

Application of the Fairness Doctrine to Ordinary Product Advertisements: *National Citizens Committee for Broadcasting v. FCC*¹—The fairness doctrine in broadcasting imposes a twofold obligation on television and radio broadcast licensees: licensees must broadcast material concerning controversial issues of public importance, and they must broadcast differing views on those controversial issues.² The doctrine attempts to ensure that a licensee's total programming presents balanced coverage of important public issues.³

The fairness doctrine was developed by the Federal Communications Commission (FCC or Commission),⁴ and was later incorporated into the Communications Act⁵ and validated by the Supreme Court.⁶ While the FCC considered applying the fairness doctrine to commercial advertising for over thirty years,⁷ it did not do so until 1967. In *WCBS/TV (Banzhaf)*,⁸ the first case

¹ 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 926 (1978).

² *The Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1248-49 (1949) [hereinafter cited as *Editorializing Report*].

³ *Id.* at 1255. Potential sanctions for violating the doctrine run from a mild notice of violation kept on file, *see* Central Maine Broadcasting Sys., 23 F.C.C.2d 45 (1970), to non-renewal of the offending broadcaster's license, *see* Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18 (1970).

To comply with its fairness doctrine obligation, a licensee need not air opposing views on the same program, but it must make a reasonable effort to ensure balanced coverage. *Editorializing Report*, *supra* note 2, at 1255. For example, after broadcasting a controversial issue, the licensee must make a diligent, good faith effort to solicit a spokesman to present the opposing view. *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 13-14 ¶ 37 (1974) [hereinafter cited as *Fairness Report*]; *Editorializing Report*, *supra* note 2, at 1251. The licensee must also provide the spokesman airtime at its own expense if sponsorship is unavailable. Cullman Broadcasting Co., 40 F.C.C. 576, 577 (1963).

⁴ Early traces of the fairness doctrine can be found in Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930); Trinity Methodist Church v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); Young People's Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938); and, Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940). The FCC definitively formulated the doctrine in 1949. *Editorializing Report*, *supra* note 2, at 1249-52.

⁵ 47 U.S.C. § 315(a) (1976).

⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 385 (1969).

⁷ *Sam Morris*, 11 F.C.C. 197 (1946), which was decided prior to the explicit formulation of the fairness doctrine, was the first case to suggest advertising could involve controversial public issues. *Id.* at 198-99. The case involved a radio station's refusal to sell time for broadcast of alcohol abstinence commercials. *Id.* at 197. Although the FCC refused to consider the problem in the context of a single station, *id.* at 198, it noted that a licensee's public interest obligations might require the broadcast of viewpoints opposing advertising claims when an advertisement raises basic and important social, economic, or political issues. *Id.* at 198-99.

The 1949 *Editorializing Report*, *supra* note 2, following *Sam Morris*, did not discuss advertising. The issue lay dormant until 1963, when the FCC noted that in determining whether particular programs or viewpoints are subject to the fairness doctrine, it is immaterial whether they are paid announcements. *Stations' Responsibilities Under the Fairness Doctrine as to Controversial Issue Programming*, 40 F.C.C. 571, 572 (1963). Nothing came of this notice, however, until the FCC first ruled directly on advertising and the fairness doctrine in 1967. See text at notes 10-13 *infra*.

⁸ *WCBS-TV*, 8 F.C.C.2d 381, *upon reconsideration*, 9 F.C.C.2d 921 (1967), *aff'd sub nom.* *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

in which the FCC applied the fairness doctrine to commercial advertising, the Commission held that cigarette advertising was subject to the fairness doctrine because it raised the controversial and publicly important issue whether smoking is desirable.⁹ Although the Commission referred to cigarette advertising as "unique" and sought to limit the application of the fairness doctrine to cigarette advertisements,¹⁰ the courts soon extended the doctrine to other product advertisements.¹¹

During the next several years, the debate over the proper interplay between the fairness doctrine and advertising focused on delineating the contours of the *Banzhaf* approach.¹² Out of this debate grew the realization that it was difficult, and perhaps impossible, to decide on a case-by-case basis which advertisements should be subject to fairness obligations.¹³ Neither the courts nor the Commission clearly articulated a standard for applying *Banzhaf* to product advertisements.¹⁴ Faced with this confusion, the FCC investigated methods for more adequately implementing the fairness doctrine in the commercial advertising context and released its conclusions in its 1974 *Fairness Report*.¹⁵ The *Fairness Report* divides advertisements into three categories:

⁹ WCBS-TV, 8 F.C.C.2d 381, 381-82 (1967). The complainant in *Banzhaf* argued that, after broadcasting a number of cigarette commercials, a television station's refusal to allow a responsible opposing presentation on the advisability of smoking was a fairness doctrine violation. *Id.* at 381.

¹⁰ WCBS-TV, 9 F.C.C.2d 921, 943 (1967). The FCC stated that its "ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation . . . with respect to other product advertising." *Id.* The FCC did not apply the fairness doctrine to any standard product commercials after *Banzhaf*.

¹¹ The first indication that the FCC's attempt to limit *Banzhaf* to cigarette advertisements would fail came in *Retail Store Employees Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970). In that case, the Court of Appeals for the District of Columbia Circuit held that a department store's regular product advertising during a union boycott of the store inherently raised one side of a controversial and important issue—the boycott—and that the FCC had to consider a fairness complaint that a station's discontinuance of the union's boycott support advertising while continuing to broadcast the store's regular product advertising violated the station's fairness obligations. *Id.* at 258-59.

Shortly thereafter, the same court held that television advertisements for large cars and leaded gasolines raised the controversial and publicly important issue of the desirability of motorist preferences which could increase automobile-related air pollution and its attendant health hazards. *Friends of the Earth v. FCC*, 449 F.2d 1164, 1169 (D.C. Cir. 1971). Other parties argued that *Banzhaf* applied to everything from military recruitment commercials, *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971), to oil company commercials concerning the development of oil in Alaska, *National Broadcasting*, 30 F.C.C.2d 643 (1971).

¹² See Simmons, *Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective*, 75 COLUM. L. REV. 1083, 1090-1100 (1975).

¹³ See *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095, 1101-02 (D.C. Cir. 1977).

¹⁴ *Id.* at 1102.

¹⁵ *Fairness Report*, *supra* note 3. The FCC's response to the requests for reconsideration are found in *Memorandum Opinion and Order on Reconsideration of the Fairness Report*, 58 F.C.C.2d 691 (1976) [hereinafter cited as *Reconsideration Order*].

editorial advertisements, advertisements making product efficacy claims about which there is a dispute, and standard product commercials.¹⁶

Editorial advertisements consist of "direct and substantial commentary on important public issues."¹⁷ A typical example is an "overt" editorial, prepared and paid for by an organization or an individual, which takes a position on one side of an important public issue.¹⁸ The advertisement need not explicitly take a position; any advertisement that "presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance" constitutes an editorial advertisement.¹⁹ The *Fairness Report* indicates that the FCC will continue to apply the fairness doctrine to editorial advertisements.²⁰

The second category of advertisements in the *Fairness Report* encompasses advertisements making product efficacy claims about which there is a dispute.²¹ These include deceptive, false, and misleading advertisements.²² Because the FCC believes that the Federal Trade Commission can better sanction false advertising,²³ it decided not to apply the fairness doctrine to advertisements making product efficacy claims.²⁴

The third category of advertisements, standard product commercials, includes advertisements that simply promote the sale of a product.²⁵ Although under the *Banzhaf* approach these advertisements were potentially subject to the fairness doctrine, the FCC announced in the *Fairness Report* its decision to remove standard product commercials from the doctrine's coverage.²⁶ The FCC based this decision on its conclusion that these commercials "make no meaningful contribution toward informing the public on any side of any issue."²⁷ The Commission noted, however, that some product commercials might discuss public issues in an obvious and meaningful way and would therefore be subject to the fairness doctrine as editorial advertisements.²⁸

The *Fairness Report* brought both constitutional and statutory objections from the public. The National Citizens Committee for Broadcasting (NCCB), Friends of the Earth, and the Council of Economic Priorities sought judicial review of the FCC's decision not to apply the fairness doctrine to ordinary product advertisements.²⁹ These petitioners argued that the public's first

¹⁶ *Fairness Report*, *supra* note 3, at 22. The *Fairness Report* generally classifies advertisements as "paid announcements." *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 22-23.

¹⁹ *Id.* at 23.

²⁰ *Id.* at 22.

²¹ *Id.* at 26-28.

²² *Id.* at 27.

²³ *Id.* at 27-28.

²⁴ *Id.*

²⁵ *Id.* at 24-26.

²⁶ *Id.* at 26.

²⁷ *Id.* at 24.

²⁸ *Id.* at 26.

²⁹ *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095, 1098 (D.C. Cir. 1977).

amendment right to receive commercial information gives rise to a duty on the broadcaster to broadcast counter-advertisements.³⁰ The petitioners further contended that the FCC's decision was contrary to the public interest standard imposed on broadcasters by the Communications Act,³¹ and was arbitrary, capricious, and an abuse of the Commission's discretion.³²

These petitions and other petitions objecting to various parts of the FCC's decision³³ were consolidated for review by the United States Court of Appeals for the District of Columbia Circuit in *National Citizens Committee for Broadcasting v. FCC*.³⁴ After considering petitioners' objections and the FCC's justifications for its *Fairness Report*, the circuit court HELD: neither the first amendment nor the Communications Act requires application of the fairness doctrine to ordinary product commercials which do not obviously and meaningfully address a controversial issue of public importance.³⁵ The court upheld the FCC's decision not to apply the fairness doctrine to ordinary product commercials as both proper and supported by substantial evidence.³⁶

National Citizens is significant because it denies any constitutional or statutory basis for requiring application of the fairness doctrine to product advertisements. By refusing to base a public right of access to the broadcast media for counter-advertising on the recent extension of first amendment protection to commercial speech,³⁷ the court has diminished the hope for a constitutionally-based public right of access on any issue. Additionally, by finding that the Communications Act's public interest standard only broadly

³⁰ *Id.* at 1105.

³¹ 47 U.S.C. § 315(a) (1976).

³² 567 F.2d at 1106.

³³ Petitioner Committee for Open Media (COM) challenged the FCC's failure to adopt COM's proposal for a public right of access to the broadcast media as an alternative to the fairness doctrine. *Id.* at 1098. COM advocated that licensees allot a specified amount of time for the broadcast of messages by members of the public. *Id.* at 1112. Also, intervenor Henry Geller challenged the Commission's failure to adopt his proposal concerning how the FCC should enforce the fairness doctrine's requirement that broadcasters devote a reasonable amount of time to coverage of important public issues. *Id.* at 1098. Mr. Geller suggested that to ensure compliance with this requirement, the FCC should require licensees to submit annually a list of what they considered the ten most controversial issues of public importance during the year, and a report on the representative programming that was aired on both sides of each issue. *Id.* at 1115. Geller also advocated that the FCC abandon its case-by-case review of fairness doctrine complaints and return to its pre-1962 practice of ascertaining only at license renewal time whether the licensees complied with the fairness doctrine. *Id.* The court's disposition of the COM and Geller proposals is explained at note 36 *infra*.

³⁴ 567 F.2d 1095 (D.C. Cir. 1977).

³⁵ *Id.* at 1105-08.

³⁶ *Id.* at 1108. Although upholding the *Fairness Report*, the court further ordered the Commission to reconsider the COM access proposal and the Geller "10 issue" proposal. *Id.* at 1116. The court rejected, however, Geller's second proposal—that the FCC investigate allegations of fairness doctrine violations only when the licensee comes up for renewal—on the grounds that the Commission adequately justified its rejection of the proposal. *Id.* As to the court's reasons for its remand, see note 66 *infra*.

³⁷ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-62 (1976).

guides the FCC, the court has granted the Commission wide discretion to administer the fairness doctrine and balance the many competing interests in broadcasting. In the future, unless obvious or compelling circumstances demand implementation of a different policy, the court will accept the agency's determination of how best to serve the public interest through the fairness doctrine.

This casenote will first examine the reasoning employed by the *National Citizens* court. It will then analyze the court's rejection of petitioners' arguments that the first amendment and the Communications Act require application of the fairness doctrine to standard product advertisements. It will be suggested that two factors made inevitable the court's holding that application of the fairness doctrine to product advertisements is neither constitutionally nor statutorily required. The first factor is the historical basis of the fairness doctrine; it is an administrative compromise, not a constitutionally required balance between broadcasters' and listeners' rights. The second factor is the courts' traditional deference to administrative agencies, including the FCC.

1. THE *NATIONAL CITIZENS* DECISION

In *National Citizens*, the court considered separately the constitutional and statutory issues presented. Turning initially to the constitutional issues, the court rejected two arguments advanced by petitioners asserting that there is a constitutional basis for requiring the FCC to apply the fairness doctrine to standard product advertisements.³⁸ First, the court dismissed the contention that statements which oppose views presented in commercial advertisements must be broadcast under the fairness doctrine simply because such statements are a form of commercial speech protected by the first amendment.³⁹ Second, the court rejected the argument that the public has a significant, constitutionally protected interest in the free flow of information provided by these counter-commercials.⁴⁰

In rejecting petitioners' constitutional arguments, the court stressed that no individual or group has a right to broadcast a particular point of view simply because that point of view is protected speech under the first amendment.⁴¹ The court further determined that the fairness doctrine and the first amendment are not coextensive,⁴² because the FCC's standard for determining whether particular programming is subject to the fairness doctrine—whether the programming advocates one side of a controversial issue of public importance—is different from the courts' standard for determining whether certain speech is protected by the first amendment—whether the speech disseminates information important to the functioning of a free enterprise system.⁴³ The court stated that product advertisements do not necessar-

³⁸ 567 F.2d at 1105.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1105-06.

ily meet the more rigorous standard for determining whether to apply the fairness doctrine even though they do meet the standard for determining whether they are constitutionally protected speech.⁴⁴ Thus, the court indicated that it is irrelevant to the fairness doctrine inquiry that such speech is protected under the first amendment.⁴⁵ The court effectively denied a constitutionally-based public right of access to the broadcast media by finding that the first amendment protection given to commercial speech, and, thus, counter-advertisements, neither gives the public a right to broadcast such speech nor compels applying the fairness doctrine to such speech.

Turning to petitioners' statutory challenges to the *Fairness Report*, the court first rejected petitioners' argument that the 1959 amendments to the Communications Act⁴⁶ codified the FCC's policy of applying the fairness doctrine to product advertisements.⁴⁷ The court noted that there is no conclusive evidence that counter-advertising was part of the FCC's fairness doctrine policy prior to 1959.⁴⁸ Even assuming that counter-advertising was part of pre-1959 policy, the court held that the 1959 amendments did not incorporate that policy into the Act.⁴⁹ The court based its conclusion on an earlier case in which the Supreme Court found that "[w]hen the Congress ratified the . . . fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the [FCC] on the subject. . . ."⁵⁰ Thus, the court in *National Citizens* concluded that a policy of applying the fairness doctrine to product advertisements was not incorporated in the Communications Act.⁵¹

The court next considered petitioners' second statutory argument—that the public interest standard of the Communications Act requires the FCC to allow counter-advertising.⁵² The court noted that the fairness doctrine stems from the Communications Act's requirement that broadcasters operate in the "public interest."⁵³ The court stressed, however, that operating in the public interest does not necessarily entail application of the fairness doctrine to product advertisements.⁵⁴ Instead, the FCC has discretion to decide what the public interest demands of broadcasting,⁵⁵ and courts accord great deference

⁴⁴ *Id.* at 1104-06.

⁴⁵ *Id.*

⁴⁶ Pub. L. No. 86-274, § 1, 73 Stat. 557 (1959) (codified at 47 U.S.C. § 315 (1976)).

⁴⁷ 567 F.2d at 1107.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1107-08.

⁵⁰ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 385 (1969).

⁵¹ 567 F.2d at 1107-08.

⁵² *Id.* at 1106, 1108.

⁵³ *Id.* at 1107 (citing 47 U.S.C. § 315(a) (1976)).

⁵⁴ 567 F.2d at 1108.

⁵⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 385 (1969); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 109-11 (1973). The public interest standard includes the obligation to discuss both sides of controversial issues. *Red Lion*, 395 U.S. at 385.

to the FCC's judgment of what the public interest entails.⁵⁶ Accordingly, the *National Citizens* court found that the public interest is served as long as the FCC enforces the fairness doctrine's requirement that broadcasters "present opposing points of view whenever there is direct, obvious or explicit advocacy of one side of a controversial issue of public importance."⁵⁷ When, as in product advertisements, indirect advocacy of one side of an issue is broadcast, opposing views need not be presented.⁵⁸ Thus, the court concluded that the FCC's decision not to apply the fairness doctrine to standard product advertisements is within the Commission's discretion and consistent with the public interest standard in the Communications Act.⁵⁹

Finally, the court examined petitioners' argument that the FCC acted arbitrarily and abused its discretion in withdrawing standard product commercials from the ambit of the fairness doctrine.⁶⁰ Petitioners acknowledged that the fairness doctrine applies only to advertisements presenting meaningful discussion on controversial issues of public importance.⁶¹ They argued, however, that standard product advertisements implicitly discuss the controversial issue of product desirability and, therefore, that the FCC acted arbitrarily in concluding that product desirability is not an important, controversial issue within the meaning of the fairness doctrine.⁶² The court rejected petitioners' contention, pointing to the logic of the FCC's reasoning as evidence that it did not act arbitrarily.⁶³ As the court noted, the FCC found that product desirability itself is not a controversial issue of public importance, but rather, the important, controversial issues are those underlying the issue of product desirability.⁶⁴ Standard product advertisements, with their emphasis on product desirability, do not meaningfully address these underlying issues.⁶⁵ On the basis of this reasoning, the court held that the FCC was warranted in concluding that standard product commercials are not subject to the fairness doctrine.⁶⁶

⁵⁶ *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

⁵⁷ 567 F.2d at 1108.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1108-10.

⁶¹ *Id.* at 1099.

⁶² *Id.* at 1109.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1108-10. Although the court upheld the FCC's decision to exclude product advertisements from the scope of the fairness doctrine, the court further determined that the FCC's decision obligated it to consider carefully serious suggestions that had been made to ensure sufficient and balanced coverage of important public issues. *Id.* at 1110. Accordingly, the court ordered the FCC to give further consideration to the COM access proposal and the Geller "10 issue" proposal. *Id.* at 1116. These proposals are described at note 33 *supra*. The court based its order on an assumption that these proposals might overcome some of the difficulties inherent in enforcement of the fairness doctrine. 567 F.2d at 1111.

II. ANALYSIS OF THE FIRST AMENDMENT ISSUES

As noted earlier, *National Citizens* is significant because it denies any constitutional basis for the fairness doctrine. It is submitted that this conclusion is inevitable because of the courts' long held view of the fairness doctrine as an administrative, rather than a constitutional, compromise between the public's right to receive information and the broadcasters' right to exercise free speech. An examination of the Supreme Court cases addressing the relationship between the fairness doctrine and the first amendment illustrates this view.

Courts have long recognized that the primary purpose of the first amendment is to foster a well-informed citizenry⁶⁷ by prohibiting governmental restraints upon speech and by permitting every speaker to express his ideas, so that the public may adopt those that are valuable and correct.⁶⁸ As applied to the broadcast industry, however, this goal must be modified since the scarcity of broadcasting frequencies⁶⁹ limits the number of speakers who can "speak" through the broadcast medium and, therefore, requires an allocation of broadcast time between competing voices.⁷⁰ Thus, although the Supreme Court recognizes that both the public's right and the broadcasters' rights are protected to some extent by the first amendment, it refuses to accord either right full constitutional protection to the exclusion of the other.

Broadcasters once claimed that the first amendment grants them, as members of the press, absolute autonomy over what is broadcast and when. They argued that the fairness doctrine's intrusion on their autonomy was a violation of their first amendment rights since it forced them to broadcast particular points of view.⁷¹ The Supreme Court rejected this claim, however,

⁶⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969).

⁶⁸ *Id.* at 390; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁶⁹ Although broadcast frequencies are available to the public, the federal government, through the FCC, allocates broadcast licenses to promote the most efficient use of available frequencies. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387-89 (1969). If the FCC did not allocate frequencies, confusion would result from multiple transmissions over the same frequencies. *Id.* at 388.

⁷⁰ *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-02 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387-91 (1969). While the FCC argues that the problem of scarcity is acute and will continue for the near future, *Fairness Report*, *supra* note 3, at 6, it has been suggested that the great capacity of cable television, when it becomes fully operative, may render obsolete the scarcity rationale. *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 75-76 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973). It has been argued, therefore, that scarcity is an invalid basis for a constitutional distinction between the broadcast and print media. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 144-45 (1973) (Stewart, J., concurring); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 223-29; Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 16 (1976); Schenkkan, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 744-48 (1974). *But see* *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978) (the FCC exceeded its jurisdiction by imposing mandatory access and channel capacity requirements upon certain cable television systems), *cert. granted*, 47 U.S.L.W. 3187 (Oct. 3, 1978).

⁷¹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

in *Red Lion Broadcasting Co. v. FCC*.⁷² In that case, the Court held that the first amendment does not prevent the government from requiring a broadcast licensee to share its frequency with others under the terms of the fairness doctrine.⁷³ In reaching this conclusion, the Court stressed the public nature of the airwaves and pointed out that the public has a right to suitable access to ideas and information from the broadcast media.⁷⁴ The Court found that the fairness doctrine, rather than impermissibly infringing the first amendment rights of broadcasters, adequately balances the broadcasters' rights with the public's right of access to information.⁷⁵ Thus, the *Red Lion* Court did not find the fairness doctrine to be a constitutionally required remedy for balancing the competing interests in broadcasting. Rather, the Court upheld the doctrine as an administrative compromise of the broadcasters' and the public's interests which does not unconstitutionally infringe the broadcasters' first amendment rights.⁷⁶

The Supreme Court affirmed the adequacy of the fairness doctrine's balance of competing constitutional interests in *Columbia Broadcasting System, Inc. v. Democratic National Committee (CBS)*.⁷⁷ In *CBS*, the Court determined that the public's "right to be informed" by the broadcast media, albeit protected by the first amendment,⁷⁸ does not require broadcasters to accept editorial advertisements from whoever wishes to pay for them.⁷⁹ In reaching this conclusion, the Court noted that the FCC promulgated the fairness doctrine to ensure that broadcast licensees provide balanced presentations of important public issues.⁸⁰ To read the first amendment as granting individuals the unfettered right to have editorial advertisements broadcast as long as they are paid for, the Court noted, would upset the delicate balance the FCC has found for serving the interests of both broadcasters and the public.⁸¹ The Court decided that the FCC must retain the flexibility to balance these interests, and refused to create its own balance based on first amendment values.⁸²

Red Lion and *CBS* demonstrate the Supreme Court's recognition of the inherent conflict between listeners' and broadcasters' first amendment

⁷² 395 U.S. 367 (1969).

⁷³ *Id.* at 389.

⁷⁴ *Id.* at 390. In *Red Lion*, a broadcaster claimed that the fairness doctrine's requirement that he broadcast particular views, *i.e.*, responses to personal attack, violated his first amendment freedom of speech and press. *Id.* at 386. To justify the fairness doctrine's limited infringement on the broadcaster's rights, the Court cited the listener's right to receive information as an important countervailing interest. *Id.* at 390. The mere existence of the listener's right served the Court's purpose and it was unnecessary to explore the scope of that right.

⁷⁵ *Id.* at 390-96.

⁷⁶ *Id.*

⁷⁷ 412 U.S. 94 (1973).

⁷⁸ *Id.* at 102.

⁷⁹ *Id.* at 130-31.

⁸⁰ *Id.* at 111-13.

⁸¹ *Id.* at 120.

⁸² *Id.* at 120-21.

rights.⁸³ However, the Court has concluded that the fairness doctrine adequately balances these competing interests and, therefore, has found it unnecessary to develop a constitutionally-based balance. Because the Court refused to find that the public has a constitutional right to media access, persons could obtain access after *Red Lion* and *CBS* only if they could argue successfully that the issue which they wanted to address was subject to the fairness doctrine.

When the Supreme Court recently extended first amendment protection to commercial speech,⁸⁴ counter-advertising proponents believed their argument that the public has a constitutional right to broadcast media access was renewed. Commercial speech traditionally was not included under the umbrella of first amendment protection.⁸⁵ However, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁸⁶ the Supreme Court held that speech does not lose its first amendment protection merely because it is in the form of a paid commercial announcement,⁸⁷ or because the advertiser's interest is purely economic,⁸⁸ and that no lines can be drawn between publicly "interesting" and "important" commercial speech and "the opposite kind."⁸⁹

⁸³ The Court has stated that "it is idle to posit an unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish" because the unique nature of the broadcast media limits the number of frequencies available for broadcasting. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388. Because of this limitation, speakers' and listeners' rights conflict, and an ordering of their respective first amendment values is required. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 101.

⁸⁴ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); see text at notes 85-90 *infra*.

⁸⁵ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). It was stated later: Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, promoting product sales does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.

Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968).

⁸⁶ 425 U.S. 748 (1976).

⁸⁷ *Id.* at 761.

⁸⁸ *Id.* at 762.

⁸⁹ *Id.* at 765. The Court pointed out that "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price," and should be protected to ensure the free flow of information. *Id.*

At issue in *Virginia State Board* was a Virginia statute which prohibited licensed pharmacists from advertising the prices of prescription drugs. *Id.* at 749-50. A consumer group challenged the statute's constitutionality under the first amendment. *Id.* Justice Blackmun, speaking for the majority, concluded that any first amendment protection enjoyed by advertisers may be asserted by the public as recipients of information, *id.* at 756-57; that commercial speech is not wholly outside first amendment protection, *id.* at 761; and, therefore, that the ban on drug price advertisements is invalid, *id.* at 770.

For a brief survey of the history of the breakdown of the commercial speech exception to first amendment free speech protection, see Note, *The Fairness Doctrine and Access to Reply to Product Commercials*, 51 IND. L.J. 756, 769-73 (1976).

Virginia State Board also held that there is a reciprocal right to receive advertising.⁹⁰

Petitioners in *National Citizens* used *Virginia State Board* to argue that since product advertisements are protected by the first amendment, opposing information is also protected by the first amendment.⁹¹ Therefore, the petitioners argued, the first amendment demands that such opposing information be provided via application of the fairness doctrine to standard product advertisements.⁹² As the court in *National Citizens* recognized, acceptance of this argument would mean that the fairness doctrine is coextensive with the first amendment.⁹³ Acceptance of this argument also would mean that the fairness doctrine is a constitutionally-based remedy for the conflict between the first amendment rights of broadcasters and listeners. The court in *National Citizens* rejected petitioners' contention on the basis of the Supreme Court's previous refusal to establish a constitutional basis for the fairness doctrine.⁹⁴

It is submitted that petitioners' argument in *National Citizens* was nothing more than an assertion that the relatively recent identification of the listener's right to receive information, and the recent extension of first amendment protection to commercial speech, tip the compromise balance in favor of the listener on the product advertisement issue.⁹⁵ The circuit court declined to go that far and, instead, followed the Supreme Court in deferring to the FCC's opinion of the proper balance.⁹⁶ Thus, *National Citizens* strongly reinforces the courts' characterization of the fairness doctrine as an administrative compromise which determines who has access to the broadcast medium, and forecloses arguments that the public has a constitutionally-based right of access to the medium for counter-advertising or any other type of speech. Consequently, individuals seeking access after *National Citizens* have only two hopes for obtaining it. First, they can argue that current fairness doctrine requirements demand the broadcast of their point of view. Second, they can seek changes in the fairness doctrine through lobbying directed at either Congress or the FCC with a view toward obtaining greater media access for

⁹⁰ *Virginia State Board*, 425 U.S. at 757.

⁹¹ 567 F.2d at 1105.

⁹² *Id.* One difficulty which petitioners' argument faced was that the nature and extent of the rights involved are simply not well-defined. The *Virginia State Board* holding, which was crucial to petitioners' argument, concerned *printed* advertising. The Court expressly noted that "the special problems of the electronic broadcast media are . . . not in this case." 425 U.S. at 773. Thus, petitioners were asking the court to extend *Virginia State Board* to the broadcast media. Another difficulty which petitioners faced was that the listeners' right to receive information was not defined clearly. *CBS*, 412 U.S. at 101-03; *Red Lion*, 395 U.S. at 390. Moreover, the Supreme Court views the electronic broadcast media as "unique," *CBS*, 412 U.S. at 101, which apparently means that first amendment issues may be twisted to solve the media's "unique" problems. With so much flexibility in the issues, it is not surprising that petitioners' argument in *National Citizens* failed.

⁹³ 567 F.2d at 1105.

⁹⁴ *Id.* at 1105-06.

⁹⁵ See note 92 *supra*.

⁹⁶ 567 F.2d at 1106.

the public. The latter method is more promising since it has greater potential to increase access.⁹⁷ Thus, the importance of *National Citizens* is that the debate over access now will occur in legislative or administrative bodies, not in the courts.

III. ANALYSIS OF THE STATUTORY ISSUES

The court's resolution of the statutory issues in *National Citizens* is important for what it says about the FCC's discretion in administering the fairness doctrine. In effect, the court stated that the determination of who should have access to the broadcast media is an administrative, not a judicial, decision.⁹⁸ This was evident in the court's rejection of petitioners' arguments that applying the fairness doctrine to product advertisements was required by the Communications Act. The court accepted the FCC decision to the contrary in the absence of explicit statutory language supporting the petitioners' arguments.⁹⁹

Although the court granted the FCC wide discretion to administer the fairness doctrine, judicial review does play an important role after *National Citizens* in ensuring that the FCC follows proper decisionmaking standards.¹⁰⁰ By concentrating on the FCC's decisional criteria rather than on its actual decision, *National Citizens* is a good illustration of how the District of Columbia Circuit will approach challenges to the FCC's administrative decisions. This approach is exemplified by the court's rejection of the argument that the FCC acted arbitrarily and capriciously, and abused its discretion in finding that standard product advertisements do not present meaningful discussion on controversial issues of public importance.¹⁰¹ The Commission argued that counter-commercials present only one side of a controversial issue, since commercials typically only exhort consumers to buy, while counter-commercials discuss the underlying issues regarding the desirability of buying.¹⁰² It also contended that applying the fairness doctrine to standard

⁹⁷ Behind the access question is the broadcasters' claim that under the first amendment they, as members of the "press," should not be subject to any regulation whatsoever. See *Red Lion*, 395 U.S. at 386. While the uninhibited exercise of free speech in a regulated industry may be incongruous, one can find support for the broadcasters' position. See, e.g., *CBS*, 412 U.S. at 132-46 (Stewart, J., concurring), 146-47 (White, J., concurring), 148-70 (Douglas, J., concurring); Schenkkan, *supra* note 70 at 765-72.

The access debate foreshadows the larger issue of regulation of program content. Ultimately, the question that must be answered is "who shall determine what issues are to be discussed [through the electronic broadcast media], by whom, and when." *CBS*, 412 U.S. at 130. For suggested answers to this question, see Bollinger, *supra* note 70; Schenkkan, *supra* note 70. An exhaustive compilation of articles on access may be found in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1, 2 n.5 (1973).

⁹⁸ 567 F.2d at 1108.

⁹⁹ The *National Citizens* court was led to this result by its decision that "the [FCC] is neither constitutionally nor statutorily required" to subject counter-advertisements to fairness doctrine requirements. *Id.* at 1116 (emphasis in original).

¹⁰⁰ *Id.* at 1107-16.

¹⁰¹ *Id.* at 1108.

¹⁰² *Id.* at 1109.

product commercials would decrease the attention given by broadcasters to more important issues covered by the doctrine and, therefore, would not contribute efficiently to informed public opinion.¹⁰³ Furthermore, application of the doctrine to commercial advertising could undermine the economic base of commercial broadcasting.¹⁰⁴ Thus, the FCC argued, product advertisements do not meaningfully discuss controversial issues of public importance and, accordingly, do not come within the scope of the fairness doctrine.¹⁰⁵

While the FCC's arguments are plausible, they are not self-evident and are subject to vigorous counter-argument.¹⁰⁶ Nevertheless, given the FCC's discretion to administer the fairness doctrine and the courts' deference to the Commission's decisions, the plausibility of these arguments was sufficient for the court in *National Citizens* to refuse to reverse the FCC decision based on them.¹⁰⁷ The *National Citizens* court properly concluded that the FCC had not acted arbitrarily and capriciously, or abused its discretion, in excluding product advertisements from fairness doctrine coverage. The flexibility and discretion accorded to the FCC stems in part from the courts' recognition that application of the fairness doctrine encompasses the problem of conflicting first amendment rights between broadcaster and listener, and the broader problem of public access to the broadcast media in general. The complexity of these problems is one reason the courts have not given the fairness doctrine a constitutional or statutory foundation. Instead, the courts have allowed the FCC to resolve these problems. Courts will intervene only to ensure that the FCC's administrative decisionmaking conforms with the public interest.

The issue remains whether giving the FCC wide discretion in administering the fairness doctrine produces a satisfactory solution to the problem of who should have access to the broadcast media and for what reasons. In less than ten years, the FCC has traveled 360 degrees with respect to subjecting product advertisements to fairness doctrine requirements.¹⁰⁸ Nevertheless, it is submitted that the FCC's policy now rests on a sturdier foundation. The basic consideration underlying both the *Fairness Report* and *National Citizens* is that standard product commercials and counter-commercials do not present enough meaningful information to justify the difficulties and cost of broadcasting them under the auspices of the fairness doctrine. As one commentator has aptly put it, "[t]he fundamental purpose of the fairness doctrine is to inform the public on important social issues, and further an open, diverse

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1110.

¹⁰⁵ *Id.* at 1109.

¹⁰⁶ One also can argue that it is not apparent that commercials cannot contribute information useful in forming public opinion. See text at note 101 *supra*. Similarly, one can argue that addition or deletion of an issue covered by the fairness doctrine will not necessarily lead to a decrease or increase in the attention given to more important issues. See text at note 102 *supra*. While sponsors might be discouraged from broadcasting advertisements subject to mandatory counter-advertisement, thereby causing economic loss to broadcasters, no evidence exists as yet to justify this theory. See text at note 104 *supra*.

¹⁰⁷ Correspondingly, the counter-arguments in note 106 *supra* are also merely plausible. Thus, the Commission is free to choose either side.

¹⁰⁸ See text at notes 7-27 *supra*.

marketplace of ideas. . . . Telling people to 'Join the Dodge Rebellion' and 'Step Up' to a larger car is simply not speech on this level."¹⁰⁹ Thus, the FCC and courts such as the court in *National Citizens* have concluded that product advertisements are a less important type of speech than political editorials or institutional advertising. This conclusion represents progress in the correct direction. It eliminates the confusion emanating from past attempts to tie the fairness doctrine to product advertisements and rationally allocates limited broadcast time and resources between the various issues that different groups think ought to be heard.

CONCLUSION

The FCC's 1974 *Fairness Report* announced the Commission's removal of standard product advertisements from the purview of the fairness doctrine. In upholding this policy, the *National Citizens* court refused to base a public right of access to the broadcast media on either the public's first amendment right to receive broadcast information, or the public interest standard of the Communications Act. The court's decision underscores the FCC's wide discretion in administering the fairness doctrine. As long as the FCC strictly enforces the fairness obligation that broadcasters present opposing points of view whenever there is direct, obvious, or explicit advocacy on one side of a controversial issue of public importance, the Commission is acting consistently with its public interest mandate.

The fairness policy upheld in *National Citizens* illustrates the FCC's continuing attempt to define the types of speech subject to fairness doctrine requirements and, thus, the kinds of issues that will be addressed in the broadcast media. The courts' traditional deference to the FCC's decisions and their refusal to find a constitutionally-based public right of access to the broadcast media ensure that the FCC will continue to enjoy great flexibility in addressing these problems.

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¹⁰⁹ Simmons, *supra* note 12, at 113.