OLD WINE IN NEW BOTTLES: REPLACING THE FAIRNESS DOCTRINE WITH ENFORCED COMPETITION IN THE MEDIA

The first amendment to the United States Constitution guarantees that "Congress shall make no law . . . abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] These noble words have invested Americans with an almost unfettered right to speak, print, and publish.

On its face, the first amendment guarantees the right to speak free from government constraint. But according to certain jurists and scholars, the various first amendment guarantees, taken together, also give rise to a penumbra—the right of the public to know.[2] This right entitles a self-governing public to the information necessary to make informed choices;[3] such information is most valuable if it stems from a free flow of ideas from diverse and, if possible, antagonistic sources.[4] In other words, the first amendment envisions the maintenance of a "marketplace of ideas,"[5] wherein free and competitive debate would cultivate an informed, and perhaps wiser, public.

The federal government has created for itself a role in protecting the marketplace of ideas and the public right to know. The Federal Communications Commission (F.C.C.)[6] enforces, pursuant to statute[7] and its own regulations,[8] the fairness doctrine. The fairness doctrine "provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[9] Broadcasters are thus required by law to provide

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[1] U.S. Const. amend. I.

[2] *See infra* notes 25, 26 and accompanying text. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12–19 (1978) [hereinafter cited as L. TRIBE].

[3] *See infra* note 21 and accompanying text.

[4] *See infra* notes 22–24 and accompanying text.

[5] *See infra* notes 20–24 and accompanying text.

[6] Hereinafter also cited as Commission.

[7] 47 U.S.C. § 315(a) (1976).

[8] F.C.C. Org., 47 C.F.R. §§ 0.71, 0.453 (1982); F.C.C. Radio Broadcast Servs., 47 C.F.R. § 73.1910 (1982); F.C.C. Cable Television Serv., 47 C.F.R. §§ 76.205, 76.209 (1982).

[9] F.C.C. Radio Broadcast Servs., § 73.1910 (1982). *See* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 369 (1969); *In re* Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974) [hereinafter cited as *Fairness Report*].

a medium for an exchange of ideas from different ideological perspectives, keeping in mind the public's first amendment right to be informed.[10]

If the government has assumed responsibility through the fairness doctrine to protect the public's right to know by "maintaining and enhancing a system of free expression,"[11] it has not succeeded in its task. First, only the broadcast media are subject to the fairness doctrine.[12] No newspaper, magazine, or any other print publication is obligated by law to print contrasting viewpoints on issues of public concern; the constitution would prohibit such a result.[13] In other words, the protection is incomplete. Second, it has always been procedurally difficult for a prospective complainant to gain the ear of the Commission, to say nothing of succeeding on the merits;[14] to make matters worse, the present Commission has declared an overt hostility toward the fairness doctrine.[15] Third, and most devastating to the fairness doctrine, is the argument, which has become more potent in recent years, that it is constitutionally suspect.[16]

This note will proffer a substitute for the fairness doctrine. The duty of broadcasters under the fairness doctrine to be "fair" is not an end in itself, but is merely a means to an end: cultivating exchange of information and public debate.[17] It will be suggested that the government need not require that broadcasters or newspapers be "fair" in order to bring about that purpose. Instead, the government should ensure that broadcast stations and newspapers are free to compete against each other; that the marketplace of ideas is free of all anti-competitive influences and restraints of trade. The government may achieve that result by an approach less intrusive, and yet more comprehensive, than the fairness doctrine. The means would be the antitrust laws,[18] modified so as to protect a free competition of ideas, and thereby the public right to turn to diverse sources for the information which it considers to be important.[19]

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[10] *Fairness Report*, *supra* note 9 at 1-3; *Red Lion*, 395 U.S. at 390.

[11] *Fairness Report*, *supra* note 9, at 3, 6.

[12] The F.C.C.'s jurisdiction extends only to the broadcast media. 47 U.S.C. § 152 (1976).

[13] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[14] *See infra* notes 89-106 and accompanying text.

[15] *See infra* notes 108-112 and accompanying text.

[16] *See infra* notes 85-88 and accompanying text.

[17] *See infra* note 122 and accompanying text.

[18] 15 U.S.C. §§ 1-7, 12-27, 41-51 (1976).

[19] Resort to the antitrust laws might be made to address other broadcast regulation issues, such as, *inter alia*, frequency allocation and station licensing. This Note, however, will confine itself to the fairness doctrine. In addition, this Note will not discuss the issues involved in the regulation of political broadcasting. While the equal opportunities doctrine and the fairness

I. The Right to Know and the Fairness Doctrine

A. *The Marketplace of Ideas*

The notion of an individual's right to speak, rooted in the first amendment, is not unlike that of the freedom granted to the individual in capitalist societies to freely engage in economic activity. Just as society as a whole, at least in theory, benefits from the efficient allocation of resources and the increased productivity and innovation stimulated by free and competitive economic trade, it benefits from the lively and informative discourse resulting from the free trade of ideas. According to Justice Holmes, this "marketplace of ideas" is an efficient means for society to arrive at the "truth":

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate, is the theory of [the first amendment].[20]

It has been suggested that the public's right to the "truth" strikes at the heart of its ability to govern itself. This right is thus raised to constitutional dimensions:

> The First Amendment . . . protects the freedom of those activities of thought and communication by which we 'govern'. . . . [We] must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon the issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness. . . . These are the activities to which [the First Amendment] gives its unqualified protection. . . .[21]

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doctrine are codified in the same section of the Communications Act of June 19, 1934, ch. 652, 48 Stat. 1064 (current version at 47 U.S.C. § 315(a) (1976)), the equal opportunities doctrine concerns the candidates themselves, while the fairness doctrine speaks to the issues. The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2300–01 (1978) [hereinafter cited as *Political Primer*]. The equal opportunities doctrine touches constitutional issues in addition to the first amendment, such as the right to vote and the right to run for public office. Such issues are best discussed in another context.

[20] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[21] Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 255, *quoted in* Hynes v. Mayor and Council of Oradell, 425 U.S. 610, 627–28 (1976) (Brennan, J., concurring in

The Supreme Court has adopted this marketplace of ideas concept on a number of occasions. It has stated that the first amendment seeks to encourage "debate on public issues," and that it "be uninhibited, robust, and wide open."[22] Moreover, the Court has interpreted the goal of the first amendment as being the achievement of "the widest possible dissemination of information from diverse and antagonistic sources."[23] Finally, the Court envisioned the intensity of the debate fostered by the first amendment to be most effective "when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[24]

Stemming directly from the marketplace of ideas notion, and the reciprocal of the right to speak, is the right to know.[25] As touched upon above, the right to know represents the public's interest in the marketplace of ideas[26]—the right to receive competing ideas from many informative outlets.

The clear meaning of the first amendment guarantees the right to speak, free from government interference.[27] By its very nature, an uninhibited right to speak will inevitably conflict with the right to know. For example, a speaker capable of outshouting all other speakers is within his rights to do so. Does his audience have any right to hear his competitors? Can the government step in and limit his speech so that others may also be heard? As will be seen below, analogous fact patterns have been dealt with by the Supreme Court. The Court's conclusions have varied, depending on the type of medium the speaker has chosen to use.

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part). *See* Thornhill v. Alabama, 310 U.S. 88, 102 (1940); Grosjean v. American Press Co., Inc., 297 U.S. 233, 249–50 (1936).

[22] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[23] Associated Press v. United States, 326 U.S. 1, 20 (1945). *See* United States v. Midwest Video Corp., 406 U.S. 649, 667–69 (1972); *Red Lion*, 395 U.S. at 384, 390.

[24] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[25] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 (1976) (citing Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972)). *See* Procunier v. Martinez, 416 U.S. 396, 408–09 (1974) (Prisoners have a first amendment right to receive uncensored mail.); Stanley v. Georgia, 394 U.S. 557 (1969) (a conviction for possession of pornographic material violates the possessor's right to know); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (the first amendment guarantees a right to receive information); Meyer v. Nebraska, 262 U.S. 390 (1923), *construed in* Griswold v. Connecticut, 381 U.S. 479 (1965) (students have a first amendment right to acquire knowledge).

[26] *See* L. TRIBE, *supra* note 2, at 676 ("The right to know is the first amendment filtered through Holmes' marketplace of ideas.").

[27] *See supra* note 1 and accompanying text.

B. *Government's Initiative: The Fairness Doctrine*

Federal regulation of broadcasting, as we know it today, traces its beginnings to the Radio Act of 1927.[28] The years preceding its enactment witnessed unbridled competition by broadcasters on a finite broadcast spectrum; the result was unmitigated chaos.[29] While an existing statute[30] authorized the government to assign frequencies, the law had no teeth, since it did not empower the government to discipline an unruly broadcaster.[31] When Commerce Secretary Herbert Hoover was stymied in his effort to penalize a licensee for broadcasting on an unauthorized frequency,[32] it became clear that the government should not remain helpless:[33] Hence, the Act of 1927 was passed.[34]

The Act of 1927 vested the newly created Federal Radio Commission (F.R.C.)[35] with the authority to allocate frequencies to applicants in a manner which would best serve the public "convenience, interest,

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[28] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 [hereinafter cited as Act of 1927].

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> From July 1926, to February 1927, when Congress enacted the Radio Act of 1927, almost 200 new radio stations went on the air. These new stations used any frequency they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos.

Fairness Report, supra note 9, at 3 (quoting F.C.C. Office of Network Study, *Second Interim Report on Television Network Procurement*, 65-66 (1965)).

[30] Radio Communications Act of 1912, ch. 287, 37 Stat. 302.

[31] Hoover v. Intercity Radio Co., 286 F. 1003 (1923), *appeal dismissed per stipulation*, 266 U.S. 236 (1924).

[32] United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926).

[33] A sponsor of the Radio Act of 1927, Congressman White, observed:

> We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual . . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.

67 CONG. REC. 5479 (1926), *quoted in Red Lion*, 395 U.S. at 376 n.5.

[34] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

[35] *Id.*

or necessity."[36] Motivated in part by fear of potential abuse of, and anti-competitive practices within, the new medium,[37] Congress attempted to ensure that the right of the public at large to receive information is superior to the right of any particular individual to transmit it.[38]

Congress and the nascent F.R.C. grounded their regulation of this burgeoning sector of the American press in the concept of "public

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[36] In §4, 44 Stat. 1163 (codified at 47 U.S.C. §309 (1976)), it provides:

§309. Application for license (a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

[37] During debate on passage of the Act of 1927, *supra* note 28, Congressman Johnson observed:

> There is no agency so fraught with possibilities for service of good or evil to the American people as the radio. . . . The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. . . . [I]t will only be a few years before these broadcasting stations, if operated by chain stations, will simultaneously. . .bring messages to the fireside of nearly every home in America. They can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American politics will be largely at the mercy of those who operate these stations.

67 CONG. REC. 5558 (1926).

[38] Then Secretary of Commerce Herbert Hoover stated:

> We hear a great deal about the freedom of the air; but there are two parties to freedom of the air, and to freedom of speech, for that matter. . . . Certainly in radio I believe in freedom for the listener. He has much less option upon what he can reject, for the other fellow is occupying his receiving set. The listener's only option is to abandon his right to use his receiver. Freedom cannot mean a license to every person or corporation who wishes to broadcast his name or wares, and thus monopolize the listener's set. . . . The ether is a public medium, and its use must be for public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public.

Address by Herbert Hoover, Fourth National Radio Conference, 1925, *quoted in* Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L. J. 659 (1975).

Judge Learned Hand expressed a similar opinion:

> The interests which [broadcasting] regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interests, first, of the 'listeners,' next, of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks.'

National Broadcasting Co. v. United States, 47 F. Supp. 940, 945 (S.D.N.Y. 1942), *aff'd*, 319 U.S. 190 (1943).

trust."[39] The electromagnetic spectrum through which broadcast frequencies operate was thereby "entrusted" to broadcasters by F.R.C. license, with the public retaining the beneficial interest. The F.R.C., in the public interest,[40] was obliged to scrutinize the operations of its licensees, to prevent waste and abuse of the "trust."

A landmark F.R.C. interpretation of the new "public interest" standard was promulgated in *Great Lakes Broadcasting Co.*,[41] where the F.R.C. ruled that the "public interest requires ample play for the free and fair competition of opposing views, and [that] principle applies to all discussion of issues of importance to the public."[42]

The Communications Act of 1934,[43] which created the F.C.C.,[44] superseded the Act of 1927.[45] A 1959 amendment[46] to the Act of 1934

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[39] *See* S. REP. No. 562, 86th Cong., 1st Sess. at 8-9 (1959).

[40] *See supra* note 36.

[41] 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 3 F.2d 993, *cert. dismissed*, 281 U.S. 706 (1930).

[42] 3 F.R.C. Ann. Rep. at 33.

[43] Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151–609 (1976)).

[44] 47 U.S.C. §151 (1976).

[45] *See* 47 U.S.C. §§ 81–119 (1976).

[46] Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (current version at 47 U.S.C. §315(a) (1976)):

> §315. (a) Candidates for public office
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> Equal opportunities requirement: censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities
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> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any –
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> (1) bona fide newscast
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> (2) bona fide news interview
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> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
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> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
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> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. *Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford*

was deemed to have codified then ongoing F.C.C. policy, which had originated in *Great Lakes.*[47]

In *Red Lion Broadcasting Co. v. F.C.C.*,[48] the Supreme Court lent its support to this policy, which had become known as the fairness doctrine. The Court held that the imposition of the fairness doctrine on broadcasters did not violate their right of speech under the first amendment. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[49] Since the first amendment seeks to guarantee an "uninhibited, robust, and wide open" public debate on important issues,[50] the Court saw nothing wrong with government using its power to cultivate such debate.[51] The Court found that the limited nature of the electromagnetic spectrum mandated a distinction between media susceptible to regulation and media not so susceptible:

> 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. . . . 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.[52]

In other words, the fairness doctrine requires that each broadcast licensee provide a "marketplace of ideas" for his particular broadcast market, since, in contrast to the print media, the resource upon which the broadcaster depends is scarce.

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reasonable opportunity for the discussion of conflicting views on issues of public importance [emphasis added].

See Political Primer, supra note 19, at 2218-19.

[47] *Construed in Red Lion*, 395 U.S. at 380.

[48] *Id.* at 367.

[49] *Id.* at 390.

[50] *New York Times*, 376 U.S. at 270.

[51] Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.

Red Lion, 395 U.S. at 401 n.28 (citing Citizen Broadcasting Co. v. United States, 394 U.S. 131 (1969)).

[52] *Id.* at 388–89.

The Court took a cautious step backward in *Columbia Broadcasting System v. Democratic National Committee*,[53] where it upheld two F.C.C. rulings[54] which refused to interfere in broadcasters' decisions to deny certain concerned groups time to air editorial advertisements dealing with what the groups considered to be issues of public importance. Retreating a bit from its reasoning in *Red Lion*,[55] the Court recognized that broadcasters, as journalists, must retain broad discretion as to what they will and will not air. At the same time, however, the Court reaffirmed the broadcasters' obligation to act in the public interest.[56] The Court attempted to reconcile these potentially conflicting goals by requiring broadcasters to balance their private journalistic interests against their obligations as public trustees to act in the public interest.[57] It endorsed the Commission's policy of limiting scrutiny of its licensees to the "totality of their performance,"[58] intervening in a licensee's programming decision "[o]nly when the interests of the public are found to outweigh the private journalistic interests of the broadcasters."[59]

Red Lion and *Columbia Broadcasting System*, taken in tandem, legitimized the fairness doctrine in terms of first amendment dogma. The rights of listeners and viewers were declared by the Court to be paramount. Each broadcaster was invested with a duty to maintain a marketplace of ideas for the public benefit; at the same time, the F.C.C. and the courts were required to defer to a licensee's good faith decisions.

C. *The First Amendment Dichotomy*

The fairness doctrine requires, in theory at least, that broadcasters consider the public's right to know in deciding when it is appropriate to air issues of public importance and opposing points of view. According to the Supreme Court, however, similar obligations may not be imposed upon the print media.[60] In *Miami Herald Publishing*

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[53] 412 U.S. 94 (1973).

[54] Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242 (1970); Democratic National Comm., 25 F.C.C.2d 216 (1970).

[55] *See supra* note 52 and accompanying text.

[56] *Columbia Broadcasting Sys.*, 412 U.S. at 118–19, 124–25.

[57] *Id.* at 118.

[58] *Id.* at 120–21.

[59] *Id.* at 110.

[60] *See infra* notes 61–67 and accompanying text.

Co. v. Tornillo,[61] the Court declared a Florida statute,[62] which contained fairness doctrine-type language, unconstitutional. The statute provided a candidate for public office with a right to demand that any newspaper print free of charge his reply to any attack on his personal character or official record printed by that newspaper. Not unlike *Columbia Broadcasting System*,[63] *Tornillo* held that private parties have no right of access to publish their personal views through the media.[64] *Tornillo*, however, went further, reasoning that government cannot, even in the interest of fostering free debate, "compel editors and publishers to publish that which reason tells them should not be published."[65] Thus, while broadcasters are required to balance their own journalistic interests against the public interest,[66] newspapers are not so required. Speaking for the Court, Chief Justice Burger stated unequivocally: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[67]

Tornillo made it clear to those who may have hoped otherwise, that nothing resembling a fairness doctrine can be imposed upon the print media. It established beyond a doubt that the electronic and print media would not be equally free of government scrutiny of their publishing activities.

Certain reasoning behind the Court's different conclusions in *Red Lion* and *Columbia Broadcasting System*, and in *Tornillo* seems, on its face, to be inconsistent. For example, the Court has found that while government-imposed fairness will not cause broadcast editors to

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[61] 418 U.S. 241 (1974).

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> §104.38 *Newspaper assailing candidate in an election; space for reply*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable [by fine].

Fla. Stat. §104.38 (1973).

[63] *See supra* note 53.

[64] *Tornillo*, 418 U.S. at 127.

[65] *Id.* at 256.

[66] *See supra* notes 49–51, 55–59 and accompanying text.

[67] *Tornillo*, 418 U.S. at 256.

resist airing controversial issues for fear of triggering an obligation to air opposing views,[68] newspaper editors, given the same obligation, will resist printing such issues.[69] Moreover, the Court reasoned that while freedom of the press is not abridged when broadcasters are required, directly or indirectly, to air controversial issues and opposing views,[70] not even indirect restraints may be imposed upon the discretion of newspaper publishers.[71]

A most graphic example of this dichotomy of first amendment scrutiny can be found in the reasoning of Justice White, the author of the Court's opinion in *Red Lion*. Referring to the evils which the fairness doctrine sought to mitigate, Justice White stated that

> [absent the fairness doctrine,] station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.[72]

In stark contrast, and a mere four years later, Justice White sounded a highly deferential note:

> [T]he press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints will not be expressed.[73]

As might be expected, this dichotomy is not without justification. First, compared to paper and ink, the broadcast spectrum is a scarce public resource. According to this argument, if a person has something to say, he can always print a pamphlet or a flyer, or even start a publication. He cannot, however, pick up a microphone and broadcast; there are not enough broadcast bands to go around. Thus, those who are lucky enough to have obtained broadcast licenses are a privileged few. It does not seem at all wrong, the argument concludes, to require those fortunate enough to have received licenses to keep in

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[68] *Red Lion*, 395 U.S. at 393–94.
[69] *Tornillo*, 418 U.S. at 257.
[70] *Red Lion*, 395 U.S. at 392.
[71] *Tornillo*, 418 U.S. at 256.
[72] *Red Lion*, 395 U.S. at 392.
[73] *Tornillo*, 418 U.S. at 260 (White, J., concurring).

mind the interests of those who have not been so fortunate.[74] Since the print media do not operate under the same resource constraints, they do not bear similar burdens.

Second, the pervasive nature of radio and television necessitates close government scrutiny for the public's protection. Radio listeners and television viewers are a captive audience. What they see and hear cannot be easily tuned out. A newspaper reader can be most careful and selective in what he reads; if he does not like what he sees, he may simply read the sports. This is not so with listeners and viewers, who cannot simply ignore what they do not want to hear. Indeed, once a viewer turns on his television or radio, the privacy of his home is invaded by voices and ideas broadcast over a public medium, a presence over which he has no control. This involuntariness makes the impact of the broadcast media on the minds of the public that much greater. With such an impact comes a greater potential for abuse by an unscrupulous broadcaster; hence the obligation imposed by the government to be fair.[75]

Neither argument is persuasive. The "scarcity of the resource" argument has been seriously weakened in recent years by technological advances in the communications industry.[76] In the near future, the existing electromagnetic spectrum may be rendered limitless by digital data compression,[77] time division multiple access (TDMS)[78] and dual polarization[79] techniques. High frequencies, such as the currently under-utilized ultrahigh frequency (UHF) band,[80] and the new and

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[74] *Fairness Report, supra* note 9, at 6–8; *see Red Lion*, 395 U.S. at 388, 392–95.

[75] *See* F.C.C. v. Pacifica Found., 438 U.S. 726, 748–49 (1978); *Columbia Broadcasting Sys.*, 412 U.S. at 128; *see also supra* note 38.

[76] *See* Kaufman, *Reassessing the Fairness Doctrine*, N.Y. Times, June 19, 1983, §6 (Magazine), at 16.

[77] This is a technique by which digital technology is used to select and transmit only certain critical elements of a broadcast signal, effectively "compressing" the data transmitted, utilizing much less spectrum space. *Freedom of Expression and the Electronic Media: Hearings Before the Senate Committee on Science, Commerce and Transportation*, 97th Cong., 2d Sess., at 19 (1982) (testimony of John V. Harrington).

[78] This is a technique by which several earth stations at once can time-share the entire bandwidth of satellite transmissions via a single satellite transponder. Earth stations receive the messages, decode them, and relay them to other facilities. *Id.* at 20.

[79] This is a technique by which radio frequency waves are oriented in horizontal, vertical, and circular modes, allowing for the reuse of the same increment of spectrum two or more times. *Id.* at 20–21.

[80] UHF, which utilizes higher frequencies than conventional very high frequency (VHF) television, is much harder to work with than VHF; until VHF reached saturation in the mid 1960's, there was no need to experiment with UHF. Between that time and 1977, the number of

even higher frequency system called Multichannel Service (MCS)[81] will significantly increase the number of conventional television channels. The range of available cable television channels will also be greatly extended in the near future:[82] Even today, when such space age technologies have yet to be implemented, there are many more broadcast stations than there are newspapers.[83]

The "pervasiveness of television and radio" argument was never very tenable. While the presence of television and radio broadcasts may be hard to ignore, so is a sensational newspaper headline, or the cover of the National Enquirer. Printed literature has established no less a pervasive presence in contemporary society than television and radio have. As easily as a reader can turn a page, a viewer can turn off his television or radio set in response to programming which he dislikes:

> Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the 'off' button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.[84]

UHF stations had tripled. *Freedom of Expression and the Electronic Media: Hearings Before the Senate Committee on Science, Commerce and Transportation*, 97th Cong., 2d Sess., at 36 (1982)(testimony of Harry E. Smith).

[81] MCS broadcasts on frequencies about three times as high as UHF, and will soon be available in several cities. *Id.*

[82] Each cable system may soon have the capacity to transmit 100 channels or more, given recent technological advances. *Id.* at 32.

[83] In 1977 there were over 9,000 total AM and FM radio, and VHF and UHF television stations nationwide, up from approximately 6,500 in 1966. *Id.* at app. In contrast, the number of daily newspapers declined from a total of approximately 2,600 in 1910 to approximately 1,750 in 1978. Lively, *Media Access and a Free Press: Pursuing First Amendment Values Without Imperiling First Amendment Rights*, 58 DEN. L.J. 17, 17 n.5 (1980). *See* Kaufman, *supra* note 76, at 16.

It can be argued, however, that when one factors into the equation the number of periodicals and other printed matter exclusive of newspapers currently circulating, the number of available broadcast bands once again seems to be scarcer by comparison. It could be argued in reply that the numerical comparison is only meaningful if daily newspapers are compared with broadcast stations, since they compete every day on a head to head basis. In addition, it is likely that the new technologies will keep the number of available broadcast spaces expanding almost if not as fast as new periodicals are produced. *See* Bazelon, *F.C.C. Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 224-25. *See also* Kaufman, *supra* note 76, at 18.

[84] *Pacifica Found.*, 438 U.S. at 766 (Brennan, J., dissenting).

If indeed the "scarcity of the resource" contention must fall to the advance of high technology, and the "pervasiveness of radio and television" position must collapse of its own weakness, then what was seen in *Red Lion* as a legitimate government interest in imposing a fairness doctrine only on broadcasters must fail. Absent a valid justification, government may not constitutionally single out the speech of a particular individual or class of individuals for favorable or unfavorable treatment.[85]

The only thing that remains as a potential justification for imposing a fairness doctrine is the public right to know.[86] This right is independent of the medium, since it speaks only in terms of the receipt of information and ideas, regardless of the source.[87] Yet the safeguarding of the right to know was not seen as compelling enough a government objective to permit the imposition of a fairness doctrine on the print media.[88] Thus, stripped of the justifications once seen as sufficient, imposing the fairness doctrine on the electronic media would similarly have to fail.

D. *From Obstacles to Barriers*

Assuming that the fairness doctrine survives constitutional challenge, would the public gain anything by its retention? The answer is, given present conditions, probably not. After a brief overview of the Commission's role in enforcing the fairness doctrine, as well as a look at the attitude of the current Commission, the reason should become clear.

In response to the general uncertainty and the public outcry for access to broadcast facilities following *Red Lion*, the Commission undertook a complete review of the fairness doctrine, beginning in July of 1971,[89] and culminating in the *Fairness Report*[90] in 1974. The *Fairness Report* began by framing the obligations as follows: First,

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[85] *See* Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) (a state may not selectively abridge the right to speak of certain picketers, but not that of others, consistent with the first and fourteenth amendments).

[86] *See supra* notes 25–26 and accompanying text.

[87] *Id. Cf.* First Nat'l. Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976).

[88] *See supra* note 67 and accompanying text.

[89] *In re* Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 30 F.C.C.2d 26 (1971).

[90] *Fairness Report, supra* note 9. The *Fairness Report* was later supplemented. *In re* Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691 (1976) [hereinafter cited as *Fairness Reconsideration*].

"the broadcaster must devote a reasonable percentage of this [sic] broadcast time to the coverage of public issues."[91] Second, "his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view."[92]

The *Fairness Report* explained that a "reasonable" amount of time is to be determined by the licensee, who does not violate his obligation unless it is clear that he has not attempted to meet it in good faith.[93] "Contrasting points of view" by responsible spokesmen are to be actively solicited by the licensee, and aired on his own programming; it is not sufficient that opposing views have been aired somewhere in the broadcast area on another station.[94] Opposing viewpoints need not be precisely balanced.[95] A "public issue" is one which is controversial, or "the subject of vigorous debate with substantial elements of the community in opposition to one another."[96] An issue of public importance is determined by the "impact that the issue is likely to have on the community at large."[97]

The role of the Commission in enforcing fairness obligations is one involving limited scrutiny. So long as the licensee attempts in good faith to fulfill his obligations as outlined above, the Commission will not substitute its judgment for that of the broadcaster.[98]

The Commission's limited role has been virtually assured by the network of procedural obstacles it has erected which have made enforcement action most uncommon.[99] The Commission has chosen for itself a passive, rather than an active role. Although it has the statutory power to levy fines[100] and to grant, renew and revoke licenses[101] upon its own initiative, it only acts upon complaints received from "regular" viewers and listeners.[102] The status of regular viewer or listener is not readily conferred. In order to have such standing to file

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[91] *Fairness Report*, *supra* note 9, at 7.

[92] *Id.*

[93] *Id.* at 9–10.

[94] *Id.* at 10–11. *See* Cullman Broadcasting Co., 40 F.C.C. 576 (1963) (licensee must provide free time to spokesmen presenting opposing points of view in the event that no paying spokesman can be found).

[95] Cullman Broadcasting Co., 40 F.C.C. 576 (1963). *Compare* 47 U.S.C. § 315(a) (1976), the "equal opportunities doctrine," under which broadcasters must allow opposing political candidates precisely equal time to air their messages.

[96] *Fairness Report*, *supra* note 9, at 12.

[97] *Id.*

[98] *Id.* at 13-17.

[99] *See* Lively, *supra* note 83, at 22.

[100] 47 U.S.C. § 503(b) (1976).

[101] 47 U.S.C. §§ 307(d), 312(b) (1976).

[102] *See Fairness Report*, *supra* note 9, at 17–21.

a complaint, one must routinely watch the evening news and a significant portion of the public affairs programs of a particular television station, or listen to major portions of a radio station's news and public affairs programming.[103]

After the viewer or listener has established his credentials, he is required to list in his complaint specific information about the station involved, the particular controversial issue discussed on the air, the date and time the program was carried, the basis for his claim that the station presented only one side of the issue, and whether the station has afforded, or plans to afford, opportunity for presentation of contrasting viewpoints.[104] In addition, the Commission will not hear the complaint unless it has first been submitted to the broadcaster implicated.[105] Finally, the burden imposed on the complainant is the presentation of prima facie evidence of a violation.[106]

The above procedural requirements have made the fairness doctrine difficult for a prospective complainant to invoke, and arguably provide an effective way for the F.C.C. to limit frivolous claims. In addition, the reluctance of the Commission to interfere with the discretion of a broadcaster can best be understood in light of *Columbia Broadcasting System*,[107] which made it clear that such discretion must be given deference.

However, the current Commission has declared hostility toward the fairness doctrine. On September 17, 1981, the Commissioners voted, by a margin of 4-2, to recommend to Congress that it be repealed.[108] More recently, the Chairman of the F.C.C. opined that

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[103] *Id.* at 19.

[104] *In re* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 600 (1964) [hereinafter cited as *Fairness Primer*].

[105] *Fairness Report*, *supra* note 9, at 20–22.

[106] *Id.* at 19. The Commission has abided by its *Fairness Report*, *supra* note 9. In *Fairness Reconsideration*, *supra* note 90, the Commission summarily considered, and rejected, a number of proposals solicited from the public on how to better enforce fairness among licensees. The two major proposals considered and rejected by the F.C.C. were the Henry Geller proposal (Licensees should be required to list annually ten controversial issues of public importance which they chose for coverage in the prior year and to submit the list together with a summary of representative programming on and offers made for response to such issues. The F.C.C. would review complaints once a year at license renewal time.) and the Committee for an Open Media (COM) proposal (Licensee should set aside one hour per week of programming time for public access, which the Commission would consider to be presumptive compliance with the fairness doctrine.). *Id.* at 691–92. The various proponents appealed. National Citizens Comm. for Broadcasting v. F.C.C., 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). Upon remand, the Commission again rejected them. *In re* Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 74 F.C.C.2d 163 (1979).

[107] *See supra* notes 53–59 and accompanying text.

[108] Durbin, THE FAIRNESS DOCTRINE AND THE EQUAL OPPORTUNITIES DOCTRINE IN POLITICAL BROADCASTING, CONGRESSIONAL RESEARCH SERVICE, I.B. No. IB82087, at 1.

"the fairness doctrine ought to be eliminated" since it "operate[s] to throttle, rather than encourage, the broadcasting of different points of view."[109]

It is unrealistic to expect this Commission to enforce the fairness doctrine as it was intended to be enforced. In fact, in view of this Commission's open pronouncements, it is unlikely that its "lifted eyebrow"[110] would scare broadcasters into compliance with the fairness guidelines, since an F.C.C. staff member issuing a warning to a licensee will no longer be assured of backing from the top. This Commission's record of decisions[111] indicates that it intends to use the procedural tools at its disposal as road-blocks, so as to make it more difficult, if not impossible, for a claimant to bring a licensee who has violated the fairness doctrine to task.[112]

E. *The Case for Government Intervention*

If indeed the fairness doctrine should fall, what, if anything, should take its place? Some, including the Chairman of the F.C.C.,[113] would answer "nothing." For convenience, this group will be called the "deregulators." They contend that there is absolutely nothing in the first amendment which allows the public to claim a right to know; the first amendment guarantees a right to speak, free from government interference, "nothing less, . . . nothing more."[114] They further

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[109] J. Curtis Herge (NCPAC), 89 F.C.C.2d 626, 630 (1982) (Fowler, Chairman, concurring).

[110] The "lifted eyebrow" effect occurs when a member of the F.C.C.'s staff has expressed concern to a licensee over his action, in response to the licensee's inquiry. Robinson, *The F.C.C. and the First Amendment: Observations in 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119-20 (1967).

[111] Based upon the cases reported in the F.C.C. reporter, the current Commission has generally found either that the licensee did not exceed its discretion in not airing an opposing point of view or a controversial issue, *see, e.g.*, Henry W. Maier, 93 F.C.C.2d 132 (1983); Minnesota Farmers Union, 88 F.C.C.2d 1455 (1982); Ed Clarke for President Comm., 87 F.C.C.2d 417 (Broadcast Bureau, 1980), or that the complaint was not on its face sufficient, *see, e.g.*, Democratic Nat'l Comm., 91 F.C.C.2d 373 (1982); Environmental Defense Fund, 90 F.C.C.2d 648 (1982); Gerald Cardinale, 88 F.C.C.2d 346 (Broadcast Bureau, 1981); Robin Ficker, 88 F.C.C.2d 509 (Broadcast Bureau, 1980); J. Curtis Herge (NCPAC), 88 F.C.C.2d 626 (Broadcast Bureau, 1981), *application for review denied*, 89 F.C.C.2d 626 (1982). The Commission has not found a single fairness doctrine violation pursuant to a complaint within the last three years.

[112] The fact that the composition of the Commission will eventually change is no comfort, since change is years away. Even when change in personnel comes, there is no guarantee that the Commission's political outlook will similarly change.

[113] *See, e.g.*, *Fairness Reconsideration*, *supra* note 90, at 706 (Robinson, Chairman, dissenting); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982) [hereinafter cited as Fowler and Brenner].

[114] *Fairness Reconsideration*, *supra* note 90, at 707.

argue that the public interest is adequately served by the forces of the "free market."[115] Public preferences, they explain, will eventually become clear to broadcasters in the "ratings," and will cause broadcasters to adjust their programming accordingly.[116] In other words, government should not be in the business of defining the priority of anyone's rights under the first amendment.

Perhaps the deregulators are right. Maybe the only way to maintain the integrity of freedom of speech is for government to play no role whatsoever. Indeed, the constitutional injunction is clear: "Congress shall make no law . . . abridging freedom of speech or of the press . . . ."[117]

Yet there remains something troubling. Must government stand by when the speech of one has restrained, or threatens to restrain, the speech of others, thereby limiting activity in the marketplace of ideas? In the context of the print media, which are subject to no regulations, Justice Douglas articulated certain fears:

> Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude—and to make money.[118]

Similarly, the threat of a monopoly of the means of expression would plague broadcast media free of government "interference":

> The stated purpose [of repealing the fairness doctrine] is to create 'freedom for each and every form and portion of the media to choose the mode and content of *its own expression*'. . . . [T]he result would only be to assure a continuing monopoly of expression to existing owners and operators of the broadcasting facilities.[119]

When this very real threat of monopoly is factored into an analysis of the marketplace of ideas, the prospect of government recusing itself from any role in regulating that marketplace is disturbing. If one accepts the existence of a right to know, as the Supreme Court has

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[115] Fowler & Brenner, *supra* note 113, at 239.

[116] *Id. See also* Safire, *Freedom Is Unfair*, N.Y. Times, Nov. 11, 1982 at A31, col. 1.

[117] *See supra* note 1 and accompanying text.

[118] *Tornillo*, 418 U.S. at 253 (quoting W.O. Douglas, The Great Rights 124-25, 127 (1963)).

[119] T.I. Emerson, speaking at the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, American Trial Lawyers Foundation, The First Amendment and the News Media—Final Report 30 (1973), *quoted in* Barrow, *supra* note 38, at 681.

done,[120] one might see how the activities of an idea monopolist would subvert that right, by severely limiting the array of ideas from which the public can choose. Private monopolies could thus accomplish by fiat the same effect as Congress could by legislation. As the Supreme Court has said:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. . . . Freedom of the press from governmental interference under the First Amendment does not sanction the repression of that freedom by private interests.[121]

Governmental power is the only effective counterweight to private forces wielding quasi-governmental power.

Thus, in answer to the question posited at the beginning of this section, the federal government must replace the fairness doctrine with an effective, comprehensive, and less intrusive regulatory scheme. When the marketplace of ideas functions smoothly and competitively, government should abstain from action. So long as newspapers and broadcast stations behave in the spirit of competition, they should be left to publish as they choose. However, government should step into the marketplace of ideas when free trade therein is being "abridged" by anti-competitive practices. That has essentially been the purpose of the fairness doctrine; the requirement that broadcasters be fair as such is simply a means to this end.[122] The deregulators demand repeal of the means while disregarding the end. The end, however, is much too important to ignore, since upon it depends the continued vitality of the American democratic system.[123] The antitrust laws,[124] as will be explained below, can provide for its protection.

II. Antitrust as the Basis for Media Diversity

A. *Antitrust and the First Amendment*

The Sherman Act,[125] the basic antitrust law,[126] was designed to prevent the concentration of economic power in the hands of the few,

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[120] *See supra* notes 20–24 and accompanying text.

[121] *Associated Press*, 326 U.S. at 20.

[122] Brandywine-Main Line Radio, Inc. v. F.C.C., 473 F.2d 16, 33–38 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); Green v. F.C.C., 447 F.2d 323, 329 (D.C. Cir. 1971).

[123] *See supra* note 21 and accompanying text.

[124] 15 U.S.C. §§ 1–7, 12–27, 41–51 (1976).

[125] Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209, current version at 15 U.S.C. §§ 1–7 (1981). Sections 1 and 2 of the Sherman Act read as follows:

and to protect pluralism and liberty in the marketplace, thereby serving the best interests of consumers.[127] The first amendment carries a similar concept into the realm of ideas in its fostering of robust debate, from as many sources as possible, so as to guarantee the public access to information. As Judge Learned Hand explained:

> [N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: The dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[128]

Since the two doctrines are complementary, it is only natural that they should support each other when possible.[129]

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
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> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[126] *See generally*, E. KINTNER, AN ANTITRUST PRIMER 15–24 (1973).

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> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4–5 (1958) (opinion per Black, J.). *See* 1 E. KINTNER, FEDERAL ANTITRUST LAW § 1.16 (1980); 1 P. AREEDA & D. TURNER, ANTITRUST LAW 7–8 (1978). *See generally*, C. KAYSEN & D. TURNER, ANTITRUST POLICY 11–20 (1959).

[128] Associated Press v. United States, 52 F. Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945).

[129] The first amendment has been used by the federal courts to promote the goals of antitrust law, *e.g.*, promoting competition, where federal antitrust jurisdiction would normally not

There is precedent for using antitrust to promote first amendment rights. The F.C.C., authorized to regulate in the "public interest,"[130] has interpreted its role on a number of occasions as that of prohibiting certain instances of multiple ownership of broadcast stations.[131] In 1975, the F.C.C., utilizing its licensing power,[132] ruled that all prospective instances of newspaper-broadcast co-ownership within the same media market be prohibited. Relying on antitrust law as a model, it required that interests which owned or controlled both newspapers and broadcast licensees within the same market divest themselves of their broadcast stations.[133] The Commission, later affirmed by the Supreme Court,[134] reasoned that the greater the diversity of ownership of media units, the greater the diversity of viewpoints.[135]

The print media have historically contended that the first amendment limits the power of government to subject them to the antitrust laws. In *Associated Press v. United States*,[136] the Supreme Court,

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reach. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (Virginia statute banning advertisement of prescription drugs struck down as offensive to the right of commercial speech, and to the free enterprise system); Bates v. State Bar of Arizona, 433 U.S. 350 (1977), *reh'g denied*, 434 U.S. 881 (1977) (Arizona ban on advertising by lawyers held unconstitutional for similar reasons).

[130] 47 U.S.C. §§ 301, 303, 309(a) (1981). In administering the public interest standard, the F.C.C. may take antitrust policies into account. F.C.C. v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795–96 (1978); United States v. Radio Corp. of Am., 358 U.S. 334, 351 (1959); National Broadcasting Co. v. United States, 319 U.S. 190, 222–24 (1943).

[131] In the 1940's, the F.C.C. prohibited ownership or control by one person of more than one station in the same broadcast service (*e.g.*, AM, FM or television) serving the same broadcast market. 8 Fed. Reg. 16,065 (1943); 6 Fed. Reg. 2284, 2285 (1941); 5 Fed. Reg. 2384 (1940). In 1953, the Commission placed a limit on the number of stations in each broadcast service which a single person may own or control. *In re* The Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 18 F.C.C. 288 (1953). In 1964, common ownership of any stations in the same broadcast service which had overlaps in certain service contours was prohibited. *In re* The Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964). In 1970, common ownership of VHF television and any radio station serving the same broadcast market was prohibited prospectively. *In re* Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C.2d 306 (1970).

[132] *See supra* note 36.

[133] *In re* Sections 73.345, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975), *aff'd sub nom.* F.C.C. v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) [hereinafter cited as *Multiple Ownership Order*].

[134] *National Citizens Comm. for Broadcasting*, 436 U.S. at 775.

[135] *Id.* at 1076.

[136] 326 U.S. 1 (1945).

speaking through Justice Black, dismissed this argument. News, like other goods, is an article of commerce; a news organization may not restrain the flow of news, and then hide behind the cloak of the first amendment to escape antitrust scrutiny.[137] Significantly, the Court found that restraints of trade in the news industry violate not only the antitrust laws, but also abridge the first amendment right of the public to know:

> [A] command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[138]

Since *Associated Press*, antitrust remedies have successfully been sought against the print media on a number of occasions. In *Lorain Journal Co. v. United States*,[139] a newspaper in a dominant market position[140] was found to have attempted to monopolize the dissemination of news in a geographical area by refusing to accept advertisements from those who had also advertised on a local radio station. The Supreme Court affirmed an injunction under sections 1 and 2 of the Sherman Act,[141] enjoining the newspaper from refusing to print such advertisements. The Court found that what in essence was a court order to a newspaper to print certain matter against its will was not a prior restraint in violation of the newspaper's first amendment rights.[142]

In *Citizen Publishing Co. v. United States*,[143] the Court ordered a parent newspaper to divest itself of its interest in the only other local newspaper. The Court held, in addition, that a joint operating agree-

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[137] *Id.* at 18–19.

[138] *Id.* at 20.

[139] 342 U.S. 143 (1951). *See* Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957) (newspaper enjoined from refusing to print advertisements by those who advertised in competing newspapers).

[140] The defendant newspaper served 99 percent of all households and owned both newspapers in the city of Lorain. *Lorain*, 342 U.S. at 146.

[141] 15 U.S.C. §§ 1, 2 (1981). The suit contained five counts: Combination in restraint of trade (15 U.S.C. § 1 (1981)), conspiracy in restraint of trade (*Id.*), combination to monopolize commerce (15 U.S.C. § 2 (1981)), conspiracy to monopolize commerce (*Id.*) and attempt to monopolize commerce (*Id.*).

[142] *Lorain*, 342 U.S. at 155–56; *accord Kansas City Star*, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957). *But see supra* notes 65 and 66 and accompanying text.

[143] 394 U.S. 131 (1969).

ment between the two newspapers was a contract or combination in restraint of trade, in violation of section 1 of the Sherman Act.[144]

B. *Application*

The antitrust laws were created with the interest of the public in mind. Competition and free trade serve not only the interests of the competitors, but the interests of society in general, and of the consumer in particular, by stimulating the efficient allocation of resources, economic growth, and productivity.[145] The consumer of ideas, as relayed to him by the press, not only may expect that segments of the press compete against each other in a purely economic sense, but has a first amendment right to expect that in the process, the ideas that they put forth will similarly compete.[146] Thus, when a participant in the marketplace of ideas engages in practices which tend to restrain and inhibit free trade therein, he tramples upon both the spirit of competition, which antitrust seeks to preserve, and the free flow of ideas, which the first amendment seeks to protect. What began as merely a potential violation of the antitrust laws is then raised to constitutional dimensions. When the integrity of the marketplace of ideas is thus threatened, the federal government should step in.

Antitrust enforcement of media diversity would treat the broadcast and print media alike. Journalistic discretion, so zealously protected in *Tornillo*, would be scrupulously respected; journalists would not be required, either directly or indirectly, to publish or not to publish.[147] Neither broadcasters nor newspaper publishers would be required to be "fair" under this scheme. No individual media entity would be under a legal duty to present opposing points of view, since such a requirement would not only be deemed intrusive under *Tornillo*,[148] but would be unnecessary. A marketplace of ideas, in order to function smoothly and efficiently, need only be cleansed of all restraints of trade; it is both unnecessary and undesirable for the government to create little marketplaces within the purview of each broadcast licensee, as the fairness doctrine sets out to do.[149]

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[144] *Id.*
[145] *See supra* note 127.
[146] *See supra* notes 25 and 26 and accompanying text.
[147] *See supra* note 65 and accompanying text.
[148] *Id.*
[149] *See supra* note 52 and accompanying text.

The articles of commerce traded in this marketplace are ideas. The Supreme Court has found news to be an article of commerce,[150] and news is no less an intangible item than the idea or information which it embodies. The conventional antitrust mechanisms would be used to enforce media diversity, with one exception: When a per se violation[151] of the Sherman Act has not been established, and rule of reason[152] analysis is called for, purpose, anti-competitive effect, and market power[153] must be scrutinized in light of the public's first amendment interest in maintaining a vibrant and competitive marketplace of ideas. Even if the activity of a media entity seems to be reasonable in a purely economic sense, the addition of the first amendment factor may render it an unreasonable restraint of trade, and actionable under the Sherman Act. Moreover, a court must consider the public right to know when it chooses an appropriate remedy.

Markets would be defined in terms of local media markets, from the perspective of the information consumer—the demand side. Participants would include each media entity which devotes a regular part of its broadcast time or print space to news and public affairs. Admittedly, certain vast and highly diverse media markets, such as those in large metropolitan areas, would not be reachable under this scheme, since they already enjoy sufficient media competition. In smaller markets, however, where the number of media entities is few, the potential for antitrust violation is clear.

To see how such a scheme might work, assume that the hypothetical town of Beset, population 15,000, is served by one morning newspaper, one afternoon newspaper, two television stations—KNID and KLUK, and a number of AM and FM radio stations. Both newspapers are wholly owned by the Day-Walker Company, a national newspaper chain. Day-Walker, whose newspapers are generally known to take a conservative stand on most issues, has agreed informally with the United Broadcasting System (UBS), which owns KNID, that only the product of news and editorial writers of "the conservative persuasion" will be aired on KNID. The agreement is

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[150] *See supra* note 137.

[151] The acts which constitute per se violations of the Sherman Act are price fixing agreements, market division agreements, group boycotts and tying agreements. Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958).

[152] *The rule of reason provides that when a restraint of trade is not a per se violation of the* Sherman Act, it will only be found to be illegal if it is unreasonable. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[153] *Id.*; United States v. American Tobacco Co., 221 U.S. 106 (1910); United States v. United States Steel Corp., 251 U.S. 417 (1920).

documented in various memoranda exchanged between the two concerns. KNID's regular audience for news programming includes 75 percent of the households in Beset.

Assuming that the agreement is not a per se violation of section 1 of the Sherman Act,[154] the modified rule of reason would be applied. The commodity which the agreement sought to restrain is identifiable as news, particularly the product of non-conservative writers, which the public has a right to receive. The purpose of the agreement between Day-Walker and UBS is to restrain the trade of such news, by agreeing horizontally not to compete, causing a stabilization of what should be a competitive marketplace of ideas. Such a restraint would be actionable as a contract or conspiracy in restraint of trade, a violation of section 1 of the Sherman Act.[155]

Nothing is more inimical to Hand's "multitude of tongues" than a combination of media entities working together to limit the diversity of information in the same media market. The F.C.C. has attacked such combinations in the past, reaching even newspapers in the process. It did so, however, through its licensing power and not through traditional antitrust remedies.[156] Thus, the F.C.C. was not required to find actual violations of the antitrust laws to justify its order. Should the Chairman of the F.C.C. have his way, the licensing power will soon be curtailed[157] and perhaps limited in its power to impose further multiple ownership guidelines. Without the F.C.C.'s broad licensing power, it is highly unlikely that the government would be able to force a break-up of a media combination which does not control a monopoly share[158] of the market, or alternatively, where no intent to monopolize can be proven.[159]

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[154] *See supra* note 151.

[155] *See supra* note 125.

[156] *See supra* notes 130, 131, and 133 and accompanying text. While the Multiple Ownership Order applied to newspapers, such was only possible when a publisher applied to the F.C.C. for a broadcasting license. The F.C.C. was only able to ban prospective newspaper-broadcast combinations. Thus, the F.C.C. was able neither to enforce diversity when no broadcasting licenses were at stake, nor to affect inter-newspaper relationships.

[157] Address by Mark S. Fowler, Chairman of the F.C.C., in Raleigh, North Carolina (Oct. 25, 1983).

[158] As a prerequisite to finding a violation of § 2 of the Sherman Act, the courts have required a monopoly share of the market. According to Judge Learned Hand, "[a] percentage [over ninety] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent not." United States v. Aluminum Corp. of Am., 148 F.2d 416, 422 (2d Cir. 1945).

[159] In both *Lorain* and *Kansas City Star* the government was able to prove actual monopoly in the cases of each of the defendant publishers. The Lorain Journal Company reached 99 percent

The modified rule of reason would be used to achieve results similar to those which the F.C.C. had wrought through its multiple ownership regulations. The traditional threshold of what constitutes monopoly power would not be a barrier since, in the marketplace of ideas, it would be measured differently. The marketplace of ideas requires a "multitude of tongues"[160] to function properly; as a result, only a modicum of power is needed to restrain trade there. Thus, to qualify as a media monopoly, an entity's share of its market could be as small as perhaps fifty percent. A combination found to possess such power could be attacked as a violation of section 1 of the Sherman Act, the power element of the rule of reason being satisfied.

In the case of a media monopoly resulting from a merger, or composed of a single firm, which is found to violate section 2 of the Sherman Act, divestiture or dissolution of the firm into smaller entities[161] would be the preferred remedies, since only such measures would adequately ensure that a diversity of sources of information would arise pursuant to the action.[162]

This comprehensive antitrust enforcement system might, however, be seen as running askance of two specific Supreme Court admonitions. First, in *Buckley v. Valeo*,[163] the Court ruled that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others."[164] Limiting the market power of certain media entities, for the purpose of securing a more competitive marketplace of ideas, might be so interpreted. In sustaining the Multiple Ownership Order,[165] the Supreme Court heard a similar argument; it dismissed it on the grounds that the

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of all families in its market area. *Lorain*, 342 U.S. at 152. The Kansas City Star controlled 94 percent of the market in Kansas City. *Kansas City Star*, 240 F.2d at 654.

[160] *See supra* note 128 and accompanying text.

[161] The courts have hesitated in the past, and have imposed divestiture or dissolution only in extreme circumstances. *See* K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES 50–54 (1977).

[162] Should it be found by a future court that some media combinations cannot be attacked, Congress might, as an alternative, legislate the creation of separate and independent editorial and reporting functions for each component unit within a combination. There is ample precedent for such action in the case of the newspaper industry. *See* 15 U.S.C. §§ 1801-1804, the Newspaper Preservation Act, which provides that when ailing newspapers are taken over by other newspapers from their own geographical area, separate editorial boards and reporting staffs must be maintained. *See* 11 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 79.06 (1979) [hereinafter cited as VON KALINOWSKI].

[163] 424 U.S. 1 (1976).

[164] *Id.* at 48–49.

[165] *National Citizens Comm. for Broadcasting*, 436 U.S. at 775.

broadcast industry is an exception to the rule.[166] It should be noted, however, that the Multiple Ownership Order affected newspapers, not only broadcasters, a point which the Court seems to have overlooked.[167] The Multiple Ownership Order's intent was clear: To increase the number of voices in the community, at the expense of more powerful voices. Thus, it is unclear whether the Court would rely on the *Buckley* rule to strike down an antitrust scheme which would essentially do the same. *Associated Press* and *Lorain* suggest that such government intervention would be permissible.

Second, *Tornillo* held that the print media cannot, under any circumstances, be subjected to government penalties on account of what it prints, or refuses to print.[168] The plan herein suggested might conflict with that holding, since there may be occasion where the only way that the government could establish anti-competitive collusion involving newspapers is by scrutinizing what they actually print. In the Day-Walker hypothetical, for example, instances would be quite rare in which the government would be able to establish conspiracy by direct proof. It might instead have to rely upon inferences drawn from the fact that both the Day-Walker newspaper and KNID are following the same ideological line to establish anti-competitive effect.[169] The remedies imposed by the antitrust laws would be seen as penalizing newspapers for what they print.

But *Tornillo* need not be construed as ruling out the antitrust plan completely. *Tornillo* could be seen instead as having dealt only with the issue of whether government may foist an "access" requirement upon newspapers, which it resolved in favor of the newspapers, reasoning that newspapers cannot be forced to print what "reason tells

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[166] *Id.* at 799; *Buckley*, 424 U.S. at 49 n.55.

[167] The Court reasoned that the F.C.C. did not abridge the rights of newspapers prohibited from owning television or radio stations since the ban was designed to " 'increas[e] the number of media voices in the community,' and not to restrict or control the content of free speech." *National Citizens Comm. for Broadcasting*, 436 U.S. at 790. Yet the *Buckley* prohibition did not refer to content regulation; it dealt with relative voices. Decibels are content-neutral. *Buckley*, 424 U.S. at 48–49.

[168] *Tornillo*, 418 U.S. at 256–58.

[169] When no express agreement or contract could be found, the antitrust law has made inferences from uniformity of action and anti-competitive effects. *See* F.T.C. v. Cement Inst., 333 U.S. 683 (1948) (inference of agreement established from basing point and freight absorption systems in which defendants participated); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (agreement inferred from defendants' "concert of action"); C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952)(price uniformity, artificial standardization of products, background of illegal licensing agreements, policing of dealers, and delivered price system established an inference of conspiracy).

them should not be published."[170] The antitrust scheme is neither a direct nor an indirect interference in editorial discretion. Newspapers would remain individually free to print, or not to print, whatever they chose. Antitrust would only prohibit newspapers from monopolizing the trade in ideas in a particular market, as they were prohibited from doing in *Citizen Publishing Co.*,[171] or from collectively deciding to restrain the flow of ideas in a particular market.

Yet it may still be argued that the system herein suggested is merely an end-run around the *Tornillo* prohibition. Perhaps it is. If that is the case, *Tornillo* itself should be seen as having been wrongly decided. Absolute and untouchable journalistic discretion is not a benefit to society if it can be used as a cover for activities intended to restrain competition in the marketplace of ideas. Freedom of speech might then be seen as a pretext for the acquisition and maintenance of power over the exchange of ideas by the "media giants," whoever they may be. If the Court foresaw such a result in its decision in *Tornillo*, it should reconsider.

III. Conclusion

One person's speech, regardless of the medium used to transmit it, should not be permitted to block out the speech of others to the detriment of the public. Neither a newspaper's nor a broadcast station's interest in conducting its business of publishing information and ideas is "conclusive";[172] it must accommodate the public's right to know. The antitrust laws could be used by the government to ensure that no media entity becomes so strong or influential that it will be able to do what the government may not do under the first amendment—abridge the free flow of ideas in society.

The fairness doctrine attempts to moderate the power of broadcasters to monopolize and restrain debate on issues of public importance. But the fairness doctrine does not require broadcasters to publish any information which they have chosen not to publish, so long as they have acted in good faith. In practice, the good faith of a broadcaster is rarely questioned. In addition, the fairness doctrine does not apply to the print media. The antitrust laws, if applied scrupulously and carefully to the broadcast media while keeping in mind the

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[170] *Tornillo*, 418 U.S. at 256.

[171] *See supra* note 143. The Newspaper Preservation Act, *supra* note 162, was passed in response to the Court's decision in *Citizen Publishing*. *See* Von Kalinowski, *supra* note 162.

[172] *See supra* note 128 and accompanying text.

public's right to benefit from the marketplace of ideas, might obviate the need for the fairness doctrine, while at the same time reaching where the fairness doctrine was prohibited from reaching: the print media. The most appealing aspect of the antitrust scheme is that it would allow all journalists to retain unlimited discretion as to what they will and will not publish, so long as they do not act to restrain the free flow of information.

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