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Alternatives to the Fairness Doctrine: Structural Limits Should Replace Content Controls

by CHRISTOPHER A. HILEN*

Introduction

The Fairness Doctrine appears to be drawing its last breath, strangled by a Federal Communications Commission (FCC or Commission) bent on its elimination. The Commission abolished the general applicability1 of the Fairness Doctrine on August 4, 1987,2 and Congress has so far failed in attempts to codify it.3 If congressional efforts to codify the Doctrine continue to fail, Congress, the FCC and the broadcast industry will need to examine alternatives and decide with what regulatory scheme, if any, they want to replace the Fairness Doctrine.4 Now is the time to study alternatives in a comprehensive manner5 and consider how they might achieve the purposes of the Doctrine.6

The Fairness Doctrine was designed to ensure adequate and

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* Member, Third Year Class. The author dedicates this Note to Sterling L. Hilen, the first lawyer in the family, for his example and encouragement. Thanks to Professor John Diamond for his helpful comments on an earlier draft of this Note, to Eileen O'Conor for her invaluable editing, and to the other COMM/ENT editors and members who assisted in completing this Note.

1. Particular applications of the Doctrine remain. See infra notes 89-109 and accompanying text.
3. See infra notes 85-88 and accompanying text.
4. As indicated below, the FCC's action left intact certain aspects of the Doctrine, including the Personal Attack Rule, the Political Editorial Rule, the Zapple Doctrine, and application of the Fairness Doctrine to ballot issues. See infra notes 89-109 and accompanying text.
6. For a discussion of the purposes of the Fairness Doctrine, see infra notes 121-24 and accompanying text.
balanced coverage of controversial issues of importance to the community. Additional factors, including governmental intrusion into the first amendment rights of broadcasters, and practical workability, must be examined in conjunction with this study of alternatives.

This Note evaluates alternatives to the Fairness Doctrine. Section I describes the Fairness Doctrine, its development and enforcement and the decisions of courts and the FCC which have brought about its decline. Section III examines several proposed alternatives to the Doctrine, evaluating each using a "Fair Treatment Test," outlined in Section II, which evaluates how well each alternative meets the twin goals of greater diversity in broadcasting for viewers or listeners and greater editorial freedom for broadcasters. In Section IV, this Note concludes that the structural approach, under which diversity of ownership and views is pursued by severely limiting the number of broadcast stations any individual can own, is the best available approach.

I

Background

A. The Fairness Doctrine

1. Development and Requirements

The Federal Communications Commission and its predecessor, the Federal Radio Commission, developed the Fairness Doctrine through rulemaking and adjudicatory proceedings.\footnote{7. Without governmental regulation, the first broadcasters transmitted over whatever frequencies they chose. The number of broadcasters soon exceeded the capacity of the radio spectrum. Competing broadcasters frequently broadcast over the same frequency, drowning out both signals. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-76 (1969). The infant radio industry, fearing that "the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard," asked the federal government to step in and provide some regulation. See id. at 375-76 & n.4. Then Secretary of Commerce Herbert Hoover instituted a licensing system to regulate frequencies and hours of operation, but the Supreme Court struck down the system, holding that the Radio Communications Act of 1912, 37 Stat. 302, did not permit enforcement. U.S. v. Zenith Radio Corp., 12 F.2d 614, 618 (N.D. Ill. 1926). In 1927, Congress passed the Radio Act, creating the Federal Radio Commission to license broadcasters. See Radio Act of 1927, § 4, 44 Stat. 1163. The Communications Act of 1934, which superseded the Radio Act, established the FCC and charged it with the responsibility of regulating the broadcast industry in the "public interest, convenience and necessity." 47 U.S.C. §§ 303, 307(a), 309(a) (1987).}
The FCC first comprehensively set out the Fairness Doctrine in a 1949 report entitled *Editorializing by Broadcast Licensees.* The Doctrine imposed an obligation on broadcasters to 1) provide coverage of vitally important controversial issues of interest in the community served by the licensee, and 2) provide a reasonable opportunity for contrasting viewpoints on such issues.

The obligation was an affirmative one, requiring broadcasters to search out contrasting viewpoints for broadcast. If the broadcaster was unable to obtain paid sponsorship of a contrasting viewpoint, the Cullman Doctrine required licensees to provide one at the licensee's expense. In the *Editorializing* decision, the Commission also ended its ban on broadcaster editorializing, overruling its earlier holding in *In re Mayflower Broadcasting Co.*, which had prohibited the practice.

2. Rationales for Fairness Doctrine

a. Scarcity Theory

For many years, the FCC justified the Fairness Doctrine by arguing that because the airways are a scarce technological resource, licensees have the right neither to monopolize frequencies nor to broadcast only their own views. Rather, licensed broadcasters operate as "public trustees." Because

10. *Id.* at para. 7.
14. *Id.* at para. 13.
15. 8 F.C.C. 333 (1940).
16. The airwaves are unlike the print medium, where, theoretically, anyone can buy a printing press and publish.
17. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969). In *Red Lion*, the Supreme Court relied on the scarcity theory to justify its holding that the Fairness Doctrine did not violate the first amendment rights of broadcasters. *Id.* at 388-89.
18. *Id.* at 383.
"[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,"19 government may act to ensure that all views on controversial issues are heard over the airwaves.20 The Fairness Doctrine was the FCC's attempt to ensure this.

The D.C. Circuit Court of Appeals rejected the scarcity theory as a justification for regulation of broadcasting in Telecommunications Research and Action Center v. FCC (TRAC).21 Further, the FCC, in abolishing the Fairness Doctrine, flatly stated: "We do not believe that any scarcity rationale justifies differential First Amendment treatment of print and broadcast media."22

b. Impact/Passive Activity/Pervasiveness Theory

Another argument for imposing regulation on the broadcast media is known either as the "impact theory," the "passive activity theory," or the "pervasiveness theory." This theory holds that "it is the immediacy and the power of broadcasting that causes its differential treatment."23 Chief Judge Bazelon described the theory as follows:

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.24

The Supreme Court set out its version of the impact theory in FCC v. Pacifica Foundation.25 In his majority opinion, Jus-

19. Id. at 390.
20. Id. at 394.
22. Syracuse II, supra note 2, at para. 73.
23. 801 F.2d at 508 (rejecting the impact theory as a justification for according broadcasting less first amendment protection).
25. 438 U.S. 726 (1978), reh'g denied, 439 U.S. 833 (1978) (upholding the FCC's decision that a broadcast by comedian George Carlin was indecent and could be regulated by the FCC).
tice Stevens stated that greater regulation of broadcasting is justified because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." Stevens found greater regulation justified because broadcast media invade "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Because a listener may tune in to the middle of a program, pre-program warnings about the nature of the program may not protect one from unexpected program content. The impact theory, used in Pacifica to justify regulation of indecent programming, has never been used by the Supreme Court to justify the Fairness Doctrine, and it is unclear whether it provides a suitable rationale for regulating programming that is controversial but not indecent.

c. Public Ownership of the Airwaves Theory

Advocates of the public ownership theory argue that government may regulate broadcasters because the people own the airwaves. Professor Jaffe criticized the public ownership theory as a rationale that would never have been espoused if technological limits had not required government regulation to avoid interference. Professor Jaffe argues that defining air and space, something we all use, as owned by the government is a solecism. Remarks of framers of the Radio Act of 1927 indicate that they did not base the regulation of radio on a theory of public ownership of the airwaves.

26. 438 U.S. at 748.
27. Id.
28. Id.
32. Id.
33. See 68 CONG. REC. 2870, 2872 (1927) (remarks of Sen. Dill) ("The Government does not own the frequencies, as we call them, or the use of frequencies. It only possesses the right to regulate the apparatus . . . . We might declare that we own all the channels, but we do not.


3. Application and Enforcement

The Fairness Doctrine applies "in any case in which broadcast facilities are used for the discussion of a controversial issue of public importance." This generally covers a television or radio station's programming in the areas of newscasts, public affairs, documentaries, issue advertising, advertising on ballot propositions, and commentary. After briefly applying the Doctrine to standard product advertising, the Commission reversed itself seven years later due to complications in the application.

The Fairness Doctrine's applicability to cable television is unclear. The Cable Communications Policy Act of 1984 skirted the issue.

Historically, the first prong of the Doctrine—coverage of vitally controversial issues of interest in the community served by the licensee—was rarely enforced. In fifty years the FCC sustained only one complaint due to broadcaster failure to comply with the first prong. Most enforcement has come under the second prong, which requires broadcasters to provide contrasting viewpoints on controversial issues previously aired.

The FCC does not ordinarily invoke the Fairness Doctrine on its own motion, rather it relies on private parties to monitor broadcasters' compliance and file complaints. Before the FCC will accept a complaint charging that a broadcaster is not

34. 1964 Fairness Primer, supra note 11, at 598.
35. 1974 Fairness Report, supra note 11, at para. 60.
36. Id. at para. 86.
39. Complaint of Representative Patsy Mink & O.D. Hagedorn v. Station WHAR, Memorandum Opinion and Order, 59 F.C.C.2d 987 (1976) (West Virginia station violated Fairness Doctrine by refusing to cover strip mining issue, which was one of the most controversial issues of public importance at the time in the state).
meeting its Fairness Doctrine obligations, a complainant must first ask the broadcaster to comply. If the broadcaster's response is not satisfactory, a party may then complain to the Commission. The complaint must present prima facie evidence of a violation of the Doctrine before the Commission will forward a complaint to the licensee for its comments.

The Commission has turned the requirement of a prima facie case into a "formidable procedural barrier," in order "[t]o preclude the chilling effect that these insubstantial complaints might cause." Most complaints are dismissed with a finding of no violation. Usually no sanction is imposed if the FCC finds isolated violations during a license term. The licensee is simply asked to make additional provision for broadcast of opposing views, and the violation is added to the broadcaster's file for consideration at renewal. Very few licenses have been revoked for violation of the Fairness Doctrine.

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44. Democratic Nat'l Comm., 717 F.2d at 1475.
45. By way of example, in 1973, the Commission received 2400 Fairness Doctrine complaints; only 94 were forwarded to the licensee for comment. 1974 Fairness Report, supra note 11, at para. 19. In 1973-74, of the 4,280 Fairness Doctrine complaints received, only 19—about 0.4%—resulted in findings adverse to the licensee. Seven related to the Political Editorializing Rules, 7 to the Personal Attack Rule, and 5 to general Fairness Doctrine violations. Furthermore, only 8 of those 19 resulted in a financial penalty. 1976 Reconsideration, supra note 40, at 709 (dissenting statement of Commissioner Robinson). From 1982 to 1986, of the thousands of Fairness Doctrine complaints received by the Commission, only 24 made it to the Commission appeals process. Bolton, In Stark Contravention of Its Purpose: F.C.C. Enforcement of the Fairness Doctrine, 20 U. MICH. J.L. REF. 799, 820 (1987). Of those 24, only one resulted in a finding adverse to the licensee, and it was reversed by the Court of Appeals. See infra notes 65-69 and accompanying text.
46. 1974 Fairness Report, supra note 11, at para. 45.
47. Brandywine-Main Line Radio v. FCC, 24 F.C.C.2d 18 (1970), aff'd, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973), was one of the few revocations
The FCC traditionally gave licensees great discretion in meeting their Fairness Doctrine obligations, imposing only a reasonableness requirement: "In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith."48

Broadcasters need not provide an exact balance of views on controversial issues.49 Differences of two-to-one, three-to-one, and even four-to-one have been accepted by the Commission as meeting the broadcaster's duty under the Doctrine.50 While there is no mathematical formula for balance, the Commission and the courts have held that serious imbalances violate the Doctrine.51 The Commission refused to adopt a rigid formula because of the concern that it would be impracticable, that it would inhibit the discussion and presentation of controversial issues, that it would involve the Commission too deeply in the daily judgments of broadcasters, that it would prove in many cases to be unreasonable, and that if a "floor" was established, it might become the "ceiling" for treatment of opposing views.52

4. Court Treatment of the Fairness Doctrine

In NBC v. United States,53 the U.S. Supreme Court affirmed
the FCC's power and duty to regulate the content of broadcast programming: "The Act does not restrict the Commission merely to supervision of the traffic. It puts on the Commission the burden of determining the composition of that traffic."54

The Supreme Court upheld the Fairness Doctrine against the claim that it violated broadcasters' first amendment rights in Red Lion Broadcasting Co. v. FCC.55 The Court cited the scarcity theory as justification for restricted first amendment rights for broadcasters and governmental regulation of the broadcast medium.56 The right of the listener and viewer to receive the widest variety of views on controversial issues outweighs the right of broadcasters to use their licenses to broadcast their private views.57 Because of this, government may, through the Fairness Doctrine, require a good faith effort by broadcasters to provide both coverage of important controversial issues of interest and a reasonable opportunity for contrasting viewpoints on such issues.58

The Court indicated that if in the future it was presented with evidence that the Fairness Doctrine acted to reduce rather than enhance the volume and quality of coverage, "there will be time enough to reconsider the constitutional implications" of the Doctrine.59 In 1984 the Court reiterated its willingness to reexamine the constitutional basis of its Red Lion holding.60

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54. 319 U.S. at 215-16.
56. Id. at 388-90.
57. Id. at 390.
58. Id. at 400-01.
59. Id. at 393.
60. In FCC v. League of Women Voters of California, the Court said it would reconsider Red Lion if Congress or the FCC gave the Court some signal that technological developments have advanced so far that the scarcity rationale is obsolete. 468 U.S. 364, 376-78 nn.11-12 (1984).
In *TRAC*, the D.C. Circuit Court of Appeals held that a 1959 congressional amendment to section 315 of the Communications Act that created exceptions to the Equal Opportunities Rule for bona fide newscasts, bona fide news interviews, bona fide news documentaries, and on-the-spot coverage of bona fide news events, did not codify the Fairness Doctrine, but merely ratified the FCC's creation of the Doctrine. The FCC cited this holding as giving it authority to modify or eliminate the Fairness Doctrine without congressional approval.

In *Syracuse Peace Council v. Television Station WTVH (Syracuse I)*, the FCC determined that Television Station WTVH of Syracuse, New York, violated the Fairness Doctrine. On appeal, the D.C. Circuit Court of Appeals held, in *Meredith Corp. v. FCC*, that the Commission had acted improperly in ruling that WTVH violated the Doctrine because the Commission failed to respond to the broadcaster's constitutional challenge to the Doctrine. The court found that the Commission, in its 1985 Fairness Report, undermined the legitimacy of the Fairness Doctrine by casting doubts on its constitutionality and remanded the case to the Commission, ordering the Com-

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   (1) bona fide newscast,
   (2) bona fide news interview,
   (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
   (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
   shall not be deemed to be use of a broadcasting station within the meaning of this subsection. 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 imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.
63. 801 F.2d at 517.
64. *Syracuse II, supra* note 2, at para. 27.
66. 809 F.2d 863 (D.C. Cir. 1987).
67. Id. at 872-73.
68. Id. See infra note 70.
mission to either consider Meredith Corporation's constitutional challenge to the Doctrine, or decide that the Doctrine violates the public interest standard of the Communications Act. 69

B. Elimination by the FCC

In its 1985 Fairness Report, 70 the FCC found that the Fairness Doctrine inhibits broadcaster coverage of controversial issues of public importance 71 and causes broadcasters to provide less effective coverage of those issues it does cover because it "inherently provides incentives that are more favorable to the expression of orthodox and well-established opinion with respect to controversial issues than to less established viewpoints." 72 Additionally, the Commission found that the Doctrine places government in the intrusive role of scrutinizing program content 73 and creates the opportunity for government officials to intimidate broadcasters. 74 For these reasons, the Commission held that the Doctrine did not serve the public interest 75 and might be unconstitutional 76.

However, the Commission declined to eliminate the Doctrine because of uncertainty over whether the 1959 amendment to section 315 of the Communications Act codified the

69. "[W]e remand the case to the FCC with instructions to consider Petitioner's constitutional arguments... The Commission need not confront... [the constitutionality of the doctrine] if it concludes that in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest." Id. at 874.


71. Id. at para. 29.

72. The Doctrine inherently provides incentives more favorable to the expression of orthodox opinion than to less well-established viewpoints. Evidence of this is seen in the number of broadcasters denied or threatened with denial of license renewal on fairness grounds, even though they had provided controversial issue programming far in excess of the typical broadcaster. These broadcasters experienced Fairness Doctrine challenges not because they aired controversial issue programming, but because they espoused provocative opinions that many found to be abhorrent and extreme. Licensees, therefore, have strong incentives to stifle viewpoints which may be unorthodox, unpopular or unestablished. Id. at paras. 69-71. See also Syracuse II, supra note 2, at para. 45.

73. 1985 Fairness Report, supra note 70, at para. 72.

74. Id. at para. 74.

75. Id. at para. 5.

76. Id. at para. 19.
Doctrine and because of Congress' strong interest in the Doctrine's survival. Instead, the Commission sent its report to Congress and deferred action pending congressional review of the Commission's record. The D.C. Circuit's holding in TRAC, that the Fairness Doctrine was not statutorily mandated, and in Meredith Corp. v. FCC, ordering the Commission to consider the constitutionality of the Doctrine, eliminated these roadblocks, and the FCC abolished the Fairness Doctrine on August 4, 1987.

In eliminating the Fairness Doctrine, the FCC relied on the findings in its 1985 Fairness Report. The Commission also found the scarcity rationale for the Doctrine obsolete due to the increase in broadcast, cable, satellite, and other technologies since the Red Lion decision in 1969.

C. Court Challenge to FCC Abolition of the Fairness Doctrine

The Commission's repeal of the Doctrine was appealed by the Syracuse Peace Council. The challengers argued that, contrary to the TRAC decision, the Doctrine was mandated by section 315 of the Communications Act, and the FCC had neither the power to repeal it nor an adequate record to do so. The U.S. Court of Appeals for the District of Columbia recently rejected the challenge, holding that the Commission's determination that the Doctrine did not serve the public interest was supported by its record in the proceeding. The court refused to reach the Commission's finding that the Doctrine was unconstitutional.

D. Congressional Codification Efforts

Congress attempted to enact the Fairness Doctrine on June 3, 1987, but was unable to override President Reagan's veto.

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77. See supra notes 62-63 and accompanying text.
79. Id. at para. 181.
80. 801 F.2d 501, 517 (D.C. Cir. 1986).
81. Syracuse II, supra note 2, at para. 61.
82. Id. at para. 73.
84. Id.
85. S. 742 was passed by the Senate on April 21, 1987, and H.R. 1934 was passed by the House of Representatives on June 3, 1987.
86. The President vetoed S. 742 on June 19, 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 29, 1987). On June 23, 1987, the Senate voted to return the bill to commit-
Subsequent congressional efforts to include the Doctrine in a $600 million appropriations bill (continuing resolution needed to keep the government operating) signed by the President December 22, 1987, also failed.87 Congressional attempts to codify the Fairness Doctrine are expected to continue.88

E. Current State of Affairs

The Commission's decision in Syracuse II89 did not eliminate every application of the Fairness Doctrine:90 "we need not—and do not—decide here what effect today's ruling will have on every conceivable application of the Fairness Doctrine."91 The ruling does not affect the responsibility of broadcasters to comply with statutory requirements such as the Reasonable Access92 and Equal Opportunity93 provisions of the Communications Act. The FCC's action also left intact, for the time being, certain portions of the Fairness Doctrine,94 in-
cluding the Personal Attack Rule, the Political Editorial Rules, the Zapple Doctrine, the Cullman Doctrine, and application of the Fairness Doctrine to ballot issues. Also unchanged are the FCC's other content rules, such as issue responsive programming, prime time access, and the FCC's ability to license and regulate in the public interest.

Despite the limited scope of Syracuse II, it was, nevertheless, a watershed decision, probably presaging FCC elimination of most, if not all, of the Fairness Doctrine rules. Although the remaining portions of the Doctrine contain its most often enforced portions, the current Commission will probably not enforce them without congressional action. Accordingly, broadcasters are no longer compelled by the FCC to provide coverage of vitally important controversial issues of interest to the community served by the licensee, or to provide a reason-

95. If a broadcast attacks the personal qualities of an identified person or group in the context of a controversial issue of public importance, the Personal Attack Rule requires the broadcaster to notify the attacked person or group, provide them with a transcript, copy, recording or summary of the broadcast, and afford them an opportunity to respond. 47 C.F.R. § 73.1920 (1986). See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 373-75 (1969).

96. The Political Editorial Rule requires that when a licensee endorses or opposes a legally qualified candidate in an editorial, the licensee must send the other candidate(s) for the same office, or the candidate(s) opposed in the editorial, a script or tape of the editorial within 24 hours, and the station must offer a reasonable opportunity for the candidate or a spokesperson to respond over the licensee's facilities. Where such an editorial is broadcast within 72 hours prior to the election, the licensee must notify the respective candidate(s) ahead of time to enable the candidate(s) to respond before the election. 47 C.F.R. § 73.1930 (1986).

97. The Zapple Doctrine requires that when supporters of a candidate buy time and broadcast a discussion of the candidates or the campaign issues, it is unreasonable for the licensee to refuse to sell comparable time to supporters of an opposition candidate. Letter from Dean Burch, Chairman of the Commission, to Nicholas Zapple, 23 F.C.C.2d 707 (1970).

98. See supra note 12 and accompanying text.

99. See Public Media Center v. FCC, 587 F.2d 1322 (D.C. Cir. 1978) (applying Fairness Doctrine to ballot measure advertising).

100. See infra notes 107-09 and accompanying text.

101. The Prime Time Access Rules prohibit licensees from obtaining more than three hours of their 7-11 p.m. prime time programming from the networks. Limited exceptions are provided for children's programming, special news events, political broadcasts, and specific sporting events, such as the Olympics and New Year's Day college football games. 47 C.F.R. § 73.658(k) (1987).


103. President George Bush's reported support of President Reagan's veto of Fairness Doctrine codification indicates that the dismantling of the Doctrine is likely to continue. Reregulation, Deregulation, and the Future of Communications Policy, BROADCASTING, Nov. 21, 1988, at 56.
able opportunity for contrasting viewpoints on controversial issues which are covered.\(^{104}\)

While the Fairness Doctrine is on its way out, the public interest standard of the Communications Act remains, and the FCC has indicated its intent to continue to regulate broadcasting in the public interest.\(^{105}\) One of the Commission’s stated reasons for eliminating the Doctrine was that the Doctrine violated the public interest.\(^{106}\)

The public interest standard no longer requires formal ascertainment requirements to determine a community’s broadcasting needs; they were eliminated by the Commission when it deregulated radio and television.\(^{107}\) Broadcasters, however, must still provide programming that is responsive to community needs,\(^{108}\) a requirement that dovetails with prong one of the Doctrine requiring broadcasters to provide coverage of controversial issues of importance to the community.\(^{109}\)

\(^{104}\) It is too soon to tell if broadcasters are changing their programming as a result of the elimination of the Fairness Doctrine. Should congressional codification efforts fail, this is certain to be an area of study by interested parties.

\(^{105}\) *Syracuse II,* supra note 2, at para. 81.

\(^{106}\) The Commission stated in its 1985 Fairness Report that the Doctrine violated the public interest for several reasons: the public has “access to a multitude of viewpoints without the need or danger of regulatory intervention,” *supra* note 70, at para. 138; “in stark contravention of its purpose, [the Doctrine] operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance,” *id.* at para. 42; and enforcement of the Doctrine inhibits the expression of unpopular opinion, *id.* at paras. 69-71, places the government in the intrusive role of scrutinizing program content, *id.* at paras. 72-73, creates the opportunity for abuse for partisan political purposes, *id.* at paras. 74-76, and imposes unnecessary costs upon both broadcasters and the Commission, *id.* at paras. 77-80.


\(^{108}\) As part of its mandate to regulate the broadcasting industry in the public interest, the FCC requires broadcasters to familiarize themselves with the needs, interests and problems of the groups comprising the community proposed to be served, to document such familiarity in license applications, and to provide programming which is responsive to those needs. See *Television Deregulation,* supra note 107, at para. 24; *Radio Deregulation,* supra note 107, at para. 34. While abolishing the Fairness Doctrine, the Commission held that broadcasters’ duty to provide issue responsive programming remains. *Syracuse II,* supra note 2, at para. 34.

\(^{109}\) *Complaint of Syracuse Peace Council v. WTVH,* 3 F.C.C. Red. 2035, para. 27 (1988) [hereinafter *Syracuse III*]; *Syracuse II,* supra note 2, at para. 34.
II
Test for Analyzing Alternatives

The Communications Act of 1934 requires licensees to broadcast in the public interest.\textsuperscript{110} Although the broadcaster has first amendment rights, those rights have been subordinated to those of the receiver, and the broadcaster is not free from governmental intrusion into its editorial process.\textsuperscript{111} The Supreme Court long ago stated that "[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . . . Freedom to publish means freedom for all and not for some."\textsuperscript{112}

The listener's right to receive diverse views does not, however, imply a corresponding right of any particular viewer to have access to the airwaves to broadcast his or her own particular program.\textsuperscript{113} Rather, the broadcaster must ensure, through its overall programming, broadcast of a rough balance of coverage on controversial issues.\textsuperscript{114} Since no individual viewer can demand access to a station to broadcast his or her contrasting views on a controversial issue, the broadcaster retains the editorial discretion to choose how to meet its Fairness Doctrine obligations.\textsuperscript{115}

The Fairness Doctrine is neither constitutionally nor statutorily mandated. Rather, it is "a means of ensuring the attainment of first amendment objectives,"\textsuperscript{116} and controversy has centered not on whether broadcasters should enjoy first amendment rights, but on the definition of the relative rights of the viewer and the broadcaster.

\textsuperscript{111} United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).
\textsuperscript{112} Associated Press v. United States, 326 U.S. 1, 20 (1945).
\textsuperscript{113} CBS v. Democratic Nat'l Comm., 412 U.S. 94, 113 (1973); Letter from Ben F. Waple, Secretary, to Madalyn Murray, 40 F.C.C. 647, 647-48 (1965) [hereinafter Madalyn Murray]; In re Complaint of Democratic State Cent. Comm. of Cal., 19 F.C.C.2d 833, 834 (1968); Complaint by Boalt Hall Student Ass'n v. KPIX, 20 F.C.C.2d 612, para. 7 (1969); Branch v. FCC, 824 F.2d 37, 50 (D.C. Cir. 1987).
\textsuperscript{114} In re Complaint of Margaret L. Scherbina, 21 F.C.C.2d 141, 143 (1969).
\textsuperscript{115} CBS, 412 U.S. at 113; Madalyn Murray, supra note 113, at 647-48; Democratic State Cent. Comm. of Cal., 19 F.C.C.2d at 834; Boalt Hall Student Ass'n, 20 F.C.C.2d at para. 7.
Up to now, the Supreme Court has approved the Fairness Doctrine as a reasonable intrusion into broadcasters' first amendment rights, necessitated by the public's right to an "uninhibited marketplace of ideas." The Court has stated, however, in both Red Lion and League of Women Voters, its willingness to reconsider the Doctrine, but not "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." Since Red Lion, the Supreme Court, by approving the Fairness Doctrine, approved a regulation which, as enforced, protected viewers' first amendment rights at the expense of broadcasters' first amendment rights. With the abolition of the Fairness Doctrine, an opportunity now exists to examine alternatives to determine the extent to which each also provides first amendment protection to broadcasters. An examination of the purpose of the Fairness Doctrine and its application by the FCC and the courts reveals an attempt to weigh the rights of the audience and the broadcaster equally and to maximize both.

The Doctrine has been described as intended to ensure "the widest possible dissemination of information from diverse and antagonistic sources." The Commission has stated, "[i]t is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."

"The purpose and foundation of the Fairness Doctrine is therefore that of the first amendment itself: 'To preserve an uninhibited marketplace of ideas in which truth will

118. See supra notes 59-60 and accompanying text.
120. Red Lion provides a constitutional mandate that viewers' first amendment rights are paramount over broadcasters' first amendment rights. However, the Court's and the Commission's policy of encouraging greater coverage of controversial issues of public importance provides a policy mandate for protection of broadcasters' first amendment rights. Given the Court's hints in Red Lion and League of Women Voters, it is possible that the policy mandate for full first amendment rights for broadcasters will one day become a constitutional one.
122. 1964 Fairness Primer, supra note 11, at 600 (quoting In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246, para. 6 (1949)).
ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” 123 Clearly, any alternative must meet “the goal of the Fairness Doctrine [which] is to inform the public.” 124

On the other hand, the Commission and the courts have been reluctant to violate the first amendment rights of broadcasters in applying and enforcing the Doctrine. The Commission has held that “[i]n passing on any complaint in this area, the Commission’s role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.” 125 The Commission repeated its support for such a limited inquiry in its 1974 Report: “In reviewing the adequacy of the amount of a licensee’s public issue programming, we will, of course, limit our inquiry to a determination of its reasonableness.” 126 The Commission has sought to give broadcasters wide latitude in meeting their Fairness Doctrine obligations: “We wish to emphasize that the responsibility for the selection of program material is that of the individual licensee.” 127

The Supreme Court has also recognized the dangers of governmental censorship and the need for the FCC to tread lightly in enforcing the Doctrine. In CBS v. Democratic National Committee, the Court held that “Congress appears to have concluded . . . that of these two choices—private or official censorship—Government censorship would be the most


125. 1964 Fairness Primer, supra note 11, at 599.


127. Id. at para. 26. “In developing and implementing the fairness doctrine, it has never been our intention to force licensees to conform to any single, preconceived notion of what constitutes the ‘ideal’ in broadcast journalism.” Id. at para. 21.
pervasive, the most self-serving, the most difficult to restrain
and hence the one most to be avoided."

Examination of the purposes and enforcement of the Doc-
trine as outlined above yields a two-part "Fair Treatment
Test" for possible alternatives: 1) Does the alternative ensure
that viewers and listeners will have access to a wide variety of
viewpoints on a wide variety of controversial issues of impor-
tance to the community?, and 2) Does the alternative ensure
that the broadcaster will maintain editorial discretion, pre-
cluding the government from telling the licensee what to
broadcast?

An alternative satisfying both these goals is possible if cer-
tain factors are taken into account. These factors include
the current state and future growth of the communications
media, including broadcasting, cablecasting,\textsuperscript{129} new broadcast
technologies such as low power television (LPTV),\textsuperscript{130} multi-
point distribution service (MDS) and multichannel multipoint
distribution service (MMDS),\textsuperscript{131} satellite master antenna

\begin{itemize}
\item \textsuperscript{128} CBS v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973).
\item \textsuperscript{129} Cable television systems receive television, radio, or other electronic signals
by antennae, including satellite and microwave transmissions. They may also gener-
ate their own signals and transmit them via microwave or coaxial cable to a
headend. At the headend, the signals are processed, amplified and fed into a distri-
bution path consisting of coaxial trunk lines, feeder cables, and drop cables. The
distribution path carries the cable signal to recipients. \textsc{D. Brenner \& M. Price},
\textsc{Cable Television and Other Nonbroadcast Video: Law and Policy} \S 1.03
(1986). As of 1985, cable television was available to more than 73 million of the 84
million television households, and close to 29 million homes subscribed to basic cable
\item \textsuperscript{130} Low power television (LPTV) is an over-the-air service limited to 10 watts
for VHF and 1,000 watts for UHF. LPTV stations were originally known as transla-
tors because they were only permitted to rebroadcast signals from full-service sta-
tions. They have principally served rural areas. In 1982 the FCC authorized them to
originate programming. \textit{See} Low Power Television Service, 47 Fed. Reg. 21,468
(1982). They are less expensive to operate than conventional broadcast stations and
are expected to serve areas with a limited number of television signals or communi-
ties which have been underserved in the past. 1984 Notice of Inquiry, \textit{supra} note
116, at para. 41.
\item \textsuperscript{131} Multipoint distribution service (MDS) and multichannel multipoint distribu-
tion service (MMDS) are common carrier services used primarily to provide sub-
scription programming to consumers via microwave transmissions. MDS service
became available in 1974 and, as of 1985, served approximately 530,000 subscribers
out of a potential subscriber base of over 15 million. 1984 Notice of Inquiry, \textit{supra}
\end{itemize}
service (SMATV), subscription television (STV), direct broadcast satellite (DBS), instructional television fixed service (ITFS), videotext and teletext, and print media.

Advocates of broadcast regulation have often made the mistake of treating each type of media service in a vacuum, apparently assuming that anyone who watches television ignores radio, newspapers, magazines and other information services. While a majority of Americans apparently get most of their information from a single medium—television—they do not ignore the other media. It is similarly erroneous to assume that individuals rely on a single outlet or source within a particular medium.

Former FCC Chairman Charles Ferris and L. Gregory Ballard argue that the number of television stations should be compared not just with national newspapers, but with the entire print medium, including dailies, weeklies, locals,

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132. Satellite master antenna television (SMATV) systems broadcast via satellite transmissions to multiple dwelling units through the use of antenna systems, including satellite earth stations installed on buildings, that gather programming which is then fed to the building's occupants by cable. *Id.* at para. 40.

133. Subscription television broadcasting (STV) consists of a scrambled broadcast signal that is made available to those who pay for decoders. As of 1985 there were 19 STV stations serving approximately one million subscribers. *Id.* at para. 39.

134. Direct broadcast satellite service (DBS) systems can transmit entertainment, news and information services, including teletext, from high-powered satellites on the Ku satellite band directly to inexpensive home receivers, cable systems, conventional and low power television broadcast stations, and other land-based communications facilities. They were authorized by the FCC in 1982. See Direct Broadcast Satellite Service, 90 F.C.C.2d 676, para. 1 (1982); Satellite Television Corp., 91 F.C.C.2d 953, para. 1 (1982); CBS, Inc. et al., 92 F.C.C.2d 64, para. 3 (1982). There are estimated to be over one million DBS subscribers, with estimated growth of 40,000-80,000 per month. See also 1985 Fairness Report, *supra* note 70, at para. 118.

135. Videotext and teletext combine elements of both electronic and print media by enabling television broadcast stations, cable systems, or telephone systems to transmit textual or graphic information for display on video monitors. These systems can offer a wide range of information, including news, weather, and consumer advice, which can be continuously updated. Teletext is a one-way system, while videotext systems have two-way capabilities allowing consumers to transact business with banks or stores and engage in electronic messaging. They are expected to become commonplace in the future. See 1984 Notice of Inquiry, *supra* note 116, at para. 42.

136. Sixty-six percent of Americans use TV as their primary source of news. *A Short Course in Broadcasting, 1988*, BROADCASTING/CABLECASTING YEARBOOK, at A-2 (1988) (citing a 1987 study which concluded that 66% of Americans mention television as their main news source, compared to 36% who cite newspapers, 14% who cite radio, and 4% who cite magazines. TIO/ROPER, AMERICA'S WATCHING: PUBLIC ATTITUDES TOWARD TELEVISION 4 (1987)). The networks' share of television viewers has fallen from 90% of television homes to 75%. *Ratings Down 10%, Share Off Four Points*, BROADCASTING, Nov. 9, 1987, at 35.
magazines, newsletters, trade journals and books. In that case, the nation's approximately 1,750 television and low power television stations are dwarfed by the thousands of print outlets. However, if all print media are to be grouped together for comparison with broadcasting, television should logically be grouped with radio, cable, and all other nonbroadcast video.

Ferris' grouping is structural rather than functional. Broadcast stations with daily news and information programs are functionally more akin to daily newspapers than are weekly newspapers, semiweekly newspapers, and periodicals. Professor Donald Lively contends that the media, despite their structural differences, are functionally similar and should, therefore, be considered as a whole.

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138. The print media consist of 9,031 newspapers (1,646 dailies, 6,750 weeklies, 510 semiweeklies) and 11,593 periodicals (including 1,460 weeklies, 858 semimonthlies, 4,031 monthlies, 1,402 bimonthlies, and 1,984 quarterlies). BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988, 528, at chart No. 891 (108th ed. 1988).

By way of comparison, the number of radio and television stations and cable operators transmitting as of 1987 was as follows:

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial AM Radio</td>
<td>4,915</td>
</tr>
<tr>
<td>Commercial FM Radio</td>
<td>4,116</td>
</tr>
<tr>
<td>Educational FM Radio</td>
<td>1,356</td>
</tr>
<tr>
<td><strong>Total Radio</strong></td>
<td><strong>10,387</strong></td>
</tr>
<tr>
<td>Commercial VHF TV</td>
<td>543</td>
</tr>
<tr>
<td>Commercial UHF TV</td>
<td>506</td>
</tr>
<tr>
<td>Educational VHF TV</td>
<td>119</td>
</tr>
<tr>
<td>Educational UHF TV</td>
<td>214</td>
</tr>
<tr>
<td><strong>Total TV</strong></td>
<td><strong>1,382</strong></td>
</tr>
<tr>
<td>VHF Low Power TV</td>
<td>109</td>
</tr>
<tr>
<td>UHF Low Power TV</td>
<td>290</td>
</tr>
<tr>
<td><strong>Total Low Power TV</strong></td>
<td><strong>399</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cable</td>
<td></td>
</tr>
<tr>
<td>47,042,000 Total Subscribers</td>
<td></td>
</tr>
<tr>
<td>73,900,000 Homes Passed</td>
<td></td>
</tr>
<tr>
<td>8,000 Total Systems</td>
<td></td>
</tr>
<tr>
<td>52.8% Household Penetration</td>
<td></td>
</tr>
<tr>
<td>32% Pay Cable Penetration</td>
<td></td>
</tr>
</tbody>
</table>

*By the Numbers, Broadcasting,* Nov. 28, 1988, at 12.

139. See supra notes 129-35 and accompanying text.

III
Alternatives to the Fairness Doctrine

What follows is not a list of all possible alternatives to the Fairness Doctrine. However, it does include most of the major proposals that the FCC and Congress have considered during the last 25 years. Some involve only modifications of the Fairness Doctrine, while others represent complete departures from the current system of broadcast regulation.

Applying the Fair Treatment Test first to the recently discarded Fairness Doctrine, one can see that the Doctrine maximized neither the viewer's nor the broadcaster's first amendment rights. Compliance with the second prong of the Doctrine, including litigating complaints in which the broadcaster eventually prevailed, imposed heavy costs on broadcasters. In order to avoid these high costs, many broadcasters limited the amount of controversial issue programming to the minimum required by the first prong (its obligation to cover controversial issues of vital importance to the community). The result was that viewers were deprived of a wide variety of views on such issues. The Doctrine, therefore, fails part one of the Fair Treatment Test.

The FCC's power under the Fairness Doctrine to determine whether a broadcaster's controversial issue programming was balanced and to order broadcasters to provide additional programming resulted in the FCC second-guessing the editorial decisions of broadcasters. Thus, the Doctrine fails the sec-

141. Others include keeping the Fairness Doctrine but abandoning the case by case enforcement approach in favor of enforcement at license renewal time under a malice standard, and requiring deliberate violation of the Doctrine or a pattern of acting in reckless disregard of the Doctrine in order to deny renewal of the license. See 1987 Fairness Report, supra note 5, at paras. 36-40. A related proposal is to abandon the case by case enforcement approach in favor of an overall review of the licensee's record at renewal time. See id. at paras. 41-53. Because these proposals retain the Fairness Doctrine, they will not be discussed in this Note. Alternatively, some have advocated imposing broadcast-like regulations on the print media. See, e.g., Spitzer, Controlling the Content of Print and Broadcast, 58 S. CAL. L. REV. 1349, 1353 (1985). This proposal raises a host of additional constitutional issues which are beyond the scope of this Note.

142. Many were considered by the FCC in its 1987 Fairness Report, supra note 5.

143. Syracuse II, supra note 2, at para. 43; 1985 Fairness Report, supra note 70, at para. 41.

144. Syracuse II, supra note 2, at para. 43; 1985 Fairness Report, supra note 70, at para. 46.

ond part of the Test; it encroaches on broadcasters' editorial discretion by allowing a government agency to tell the licensee what to broadcast.\textsuperscript{146} Such action steps dangerously close to censorship, prohibited by section 326 of the Communications Act.\textsuperscript{147}

A. Alternative One: Mandatory Access

Under the mandatory access alternative, broadcasters would be required to set aside a discrete period of time for regular discussion of controversial public issues by interested parties.\textsuperscript{148} A mandatory access plan could provide either free or paid access. A variety of access schemes have been proposed over the years.

Professor Barron advocated recognizing a first amendment right to mandatory access to all media.\textsuperscript{149} Professor Bollinger argued that legislative access regulations should be applied to one segment of the media to assure achievement of first amendment goals.\textsuperscript{150}

The Federal Trade Commission in 1974 proposed a right of access to respond to four categories of commercial announcements, including 1) those advertisements that explicitly raise controversial issues; 2) those that raise controversial issues implicitly; 3) those that make claims based on scientific premises that are in dispute; and 4) those that are silent about negative aspects of the advertised products.\textsuperscript{151}

\textsuperscript{147} 47 U.S.C. § 326 (1987) states:
Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.
\textsuperscript{148} In order to be a true alternative to the Fairness Doctrine, such a plan should be structured to substitute for, rather than to supplement, Fairness Doctrine obligations. As the FCC stated in its 1987 Fairness Report: "Those access proposals that would serve as a supplement to the fairness doctrine do not represent acceptable alternatives to the doctrine since they would not relieve broadcasters of their existing fairness doctrine obligations, but instead would result in further burdens and government oversight for broadcasters." Supra note 5, at para. 88.
\textsuperscript{151} 1974 Fairness Report, supra note 11, at para. 71.
In 1974 and 1976, the Committee for an Open Media (COM) offered a proposal for access through “Free Speech Messages” as a supplement to a licensee’s Fairness Doctrine obligations. Under the COM proposal, publicly available spot messages would be broadcast at different times during the week. Half the spots would be available on a first-come-first-served basis, and the other half would be rotated among representative spokespersons from groups that have demonstrated significant community support. The plan was offered as an optional method for broadcasters to meet their Fairness Doctrine obligations. The Commission praised it as a serious attempt to meet the Commission’s requirements for an access system but, nevertheless, rejected the proposal as not perfected nor ready for adoption as a rule or policy.

In 1979, Henry Geller, Director of the Washington Center for Public Policy Research at Duke University, suggested a “Ten Issue” requirement for television licensees as a supplement to the Fairness Doctrine. In 1987, similar proposals for access as a supplement to Fairness Doctrine obligations were made by Geller and Donna Lampert, the Telecommunications Research and Action Center, and the New York Consumer Protection Board. The Commission has consistently rejected mandatory access as a substitute for the Fairness Doctrine.

Mandatory access offers several advantages. It would re-

152. 1976 Reconsideration, supra note 40, at para. 7.
153. Id.
154. Id.
155. These include maintaining licensee discretion, providing no right of access to particular persons or groups, ensuring that important issues not escape timely public discussion, and not drawing the government into the role of deciding who gets onto the air. Id. at para. 32.
156. Id. at para. 33.
157. The “Ten Issue” requirement would require a licensee to list annually the ten community and national controversial issues of public importance which it chose for the most coverage in the prior year. The licensee would keep a record of its offers to the public for response, the representative programming that was devoted to each issue, the partisan spokespersons presented, and the source and time of the broadcasts. Normal news coverage would be excluded. The list would be retained by the licensee, made available to the public, and submitted to the Commission as part of the licensee's renewal application. 1979 Remand, supra note 124, at para. 4.
158. A member of the Washington Center for Public Policy Research.
159. 1987 Fairness Report, supra note 5, at paras. 63-88.
duce both the complexity of FCC regulation under the Fairness Doctrine and the vagueness from which the Doctrine suffers. It would also limit the wide discretion the FCC possessed in enforcing the Fairness Doctrine, leaving the broadcaster free to provide additional programming on controversial issues. Finally, mandatory access would allow the public to discuss controversial issues that may have been overlooked by the broadcaster and would permit sharper discussion of issues, because views would be presented directly by partisans rather than by a broadcaster.

Mandatory access plans also have disadvantages. For example, a system of paid access would favor the wealthy, while a system of free access may penalize the broadcaster monetarily or force the government to subsidize the program. In holding that neither the Communications Act nor the first amendment guarantees individuals a right of access, the United States Supreme Court, in *CBS v. Democratic National Committee*, \(^{161}\) stated that even with a first-come-first-served system of access, "the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently." \(^{162}\)

Also, because an access plan would offer individuals the opportunity to broadcast their views directly, it might draw more people than can be heard in the time available for discussion. If this happened, the FCC "would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired." \(^{163}\) Such extensive involvement by the FCC in broadcasters' day-to-day programming would seriously infringe upon broadcasters' journalistic freedoms, and would, therefore, fail part two of the Fair Treatment Test.

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161. 412 U.S. 94 (1973). The Supreme Court reversed the D.C. Circuit Court of Appeals which, in *Business Executives' Move for Vietnam Peace v. FCC*, held that a flat ban on paid public issue announcements by broadcast licensees violated the first amendment rights of viewers, at least where other sorts of paid announcements were accepted. 450 F.2d 642 (D.C. Cir. 1971).


163. 412 U.S. at 127.
An alternative to this type of government involvement would be access on a first-come-first-served basis, or access by lot or drawing. This system, which can be referred to as random access, necessarily places decisions for program content in the hands of viewers, and would not ensure timely discussion of the most important issues, because the partisan, and not the licensee, would control the choice of issues. The FCC, in rejecting a random access system in its 1974 Fairness Report, pointed out the Supreme Court's observation in CBS that "[t]he public interest would no longer be paramount, but, rather, subordinate to private whim especially since . . . a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster."164 This would prevent the audience from receiving a diversity of views on controversial issues and would violate part one of the Fair Treatment Test.

A random access system would also reduce broadcaster discretion over topics, speakers and quality of programs, constituting "a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees . . . to private individuals . . ."165 This violates part two of the Fair Treatment Test.

Any mandatory access variation would, therefore, fail the Fair Treatment Test. Furthermore, a mandatory access proposal may violate the Communications Act, which prohibits treating broadcasters as common carriers.166 In striking down an FCC rule requiring cable systems to provide community access channels, the Supreme Court, in FCC v. Midwest Video Corporation, stated that "[i]t is difficult to deny, then, that forcing broadcasters to develop a 'nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through section 3(h) of the Act.'"167 The mandatory access plan does not seem to be a viable alternative to the Fairness Doctrine.

165. CBS, 412 U.S. at 124.
166. Communications Act of 1934, § 3(h) (codified at 47 U.S.C. § 153(h) (1987)).
167. FCC v. Midwest Video Corp., 440 U.S. 689, 705 (1979) (quoting CBS, 412 U.S. at 140 n.9 (Stewart, J., concurring)).
B. Alternative Two: Treat Broadcasters as Common Carriers

As noted, section 3(h) of the Communications Act prohibits treating broadcasters as common carriers. The Supreme Court confirmed this prohibition in *FCC v. Midwest Video Corporation*, holding that "[t]he Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters." This alternative, therefore, requires amendment of the Communications Act by Congress.

The common carrier alternative requires broadcasters to accept all programming offered to the station. AT&T attempted a common carrier system of broadcasting in the early 1920's. AT&T did not intend to create any programming, but rather to build a transmitter and studios in every city and make them available, for a fee, to whomever wished to use them. The experiment failed because, at the time, the existence of few radios in American homes meant little incentive existed for anyone to buy and program airtime. AT&T left the broadcasting industry in 1926, selling its experimental television station, WEAF in New York, to RCA. Moreover, fears of an AT&T broadcasting monopoly similar to its telephone monopoly were so great in 1927 and 1934 that Congress specifically rejected a common carrier approach to broadcasting.

Telephone companies can be treated as common carriers because they have the capacity to handle as many calls as customers wish to place on most occasions. The lure of broadcasting personal views without censorship might attract more would-be broadcasters than broadcast stations could handle. The FCC would need to intervene to decide which applicants would get their five minutes time, resulting in an even greater supervisory role for the Commission.

Unlike a mandatory access system, which sets aside a dis-

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171. *Id.* at 35.
172. *Id.* at 136-37.
173. Admittedly, this statement ignores difficulties in making calls on certain holidays.
crete period of time for partisans, the common carrier approach turns the entire broadcast day over to partisans. It is not clear how this system would be funded. As with a mandatory access system, a system of paid access favors the wealthy, while a system of free access forces the broadcaster or the government to subsidize programming. This system deprives broadcasters of all control over programming and does not guarantee that controversial issues will be discussed. Viewers might be treated to a potpourri of trivial and insignificant issues of little or no relevance to the community. In short, a common carrier system has all the problems of a mandatory access system without the accompanying advantages.

A common carrier plan would open up broadcast time to a variety of people with differing views, but because the broadcaster would have no control over the issues discussed, the plan would not guarantee viewers access to programming on issues of importance to the community. The common carrier plan, therefore, fails part one of the Fair Treatment Test. It does not meet part two of the Test because it removes the broadcaster's editorial control, placing it in the hands of whichever partisans are chosen to present their views.

C. Alternative Three: Prong One Enforcement

The lack of enforcement of prong one of the Doctrine, combined with the heavy threat of enforcement under prong two, resulted in lack of compliance with prong one. A broadcaster risked an expensive and time-consuming Fairness Doctrine fight every time she attempted to comply with prong two of the Doctrine by providing coverage of a truly controversial issue. Because prong one was rarely enforced, it was easier and less expensive to limit or avoid controversial issues altogether. Instead of providing balanced coverage of controversial issues of public importance, broadcasters provided little coverage, balanced or unbalanced, of such issues. Elimination of prong two of the Doctrine and stronger enforcement of prong one would require broadcasters to provide greater coverage of controversial issues of importance to the broadcaster's

176. "[T]he threshold which triggers the second fairness obligation is lower than that which triggers the first." Nat'l Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978).
community but would not require them to provide coverage of all sides of those issues. Lessening the chilling effect caused by the constant threat of challenges under prong two of the Fairness Doctrine should result in increased broadcaster willingness to air programming on controversial issues of public importance, resulting in benefit to viewers. Thus, part one of the Fair Treatment Test would be met.

The prong one enforcement approach is not without defect. A broadcaster could use her license to air personal views without providing the community with a multiplicity of views on controversial issues. However, the code of journalistic ethics, subscribed to by both broadcast and print journalists, does impose a duty to provide balanced coverage.\textsuperscript{177}

The prong one enforcement alternative does not increase the likelihood that viewers will have access to a wide variety of views on controversial issues from any single broadcaster. However, currently, there are so many different electronic media—radio, television, cable, satellite—in addition to the print media, that the viewer is virtually assured a broad range of views on controversial issues of public importance.\textsuperscript{178}

Removing from the FCC the power to determine whether a particular station has provided balanced coverage of an issue enhances the broadcaster's editorial discretion.\textsuperscript{179} However, in the absence of a requirement of balanced coverage, complainants might "transform their complaints to accusations of broadcaster failure to cover particular issues adequately."\textsuperscript{180} As a result, there might be increased litigation over prong one of the Doctrine. Strengthening enforcement of prong one will necessitate increased FCC supervision to determine whether

\textsuperscript{177.} See Code of Broadcast News Ethics of the Radio Television News Directors Association (1988) (stating that the members will "[s]trive to present the source or nature of broadcast news material in a way that is balanced, accurate and fair"); Code of Ethics of the Society of Professional Journalists/Sigma Delta Chi (1973) (observing that "[n]ews reports should be free of opinion or bias and represent all sides of an issue").

\textsuperscript{178.} Crossownership of different types of broadcast stations and nonbroadcast media in the same market weakens this argument. To the extent that the various media in a particular market are owned and operated by the same people, it is less likely that the receiver will have access to a diversity of viewpoints. See infra notes 208-32 and accompanying text.

\textsuperscript{179.} On the other hand, strengthening enforcement of prong one without eliminating prong two would increase FCC intrusion into the editorial discretion of broadcasters.

\textsuperscript{180.} 1987 Fairness Report, supra note 5, at para. 130 n.125 (comments of CBS).
broadcasters cover controversial issues. The FCC could then tell a licensee what to broadcast if it decided that the licensee had not adequately covered an issue the Commission deemed controversial. Broadcasters would not exercise full editorial discretion, and this alternative would, therefore, fall short of part two of the Fair Treatment Test.

D. Alternative Four: Small Market Enforcement

Under the small market enforcement alternative, the Fairness Doctrine would be enforced in small markets but eliminated in those media markets exceeding a set number of outlets. The market's media could include all information sources—including print media—or be limited to a smaller subset, for instance, all radio and television stations or all radio, television and cable stations.

In a 1975 speech to the International Radio & Television Society and in the Commission's 1976 Reconsideration of the 1974 Fairness Report, former FCC Chairman Richard E. Wiley urged abandoning the Fairness Doctrine in the larger radio markets. The Commission rejected the proposal for an experimental moratorium.

A small market enforcement alternative would eliminate intrusive governmental regulation in those markets with a sufficiently large number of media outlets to ensure that viewers receive a diversity of views from the variety of media outlets serving the market.

The alternative also recognizes that people obtain their information about public issues from a variety of sources, including print, broadcast and nonbroadcast video media. The small market alternative could be applied to all broadcast and nonbroadcast video media, just broadcast media, or just radio or television. Under the latter application, the alternative would ensure a diversity of views, even for those people who receive all their information from television alone.

The major disadvantage of the small market enforcement

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181. The Commission would have to establish a number qualifying a market as "small."
184. Id. at 699 n.11.
alternative proposal is that limiting its application to small markets would result in unequal treatment of broadcasters based solely on the size of the market served. It would, however, maximize the editorial freedom and first amendment rights of large market broadcasters. At the same time, access by viewers to a wide variety of views on controversial issues is not reduced. Thus, part one and part two of the Fair Treatment Test are met. However, leaving the Fairness Doctrine in force in smaller markets fails the Test, just as a fully enforced Fairness Doctrine does.

E. Alternative Five: Television Enforcement

Under the television enforcement alternative, the Fairness Doctrine would be applied only to television stations (in all markets) on the theory that television has an overwhelming impact on the community. Radio stations would be freed from the burdens of regulation and supervision. This alternative would remove intrusive governmental intervention in the editorial functions of radio stations, a medium with a sufficient number and diversity of broadcasters to assure coverage of all sides of controversial issues.

The television enforcement alternative, therefore, meets the Fair Treatment Test to the extent it eliminates the Fairness Doctrine from one segment of broadcasting. It fails the Test, however, with regard to television broadcasters, because they would be subject to all the previously enforced burdens of the Fairness Doctrine. A few media markets still receive only a few radio channels. However, even small broadcast markets

185. See supra notes 23-29 and accompanying text (discussing impact theory).
186. Former FCC Chairman Richard E. Wiley advocated limiting enforcement of the doctrine to television in the 1976 Reconsideration, supra note 40, at 700 (statement of Chairman Wiley).
187. The following figures demonstrate the tremendous growth in numbers of radio stations (* indicates data not available):

<table>
<thead>
<tr>
<th>1950</th>
<th>1970</th>
<th>1983</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,867</td>
<td>6,889</td>
</tr>
<tr>
<td>Standard (AM)</td>
<td>2,086</td>
<td>4,292</td>
</tr>
<tr>
<td>AM Commercial</td>
<td>*</td>
<td>4,267</td>
</tr>
<tr>
<td>AM Educational</td>
<td>*</td>
<td>25</td>
</tr>
<tr>
<td>FM</td>
<td>781</td>
<td>2,597</td>
</tr>
<tr>
<td>FM Commercial</td>
<td>733</td>
<td>2,184</td>
</tr>
<tr>
<td>FM Educational</td>
<td>48</td>
<td>413</td>
</tr>
</tbody>
</table>

1984 Notice of Inquiry, supra note 116, at para 34.
have ever-increasing access to cable and satellite television viewing. 188

F. Alternative Six: Marketwide Approach

The marketwide approach alternative relies on other media in a market to balance the presentation of controversial issues of public importance. The FCC would allow licensees to respond to complaints by showing that coverage of the issue was balanced within the entire market, despite the imbalance in that particular licensee's coverage. 189 The FCC rejected this approach in a 1958 proceeding. 190 In its 1964 Fairness Report 191 and 1974 Fairness Report, 192 the Commission reiterated its position that a licensee must satisfy its Fairness Doctrine obligations with its own broadcasting, relying on neither other broadcasting stations nor other media. The Commission stated that requiring each station to provide contrasting views would increase the chance that viewers would be exposed to a full discussion of controversial issues. 193

This alternative recognizes that people obtain information on controversial issues from many sources. 194 Former FCC Commissioner Glenn O. Robinson argued that the rationale of the Fairness Doctrine did not withstand scrutiny if the Commission did not consider whether the public received a diversity of views from the media taken as a whole. Professor Robinson argued:

If the right of the public to receive diverse and balanced viewpoints is the decisive desideratum, it is curious, to say the least, that the Commission purposely insists on ignoring the question of whether the public is in fact receiving diverse and balanced presentations from existing communications media as a whole. 195

In 1983, former FCC Chairman Charles Ferris and L. Gregory Ballard argued that cable and other emerging video

188. See supra notes 129 and 132-34 and accompanying text.
189. The burden of proving that coverage was balanced within the entire market would be on the licensee.
191. 1964 Fairness Primer, supra note 11, at para. 11.
193. Id. However, as the FCC retreats from enforcement of the Fairness Doctrine, this objection may no longer carry much force.
194. See supra notes 129-39 and accompanying text.
sources did not yet offer sufficient additional "diverse, self-generated informational programming to wean the American public from its dependence for information on the three commercial networks." Today, the viewing shares of the three major national networks are dropping, and millions of viewers receive their information from other sources, such as the MacNeil-Lehrer News Hour, Cable News Network (CNN), C-Span, and independent broadcasting and cable stations. Professor Donald Lively argues persuasively that all media in a market should be considered as a whole because "[e]ven if a particular medium does not provide fair coverage . . . most individuals are exposed to multiple sources of information that compete and balance one another."

The marketwide approach to enforcement is consistent with current FCC practice allowing broadcasters to rely on the programming of other stations in the market to fulfill other obligations. For instance, in determining how to meet the needs of their audience with regard to issue responsive programming, broadcasters may rely on the ascertainment records of other broadcasters within their market.

This alternative poses problems of administration and enforcement. Broadcasters and the FCC would have to obtain records of all media sources in a market to determine the extent of coverage on a particular issue. This alternative is somewhat less intrusive on broadcasters' editorial discretion than the Fairness Doctrine because broadcasters would be able to rely on other media for balancing views.

The marketwide approach alternative meets the first part of the Fair Treatment Test because the multiplicity of media outlets in the market provides viewers with a diversity of views on controversial issues. However, this alternative does not maximize the editorial freedom of broadcasters because their programming decisions would be subject to review and correc-

197. If all media in a market are examined collectively, rather than being treated in isolation, "[t]he quality of first amendment results thus would be enhanced to the extent analysis was calibrated toward the media collectively rather than specifically." Lively, supra note 140, at 972.
198. See supra notes 107-09 and accompanying text.
199. Radio Deregulation, supra note 107, at para. 34 n.32.
tion by the FCC, thereby failing part two of the Test.\footnote{201} Finally, if it is determined that overall coverage of an issue is not balanced in a given market, the method by which the FCC would determine which stations would need to air programming to obtain the desired balance is unclear.\footnote{202}

G. Alternative Seven: Enforcement Moratorium

The FCC’s elimination of the Fairness Doctrine has created a de facto moratorium on enforcement of fairness-type complaints. A de jure moratorium would differ because broadcasters could anticipate the date of the moratorium’s termination.

Alfred Sikes, head of the National Telecommunications and Information Administration, recently called for a five-year test of complete content deregulation of radio, including the Fairness Doctrine and its remnants. Sikes claims that such a test “would provide an objective basis on which lawmakers could determine whether television should also be deregulated or whether radio should be ‘re-regulated.’”\footnote{203}

A moratorium would provide an opportunity to test the efficacy and necessity of the Fairness Doctrine.\footnote{204} A moratorium with an automatic expiration, short of outright reimposition of the Doctrine, may even be supported by some proponents of the Fairness Doctrine as an opportunity to test the need for the Doctrine. It would create no new regulatory burdens for broadcasters or the FCC. In a compromise effort, Congress could codify the Doctrine, but impose a moratorium by delaying the effective date.

Knowing that the moratorium would be temporary, however, might skew broadcasters’ actions and undermine the test results. Additionally, the amount of administrative review necessary to adequately evaluate such an experiment would require even greater governmental oversight than existed under the Fairness Doctrine.

A moratorium would, therefore, fail the second part of the

\footnote{201}{However, such review presumably would arise less frequently than it would under the Fairness Doctrine as previously enforced.}

\footnote{202}{The FCC raised this as an objection in rejecting the proposal in its 1974 Fairness Report, supra note 11, at para. 28.}

\footnote{203}{\textit{Radio Plays to a New Record in Washington}, Broadcasting, Sept. 19, 1988, at 45-46.}

\footnote{204}{Former FCC Chairman Richard Wiley advocated an experimental moratorium on enforcement in larger markets for this reason. 1976 Reconsideration, supra note 40, at 700-01 (statement of Chairman Wiley).}
Fair Treatment Test, with no guarantee that it would meet the first part of the Test because of broadcaster uncertainty over its temporary nature.

H. Alternative Eight: Free Market Approach

Under the free market approach, all content and structural regulations that presently exist, with the exception of antitrust laws, would be eliminated, and the broadcast media would be treated in the same manner as are the print media. \(^{205}\) This alternative guarantees broadcasters’ first amendment rights by providing the same editorial discretion newspaper publishers enjoy. The chilling effect of governmental supervision would be eliminated, and broadcasters would be free to provide coverage of controversial issues, without fear of complaint from individuals who disagree with the views broadcast, subject only to the dictates of the marketplace.

The chief disadvantage of the market approach is that it eliminates the ability of the FCC to ensure that coverage of controversial issues is comprehensive and balanced. However, viewers who are dissatisfied with the quality of certain programming can simply “vote with the remote” and change the channel, thereby ensuring that programming will meet the needs of the community. \(^{206}\) Broadcasters will have to provide the coverage their audiences desire or lose them.

The print media are given freedom to publish what they choose, \(^{207}\) subject only to the confines of whatever journalistic code of ethics they follow and their readers’ faith that controversial issues are fairly covered. Different treatment for broadcasters may stem from the questionable proposition that they are less scrupulous or less capable than print journalists.

One danger in the free market approach is the possibility that, lacking economic regulation other than antitrust laws, one individual, or several collectively, could obtain a controlling percentage of the media outlets in a market, thereby thwarting the goal of diverse media viewpoints. This result would violate part one of the Fair Treatment Test.


\(^{206}\) A “remote” refers to a remote control unit for a television.

IV

The Preferred Alternative: A Structural Approach

The structural approach seeks to promote diversity of viewpoints through non-content-based regulations.\(^{208}\) Under this alternative, instead of regulating program content, the FCC would severely limit the number of broadcast stations a single licensee could own. The FCC’s current structural regulations consist of duopoly and one-to-a-market rules, multiple ownership rules, and crossownership rules.

Under the original duopoly rule, individuals were limited to one license in a single service area. Because AM radio, FM radio, and television were defined as different service areas, licensees could own one of each in a market. Under the original one-to-a-market rule, established in 1970, licensees were limited to one broadcast station in any market, regardless of the type of broadcast service involved.\(^{209}\) The FCC viewed this as a logical extension of the duopoly rules.\(^{210}\) However, the 1970 rules did not contain a firm ban against radio-UHF combinations because UHF stations were weak and the Commission felt that few would go on the air unless affiliated with an established radio station.\(^{211}\) The Commission decided to review radio-UHF combinations on a case-by-case basis.\(^{212}\) The rules were prospective only because of concern that requiring divestiture would result in instability.\(^{213}\) On reconsideration, the Commission modified the rules to permit AM-FM combinations, because it believed that continued development of FM radio required the financial stability that such combinations would provide.\(^{214}\) As a result of these exceptions, the rules flatly banned only VHF-radio combinations.

The current multiple ownership rules, as amended in 1985, limit the number of broadcast licenses any single individual

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\(^{210}\) 22 F.C.C.2d at para. 21.

\(^{211}\) Id. at paras. 43-47.

\(^{212}\) Id. at para. 47.

\(^{213}\) Id. at paras. 48, 65.

\(^{214}\) Multiple Ownership Rules I, supra note 209, at paras. 35-37.
can own. Under the FCC's 12-12-12 multiple ownership rules, no individual may own any interest in more than twelve AM, twelve FM, and twelve television stations nationwide. Similarly, no individual can own an interest in stations which have an aggregate national audience exceeding twenty-five percent.

Current crossownership rules, as amended in 1975, prohibit owning a daily newspaper and a broadcast station in the same market. The 1975 amendment eliminated the radio-UHF exception to the duopoly rules and required divestiture by 1980 of newspaper-broadcast combinations. In addition, the Communications Act prohibits cable operators from owning broadcast stations in the area they serve.

A structural approach to fairness regulation should tighten crossownership restrictions and prohibit licensees from owning more than one broadcast station of any type in a single market, or from owning any other major media source in the same market. These restrictions would have to be strictly enforced, with no exemptions.


218. 47 C.F.R. § 73.3555(e) (1986).


220. An exception was provided for newspaper-radio combinations in communities served by a separately owned television station. Id. at paras. 108-22.


222. Language inserted into the Fiscal Year 1987 Continuing Resolution by Senator Ernest Hollings (Dem-SC) at the request of Senator Edward Kennedy (Dem-MA) blocked the FCC from taking steps to repeal or modify the television-newspaper crossownership ban, and prohibited the FCC from granting waivers or extensions of waivers to the ban. See Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 1988 U.S. Code Cong. & Admin. News (101 Stat.) 1329. The language, slipped into the omnibus spending bill on December 21, 1987, just before it was passed and sent to the President, was aimed specifically at Rupert Murdoch, who owns both a television station and a newspaper in Boston and New York. Current waivers expired during the next six months, and would have forced Murdoch to sell either the Boston Herald or WFXT-TV in Boston by June 30, 1988, and either the New York Post or WNYW-TV in New York by March 6, 1988. See Hollings,
This alternative would increase the number of broadcast owners and thereby increase the diversity of programming without the intrusiveness of content regulations such as the Fairness Doctrine. Professor Tom Collins argues that FCC regulations have increased the diversity of ownership in the broadcast industry, but questions whether they have increased the diversity of views.\textsuperscript{223} His point is well taken. For a structural approach to effectively increase the diversity of views and information broadcast, it must nurture a diversity in broadcast ownership which may or may not currently exist. Achieving such diversity may require a re-examination and expansion of the FCC's minority preference rules, to encourage greater participation in the broadcast industry of people traditionally underrepresented. Minority preference rules are a separate topic beyond the scope of this Note. Suffice it to say that a structural approach to regulation will benefit from any Commission action which results in greater broadcast ownership by previously underrepresented communities.

The structural approach has certain disadvantages. First, it limits all broadcasters on the basis of how many stations they own, rather than on the basis of the diversity and quality of their programming; second, some financially troubled newspapers can continue only if subsidized by a profitable business which, in many cases, would be a broadcast station. Such is the case with a money-losing New York Post and a profitable WNYW-TV, both owned by Robert Murdoch in New York.

A third objection to the structural approach is that the FCC's multiple ownership rules may actually reduce diversity of program and service viewpoints. Because they prohibit broadcasters from owning large groups of stations, the multiple ownership rules deny broadcasters the cost savings generated by producing programming for a large number of stations, as the three major networks are able to do. The inability to accumulate a large number of stations under single ownership hampers the development of additional major na-

The FCC's 1985 amendment liberalizing its multiple ownership rules is predicated in part on this belief. The Commission stated at that time that its ultimate goal was reduction of the multiple ownership rules "to the maximum extent feasible."

Liberalizing the multiple ownership rules is not inconsistent with a structural approach to the Fairness Doctrine. As long as no individual can own more than one broadcast station within a media market, the number of stations any one individual owns nationwide should not affect the diversity of programming available to a viewer. However, more restrictive multiple ownership rules, to the extent that they limit total ownership, should increase opportunities for underrepresented groups to enter broadcast ownership.

Professor Rossini argues that rules imposing structural limitations should be "simple to understand and inexpensive to administer." Strict limits on ownership within markets would be simple and would avoid the potential danger under the market approach of a monopoly of the medium within a market. The escalating prices of broadcast stations indicate a strong demand for them, something which was not true for FM radio stations and VHF television stations in the past. Limiting broadcasters to one station per market and requiring

224. See Amendment of Rules Limiting Multiple Ownership of AM, FM, and Television Broadcast Stations, 48 Fed. Reg. 49,438, 49,446 (1983) (to be codified at 47 C.F.R. §§ 73.34, 73.240, 73.636) (proposed Sept. 22, 1983) [hereinafter Multiple Ownership Notice]. See also In re Application of Combined Communications Corp., 72 F.C.C.2d 637, para. 42 (1979) (financial health of media chain may encourage initiative and risk taking in news reports, diminish concern for sponsor reaction, facilitate challenges to local parochial views, and provide a major media source to compete with national news media); Lively, supra note 140, at 975.

The recent success of the fledgling Fox Network indicates that there is potential for the rise of additional networks. While the multiple ownership rules also apply to the networks and limit the number of stations they can own to 12 AM, 12 FM and 12 TV, it is important to note that the networks developed in the early days of television, when conditions enabled them to obtain a firm lock on programming, which they are only now losing, 40 years later. A broadcaster attempting to form a national network under current multiple ownership rules has direct control over only 12 television stations. Additional stations must be brought within the network by means of network agreements. In addition, the predominance of the three major networks makes formation difficult, as evidenced by the 40-year domination of television by ABC, NBC, and CBS.

225. Multiple Ownership Notice, supra note 224, at 49,446.
226. Id. at 49,451.
divestiture of multiple media outlets in a market, including major newspapers, will not leave some stations to fail. Where the FCC once found it necessary to prop up FM stations, FM now dominates the radio markets. And, where the Commission once feared for the survival of UHF stations, the stations are now coming into their own as profitable enterprises. There is no economic necessity for the FCC to allow a single broadcaster to own multiple stations in a market in order to ensure their survival.

FCC Chairman Dennis Patrick has proposed a relaxation of the duopoly and one-to-a-market rules. Patrick's advocacy of economic deregulation misses the mark: the primary target of deregulatory efforts should be content controls on broadcasters. Regulation of electronic media should avoid content regulation, consistent with the first amendment, and, in exchange, the broadcasting industry should be willing to accept some economic regulation.

In its 1983 notice to change the multiple ownership rules, the Commission indicated its desire to eliminate all structural limits on broadcast ownership and, instead, leave economic regulation of the broadcast industry to enforcement of the antitrust laws by the Federal Trade Commission and the Department of Justice. The Commission declined the elimination of its structural regulations in favor of relaxed multiple ownership limitations. In light of the current lax antitrust enforcement policies of those agencies, limiting economic regulation of the broadcast industry to antitrust law amounts to no economic regulation at all.

A recent Note argued that antitrust laws are an inadequate source of structural regulation. The author advocated regulations that would limit network affiliation with VHF television stations, maintain VHF station ownership limits at five (increased by the FCC to twelve), and expand UHF ownership limits to a significant enough percentage of markets needed for developing and maintaining a national network. These

228. Radio Plays to a New Record in Washington, BROADCASTING, Sept. 19, 1988, at 44.
230. Id. at 49,447.
231. Id. at 49,446-47.
proposals go toward national limits on ownership, which are reflected in the multiple ownership regulations.

If fully implemented as outlined above, the structural approach should expand the diversity of broadcast ownership and programming, meeting part one of the Fair Treatment Test. The structural approach also meets part two of the Test because it eschews content controls for economic regulation, leaving broadcasters in control of their programming.

Conclusion

Until August of 1987, the FCC enforced the Fairness Doctrine as though each broadcast station was an island, rather than a player in a complex media market composed of a panoply of news and information sources. The Fairness Doctrine is a content regulation, making it immediately suspect under the first amendment freedom of speech clause. The FCC has abolished the general applicability of the Doctrine.\(^{233}\)

Entering what could be a new era in broadcast regulation, the FCC has an opportunity to throw out the old standards and develop new ones. These new standards should require both protection of viewer interests in diversity (the constitutional requirement of *Red Lion*) and full protection for the editorial independence of broadcasters. If the media marketplace is viewed as a marketplace of ideas, made up of many diverse media sources, the search for an alternative to the Fairness Doctrine that guarantees full first amendment rights for both viewers and broadcasters will be an easier one.

A useful tool to employ in this search is a Fair Treatment Test, against which all alternatives should be measured. Under the Test, the alternative in question must ensure that 1) the viewer will have access to a wide variety of viewpoints on a wide variety of controversial issues of importance to the community, and 2) the broadcaster will maintain editorial discretion and preclude the government from telling the broadcaster what to broadcast.

Mandatory access proposals, including both limited direct access and common carrier, fail both parts of the Fair Treat-

\(^{233}\) It is possible that the FCC will decide to keep certain aspects of the Fairness Doctrine, such as the Personal Attack Rule and the Political Editorializing Rule, on the grounds that they are narrowly tailored and serve a substantial governmental interest. *See supra* notes 89-102 and accompanying text.
ment Test because partisans of one side of an issue could monopolize the available programming time. The result would be lack of diverse viewpoints on a particular issue and possibly a lack of coverage of all but a few controversial issues. Mandatory access proposals also fail because they remove editorial decisionmaking from the broadcaster and place it in the hands of those partisans given access and because they require a heavy FCC role in deciding who goes on the air.

The prong one enforcement alternative should increase the diversity of views available to viewers by removing the disincentive to broadcast programming on controversial issues. With all media outlets in a market providing controversial issue programming, viewers will have access to a variety of views, meeting the first part of the Fair Treatment Test. However, FCC oversight will shift to prong one of the Doctrine, and the resulting interference with editorial discretion will violate the second part of the Test.

The small market enforcement alternative and the television enforcement alternative meet the Test in that they eliminate enforcement of the Doctrine for some markets or some broadcasters. To the extent the Doctrine is enforced in some markets or against some broadcasters, it fails the Test. The Fairness Doctrine fails part one of the Fair Treatment Test because its litigation, compliance and reputational costs provide a disincentive to broadcast programming on controversial issues. Therefore, it does not ensure that viewers have access to a diversity of views on a diversity of controversial issues. In addition, because it allows the FCC to second-guess the programming decisions of the broadcaster and order the broadcaster to provide programming on particular issues, it interferes with the broadcaster's editorial discretion and fails part two of the Test.

The marketwide approach ensures a variety of views on controversial issues. Thus, the first part of the Fair Treatment Test is met. However, significant FCC oversight of licensee broadcast decisions still remains, and, therefore, the second part of the Test is not met.

The free market approach meets the Test because it eliminates the Fairness Doctrine, thereby allowing broadcasters to provide programming on controversial issues without fear of FCC sanctions and leaving viewers free to support those media outlets meeting their informational needs. An experimental
moratorium achieves the same objectives on a short term basis, but involves greater FCC monitoring of broadcaster performance than presently exists. The free market approach would fail part one of the Test if it resulted in a concentration of media ownership within a market.

The structural approach meets part two of the Fair Treatment Test because it eliminates content-based regulations (including the Fairness Doctrine) and meets part one of the Test because it guarantees a diversified media ownership within markets.

Broadcasters and viewers are dependent on one another for more than just news, entertainment and advertising dollars. They depend on each other for full exercise of their first amendment rights. A broadcaster under the ever-watchful eye of a government agency does not feel free to provide the diversity of views and programming viewers need to exercise their first amendment rights. Viewers denied access to a diversity of views may eventually turn away from television and radio, impairing the exercise of the first amendment rights of both broadcaster and viewer.