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À PROPOS DE NOUS

La **Revue Internationale de droit des données et du numérique (RIDDN)/ the International Journal of Digital and Data Law** est une revue universitaire créée et dirigée par Irène Bouhadana et William Gilles au sein de l'IMODEV, l'Institut du Monde et du Développement pour la Bonne Gouvernance publique.

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MANDATED BROADCAST COVERAGE OF PUBLIC AFFAIRS: A LOOK BACK AT THE FAIRNESS DOCTRINE IN THE UNITED STATES

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In 1949, the communication regulator in the United States, the Federal Communications Commission (FCC), adopted the Fairness Doctrine[1]. The Fairness Doctrine had two requirements. First, broadcasters had to "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations", and, second, they had to ensure that their programming were "designed so that the public ha[d] a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community"[2]. The Fairness Doctrine was controversial. Critics claimed that the Doctrine was an unjustified imposition on free speech and press rights, particularly because, in the critics' view, the Doctrine chilled broadcasters' communication[3]. Free speech and press rights are generally protected under the First Amendment to the U.S. Constitution.[4]

Over the course of nearly four decades during which the Fairness Doctrine was operational, discussion of the Doctrine arose in various legal and administrative proceedings, two of which are of special interest to this paper. In 1969, the United States Supreme Court upheld the constitutionality of the Doctrine in *Red Lion Broadcasting v. FCC*[5]. In 1987, the FCC repealed the Doctrine in *Syracuse Peace Council v. Television Station WTVH*[6].

While the Fairness Doctrine is no longer in use, the concerns behind the Doctrine remain important. Accordingly, this paper provides a retrospective on the Fairness Doctrine. To do so, the

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[1] C. R. SMITH, "The campaign to repeal the Fairness Doctrine", *Rhetoric and Public Affairs*, No. 2/1999, p. 482.

[2] Editorializing by broadcast licensees, 13 F.C.C. 1246, 1257-58 (1949).

[3] SMITH, *vide supra* note 1, at 487.

[4] *U.S. Constitution*, 1787, amend. I.

[5] 395 U.S. 367 (1969).

[6] 2 F.C.C. Rcd 5043 (1987).

paper will offer background on the Doctrine, examine the key arguments that emerged in *Red Lion Broadcasting v. FCC* and *Syracuse Peace Council v. Television Station WTVH*, address the strengths and weaknesses of the Doctrine, and finally discuss alternatives to the Doctrine.

§ 1 – BACKGROUND ON THE FAIRNESS DOCTRINE

In the United States, the idea of fairness in broadcasting dates from the early years of broadcasting[7]. When Congress passed the Radio Act of 1927[8], the Act had fairness rules for political candidates, although not for matters of public interest more generally[9]. Several years later, Congress replaced the Radio Act with the Communications Act of 1934[10], which retained the existing fairness rules[11].

In the early 1940s, the FCC promulgated what became known as the *Mayflower* Doctrine[12]. The *Mayflower* Doctrine prohibited broadcasters from editorializing on political matters[13]. The FCC was concerned that radio licensees could exploit the limited number of frequencies on the electromagnetic broadcast spectrum, a phenomenon called spectrum scarcity[14], for their own partisan ends[15]. The FCC maintained that "[r]adio [could] serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio [could] not be used to advocate the causes of the licensee"[16]. Essentially, "the broadcaster [could] not be an advocate"[17]. Broadcasters claimed that the *Mayflower* Doctrine impermissibly restricted their free speech rights[18].

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[7] M. R. ARBUCKLE, "How the FCC killed the Fairness Doctrine: A critical evaluation of the 1985 Fairness Report thirty years after *Syracuse Peace Council* ", *First Amendment Law Review*, n°15/2017, p. 332.

[8] Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934). Congressional authority to regulate broadcasting falls under the Commerce Clause of the U.S. Constitution. *U.S. Constitution*, *vide supra* note 4, at art. I, § 8, cl. 3; National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943).

[9] ARBUCKLE, *vide supra* note 7, at 336.

[10] Pub. L. No. 73-416, 48 Stat. 1064.

[11] ARBUCKLE, *vide supra* note 7, at 336. Section 315(a) of the Communications Act was the equivalent of Section 18 of the Radio Act. C. LEFEVRE-GONZALEZ, "Restoring historical understandings of the 'public interest' standard of American broadcasting: An exploration of the Fairness Doctrine", *International Journal of Communication*, n°7/2013, p. 91.

[12] Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940-41).

[13] *Ibidem* at 340.

[14] "The Mayflower Doctrine scuttled", *Yale Law Journal*, n°59/1950, p. 761.

[15] V. PICKARD, "The strange life and death of the Fairness Doctrine: Tracing the decline of positive freedoms in American policy discourse", *International Journal of Communication*, n°12/2018, p. 3438.

[16] *Mayflower Broadcasting Corp.*, *vide supra* note 12, at 340.

[17] *Ibidem*.

[18] "Radio editorials and the Mayflower Doctrine", *Columbia Law Review*, n°5/1948, p. 786.

Some confusion about broadcasters' obligations under the *Mayflower* Doctrine lingered[19], and, by the mid-1940s, the FCC was apparently reconsidering the Doctrine[20]. In 1948, the FCC held hearings on it[21]. Most of the letters from the radio-listening public that the FCC had received supported the Doctrine[22]. Regardless of robust public support for the Doctrine, the FCC eventually repealed it in 1949[23].

In place of the *Mayflower* Doctrine, the FCC promulgated the Fairness Doctrine. As indicated above, the Fairness Doctrine required broadcasters to devote adequate time to controversial public issues and to cover such issues so as to offer balanced perspectives[24]. The Fairness Doctrine was a compromise between the *Mayflower* Doctrine and the position of the broadcasters, who opposed regulation[25]. While later generations might have seen the Fairness Doctrine as a form of excessive regulation, in 1949, the Fairness Doctrine, following the *Mayflower* Doctrine, was actually a form of deregulation[26].

Over the decades, the Fairness Doctrine proved difficult to enforce[27]. Although few complaints were filed before the 1960s, the number of complaints greatly increased during that decade[28]. Nonetheless, over the years, under one percent of the complaints succeeded[29]. The FCC frequently deferred to broadcasters regarding the presentation of diverse views[30], but broadcasters complained about the Fairness Doctrine just as they had about the *Mayflower* Doctrine[31].

In 1969, the U.S. Supreme Court had the opportunity to rule on the constitutionality of the Fairness Doctrine. The Court did so in *Red Lion Broadcasting v. FCC*[32], by a vote of eight to zero[33], adjudicating a challenge to the personal attack rule of the Fairness Doctrine, which required broadcasters to provide free airtime to individuals involved in matters of public discussion who had been attacked in previous broadcasts[34]. Several exceptions to this personal attack rule were cases where personal attacks occurred

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19 ARBUCKLE, *vide supra* note 7, at 341-42.
20 PICKARD, *vide supra* note 15, at 3439.
21 *Ibidem* at 3440.
22 *Ibidem*.
23 *Ibidem* at 3441.
24 *Editorializing by broadcast licensees*, *vide supra* note 2, at 1257-58.
25 PICKARD, *vide supra* note 15, at 3446.
26 *Ibidem*.
27 M. AMMORI, "The Fairness Doctrine: A flawed means to attain a noble goal", *Administrative Law Review*, n°60/2008, pp. 887-89.
28 *Ibidem* at 887.
29 *Ibidem* at 887-89.
30 *Ibidem* at 889.
31 T. I. EMERSON, "Colonial intentions and current realities of the First Amendment", *University of Pennsylvania Law Review*, n°125/1977, pp. 752-53.
32 395 U.S. 367 (1969).
33 "Red Lion Broadcasting Co. v. FCC", *Oyez* [https://www.oyez.org/cases/1968/2].
34 *Red Lion*, *vide supra* note 5, at 401.

during bona fide newscasts, news interviews, and commentaries[35]. Station editorials and documentaries were not exempt from the rule[36]. In *Red Lion*, the Court upheld the personal attack rule of the Fairness Doctrine and also gave a relatively detailed justification for the Fairness Doctrine itself.

During the 1980s, the FCC was "deregulation-minded"[37]. After issuing the *1985 Fairness Report*[38], which eroded the justifications for the Fairness Doctrine[39], the FCC repealed the Doctrine in 1987 in *Syracuse Peace Council v. Television Station WTVH*[40]. In the *Syracuse Peace Council* decision, the FCC noted, "The problem is not with the goal of the fairness doctrine, it is with the use of government intrusion as the means to achieve that goal"[41]. To this the FCC added, "The First Amendment was adopted to protect the people *not from journalists, but from government*"[42].

Although, in 1987, the FCC repealed the Fairness Doctrine, the FCC did not at that time repeal the personal attack and personal editorial rules of the Doctrine[43]. The personal attack rule was mentioned above. The personal editorial rule required that broadcasters provide free airtime to opposing candidates when the broadcasters aired editorials in favor of other political candidates[44]. Nonetheless, in 2000, the U.S. Court of Appeals for the District of Columbia Circuit ordered the FCC to repeal the personal attack and editorial rules[45].

After *Syracuse Peace Council*, the fate of the Fairness Doctrine was in the hands of the U.S. Congress. An effort to codify the Fairness Doctrine received support from individuals on both the liberal and conservative sides of U.S. politics[46]. One conservative supporter was then-Representative Newt Gingrich, who later became Speaker of the House of Representatives during the presidency of Bill Clinton[47]. Congressional attempts to codify the Fairness Doctrine in 1987 failed when President Ronald Reagan vetoed the legislation[48]. Likewise, an attempt to codify the Fairness Doctrine in 1991 failed when President George H. W. Bush threatened to

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[35] D. L. TEETER, D. R. LE DUC & B. LOVING, *Law of mass communications*, New York, Foundation, 1998, p. 643.
[36] *Ibidem* at 642-43.
[37] ARBUCKLE, *vide supra* note 7, at 346.
[38] Inquiry into Section 73.1910 of the Commission's rules and regulations concerning the general Fairness Doctrine obligations of broadcast licensees, 102 F.C.C.2d 142 (1985) [hereinafter Inquiry into Section 73.1910].
[39] ARBUCKLE, *vide supra* note 7, at 332.
[40] 2 F.C.C. Rcd 5043 (1987).
[41] *Ibidem* at 5056.
[42] *Ibidem* at 5057.
[43] TEETER, LE DUC & LOVING, *vide supra* note 35, at 642-43.
[44] *Ibidem* at 642.
[45] Radio-Television News Directors Ass'n v. FCC, 229 F.3d 269, 272 (2000).
[46] PICKARD, *vide supra* note 15, at 3443.
[47] *Ibidem*.
[48] ARBUCKLE, *vide supra* note 7, at 379.

veto the bill[49]. In 2011, during the administration of Barack Obama, the FCC removed the Fairness Doctrine, along with over eighty other media rules, from its books[50].

§ 2 – *RED LION BROADCASTING V. FCC*

As noted above, the Supreme Court decided *Red Lion Broadcasting v. FCC* in 1969. The decision grew out of two cases. In the first case, on 27 November 1964, the Red Lion Broadcasting Company, which was licensed to operate a radio station in Pennsylvania, aired a fifteen-minute program as part of a series called the *Christian Crusade*[51]. On the program, Reverend Billy James Hargis accused author Fred J. Cook of a number of items: being fired by a newspaper after having levied false claims against city officials; working for a publication with communist connections; defending Alger Hiss, a U.S. Department of State official who had been accused of spying for the Soviet Union and was convicted of perjury during the McCarthy Era; attacking Federal Bureau of Investigation Director J. Edgar Hoover and the Central Intelligence Agency; and more recently authoring a book to attack Barry Goldwater, the 1964 Republican presidential candidate[52]. Cook, who had heard the broadcast and decided that Hargis had attacked him, contacted the radio station and asked for free reply time[53]. After the station refused to provide the free reply time, the FCC sided with Cook, and the U.S. Court of Appeals for the District of Columbia Circuit upheld the FCC's decision[54].

In the second case, the FCC had issued a Notice of Proposed Rule Making to make the personal attack component of the Fairness Doctrine more specific and hence enforceable[55]. After receiving written comments, the FCC ultimately adopted the proposal, but, in litigation that involved the Radio-Television News Directors Association (RTNDA), the U.S. Court of Appeals for the Seventh Circuit held the modifications unconstitutional as a violation of the Free Speech and Press Clauses of the First Amendment[56].

The U.S. Supreme Court agreed to hear both cases. Focusing on the challenges to the Fairness Doctrine in the two cases, the Court combined the cases and addressed the issue of whether the Fairness Doctrine violated the First Amendment's free speech and press guarantees[57].

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[49] *Ibidem*.
[50] PICKARD, *vide supra* note 15, at 3445.
[51] *Red Lion*, *vide supra* note 5, at 371.
[52] *Ibidem*.
[53] *Ibidem* at 371-72.
[54] *Ibidem* at 371-73.
[55] *Ibidem* at 373.
[56] *Ibidem*.
[57] *Ibidem* at 370-71, 375.

In upholding the Fairness Doctrine, the Court made a number of arguments, beginning by explaining that the FCC, through the Doctrine, was furthering congressional policy[58]. The Court described the "cacophony of competing voices" that plagued broadcasting in the U.S. before 1927, a problem which Congress had tried to remedy via the establishment of the Federal Radio Commission (FRC), later the FCC[59]. The FRC was to hold applicants for licenses to the standard of meeting "the public 'convenience, interest, or necessity'"[60]. Included in this standard was the need for "'ample play for the free and fair competition of opposing views'"[61].

The Court then detailed how the Fairness Doctrine furthered congressional policy through the requirement that broadcasters had to "give adequate coverage to public issues" such that the coverage was "fair in that it accurately reflect[ed] the opposing views"[62]. The personal attack rule, a component of the Doctrine, required that when a broadcaster delivered a personal attack on a figure associated with a public issue, the broadcaster had to provide reply time for the individual who had been assailed[63]. The Court characterized the Fairness Doctrine as the FCC's way of ensuring that broadcasters would act in the "'public convenience, interest, or necessity'"[64]. This FCC policy could include requiring broadcasters "to use their stations for discussion of public issues"[65].

Further, the Court pointed out that the Fairness Doctrine prevented broadcasters from circumventing Section 315 of the Communications Act of 1934[66], which stated that broadcasters had to allot equal broadcast time to all qualified candidates for public office who paid for that time[67]. Under Section 315 alone, if a broadcaster refused to allow any candidates whatsoever on a broadcast, the broadcaster then could advocate the cause of his or her own candidate of choice instead[68]. However, with the addition of the Fairness Doctrine, a broadcaster could not do this because the broadcaster had to allow for multiple perspectives[69]. Referring to Section 315 and its equal time rule, the Court noted, "It would exceed our competence to hold that the Commission is

[58] *Ibidem* at 375.
[59] *Ibidem* at 376.
[60] *Ibidem* at 376-77 (quoting Radio Act, *vide supra* note 8, at § 4).
[61] *Ibidem* at 377 (quoting Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930)).
[62] *Ibidem*.
[63] *Ibidem* at 378.
[64] *Ibidem* at 379 (quoting 47 U.S.C. § 303).
[65] *Ibidem* at 382.
[66] 47 U.S.C. § 315(a).
[67] *Red Lion*, *vide supra* note 5, at 369-70, 382.
[68] *Ibidem* at 382-83.
[69] *Ibidem* at 383.

unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station"[70]. In light of this analysis, the Court found the FCC's regulations consonant with the First Amendment.

Having made its argument in favor of the constitutionality of the Fairness Doctrine, the Court responded to several arguments that the broadcasters had made against the Doctrine. For instance, the broadcasters had maintained that the Doctrine violated their free speech and press rights under the First Amendment[71]. The Court pointed out that certain limitations on speech do exist. For instance, in a way similar to how the government could restrict the use of sound-amplification equipment that stifled other speech, the government also could restrict the use of broadcast equipment[72]. "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others"[73], the Court said.

Along the same lines, the Court observed that, "because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few"[74]. Hence, the Court pointed out that "[w]here 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"[75]. The Court added that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech'"[76]. Additionally, the Court indicated the following:

> 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[77].

By way of extending the role of the First Amendment in the case at hand, the Court focused on several related points. The Court noted the importance of "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than [ ]

[70] *Ibidem* at 385.
[71] *Ibidem* at 386.
[72] *Ibidem* at 387.
[73] *Ibidem*.
[74] *Ibidem* at 388.
[75] *Ibidem*.
[76] *Ibidem* at 389 (quoting *National Broadcasting Co.*, *vide supra* note 8, at 227).
[77] *Ibidem*.

countenanc[ing] monopolization of that market"[78]. For support on this point, the Court cited various authorities, including the dissent of Justice Oliver Wendell Holmes in *Abrams v. United States*[79], which introduced the marketplace of ideas concept into U.S. jurisprudence[80]. Further, the Court added, "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government'"[81]. In light of these points, the Court noted that the public had the right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"[82]. The key line in the Court's argument was the following: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount"[83].

To embellish their First Amendment argument, the broadcasters had contended that the Fairness Doctrine would force them to engage in self-censorship so as to avoid having to air "views [that were] unpalatable to the licensees"[84]. In reply, the Court noted that the FCC had indicated that such a possibility was mere speculation[85]. Also, the Doctrine had never had that effect in the past[86].

Moreover, the broadcasters had claimed that the FCC's regulations were void for vagueness[87]. In response, the Court pointed out that "there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply" and that the same analysis was appropriate in the *RTNDA* case as well[88].

Finally, the broadcasters had argued that spectrum scarcity was no longer the issue that it had been in decades past[89]. To respond, the Court admitted that technological advances had led to better use of the spectrum, but that demand for use of the spectrum also had grown[90]. For example, in the nation's major markets, the spectrum was almost entirely in use[91].

The Court concluded with the following:

> In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for

78 *Ibidem* at 390.
79 250 U.S. 616 (1919).
80 *Red Lion*, *vide supra* note 5, at 390.
81 *Ibidem* (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).
82 *Ibidem*.
83 *Ibidem*.
84 *Ibidem* at 392-93.
85 *Ibidem* at 393.
86 *Ibidem*.
87 *Ibidem* at 395.
88 *Ibidem*.
89 *Ibidem* at 396.
90 *Ibidem* at 396-97.
91 *Ibidem* at 398.

> expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional[92].

Hence, the FCC had acted according to congressional mandate and the Court's understanding of the First Amendment's Free Speech and Press Clauses. The Court upheld the District of Columbia Circuit's decision in *Red Lion* and reversed the Seventh Circuit's decision in *RTNDA*[93].

§ 3 – *SYRACUSE PEACE COUNCIL V. TELEVISION STATION WTVH*

In 1987, nearly two decades after the Supreme Court's decision in *Red Lion*, the FCC decided *Syracuse Peace Council v. Television Station WTVH*. The U.S. Court of Appeals for the District of Columbia Circuit had remanded to the FCC the case of *Meredith Corp. v. FCC*[94] for consideration of enforcement of the Fairness Doctrine against the TV station WTVH, located in Syracuse, New York[95]. The station had broadcast a series of advertisements that advocated for the construction of the Nine Mile Point II nuclear plant as a positive move for New York[96]. In its prior proceeding, the FCC had determined that the advertisements impacted "a controversial issue of public importance", and, because of the station's failure to air competing points of view on the issue, the station technically had violated the Fairness Doctrine[97]. The Court of Appeals had instructed the FCC to examine closely the contention of WTVH that the Fairness Doctrine violated the First Amendment rights of the station[98]. This became the issue in the case.

To begin its opinion, the FCC observed that it would examine both policy and constitutional matters since the two came together in the case[99]. Also, the FCC attempted to broaden the impact of its decision by noting that, because of what the FCC saw as the unconstitutionality of the Fairness Doctrine, the decision would extend beyond the facts of the case at hand[100].

The FCC then turned to its own reading of the U.S. Supreme Court's decision in *Red Lion v. FCC*. While noting that the Court had upheld the rights of viewers and listeners over the rights of broadcasters, the FCC pointed to several limitations of the Court's decision. First, *Red Lion* did not pertain to all aspects of the Fairness

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92 *Ibidem* at 400-01.
93 *Ibidem* at 401.
94 809 F.2d 863 (D.C. Cir. 1987).
95 *Syracuse Peace Council*, *vide supra* note 6, at 5043.
96 *Ibidem* at 5044.
97 *Ibidem*.
98 *Ibidem* at 5043.
99 *Ibidem* at 5045-47.
100 *Ibidem* at 5047.

Doctrine[101]. Second, *Red Lion* was based on the principle of scarcity of broadcast frequencies[102]. Third, *Red Lion* accepted the FCC's late-1960s recommendation that the Doctrine did not chill speech[103].

In light of this reading of *Red Lion*, the FCC proceeded to examine the facts at hand. To do so, the FCC called upon its own *1985 Fairness Report*[104], which argued that the Fairness Doctrine thwarted its stated purpose[105]. The *Fairness Report* proved to be "'a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine'" for the writing of which "the Commission considered more than one hundred formal comments and reply comments, hundreds of informal submissions, and oral arguments presented in two full days of hearings"[106]. According to the *Report*, the Doctrine provided broadcasters with incentive to avoid controversial programming because of potential complaints and litigation and even loss of license[107]. Also, the *Report* determined that the Doctrine promoted the status quo because broadcasters who aired controversial materials found themselves especially subject to Fairness Doctrine requirements[108]. These findings and others in the *Report* allowed the FCC to conclude that the Fairness Doctrine had a chilling effect on broadcasters' speech.

As well as looking at that chilling effect, the FCC expressed concern over the extent and necessity of government intervention into editorial discretion. The FCC noted that the Fairness Doctrine placed the government in a position to second-guess the decisions of broadcasters[109]. This second-guessing required that the government make "subjective and vague value judgments"[110]. The FCC added that the Doctrine allowed the government to intimidate broadcasters who might criticize government policy on controversial issues[111].

Following this critique of the Fairness Doctrine, the FCC turned to what it believed to be a constitutional approach better than the Doctrine. Initially, the FCC argued that, because nearly two decades had passed since *Red Lion* was decided, the door for reconsideration of the underlying facts in that case had opened[112]. Specifically, the FCC pointed out that its reports, including the

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101 *Ibidem* at 5048.
102 *Ibidem*.
103 *Ibidem*.
104 Inquiry into Section 73.1910, *vide supra* note 38.
105 *Syracuse Peace Council*, *vide supra* note 6, at 5049.
106 *Ibidem* at 5043 (quoting *Meredith Corp.*, *vide supra* note 94, at 866).
107 *Ibidem* at 5049.
108 *Ibidem*.
109 *Ibidem* at 5051.
110 *Ibidem*.
111 *Ibidem*.
112 *Ibidem* at 5053.

1985 Fairness Report, had found "an explosive growth in both the number and types of outlets providing information to the public"[113]. This information came from older sources like radio and television, as well as newer sources like cable[114].

The FCC next addressed the scarcity rationale so important to the Court in *Red Lion*. Recognizing the physical limitations of the electromagnetic spectrum, the FCC argued that this point was not unique in the broadcast context.[115] Indeed, the FCC, quoting the U.S. Court of Appeals for the District of Columbia Circuit, observed the following:

> "It is certainly true that broadcast frequencies are scarce but is it unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism"[116].

The FCC even urged the Supreme Court to reconsider this point[117]. According to the FCC, scarcity of a resource such as the electromagnetic spectrum was insufficient to justify government regulation of the editorial process[118].

Going so far as to question *Red Lion*, the FCC extended its alternative constitutional perspective by contrasting *Red Lion* and some traditional First Amendment principles. For instance, the FCC noted that, contrary to much First Amendment jurisprudence, *Red Lion* allowed the government to interfere with the marketplace of ideas and the free press[119]. The decision also provided for government coercion of speech, a long-held legal taboo in the United States, and the inhibition of speech on matters of public concern, speech which the U.S. legal system long had held in high esteem[120]. Additionally, *Red Lion* allowed content-based regulations of speech to escape the difficult challenge of surviving close judicial scrutiny[121].

Furthermore, the FCC pointed out that the Supreme Court never had upheld the *Red Lion* standard in the context of print journalism. For example, in *Miami Herald Publishing v. Tornillo*[122], the Court had struck down a state statute that required a newspaper to publish

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113 *Ibidem*.
114 *Ibidem*.
115 *Ibidem* at 5054.
116 *Ibidem* (quoting Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986)).
117 *Ibidem*.
118 *Ibidem* at 5055.
119 *Ibidem*.
120 *Ibidem* at 5056.
121 *Ibidem*.
122 418 U.S. 241 (1974).

the reply of a political candidate whom the paper had criticized[123]. According to the FCC, the Court's promulgating the lower standard of scrutiny for government interference with broadcast journalism was inconsistent[124]. The FCC opined, "We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint"[125].

Consequently, the FCC decided that the First Amendment protected the editorial decision-making of WTVH to broadcast the advertisements that advocated the construction of the Nine Mile Point II nuclear plant[126]. As a result, the FCC denied the complaint of the Syracuse Peace Council[127]. In making its decision, the FCC put aside the Fairness Doctrine, which had been in place for almost forty years[128].

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit upheld the FCC's decision, noting that it "was neither arbitrary, capricious nor an abuse of discretion"[129]. The Court of Appeals did not reach the constiutional issues, which it believed the FCC had mixed inaprropriately with the public policy issues[130].

§ 4 – STRENGTHS AND WEAKNESSES OF THE FAIRNESS DOCTRINE

The *Red Lion* and *Syracuse Peace Council* decisions suggest that the Fairness Doctrine had both positive and negative aspects. On the positive side, the Doctrine made an effort to provide for "adequate coverage to public issues" so that the coverage was "fair in that it accurately reflect[ed] the opposing views"[131]. In the 1960s, Justice William Brennan of the U.S. Supreme Court observed "that debate on public issues should be uninhibited, robust, and wide-open"[132]. Public matters require an airing of ideas so that the public can consider many differing perspectives. With such a breadth of ideas, the public is then prepared to make important social decisions through voting. By requiring that broadcasters covered controversial public matters and addressed such matters in a

123 *Syracuse Peace Council*, *vide supra* note 6, at 5057.
124 *Ibidem*.
125 *Ibidem*.
126 *Ibidem* at 5057-58.
127 *Ibidem* at 5058.
128 The elimination of the Fairness Doctrine took place during the tenure of FCC Chairman Dennis Patrick, but efforts to end use of the Doctrine had begun under Chairman Mark Fowler, who was in office during most of the presidency of Ronald Reagan. D. BRENNER, "Explaining yourself: Thirty years after 'A marketplace approach to broadcast regulation'", *Administrative Law Review*, n°65/2013, p. 746; D. KORDUS, "What's on (digital) TV? Accessing the digital television broadcasting system, its potential and its performance in increasing media content diversity", *Communication Law and Policy*, n°19/2014, p 60.
129 *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989).
130 *Ibidem* at 656, 669.
131 *Red Lion*, *vide supra* note 5, at 377.
132 New York Times Co. v Sullivan, 376 U.S. 254, 270 (1964).

balanced way, the Fairness Doctrine attempted to facilitate this end.

Furthermore, the Doctrine recognized the historical reality of electromagnetic spectrum scarcity. In *Red Lion*, the Supreme Court observed that "there [were] substantially more individuals who want[ed] to broadcast than there [were] frequencies to allocate"[133]. Since not everyone could broadcast, the government had a role to play in assigning licenses. This spectrum scarcity loomed even larger because a few giant corporations and their affiliates controlled most of the broadcast licenses in the United States. Hence, the Doctrine attempted to ensure that the voices of other parties besides giant corporations would have a say. In essence, with great broadcasting power came great responsibility.

Despite some of the strengths of the Fairness Doctrine, the Doctrine had its shortcomings. Specifically, the Doctrine left open the door to possible government control of editorial decisions. Essentially, the government could tell broadcasters what else the broadcasters had to carry besides their chosen programming. The notion of government intrusion into journalism runs counter to the spirit of the First Amendment, which followed an era in England during the sixteenth and seventeenth centuries in which the government had censored newspapers[134]. In light of this history, as well as similar subsequent history in the thirteen colonies that eventually became the United States[135], the Framers of the First Amendment, at a minimum, placed limitations on the government's prior restraint of the press, which in effect had been a form of censorship of or control over media content[136]. Of course, all broadcasters do not necessarily offer journalism, and even broadcasters who do frequently have other components to their broadcasting. For example, with advertising, more takes place in broadcasts than the dissemination of news.

Moreover, proponents of the Fairness Doctrine failed to explain how the electromagnetic spectrum was any more scarce than other resources. Although spectrum space was limited, so were "newsprint, ink, delivery trucks, computers, and other resources that [went] into the production and dissemination of print journalism"[137]. Also, not everyone could own a newspaper[138]. Judge Robert Bork of the U.S. Court of Appeals for the District of Columbia Circuit captured the essence of this shortcoming in

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133 *Red Lion*, *vide supra* note 5, at 388.
134 TEETER, LE DUC & LOVING, *vide supra* note 35, at 39.
135 M. I. MEYERSON, "The neglected history of the prior restraint doctrine: Rediscovering the link between the First Amendment and the separation of powers", *Indiana Law Review*, n°34/2001, pp. 314-22.
136 T. I. EMERSON, "The doctrine of prior restraint", *Law and Contemporary Problems*, n°20/1955, pp. 650-52.
137 *Telecommunications Research and Action Center*, *vide supra* note 116, at 508.
138 *Ibidem*.

explanation when he noted, "Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion"[139].

As technology evolved, more information became available. Spectrum scarcity became much less of an issue when digital broadcasting, with its greater capacity than that of analogue broadcasting, replaced analogue broadcasting[140]. Indeed, in 2009, Justice Clarence Thomas of the U.S. Supreme Court recognized that the "[b]roadcast spectrum [was] significantly less scarce than it [had been] 40 years ago"[141]. After the early decades of broadcasting, later decades brought cable TV, satellite TV, and satellite radio[142]. Still, while more information had become available through technological developments, some critics would point out that only a handful of large corporations owned most of the media landscape[143].

On a pragmatic note, the enforcement of the Fairness Doctrine was a challenge. The government had to determine the fairness of the contents of broadcasts, which was not necessarily easy to do[144]. In the case of a personal attack, the broadcaster had to notify the target of the attack, furnish that person with a transcript, tape, or summary of the attack, and extend an offer for reply time[145]. In the case of a political editorial, the broadcaster was supposed to contact an opposing candidate within twenty-four hours, provide the opposing candidate with a transcript of the attack, and extend an offer for reply time[146]. One can imagine how this process might become tedious in the middle of an election year. As is often the case with policies like the Fairness Doctrine, while the ideal may have been noble, the application was problematic.

§ 5 – ALTERNATIVES TO THE FAIRNESS DOCTRINE

Along with over eighty other media rules, the FCC removed the Fairness Doctrine from its books in 2011[147]. If discussion of public affairs is still important, which this paper assumes is the case, considering possible alternatives to the Fairness Doctrine is likewise important. Thus, consideration of several alternatives now follows.

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139 *Ibidem*.
140 KORDUS, *vide supra* note 128, at 55-56.
141 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 533 (2009) (Thomas, J., concurring).
142 J. A. BARRON, "Access reconsidered", *George Washington Law Review*, n°76/2008, p. 840.
143 *Ibidem* at 834-35.
144 T. G. KRATTENMAKER & L. A. POWE, "The Fairness Doctrine today: A constitutional curiosity and an impossible dream", *Duke Law Journal*, n°1985/1985, p. 168.
145 TEETER, LE DUC & LOVING, *vide supra* note 35, at 643.
146 *Ibidem*.
147 PICKARD, *vide supra* note 15, at 3445.

First, the FCC could adopt a structural approach to broadcast regulation[148]. In light of the problem of government control of content, the FCC would limit the number of broadcast stations that a single licensee might own[149]. For example, in a media environment of a given size, a broadcaster would have a specific number of radio and television stations that the broadcaster could own. Ideally, more owners and thus more ideas would result[150]. This approach would call for increased regulation of media ownership, a direction in which the FCC recently has not shown an inclination to go[151].

Second, the requirement of broadcasters to provide for public access programming would be another option[152]. This approach, which has "been a regular feature on cable systems throughout the United States" since the 1970s[153], would allow the public free airtime to comment on public matters[154]. Under this approach, the government would not have to tell broadcasters to air specific viewpoints and perspectives as in the case of government enforcement of the Fairness Doctrine. Hence, if a broadcaster aired one side of a controversial story and ignored other sides of the story, the government would not have to ensure that other sides had airtime. Instead of complaining to the government, groups whose perspectives the broadcaster had ignored could take advantage of the public access programming and air their own views during the allotted time. Government control of specific content of programming would not be an issue.

Some commentators might contend that this proposal is not too much to ask of broadcasters who are able to enjoy "[t]he extremely high profitability of broadcasting in the United States"[155]. With this approach, broadcasters would have their broadcast time, except that they would have to leave open certain portions of their schedules for public access programming.

During the 1970s, the FCC required public access broadcasting by cable operators[156]. However, the U.S. Supreme Court determined

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148 C. A. HILEN, "Alternatives to the Fairness Doctrine: Structural limits should replace content controls", *Hastings Communications and Entertainment Law Journal*, n°11/1989, p. 326.

149 *Ibidem*.

150 *Ibidem* at 328.

151 See J. PUZZANGHERA, "FCC clears way for big TV mergers, eases broadband price limits", *Los Angeles Times*, 20 Apr. 2017 [https://www.latimes.com/business/la-fi-fcc-deregulation-20170420-story.html].

152 D. J. SCHOAFF, "*Meredith Corp. v. FCC*: The demise of the Fairness Doctrine", *Kentucky Law Journal*, n°77/1989, p. 235.

153 Manhattan Community Access Corp. v. Halleck, 139 S.Ct. 1921, 1926 (2019).

154 SCHOAFF, *vide supra* note 152, at 235.

155 M. K. HEDBLOM, "Returning fairness to the broadcast media", *Law & Inequality*, n°7/1988, p. 44.

156 B. T. JANES, "History and structure of public access television", *Journal of Film and Video*, n°39/1987, p. 14.

that the FCC had exceeded its congressional mandate[157]. Several years later, the U.S. Congress adjusted its mandate by passing the Cable Communications Policy Act of 1984[158], which, in relevant provision, allowed state and local authorities to require that cable operators provide public access stations[159].

Third, the market approach is another option[160]. Under this approach, broadcaster competition for the time and attention of viewers is one way to promote diversity of ideas[161]. Specifically, in this process of competition, different portions of the marketplace adopt differing specialties[162]. For instance, some broadcasters might speak to liberals, and other broadcasters might speak to conservatives. Still other broadcasters may not even address public issues[163]. In the end, a given broadcaster does not have to cover all points of view because, as long as public demand calls for differing points of view, these perspectives have other avenues of access to the marketplace[164]. The overall idea is that competition will reveal the whole story[165]. Some scholars believe that "[u]nless radio and television are unique among all media of mass communications, the evidence that competition will work satisfactorily is overwhelming"[166].

This market perspective rejects the notion of the public's right to know. If one party lacks a right, another party lacks a duty[167]. In essence, broadcasters have no duty to serve the public interest. Rather, in order to survive and prosper, broadcasters provide the public with what the public desires. The public will get what it wants, even if that is low-brow entertainment.

Unfortunately, the marketplace is not readily accessible to everyone[168]. Indeed, only a few voices often dominate the discourse mediated via broadcasting. If the FCC continues to allow large corporations to acquire increasingly larger shares of market ownership[169], the broadcast media landscape will, to a great extent, be left in the hands of such companies[170]. These companies have

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157 FCC v. Midwest Video Corp., 440 U.S. 689 (1979).
158 Pub. L. No. 98-549, 98 Stat. 2779.
159 47 U.S.C. § 531(b).
160 See M. S. FOWLER & D. L. BRENNER, "A marketplace approach to broadcast regulation", *Texas Law Review*, n°60/1982, pp. 230-42. As noted previously, Mark Fowler was chairman of the FCC during the presidency of Ronald Reagan. KORDUS, *vide supra* note 128, at 60.
161 KRATTENMAKER & POWE, *vide supra* note 144, at 166.
162 A. CRONAUER, "The Fairness Doctrine: A solution in search of a problem", *Federal Communications Law Journal*, n°47/1994, p. 71.
163 *Ibidem* at 74.
164 *Ibidem*.
165 KRATTENMAKER & POWE, *vide supra* note 144, at 167.
166 *Ibidem* at 166.
167 R. P. RHODES, "Commentary on Adrian Cronauer's 'The Fairness Doctrine'", *Federal Communications Law Journal*, n°47/1994, p. 95.
168 BARRON, *vide supra* note 142, at 830.
169 See PUZZANGHERA, *vide supra* note 151.
170 BARRON, *vide supra* note 142, at 834-35.

the option of ignoring public matters and presenting what they want to present, which is presumably what will make them the most money. Between such corporate communicators and human communicators, vast "differentials in communicating power" exist[171].

Fourth, the development of the Internet has provided an alternative way for people to access and send information, including information in the public interest. Particularly with the development of social media like Facebook, Twitter, and other platforms, people with Internet access around the globe can communicate about innumerable matters, many trivial and some not. Gatekeepers are less present with the Internet than with older media like radio and TV[172], and, as such, more people are able to speak than in the past[173]. Unlike traditional broadcasting, the Internet does not have the problem of spectrum scarcity[174]. Thus, the Internet provides people with the means to access this medium a diversity of sources of information and the tools by which to speak out regarding that information.

While the Internet has plenty to offer, it is far from a perfect medium for communication, including about matters of public interest. Gatekeepers do exist in the form of Internet service providers (ISPs), search engines, and social media platforms, and these gatekeepers are all profit-driven[175]. By censoring content, ISPs can seek to avoid controversial matters like anti-war communications or criticisms of the gatekeepers and the commercial partners of the ISPs[176]. Meanwhile, search engines can sell key positions in online search results, sometimes without transparency[177].

Social media are problematic, too. For instance, Facebook, like various social media, allows users to surround themselves with echo chambers of bias, and Twitter greatly limits the number of characters in a given Tweet, which restricts the depth of engagement of a topic[178]. Information on the Internet is not necessarily accurate. For example, during the 2016 U.S. presidential election, forces linked to the Russian government used a variety of social media, including Facebook, Twitter, YouTube, and

171 *Ibidem* at 835.
172 R. L. WEAVER, *From Gutenberg to the Internet: Free speech, advancing technology, and the implications for democracy*, Durham, Carolina Academic, 2013, pp. 15, 37.
173 G. P. MAGARIAN, "Forward into the past: Speech intermediaries in the television and Internet ages", *Oklahoma Law Review*, n°71/2018, p. 253.
174 *Ibidem* at 264.
175 *Ibidem* at 251.
176 *Ibidem* at 254.
177 *Ibidem* at 254-55.
178 *Ibidem* at 255.

Instagram, to spread propaganda in an attempt to influence the election[179].

During the 2020 U.S. presidential election, Donald Trump falsely claimed on Twitter, more than seventy times, that mail-in ballots would lead, or had led, to mass fraud[180]. Before the results of the election were known, Trump asserted on Twitter that he had won, which, after mail-in ballots were counted, he had not[181]. During the remainder of his presidency, on Twitter and elsewhere, Trump continued his unsubstantiated assertions of mass election fraud[182]. Only after a mob of thousands of pro-Trump extremists, apparently inspired by Trump's false claims, stormed the U.S. Capitol on 6 January 2021, when Congress was officially certifying the presidential election[183], did Twitter suspend Trump's account, eventually permanently[184].

CONCLUSION

This paper has offered a retrospective on the Fairness Doctrine, a major U.S. broadcast doctrine of the twentieth century. Doing so involved providing background on the Fairness Doctrine and offering close readings of *Red Lion Broadcasting v. FCC* and *Syracuse Peace Council v. Television Station WTVH*, two of the key cases in the legal debate over the Doctrine. These readings led to an analysis of some of the strengths and weaknesses of the Doctrine and discussion of its alternatives.

Given the FCC's reluctance to regulate with a heavy hand, as well as the related increasing media concentration in broadcasting, the Internet likely has become the most prominent viable, although far from perfect, alternative to the Fairness Doctrine. While the Internet has, to an extent, further democratized communication

179 "Russia 'meddled in all big social media' around US election", *BBC News*, 17 Dec. 2018 [https://www.bbc.co.uk/news/technology-46590890].

180 "US election 2020: Donald Trump's speech fact-checked", *BBC News*, 6 Nov. 2020 [https://www.bbc.co.uk/news/election-us-2020-54837926].

181 T. SMITH, "Trump has longstanding history of calling elections 'rigged' if he doesn't like the results: The President has refused to acknowledge his loss to Joe Biden", *ABC News*, 11 Nov. 2020 [https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926].

182 E. DWOSKIN & C. TIMBERG, "Misinformation dropped dramatically the week after Twitter banned Trump and some allies: Zignal Labs charts 73 percent decline on Twitter and beyond following historic action against the president", *The Washington Post*, 16 Jan. 2021 [https://www.washingtonpost.com/technology/2021/01/16/misinformation-trump-twitter/].

183 D. MONTANARO, "Timeline: How one of the darkest days in American history unfolded", *National Public Radio*, 7 Jan. 2021 [https://www.npr.org/2021/01/07/954384999/timeline-how-one-of-the-darkest-days-in-american-history-unfolded]; J. JACOBO, "A visual timeline on how the attack on Capitol Hill unfolded", *ABC News*, 10 Jan. 2021 [https://abcnews.go.com/US/visual-timeline-attack-capitol-hill-unfolded/story?id=75112066].

184 T. ARBEL, "Twitter permanently bans Trump, citing risk of incitement", *PBS Newshour*, 8 Jan. 2021 [https://www.pbs.org/newshour/politics/twitter-bans-trump-citing-risk-of-incitement].

about matters of public interest, Internet users would benefit substantially from consulting a variety of quality sources and bringing critical eyes to the information consumed online. As always, when the democratic process is unfolding, the stakes are high.