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## Political Broadcasting Fairness in the Twenty-First Century: Putting Candidates and the Public on Equal First Amendment Footing

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# Political Broadcasting Fairness in the Twenty-First Century: Putting Candidates and the Public on Equal First Amendment Footing

by MARK R. ARBUCKLE, PH.D.\*

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## I. Introduction

There is a fundamental inconsistency in the current political fairness and access rules for U.S. broadcasting. While political candidates enjoy a long-standing right of access to broadcast stations to express their views and attack and answer attacks from opponents, stations have no obligation to be fair to noncandidate citizens who may be personally attacked, nor to make any good-faith effort to present opposing views on controversial public issues.<sup>1</sup> However, this has not always been the case. Under the Fairness Doctrine, in place from 1949 to 1987, broadcasters were expected to present controversial issues of public importance and provide reasonable

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1. Communications Act of 1934, 47 U.S.C. §§ 315, 312(a)(7) (2012).

opportunity for opposing views.<sup>2</sup> Since the electromagnetic spectrum is a limited public resource, broadcasters using it must serve the public interest in exchange for the privilege of holding a license.<sup>3</sup> Traditionally, this meant abiding by the candidate fairness rules as well as following general fairness expectations and rules with regard to noncandidate citizens and public issues.

In 1987 the D.C. Circuit Court of Appeals upheld the FCC's decision to eliminate the Fairness Doctrine.<sup>4</sup> The court accepted the FCC's argument that spectrum scarcity—the underlying rationale for fairness rules for the public and candidates—had been alleviated by growth in the number of diverse media outlets available to the public.<sup>5</sup> The Commission also felt the Fairness Doctrine infringed broadcasters' First Amendment rights.<sup>6</sup> Ultimately the candidate rules were left intact and remain today.

During the 2012 elections, television and radio audiences found themselves awash in the usual advertisements from political candidates and their supporters. This time campaign spending was higher than ever before. The *Washington Post* reported total spending by Barack Obama and Mitt Romney to be a record two billion dollars.<sup>7</sup> The total cost of the 2012 election season—including federal, state and local elections—was widely reported to be six billion dollars.<sup>8</sup> However, media critics Bob McChesney and John Nichols argue the figure is actually closer to ten billion dollars.<sup>9</sup> Whatever the actual figure, in the post-*Citizens United*<sup>10</sup>

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2. See FCC, REPORT ON EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246, 1247 (1949); FCC, HANDLING PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE, 48 F.C.C.2d 1, 5 (July 12, 1974); and *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

3. See 47 U.S.C. § 307(a) (2012) (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore a station license provided for by this Act.”); see also *NBC v. United States*, 319 U.S. 190, 216 (1943).

4. See *Telecomm. Research and Action Ctr. v. FCC*, 801 F.2d 501, 507 (D.C. Cir. 1986).

5. See *Syracuse Peace Council*, 2 FCC Rcd. 5043, 5054 (Aug. 4, 1987).

6. *Id.*

7. See *2012 Presidential Campaign Finance Explorer*, WASHINGTON POST (Dec. 7, 2012), [http://www.washingtonpost.com/wp-srv/special/politics/campaign-finance/?tid=rr\\_mod](http://www.washingtonpost.com/wp-srv/special/politics/campaign-finance/?tid=rr_mod).

8. See Nick Confessore, *Total Cost of Election Could Be \$6 Billion*, N.Y. TIMES (Oct. 31, 2012), <http://thecaucus.blogs.nytimes.com/2012/10/31/total-cost-of-election-could-be-6-billion/>; Charles Mahtesian, *2012 Election Price Tag: \$6 Billion*, POLITICO (Aug. 2, 2012), <http://www.politico.com/blogs/charlie-mahtesian/2012/08/election-price-tag-billion-130856.html>; Jonathan D. Salant, *Election Costs to Exceed \$6 Billion in 2012, Research Group Says*, BLOOMBERG BUSINESSWEEK (Oct. 31, 2012), <http://www.bloomberg.com/news/2012-10-31/election-costs-to-exceed-6-billion-in-2012-research-group-says.html>.

9. See JOHN NICHOLS & ROBERT W. MCCHESENEY, *DOLLAROCRACY: HOW THE MONEY AND MEDIA ELECTION COMPLEX IS DESTROYING AMERICA* 38 (2013).

10. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 335–36 (2010) (restrictions on campaign expenditures by corporations and unions violate their First Amendment free speech rights).

world, political broadcast advertising will likely continue to increase. While campaign spending is at record levels, broadcast political advertising is not a new phenomenon. It has been a part of broadcasting since the early years of radio in the 1920s.<sup>11</sup>

Federal law requires broadcasters to provide fair treatment to legally qualified candidates and virtually absolute access to candidates for federal office.<sup>12</sup> Ensuring fairness and access for candidates, as well as discussion of public issues, was part of broadcast regulation from the inception of broadcasting itself. From 1922 to 1925, Secretary of Commerce Herbert Hoover convened four National Radio Conferences where government and industry leaders collaborated on developing the first broadcast regulation.<sup>13</sup> Censorship and discrimination by broadcasters were among the issues discussed.<sup>14</sup> Access and fairness also drove much of the congressional debate leading to passage of the 1927 Radio Act.<sup>15</sup>

The 1934 Communications Act requires broadcasters to serve the public interest, convenience, and necessity as conditions of holding a broadcast license.<sup>16</sup> Providing fairness and access for political expression has long been a fundamental part of serving the public interest. Rules for political broadcasting are specifically spelled out in sections 315<sup>17</sup> and

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11. See Lewis E. Weeks, *The Radio Election of 1924*, 8 J. OF BROAD. 233, 234–43 (1963); LAWRENCE LICHTY & MALACHI TOPPING, *AMERICAN BROADCASTING: A SOURCE BOOK ON THE HISTORY OF RADIO AND TELEVISION* 446 (Hastings House 1975); Louise M. Benjamin, *Broadcast Campaign Precedents from the 1924 Presidential Election*, 31 J. OF BROAD. AND ELEC. MEDIA 449, 450 (1987).

12. See Communications Act of 1934, 47 U.S.C. §§ 315, 312 (a)(7) (2012).

13. Hoover was in charge of broadcast regulation under the ineffective 1912 Radio Act. The Act, which was aimed at point-to-point wireless telegraphy, gave little authority to the Secretary of Commerce. It was passed before the emergence of commercial broadcasting in the 1920s. Radio Act of 1912, Pub. L. No. 264, § 1, 37 Stat. 302, 304 (1912).

14. See Herbert Hoover, Secretary of Commerce, Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio (Nov. 9–11, 1925), <http://earlyradiohistory.us/1925conf.htm>; C. M. Jansky, Jr., *The Contribution of Herbert Hoover to Broadcasting*, 1 J. OF BROAD. 241, 245 (1957); Donald G. Godfrey, *The 1927 Radio Act: People and Politics*, 4 JOURNALISM HISTORY 74, 75–78 (1977); Daniel E. Garvey, *Secretary Hoover and the Quest for Broadcast Regulation*, 3 JOURNALISM HISTORY 66–85 (1976); Joseph P. McKerns, *Industry Skeptics and the Radio Act of 1927*, 3 JOURNALISM HISTORY 128–136 (1976); Louise Benjamin, *Working it Out Together: Radio Policy From Hoover to the Radio Act of 1927*, 42 J. BROAD. AND ELEC. MEDIA 221, 222–236 (1998); and Philip T. Rosen, *THE MODERN STENTORS: RADIO BROADCASTERS AND THE FEDERAL GOVERNMENT* 94–95 (1980).

15. See 67 CONG. REC. 12503–04 (daily ed. July 1, 1926). See also LOUISE M. BENJAMIN, *FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935* 32–54 (2001); STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 16–27 (1978); David H. Ostroff, *Equal Time: Origins of Section 18 of the Radio Act of 1927*, 24 J. OF BROAD. 367–80 (1980).

16. See § 307(a) (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore a station license provided for by this Act.”). See also *NBC v. United States*, 319 U.S. 190 (1943).

17. § 315(a) reads as follows:

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312<sup>18</sup> of the 1934 Act and in its predecessor, section 18 of the 1927 Radio Act.<sup>19</sup> Despite various modifications to the 1934 Act,<sup>20</sup> the basic access and fairness rules for candidates spelled out in sections 315 and 312(a)(7) remain in force. However, little remains of the increasingly disregarded flipside of the broadcast fairness coin—the general fairness rules that were intended to ensure fairness and access for noncandidate members of the public and for discussion of controversial public issues. As previously noted, these rules were enforced as the Fairness Doctrine from 1949 to 1987.<sup>21</sup> In short, the primary rationale supporting both the candidate rules and the Fairness Doctrine was spectrum scarcity and the broadcast

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If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provision of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any-- (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 Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

18. Section 312(a)(7) requires broadcasters to “allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.”

19. The Radio Act of 1927, Pub. L. No. 69-632, § 18, 44 Stat. 1162, 1170 (1927) reads as follows:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

20. See Cable Communications Act of 1984 § 601, 47 U.S.C. § 521 (2012); Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); and Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

21. See FCC, EDITORIALIZING BROADCAST LICENSEES, 13 F.C.C. 1246, 1247 (1949); FCC, HANDLING PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE, 48 F.C.C.2d 1 (June 27, 1974); and *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

spectrum as public property. Broadcasters had to serve the public interest and fairness was a significant component in accomplishing that mandate.

The Federal Radio Commission (“FRC”) explained the public interest responsibility of broadcasters in 1929 as follows: “Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of groups of individuals. The standard . . . means nothing if it does not mean this.”<sup>22</sup> Former FCC Commissioner Michael Copps described the public interest responsibility of licensees in a 2007 *New York Times* opinion article:

America lets radio and TV broadcasters use public airwaves worth more than half a trillion dollars for free. In return, we require that broadcasters serve the public interest: devoting at least some airtime for worthy programs that inform voters, support local arts and culture and educate our children—in other words, that aspire to something beyond just minimizing costs and maximizing revenue.<sup>23</sup>

Because the spectrum is a limited public resource, broadcasters who are granted the privilege of using it must serve the public interest and are subject to government regulation.<sup>24</sup> An important part of that regulation has historically included political fairness rules. Even before the formal Fairness Doctrine was in place,<sup>25</sup> general fairness was expected as part of broadcasters’ public interest obligation. As early as 1928, the FRC made this point clear.<sup>26</sup> Nevertheless, the 1980s deregulation-minded FCC<sup>27</sup> and

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22. Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32 (1929).

23. Michael J. Copps, *The Price of Free Airwaves*, N.Y. TIMES, June 2, 2007, <http://www.nytimes.com/2007/06/02/opinion/02copps.html?pagewanted=all>.

24. See *NBC v. United States*, 319 U.S. 190 (1943); see also *Red Lion*, 395 U.S. 367 (1969). Broadcast scholar Walter Emery noted forty-four years ago that broadcasters have a duty to serve the public even if members of the public are unaware of the public nature of the electromagnetic spectrum:

Many people seem unaware that the radio spectrum belongs to the public and no broadcaster, whether commercial or educational, acquires any ownership rights in the frequency which is assigned to him. He receives a license . . . to use this publicly owned resource. This license is subject to renewal if he can show that his station has operated in the public interest and not simply in terms of his private and personal interest. Too many people think of radio and television stations as being owned in the same way as farm land, grocery or hardware stores.

WALTER B. EMERY, NATIONAL AND INTERNATIONAL SYSTEMS OF BROADCASTING: THEIR HISTORY, OPERATION AND CONTROL 13 (1969).

25. See EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246, 1248–49 (1949).

26. See Federal Radio Commission, 1928 ANNUAL REPORT, 2 F.R.C. Ann. Rep. 166 (Aug. 28, 1928).

the D.C. Circuit Court of Appeals<sup>28</sup> said, due to growth in the number of diverse media outlets, the Fairness Doctrine was no longer needed.<sup>29</sup> Since 1987 general broadcast fairness requirements for non-candidates have not been enforced.<sup>30</sup>

At a time when social/political protesters<sup>31</sup>—the Occupy and Tea Party movements for example—are influencing public opinion, debate and policy, it is important to examine the rationale for, and origin of, broadcast political fairness and access rules. One is compelled to ask why fairness and access rules for candidates remain in force when such guarantees of access to the *public* airwaves for members of the *public* to discuss *public* issues are deemed no longer necessary. This article traces the origins and development of the candidate fairness and access rules, and the general non-candidate fairness rules including the rise and fall of the Fairness Doctrine. Ultimately this article argues that broadcast fairness rules should apply equally to candidates and members of the public. The rationale for fairness cannot apply to one group and not the other. If the spectrum scarcity and public interest rationale for candidate rules still exist, then that rationale also supports the need for general fairness rules—perhaps even a resurrected twenty-first century Fairness Doctrine. Conversely, if media growth and the resulting market forces have eliminated the need for general fairness rules, then the need for candidate fairness and access rules must also be questioned.

## II. The Origin of Political Broadcast Fairness Rules

Broadcasting plays a unique and important role in democracy. It sits at the juncture between two well-established principles: Expression related to self-government is afforded the highest level of First Amendment protection, and broadcasters must serve the public interest as a condition of

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27. See INQUIRY INTO SECTION 73.1910 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE GENERAL FAIRNESS OBLIGATIONS OF BROADCAST LICENSEES, 102 F.C.C. 2d 143, 146, 148 (Aug. 7, 1985) (hereafter referred to as the "1985 FAIRNESS REPORT").

28. See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989).

29. See *Syracuse Peace Council*, 2 F.C.C. Rcd. 5043 (1987).

30. The personal attack rules and political editorial rules were formally eliminated in 2000. See *Radio-Television News Dirs. Assoc. v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000).

31. See *Occupy Movement (Occupy Wall Street)*, N.Y. TIMES (July 31, 2013), available at [http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy\\_wall\\_street/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy_wall_street/index.html); *Occupy movement*, ACLU, <http://www.aclu.org/blog/tag/occupy-movement> (last visited Oct. 16, 2013); OCCUPY WALL STREET, <http://occupywallst.org> (last visited Oct. 16, 2013); TEA PARTY, <http://www.teaparty.org> (last visited Oct. 16, 2013); *Tea Party Movement*, N.Y. TIMES (July 31, 2013), [http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea\\_party\\_movement/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea_party_movement/index.html).

being granted a license.<sup>32</sup> The political fairness and access rules exist because broadcasters occupy a unique position. These rules are the most specific and expansive form of government content regulation on broadcasting.<sup>33</sup> As a result, they have traditionally been unpopular with many broadcasters. One radio station manager characterized the political broadcasting regulations as “confusing” and “grossly unfair.”<sup>34</sup> Like many other regulations of expression, these rules have been challenged and have evolved over decades. These regulations have also frequently been upheld by the courts.<sup>35</sup>

The philosophical basis for regulation of political broadcasting is the Jeffersonian proposition that the free flow of political news and information to citizens is a fundamental requirement for a viable democracy.<sup>36</sup> In theory, the aim of access and fairness rules is to encourage maximum expression and discussion of diverse ideas—the traditional concept of a marketplace of ideas—via broadcasting.<sup>37</sup>

Some critics have argued that, in reality, only the major parties and their wealthy and powerful supporters have access to the marketplace because regulators marginalize political ideas from outside the status quo.<sup>38</sup>

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32. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372, 374 (2010); *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Boos v. Berry*, 485 U.S. 312 (1988); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Tinker v. Des Moines*, 393 U.S. 503, 505–06 (1969).

33. Broadcasters are also subject to content regulation of indecency and children’s television, but the political fairness rules are more expansive and intrusive. See *FCC v. Pacifica*, 438 U.S. 726, 737–38 (1978) (upholding regulation of broadcast indecency); and *Cruz v. Ferre*, 755 F. 2d 1415, 1420–23 (11th Cir. 1985) (distinguishing protected cable indecency from regulated broadcast indecency); see also *Children’s Television Act of 1990*, 47 U.S.C. §§ 303(a), 303(b), 394 (2012) (establishing mandatory programming and commercial limits).

34. Elizabeth Krueger & Kimberly and Corrigan, *Broadcasters’ Understanding of Political Broadcast Regulation*, 35 J. OF BROAD. 289, 300 (1991).

35. See *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969); *Paulsen v. FCC*, 491 F.2d 887, 892 (9th Cir. 1974); *CBS v. FCC*, 453 U.S. 567 (1981); *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 429–30 (D.C. Cir. 1980); *Daniel Becker v. FCC*, 95 F.3d 75, 84–85 (D.C. Cir. 1996); and *Branch v. FCC*, 824 F.2d 37, 42–47 (D.C. Cir. 1987).

36. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 38–39 (1948); THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–9, (1970); ZECHARIAH CHAFEE JR., *FREEDOM OF SPEECH* 34 (1920); RODNEY SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6–17 (1992). See also *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Boos v. Barry*, 485 U.S. 312 (1988); *Texas v. Johnson*, 491 U.S. 397 (1989); and *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1966), “speech concerning public affairs is more than self-expression; it is the essence of self-government.”

37. A 1991 study of eighty-three stations in the state of Washington concluded that, in reality, many broadcasters (in all market sizes) did not understand the access rules. § 312(a) (7) access for federal candidates, access for candidates’ supporters (“Zapple Doctrine”), and the personal attack rules proved to be particularly confusing. One station manager claimed, “I don’t know a single broadcaster that fully understands political rules. Most of us fly by the seat of our pants on these issues.” Krueger and Corrigan, *supra* note 34.

38. See ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935* (1994).



Others have argued that Congress enacted political broadcasting rules for selfish reasons: “Congress protects its own.”<sup>39</sup> No matter how one views their motivation and performance, broadcast regulators over the decades have implemented and interpreted numerous content regulations based on the rationale that access and fairness in political broadcasting are necessary elements in protecting the public interest. One commentator simply explained the rationale for regulation as follows: “Since broadcasters enjoy a government-granted monopoly to use a scarce public resource—the airwaves—they have certain responsibilities to the public, and should be prevented from exploiting their monopolies.”<sup>40</sup>

Prior to 1927, political broadcasting was mostly uncharted territory with very little government control. However, as radio’s power to shape public opinion emerged, politicians began to see the possibilities for abuse and unfairness. In 1922, Republican Senator Harry New used U.S. Navy radio facilities to broadcast a campaign message from Washington to his constituents in Indiana. After Democrats complained about New using government facilities for a partisan broadcast, the Navy began denying use of its facilities for political broadcasts.<sup>41</sup> That same year Democrat William Jennings Bryan predicted that radio would be a great benefit to Democrats because “arrangements will be made for impartial treatment of candidates.”<sup>42</sup> Major newspapers of the time, which tended to support Republicans, were under no obligation to treat candidates impartially.

During the 1924 presidential campaign, charges of political censorship arose when Progressive Party candidate Robert La Follette was not allowed to speak on station WHO in Des Moines, a station owned by Republicans. An unnamed official from AT&T reportedly expressed reluctance to air broadcasts by Progressive candidates for fear of angering stockholders, and another broadcaster expressed fear of the economic consequences of letting a Socialist speak on his station.<sup>43</sup> Radio commentator H. V. Kaltenborn made critical statements about Secretary of State Charles Evans Hughes during a 1924 broadcast on AT&T’s WEAf station when the U.S. government refused to formally recognize the Bolshevik government of the USSR. After Hughes complained to company officials, AT&T adopted a

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39. FORD ROWAN, *BROADCAST FAIRNESS, DOCTRINE, PRACTICE, PROSPECTS: A REAPPRAISAL OF THE FAIRNESS DOCTRINE AND EQUAL TIME RULE* 35 (1984).

40. Michael Pollan, *Keeping Television Regulated*, N.Y. TIMES, Dec. 22, 1981, <http://www.nytimes.com/1981/12/22/opinion/keeping-television-regulated.html>.

41. See Ostroff, *supra* note 15, at 369.

42. *Id.*

43. See *id.* at 370–371.

policy prohibiting broadcasts critical of the government or government officials.<sup>44</sup>

After the Republicans held on to the White House, *The New Republic* concluded that because the majority of stations were owned by big industry and managed by conservatives (and Republicans had more money to spend), Republicans got more airtime than Democrats and “at least ten times as much as the Progressives.”<sup>45</sup> Broadcast historian Louise Benjamin noted that while the Republicans did have more money than the Democrats and Progressives, they were also more savvy and made better use of radio—including requesting a radio-use guide from AT&T.<sup>46</sup> General Electric had adopted a fairness policy during the campaign requiring its stations to present opposing views when broadcasting political speeches or other controversial subjects.<sup>47</sup> The importance of broadcasting in politics became clear on election night 1924 when an estimated twenty million listeners tuned in to hear the results on more than four hundred stations.<sup>48</sup>

The 1927 Radio Act was the first enacted legislation to specifically address political broadcasting.<sup>49</sup> Section 18 guaranteed equal opportunities for opposing candidates with no censorship power for stations.<sup>50</sup> Over the years the rules expanded to include an access right for federal candidates,<sup>51</sup> the Fairness Doctrine,<sup>52</sup> editorial rules,<sup>53</sup> equal opportunity for candidates’ supporters,<sup>54</sup> and rules limiting rates charged for political advertisements.<sup>55</sup> These rules, both indirect and direct content regulations, were implemented in the name of the public interest. Congress, the FRC, and the FCC believed broadcasters’ role of providing information was so vital to the proper functioning of a representative democracy, it justified such content regulation.<sup>56</sup> Regulators largely held on to this view up to the 1980s when the Fairness Doctrine was eliminated.<sup>57</sup>

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44. See BENJAMIN, *supra* note 15, at 33–34. Kaltenborn’s contract was not renewed despite his popularity.

45. *Editorial*, THE NEW REPUBLIC, Nov. 19, 1924, at 284.

46. See BENJAMIN, *supra* note 15, at 44.

47. See BENJAMIN, *supra* note 15, at 46–47.

48. See Benjamin, *supra* note 11, at 456; see also Weeks, *supra* note 11, at 233–43.

49. *Radio Act of 1927*, U.S. Statutes at Large 44 (1927).

50. See Communications Act of 1934, 47 U.S.C. § 312(a)(7) (2012).

51. Communications Act of 1934, 47 U.S.C. § 312 (2012).

52. FCC, REPORT ON EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246 (1949).

53. *Id.*

54. Request by Nicholas Zapple, 23 F.C.C. 2d 707 (1970).

55. 47 U.S.C. § 312.

56. See generally *NBC v. United States*, 319 U.S. 190 (1943); and *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

57. See *Meredith Corp. v. FCC*, 809 F.2d 874 (D.C. Cir. 1987); *Syracuse Peace Council, 2 F.C.C. Rcd. 5057* (1987); and *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

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### III. Fairness for Candidates

Section 18 of the 1927 Radio Act said licensees who allowed a legally qualified candidate to use their stations must afford equal opportunities to all other such candidates for that office.<sup>58</sup> In addition, licensees were prohibited from censoring candidates' messages. Stations were not required to give access to candidates in the first place, but once they allowed a use by one, equal access for opponents was triggered.<sup>59</sup> When the 1934 Communications Act supplanted the 1927 Act, section 18 carried over as section 315 of the new Act. Legally qualified candidates were defined by the FCC as those who publicly announced their intentions to run were qualified by state or federal law to hold the office, had a place on the ballot (or a public write-in campaign), and were actively campaigning.<sup>60</sup> In 1950 in *Felix v. Westinghouse Radio Stations*, an appellate court ruled that candidates must personally appear and "use" a station—for equal access to be triggered.<sup>61</sup> Appearances by candidates' supporters or friends did not count as a candidate use.<sup>62</sup>

#### A. No Censorship

The no censorship provision of section 18 was tested in 1932 when the Nebraska Supreme Court said stations were responsible, along with candidates, for defamatory comments made during political broadcasts.<sup>63</sup> In 1958 the U.S. Supreme Court clarified the no censorship or station liability conflict when the Farmers Educational and Cooperative Union of America sued a North Dakota radio station after it aired a speech by a senatorial candidate.<sup>64</sup> The candidate had accused the Union and his opponents of conspiring to establish a communist organization.<sup>65</sup> The U.S. Supreme Court held that licensees could not censor candidates' messages, and they were also protected from any liability for candidates' defamatory statements.

In a series of rulings starting in the 1970s the Commission interpreted the political rules to mean even extreme candidate speech cannot be censored. In 1972 the FCC ruled that stations could not censor candidates' political speech, even when it was highly inflammatory and caused threats of violence. An Atlanta radio station reported receiving bomb threats after

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58. See Radio Act of 1927, *supra* note 49.

59. *Id.*

60. See FCC Broadcast Radio Services, 47 C.F.R. § 73 (1940).

61. 186 F.2d 1 (3d Cir.1950).

62. *Id.*

63. See *Sorenson v. Wood*, 243 N.W. 82 (1932).

64. See *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

65. *Id.* at 526–27.

airing a political announcement made by a white racist from Georgia who was a candidate for the U.S. Senate. Among other things, the candidate said, “you cannot have law and order and niggers too.”<sup>66</sup> The Mayor of Atlanta and a number of groups asked the FCC to rule that broadcasters should not have to air such announcements if they pose a public safety threat. The Commission refused, noting that, in the absence of direct incitement of imminent lawless action, censorship of candidates’ remarks cannot be allowed. It argued that if it allowed such censorship, anyone could block a candidate’s message merely by threatening violence.<sup>67</sup> In 1978, the Commission said the no censorship provision of section 315 means even if words are thought to be indecent or obscene, candidates cannot be prohibited from using them in their political announcements.<sup>68</sup> During the 1980 presidential campaign the Citizens Party ran a radio commercial in which the word “bullshit” was repeated a number of times.<sup>69</sup> Echoing the 1972 ruling on racist political broadcasts, the FCC held such announcements cannot be censored unless the candidate creates a clear and present danger of riot or violence.<sup>70</sup>

In 1996 the D.C. Circuit Court of Appeals said channeling controversial political announcements to nighttime safe harbor hours is censorship in violation of section 315.<sup>71</sup> In 1992, a legally qualified congressional candidate ran a television advertisement depicting aborted fetuses on an Atlanta station shortly before 8PM.<sup>72</sup> The station received numerous viewer complaints.<sup>73</sup> When the candidate asked to air a Sunday afternoon thirty-minute political program, containing similar graphic depictions, the station cited indecency rules and agreed to air the program only during late night safe harbor hours.<sup>74</sup> During this time some anti-abortion candidates were producing advertisements that showed “tiny

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66. Complaint by Atlanta NAACP, Atlanta, Ga., 36 F.C.C. 2d 635, 636 (1972).

67. *Id.* at 637.

68. See Complaint by Julian Bond, 69 F.C.C. 2d 943 (1978).

69. Complaint of Barry Commoner and LaDonna Harris against NBC Radio, 87 F.C.C. 2d 1, 2 (1980).

70. *Id.* at 6. Under the U.S. Supreme Court’s incitement standard, speech can only be prohibited when it is directly inciting imminent lawless action that is likely to occur. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

71. *Daniel Becker v. FCC*, 95 F.3d 75, 85 (D.C. Cir. 1996). Safe harbor hours are times (currently 10 p.m. to 6 a.m.) when indecent material can be broadcast because children are not likely to be in the audience. See also *ACT v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

72. *Becker*, 95 F.3d at 76.

73. The FCC reportedly received approximately twelve hundred phone complaints and one thousand letters. Carol S. Lomicky & Charles B. Salestrom, *Anti-Abortion Advertising and Access to the Airwaves: A Public Interest Doctrine Dilemma*, 42 J. OF BROAD. AND ELEC. MEDIA 491, 505 (1998).

74. *Becker*, 95 F.3d at 77.

dismembered body parts, partially formed faces and bloody uterine fluid.”<sup>75</sup> The FCC supported the station ruling in 1994 that limiting the advertisements to late-night hours protects children and does not violate the no-censorship provision of section 315.<sup>76</sup> On appeal the D.C. Circuit sided with the candidate.<sup>77</sup> The court argued that content-based channeling limited candidates’ ability to fully inform voters, and it inhibited full discussion of political issues.<sup>78</sup> The candidate could not reach voters with his message as effectively during late night hours as he could on a Sunday afternoon.<sup>79</sup>

### B. Defining “Use”

Despite the 1951 *Felix v. Westinghouse* ruling that equal access was only triggered when a candidate personally appeared on a station, there were no guidelines spelling out what kinds of appearances counted as uses.<sup>80</sup> When the FCC ruled in 1959 that both political and non-political appearances by Chicago Mayor Richard Daley and his Republican opponent were uses triggering equal access for a third party candidate, Congress acted.<sup>81</sup> Section 315(a), as amended in 1959, contains four use exemptions. Appearances by candidates are not a use if they occur during: (1) a bona fide newscast, (2) a bona fide news interview, (3) a bona fide news documentary (if the appearance is incidental to the primary program subject), and (4) on-the-spot coverage of bona fide news events.<sup>82</sup>

Application of the use exemptions has not been simple. The FCC has defined use as any positive appearance by a candidate by voice or picture, not covered by one of the above exemptions.<sup>83</sup> Nevertheless, numerous questions have arisen over the years involving definitions of news events, program formats, sponsorship and control of the programs, presidential news conferences, and non-political appearances. Shortly after creating the use exemptions, Congress temporarily suspended section 315 in 1960 so stations could air the first-ever televised presidential debates between John Kennedy and Richard Nixon without triggering equal time for minor party

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75. Lomicky and Salestrom, *supra* note 73, at 493.

76. *See* Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C. Rcd. 7638, 7649 (1994).

77. *Becker*, 95 F.3d at 71.

78. *Id.* at 82.

79. *Id.* at 83.

80. 186 F.2d 1 (3d Cir. 1950).

81. *See* Petitions of CBS, Inc. and NBC, 26 F.C.C. 715 (1959).

82. *See* 47 U.S.C. § 315 (a) (2012).

83. *Id.* § 315.

candidates.<sup>84</sup> Four years later, the FCC created confusion when it said President Johnson's press conferences were not covered by any of the use exemptions, and then seemed to reverse itself two weeks before the election when it said his speech (carried on the three networks) addressing events in the Soviet Union and China was exempt as a bona fide news event.<sup>85</sup> In 1975 the Commission changed its position on press conferences by incumbents and candidates, ruling that broadcasts of such conferences are not uses, but rather, on-the-spot coverage of bona fide news events.<sup>86</sup> However, broadcasts of press conferences are not considered bona fide news interviews because they are not regularly scheduled nor controlled by broadcasters.<sup>87</sup> In 1980 the FCC said even when incumbents used press conferences to attack political opponents, such broadcasts are exempt as on-the-spot news as long as broadcasters are exercising bona fide news judgment.<sup>88</sup>

In 1972 the D.C. Circuit of the U.S. Court of Appeals reversed an earlier FCC decision<sup>89</sup> when it ruled that a broadcast of *Face the Nation*, featuring leading Democratic presidential candidates Hubert Humphrey and George McGovern, did not qualify for exemption as a bona fide news interview.<sup>90</sup> The network had expanded the show from its regular half-hour to a full hour, prompting a third-party candidate to ask for time on CBS, which she was eventually granted. News interview and discussion shows, such as *Meet the Press*, *Good Morning America*, and *The View* are generally treated as bona fide news interview exemptions as long as the program is regularly scheduled, the program is controlled by the broadcasters, and format, guests, and content decisions are based on broadcasters' journalistic judgments rather than political considerations.<sup>91</sup>

Televised debates are now considered bona fide news events, but prior to 1984, a third party—not the candidates or broadcasters—had to sponsor the debate. As noted above, Congress made a special exception to section 315 in 1960 so the presidential debates could be televised.<sup>92</sup> In 1975, just in time for the 1976 presidential election, the FCC ruled that third-party-sponsored debates were covered by the on-the-spot coverage of bona fide

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84. ALAN SCHROEDER, *THE PRESIDENTIAL DEBATES: FIFTY YEARS OF HIGH RISK TV* 16–17 (2d ed. 2008).

85. See Inquiry Concerning “Equal Time” Requirements under Section 315 of the Communications Act of 1934 as Amended, 40 F.C.C. 3953 (1964).

86. See Petitions of Aspen Inst. and CBS, Inc., 55 F.C.C. 2d 697 (1975).

87. *Id.* at 711.

88. See *Kennedy for President Comm. v. FCC*, 636 F.2d 432 (D.C. Cir. 1980).

89. See *Hon. Sam Yorty and Hon. Shirley Chisholm*, 35 F.C.C. 2d 572 (1971).

90. See *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1972).

91. See Request by CBS Inc. for Declaratory Ruling, 2 FCC Rcd. 4377 (1987).

92. See *Chisholm v. FCC*, 538 F.2d 349.

news events exemption.<sup>93</sup> As a result, the League of Women Voters organized televised presidential debates in 1976 and 1980.<sup>94</sup> The Commission expanded the debate exemption in 1983 to include debates sponsored by broadcasters.<sup>95</sup> It reasoned that the identity of a debate sponsor had no bearing on the newsworthiness of the event.<sup>96</sup> The League of Women Voters challenged the policy change citing fears of broadcasters showing favoritism to some candidates.<sup>97</sup> The court of appeals upheld the policy change.<sup>98</sup> The FCC ultimately extended the on-the-spot bona fide news exemption to include debates sponsored by the candidates themselves as long as broadcasters controlled amount and type of coverage,<sup>99</sup> and even to a one-hour program featuring back-to-back half-hour presentations by opposing candidates.<sup>100</sup>

### C. NonPolitical Appearances

Not all broadcast appearances by candidates are “political.” Since the political successes in the 1960s, 1970s, and 1980s of President Reagan, a former actor, it has become more common for celebrities to run for public office. The 2003 campaign of California Governor Arnold Schwarzenegger is a good example of the complexity of interpreting the nature of appearances by celebrity candidates. Controversial radio host Howard Stern was advised to cancel an interview with Schwarzenegger because of equal opportunity questions surrounding the 130 plus candidates in the 2003 California recall election; however, the FCC ultimately ruled that interview segments of Stern’s “shock jock” show qualified as a bona fide news interview.<sup>101</sup> Former Senator and *Law and Order* actor Fred Thompson mounted a presidential campaign in 2008,<sup>102</sup> and satirist writer Al Franken won a seat in the U.S. Senate.<sup>103</sup> By definition, celebrities are people who frequently appear in mass media. When celebrities are also candidates, such appearances raise complicated use questions.

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93. *Id.*

94. *See* League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1984), *affirming* Petitions of Geller, 95 F.C.C. 2d 1236 (1983).

95. Geller, 95 F.C.C. 2d at 1245.

96. *Id.*

97. *Id.* at 1241.

98. *See generally* League of Women Voters, 731 F.2d 995.

99. *See* Request for Declaratory Ruling by WCVB-TV, 2 FCC Rcd. 4778 (1987).

100. *See* Request of King Broad. Co., 6 FCC Rcd. 4998 (1991).

101. *See* Request of Infinity Broad. Operations, Inc. for a Declaratory Ruling, 18 FCC Rcd. 18603 (2003).

102. John Harwood, *Fred Thompson Hoping Chaos Brings Political Order*, FREE REPUBLIC (Sept. 1, 2007), <http://www.freerepublic.com/focus/news/1889826/posts>.

103. *The ‘Absentee’ Senator*, WALL ST. J. (July 2, 2009), <http://online.wsj.com/news/articles/SB124640687950076679>.

In 1972, celebrity comedian Pat Paulsen challenged section 315 as an unconstitutional abridgment of his due process and equal protection rights.<sup>104</sup> He argued that it was unfair that he had to give up his entertainment career in order to run for public office.<sup>105</sup> Both the FCC and the D.C. Circuit Court of Appeals disagreed with Paulsen, noting that equal opportunity rules were necessary to ensure fair use of broadcasting by candidates.<sup>106</sup> In 1976 the FCC said if television stations aired old Ronald Reagan movies, it would be a use, and they would have to offer equal opportunities to his opponents.<sup>107</sup>

In 1985 a television journalist wanting to run for public office said equal time should not be triggered every time he appeared on television as part of his job.<sup>108</sup> He argued that his work appearances were not uses because he appeared on bona fide newscasts.<sup>109</sup> The Ninth Circuit Court of Appeals disagreed and held that the events the reporter covered were newsworthy, but there was nothing newsworthy about the fact the reporter was covering such events.<sup>110</sup> The court also said section 315 did not prohibit the reporter from running for office.<sup>111</sup> He was just required to make sacrifices—his station told him he must take a leave of absence—as many candidates frequently must do.<sup>112</sup>

The Commission reversed its “Reagan” nonpolitical appearance ruling in 1992 when it said appearances, such as broadcasting old movies featuring candidates, are only uses if the presentation is sponsored or controlled by the candidate.<sup>113</sup> Just two years later, the FCC reversed its previous reversal, ruling that any positive appearance not covered by one of the bona fide news exemptions is a use, regardless of who is responsible for its airing.<sup>114</sup> Presumably, under this interpretation, even radio broadcasts of songs by singers who may happen to be running for office would qualify as uses triggering equal opportunity.

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104. Paulsen v. FCC, 491 F.2d 887 (9th Cir. 1974).

105. *Id.* at 891–92.

106. *Id.* at 892.

107. Request by Adrian Weiss, 58 F.C.C. 2d 342, 343–44 (1976).

108. Branch v. FCC, 824 F.2d 37, 39 (D.C. Cir. 1987)

109. *Id.* at 41.

110. *Id.* at 45.

111. *Id.* at 48.

112. *Id.* at 39.

113. See Codification of the Commn’s Political Programming Policies, 7 FCC Rcd. 4611 (1992).

114. See Political Programming Policies, 9 FCC Rcd. 551, 651–52 (1994).



#### D. Expanding Access

In 1971 Congress expanded political access when it added section 312(a)(7)<sup>115</sup> to the Communications Act, giving federal candidates a right to reasonable access. Stations cannot refuse to sell airtime to candidates for federal office unless they can demonstrate a very good reason for doing so. Although unlikely, a station could refuse to run ads for candidates for non-federal political offices without providing a reason. If stations do not provide “reasonable access” to federal candidates, their licenses can be revoked. Broadcasters are not required to give any candidates free airtime, but they cannot shut them out by overcharging them either. Section 315 (b) requires all candidates be given stations’ lowest advertising rates during the forty-five days before primaries and sixty days leading up to general elections.<sup>116</sup> Together, sections 315 and 312 require broadcasters to sell advertisements to federal candidates and provide equal access opportunity to all candidates, without censorship, no matter what the candidate says or depicts, and they have to offer their best advertisement rates.

During the 1980 presidential campaign the television networks challenged the reasonable access provision of section 312. President Carter had asked to buy thirty-minute time slots for a campaign program to air December 1979.<sup>117</sup> The networks argued that it was too early to air political programs when the election was not until November 1980.<sup>118</sup> The U.S. Supreme Court said broadcasters do not decide when a campaign starts; federal candidates have an “affirmative, promptly enforceable right of reasonable access.”<sup>119</sup> During the campaign Senator Ted Kennedy, a candidate for the Democratic nomination, responded to a broadcast of a thirty-minute Carter speech on economics by demanding thirty minutes of free airtime.<sup>120</sup> Kennedy argued he was entitled to the time under section 312 because the Carter broadcast occurred just four days before the New Hampshire primary.<sup>121</sup> The D.C. Circuit held that Kennedy was entitled to an opportunity to respond, but broadcasters could charge for the time.<sup>122</sup> There was no obligation to give Kennedy free airtime.<sup>123</sup>

In the 1980s and 1990s the FCC ruled that Political Action Committees (“PACs”) do not have section 312(a)(7) access rights,<sup>124</sup> and broadcasters

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115. Communications Act of 1934, 47 U.S.C. § 315(a) (2002).

116. *See* 47 U.S.C. § 315(b).

117. *CBS v. FCC*, 453 U.S. 367, 414 (1981).

118. *Id.* at 393.

119. *Id.* at 377.

120. *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 420–21 (D.C. Cir. 1980).

121. *Id.* at 430.

122. *Id.* at 432.

123. *Id.*

124. *See Nat’l Conservative Political Action Comm.*, 89 F.C.C. 2d 626 (1982).

only have to offer candidates the same lengths of program times they sold to commercial advertisers within the previous year.<sup>125</sup> In 1996, third-party presidential candidate Ross Perot filed a section 312 complaint when the networks refused to sell him all eight of the half-hour prime-time slots he requested.<sup>126</sup> The Commission sided with broadcasters noting they had not denied Perot access.<sup>127</sup> Rather, they had attempted to balance Perot's needs with other legitimate concerns when they only sold him part of the time he requested.<sup>128</sup>

In 1970 the FCC extended equal opportunity access to supporters of candidates. Section 315 provides equal access when candidates themselves appear in a nonexempt use, but under the Zapple Doctrine,<sup>129</sup> equal opportunity for supporters is triggered when supporters of an opposing candidate appear on his or her behalf. The doctrine only applies during campaigns, and even then, stations do not necessarily have to give supporters free time. As with section 315, bona fide news appearances by supporters do not trigger Zapple access.

Since the Radio Act of 1927 was enacted, government regulators have gone to great lengths to provide fair candidate access with no censorship. Section 18 was transplanted into the 1934 Communications Act as section 315.<sup>130</sup> A candidate use triggered access for opponents and stations were legally protected from liability for candidates' comments. The commitment to free speech was tested and upheld when the FCC and the courts protected controversial political broadcasts from censorship. From the 1960s through the 1990s, regulators attempted to define "use" and bona fide news exemptions to encourage dissemination of political information. The section 312 and section 315 limits on advertising rates ensured access for federal candidates and reasonable advertising costs.<sup>131</sup> It is difficult to imagine how Congress, the courts, and the FCC could have done more to ensure maximum access and fairness for political candidates.

#### **IV. Fairness for Noncandidates and Public Issues**

Fairness and access for discussion of political issues has been one of the cornerstones of broadcasting regulation going back to Hoover's National Radio Conferences of 1922-1925<sup>132</sup> and the debate leading to the

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125. See Nat'l Ass'n of Broad., 9 FCC Rcd. 5778 (1994).

126. Complaint of Ross Perot, 11 FCC Rcd. 13109 (1996).

127. *Id.* at 13121-24.

128. *Id.* at 13119.

129. See Request by Nicholas Zapple, 23 F.C.C. 2d 707 (1970).

130. 47 U.S.C. § 315 (2012).

131. Communications Act of 1934, 47 U.S.C. § 315(a) (2012).

132. President Coolidge told delegates at the third radio conference in 1924 that increased government authority would help ensure against powerful organizations controlling the airwaves.

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1927 Radio Act.<sup>133</sup> The 1924 presidential campaign provided an opportunity for experiments with network broadcasting. Stations in widespread cities were connected to carry both party conventions, and the candidates gave a number of radio addresses, which were broadcast simultaneously on stations throughout the country.<sup>134</sup> The unwavering commitment by broadcast regulators to protect candidates' free speech is evident in the candidate rules discussed above.

However, fairness in the discussion of public issues by citizens who are not candidates was also an important part of broadcast regulation from the 1920s to the 1980s. In a March 16, 1924, statement to the *New York World*, Secretary of Commerce Hoover argued that the radio bill being debated in Congress would "enable us to keep the ether open to everybody."<sup>135</sup> Hoover had expressed a similar view earlier that month. Testifying before the House Committee on Merchant Marine and Fisheries, Hoover had said:

We cannot allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.<sup>136</sup>

Fairness in political broadcasting was an important issue for many of the legislators grappling with the bills that would eventually lead to the 1927 Radio Act. Representative Ewin Davis feared that broadcasters had already formed a powerful monopoly and were using their stations for selfish purposes not in the public interest.<sup>137</sup> He advocated regulating radio as a public utility to ensure fairness:

We are going to have to regulate the rates and the service, to force them to give equal service and equal treatment to all. As it stands now they are absolutely the arbiters of the air . . . They can permit the proponents of a measure to be heard and can refuse to grant the

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See Herbert Hoover, Secretary of Commerce, *Proceedings of the Third National Radio Conference* (October 6–10, 1924) (transcript available in the Herbert Hoover Presidential Library, commerce papers, box 496).

133. See BENJAMIN, *supra* note 15, at 32–54; see also SIMMONS, *supra* note 15.

134. See Weeks, *supra* note 11, at 233–43.

135. Herbert Hoover, Secretary of Commerce, *The Government's Duty is to Keep the Ether Open and Free to All*, N.Y. WORLD (Mar. 16, 1924) (transcript available in the Herbert Hoover Presidential Library, Bible, No. 364).

136. Herbert Hoover, Secretary of Commerce, *To Regulate Radio Communication, and for Other Purposes: Statement by Secretary Hoover at Hearings Before the Committee on the Merchant Marine and Fisheries on H.R. 7357* (Mar. 11, 1924) (transcript available in the Herbert Hoover Presidential Library, commerce papers, box 489).

137. 67 CONG. REC. 5483 (daily ed. Mar. 12, 1926).

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opposition a hearing. They can charge one man an exorbitant price and permit another man to broadcast free or at a nominal price. There is absolutely no restriction whatever upon the arbitrary methods that can be employed and witnesses have appeared before our committee and already have given instances of arbitrary and tyrannical action in this respect, although the radio industry is now only in its infancy.<sup>138</sup>

Davis also cited committee testimony in which an AT&T executive had testified that his company had rejected “a great many” requests to use its stations and “edited” speakers’ statements as a matter of policy.<sup>139</sup>

Senator Robert Howell argued that it was a matter of tremendous importance to include a fairness provision that would ensure equal treatment of candidates and extend to discussion of public issues. “I cannot emphasize this too strongly.”<sup>140</sup> Howell was also concerned with private censorship being exercised by broadcasters. “Are we content to the building up of a great publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?”<sup>141</sup> Senators Thomas Heflin and James Watson also expressed concern about keeping radio free from domination by a few wealthy station owners who would use it to unduly shape opinion on public issues. Heflin warned, “We ought not to let anyone have a monopoly of the air.”<sup>142</sup>

## V. Fairness and the Public Interest

General fairness in overall programming was a part of broadcasters’ public interest mandate. Throughout much of the twentieth century, under the Fairness Doctrine, broadcasters were guided by a set of rules designed to ensure that controversial issues of public importance and personal attacks were dealt with fairly. The origins of the Fairness Doctrine go back to the 1940s, but as previously noted, the issue of fairness in the discussion of politics and public issues emerged in the early years of radio in the 1920s.<sup>143</sup>

### A. Informal Fairness Requirements

In the years before there was a formal Fairness Doctrine, the FRC expected fairness in the discussion of public and political issues as part of

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138. *Id.*

139. *Id.* at 5484.

140. *Id.* at 12504.

141. *Id.* at 12503.

142. *Id.* at 12357.

143. *Supra* Part IV.

broadcasters' general duty to serve the public interest. In its 1928 Annual Report, the Commission said a New York Socialist party station must show "due regard for the opinions of others."<sup>144</sup> In 1929 the FRC told the Chicago Federation of Labor that its station should appeal to the general public and serve the public interest, rather than just benefiting narrow group or class interests.<sup>145</sup> That same year, in what came to be known as the *Great Lakes* statement,<sup>146</sup> the FRC said allowing one-sided presentations of political issues would not be good service to the public, and public interest required ample free and fair competition of opposing views. The Commission also noted that such fairness applied not only to candidates, but also to "all discussions of issues of importance to the public."<sup>147</sup>

Congress attempted to formalize broadcast fairness in 1932 when it passed an amendment adding the following language to section 18 of the Radio Act: "It shall be deemed in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions."<sup>148</sup> President Hoover pocket-vetoed the amendment in 1933, along with other lame-duck legislation passed by the Democrat-controlled Congress.<sup>149</sup> Although this might seem counter to Hoover's staunch support and years of work protecting the public interest in broadcasting, it may be that the failing economy in 1933 and his contentious relationship with the Democrat-controlled Congress led him to use the veto somewhat indiscriminately.<sup>150</sup>

The following comments, made by Representative Harold McGugin during discussion of the equal opportunity amendment in February 1932, illustrate how passionate he felt about protecting free public discussion from censorship imposed by private broadcasters:

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144. Federal Radio Commission, 1928 ANNUAL REPORT, 2 F.R.C. Ann. Rep. 155 (Aug. 28, 1928).

145. See Chicago Fed'n of Labor, 3 F.R.C. Ann. Rep. 36 (1929).

146. See Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32 (1929).

147. *Id.*

148. H.R. REP. NO. 72-2106, at 4 (1933).

149. 76 CONG. REC. 5787 (daily ed. Mar. 3, 1933).

150. See generally HARRIS GAYLORD WARREN AND HERBERT CLARK HOOVER, HERBERT HOOVER AND THE GREAT DEPRESSION 151 (1980) (chronicling Hoover's difficulties with the Democratic-controlled lame duck Congress); HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933 217 (1952) (Hoover believed Democrats, and some older members of his own party in Congress, were sabotaging his efforts to deal with the Depression. He wrote in his memoirs that during his final two years as president the Democratic Congress was "bent on the ruin of the administration," and he accused "older Republican elements of the party in Congress" of "surreptitious encouragement to the opposition and refusal to "defend the administration.").

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I believe we are considering something that strikes at the very roots of government itself . . . In this modern age there is no freedom of speech worthy of the name unless there is reasonable freedom of access to radio. The right and privilege to stand on the street corner and talk no longer fills the bill . . . With the coming of radio we have virtually seen air of the country monopolized and turned over to the largest stations, such as the one that my friend from New York has just described; but, my friends that wonderful station . . . which belongs to General Electric, will never use its facilities to appeal for the rights of the people of this country. The facilities of that station will be used to spread propaganda to lull the people to sleep while monopoly or concentrated greed takes unfair advantage of the country. The hope of freedom of speech is going to rest back in the little, free, independent radio stations in the country.<sup>151</sup>

Nevertheless, the amendment was not added to section 18 when it became section 315 of the 1934 Communications Act.<sup>152</sup> Senator Clarence Dill, coauthor of the 1927 and 1934 Acts, believed the FRC already had authority to require equal opportunity for fair discussion of public issues without adding a specific amendment.<sup>153</sup>

In 1938, the FCC reinforced its position that broad programming for the general public best served the public interest, rather than narrow propaganda supported by licensees. The Commission denied a license application from a fundamentalist religious group that indicated it would only air programming that supported its beliefs.<sup>154</sup> In its 1940 Annual Report, the FCC said broadcasters could decide which specific groups or individuals to allow on their stations, but serving the public interest meant furnishing “well-rounded rather than one-sided discussions of public questions.”<sup>155</sup>

In 1941, in what came to be known as the *Mayflower* statement, the FCC laid the foundation for what would become the Fairness Doctrine.<sup>156</sup> The Commission warned that a station in Boston must stop broadcasting editorials because “truly free radio cannot be used to advocate the causes of the licensee.”<sup>157</sup> The Commission said the public interest requires licensees to provide full and equal opportunity for presentation of all sides of public

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151. 75 CONG. REC. 3692 (daily ed. Feb. 10, 1932).

152. See 78 CONG. REC. 10988 (daily ed. June 9, 1934).

153. See H.R. REP. NO. 7716 (1933).

154. See Young People’s Ass’n for the Propagation of Gospel, 6 F.C.C. 178 (1938).

155. 6 FCC Ann. Rep. 55 (1940).

156. See *Mayflower Broad. Corp.*, 8 F.C.C. 333 (1940).

157. *Id.* at 340.

issues. “The public interest—not the private—is paramount.”<sup>158</sup> Many misinterpreted the decision as an outright ban on editorials.<sup>159</sup>

In 1945 the Commission clarified its 1929 *Great Lakes*<sup>160</sup> Statement and broadcasters’ obligation to present important public issues. The FCC said it is “the duty of each licensee to be sensitive to the problems of public concern in the community and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof.”<sup>161</sup> The Commission also explained that it would not require balance in individual programs. Rather, it would look at fairness in stations’ overall programming. The FCC’s 1946 Public Service Responsibility of Broadcast Licensees (the “Blue Book”) suggested program guidelines for broadcasters to follow to ensure they served the public interest.<sup>162</sup> It emphasized the affirmative duty of broadcasters to present controversial public issues.<sup>163</sup> Broadcasters who attempted to avoid problems by avoiding controversial community issues were not serving the public interest.<sup>164</sup>

## B. Formalizing Fairness

The 1949 Report on Editorializing by Broadcasting Licensees concluded that licensees could express their views in editorials.<sup>165</sup> However, such editorials were to be just one part of the larger duty to devote reasonable time to differing views. The Report also established the Fairness Doctrine as an FCC policy.<sup>166</sup> Broadcasters were required to present controversial issues of public importance and allow reasonable opportunity for opposing views.<sup>167</sup> The FCC said a reasonableness standard would be used for judging stations’ compliance—there could be

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158. *Id.*

159. See STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 41 (1978). “The National Association of Broadcasters, local stations, labor groups, and individual citizens opposed the supposed ban on editorializing as an invasion of free speech, and there were demands from all quarters for clarification of exactly what the *Mayflower* decision meant.” Commissioner Robert F. Jones contended the *Mayflower* Doctrine “fully and completely” prohibited licensees from speaking “in behalf of any cause.” See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1259 (1949).

160. See *Great Lakes Broad. Co.*, 3 F.R.C. Ann. Rep. 32 (1929).

161. *United Broad. Co.*, 10 F.C.C. 517 (1945).

162. See FCC, *Public Service Responsibility of Broadcast Licensees March 7, 1946*, DOCUMENTS OF AMERICAN BROADCASTING 151, 152 (Frank J. Kahn ed., 1973).

163. *Id.*

164. In 1976 the FCC reprimanded a West Virginia radio station for refusing to air programming on strip mining even though it was an important controversial community issue. The station itself had cited development of new industry, and air and water pollution as issues important to its listeners. See Rep. Patsy Mink, 59 F.C.C. 2d 987 (1976).

165. 13 F.C.C. 1246 (1949).

166. *Id.*

167. *Id.* at 1249.

no strict formula. Going beyond section 315 and section 312 access and fairness rules, which applied to candidates only, the Fairness Doctrine extended fairness and access to noncandidate members of the public for the discussion of any issues of public importance. Broadcasters were required to play a “conscious and positive role” in presenting opposing views, and make their facilities “available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise.”<sup>168</sup>

In 1959 Congress appeared to codify the Fairness Doctrine as part of section 315 of the Communications Act.<sup>169</sup> Section 315 (a) (4) on-the-spot news exemption contained the following passage:

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.<sup>170</sup>

The FCC explained in a 1963 letter to Congressman Oren Harris that the Fairness Doctrine had become a “specific statutory obligation.”<sup>171</sup> This 1959 amendment seemingly elevated the doctrine from an FCC policy to statutory law.

In 1964, the FCC issued a Fairness Primer which reminded broadcasters that they were free to editorialize as long as they complied with the Fairness Doctrine.<sup>172</sup> It included summaries and explanations of more than ten years of FCC fairness rulings and a section on personal attacks.<sup>173</sup> The Commission issued formal rules on personal attacks and political editorials in 1967.<sup>174</sup> The personal attack rule required broadcasters to notify and offer a reasonable response time within one week to non-candidates or groups who were attacked during presentations of controversial issues of public importance.<sup>175</sup> Section 315 already

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168. *Id.* at 1248–50.

169. 47 U.S.C. § 315(a)(4) (2002).

170. *Id.*

171. Letter to Oren Harris, 40 F.C.C. 582, 583 (1963).

172. *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (July 25, 1964).

173. *Id.*

174. *See* FCC, REPORT AND ORDER ON THE PERSONAL ATTACK RULES, 32 Fed. Reg. 10303, 10305 (July 12, 1967).

175. *Id.*



provided response opportunities for candidates who were attacked by their opponents. The political editorial rules required licensees who endorsed or opposed candidates in editorials to notify the candidates and offer a reasonable opportunity for them or their representatives to respond. The Commission stressed that political editorials and personal attacks were not prohibited, but stations must comply with the notification and response requirements.<sup>176</sup>

The Fairness Doctrine was challenged by a Pennsylvania radio station and upheld by the U.S. Supreme Court in 1969 in *Red Lion Broadcasting v. FCC*.<sup>177</sup> The station, owned by Red Lion, aired a *Christian Crusade* broadcast in 1964 that included a personal attack on author Fred J. Cook. Reverend Billy James Hargis claimed that Cook, who wrote a book titled *Barry Goldwater—Extremist of the Right*, had worked for a Communist publication and was attempting to smear Barry Goldwater. Red Lion denied Cook's request for time to reply.<sup>178</sup> He complained to the FCC, which told Red Lion it must give Cook reply time under its Fairness Doctrine obligations.<sup>179</sup> Red Lion appealed, arguing the doctrine and its personal attack rules were not authorized by Congress and furthermore violated the First Amendment.<sup>180</sup> The Supreme Court disagreed, holding that because of spectrum scarcity, the personal attack rules and the Fairness Doctrine did not violate the First Amendment rights of broadcasters.<sup>181</sup> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.<sup>182</sup>

The Court stressed the First Amendment rights of the viewing and listening public over the rights of the broadcasters:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.<sup>183</sup>

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176. *Id.* at 10303. *See also*, SIMMONS, *supra* note 15 at 76–77.

177. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

178. FRED J. COOK, *BARRY GOLDWATER – EXTREMIST OF THE RIGHT* (1964).

179. *Red Lion*, 395 U.S. at 389.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 390.

The Court also said that the Fairness Doctrine and the personal attack and political editorializing rules were a legitimate exercise of congressionally delegated authority.<sup>184</sup> The personal attack and editorial rules were later codified as federal statutory law in 1976.<sup>185</sup>

The FCC issued another Fairness Report in 1974.<sup>186</sup> Echoing the 1949 Editorializing report,<sup>187</sup> it reminded broadcasters of their duty to air controversial issues of public importance and allow opportunity for opposing views. The Commission said that providing fairness was “the single most important requirement of operation in the public interest—the *sine qua non* for grant of a renewal of license.”<sup>188</sup> The report also explained that the FCC would not actively monitor stations for fairness violations. Rather, it would rely on citizen complaints; specifically, only complaints containing clear evidence of violation would be forwarded to stations. The FCC noted that only ninety-four of twenty-four hundred complaints it received in 1973 were forwarded to stations for their comments. The report explained that in order to determine when an issue was an important public issue, stations should measure the degree of attention paid to an issue by government officials, community leaders, and the media.

The Fairness Doctrine was unpopular with many broadcasters and some scholars. In addition to First Amendment challenges, such as the ones put forth in *Red Lion*, critics have argued that the Fairness Doctrine was excessively vague and impossible to fairly enforce.<sup>189</sup> Others argued that politicians and supporters used it as a tool to intimidate and manipulate stations into not airing opposing programs.<sup>190</sup> The deregulation philosophy<sup>191</sup> of the Reagan-era FCC of the 1980s further encouraged attacks by the opponents of the Fairness Doctrine.

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184. *Id.* at 386.

185. See C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1976).

186. See FCC, 1974 FAIRNESS REPORT, 48 F.C.C. 2d 1 (1974).

187. See REPORT ON EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246 (1949).

188. 1974 Fairness Report, *supra* note 186, at 10, quoting Comm. for the Fair Broad. of Controversial Issues, Memorandum Opinion and Order, 25 F.C.C. 2d 283 (1970).

189. See THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 240 (1994). The authors, who advocate strong newspaper-style First Amendment rights for broadcasters, concluded the following: “We believe that, notwithstanding those rather impressive credentials as a symbol of virtuous aspirations, the Fairness Doctrine will not and cannot work.”

190. See ROWAN, *supra* note 39, at 189; see also LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 142–61 (University of California Press 1987).

191. FCC Chairman Mark Fowler (1981–1987) observed in a 1981 magazine interview that television is just another appliance, and characterized it as nothing more than “a toaster with pictures.” See *Voices of Reason*, REASON MAGAZINE (Dec. 1, 1998), <http://reason.com/archives/1998/12/01/voices-of-reason/4>. See also Peter J. Boyer, *Under Fowler, F.C.C. Treated*

### C. The Demise of the Fairness Doctrine

In 1985, the FCC issued another Fairness Report.<sup>192</sup> A decade after calling the Fairness Doctrine indispensable—the *sine qua non* for license renewal—the FCC now said it was obsolete. The Commission noted that the increased number of broadcast stations and cable channels in the years since *Red Lion* (a more than 40% increase in the number of radio and television stations)<sup>193</sup> had produced sufficient viewpoint diversity to ensure fairness. The “multiplicity of voices in the marketplace”<sup>194</sup> would naturally produce fairness. Nevertheless, the FCC did not immediately repeal the Fairness Doctrine.

Confusion remained about whether the Doctrine was codified as part of section 315 or merely an FCC policy. However, following a 1986 opinion from the D.C. Circuit Court of Appeals, the FCC eliminated Fairness Doctrine requirements in 1987.<sup>195</sup> In *TRAC v. FCC*, the court held that, despite the language of the 1959 amendment to section 315, the Fairness Doctrine was not mandated by the Communications Act.<sup>196</sup> The 1959 amendment only ratified “the Commission’s long-standing position that the public interest standard authorizes the fairness doctrine.”<sup>197</sup> The Fairness Doctrine was an FCC policy, which the FCC could eliminate if it determined it no longer served the public interest.<sup>198</sup> The D.C. Circuit upheld the FCC decision to eliminate the doctrine. The court agreed that it chilled speech and was unnecessary.<sup>199</sup>

The 1967 personal attack and editorial rules—providing response opportunities for individuals attacked during a broadcast, or opponents of candidates endorsed by stations—remained, but they too were eliminated in 2000 after the FCC failed to provide the D.C. Circuit with a public interest rationale for them.<sup>200</sup> The court ordered the Commission to repeal both the personal attack and political editorial rules.<sup>201</sup> Though the Fairness Doctrine was not enforced after 1987, it was not formally eliminated until 2011. On August 22 of that year FCC Chairman Julius Genachowski

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*TV as Commerce*, N.Y. TIMES, Jan. 19, 1987, <http://www.nytimes.com/1987/01/19/arts/under-fowler-fcc-treated-tv-as-commerce.html>.

192. See 1985 FAIRNESS REPORT, *supra* note 27.

193. See *id.* at 202.

194. *Id.* at 147.

195. Television News Dirs. Ass’n. (“TRAC”) v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

196. *Id.*

197. *Id.* at 517–518.

198. *Id.* at 518.

199. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

200. See Radio-Television News Directors Ass’n v. FCC, 229 F.3d 269 (D.C. Cir. 2000).

201. *Id.*

announced the elimination of “eighty-three outdated and obsolete media-related rules, including Fairness Doctrine regulations.”<sup>202</sup>

As the twenty-first century began, section 312 and section 315 access for candidates and Zapple access for candidate supporters remained, but the Fairness Doctrine and its key corollaries were deemed to no longer serve the public interest. Strong protections have ensured candidate access and fairness over the past decades. Candidates and their supporters today enjoy equal opportunity access with no censorship, and federal candidates have a near absolute right of access with guaranteed minimum advertising rates. Noncandidate members of the public, on the other hand, have not fared as well.

For nearly forty years, the Fairness Doctrine was in place for the benefit of citizens to encourage fair and open discussion of important public issues. However, the growth of mass media, along with a “television-is-a-toaster”<sup>203</sup> deregulation philosophy and a reinterpretation of section 315 (a)(4), led to the doctrine’s demise in the 1980s. The explosive growth of conservative talk radio in the 1980s and 1990s led to calls from some progressives for resurrection of the Fairness Doctrine.<sup>204</sup> Nevertheless, the FCC has not attempted to reestablish the doctrine and attempts by Congress have been vetoed or died from lack of support.<sup>205</sup>

## VI. Discussion: Equality for Everyone

As noted above, the traditional rationale for broadcast fairness and access rules has been spectrum scarcity and the public nature of the

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202. FCC, *FCC Chairman Genachowski Continues Regulatory Reform to Ease Burden on Businesses; Announces Elimination of 83 Outdated Rules*, FEDERAL COMMUNICATIONS COMMISSION WEBSITE (Aug. 22, 2011), <http://www.fcc.gov/document/genachowski-announces-elimination-83-outdated-media-rules>. See also, *FCC Axes Fairness Doctrine, Other Old Media Regulations*, FIRST AMENDMENT CENTER (Aug. 23, 2011) <http://www.firstamendmentcenter.org/fcc-axes-fairness-doctrine-other-old-media-regulations>.

203. See 67 CONG. REC. 5483 (daily ed. Mar. 12, 1926).

204. A study by the Center for American Progress concluded that by 2007 (twenty years after the FCC stopped enforcing the Fairness Doctrine), 91% of the total weekday talk radio programming on the 257 news/talk radio stations owned by the top five commercial station owners was conservative. Nine percent was classified as progressive. See *The Structural Imbalance of Political Talk Radio*, CENTER FOR AMERICAN PROGRESS & FREE PRESS (June 21, 2007), [http://www.americanprogress.org/wp-content/uploads/issues/2007/06/pdf/talk\\_radio.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2007/06/pdf/talk_radio.pdf).

205. In 1987 both the House and Senate passed a bill to restore the Fairness Doctrine only to have it vetoed by President Reagan. See Nat Hentoff, *Policing the First Amendment*, FIRST AMENDMENT CENTER (Jan. 31, 2007), available at <http://www.firstamendmentcenter.org/policing-the-first-amendment>. Similar bills failed in 1993 and 2007. See Jim Puzzanghera, *Fairness Doctrine Debate Ignites Heated Discussion*, CHICAGO TRIBUNE, July 30, 2007, [http://articles.chicagotribune.com/2007-07-30/business/0707290144\\_1\\_fairness-doctrine-controversial-issues-kmet-fm-in-los-angeles](http://articles.chicagotribune.com/2007-07-30/business/0707290144_1_fairness-doctrine-controversial-issues-kmet-fm-in-los-angeles).

spectrum.<sup>206</sup> The electromagnetic spectrum is a finite, publically owned resource. As such it is subject to government regulation. Those who enjoy the broadcast privilege must follow public interest regulations, including the political rules. When the Fairness Doctrine was eliminated in 1987, the FCC and the Court of Appeals cited growth in the number and diversity of media outlets, and First Amendment concerns, as the key reasons it was no longer needed. If one accepts this rationale for eliminating the Fairness Doctrine, one must then question how this rationale can support the continued existence of the candidate access and fairness rules. Are the section 315 and section 312 candidate rules still needed? In order to address that question it is necessary to briefly revisit key points of the FCC's Report and its reasons for eliminating the Fairness Doctrine.

#### **A. Rationale for Eliminating the Fairness Doctrine**

Citing its 1985 Report, in 1987 in *Syracuse Peace Council*,<sup>207</sup> the FCC said spectrum scarcity was no longer a relevant issue due to the growth of diverse sources of information and viewpoints in the years since *Red Lion* was decided. It noted that in 1987 there were 1,315 television stations (54% increase) and 10,128 radio stations (57% increase).<sup>208</sup> The Commission concluded that spectrum scarcity was no different from limits on newsprint and ink, or any other scarce limited resources.<sup>209</sup> The Commission also pointed to the growth of cable and satellite communication to justify its argument that “government regulation such as the fairness doctrine is not necessary to ensure that the public has access to the marketplace of ideas.”<sup>210</sup>

The FCC also argued that the Fairness Doctrine led to inappropriate government intrusion on the editorial discretion of broadcast journalists requiring regulators to “second guess” their decisions<sup>211</sup> In short, the 1987 FCC concluded the Fairness Doctrine was an unnecessary burden on broadcasters that infringed their First Amendment rights. It was no longer part of serving the public interest—the *sine qua non* of a license renewal.

#### **B. Applying the Rationale to the Candidate Rules**

There were more media outlets in 1985 than there were when *Red Lion* was decided in 1969. With the growth in cable and satellite

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206. See *NBC v. United States*, 319 U.S. 190, 216 (1943), and *Red Lion Broad. v. FCC*, 395 U.S. 367.

207. See *Syracuse Peace Council*, 2 FCC Rcd. 5043, 5054 (Aug. 4, 1987).

208. See *id.* at 5051.

209. See *id.* at 5055.

210. *Id.* at 5051.

211. *Id.* at 5051–52.

communication, and the Internet, there are obviously many more media voices in 2013. Even with the rapid ownership consolidation<sup>212</sup> following passage of the 1996 Telecommunications Act,<sup>213</sup> there are vastly more media choices available than in 1969. Following the reasoning of the 1985 Fairness Report, individual broadcast stations no longer need to cover public issues and present opposing views because the sheer number of diverse media outlets ensure fairness in the larger “information marketplace.”<sup>214</sup> Members of the public should naturally receive diverse viewpoints on controversial public issues from the numerous media sources available to them. The further expansion of media since the 1980s, social media most recently, has put even more information at the public’s fingertips. Opponents of the Fairness Doctrine would likely argue that citizen activists or individuals attempting to build public support for a cause or issue have no need for Fairness Doctrine-type access to broadcast stations when they have these twenty-first century media outlets at their disposal. However, political candidates and their staffs have access to these same new media. Why do they still need sections 315 and 312 access and fairness protection?

If candidate A makes a claim on his or her website or Facebook page, or during a paid advertisement—broadcast or otherwise—candidate B can counter that claim through a wide range of media without needing to invoke the broadcast access/fairness rules. As the 1985 Report explained, the information marketplace ensures fairness. If desirability of the Fairness Doctrine must be considered in the context of the twenty-first century information marketplace, why are the candidate rules stuck in decades long past? The language of section 315 comes from the 1920s and section 312 access was created in 1971.

One might argue that, despite the numerous information sources available today, many people still rely on local over-the-air broadcast stations for news and other information. Former FCC commissioner Michael Copps noted that as recently as 2007, “Nearly 60% of adults watch local TV news each day—it remains the nation’s most popular information source.”<sup>215</sup> The FCC’s public service campaign<sup>216</sup> to educate viewers about

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212. Between 1996 and 2002 the number of U.S. commercial radio stations increased 5.4% while the number of station owners decreased 34%. See George Williams, *Review of the Radio Industry, 2007*, FEDERAL COMMUNICATIONS COMMISSION WEBSITE (2007) at 5, <http://www.fcc.gov/ownership/studies.html>. One observer noted, “[o]utlet diversity should not be presumed to guarantee viewpoint diversity in a highly concentrated industry in which profit drives the content chosen,” Ann L. Plamondon, *Proposed Changes in Media Ownership Rules*, 25 COMM. & L. 47, 93 (2003).

213. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

214. *Supra* note 27.

215. Michael J. Copps, *supra* note 23.

the 2009 transition of over-the-air television from analog to digital also illustrates the value the government still places on free broadcast television and its important role in keeping citizens informed. In light of this, logic suggests that the candidate broadcast fairness rules are still needed to keep citizens informed. However, this line of reasoning also strongly supports requiring stations to make a good faith effort to inform those same citizens by presenting important public issues with opportunities for opposing views—a Fairness Doctrine. If the U.S. information marketplace has outgrown Fairness Doctrine rules then it has also outgrown the section 315 and section 312 candidate rules.

One might also argue that broadcast media are different from satellite, Internet and print media in that they utilize the finite public broadcast spectrum and are subject to licensing and tighter regulation, such as the candidate rules. After all, this is the foundation for the public interest standard and all U.S. broadcast regulation.<sup>217</sup> But again, this same argument supports enforcing Fairness Doctrine rules.

The FCC also argued the Fairness Doctrine violated the First Amendment and infringed on broadcast journalists editorial discretion.<sup>218</sup> Broadcasters do have First Amendment rights,<sup>219</sup> but not to the same extent as print media, cable or the Internet.<sup>220</sup>

Nevertheless, in the 1985 Fairness Report the Commission was concerned with protecting the rights of broadcasters to control the content of their stations, even suggesting broadcast speech be elevated to the same First Amendment standard enjoyed by print media.<sup>221</sup> The Commission frequently used the term “broadcast journalists” when referring to broadcasters’ right to be free from “intrusive government regulation.”<sup>222</sup> While there can be no simple definition of journalism, it is likely the Commission’s conception of broadcast journalism in 1985 was significantly different from the reality of the entertainment-driven

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216. See *Digital Television*, FEDERAL COMMUNICATIONS COMMISSION WEBSITE, [www.fcc.gov/digital-television](http://www.fcc.gov/digital-television) (last visited Aug. 5, 2013).

217. See *NBC v. United States*, *supra* note 3, *Red Lion Broad. v. FCC*, *supra* note 2, and *FCC v. Pacifica*, *supra* note 33.

218. *Supra* note 5, at 5051–52.

219. See Communications Act of 1934, 47 U.S.C. § 326 (1948).

220. See *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (prior restraints on print media are presumed to be unconstitutional); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (right-of-reply law violated First Amendment rights of newspaper); *Cruz v. Ferre*, *supra* note 33 (cable television has more First Amendment protection than broadcast); *Reno v. ACLU*, 521 U.S. 844 (1997) (internet indecency restrictions in the Communications Decency Act, 47 U.S.C. § 223, violate the First Amendment).

221. See 1985 Fairness Report, *supra* note 27, at 155.

222. *Id.* at 148.

television programming<sup>223</sup> and the emotionally charged political talk radio broadcasting prevalent in 2013.

The Commission characterized the Fairness Doctrine as, “a regulation which directly affects the content of speech,” and “significantly impairs the journalistic freedom of broadcasters.”<sup>224</sup> In short, the 1985 Report argued the Fairness Doctrine infringed broadcasters’ editorial discretion and First Amendment rights because it required them to present controversial public issues and provide reasonable opportunities for opposing views. Conversely, the FCC and the courts have said it is in the public interest and not an infringement of broadcasters’ editorial discretion and First Amendment rights to force them to air candidates’ political ads containing racial slurs<sup>225</sup> and images of aborted fetuses<sup>226</sup> as required under section 315 and section 312 candidate rules. Enforcing the Fairness Doctrine was infringing broadcasters’ rights but requiring them to repeatedly broadcast outrageous candidate messages is not. The inconsistency is staggering.

## VII. Conclusion

In eliminating the Fairness Doctrine broadcast regulators abandoned a fundamental public interest principle that had been in place for five decades. One would expect that such a dramatic shift would be driven by significant change in the underlying rationale. The Commission cited the changing media landscape—more media outlets and diversity—and First Amendment concerns as its key justifications. However, as noted frequently in this article, those justifications for eliminating the Fairness Doctrine equally justify eliminating the candidate fairness rules. The public interest contradiction is obvious.

As of 2013 the section 315 and section 312 candidate fairness rules remain in place. As political spending continues to increase to record levels,<sup>227</sup> it is likely the public will see and hear more and more messages from candidates broadcast over the public’s airwaves. Political candidates for federal, state, or local office should be on the same First Amendment footing as members of the general public—no more or no less. This could be achieved two ways. First, Congress—with input from the FCC and broadcasters—could draft and enact a new Fairness Doctrine that clearly

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223. For an account of the origins of the decline of network television journalism in the 1980s, see JOE FOOTE, LIVE FROM THE TRENCHES: THE CHANGING ROLE OF THE TELEVISION NEWS CORRESPONDENT (1998).

224. 1985 Fairness Report *supra* note 27, at 156.

225. Complaint by Atlanta NAACP, Atlanta, GA, *supra* note 66.

226. See Daniel Becker v. FCC, *supra* note 35.

227. See *supra* note 7.



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establishes the doctrine as statutory law and that also takes into account the media landscape as it exists in 2013 and with an eye to the future. Or second, Congress could simply eliminate section 315 and section 312 candidate fairness rules using the same justifications used to eliminate the Fairness Doctrine in 1987.

It is past time for broadcast regulators to recognize the hypocrisy and act. Intellectual honesty and the public interest demand it.