RED LION AND THE FAIRNESS DOCTRINE: REGULATION OF BROADCASTING "IN THE PUBLIC INTEREST"

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Twentieth century technological advancements in such areas as transportation and communication have caused an inundation of regulations to pour from federal administrative agencies. The "administrative revolution" has become readily visible since the 1930's and the administrative functions of rulemaking and adjudication have given these agencies tremendous "legislative" and "judicial" power. The application of this pervasive regulatory power has inevitably given rise to challenges to its validity, especially when the nature of the regulated matter embodies fundamental constitutional rights. The United States Supreme Court was recently confronted with such a challenge in *Red Lion Broadcasting Co. v. FCC*[1] which involved the broadcasting industry's attempt to invalidate the Federal Communications Commission's fairness doctrine and its component personal attack and political editorial rules. The Court ratified the Commission's application of "public interest" oriented regulations and for the first time sustained the constitutionality of FCC regulation of program content. The purpose of this comment is to examine the background of the fairness doctrine and FCC regulation of the communications industry in an effort to assess the impact of *Red Lion* on future claims by broadcasters of unconstitutional Commission action.

THE FAIRNESS DOCTRINE IN HISTORICAL PERSPECTIVE[2]

Early History of the Communications Industry

Perhaps the most rapid development and application of technological knowledge for popular use has occurred in the field of broadcasting.[3] However, during its early stages the increased availability of broadcasting was not accompanied by effective governmental regulation.[4] With no

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1 395 U.S. 367 (1969).

2 The fascinating early development of wire communications is beyond the scope of this comment. *See generally* W. EMERY, BROADCASTING AND GOVERNMENT: RESPONSIBILITY AND REGULATIONS 3-16 (1968) for an excellent treatment of this historical development.

3 From 1920 to 1924, the number of radio stations providing regular program service to the public increased at an unbelievable rate: from three in 1920 to more than 500 in 1924. *Id.* at 13.

4 Regulation developed very slowly. In 1910 Congress made it unlawful for a ship carrying more than 50 passengers to leave a United States port without sufficient radio equipment. Act of June 24, 1910, ch. 379, 36 Stat. 629. In 1912, due to the *Titanic* disaster, the provisions of the 1910 Act were strengthened but were still inadequate. Act of July 23, 1912, ch. 250, 37 Stat. 199.

outside control, stations were able to increase their output of power in order to smother competitors and could periodically change their hours of operation in an effort to expand their public exposure.[5] With rapid urban growth, the public's awareness and evaluation grew concurrently with its dependence on communications and dissatisfaction was voiced with the growing problems that plagued the airways, including censorship, offensive advertising, and monopoly.[6]

In 1922 Secretary of Commerce Herbert Hoover, convinced that the serious problems in the broadcasting industry could not be resolved until the federal government was given positive authority to act, called the first conference of radio experts to discuss the aggravated situation.[7] Despite worsening conditions, Congress could not agree on the proposals which emerged from the first conference and further conferences were called.[8] At the Fourth National Radio Conference, Hoover reiterated the gravity of the need for effective regulation; his message formed the underlying basis for governmental regulation of broadcasting:

> We hear a great deal about freedom of the air, but there are two parties to freedom of the air, and to freedom of speech, for that matter . . . . Freedom cannot mean a license to every person or corporation who wishes to broadcast his name or his wares, and thus monopolize the listener's set . . . . [The main] consideration in the radio field is, and always will be, the great body of the listening public . . . .[9]

Based on recommendations from the 1925 conference, court developments,[10] and subsequent congressional hearings,[11] Congress passed the Radio Act of 1927[12] which subsequently proved inadequate, thus

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[5] W. Emery, *supra* note 2, at 13.

[6] *Id.* at 15.

[7] *Id.* at 17, *citing* First National Radio Conference Proceedings (Washington, D.C. Feb. 27, 1922).

[8] W. Emery, *supra* note 2, at 17, *citing* Third National Radio Conference, Recommendations for Regulation of Radio (Washington, D.C., Oct. 6-10, 1924); Fourth National Radio Conference, Proceedings and Recommendations for Regulation of Radio (Washington, D.C., Nov. 9-11, 1925).

[9] W. Emery, *supra* note 2, at 18-19, *quoting* Fourth National Radio Conference Proceedings and Recommendations for Regulation of Radio 7 (Washington D.C., Nov. 9-11, 1925).

[10] *E.g.*, in United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926), the court held that a station owner could not be punished by the Government for disregarding a frequency assignment. This case decidedly worsened the situation.

[11] *Hearings on S. 1 and S. 1754 Before the Interstate Commerce Subcomm. on the Study of the Regulation of Radio Communications*, 69th Cong., 1st Sess. (1926).

[12] Radio Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162. This legislation constituted an important step toward necessary radio regulation and did much to relieve the chaotic conditions that plagued the airways. The Federal Radio Commission, however, was not given any authority to regulate the telephone and telegraph industry. W. Emery, *supra* note 2, at 21. Regulation of telephone and telegraph companies had been given to the Interstate Commerce Commission by Congress, Act of June 18, 1910, ch. 309, 36 Stat. 539, but little attention was in fact paid by the ICC to this regulatory power. Consequently it was urged that a single federal agency be formed to administer and implement the proposed comprehensive regulation. Congress responded in 1934 with the Communications Act which repealed

causing Congress to eventually pass the Communications Act of 1934.[13] This Act was intended to provide comprehensive regulation of broadcasting and

> to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .[14]

Under this new law governing the communications industry, the Federal Communications Commission was created to regulate all interstate and foreign wire and radio communication.[15] The Commission was granted extensive authority "as public convenience, interest, or necessity requires"[16] to promulgate any regulations necessary to carry out the provisions of the act.

Evolution of the Fairness Doctrine

Embedded in the "public interest" provision of the Communications Act was the initially vague notion that issues of public importance must be presented in an impartial manner.[17] Commission adjudication gradually crystallized this notion into the fairness doctrine, which received initial formulation by the FCC in *The Mayflower Broadcasting Corp.*:[18]

> Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias.[19]

In 1946 the Commission's "Blue Book,"[20] was issued declaring that adequate amounts of time must be available for the discussion of public issues and that this would be taken into account when evaluating whether or not a licensee was serving in the public interest.

Finally, in 1949 the fairness doctrine was further refined in an FCC

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the Radio Act but retained most of its important objectives. *See* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

13 Communications Act of June 19, 1934, 47 U.S.C. §§ 151-609 (1964).

14 47 U.S.C. § 151.

15 *Id.* § 154-55.

16 *Id.* § 303, 303(r). These sections pertained to the regulation of radio. As to overall regulation section 154(i) provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

17 For early "public interest" litigation, see Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied,* 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931); Great Lakes Broadcasting Co. v. Federal Radio Comm'n, 37 F.2d 993 (D.C. Cir.), *cert. dismissed,* 281 U.S. 706 (1930).

18 8 F.C.C. 333 (1941).

19 *Id.* at 340.

20 FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSES (1946).

report regarding editorializing by boadcast licensees.[21] The dicta in *Mayflower* which stated that a broadcaster could not advocate or editorialize his own personal views over the station[22] was reversed by the report and continued editorializing was permitted as long as station owners were aware of the fundamental obligation to present all sides of public issues. More specifically, the report presented the modern statement of the fairness doctrine imposing a twofold obligation on licensees: the broadcaster must not only give adequate coverage to public issues but must also "seek out" all responsible viewpoints on controversial issues and afford an opportunity for the opposing views to be heard.[23] Since no "seek out" provisions had been previously enacted, the report was a positive step toward assurance that the broadcasting licensee would take affirmative action to see that all sides of controversial issues were exposed.

Following the issuance of the *Report on Editorializing* in 1949 was a period of adjudication by the Commission dealing on an ad hoc basis with problems arising under the fairness doctrine. This method, which had been forecast by the report,[24] proved objectionable, however, since individual determinations merely settled two-party disputes without offering guidance to the remaining broadcasters. To remedy the uncertainty, the Commission sent all licensees a public notice, known as the *Fairness Primer*,[25] which specified broadcaster obligations derived from Commission adjudications and set forth Commission rulings concerning personal attacks and political editorializing.[26]

Despite the *Fairness Primer*, the procedures prescribed for personal attacks and political editorializing were largely disregarded by licensees even in the context of a program dealing with a controversial issue.[27] Such disregard caused the litigation in *Red Lion Broadcasting Co. v. FCC*[28] and ultimately forced the FCC to issue a rule which was intended to clarify procedures which licensees were required to follow in personal attack situations and to implement a recent Commission ruling as to sta-

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21 FCC, REPORT IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246 (1949) [hereinafter cited as REPORT ON EDITORIALIZING]. The report was issued by the Commission to clarify its position regarding the broadcaster's obligation in the area of "news, commentary, and opinion." The Commission stated:

> It was believed that in view of the apparent confusion concerning certain of the Commission's previous statements on these vital matters by broadcast licensees . . . a reexamination and restatement of its views by the Commission would be desirable. *Id.*

22 8 F.C.C. 333, 339-41 (1941).

23 REPORT ON EDITORALIZING, *supra* note 21, at 1249, 1251. *See* United Broadcasting Co., 10 F.C.C. 515 (1945).

24 REPORT ON EDITORIALIZING, *supra* note 21, at 1256.

25 *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10416 (1964).

26 *Id.* at 10420-21.

27 *See, e.g.,* Richard B. Wheeler (KTLN), 6 F.C.C.2d 599 (1965).

28 381 F.2d 908 (D.C. Cir. 1967).

tion editorials endorsing or opposing political candidates.[29] The first aspect of the rule (hereinafter referred to as the personal attack rule) required that when an attack is made upon an identified person or group during the presentation of views on a controversial issue of public importance, the licensee must within one week: (1) notify the attacked party of the broadcast; (2) send him a transcript, tape, or summary of the attack; and (3) offer a reasonable opportunity to respond over the licensee's facilities.[30] The second aspect of the rule (hereinafter referred to as the political editorial rule) provided that where a licensee editorially endorses or opposes a legally qualified candidate he shall provide all other candidates with an opportunity to respond.[31]

The personal attack and political editorial rules were the results of the Commission's efforts to clarify the fairness doctrine which, in itself, was an FCC implementation of the principles inherent in Section 315 of the Communications Act of 1934.[32] Section 315 provides that if any licensee affords a legally qualified candidate for public office the opportunity to use his station, he must also afford equal opportunities to all other such candidates for that office.[33] The provision was designed to promote fair and honest debate over the broadcasting medium as a part

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[29] Times-Mirror Broadcasting Co. (KTTV), 24 P & F Radio Reg. 404 (1962), as quoted in RTNDA v. United States, 400 F.2d 1002, 1004-05 n.5 (7th Cir. 1968). The Commission said:

> Under the fairness doctrine, when a broadcast station permits, over its station facilities, a commentator or any person other than a candidate to take a partisan position on the issues involved in a race for political office and/or to attack one candidate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast. 24 P & F Radio Reg. 404, 405 (1962).

[30] 32 Fed. Reg. 10303 (1967).

[31] *Id.*

[32] 47 U.S.C. § 315 (1964).

[33] The words "legally qualified candidate" and "equal opportunities" raise questions of interpretation that have generally been settled by the Commission. The Commission's regulations define a legally qualified candidate as:

> any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, State or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:
> (1) Has qualified for a place on the ballot or
> (2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or any other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be. 47 C.F.R. 73.120 (1969).

Concerning equal opportunity, the station must offer to an opposing candidate an equally desirable amount of time and personal treatment. This does not mean that the station must offer an identical time period to the opposing candidate or candidates; merely a time of comparable desirability must be afforded. Finally, equal opportunity does not mean affording free time to an opposing candidate when the original candidate purchased his own time.

of the political process and to curtail broadcaster discretion in favor of some higher and more important public interest.

Notwithstanding their distinct origins, since both the fairness doctrine and section 315 have as an underlying basis the promotion of the "public interest," the FCC considered promulgation of the personal attack and political editorial rules to be consistent with the purposes of broadcasting regulation. The broadcasting industry, however, was less than pleased, feeling that compliance with the rules would place tremendous burdens on licensees. Consequently, the constitutionality of the rules was challenged shortly after their promulgation in *Radio Television News Directors Association v. United States.*[34]

THE CONSTITUTIONAL CHALLENGES

Red Lion: The Doctrine Upheld

One month prior to the promulgation of the formal rules, at a time when only the *Fairness Primer* specified the appropriate steps to be taken in the event of a personal attack, the Circuit Court of Appeals for the District of Columbia, in *Red Lion Broadcasting Co. v. FCC,*[35] affirmed the fairness doctrine. The court sustained an FCC order which required that a broadcaster furnish free reply time to an attacked person without requiring him to claim or prove an inability to pay for such time.

In November, 1964, the petitioner aired a program by the Reverend Billy James Hargis in conjunction with the controversial Christian Crusade Series. The program included a personal attack on the character of Fred Cook, author of a book entitled *Goldwater—Extremist on the Right.* Thereafter, Cook wrote a letter to the local broadcaster, radio station WGCB (owned by Red Lion Broadcasting Co.), requesting time to reply to Hargis' remarks, and asking that the time be furnished at the broadcaster's expense. The radio station felt that they had to supply free time only if no paid sponsorship could be found by Cook and consequently refused Cook's request.[36] After Cook's formal complaint to the FCC, charging that WGCB did not comply with the personal attack aspect of the fairness doctrine, considerable correspondence ensued between the Commission and the radio station. Ultimately, the FCC entered an order requiring WGCB to assume the burden of sponsorship in order

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[34] 400 F.2d 1002 (7th Cir. 1968).

[35] 381 F.2d 908 (D.C. Cir. 1967). The Supreme Court granted certiorari, 389 U.S. 968 (1967), but deferred a final decision until the outcome of *RTNDA.*

[36] Station WGCB (Red Lion Broadcasting Co.) said in a letter to the FCC:

> It has been our understanding that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to 'sponsor' or pay for his reply broadcast. 381 F.2d at 911.

to avoid leaving "the public uninformed as to [Cook's] side . . . ."[37] On appeal, the D.C. Circuit affirmed the order of the Commission and sustained the constitutionality of the fairness doctrine.[38]

The two most critical issues relating to the fairness doctrine concerned allegations of vagueness and prior restraints. Treating the latter issue first, the licensee contended that the fairness doctrine imposed a prior restraint on the exercise of free speech,[39] deterring coverage of controversial subjects because free time must be made available to voice the opposing view. It further argued that broadcasters must relinquish their freedom of expression as a precondition to obtaining a license and subsequently must act as their own censors for fear of losing their license at renewal time.[40]

The court, rejecting the prior restraint contention, emphasized the broadcaster's duty as a trustee of the public interest.[41] Examining the doctrine's personal attack aspects, the court observed that "the Doctrine, rather than limiting the petitioners' right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast."[42] The court concluded that since the licensee was allowed to select his own program material and was not required to obtain approval for a proposed program prior to broadcast, the characteristics of prior restraint were absent and the first amendment was not violated.[43]

As to the vagueness issue, the licensee in *Red Lion* argued that the Commission's vague description of the fairness doctrine violated the due

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[37] *Id.* at 913.

[38] *Id.* at 930. The court also held that Section 315 of the Communications Act, as amended in 1959, adopted the Commission's fairness doctrine and that no unconstitutional congressional delegation of legislative power was involved. 381 F.2d at 930. Further, the court held that section 315 did not violate the ninth and tenth amendments to the constitution. *Id.* at 925-27.

[39] *Id.* at 927-29.

[40] *Id.* at 927-28.

[41] *Id.* at 928. The court was persuaded by the government's succinct arguments concerning the "public interest" and their citing of 47 U.S.C. §§ 303, 303(g) (1964) which states:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
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> . . . .
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> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the *public interest.* (emphasis added).

[42] 381 F.2d at 924.

[43] *Id.* at 929. Professor Emerson has aptly characterized the basis of the self-censorship problem to be stringent government regulation:

> Just as the government is now a more formidable foe, so is it a more necessary ally . . . . The situation is indeed paradoxical. Freedom of expression is by its very nature laissez-faire; it implies absence of government control. Yet the conditions under which freedom of expression can successfully operate in modern society require more and more government regulation. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 902 (1963).

process clause of the fifth amendment.[44] The court, however, found nothing vague about the standards of the section governing personal attacks.[45]

RTNDA: The Rules Invalidated

One month after the personal attack aspect of the fairness doctrine was sustained, the FCC sought to clarify the uncertainty which had caused *Red Lion* and promulgated formal personal attack and political editorial rules.[46] Shortly thereafter, in *Radio Television News Directors Association v. United States*,[47] an unincorporated association of radio

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[44] 381 F.2d at 925.

[45] *Id.* In support of this determination, it seems that the clear language of the personal attack principles, which requires a specific offer of rebuttal time, is not so vague as to preclude a licensee from being aware of his rights. *See* amended text of the formal rules in note 46 *infra*. Moreover, broadcasters are protected both by the procedural safeguards of the Communications Act, 47 U.S.C. §§ 151-609 (1964), and provisions of the Administrative Procedure Act, 5 U.S.C. §§ 1001-11 (1964).

[46] The full text of the rules, as amended, reads:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a special factual situation, may be applicable in the general area of political broadcasts (ii), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*. 29 F.R. 10415. The categories listed in (iii) are the same as those specified in section 315(a) of the Act.

(c) Where a licensee, in an editorial (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however*, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion. 47 C.F.R. 73.123 (1969).

[47] 400 F.2d 1002 (7th Cir. 1968).

and television journalists petitioned the Court of Appeals for the Seventh Circuit to review and set aside the Commission's action on grounds "that the Commission's personal attack and political editorial rules, as amended, will impose unconstitutional burdens on freedom of speech."[48]

The broadcasters in *RTNDA* asserted essentially the same two arguments that were raised in *Red Lion, i.e.*, that the amended rules were unconstitutionally vague[49] and were a prior restraint on freedom of expression.[50] The broadcasters asserted that the only way they could avoid the potential detrimental effect of the Commission's rules was to curtail their coverage of controversial public issues, the result of which would be a "bland neutrality" which would not be in the "public interest."[51] Accepting many of these arguments, the Seventh Circuit relied on the far-reaching words of *New York Times Co. v. Sullivan*[52] and held that the Commission's personal attack and political editorial rules contravened the first amendment.[53]

The Supreme Court

The United States Supreme Court responded to the conflict and granted certiorari in both *Red Lion* and *RTNDA*.[54] The cases were consolidated and after consideration, Mr. Justice White spoke for a unanimous Court:[55]

> Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.[56]

The opinion traced the history of the fairness doctrine, showing its interrelationship, notwithstanding distinct origins, with section 315.[57] The

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48 *Id.* at 1010.

49 *Id.*, referring to words such as "attack," "character," "like personal qualities," and "identified individuals."

50 *Id.*

51 *Id.* at 1011.

52 376 U.S. 254 (1964).

53 The court reasoned that the rules were unconstitutionally vague and that undue burdens were placed on individual licensees. In addition, considerable weight was placed on the likelihood of self-censorship and the possibility of censorship by the Commission itself. 400 F.2d at 1012-17.

This comment does not consider the scope of judicial review of rules such as here involved. *See* 1 K. Davis, Administrative Law Treatise § 5.03 (1958).

54 Certiorari was granted in *RTNDA* by the Supreme Court at 393 U.S. 1014 (1969), and in *Red Lion* at 389 U.S. 968 (1967).

55 Not having heard oral argument, Mr. Justice Douglas did not participate in the decision.

56 395 U.S. at 375.

57 *Id.* at 371-86. The opinion noted that section 315 applied only to appearances by candidates and was silent as to supporters. Therefore, the Court reasoned, section 315 "could readily be circumvented," by disallowing *all* political candidates

broadcasters involved in *RTNDA* and the licensee in *Red Lion* had asserted that the first amendment protected their right to broadcast whatever they chose (excluding, of course, unprotected forms of expression such as obscenity). Equal regulation should be imposed on the broadcasting and publishing media, they asserted, since "[n]o man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents."[58] The Court, however, declared that differences in the characteristics of communications media justified differences in the application of first amendment standards,[59] analogizing the ability of a court to restrict the usage of sound equipment[60] and emphasizing that "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."[61]

> 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 . . . . [A]ll of them may have the same 'right' to a license [but it] would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.[62]

The next main contention, raised both in *RTNDA* and *Red Lion,* was that if political editorials and personal attacks required free opportunity to respond, then broadcasters would be forced to censor their coverage of controversial issues and a "bland neutrality" would result, not compatible with the purposes of the first amendment in developing an informed public.[63] The Court rejected this notion, though leaving room

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for public office to appear on the broadcaster's station and allowing the supporters of one side to appear, were it not for the fairness requirement that the public interest be served by presenting public issues in an impartial manner. *Id.* at 382-83.

58 *Id.* at 386.

59 The uniqueness concept is based on the anomaly which exists in the constitutional development of two traditions of first amendment freedom of expression—that of the written and that of the broadcast word. Governmental regulation of broadcasting grew out of the chaotic conditions of the 1920's with the ultimate evolution of the broadcaster as a trustee of the public interest. The *Red Lion* trial court, recognizing that this distinct evolution differed from the constitutional development of freedom of the press, observed that the Supreme Court had sustained a different constitutional interpretation of broadcasting regulation in NBC v. United States, 319 U.S. 190, 226 (1943). Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 923 (D.C. Cir. 1967). The *RTNDA* court, on the other hand, distinguished *NBC* as not controlling. 400 F.2d at 1018.

60 395 U.S. at 387, *citing* Kovacs v. Cooper, 336 U.S. 77 (1949).

61 395 U.S. at 387, *citing* Associated Press v. United States, 326 U.S. 1, 20 (1945).

62 395 U.S. at 388-89.

63 *Id.* at 392-93. It should be noted that the first amendment is not irrelevant to public broadcasting, and noting that Section 326 of the Communications Act for-

for future developments, and observed that the past willingness of the industry to present controversial issues indicated that any claims of forced censorship were mere speculation.[64] The Court further stated that there was nothing violative of the first amendment to require presentation of "representative community views on controversial issues":[65] the licensee's overriding obligation was to operate in the "public interest."[66]

> It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.[67]

Rejecting the contention that the regulations were so vague as to leave the specific duties of the broadcaster in doubt, the Court concluded that the FCC had not been left with a free hand to promote its own ideas of free speech or what constituted the "public interest," and that there was nothing vague about the ruling that Fred Cook should be allowed to reply.[68]

The final argument, posed by the broadcasters in *RTNDA*, was that governmental control of broadcasting should no longer be necessary since the frequencies were not scarce.[69] The Court was not convinced that scarcity of frequencies was a relic of the past, observing that the radio spectrum had become so congested that at times it was necessary to suspend new applications.[70] Mr. Justice White refused to speculate as to "[t]he rapidity with which technological advances succeed one another to create more efficient use of spectrum space . . . ." and held that for the present the airways were still scarce and could thus be regulated.[71]

IMPACT OF RED LION: UNANSWERED QUESTIONS

Red Lion does not purport to be a panacea for the conflict between alleged constitutional grievances of broadcasters and FCC regulation. The decision itself was not intended to preclude future adjudication of broadcasters' first amendment rights since certain aspects of the conflict were purposefully left open by the Court's language. Mr. Justice White concluded that every aspect of the fairness doctrine need not immediately be approved and that the constitutionality of its implementation could only be dealt with on an ad hoc basis.[72]

Recognizing the possible validity of the self-censorship argument,

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bids FCC interference with the right of free speech by means of radio communication.

[64] *Id.* at 393.
[65] *Id.* at 394.
[66] *Id.* at 393.
[67] *Id.* at 390.
[68] *Id.* at 395.
[69] *Id.* at 396.
[70] *Id.* at 398.
[71] *Id.* at 399.
[72] *Id.* at 396.

the Supreme Court observed that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[73] This dicta clearly invites future litigation of self-censorship claims if broadcasters become reluctant to cover controversial issues.[74]

The Court also was reluctant to issue a sweeping ratification of FCC programming policies,[75] stating that they "need not and do not now" ratify all previous and subsequent decisions of the FCC regarding programming.[76] The Court alluded to the fact that *Red Lion* might have been decided differently had the case concerned problems of

> the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to §326; or of the official government view dominating public broadcasting.[77]

By leaving such areas open for question, the allegedly aggrieved broadcaster cannot claim that governmental regulation as sustained in *Red Lion* grants to the FCC unchecked authority over the broadcaster's first amendment rights concerning programming.

Nevertheless, the specific ratification of FCC rules concerning program content has failed to solve several areas of practical programming difficulty. For example, the popular "talk show," although not exempt from the formal rules, promises to remain a potential trouble spot due to the frequent occurrence of derogatory personal remarks. Because such

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[73] *Id.* at 393.

[74] To anticipate the results of such potential litigation would be mere speculation. However, the views of the Court's newly acquired member may be relevant to such an inquiry. In one of his final opinions as judge on the Circuit Court of Appeals for the District of Columbia, Judge Burger withdrew the broadcasting license of a Mississippi television station that had been accused of racially discriminatory programming which had been approved by the FCC. United Church of Christ v. FCC, — F.2d — (D.C. Cir. 1969). Judge Burger delivered a harsh rebuke to the FCC, demonstrating his concern that the Commission was partial to established broadcasters and had therefore forgotten that they were actually only temporary permittees and fiduciaries of the public interest. This case could have a major impact on future license disputes and should offer guidance to the FCC regarding the inherent rights of the public as opposed to the rights of an individual broadcaster.

The composition of the FCC is also changing; the Senate has confirmed the appointment of Dean Burch, a Tucson, Arizona, attorney, to the chairmanship of the Commission. Since Mr. Burch has not had any previous experience on the FCC, one can only speculate as to his attitude toward broadcasters. In the light of *Red Lion,* the public could very well be demanding more and more of the FCC through regulation and enforcement of the public interest standard, and it will be toward this end that the Commission will be pledged.

[75] Notwithstanding this reluctance, the Supreme Court in ratifying the fairness doctrine may have inferentially approved previous Commission rulings on cigarette advertising. *See* Tobacco Institute, Inc. v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 90 S. Ct. 50 (1969); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968). *See also* N.Y. Times, Nov. 6, 1969, § A, at 1, col. 2.

[76] 395 U.S. at 396.

[77] *Id.*

remarks could be construed as personal attacks, the potential financial burden which accompanies a broadcaster's attempted compliance with the personal attack rule raises the specter of self-censorship. Perhaps this may constitute one area where a documented showing of broadcaster reluctance to air controversial issues will result in a renewed attack on the constitutionally of the Commission's rules.[78]

Another practical problem is caused by the fairness doctrine's imposition of a twofold obligation on broadcasters (1) to speak out on controversial public issues, and (2) to "seek out" all responsible viewpoints on these issues and afford them an opportunity to be heard. Left unanswered by the *Red Lion* decision are questions concerning the elements of a "public issue" and the limits of a "controversy" in the broadcasting sense. What is the relevant audience to be consulted? Is the audience local, regional, or perhaps even national? For example, does a small station located and appealing to the northern part of a large city necessarily have to report an incident occurring on the south side of town that has no bearing on those living in the north?[79] As a result of the uncertainty, broadcasters may be afraid of losing their licenses at renewal time and may forego commercial advertising revenue to cover what they feel is extraneous material. In short, although the fairness doctrine has been sustained and unconstitutional vagueness is no longer in issue, questions of a practical nature still remain unanswered—thus illustrating the merits of the yet viable contention of broadcaster self-censorship.[80]

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78 *See* note 46 *supra.*

79 In addition, problems exist in determining the geographical limits of the "seek out" doctrine.

80 An article by Jaffe, *WHDH: The FCC and Broadcasting Renewals*, 82 HARV. L. REV. 1693 (1969), discusses the recent decision by the FCC in WHDH Inc., 16 F.C.C.2d 1 (1969), which held that established broadcast licensees have no advantage over new rival applicants for the same channel. As a result of *WHDH,* the established licensee's past performance is now placed in a more critical light, creating a greater likelihood that broadcasters will engage in self-censorship to insure license renewal. *See* United Church of Christ v. FCC, — F.2d — (D.C. Cir. 1969); Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity*, 118 U. PA. L. REV. 368 (1970). Consider also the Commission's concept of balanced programming which may be defined as a "balanced" variety of programs that a broadcaster must present to his audience, *i.e.*, news, music, and sports. *See* FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES, March 7, 1946. Ostensibly, the requirement may seem justified but in practice both the public and the licensee may suffer since the concept may induce broadcasters to conform to safely established patterns of programming.

A similar observation can be made regarding the operation of the equal time rule for qualified political candidates in section 315. The inherent difficulties with the equal time duty become obvious in state and national elections where all minority and fringe candidates would demand equal time if a frontrunner's viewpoints were aired. The licensee may be inclined to limit the contents of the broadcast to avoid complying with the burdensome requirements. Perhaps recognizing this potential inhibiting effect on political broadcasting, Congress suspended equal time requirements in 1960 for presidential and vice presidential candidates, 74 Stat. 554 (1960), and has amended section 315 to exempt newscasts, bona fide interviews, news documentaries, and on-the-spot coverage of bona fide news events. 47 U.S.C. § 315(a) (1964).

CONCLUSION

The broadcasting industry was surprised by the nature of the *Red Lion* decision and the unanimous holding of the Court.[81] They reasoned that the Warren Court had liberalized freedom of expression and would correspondingly broaden broadcasters' rights. However, the Court found that the fairness doctrine and its component regulations furthered the public interest and "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."[82]

Since the Supreme Court generally cannot directly enforce its decision,[83] the power to implement the "public interest" standard sustained in *Red Lion* lies with the FCC and, more importantly, the general public. Since *Red Lion* was decided in the name of this amorphous standard, the public itself should be entitled to voice its opinion directly to the Commission in order more accurately to reflect that standard. Such a procedure would effectively inject an apparently absent element of democracy into the federal agency which indirectly maintains such pervasive influence over anyone who owns a radio or television set.[84]

The procedural opportunity for public participation has existed since 1960 when the FCC, being vested with general regulatory powers over the communications industry, established a Complaints and Compliance

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[81] Considering the implications of a contrary Supreme Court result, this surprise seems unjustified. If the fairness doctrine were held unconstitutional, the broadcasting industry may have been given the power to decide whether to discuss controversial issues at all. By analogy, then, the equal time requirement for political candidates might also be unconstitutional, allowing an influential broadcaster to impose his own political views on the public and resulting in a broadcaster's political position being sold to the highest bidder. Neither result would be in the "public interest."

[82] 395 U.S. at 375.

[83] *See* L. BETH, POLITICS, THE CONSTITUTION AND THE SUPREME COURT 81-82 (1962).

[84] The basic policies of government are formalized by the procedure of choosing among conflicting interests in our society. An individual who wishes to complain about a particular station or network must turn that desire into reality by strongly vocalizing his complaint in order to make the democratic process work. In an enlightening treatise, E. REDFORD, DEMOCRACY IN THE ADMINISTRATIVE STATE 22-31 (1969), Professor Redford offers three "routes to democracy" or procedures in which the preservation and implementation of democratic morality are maintained:

> The first route is search for an implementation of consensus . . . [since] policy makers . . . can function toward democratic morality when they are knowledgeable about the consensus in their society and imaginative in developing policies that respond to, or even expand, the consensus.
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> . . . .
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> The second route is majority determination. . . . [W]hile the majority expression of the populace may rarely be determinative of particular policy issues, it is an essential device for control of the leaders whose decisions will determine policy.
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> . . . .
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> The third route to democratic morality is consideration of the requirements in policy to satisfy differences in kind, quality, intensity, and quantity of interest.

Division to receive complaints about programming policies and to assist in the evaluation of stations at renewal time.[85] Given this existing but relatively unknown avenue of individual expression, the general public must be made more aware of its right to speak out if it feels that networks or individual stations are not adequately reflecting controversial issues.[86] The burden of this educational process can and should be sustained by the FCC by purchasing network or independent station time to advise listeners and viewers of their right of expression through the Complaint and Compliance Division. If implemented and effectively advertised, such provisions for public involvement in the workings of the FCC will enable members of the public, as the affected parties, to exercise powerful checks on individual broadcasters and, indeed, on the Commission itself. *Red Lion's* ratification of the fairness doctrine and its component regulations reinforces the need for such democratic participation in the administrative process; the formulation of the "public interest" inherent in FCC regulation should be more responsive to the public itself.

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85 25 Fed. Reg. 4605 (1960). Prior to this formal avenue of expression to the FCC, if an individual was not personally attacked but still wanted to approve or complain about the practices of a particular station or network, the Communications Act did not explicitly provide for an available procedure. In sections 208 and 209 a complaint procedure exists, but only as against common carriers. Section 153(h) states "a person engaged in radio broadcasting shall not . . . be deemed a common carrier."

86 E. REDFORD, *supra* note 84, at 8. Professor Redford describes participation as a fundamental method to democracy:

> The democratic morality admits flexibility in techniques of participation. It requires, however, meaningful participation and for this there are many essentials. Among these are (1) access to information, based on education, open government, free communication, and open discussion; (2) access, direct or indirect, to forums of decision; (3) ability to open any issue to public discussion; (4) ability to assert one's claims without fear of coercive retaliation; and (5) consideration of all claims asserted.