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FAIRNESS REGULATION: AN IDEA WHOSE TIME HAS GONE

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Regulation that promotes constitutional values represents a particularly honorable governmental intention. Affirmative facilitation of equal protection goals has been employed, for instance, to remedy some of the consequences of past discrimination.[1] Impairments of the right to vote have been dismantled, and fifteenth amendment concerns advanced, pursuant to the Voting Rights Act.[2] On its face, "fairness" regulation of the broadcast media may seem a similarly fetching methodology for promoting constitutional interests. The fairness doctrine[3] evolved as a mechanism for promoting the fundamental first amendment goal of content diversity[4] in what has become the dominant mass medium.[5] Given a modern media industry that is heavily concentrated[6] and affords limited opportunities for individual participation in the trade of ideas,[7] fairness regulation has worked to retain some of the imagery if not substance of a soapbox society.[8]

Unlike policies that promote fourteenth amendment and fifteenth amendment values,[9] the fairness doctrine was promulgated without the force

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1. *See, e.g.*, Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421, 448 (1986).

2. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966). The Voting Rights Act has attracted increasing criticism, however, for subverting its own purposes. Court ordered districting schemes calculated to ensure safe minority seats actually may dilute minority representation in the broader political system. *See* A. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING (1987).

3. The fairness doctrine, until its recent abandonment, imposed upon broadcasters a two-part obligation consisting of a duty to present controversial issues of public importance and a responsibility to provide contrasting viewpoints. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969). The FCC abolished the fairness doctrine in 1987. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. 5043 (1987). Companion principles, including the personal attack and political editorial rules, endure at least for the time being. *See* 47 C.F.R. § 73.1920 (1987); Communications Act of 1934, § 315, 47 U.S.C. § 315 (1982).

4. *See* In The Matter of the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 7 (1974) [hereinafter Fairness Report].

5. In 1986, 98% of the nation's homes had at least one television, and 99% had at least one radio. *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1987, No. 906, at 531 (1987) [hereinafter STATISTICAL ABSTRACT 1987]. The average household had nearly two televisions and over five radios. *Id.*

6. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-54 (1974); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 182-92 (1973) (Brennan, J., dissenting).

7. *See Miami Herald*, 418 U.S. at 248-54; *CBS*, 412 U.S. at 182-92.

8. In favoring a direct right of public access as an even stronger diversification mechanism, Justice Brennan noted that "separation of the advocate from the expression of his views. . . diminished the effectiveness of that expression." *CBS*, 412 U.S. at 189.

9. *See, e.g., supra* notes 1-2 and accompanying text.

or authority of a particularized constitutional enabling provision.[10] The absence of such a specific linkage alone would not subvert the viability of the fairness doctrine if the provision actually served the purposes for which it was constructed. Even apparent inconsonance with constitutional text need not be fatal, as evidenced by the operation of affirmative action concepts,[11] provided constitutional interests and ends are accurately discerned and serviced. The fairness principle in practice, however, has subverted rather than promoted first amendment values.[12]

Recognizing that the fairness doctrine encouraged bland rather than diverse programming, the Federal Communication Commission ("FCC") abolished it in 1987.[13] Abandonment of the doctrine represented official departure from a mechanism that the FCC had constructed and, despite widespread criticism, persistently had endorsed.[14] Having conceived the fairness doctrine as a device for encouraging balanced presentation of controversial public issues,[15] the FCC eventually acknowledged the validity of criticism that the fairness doctrine deterred rather than facilitated coverage of those concerns.[16] Government could not enforce the duty to raise controversial issues without intolerably intruding upon the editorial process.[17]

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10. The fourteenth and fifteenth amendments empower Congress to enforce their guarantees "by appropriate legislation." U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

11. Affirmative action policies, for instance, are calculated to promote values tied to the constitutional guarantee that no State shall "deny to any person . . . equal protection of the laws," U.S. CONST. amend. XIV, § 1. Affirmative hiring practices are designed to offset past racial discrimination by employing a system of preferences, despite specific statutory language that literally prohibits racial favoritism. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 201-02 (1979) (holding that Title VII of Civil Rights Act of 1964 does not prevent employer from adopting affirmative action plan).

The fairness doctrine is at literal odds with a "freedom . . . of the press" guarantee directed toward disseminators rather than recipients of information. Policies seeming to deviate from constitutional text may be tolerable, however, if in accord with an underlying spirit and purpose that includes content diversification in the information marketplace. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1179 (1986).

12. *See infra* notes 31-46 and accompanying text. For further discussion of how the fairness doctrine undermined the interests it was supposed to serve, see, for example, In The Matter of Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 159-88 (1985) [hereinafter Fairness Report of 1985].

13. *See In re* Complaint of Syracuse Peace Council, 1 F.C.C. Rcd. 5043 (1987); *see also* In the Matter of Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligation of Broadcast Licensees, 2 F.C.C. Rcd. 5272 (1987) [hereinafter Fairness Alternatives].

14. [O]ld age [did not] secure "the fairness doctrine from the tarnish of corrosive controversy." In the Matter of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691, 703 (1976) (Comm'r Robinson dissenting) [hereinafter Reconsideration of the Fairness Doctrine]. Despite widespread criticism of fairness regulation, even after its constitutionality was upheld, the FCC until recently continued to endorse it. *See id.;* Fairness Report, *supra* note 4.

15. *See* Red Lion Broadcasting Company v. FCC, 395 U.S. 367, 375-78 (1969).

16. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5049-50 (1987).

17. *See infra* notes 39-46 and accompanying text.

For the most part, the FCC never applied the fairness doctrine forcefully.[18] The regulation nonetheless lurked as an intimidating presence for broadcasters whose capacity to operate rested upon a government license, and who were aware that few administrations had resisted the temptation to try to manipulate it for political purposes.[19]

Given the poor constitutional and practical record of fairness regulation, official efforts to reintroduce it are disquieting. The purpose of this essay is to (1) examine the nature and failings of the fairness doctrine; (2) consider arguments for its renewal; and (3) explain why attempted resurrection of the fairness doctrine should be constitutionally doomed.

I. The Nature and Failings of Fairness Regulation

The concept of "fairness," as a governing principle of broadcasting, predates the FCC. The original and enduring premise for such regulation was that the public interest demanded officially created opportunities for competing views on issues of public importance.[20] The fairness doctrine thus was conceived and administered as a mechanism for promoting balanced programming.[21] As it evolved more formally, the doctrine imposed upon broadcasters an affirmative obligation to provide reasonable amounts of time for coverage of public issues[22] and a companion duty to ensure opportunities for contrasting views.[23]

Fairness regulation eventually was challenged as an invasion of broadcasters' first amendment rights.[24] In *Red Lion Broadcasting Co. v. FCC*,[25] however, the United States Supreme Court was concerned less with unfettered editorial autonomy than it was with the implications of a purportedly scarce medium. The Supreme Court noted that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate,"[26] the danger exists that some views and ideas might not reach the citizenry.[27] Pursuant to that apprehension, the *Red Lion* Court identified a public right "to receive suitable access to social, political, esthetic, moral and other ideas and experiences"[28] and elevated the right above the first

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18. *See infra* notes 37-39, 47 and accompanying text.

19. *See infra* note 46.

20. *See* Great Lakes Broadcasting Company, 3 FRC Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

21. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377-389-91 (1969).

22. *See* Fairness Report, *supra* note 4, at 7.

23. *See id.*

24. *See Red Lion*, 395 U.S. at 386.

25. 395 U.S. 367 (1969).

26. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969).

27. Given the perceived possibility, attributed to scarcity of broadcasting frequencies, that some views might not reach the public, the Supreme Court found the first amendment did not preclude the government from insisting that broadcasters function as fiduciaries who would present diverse views and voices. *Id.* at 389.

28. *Id.* at 390. By its terms, the first amendment protects speaking and publishing,

amendment interests of broadcasters.[29] The Supreme Court and the FCC presumed that the fairness doctrine would ensure comprehensive and balanced coverage of public issues.[30]

The fairness doctrine, however, proved to deter rather than facilitate robust and unfettered debate.[31] Regulatory assumptions, for instance, failed to account for such industrial realities as the tying of profitability to market share. Profit optimization in radio and television necessitates audience maximization and thus programming strategies catering largely to mainstream tastes.[32] Moreover, orthodox rather than provocative controversy was facilitated as broadcasters hedged coverage in a fashion that would minimize the risk of a fairness complaint.[33] Sentiment that presentation of radical, adventurous or unpopular views would alienate the audience, as well as advertisers, discouraged expression of these views.[34] Presentation of controversial issues was chilled further by the prospect of administrative, reputational, and legal costs in the event of a fairness complaint.[35] The compilation of such concerns weighed against presentation of meaningful editorials and political issue advertising in the electronic forum.[36]

The fairness doctrine, even to the extent not vigorously enforced, undermined not only its policy objectives but core first amendment interests. By directing licensees to cover controversial issues and ensure that their presentations were balanced, the FCC reserved for itself significant content-based control over a prominent sector of the press. In administering the fairness doctrine, the FCC probably erred in favor of broadcasters by tending to assume good faith licensee judgment and discretion.[37] The finding of a fairness doctrine violation[38] was the exception in a system which allowed broadcasters considerable latitude "in selecting the manner of coverage, the

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activities that relate to informational sources and dissemination. The Court identified a "collective right to have the medium function consistently with the ends and purposes of the first amendment," which were defined primarily in the interest of the viewing and listening public. *Id.*

29. Thus, "the right of the viewers and listeners, not the right of the broadcasters, [became] paramount." *Id.*

30. *See* Fairness Report, *supra* note 4, at 7.

31. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5055 (1987).

32. *See* Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation,* 60 TEX. L. REV. 207, 229 (1982); Bazelon, *FCC Regulation of the Telecommunication Press,* 1975 DUKE L.J. 213, 231-32. Justice Brennan has noted that broadcasters assume "angry customers are not good customers and . . . it is simply 'bad business' to espouse—or even to allow others to espouse—the heterodox or the controversial." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 187 (1973) (Brennan, J., dissenting).

33. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. at 5049.

34. *See supra* note 32.

35. *See In re Complaint* of Syracuse Peace Council, 2 F.C.C. Rcd. at 5049-50.

36. *See id.* at 5050.

37. *See* Fairness Report, *supra* note 4, at 8, 23.

38. Of 4,280 fairness complaints received in 1973 and 1974, for instance, the FCC made findings against licensees in only 19 instances. *See* Reconsideration of the Fairness Report, *supra* note 14, at 709 (Comm'r Robinson dissenting).

appropriate spokesmen, and the technique of production and presentation."[39]

Rather than making fairness regulation more palatable, the FCC's deference further evinced the doctrine's inadequacy and undesirability. If not enforced, the fairness doctrine was a regulatory charade. To the extent the FCC might administer the fairness doctrine, however, the regulation was capable of profound constitutional treachery. The fundamental constitutional problem with the fairness doctrine was "that someone other than the speaker . . . with far-reaching enforcement powers . . . ha[d] the task of determining content."[40] The Supreme Court already had authorized the FCC to be more than a "traffic officer, policing the engineering and technical aspects of broadcasting."[41] Pursuant to the scarcity rationale, the FCC was allowed to concern itself with "program format and the kinds of programs broadcast by licensees."[42]

The Supreme Court was inclined to countenance the FCC's use of wide-ranging enforcement powers,[43] moreover, if broadcasters proved to be timorous in their programming.[44] Given the overarching interest of broadcasters in self-preservation and consequent susceptibility to "regulation by lifted eyebrow,"[45] the mere presence if not use of intimidating enforcement devices constituted a threat to editorial autonomy and press independence. The fairness doctrine enabled "administration after administration to toy with radio or TV in order to serve . . . sordid or . . . benevolent ends."[46]

To minimize the dangers of official content control, the FCC, as noted previously, generally adhered to a policy of deference to licensee discretion.[47] Administrative leniency and restraint, rather than diminishing the adverse consequences and potential of fairness regulation, further demonstrated its futility. "Fairness" could not meaningfully promote diversity unless vigorously enforced. Aggressive implementation, however, translated into intolerable government control of the editorial process.

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39. Fairness Report, *supra* note 4, at 16.

40. Reconsideration of the Fairness Report, *supra* note 14, at 707-08.

41. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943).

42. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 395 (1969).

43. Violation of the Communications Act of 1934 or rules promulgated thereunder may result in revocation of a broadcaster's license, short-term renewal, nonrenewal or fine. *See* Communications Act of 1934, §§ 307(d), 312(b), 47 U.S.C. §§ 307(d), 312(b) (1982).

44. *See Red Lion,* 395 U.S. at 395.

45. Robinson, *The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67, 119 (1967). An informal inquiry or expression of official concern may have a profound chilling effect upon the creativity and flexibility of an industry dependent upon official authorization of its existence. *See id.* at 119-20.

46. *See* S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 219-20 (1978) (discussing manner in which fairness regulation invited misuse by several presidential administrations); *see also* Fairness Report of 1985, *supra* note 12, at 192-94.

47. Balancing what it perceived as two evils, the FCC concluded that "further government intrusion is less desirable than the possibility of occasional licensee lapses." *In re* Complaint of Public Communication, Inc., 50 F.C.C.2d 395, 401 (1974).

The Supreme Court and the FCC, in determining that scarcity was a problem in broadcasting, essentially had reordered first amendment interests as a calculated strategy for promoting first amendment values.[48] Official judgment eventually began to acknowledge the wisdom of fairness critics, however, as the Court invited the FCC to reexamine the foundation of and need for the fairness doctrine.[49]

Despite the Supreme Court's intimation that it might look favorably upon administrative erasure of the fairness doctrine, and an appellate court ruling that the provision was not justified by scarcity or mandated by statute,[50] the FCC originally delayed action pending possible congressional action.[51] Congress, in fact, subsequently acted to codify the fairness doctrine.[52] After President Reagan vetoed the measure,[53] however, the FCC voted to abandon the fairness doctrine.[54]

The FCC, having noted the practical failings and constitutional dangers of mandated fairness,[55] concluded that the scarcity premise no longer applied to the broadcast medium.[56] It further determined that first amendment goals and principles would be served better by "extend[ing] to the electronic press the same first amendment guarantees that the print media have enjoyed since our country's inception."[57] A regulatory system of authoritative selection thus gave way, at least in part, to a marketplace system of autonomous selection.[58]

II. NEW DOGMA FOR A DISCREDITED PRINCIPLE

Official abandonment of the fairness doctrine did not settle the fairness controversy. Legislative response to the FCC's decision included sentiment

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48. The Supreme Court openly has acknowledged its construction of an "unusual order of first amendment values." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973).

49. When cable was still in a relatively infant stage, the Supreme Court noted that it "will afford increased opportunities for the discussion of public issues." *Id.* at 131. A decade later, the Court intimated its readiness to discard the scarcity rationale if it received a "signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters, 468 U.S. 364, 377 n.11 (1984).

50. *See* Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 3196 (1987).

51. *See* Fairness Report of 1985, *supra* note 12, at 1213-14.

52. *See* N.Y. Times, Aug. 5, 1987, at C26, col. 6.

53. *See id.,* June 21, 1987, at 1, cols. 4-5.

54. *See* Fairness Alternatives, *supra* note 13.

55. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5049-59 (1987); *see also* Fairness Alternatives, *supra* note 13, at 5275, 5293-94.

56. *See In re* Complaint of Syracuse Peace Council, 4 F.C.C. Rcd. at 5045-55.

57. *See F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision,* N.Y. Times, June 21, 1987, at 1, col. 6 (statement by FCC Chairman Patrick).

58. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. at 5055-57; Fairness Alternatives, *supra* note 13, at 5276, 5295.

that the agency was defying Congress' will.[59] Because congressional support for codification of the fairness doctrine had been widespread,[60] reenactment and presentation to a more sympathetic president are future possibilities. Fairness advocates continue to regard the doctrine as a critical methodology for ensuring propagation of pluralistic, especially minority, views.[61]

Those who would resurrect the doctrine assert that, despite a panoply of new information sources, the growth of broadcasting itself has been limited primarily to independent UHF stations that do not contribute significantly to diversity.[62] Fairness exponents note further that an increased number of signals overall has not necessarily expanded the number of signals originating locally.[63] New outlets regardless of source or origin, however, afford new options for receiving information. A focus upon type and location of signal introduces a concern that is too pinched to justify tampering with constitutional guarantees. It stretches the scarcity premise even further beyond limits of reason to address not just a particular category of media but subcategory of a specific medium. Even if structural diversity has not translated into rollicking viewpoint diversity,[64] first amendment goals would seem better facilitated by policy that is attuned to a broader reality and more obviously befriends unprompted editorial vitality.

The case for fairness regulation can rely upon some instances in which it undeniably proved to be socially beneficial. The FCC's determination that tobacco advertising had to be balanced by competing expression[65] engendered a proliferation of public service messages that graphically delineated the health hazards of smoking.[66] Such counterspeech is considered largely responsible for a decline in cigarette smoking among Americans.[67] The anti-smoking spots were so effective that the tobacco lobby itself was moved to favor a facially more oppressive total prohibition of broadcast cigarette advertising.[68]

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59. The chairman of the House Subcommittee on Telecommunications, for instance, characterized the FCC's abandonment of the fairness doctrine as "a 'rancid dish' served up by a Commission bent on defying the will of Congress." N.Y. Times, Aug. 5, 1987, at C26, col. 6.

60. *See supra* note 52 and accompanying text. Congress had voted to codify the fairness doctrine. *Id.*

61. Critics of the FCC's decision to abolish the fairness doctrine, for instance, assert that issues including women's rights, the health hazards of smoking, nuclear power plant safety and minority views would have received less prominent coverage without the requirements of the fairness doctrine. *See* N.Y. Times, Aug. 5, 1987, at C26, col. 6.

62. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5051 (1987).

63. *See* Fairness Alternatives, *supra* note 13, at 5291.

64. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. at 5051.

65. *See* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

66. *See* Capital Broadcasting, Inc. v. Mitchell, 333 F. Supp. 582, 587 (D.D.C. 1971) (Wright, J., dissenting), *aff'd,* 405 U.S. 1000 (1972).

67. *See id.* at 587-89.

68. *See id.* at 588-89.

Critics of the decision to abolish the fairness doctrine are concerned that broadcasters now can disregard important issues and will provide one-sided programming reflecting establishment or majoritarian values.[69] Such worry ignores a fundamental lesson of the fairness doctrine experience itself—that the threat of sanctions or audience loss already has fostered unduly timid, bland and culturally nonpluralistic programming.[70] The FCC's own inquiry into broadcasting practices bore out the argument of critics that the fairness doctrine caused broadcasters to shy away from controversial issues.[71]

Despite occasional social if not constitutional triumphs, fairness governance has impeded the objectives of robust debate and viewpoint diversity. The isolated benefits of fairness regulation, moreover, must be measured against the doctrine's overall performance in promoting its objectives. When balanced against perceived problems of scarcity, the case for fairness regulation may have been more facially appealing if not genuinely persuasive.[72] Given the abatement of scarcity as an even arguable concern, it is unlikely that a newly packaged fairness principle, any more than its doctrinal antecedent, can satisfy demands of sound policy and constitutional integrity.

If the FCC's decision to diminish regulation of the information marketplace is vulnerable to criticism, it is susceptible on grounds that deregulation is incomplete and the reality of governance still diverges from theory. In abolishing the fairness doctrine, the FCC observed that it was elevating the first amendment rights of broadcasters to a constitutional par with those of publishers.[73] It thus asserted that the dangers of an unfettered broadcast medium are less profound than those of a regulated one.[74] The statement of principle is misleading, however, insofar as personal attack and political editorial rules and other constitutionally derogating terms of governance survive.[75] Even if the future of fairness-type rules is ordained[76] by the devolution of the scarcity premise to which they too have been tied,[77] opportunities remain for official treachery in regard to broadcasters' first amendment rights.

With almost the same breath that it used to pronounce equal first amendment status for broadcasters and publishers, the FCC concluded that curbs upon indecent or offensive programming, although unconstitutional

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69. *See* N.Y. Times, Aug. 5, 1987, at C26, col. 6.

70. *See supra* notes 31-36, 43-46 and accompanying text.

71. *See* Fairness Alternatives, *supra* note 13, at 5274; Fairness Report of 1985, *supra* note 12, at 1151-74.

72. Even at the time of *Red Lion*, when the Court upheld the fairness doctrine against constitutional challenge, the number of radio and television stations, collectively and for the most part in individual markets, outnumbered daily newspapers. *See infra* note 89.

73. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5055-57 (1987).

74. *See id.* at 5057.

75. *See* Fairness Alternatives, *supra* note 13, at 5285; N.Y. Times, Aug. 5, 1987, at C26, col. 1.

76. *See* N.Y. Times, Aug. 5, 1987, at C26, col. 1.

77. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-92 (1969).

if applied to publishers, were not incongruent with its statement of parity.[78] Because radio and television are officially described as uniquely intrusive, pervasive and accessible to children,[79] special controls remain in place to safeguard against purportedly indecent or offensive programming.[80] Unlike fairness regulation, which on its face was a diversity enhancement scheme, such indecency controls patently are diversity restrictive. Such governance constitutes an abiding threat to expression that transcends mainstream or orthodox thinking[81] and is overtly hostile toward the declaration of constitutional parity betokening the end of the fairness doctrine. Expressive pluralism thus remains hostage to the persisting discrepancy, accentuated further by its purported dispatch, between official rhetoric and action.

III. The Dubious Constitutionality of a Fairness Revival

The Supreme Court, in eventually intimating that it was prepared to reexamine the underpinnings of the fairness doctrine,[82] fashioned a higher standard for judging constitutionality than it originally seemed to have employed.[83] Despite the first amendment interests implicated by the fairness doctrine, the Court in *Red Lion* largely deferred to the administrative judgment of the FCC.[84] A decade and a half later, in *FCC v. League of Women Voters,*[85] however, the Court articulated a more exacting standard of review. Fairness regulation would not survive now unless found to promote a substantial state objective in a fashion that least burdens first amendment interests.[86]

If the fairness doctrine were resurrected, therefore, its constitutionality would be subject not only to force of reason but a higher standard of review. Government may have a substantial interest in promoting diversity.[87] Fairness regulation, however, has proved to be a means of chilling rather

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78. *See* Infinity Broadcasting Corp., 2 F.C.C. Rcd. 2706, 2706-07 n.16 (1987). For a detailed examination of the persisting disparities in first amendment standards, see Lively, *Deregulatory Illusions and Broadcasting: The First Amendment's Enduring Forked Tongue,* 66 N.C.L. Rev. 963 (1988).

79. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978).

80. *See id.*

81. *See id* at 776-77 (Brennan, J., dissenting).

82. *See* FCC v. League of Women Voters, 468 U.S. 364, 376-79 nn.11-12 (1984).

83. *See id.* at 380.

84. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). Despite the implication of fundamental constitutional interests, which usually necessitates proof of a compelling or substantial governmental rationale, the Court stated that policy formulated "by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Id.*

85. 468 U.S. 364 (1984).

86. *See id.* at 380.

87. Media concentration and limited opportunities for access to the media, either as an entrepreneur or citizen, represent a significant concern especially to the extent coverage is undiversified and the public's ability to participate in public debate has diminished. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-52 (1974).

than facilitating such expression.[88] Reliance upon the dynamics of the information marketplace, moreover, affords an alternative for promoting first amendment values in a fashion that is less burdensome to traditional first amendment rights.

The central premise for fairness regulation has been discredited to the point that it cannot be reconstituted in a principled fashion. As a regulatory predicate, the scarcity rationale was fundamentally flawed in both its origin and operation. At the time *Red Lion* was decided, broadcasting stations outnumbered daily newspapers.[89] In subsequent years, radio and television constituted an expanding industry, while the newspaper business declined or at best remained static.[90] Especially in metropolitan areas, which increasingly became single newspaper towns, the number of broadcasters far exceeded the number of daily publishers.[91]

Even if scarcity is defined in allocational rather than purely numerical terms, it would not afford a satisfactory rationale for reinstating the fairness doctrine.[92] Distinctions, tied to the notion that anyone can publish but only a finite number of individuals can be allocated a license to broadcast,[93] are simplistic and misplaced. In *Miami Herald Publishing Co. v. Tornillo*,[94] the Supreme Court, although never actually distinguishing scarcity in broadcasting from publishing, nonetheless concluded that economic scarcity imposed no artificial barriers to publishing and thus could not justify an official fairness scheme.[95] Because licenses may be transferred and broadcast operations sold,[96] however, scarcity in broadcasting is not so readily distinguishable from scarcity in the print media. If it may be assumed that most entrepreneurs will sell if offered the right price, and entry into broadcasting thus is contingent upon raising sufficient capital, the barriers to entering either broadcasting or publishing are largely economic. Financial resources,

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88. *See supra* notes 31-36, 43-46 and accompanying text.

89. In 1970 only 1,748 newspapers published daily. *See* STATISTICAL ABSTRACT 1987, *supra* note 5, at 536. During the same year, 862 television stations and 6,519 radio stations were in operation. *See id.* at 531. The presence of 55 radio and television stations in the largest market, New York, and 4 radio and television outlets in the smallest market, Glendive, Montana, further demonstrates that numerical scarcity is more an attribute of the daily newspaper industry than broadcasting. *See* 1983 BROADCASTING/CABLECASTING YEARBOOK B-146, B-166, B-167, C-31, C-35, C-208.

90. By 1985, 1,676 daily newspapers were in existence. *See* STATISTICAL ABSTRACT 1987, *supra* note 5, at 537. A total of 9,775 radio and television stations were in operation in 1985. *See id* at 531. By 1986, a total of 7,600 expanding cable systems served 37.5 million subscribers. *See id.*

91. *See supra* note 89.

92. Allocational scarcity refers to the limits upon broadcasting opportunities attributable to licensing.

93. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-57 (1974). The Court has noted that economic factors that have fostered a declining number of newspapers also have made entry into the field almost impossible. *See id.* at 249-51.

94. 418 U.S. 241 (1974).

95. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

96. *See* Communications Act of 1934, § 310(d), 47 U.S.C. § 310(d) (1981 & Supp. 1988).

more than any theoretical scarcity, are the most pertinent factor limiting entrepreneurial opportunities with respect to any mass medium. The niceties of spectrum limitations are lost upon all but a few citizens, who possess sufficient funds to broadcast or publish commercially. A realistic understanding of the actual barriers to entrepreneurship, regardless of the nature of the medium, further militates toward similar rather than disparate constitutional standards.

Traditionally, the Court has regarded each new medium[97] as being beset by "its own peculiar problems" and concluded that those differences justify variances in first amendment standards governing them.[98] In broadcasting, that analytical departure point led to the identification of spectrum scarcity and consequent construction of fairness policies. By regarding different media in different ways, the Court created a first amendment hierarchy in which constitutional guarantees were maximized for the print media but diminished for newer media.[99] Official focus upon the extent of diversity in one medium, however, betrays insensitivity to the reality and greater significance of intermedia competition.[100] The citizenry, even at the time of *Red Lion,* received information from multiple sources. Two decades later, especially due to the expansion of cable and other new technologies, the public has even more opportunities for receiving diversified information.

Even if the scarcity rationale is no longer credible enough to support reintroduction of fairness regulation, the doctrine's proposed renewal could be tied to more generalized regulatory notions. Radio and television are subject to governance based upon the "public convenience, interest or necessity."[101] It is well-established that such a standard "means about as little as any phrase that" legislators can craft.[102] Especially due to its malleability, most recently evidenced by the crafting of separate laws for indecent or offensive broadcasting,[103] the public interest concept remains a starting point for regulatory mischief.[104] Experience should have demonstrated how fairness undermines rather than services the citizenry's interest

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97. New media generally are those media, such as radio, television, motion pictures and cable, that have emerged in the Twentieth Century.

98. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 n.8 (1981); FCC v. Pacifica Foundation, 438 U.S. 726, 744-46 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986).

99. The Court thus has stated that broadcasting is the least constitutionally protected medium. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

100. *See* Lively, *Fear and the Media: A First Amendment Horror Show,* 69 MINN. L. REV. 1071, 1094-95 (1985).

101. Communications Act of 1934, § 303, 47 U.S.C. § 303 (1981 & Supp. 1988).

102. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927,* 1 AIR. L. REV. 295, 296 (1930).

103. *See supra* note 78.

104. Prior to the Supreme Court's linkage of the fairness doctrine to the scarcity concept, one court found that the FCC's power to regulate in the public interest justified the fairness doctrine. Banzhaf v. FCC, 405 F.2d 1082, 1092-93 (1968).

in content diversity. An understanding that broadcasting exists and functions within instead of apart from a media universe, if not enough to engender comprehensive constitutional parity regardless of how information is disseminated, perhaps may suffice at least to preclude reintroduction of misconceived fairness expectations.

Given the evolution and interaction of the modern press, media specific analysis focusing upon the defects of a particular medium is obsolete. Cable television competes against broadcasting, for instance, but not by appealing to the least common denominator or with bland programming. Profit maximization in the cable industry, to the contrary, is tied to discrete programming that may appeal to some, offend others, but nevertheless promotes pluralistic expression.[105]

Structural expansion of the press has engendered dissemination of information from increasingly diverse sources. Even assuming a substantial state interest in promoting diversity, content regulation nonetheless cannot be justified given the availability of less restrictive marketplace alternatives. Competition among different media begets, if not always full and balanced presentations by a particular outlet or medium, coverage that is more comprehensive, fair, and free in the crucial panoramic sense. Microregulation intended to advance first amendment values in one industry, but disregarding the broader context and workings of the press, has proved to be too narrowly focused and ultimately disruptive of first amendment interests. The lessons of fairness and realities of modern media suggest that first amendment concerns are served better by policies which promote rather than restrain editorial autonomy.

105. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-700 (1984); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438-43 (D.C. Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986).

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