentations (does a prime-time spot count two times more heavily than a mid-morning interview? three times? or ten times?), the size and make up of the audience, and . . . the relative weight that should be accorded an indirect commercial announcement as against the direct rebuttal that would be afforded under a remedial fairness doctrine ruling. . . .

It might even be argued that we have to consider the dial switching habits of the average viewer—which means that only rarely does he recall where he viewed which side of what controversial issue! The road here could lead to a series of decisions with enough variables and shadings to rival a medieval religious tract.

broadcasts. Furthermore, it is possible that the formats of the two presentations may have some impact on their relative effectiveness.\(^\text{114}\)

Finally, a serious distortion in the FCC's mandate to assure that the public is fully and fairly informed of issues of public importance results when an opportunity to reply is offered but not accepted, and is nonetheless held sufficient to meet the licensee's fairness doctrine obligation. Although an unused offer of air time has not been the basis of any holding that a licensee had met its fairness doctrine obligation, such an offer is one factor that is frequently cited by the FCC as a determinant of the decision not to grant a complaint. In *American Conservative Union*,\(^\text{115}\) which held that the *Hunger* program had not presented the controversial issue whether hunger in this country is a national disgrace, the FCC noted that the defendant broadcaster had offered the complaining group twenty tickets for that part of the show during which questions were to be taken from the audience,\(^\text{116}\) with the implication that this measure may have balanced the presentation about which ACU had complained.\(^\text{117}\) Similarly, while denying that there was any need for the licensee to balance its coverage of the *Ferro v. Bacile* child custody case, the FCC noted that WNEW had attempted to interview Mrs. Ferro, the natural mother, and that she had declined to be interviewed.\(^\text{118}\)

One would trust that the issue, as the FCC itself has stated, is not who presents the other side, but rather whether the other side is presented at all. To cite the rejected offer as a reason for denying a complaint is to ignore both the mandate of the FCC\(^\text{119}\) and its own pronouncements on the issue.\(^\text{120}\)

### C. Whose Differing View Is To Be Presented?

Under the *Cullman* doctrine, a licensee is obligated to provide free time to spokesmen for opposing points of view when those spokesmen cannot or will not pay for it.\(^\text{121}\) However, no

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\(^{114}\) In the commercial cases to be discussed below, text accompanying notes 147-92 infra, the issues of audience size and identity are quite important because some of the commercial messages are delivered during prime-time shows, while most of the balancing presentations occur during documentary, news, or public affairs programming.


\(^{116}\) Id. at 34.

\(^{117}\) The FCC pointed out, however, that a number of contrasting views were presented on the program by panelists and members of the audience.

\(^{118}\) Bernard T. Caplan, 30 F.C.C.2d 758, 759 (1971).


\(^{120}\) E.g., Mrs. J.R. Paul, 26 F.C.C.2d 591 (1969).

individual or group has the right either to present his particular view or to have his special viewpoint presented; the licensee has the discretion to select whom he considers to be the most appropriate spokesman for the most appropriate opposing view. Only when a licensee’s broadcast attacks the “personal qualities of an identified person or group” or endorses or opposes a political candidate in an editorial is the licensee obligated to provide the attacked or opposed person, group, or candidate free time in which to respond.

The licensee’s discretion on this issue is particularly apparent in the context of an election. Although federal legislation requires a licensee who permits use of his broadcast station by a candidate for office to provide similar access to all other candidates at a charge limited by Congress, it neither requires nor prohibits variations below the ceiling to give effect to the policy of permitting all candidates to speak out. Additionally, when a supporter of a candidate rather than the candidate himself appears, either to endorse his candidate or to criticize the other candidate, the fairness doctrine rather than federal legislation governs. Although a licensee, absent unusual circumstances, is limited in his choice of who should respond to such a broadcast, he is not obligated to provide free time for such a response.

Cases that arose during the 1972 presidential election campaign made it apparent that these doctrines can be manipulated to preserve any monetary advantage that a political party can seize and to make it difficult for third (or fourth or fifth) party candidates to get their message to the voting public. In *Thomas R. Asher*, the Committee to Elect McGovern-Shriver (CEM-S) filed a complaint with the FCC alleging that the “Democrats for

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122 Fairness Primer, *supra* note 17, at 1913.
123 *Id.*
124 47 C.F.R. § 73.123 (1973). The licensee is also obligated to give notice of the broadcast and provide a transcript thereof to the person or group attacked. *Id.*
126 47 U.S.C. § 315(b) (Supp. 1972), *amending* 47 U.S.C. § 315(b) (1970). This provision has been interpreted to mean that Candidate B gets equal time for the price paid by Candidate A. See Dr. Benjamin Spock Peoples’ Party, 38 F.C.C.2d 316, 319 (1972) (Johnson, Comm’r, dissenting).
128 A spokesman or supporter of the other candidate is the logical choice as appropriate spokesman and, therefore, absent unusual circumstances, it would be unreasonable for the licensee to choose someone else. Nicholas Zapple, 23 F.C.C.2d 707, 708 (1970).
129 *Id.*
130 38 F.C.C.2d 300 (1972).
Nixon” were sponsoring spot advertisements which “grossly distort[ed] the position of the Democratic Party’s Presidential nominee . . . on one of the most important, fundamental, and controversial issues of the current campaign—welfare reform.” The CEM-S, which was not well financed, asked that it be given free air time to present its side of the welfare reform issue. The Commission denied the request, finding both of the CEM-S’s justifications for free air time invalid. The first ground, urging the suspension of Zapple when a political spot grossly and maliciously distorted the opponent's position about a fundamental campaign issue, was rejected for the same reasons that the Zapple doctrine had been originally promulgated: it was inappropriate for the FCC to interfere with the financing of political campaigns. The second ground, that the advertisements were virtually a personal attack on McGovern, was dismissed with the observations that the spot was not a personal attack, and that even if it were, personal attacks by spokesmen for political candidates are exempt from the provisions of the personal attack rules.

Similarly, the Dr. Benjamin Spock Peoples’ Party urged that Dr. Spock be granted free air time in which to present his position, alleging a fairness doctrine violation based upon the network news treatment, or nontreatment, of Spock’s presidential campaign. The FCC first treated the request for free speaking time for Dr. Spock as an equal time complaint, and dismissed it as inadequately pleaded. It then considered the fairness doctrine aspect of the complaint: that Dr. Spock’s candidacy was one side of an issue of public importance which had not been adequately treated by the three major networks. Although not addressing the merits of the issue because of a procedural defect in the filing of the complaint, the Commission did assert that a network policy of largely ignoring the campaigns of “fringe” candidates for political office could be perfectly consistent with the fairness doctrine.

131 Id. at 300.
132 Notes 128-29 supra & accompanying text.
133 38 F.C.C.2d at 301.
134 Id. at 303.
135 Id. at 301.
136 Id. (citing 47 C.F.R. § 73.123 (1973)).
137 Dr. Benjamin Spock Peoples’ Party, 38 F.C.C.2d 316 (1972).
138 Id. at 317.
139 Id. at 318.
140 Id. This policy was not new to the 1972 presidential campaign. In the Fairness Primer, supra note 17, promulgated by the FCC in 1964, the Commission stated that a licensee who provided time, either free or for a fee, to one of the major party
As the law stands now, a minority candidate has the right to reply to political editorials and the statutory right to air time in the same quantity and on the same terms as it is used by other candidates, if he can afford it. A major party candidate has not only these rights; merely by virtue of being a major party candidate, he also has substantially more access to air time, if he can afford to purchase it. The minority candidate, who must rely on the fairness doctrine, may be excluded from the air or given only token amounts of time deemed reasonable by the licensee, even though he may be able to pay for more time. If, as in the last presidential election, one party has a large amount of money and the other is poorly financed, the well-heeled party can exploit that advantage and put its message before the public in a one-sided manner with the full approval of the FCC. Moreover, if the financially well-off candidate does not himself appear, but uses spokesmen and advertisements instead, he will avoid providing the other candidates with the more powerful equal time appeal for air time. This system violates both the spirit and language of the first amendment as interpreted by the Supreme Court in Red Lion. The FCC’s duty, the Court said, is to serve the public’s right to be informed. The standard described in this section cannot be said to serve any interests but those of the broadcasters in a larger profit margin and those of the politicians in erecting barriers to the creation of viable minority parties.

candidates for a political office for the purpose of soliciting campaign contributions was obligated to provide time to the other major party candidate on the same terms for the same purpose. The Commission went on to say:

But it does not follow that if there were, in addition, so-called minority party candidates for the office . . . , these candidates also would have to be afforded a roughly equivalent number of similar announcements. In such an event, the licensee would be called upon to make a good faith judgment as to whether there can reasonably be said to be a need or interest in the community calling for some provision of announcement time to these other parties or candidates and, if so, to determine the extent of that interest or need and the appropriate way to meet it.

_Id_ at 1912.

143 The views of a major party candidate are presumed to be an issue of public importance.
146 This results both from not having to provide free time to impecunious candidates and from avoiding the alienation of parts of its audience as a result of presenting controversial candidates.
IV. Discretion Lost and Regained: The Commercial Cases

The reticence of the Commission to promulgate clearer answers to the questions posed above may be influenced in part by the disastrous results, from the FCC's point of view, which followed the Commission's cigarette ruling.\(^{147}\) Therefore, before this Comment proposes any standards to fill the gap already described, it might be instructive to review a case in which the FCC was at pains to announce clearly the principles upon which it had made its decision, and the subsequent application of those principles by the Court of Appeals for the District of Columbia Circuit to areas into which the Commission did not want to move.

For most of the years of its existence, the FCC's policy had been largely to ignore the advertising of legitimate products on the air.\(^{148}\) Whether this was the result of a conscious policy of noninterference or merely of an absence of complaints is not clear. However, in 1967 the Commission's attention was directed to cigarette advertising, and it responded dramatically. John F. Banzhaf, III, wrote to WCBS-TV, in New York City, requesting air time to present the other side of the issue whether people should smoke cigarettes, an issue that he alleged was presented in the cigarette advertisements aired by the station. In its reply to Banzhaf CBS stated that it did not believe that the fairness doctrine applied to ordinary product advertising and that the station had a continuing policy of presenting the anti-smoking viewpoint in its news coverage.\(^{149}\) Banzhaf then turned to the FCC, which issued an advisory letter to CBS.\(^{150}\)

The advisory letter to CBS caused an uproar in the broadcast and advertising industries because it stated, first, that cigarette commercials were subject to the fairness doctrine and, second, that the controversial issue presented by the cigarette advertisements would have to be balanced over relatively short time intervals.\(^{151}\) This implied, and resulted in, counter-commercials. The result of this uproar was a multi-party appeal


\(^{148}\) Id. at 926.

\(^{149}\) Id. at 922.

\(^{150}\) This was contrary to the FCC's normal procedure of advising the broadcaster that a complaint had been filed and asking for additional comment prior to issuing an advisory letter. Id. at 953 (Loevinger, Comm'r, concurring).

\(^{151}\) Id. at 941. The FCC suggested weekly balancing.
to the FCC to reconsider its position. The petitioners urged reconsideration on eight grounds, only four of which are relevant to this discussion: that the fairness doctrine did not apply to commercial advertising; that a blanket ruling that any cigarette commercial raised an issue of public importance was improperly broad; that the present ruling could not logically be limited to cigarette commercials; and that extending the fairness doctrine to commercial messages in general would drive advertisers to less "fair" forums and destroy the financial basis of the broadcast industry.

Addressing itself to the first objection, that the fairness doctrine did not apply to commercial messages, the FCC ignored its original statement of the fairness doctrine in the Report on Editorializing and Congress' endorsement of the doctrine in section 315. Both of these documents refer to news and public affairs programming and are silent about commercials and entertainment shows. The FCC looked instead to the public interest standard as authorization for the fairness doctrine's applicability to commercial messages, saying, "We believe that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue... posed by cigarette advertising..." 156

In its discussion of the broad ruling that any cigarette commercial raised a controversial issue, the Commission held that where the issue is whether a product should or should not be used, any commercial advocating its use presented one side of a controversial issue. The Commission flatly rejected an argument that commercials of lawful businesses offering lawful products for sale could not be controversial.157

Turning to the "slippery slope" argument that the cigarette

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152 Id.
153 Id. at 923-24. The petitioners also alleged that the fairness doctrine violated the first and fifth amendments of the Constitution; that Congress had pre-empted the field in the Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (1970); that the FCC's decision requiring weekly balancing, see note 151 supra, would substitute "commission fiat" for licensee judgment; and that the ruling was invalid because interested parties were not given an opportunity to be heard prior to the issuance of a novel policy determination. Id.
154 13 F.C.C. 1246 (1949).
155 "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation... to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a)(4).
156 9 F.C.C.2d at 927.
157 Id. at 940.
ruling could not be logically limited to cigarettes, the FCC said:

Our ruling [that cigarette commercials raise fairness obligations] does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) Governmental and private reports and congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

... We adhere to our view that cigarette advertising presents a unique situation. \(^{158}\)

Finally, in rejecting the contention that imposing the fairness doctrine upon commercials would drive advertisers to other forums, the Commission asserted the superiority of the broadcast media as a means of reaching a large audience. In the FCC's opinion, this superiority would clearly outweigh any disadvantages resulting from counter-commercials. \(^{159}\)

The Commission stated in summary that the obligation to cover both sides of the issue presented by cigarette commercials "stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility." \(^{160}\) In an insightful concurring opinion, Commissioner Loevinger questioned this application of the public interest standard. "Repetitious reference to the public interest as establishing whatever conclusion is contended for is no more than question-begging. The 'public interest' is a judgment encompassing whatever the person making the judgment deems to be socially desirable." \(^{161}\) He went on to express concern that the cigarette ruling could not be limited to cigarette commercials and that, as a result, the fairness doctrine would suffer. \(^{162}\) As it developed, Commis-

\(^{158}\) Id. at 943.
\(^{159}\) Id. at 944.
\(^{160}\) Id. at 949. Note also that in the subsequent court test of the cigarette ruling, the "public interest" test was narrowed to a "public health" test and the ruling was affirmed. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).
\(^{161}\) 9 F.C.C.2d at 953.
\(^{162}\) Id. at 954. Commissioner Loevinger continued:

Further, I am concerned that extension of the Fairness Doctrine to advertising is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable. No matter what the
sioner Loevinger was correct in his assessment of the Commission's ability to restrict the cigarette ruling to cigarettes.

The first major effort to enlarge the scope of the cigarette ruling was launched by environmentalists. Encouraged by the passage of the National Environmental Policy Act of 1969 (NEPA), which declared a national policy of reducing environmental pollution and which "authorized and directed" government agencies to further that goal, the Friends of the Earth (FOE) objected to those automobile and gasoline advertisements which emphasized speed, power, and performance. The FOE complaint stated that WNBC-TV, in New York City, had denied their request for time to present the other side of the controversial issue of automobile pollution raised by these advertisements, on the basis that the station had already balanced its presentations on the air pollution issue.

While noting that a commercial could deal directly with a controversial issue, the FCC denied the complaint. Although in the cigarette case and this case the commercial in question was a general product advertisement, the Commission argued, first, that a clear line could be drawn between the danger presented by cigarettes on the one hand and the danger presented by cars and gasoline on the other. The smoking of cigarettes was harmful per se and was the target of government agencies, whereas the use of cars and gasoline was both beneficial and harmful. Noting that the environmental problems caused by automobiles were also caused by "a host of other products or services—detergents . . ., gasoline . . ., electric power, airplanes, [and] disposable containers," the FCC also argued that the public interest standard required it to weigh the gains to be achieved by balancing the car and gasoline advertisements against the potential damage to the broadcasting industry that could result if commercial advertisers selected another less "fair" forum.

Commission now says about the distinction between cigarette advertising and other types of advertising, it is establishing the principle that the Fairness Doctrine applies to commercial advertising, as distinguished from paid political broadcasting. The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health.

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164 Friends of the Earth v. FCC, 449 F.2d 1164, 1166 (D.C. Cir. 1971).
166 Id. at 749.
167 Id. at 746.
168 Id.
169 Note how quickly the Commission's confidence in the superiority of the broad-
However, even assuming that we are wrong in [the] belief [that cigarette advertising presents unique problems that set it apart from all other advertising], we would not extend the ruling generally to the field of product advertising. That is what, in effect, complainant urges since, as stated, a great many products have some adverse ecological effects. Were we to [extend the cigarette ruling], the result would be the undermining of the present system, based as it is on such commercials. Such a result is not consistent with the public interest. It is not required, since there is the alternative of providing advertiser-supported programming, valued by the public, by means of the product commercial . . . . In short, our action must be guided by one standard, the public interest.\textsuperscript{170}

In this statement one sees signs of Commissioner Loevinger's characterization of the public interest standard as meaning whatever the person applying it wants it to mean.\textsuperscript{171}

The Friends of the Earth were not persuaded by the FCC's reasoning and appealed to the Court of Appeals for the District of Columbia Circuit, the same court which had earlier affirmed the FCC's cigarette ruling.\textsuperscript{172} While this action was pending, the environmentalists, taking the FCC's cue concerning products similar to high performance cars,\textsuperscript{173} kept up their attack.

In \textit{Alan F. Neckritz},\textsuperscript{174} the complainant alleged that advertisements which claimed that Standard Oil of California's F-310 gasoline reduced automobile emissions presented one side of a controversial issue that had not been properly balanced. Complainant urged two bases for his complaint: that the Federal Trade Commission had issued a complaint alleging that the commercials in question were deceptive,\textsuperscript{175} thus making the advertisement itself controversial; and that the commercial appealed to a subject of general concern, air pollution, in order to sell its product, thereby raising that issue.\textsuperscript{176} The FCC rejected the complaint because issuance of an FTC complaint did not

\textsuperscript{170} 24 F.C.C.2d at 749.
\textsuperscript{171}  See text accompanying note 159 \textit{supra}.
\textsuperscript{173}  See text accompanying note 161 \textit{supra}.
\textsuperscript{174} 29 F.C.C.2d 807 (1971).
\textsuperscript{175}  \textit{Id.} at 807.
\textsuperscript{176}  \textit{Id.} at 808.
create a controversial issue (the FCC felt that it was socially desirable to have manufacturers advertise "improvements" in their products), and because gasoline was different than cigarettes.\textsuperscript{177} The Commission noted that it would extend the fairness doctrine to a product commercial, other than a commercial for cigarettes, only when a commercial directly addresses a controversial issue of public importance.\textsuperscript{178}

In \textit{William H. Rodgers, Jr.},\textsuperscript{179} the complainant sought to have fairness doctrine obligations imposed upon licensees who broadcast commercials for phosphate detergents. Citing the international, national, federal, and local actions designed to reduce the pollution resulting from phosphate detergents, the complainant urged that commercials advocating the use of such detergents, when other nonpolluting alternatives were available, presented one side of an issue of public importance.\textsuperscript{180} The FCC responded by saying that general product commercials do not create fairness obligations, making no attempt to distinguish the phosphate detergent case from the cigarette case. The Commission therefore held that the licensee had exercised reasonable judgment in finding that no issue had been raised.\textsuperscript{181}

In \textit{Wilderness Society},\textsuperscript{182} the FCC held that three Standard Oil of New Jersey (Esso) commercials discussing the desirability, feasibility, and environmental impact of drilling for oil on the North Slope of Alaska directly raised the controversial issues of "(i) the need for developing the oil reserves in Alaska at this time and (ii) the ecological effects which may ensue from such development."\textsuperscript{183} In so holding, the Commission rejected the licensee's argument that the commercials were merely institutional advertising discussing Esso's search for oil and its concern for the environment. Without discussing whether the licensee's judgment—that it had balanced the issue presented—was reasonable and made in good faith (the ostensible test of licensee performance), the FCC found that the judgment was in error.\textsuperscript{184} This case, with its forceful finding of controversiality

\begin{footnotes}
\item[177] Id. at 810-11 (citing Friends of the Earth, 24 F.C.C.2d 743, 748-49 (1970)).
\item[178] Id. at 812.
\item[179] 30 F.C.C.2d 640 (1971).
\item[180] Id. at 640-41.
\item[181] Id. at 642.
\item[182] 30 F.C.C.2d 643 (1971).
\item[183] Id. at 646. Despite this rather clear statement, the FCC later declared that only one issue was presented in this case, the proposed construction of the Alaska Pipeline, and found that this single issue had been balanced by later presentations. Complaint of Wilderness Society, 32 F.C.C.2d 714 (1971).
\item[184] 30 F.C.C.2d at 646.
\end{footnotes}
and imbalance, was apparently an attempt by the Commission to illustrate the difference between the direct presentation of a controversial issue, which is subject to the requirements of the fairness doctrine, and a general product commercial, which is exempt.

At this point the *Friends of the Earth* cars and gasoline case was decided by the court of appeals. The Commission had framed the issue in its most basic terms: "whether the Commission reasonably refused to extend to gasoline and automobile commercials its ruling with respect to cigarette commercials."185 The court found that it had not acted reasonably.

Where the Commission departs from [the cigarette ruling] is in insisting that, because cigarettes are unique in the threat they present to human health, the public interest considerations which caused it to reach the result it did in [that case] have no force here.

The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger.186

Noting the Commission’s resolve in the cigarette case to limit the applicability of the fairness doctrine to the area of cigarette commercials only, the court held that the *FOE* and *Neckritz* dicta, asserting that a commercial could directly present a controversial issue, and the *Esso* case, so holding, vitiated the effect of such a resolve.187

Four months after the court’s decision in *FOE*, a complaint was filed with the Commission alleging that a licensee had not adequately balanced commercials advertising trash compactors.188 The complainant alleged that the commercials in question presented one side of the issue of recycling, a method of reducing pollution and preserving the environment encouraged by the National Environmental Policy Act.189 The FCC denied the complaint, stating that "[t]he Commission has consistently refused to apply the fairness doctrine to the broadcast of ordinary product commercials, and the commercials herein do not come within the exception to that policy enunciated in [the cigarette and car and gasoline cases]."190 The FCC, however,

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185 449 F.2d at 1168.
186 Id. at 1169.
187 Id. at 1169-70.
190 32 F.C.C.2d at 838.
did not state why the compactor commercials fell without the exception; it did not state why compactors were different than cars, gasoline, detergents, electric power, airplanes, or other products in the class which the FCC's reply to FOE in the original car and gasoline complaint had implied are subject to the fairness doctrine; nor did it discuss the effect of the court's waiver or vitiation theory on the "ordinary product" exemption from the requirements of the fairness doctrine.

In a more recent case,191 the FCC addressed itself to the continued viability of the ordinary product commercial exception:

We do not read the Friends of the Earth case as requiring an extension of the fairness doctrine to virtually all ordinary product commercials; rather, the Court's holding there is limited to the particular advertisements and public health issues involved, and is expressly stated to be on the grounds that pending the outcome of an overall inquiry [initiated by the FCC], the health hazard issue in Cigarette Advertising ruling cannot be distinguished from that in Friends of the Earth.192

At the present time, in addition to all of the other areas of FCC discretion, the Commission seems to be claiming as a consequence of a narrow reading of FOE, broad powers to determine how hazardous to human health a product must be before commercials advocating its use are subject to the fairness doctrine.193

V. PROPOSALS

The success of the environmentalists in applying the standards articulated in Cigarette Advertising to areas into which the FCC did not want to go may explain why the Commission has been so reluctant to promulgate standards of controversiality and balance. It is nevertheless difficult to see any viable reasons for treating essentially similar situations differently. The proposals set forth in this section represent an attempt to develop a coherent fairness doctrine policy which accommodates the interests of the public, the individual, and the broadcaster and

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192 Id. at 123.

193 A recent development in the commercial area is the refusal by the major networks to accept Mobil Oil Company's offer to buy advertising time for its critics, provided the networks allowed Mobil to buy an equal amount of time to state its position with regard to the energy crisis. N.Y. Times, Mar. 16, 1974, at 1, col. 2.
which is based upon rules and standards that are known to all concerned parties.\textsuperscript{194}

The proposals to be advanced fall into four categories: first, standards of controversality, balance, and selection of appropriate spokesmen for a reply in the political context; second, a proposal for a system of intermediate sanctions for fairness doctrine violations; third, a proposal for a system of offsetting individual access time with time that the broadcasters may use that is not subject to the fairness doctrine; and, finally, a suggestion for a minor change in the pleading requirements for filing a complaint with the Commission.

A. Standards

As described in the previous sections, the FCC's application of the fairness doctrine has been inconsistent, with similar cases decided differently; ineffective, since few citizen complaints are acted upon because of either procedural obstacles or FCC reluctance to act, with no corresponding increase in broadcaster freedom to speak out because the Commission retains the discretion to find almost any program to be unfair; and potentially repressive, since there is the appearance of almost unbridled discretion in the hands of appointed agency commissioners. While recognizing the argument that flexibility in the agency is needed to avoid infringing upon first amendment rights of the broadcasters and of individual members of the public, the discussion of the FCC decisions has attempted to show that the very lack of known standards has seriously infringed the rights which are nominally to be accommodated by the FCC.

The standards to be developed below are all based upon two central propositions. First, the fairness doctrine should be used to keep the public informed about issues upon which it or its elected representatives will vote, in an effort to make that vote both informed and representative. Accurate information about the options to be considered in any public choice is fundamental to the concept of a participatory democracy.\textsuperscript{195} Second, given the importance of this information to the effective working of such a democracy, any questions of definition or interpretation of the proposed standards should be resolved in favor of providing more information to the public. As Mr. Justice White stated in Red Lion, "It is the right of the [public to be fully and fairly informed] . . . which is paramount."\textsuperscript{196}

\textsuperscript{194} The FCC clearly has the authority to promulgate regulations and to enforce its views as to what the Act and the Constitution require. 47 U.S.C. § 154(i) (1970).

\textsuperscript{195} Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 SUP. CT. REV. 245.

1. Controversiality

As discussed above, the problem in this area is that many things are controversial to many people, but no one knows what is going to be controversial to the FCC. It is suggested that an objective test of "an issue of public importance" be based upon the following four criteria. A controversial issue would be one that was: related to the subject of an upcoming public vote or referendum; seen to be an election issue in a campaign for public office, automatically including the fact of candidacy itself; related to the subject of pending legislation or legislative hearings in the local, state, or federal legislature; or held by petition to be controversial by some reasonable percentage of the station's service area population. The first three criteria are implicit in many of the FCC's decisions; the fourth, which is not expected to be a significant factor, is a "safety valve" provision. The four criteria would be uniformly applicable to all programming: regular program material, paid political broadcasts, commercials, news reports, and public affairs programming.

Before such a test can be applied, several terms require definition: What constitutes an issue, in light of the sub-issue exception of current FCC decisions? What is meant by the term "related" as used in "related to the subject of an upcoming vote or legislative bill"? These terms should be interpreted expansively. If a complainant can define an issue which is controversial under the tests proposed above and which was presented in an unfair manner, the licensee should have the duty to balance it. The party claiming a subject not to be "related" should bear the burden of proving it to be clearly unrelated. Thus, any

197 Multi-state service area stations would have to scan the legislatures of each of the states served. While it would be possible to include matters pending before the executive and judicial branches and those before administrative agencies, such an approach has been rejected because of the huge quantity of material that would be involved. There is good reason for the public to be better informed about pending legislation: elected delegates of the people will be voting on the questions in Congress.

198 In 1934, the Senate passed somewhat similar criteria, providing that "... if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity ... for the presentation of opposite views on such public questions." Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 108 n.4 (1973) (quoting Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 19 (1934)). The Senate criteria were deleted from the Act in the conference committee. H.R. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934).

199 See, e.g., Mrs. H.B. Van Velzer, 38 F.C.C.2d 1044 (1973) (the evolution case, discussed at note 70 supra & accompanying text); Accuracy in Media, Inc., 40 F.C.C.2d
error committed would be on the side of presenting an unnecessary rebuttal rather than failing to present a necessary balancing program.

It is important to realize that this test is a narrower one than the FCC's current subjective test, in that those subjects not falling into one of the suggested categories would not have to be fairly treated. The factual situations discussed above provide several examples of the way in which the results under this proposed test of controversiality would result in different decisions than the Commission's current tests. Thus, in the absence of legislation, public referendum, or campaign dispute, the *Air Traffic Congestion and Air Safety* program would have been totally exempt, including the sub-issue of the competence of private pilots. In the cigarette situation, the fairness obligation would have been imposed during the pendency of the Cigarette Labeling and Advertising Act of 1965, but would have ceased once the Act was adopted. Similarly NEPA would have been a factor in the automobile and gasoline cases only until it was enacted. The proposed test may nevertheless prompt more fairness doctrine discipline by making those violations that do occur more difficult to ignore.

Under the proposed test of controversiality, the foreign events "exception" would be severely limited, since legislation providing for military and economic aid must be passed by Congress on a yearly basis. Coverage of events in a recipient country would be subject to scrutiny under the fairness doctrine in order that decisions about such aid be based on full information rather than on potentially one-sided representations. It should be noted, however, that the suggested criteria would not require that events in nonrecipient countries, for example, Northern Ireland, be fairly reported.

The private disputes "exception" would clearly continue, since such a dispute would not fit into any of the categories unless it became a campaign issue. However, in the adoption
case discussed above, an expansive definition of "related" might have required the Ferro v. Bacile case to be fairly treated as one element in the discussion of the proposals to change the New York state adoption laws.

Two caveats are in order at this point. First, no station is required to cover every controversial issue or every aspect of a controversial issue; it must, however, treat fairly those controversial issues, or aspects of controversial issues, that it does address. Second, since FCC scrutiny of licensee performance is triggered by a citizen complaint, there is no reason to expect more Commission scrutiny under an objective standard of controversial than under the current subjective tests. There may be more complaints investigated, however, since the definition of issues will be simplified by the existence of standards known to the public.

2. Balance

The FCC has avoided explicitly or implicitly promulgating any minimum ratio of primary issue time to balancing time that will satisfy the fairness doctrine's requirements. This inaction is the result of a fear that such a ratio would be an improper infringement of the licensee's discretion. But because the Commission is called upon to determine ultimately what a fair balance is, this position serves the appearance of licensee discretion more than it does licensee discretion itself. Further, leaving discretion in the licensee means, in this context, allowing the licensee to balance as little as possible within the vague parameters of "fairness." Since the broadcaster has had to present balancing material out of fear of FCC action, yet at least one member of the public (the complainant) still feels uninformed, this sort of discretion serves no first amendment right; rather it serves a subordinate interest in maximizing revenues.

A related problem is the Commission's examination of the amount of time devoted to each side, without a comparable scrutiny of the audience size or identity. Given the constitutional justification for the fairness doctrine, this test of balance is an unrealistic one. Thus, the presentation of an issue on

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206 Bernard T. Callan, 30 F.C.C.2d 758 (1971) (text accompanying notes 84-86 supra).
207 See text accompanying notes 111-12 supra.
208 See note 112 supra.
209 Revenues are maximized, in this context, by avoiding both the necessity of having to provide free time for fairness presentations, and any possible alienation of the audience as a result of presenting controversial speakers.
television during prime time cannot, in any realistic way, be balanced by a Sunday morning public affair's program.

Two major changes in FCC policy would meet these problems of balance. First, some fixed minimum ratio of primary issue to balancing time should be promulgated. Congress has indicated in section 315210 that its sense of balance requires fully equal treatment of both sides, in that politicians must be provided equal time to balance the appearance of their opponents. Therefore, any FCC deviation from equal time for both sides of an issue should be well justified.

Second, the balancing coverage of an issue should, to the extent possible, be directed toward the audience which probably saw or heard the original presentation. Given the FCC's recognition of various types of time based upon audience size,211 it would be relatively simple to require that prime time presentations be balanced in prime time; similarly, non-prime time weekend presentations should be balanced during similar weekend broadcasts. Under this set of proposals a licensee, when faced with a complaint, would scan his broadcasts to find those primary and balancing presentations which were broadcast during a time period comparable to that of the program complained about. This would aid in achieving the required balance of time devoted to each side of an issue. If a broadcaster discovered that the program originally complained about had already been overbalanced, there would be no need to correct the imbalance, absent a second complaint.

3. Who Presents the Other Side?

With one exception, the current system, which gives the licensee the discretion to select the spokesmen for the opposing view and to determine the content of that presentation, is reasonable. The exception is the area of paid and unpaid political broadcasts where the ill-considered Zapple doctrine212 (refusing to grant free time for fairness doctrine replies to political advertisements) prevails. The public's right to be informed would be furthered if a paid or unpaid presentation of one candidate for an office imposed upon the licensee the obligation to make the amount of time mandated by the fairness doctrine available to each of the other candidates for that office. If this were done, a political advertisement or program would trigger the requirement that each of the other candidates

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211 See, e.g., the prime time rules.
212 Notes 125-29 supra & accompanying text.
representing discrete sides of the controversial issue be given the opportunity to present a reply. Under the current Cullman doctrine, if these other candidates could not pay for such time, the licensee would be compelled to provide it free.

It may be objected that this requirement will place a great burden on licensees, since they will be giving away a significant amount of time during political campaigns. This, however, is most unlikely. The more probable result is that the broadcasters would charge fees for air time that reflected the costs of having to give free time to the other candidates, or that political parties would cut back on their paid advertising. It may also be objected that this measure would drive political campaign coverage from the air. This is not true either, however. What would be driven from the air would not be news coverage, but rather the paid political message that urges a slogan rather than a position. Finally, this proposal might raise the objection that some fringe candidates will be given free air time, but it is not the place of either the FCC or the licensee to tell state and local governments that their laws defining the qualifications for political office are too loose. If a community desires diversity in its candidates, it is not the broadcast industry's role to counteract that choice.

Although CBS clearly indicated that there is no constitutional right of access, neither is there a constitutional or statutory bar to such a proposal. This single step, pulling paid political messages within the ambit of the fairness doctrine free time rules, and providing that free time opportunity to each of the other candidates, could do much to reduce the legitimate need for massive campaign financing. If one party could not obtain an advantage in exposure to the public through its superior finances, the incentives to accumulate those funds would at least be reduced. Moreover, the adoption of this proposed system, with its disincentives to use paid political advertising, may result in broadcast coverage of campaigns without the hucksterism that has characterized political campaigns in this country.

4. Summary

These proposed standards do not eliminate the Commission's discretion entirely. Such a step is neither possible nor desirable. The standards proposed above\textsuperscript{213} are intended to

\textsuperscript{213} One additional proposal which was considered but rejected concerned the "universe" within which broadcast presentations must be balanced. The essence of the proposal is that one broadcaster could use the presentations of another broadcaster in the same service area to balance an unfair program. While superficially an appealing
limit that discretion and to have the Commission serve, more nearly than is now the case, the interests of the public which it is statutorily bound to protect, the interests of the licensees which it must respect, and the interests of the individual complainant who believes that a licensee has failed to meet his obligations. The proposals below are intended to give further effect to the new emphasis on the licensees' first amendment rights seen in CBS, and to provide some incentive for licensees to open their facilities to individuals desiring to speak out.

B. Intermediate Sanctions: The After-the-Fact Exemption

As developed above, one of the problems with the current system of sanctions imposed by the FCC for fairness doctrine violations has been the Commission's failure to develop any sanctions falling between the "lifted eyebrow" and the threat of nonrenewal of the license. It was suggested that this resulted in reluctance on the part of the FCC to impose either sanction for fear that the minor sanction would lose its effect and that imposition of the major sanction would not be approved by the courts except where overall performance was found wanting. In this Section, a system of intermediate sanctions will be proposed, sanctions which also provide licensee journalistic judgment some insulation from FCC scrutiny.

It is proposed that a given amount of time, to be used at the licensee's option, be exempt from the requirements of the fairness doctrine. The system of complaint, investigation by the FCC, and quasi-judicial finding would be retained; but, if the licensee felt that the program presented was fair or wished for other reasons not to balance, he could exempt the program by using part of his total exemption. For example, if the FCC were to provide that a licensee could exempt six hours of broadcast time per year from the fairness doctrine obligations, NBC in the Pensions situation could have elected, upon the determination that a controversial issue had been unfairly presented, to take that hour as one of the six it could exempt during that year.

suggestion, one quickly can see that rather explicit rules would have to be promulgated in order to limit the use of one extremist program to balance many opposite presentations and to establish priorities to determine which of many broadcasters may claim to be balanced by the presentation. It is felt that the need for these rules, coupled with the more complex inter-station information needed by the FCC to determine if the offending program has been balanced and the additional loss of fairness caused by an expanded "universe," make the proposal less than desirable.

214 Text accompanying notes 55-65 supra.

215 There are approximately 1,280 hours of prime time per television broadcast year.
Clearly the exemption system would impose some costs on the public's right to be informed, since the purpose of the system is to allow unfair presentations. To mitigate these effects, the FCC could regulate the use of the exempt time provision. First, since it is in the context of the franchise that the public's right to balanced information is most significant, the one-sided presentation of an issue determined to be controversial because of an upcoming election could not be exempted during some critical period prior to the election, or, alternatively, could be exempted only at a penalty rate (for example, two hours of exempt time for a one-half hour presentation). Similarly, the equal time provisions of section 315 should be retained. Second, when balancing is no longer practically possible because of the passage of time and events, exemption should be mandatory. This would provide an incentive to present a balancing broadcast in timely fashion. Third, no two broadcasters in the same medium, radio or TV, and the same service area could exempt a program on the same issue within some reasonable period, for example three months, of each other. Fourth, the exemption would have to be used in blocks of time that correspond to the length of the program in which the unbalanced presentation occurred. Thus, if a one-hour program contained a five-minute section that was unfair, the licensee would have to exempt the entire program. Unfair commercials could only be exempted by exempting a block of time, for example fifteen or thirty minutes. Finally, the personal attack rules should be retained, not solely for the protection of the public, but for the protection of attacked individuals.

The exemption system proposed here relies upon the value of the exempt time to the broadcaster for its effectiveness. It has value because it permits him to speak out on a controversial subject without having to present views to which he is opposed, a traditional first amendment right.\textsuperscript{216} It must be highly valued to prevent such abuses as exemption of product commercials, paid political announcements, and similar material as a matter of course. Rather than try to define abuse, the FCC could maintain the integrity of the system by increasing the value of the exempt time. Some of the steps outlined above, such as the rules that require time to be exempted in blocks of fifteen minutes or more, are designed to maintain the value of the exempt time. If it developed that an initial allotment of exempt time were sufficiently large that abuses occurred, the Commis-

tion could increase the value of the time by reducing the total time that may be exempted. A licensee who might use one of six hours to exempt two or four commercials may be unwilling to do so with one of only two such hours.

No sanction should be imposed upon a licensee simply because he used up his entire allotment of exempted time. The appropriate sanction for using more than the entire exemption could be a reduced exemption in the remaining year or two years of the license period, a one-year renewal period with a reduced exemption, no renewal, or revocation. One of the benefits of this exemption system is that it provides a ready test of a good faith effort to meet the requirements of the fairness doctrine in the licensee's overall programming. In the example, from zero to six hours per year of unfair exempted time is a good faith effort, over six hours is not. In view of the language of CBS emphasizing the "overview" program regulation exercised by the FCC, it seems quite unlikely that the Court would uphold the denial of a license renewal based upon a single hour of unfair programming. The system of exemptions proposed here is an attempt to recognize explicitly and to codify that result.

C. Free-Time Offset

The third proposal is designed to give licensees an incentive to provide individuals and groups with access to their facilities. Licensees would be given time which was exempt from the requirements of the fairness doctrine in some proportion to that time which they provide to the public for individual and group access, and would thus be encouraged to promote public access broadcasting. The time provided to the public would be free to the speaker; free of any licensee editorial control once the speakers were selected, with the selection to take place in a non-discriminatory fashion from a pool of speakers meeting general criteria established by the licensee; exempt from the fairness doctrine, but so identified; subject to the personal attack and equal time rules; unavailable to station employees and their relatives, advertisers, or public officials and their spokesmen; and available to individual groups or speakers in units of not less than fifteen minutes. The licensee's offset time would be available in unlimited amount in some propor-

217 The party or parties not controlling the chief executive position of the relevant government agency would be eligible under this program.

218 The 15 minute rule would eliminate most talk shows and panel presentations. The object is to provide sufficient time for the presentation of a coherent position, not mere random opinions.
tion to the public access time provided, subject to standards for determining balance;\(^2\) unavailable when the public access time is provided to meet the licensee's fairness doctrine obligations;\(^0\) subject to the personal attack and equal time rules but, of course, exempt from the fairness doctrine; identified during the presentation as exempt from the requirements of the fairness doctrine; and unavailable for use to speak out about an election issue within some critical period prior to the election.

It is to be hoped that both public access time and the offset time would be used for the presentation of background information about current controversial issues, potential future issues, minority views on issues of importance, and such other informational subjects as may be suggested by the public, although such use of the time would not be required. If broadcasters were to participate at all, they would, for purely financial reasons, have an interest in selecting interesting spokesmen and in helping to stage entertaining and informative shows. Since there would be no requirement that a licensee accept any particular spokesman or participate at all, there would be no pressure on him to broadcast amateur productions. This proposal invites experimentation with public access broadcasting. Although adoption of this proposal would result in some loss of fair time, it could help make the broadcast media a true marketplace of ideas. If such a marketplace is the constitutional goal of regulation, lowering the barriers to entry would be a pro-competitive step in the spirit of Red Lion and CBS.

D. Procedural Issue

The final proposal is that the FCC revise its procedural requirements concerning the sufficiency of complaints. The current system, requiring that the complainant set out facts sufficient to demonstrate that the licensee probably has not balanced an issue in his overall programming, virtually eliminates complaints by ordinary citizens who see a television show or hear a radio program that seems to be one-sided. An FCC investigation of those improperly pleaded complaints which have a high level of plausibility would more faithfully serve the interests represented by the fairness doctrine than does the current dismissal of complaints for inadequacy without any examination of the merits. Procedural disposition of important

\(^2\) \textit{i.e.}, a Sunday morning access program could not generate prime time offset time.

\(^0\) Additionally, public access time could not be used to balance a later presentation of the licensee, unless he gave up the free offset time generated by the access time.
questions satisfies neither the public nor the public's right to be informed.

VI. Conclusion

This Comment has attempted to develop three views of the regulation of the broadcast media as it affects the first amendment rights of the broadcasters, the individuals who desire to speak out, and the public. The judicial view was presented first. The fairness doctrine as interpreted by the Supreme Court represents a compromise between the public's right to be informed, as articulated in *Red Lion*, and the first amendment freedoms of the broadcasters, as developed in *CBS*.

The FCC's view of its role, as expressed in its decisions, was developed next. This Comment has shown that few standards have been promulgated, as either regulations or case-by-case principles of decision, that those few standards that do exist have been inconsistently applied, and that much discretion has been retained by the Commission, enabling it to act as it wishes at any given time. The role implicit in that discretion is not that of protector of the public, but rather of preserver of agency power.

Finally, a set of proposals was advanced in an effort to suggest how the regulatory agency could work to advance the conflicting legitimate interests in this important area. These proposals advocated, first, standards which would largely define the relationships of the licensee, the FCC, and the individual; second, a system which would return the FCC to a review of the licensee's overall performance rather than close scrutiny of individual programs; and, third, a system which would provide incentives to licensees to provide for individual access to the airwaves. These proposals are designed to achieve a balance among the first amendment rights of licensees to broadcast as they wish, of individuals to speak out over the airwaves, and of the public to be informed. Only when this balance is achieved will the broadcast media be able to achieve their potential as the largest and most effective marketplace of ideas.