Spring 1976

The Fairness Doctrine and Access to Reply To Product Commercials

Susan T. Edlavitch

Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Communications Law Commons

Recommended Citation


Available at: http://www.repository.law.indiana.edu/ilj/vol51/iss3/14
Notes
The Fairness Doctrine and Access to Reply To Product Commercials

The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

—Bigelow v. Virginia (1975)

The Federal Communications Commission recently announced a major change in fairness doctrine policy. In its 1974 Fairness Report on the Handling of Public Issues, the Commission stated that the fairness doctrine will no longer apply to advertisements for commercial products or services. This note examines the Commission's new policy pronouncement against the statutory and constitutional parameters of the fairness doctrine. The note will demonstrate that the FCC is not free to insulate standard product advertising from fairness obligations. Rather the Constitution and the first amendment principles embodied in the public interest standard of the Communications Act require application of the fairness doctrine to certain categories of product commercials.

1 In its Notice of Inquiry, In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 30 F.C.C.2d 26 (1971), the Commission observed that almost 22 years had passed since the fairness doctrine last received comprehensive consideration and that the time had come for reassessment and clarification of basic policy.


3 See notes 36-42 infra & text accompanying which explore in detail the Commission's treatment of product advertisements.


5 Shortly after the Fairness Report was issued, the Commission reaffirmed its refusal to apply the fairness doctrine to product advertisements by rejecting a demand that a Maine television station provide reply time to counter snowmobile advertising. Peter C. Herbst, 48 F.C.C.2d 614 (1974), aff'd sub nom. Public Interest Research Group v. FCC, 34 P & F Radio Reg. 2d 1375 (1st Cir. 1975), cert. denied, 44 U.S.L.W. 3527 (U.S. March 22, 1976). Although the court referred to the 1974 Fairness Report in sustaining the ruling, it did not take into account certain recent developments which affect the application of the fairness doctrine to product advertising. See notes 69-92 infra & text accompanying.

In light of recent developments pertaining to general access, this attempt by the FCC to limit the scope of the fairness doctrine takes on particular significance. General access refers to the claim that there is implicit in the first amendment a public right to use or purchase broadcast time to voice opinions on public issues. The fairness doctrine, on the other hand, confers a limited right of access as a result of the two affirmative obligations it imposes upon the broadcast licensee. In order to comply with the fairness requirement, the licensee must devote a reasonable percentage of time to the coverage of issues of public importance; and his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.\(^6\) Access under the fairness doctrine to express a viewpoint there-

---

\(^6\)The Commission's first general statement on fairness, announcing the doctrine's two affirmative obligations, was presented in Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Historically, the fairness doctrine has evolved from FCC policies relating to the broadcaster's social responsibility to the present day statutory mandate under the Communications Act.

The concept of fairness was regarded as an implicit element in the public interest standard. Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 37 F.2d 993, cert. denied, 281 U.S. 706 (1930). See also Trinity Methodist Church, South v. F.R.C., 62 F.2d 850 (1932), cert. denied, 288 U.S. 599 (1933) and Young People's Assn. for the Propagation of the Gospel, 6 F.C.C. 178 (1938). Initially, the fairness criterion for judging compliance with the public interest standard required that the licensee cover fairly the views of others, but refrain from expressing his own personal views. Mayflower Broadcasting Corp., 8 F.C.C. 333, 339-40 (1940). With the 1949 Report, however, the Commission reversed its stance and decided to permit licensee editorializing; the neutrality criterion was replaced with a standard of fair presentation of issues.

In 1959 the fairness doctrine was given statutory recognition when Congress amended \(\S\) 315(a) of the Communications Act to exempt news programs from the equal time requirement. 47 U.S.C. \(\S\) 315(a) (1970) provides as follows:

> 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—

1. bona fide newscast,
2. bona fide news interview,
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
4. on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), 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 act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. (Emphasis added.)

The 1959 amendment has been interpreted as vindicating the Commission's view that the fairness doctrine inhered in the public interest standard. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969).
fore exists only after a station has presented one side of a controversial issue.\(^7\)

The fairness doctrine, while in part modeled on the explicit statutory provisions relating to political candidates, should be distinguished from the equal time provision. "Equal time" applies only to personal appearances by candidates for public office and requires the broadcaster, who has provided time for one political candidate, to also provide time for his opponents. Under the equal time provision, the broadcaster's role is passive; unless reply time is requested, the station is not required to furnish it. Nor is the station required to grant equal opportunity to an opponent who is unwilling to pay. 47 U.S.C. § 315 (1970), as amended, 47 U.S.C. § 315(b) (Supp. 1975).

In contrast, the fairness doctrine is broader in scope; it imposes an affirmative duty upon the broadcaster to encourage various viewpoints on issues, and it requires only a reasonable balance instead of equal time. It is also important to note that the general fairness requirement does not give a particular individual or group the right to obtain broadcast time. Under the fairness doctrine as it applies generally to controversial issues of public importance, the viewpoint itself, rather than any particular proponent of it, must be given exposure. Cullman Broadcasting Co., 40 F.C.C. 576, 577 (1963). Exceptions to this are the personal attack and political editorializing rules, two aspects of the fairness doctrine which were codified into FCC regulations. See 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1971) (all identical). (The portion of the Commission's inquiry dealing with the application of the fairness doctrine to political broadcast was released earlier in First Report—Handling of Political Broadcast, 36 F.C.C.2d 40 (1972)).

The Commission recently extended the fairness obligation to cable television operators who control their own channels. Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

The only aspect of the fairness doctrine which is subject to review is the broadcaster's obligation to provide a reasonable opportunity for opposing viewpoints. The Commission regards the broadcaster's responsibility under the first aspect of the fairness doctrine—his affirmative obligation to provide coverage of important public issues—as a matter of journalistic discretion. FAIRNESS REPORT at 26375.

In addition, considerable deference is given the broadcaster throughout the review process, with the burden almost always on the complainant. The agency acts only on the basis of complaints from interested citizens; it does not monitor broadcasts for possible violations. Id. at 26374. Citizen complaints must also comply with rather stringent "pleading" requirements prescribed by the Fairness Doctrine Primer, 40 F.C.C. 598 (1964). The complainant must specify:

1. the particular station involved;
2. the particular issue of a controversial nature discussed over the air;
3. the date and time when the program was carried;
4. the basis for the claim that the station has presented only one side of the question; and
5. whether the station has afforded, or plans to afford, an opportunity for the presentation of contrasting viewpoints.

Id. at 600. Then there must be prima facie evidence of a violation before a complaint is even forwarded to the licensee for comments. Allen C. Phelps, 21 F.C.C.2d 12 (1969).

Following this initial screening of complaints, the Commission reviews the broadcast licensee's response to see: (1) whether the issue specified in the complaint was actually raised in the licensee's programming; (2) whether the issue is "controversial" and of "public importance;" and (3) whether the licensee has afforded a "reasonable opportunity" in his overall programming for the presentation of contrasting points of view. FAIRNESS REPORT at 26376-77. The Commission's review is limited to a determination of whether the broadcaster's decision was reasonable and made in good faith. FAIRNESS REPORT at 26375.

Hence, the broadcaster has considerable leeway in determining what specific issue was raised by his programming and whether the issue was "controversial" and of "public importance." Only in the rarest instances will his judgment be disturbed. See notes 106-08 infra & text accompanying. This ability to define the issue being raised gives rise to a strategy often employed against fairness complaints. The broadcaster can simply argue that the alleged issue was merely a sub-issue in the program, or define the issue differently than does the complaint.

If the broadcast licensee has presented one side of a controversial issue, he is not required to provide a forum for opposing views on the same program or series of programs,
The claim for a general right of access to the media\(^8\) grew out of the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*\(^9\) upholding the constitutionality of the fairness doctrine.\(^10\) *Red Lion* held that the first amendment, as it applies to the broadcast media, imposes affirmative obligations upon government to protect freedom of speech from the evils of private censorship.\(^11\) Seizing upon this interpretation of the first amendment, consumer advocates advanced a general right of

but is merely expected to afford a proper balance in his overall programming. *Fairness Report* at 26374. Nor is he required to present every possible viewpoint or shade of opinion, regardless of its significance. *Id.* at 26377.

The broadcaster's duty does include providing free time if paid sponsorship is unavailable. This principle, which was first announced in Cullman Broadcasting Co., 40 F.C.C. 576 (1963), was confirmed in the *Fairness Report* at 26377 n.13. The licensee must also make "reasonable allowance for the presentation of opposing views by genuine partisans who actually believe in what they are saying." *Id.* at 26377-78. If a licensee fails to present an opposing viewpoint on the ground that no appropriate spokesperson is available, he must demonstrate that he made a diligent effort to communicate his willingness to present their views. *See* Columbia Broadcasting System, Inc., 34 F.C.C.2d 773 (1972).

Apart from these minimal standards of fairness, however, the licensee has almost complete discretion on all matters concerning the particular opposing views to be presented and the appropriate spokesperson and format for their presentation—subject, that is, to the test of reasonableness and good faith. The broadcaster has substantial discretion in determining the amount of time to be allotted to each viewpoint, there being no requirement that the balancing presentation be as long as the original presentation. *See* *Fairness Report* at 26378. Similarly, the licensee is free to determine format and placement in prime versus non-prime time, since there is no rigid requirement that he balance audience size, identity, or other factors. *Id.*

The history of the fairness doctrine also evidences the Commission's reluctance to impose harsh sanctions for fairness doctrine violations. The Commission has wide-ranging powers to discipline licensees. These include denial of renewal at the expiration of a license period, 47 U.S.C. § 307(d); immediate revocation of a license, 47 U.S.C. § 312(a); probationary renewal of a license, 47 U.S.C. § 307(d); ordering a comparative hearing, 47 U.S.C. § 309(e); imposing fines, 47 U.S.C. § 502; and issuing cease and desist orders, 47 U.S.C. § 312(b).

Yet no license has ever been revoked on the basis of a fairness doctrine violation, and only once has the FCC refused to renew a license on fairness doctrine grounds. In Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18 (1970), *petition for reconsideration denied*, 27 F.C.C.2d 565 (1971), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973), the denial followed persistent and willful violations and was based on procedural as well as substantive grounds.

The most common disciplinary procedure used by the Commission is a simple request that the station correct its practices. *See*, e.g., Richard G. Ruff, 39 F.C.C.2d 838 (1969). A similar procedure known as the "lifted eyebrow" technique consists of a warning that a copy of the letter notifying the licensee that he has violated the fairness doctrine will be attached to his file for consideration at renewal time.


\(^10\) Although *Red Lion* dealt specifically with the fairness rules on personal attacks and political editorials, the opinion is generally cited as upholding the FCC's authority to exercise substantive control over licensees.

\(^11\) *See* notes 46-50 infra & text accompanying.
access to the mass media as practically and constitutionally necessary to protect the public's interest in robust debate.\textsuperscript{12}

Whatever its merits,\textsuperscript{13} the claim for general access has now been laid to rest. In \textit{Columbia Broadcasting System, Inc. v. Democratic National Committee},\textsuperscript{14} a majority of the Supreme Court held that neither the Communications Act nor the first amendment required broadcasters to accept paid editorial advertisements.\textsuperscript{15} While in \textit{dictum} the Court suggested that it would be permissible for the Commission to impose a general right of access,\textsuperscript{16} this alternative was explicitly rejected by the FCC. The 1974 Fairness Report concluded that a scheme of government-dictated access would be both impractical and undesirable.\textsuperscript{17}

Now that the \textit{CBS} decision and the Commission have effectively denied the claim for general access, the only channel remaining open for controversial speakers is the limited right of access available under the fairness doctrine. It is in this context that the Commission has sought to restrict the fairness doctrine by removing product advertisements from its scope.

\textsuperscript{12}The claim for general access rejects the traditional view of the free speech and free press clauses, namely, that a forum exists in this country for all those who wish to be heard and that the first amendment guards against government censorship. Rather, the access argument is predicated on \textit{Red Lion}'s view that the first amendment prohibits any interference with the free flow of ideas. The normal parameters of a free marketplace, such as freedom of entry and a multitude of sellers, do not exist in the broadcast industry. The electronic media is instead characterized by monopolistic concentrations of control and sameness of programming due to economic factors which favor some classes of ideas over others and limit the variety of ideas that will be broadcast. Recognition of these impediments to the self-correcting process of the marketplace of ideas combines with the notion that the electronic media has special impact. Access proponents argue that the test for whether a restraint on expression actually is present should focus, not on the availability of alternative forums, but on the opportunities to secure expression in the media with the largest impact. In sum, they argue that because of imperfections in the marketplace of ideas, owners of the media have become the real sources of censorship and that affirmative action on the part of government is therefore necessary to counteract this imbalance. But see \textit{The Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241 (1974) (Florida print media statute similar to the fairness doctrine held unconstitutional).

\textsuperscript{13}For an appraisal of the access argument, see \textit{Lange}, \textit{The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment}, 52 N.C.L. Rev. 1 (1973). A bibliography of the access literature is presented in id. at 2–3 n.5 & 5 n.21.

\textsuperscript{14}412 U.S. 94 (1973).

\textsuperscript{15}Two groups, the Democratic National Committee and Business Executives' Move for Vietnam Peace, argued that the general policy of certain broadcast stations of not selling any editorial advertising time to those wishing to speak out on public issues violated the Communications Act and the first amendment. Their constitutional claim required a showing that (1) private broadcast licensees were engaged in state action and (2) their policy of refusing editorial advertisements substantially violated the first amendment. A majority of the Supreme Court agreed that the plaintiffs failed on the second point because the existence of the fairness doctrine and the balanced coverage it requires is sufficient to protect the public's interest in free expression. The state action issue was left unresolved. See note 43 infra.


\textsuperscript{17}FAIRNESS REPORT at 26382–83.
Despite some early indications that commercials might trigger fairness considerations, the first application of the fairness doctrine to product advertising came in 1967 when the Commission sustained John Banzhaf’s complaint against a station’s presentation of only one side of the cigarette controversy. The Commission rejected the broadcaster’s argument that only cigarette commercials presenting an affirmative health claim should be subject to the fairness doctrine. The agency instead adopted the position that cigarette commercials in general, as opposed to any particular ad, necessarily convey the controversial view that smoking is desirable. The Commission’s definition of the issue as the desirability, not the safety, of smoking led to the blanket ruling against all cigarette ads, and seemed to pave the way for an expansive application of the fairness doctrine to product commercials in general.

To guard against such an extension of its ruling, the Commission took pains to characterize cigarettes as a “unique product.” This characterization was further underscored by the District of Columbia Circuit Court in Banzhaf v. FCC. In affirming the cigarette ruling, the court reiterated the position that, although product commercials generally are not within the reach of the fairness doctrine, its application was warranted in Banzhaf because documented evidence showed the product to be a “threat to life itself.” The Commission had looked to

---


19 Station WCBS-TV, 8 F.C.C.2d 381 (1967).


21 Id. at 953–54 (Loevinger, concurring).

22 We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General’s Committee) and congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. Station WCBS-TV, 8 F.C.C.2d 381, 381–82 (1967).


24 The D.C. Circuit Court stated:
The dangers cigarettes may pose to health ... is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not
the public interest standard as authorization for the fairness doctrine's application to commercial messages; the court, on the other hand, narrowed the "public interest" test to a "public health" test.

Several years later, when the Commission was challenged for its refusal to extend the cigarette ruling, the same court rejected the "unique product" distinction. In *In re Friends of the Earth*, the Commission dismissed a fairness doctrine complaint against a station for failing to present balanced coverage on air pollution caused by large combustion engines. The Commission's attempt to distinguish the cigarette ruling was explicitly rejected on appeal. The District of Columbia Circuit Court found sufficient evidence to conclude that the hazards to health implicit in air pollution were aggravated by such products, and held that the parallel to *Banshaf* was therefore inescapable.

While subsequent litigation also failed to support a distinction between cigarettes and other advertising, unfortunately neither the Commission nor the courts drew very clear lines of demarcation for invoking the fairness doctrine. The Commission stated in one opinion that the commercial must deal "directly" with a public issue, but in an-

---

25 The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty 'to operate in the public interest' . . . is presenting commercials urging the consumption of a product whose normal use has been found by Congress and the Government to represent a serious potential hazard to public health . . . This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

26 The Commission distinguished the cigarette ruling on three related grounds: (1) the question of automobile use, because it is both beneficial and harmful, is not as simple as smoking where official government policy urged its complete cessation, (2) the fairness doctrine ruling on cigarettes was really a substitute for the more desirable action of banning cigarette ads altogether which the FCC was prohibited by statute from doing, and, (3) advertising is only peripheral to the important pollution problems, whereas educational campaigns and restraints on promotion are central in the effort to reduce smoking. *Id.* at 746.

27 *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971).

28 *Neckritz*, 29 F.C.C.2d 807 (1971), reconsidered, 37 F.C.C.2d 528 (1972), aff'd *Neckritz v. FCC*, 502 F.2d 411 (D.C. Cir. 1974). The commercials promoted a Chevron gasoline additive called "F-310" which, the ad claimed, turned dirty smoke into good, clean mileage. The Commission rejected the contention that the ads were controversial due to a pending Federal Trade Commission suit because they did not "deal directly with an issue of public importance." 29 F.C.C.2d at 812.
other case the agency required fairness balancing when the advertisement dealt with a controversial subject only by inference. Yet in a case where the "directness" standard seemed certain to apply, the FCC avoided fairness. At the appellate level, the District of Columbia Circuit Court muddied the waters still more by applying the fairness doctrine to a commercial which urged shoppers to patronize a store then subject to a union boycott. In whatever way this decision is interpreted, its extension of the fairness doctrine is troublesome. The decision may mean that fairness scrutiny is no longer limited to products involving a health hazard. On the other hand, the court's concern for national labor policy may indicate that the application of the fairness doctrine is to be tied to the promotion of clearly established government policies.

Troubled by these developments and especially the courts' extension of fairness, the FCC finally moved to regain control over the doctrine's interpretation. Instead of attempting to distinguish among product commercials, the Commission chose to abandon the cigarette precedent altogether.

The FCC's 1974 Fairness Report

The Commission's Fairness Report on the Handling of Public Issues considered three general categories of paid announcements: (1) advertisements which are "editorial" in nature, (2) institutional advertisements which implicitly raise controversial issues of public importance, and (3) advertisements for commercial products or services.

---

82 E.g., Wilderness Society, 30 F.C.C.2d 643 (1971), 31 F.C.C.2d 729 (1971), reconsideration denied, 32 F.C.C.2d 714 (1971). The FCC there upheld a fairness complaint against NBC for airing Standard Oil commercials advocating the need for oil development in Alaska. Even though the ad did not explicitly mention the Alaskan pipeline, then subject to debate concerning its environmental impact, the Commission found that the issues discussed "inherently" raised the pipeline controversy and therefore required fairness balancing. 30 F.C.C.2d at 646.

83 Green, 24 F.C.C.2d 171 (1970), aff'd sub nom. Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971). The Commission refused to apply the fairness doctrine to military recruitment ads advocating the desirability of military service, even though at the time of the Vietnam war this was a hotly debated issue.


85 436 F.2d at 259.

86 Also referred to as "advertorials," these are commercials which deal overtly with a public issue. The Commission gives, as an example, an announcement sponsored by an organization opposed to abortion which urges a constitutional amendment overriding the Supreme Court decision legalizing abortion. Fairness Report at 26380.

87 The Commission defines promotional or institutional advertising as advertising designed to present a favorable public image of a particular corporation or industry rather than to sell a product. Cited as an example were the Standard Oil ads on the Alaskan pipeline involved in In re Wilderness Society, 30 F.C.C.2d 643 (1971). Fairness Report at 26380.
The Fairness Report did not announce any significant change in policy with respect to the first two types of advertising. The Commission said that the fairness doctrine remains fully applicable to commercials which are in fact editorials paid for by the sponsor.\textsuperscript{38} The Commission also concluded that the fairness doctrine applies to promotional or institutional advertising when the message bears, even inferentially, a substantial and obvious relationship to a current, publicly-acknowledged controversy.\textsuperscript{39}

The significance of the 1974 Fairness Report lies in its treatment of product commercials and explicit rejection of the Banzhaf precedent. Unless the advertisement affirmatively discusses a controversial public issue, simple product promotion is no longer subject to the fairness doctrine. The Commission concluded:

In the absence of some meaningful or substantive discussion, such as that found in the “editorial advertisements” referred to above, we do not believe that the usual product commercial [such as the old cigarette ads] can realistically be said to inform the public on any side of a contro­versial issue of public importance.\textsuperscript{40}

The FCC presented four reasons for not applying the fairness doctrine to product commercials.\textsuperscript{41} First, it was thought more appropriate to refer such matters to Congress for resolution, since the legislature is better able to develop expert information on whether particular products are dangerous to health or otherwise detrimental to the public interest. Second, the Commission believed that application of the fairness doctrine to product advertising would contribute nothing to the public’s understanding of the underlying issue. Rebuttal programming would at best result in a presentation of the negative side of the product use issue. The positive side would not be articulated, since the product commercial only makes the product appear desirable and does not affirmatively discuss one side of the underlying issue. Third, fairness review in this area would force the Commission to interfere with the broadcaster’s first amendment right. The fourth and perhaps most critical consideration was the Commission’s reference to advertising’s role in preserving the economic base of the commercial broadcasting system. The agency was convinced that application of the fairness doctrine to product commercials would have disastrous economic consequences for broadcasting.\textsuperscript{42}

\textsuperscript{38} The Commission noted that because editorial advertising represents only a small percentage of total commercial time, the application of fairness here would not have any serious effect on station revenues. \textit{Id.}

\textsuperscript{39} \textit{Id.} at 26380-81.

\textsuperscript{40} \textit{Id.} at 26382.

\textsuperscript{41} \textit{Id.} at 26381.

\textsuperscript{42} The adverse economic effect on broadcasting was also cited as a reason for refusing to apply the fairness doctrine to two categories of advertisements suggested in the Federal
Thus, the 1974 Fairness Report has withdrawn standard product advertisements from the scope of the fairness doctrine by erecting a presumption that they do not contain any meaningful discussion of public issues. However, an examination of the statutory and constitutional parameters of the doctrine will show that the FCC cannot, in fact, remove all product advertising from the purview of fairness scrutiny. As the primary vehicle for protecting the public's interest in free expression, the fairness doctrine is compelled by the first amendment and is triggered whenever an issue invokes the public's first amendment right to know. Because the public's right to know under the first amendment now extends to certain categories of commercial speech, the fairness doctrine must likewise apply to such constitutionally protected commercial expression. Furthermore, the Commission's justifications for isolating product commercials and giving them less protection do not outweigh the public's interest in hearing opposing views on the use of controversial products.

Trade Commission's proposal: advertisements that make claims based on scientific premises that are in dispute and those that are silent about negative aspects of the touted product. The FCC noted, in addition, that the fairness doctrine was not the appropriate vehicle for the correction of false and misleading advertising because:

A Congressionally-mandated remedy for deceptive advertising already exists in the form of various FTC sanctions. If an advertisement is found to be false or misleading, we believe the proper course is to ban it altogether rather than to make its claims a subject of broadcast debate.

Id. at 26382.

The argument that the fairness doctrine is constitutionally compelled is predicated on an initial finding of the state action necessary to invoke first amendment protection. Mr. Justice Brennan, dissenting in CBS, advanced a five-prong argument that the position of the broadcast licensee constitutes state action: (1) public ownership of the airwaves; (2) extensive governmental control over the broadcast industry; (3) broadcasters' dependence upon the government for their right to use air space; (4) government involvement in broadcaster policy; and (5) analogy to Public Utilities Commission v. Pollak, 343 U.S. 431 (1952) (policy of privately-owned bus company, franchised and regulated by federal government, constituted state action). Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 172-81 (1973) (Brennan, J., dissenting).

Although Justice Brennan's position was not accepted by the majority in CBS, the state action issue was otherwise left unresolved by the decision. See note 15 supra. Only Justices Brennan and Marshall, dissenting, found state action. Three justices (Burger, Stewart, and Rehnquist) found no state action. Justice Douglas did not indicate his position. Justices Blackmun and Powell stated it was unnecessary to reach the issue. Justice White was also undecided, but felt that government action might have been present.

In addition, the CBS decision is distinguishable from the issue at hand. CBS involved FCC acquiescence in network policy, whereas the Fairness Report is a positive agency pronouncement. If authorized under the public interest standard, the new fairness guidelines have the force of statute and are the equivalent of legislative action.

However, the state action question need not be reached because the same first amendment compulsion is present under the public interest standard of the Communications Act. The CBS Court stated that the public interest standard requires reference to first amendment principles. 412 U.S. at 122. The alternative argument is that the first amendment principles embodied in the public interest standard require application of the fairness doctrine to certain categories of product advertising. As a matter of statutory interpretation,
TOWARD A RIGHT OF ACCESS TO REPLY TO PRODUCT COMMERCIALS

The Fairness Doctrine as a Statutory and Constitutional Requirement

If at one time it was merely an administrative rule subject to broad agency discretion, the fairness doctrine is now a specific statutory requirement under the Communications Act. Red Lion noted that the 1959 amendments to the Act not only codified fairness obligations in statutory form, but vindicated the position that the fairness doctrine inhered in the public interest standard. Red Lion and the subsequent Supreme Court decision in CBS accentuate, moreover, the constitutional underpinnings of the fairness doctrine.

The main holding in Red Lion supported the limited right of access under the fairness doctrine as an extension of freedom of speech. In recognizing the rights of the public in the allocation of air time, Red Lion marked a departure from the traditional view of the first amendment. Traditional first amendment analysis regards the clauses guaranteeing freedom of speech and freedom of the press as limitations on the power of government. Red Lion rejected this interpretation and held instead that the first amendment, as applied to the broadcast media, imposes affirmative obligations upon government to guard against any interference with the free flow of ideas:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather

this argument does not rest on a finding of state action. The textual discussion therefore focuses on the substantive first amendment issues.


Red Lion upheld the constitutionality of the fairness doctrine on the basis of the right of speakers to express their views:

As far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. 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.

Red Lion is the landmark case in this area, recognizing for the first time the rights of nonbroadcasters in the allocation of air time. Prior to Red Lion, the Supreme Court's consideration of the applicability of the first amendment to broadcasting focused on the rights of broadcasters only. E.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (technical limitations on the rights of broadcast licensees held constitutional).
than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.\textsuperscript{48} The Court in \textit{Red Lion} based its finding of affirmative obligations under the first amendment on what it perceived to be an essential difference between the print and the broadcast media. The scarcity of radio frequencies restricts the number of those who would broadcast, whereas expression by publication is, at least in theory, available to all.\textsuperscript{49} The Court concluded that fairness limitations on the freedom of the broadcaster, even those that would be unacceptable when imposed upon other media, are lawful in order to enhance the public's right to be informed.\textsuperscript{50}

By giving those members of the public whose views should be expressed a limited right of access to respond to controversial issues, the fairness doctrine furthers the dual purpose of the first amendment as interpreted by \textit{Red Lion}: to assure that truth will prevail\textsuperscript{51} and to protect those forms of expression that will enable the voter to cast an intelligent ballot.\textsuperscript{52} The fairness doctrine serves these two first amendment

\textsuperscript{48} 395 U.S. at 390.

\textsuperscript{49} Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.

\textit{Id.}

\textsuperscript{50} The \textit{Red Lion} decision referred to the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." \textit{Id.}

\textsuperscript{51} The notion that the first amendment should assist in the ascertainment of truth derives from Justice Holmes's concept of a marketplace of ideas:

\begin{quote}
[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.
\end{quote}


The free exchange of ideas presupposes that competition among ideas will permit truth to prevail. The first amendment provides free exchange and full diversity of opinion so that citizens may be exposed to all the relevant considerations and enabled to draw their own conclusions.

\textsuperscript{52} The view that the first amendment's goal is to produce an informed public capable of conducting its own affairs was also adopted by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), which posited the public's right to "uninhibited, robust, and wide open" debate on public issues. \textit{Id.} at 270. See \textit{Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment,"} 1964 Sup. Cr. Rev. 191.

This interpretation of the first amendment is usually associated with Alexander Meiklejohn. According to Professor Meiklejohn, the first amendment is concerned with the political right of self-government. The importance of protecting free communication of information and opinion is not to protect the right of the speaker, but rather to guard "the freedom of those activities of thought and communication by which we 'govern'." \textit{Meiklejohn, The First Amendment is an Absolute}, 1961 Sup. Cr. Rev. 245, 255. In addition to public discussion of political issues, Meiklejohn would include education, advancements in philosophy and the sciences, and literature and the arts among the categories of expression which merit absolute protection. \textit{Id.} at 257.
principles by striking a delicate balance among the interests which compete for broadcast time. At stake are the interest of the broadcaster in determining what shall be presented by his station, the individual's right of access to present an opposing view, and the public's interest in robust debate. By upholding fairness restrictions on the licensee's use of broadcast time, *Red Lion* resolved these competing interests, according to its view of the first amendment, in favor of the public's right to know.\(^5\)

The Supreme Court's recent decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee* further reinforces the first amendment imperative underlying the fairness doctrine. *CBS* held that neither the first amendment nor the statutory public interest standard compelled broadcasters to sell advertising time to controversial speakers. A majority of the justices concluded that, even if state action were found, the licensee's policy of refusing editorial advertisements did not violate the first amendment because the public's first amendment right to be fully informed already receives adequate protection under the fairness doctrine.\(^5\) The Court noted that the existing regulatory scheme seeks to preserve the first amendment values written into the Act by defining the licensee's role in terms of a "public trustee" charged with the duty of fairly and impartially informing the listening and viewing

---

\(5\) *Red Lion* concluded: "It is the right of viewers and listeners, not the right of the broadcasters, which is paramount." 395 U.S. at 390. The public's first amendment right to know is now widely recognized and has played an increasingly significant role in other areas of the law. See generally Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970).

Most of the cases have dealt with the analogous right to receive printed material or information. The right to receive information had its genesis in dictum in *Martin v. Struthers*, 319 U.S. 141, 143, 149 (1943) (right of Jehovah's Witnesses to distribute leaflets accompanied by willing listeners' right to receive them). Subsequent decisions also treated it in dictum. *Marsh v. Alabama*, 326 U.S. 501, 508-09 (1946) (residents of company-owned town had same right to be informed as citizens living elsewhere); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (specific rights need not be enumerated in Constitution to be guaranteed; freedom of speech and press includes right to receive that which is spoken or printed); *Procunier v. Martinez*, 416 U.S. 396 (1974) (prison rules regulating censorship of mail held unconstitutional because of interference with prisoners' rights to communicate and public's right to receive information about prisons). The public's right to receive information may be outweighed by competing considerations. *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (government's interest in barring alien's entrance to country); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (newsmen have same obligations as other citizens before a grand jury); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (individual's reputational interest).

The right to receive information may not be invoked when alternative means of communication are available. See *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), two companion cases upholding prison rules prohibiting face-to-face interviews between inmates and the press without considering the implications of the right to receive information. More recently, the right to receive information has been the basis for challenging state laws forbidding the advertising of retail prescription drug prices. See note 69 infra.

\(5\) See note 15 supra.
The importance of the CBS decision is two-fold. CBS not only reaffirmed the constitutional and statutory bases of the fairness doctrine, but, in denying another form of public access to the media, elevated the fairness doctrine as the sole guardian of the public's first amendment right to know.

The analysis remains the same whether the fairness doctrine is constitutionally compelled or required by the first amendment principles embodied in the statutory public interest standard. The broadcaster's obligation to assure balanced coverage is present whenever an issue invokes the public's first amendment interests in free expression.

The Public's First Amendment Right to Know and Commercial Speech

The FCC's recent pronouncement on product commercials adheres to the political-commercial speech dichotomy traditionally associated with first amendment analysis. On the hierarchial ladder of first amendment protection, political speech is most favored, while commercial speech is entitled to little, if any, protection. This hierarchy finds clear expression in the Commission's Fairness Report. By subjecting political issues to the fairness doctrine and thereby requiring more political issue presentation, the FCC has granted that kind of speech increased protection in accord with the public's first amendment right to receive public affairs information. Conversely, when the expression is entitled to less first amendment recognition, as in the case of commercial speech, it does not receive protection under the fairness doctrine. With

---

56 See note 43 supra.
57 The prevailing justification for the political-commercial speech dichotomy is Alexander Meiklejohn's interpretation of the first amendment. Meiklejohn's self-government theory of the first amendment leads to the conclusion that commercial speech, because it only seeks to influence private economic choices and not political behavior, is simply not the type of speech the first amendment was designed to protect.

The problems with this rationale have been underscored by several critics. See, e.g., Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429 (1971); Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191 (1965).

One problem is the difficulty in distinguishing the so-called commercial transaction from speech entitled to protection. Meiklejohn's theory also breaks down with his artistic speech exception. If artistic speech is protected by the first amendment because it builds a foundation for intelligent decisionmaking, the same should be true of commercial speech. See note 111 infra & text accompanying.

58 The Commission quotes Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968): Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it 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.

Fairness Report at 26381.
commercial expression, the public’s first amendment right to know is said to be less significant and hence fairness restrictions on the broadcaster’s first amendment rights cannot be justified.

The political-commercial speech dichotomy, however, has been discredited in recent years. Its demise will be hailed by those who seek access to reply to product commercials, for if the umbrella of first amendment protection covers commercial speech, the public’s first amendment right to receive information may be sufficient to compel application of the fairness doctrine to product advertising.

The origins of the political-commercial speech dichotomy can be traced to an expansive and indeed questionable interpretation of Valentine v. Chrestensen. Chrestensen was the first Supreme Court case to consider the constitutional status of commercial speech. At issue was the constitutionality of an ordinance which prohibited the distribution of advertising handbills on the streets. In sustaining the ordinance, the Supreme Court held that the public streets were not a protected forum for the dissemination of advertising matter. The narrow holding of the case, however, was overshadowed by the Court’s broad statement that “the Constitution imposes no such restraint on government as respects purely commercial advertising.” This language was interpreted to mean that “purely commercial advertising” is not entitled to any first amendment protection. The celebrated commercial speech doctrine later emerged from this expansive reading of Chrestensen and eventually found its justification in the self-government theory of the first amendment.

59 316 U.S. 52 (1942).
60 Chrestensen was arrested for distributing handbills advertising his submarine exhibit. He had attempted to circumvent the New York City sanitary code by printing a double-faced handbill. On one side was the submarine exhibit advertisement and on the reverse side was a protest against the city for not allowing him to exhibit his submarine at a municipal pier. Id. at 53.
61 Id. at 54.
62 The Court distinguished “purely commercial advertising” from “information and opinion,” which is entitled to first amendment protection, by focusing on Chrestensen’s intent. It was evident in this instance that the purpose was one of financial profit and that the double-faced circular was designed to evade the ordinance. Id. at 55. This standard has been labeled the “primary purpose test.” Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 GEO. WASH. L. REV. 429, 451 (1971). The Chrestensen test of what constitutes purely commercial speech was subsequently overruled in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The New York Times Court held that it was immaterial whether or not the newspaper was paid to print the particular ad. The Court focused on the content of the advertisement and deemed commercial that speech which does no more than propose a commercial transaction. Id. at 265-66.
63 The original justification was that the commercial speech doctrine regulated conduct and not speech. The argument was that either advertising itself is conduct and not speech or that commercial speech is so closely tied to commercial activity, which clearly may be
Two recent Supreme Court cases, however, signal a return to the narrow reading of \textit{Chrestensen} and a departure from the notion that commercial speech per se is unprotected. In \textit{Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations},\textsuperscript{65} the Court upheld an ordinance prohibiting newspapers from publishing sex-classified help-wanted advertisements. The Court not only looked to the commercial nature of the help-wanted ads,\textsuperscript{66} but also noted that the commercial activity proposed by the ads was illegal and that the restriction on the advertising was "incidental to a valid limitation on economic activity."\textsuperscript{67} These two additional justifications suggest that the commercial nature of an expression cannot be the single basis for excluding commercial ads from first amendment protection. Furthermore, in dictum, the Court indicated that commercial advertising, in some situations, may serve first amendment interests which could prevail when balanced against the government's interest in regulation.\textsuperscript{68}

In the most recent case to deal with these issues, \textit{Bigelow v. Virginia},\textsuperscript{69} the Supreme Court at last sounded the death knell to the doctrine regulated, that commercial speech and activity are merged. This rationale has since been discredited. See Comment, \textit{The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations}, \textit{63 Geo. L.J.} 775, 800 (1975).

\textsuperscript{64} See note 52 supra.


\textsuperscript{66} \textit{Id.} at 385.

\textsuperscript{67} Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

\textsuperscript{68} \textit{Id.} at 389.

\textsuperscript{69} The Court rejected the argument that commercial speech should be accorded some degree of protection in the \textit{Pittsburgh Press} case. It left to future cases to decide what "the merits of this contention may be in other contexts" (not involving ads aiding illegal activity) and suggested that a balancing test would apply. \textit{Id.} at 388-89.

\textsuperscript{65} 421 U.S. 809 (1974). Shortly before this note was sent to the printer, the Supreme Court handed down another landmark decision on the status of commercial speech. In \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, \textit{96 S. Ct.} 1817 (1976), the Court held that commercial speech per se enjoys first amendment protection.

At issue was a Virginia statute which prohibited licensed pharmacists from advertising the prices of prescription drugs. A consumer group challenged the statute's constitutionality under the first amendment. Justice Blackmun, speaking for the majority, concluded that the public's right to receive information on prescription drug prices was of paramount importance. The state's interest in maintaining the professionalism of its licensed pharmacists could not justify the ban on advertising prescription drug prices. \textit{96 S. Ct.} at 1828-30.

The Court discussed at length the public's first amendment interests in the free flow of commercial information. These interests are present even in the pure commercial speech situation, such as prescription drug advertising, which does no more than propose a commercial transaction. For this reason, the Court declined to draw any line between publically important commercial advertising and the opposite kind. Instead, the Court held that all commercial speech is protected by the first amendment, provided it disseminates truthful information about lawful activity. \textit{Id.} at 1826-27, 1830-31.
that commercial speech per se is unprotected. As managing editor of a weekly newspaper in Virginia, Bigelow had published an ad for a New York City organization announcing that it would arrange for abortions. He was convicted of violating a Virginia statute which made it a misdemeanor to encourage or prompt the procuring of an abortion, by sale or circulation of any publication. Bigelow had argued that the statute violated his right to publish freely and that it was overbroad because it swept within its scope speech protected by the first amendment. On appeal, the Supreme Court held that the statute as applied to Bigelow was unconstitutional.

In this landmark opinion, the Court affirmed the principle that commercial advertising enjoys a degree of first amendment protection. Indeed, the Court made it clear that speech is not stripped of first amendment protection merely because it appears in the form of paid commercial advertisements or merely because it has commercial overtones or reflects the advertiser's pecuniary interests. Regardless of how the speech is labeled, be it commercial advertising or solicitation, the substance of the expression and not its form is controlling.

Although this decision takes Bigelow one step further in avowing blanket protection for commercial speech, Bigelow is likely to retain an important role for future cases. The analysis suggested by Bigelow is still instructive for fairness doctrine purposes. Also, the balancing test elucidated by Bigelow provides guidance in determining the relative merits of the various competing interests.

UNWANTED PREGNANCY
LET US HELP YOU
 Abortions are now legal in New York.
 There are no residency requirements.
 FOR IMMEDIATE PLACEMENT IN ACCREDITED
 HOSPITALS AND CLINICS AT LOW COST
 Contact
 WOMEN'S PAVILION
 515 Madison Avenue
 New York, N.Y. 10022
 or call any time
 (212) 371-6670 or (212) 371-6650
 AVAILABLE 7 DAYS A WEEK
 STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

Id. at 812.

72 421 U.S. 809, 829-36 (Rehnquist & White, J.J., dissenting).
73 Id. at 818-19. The Court cited New York Times Co., 376 U.S. at 266, as standing for the proposition that the substance of the expression, and not its label, is controlling. 421 U.S. at 820. Commercial speech was distinguished from other categories of speech, such as fighting words, obscenity, and libel, which have been held unprotected. Id. at 819. The decision in Chrestensen was regarded as a distinctly limited one upholding a reasonable regulation of the manner in which commercial advertising could be distributed. Id. at 819-20. The Court also regarded Pittsburgh Press as giving emphasis to the illegality of the advertised activity. Id. at 821-22.
74 421 U.S. at 826.
ing that speech may be commercial "in widely varying degrees," the Court also indicated that the extent to which constitutional protection is afforded commercial advertising must be decided on a case-by-case basis. The approach adopted by the Court was the familiar balancing test: The first amendment interests in the expression were assessed and weighed against the public interest allegedly served by the regulation.

Accordingly, the Court found that the ad in Bigelow did more than simply propose a commercial transaction. By indicating that abortions were legal in New York and that there were no residency requirements, the ad contained factual material of interest to the public and thus served an important informational function. The Court emphasized that editor Bigelow's first amendment interest in disseminating information on abortion coincided with the public's first amendment right to receive such information.

The Court next looked to the state's countervailing interest in regulating what its citizens may hear or read about the New York services. The Court concluded that Virginia's interest in preventing commercial exploitation of women who elect to have an abortion was entitled to "little, if any, weight" for the reason that the state's police powers do not reach activities outside its borders. A state may not, under the guise of exercising internal police powers, bar a citizen of another state from disseminating information about an activity that is legal in that state.

To uphold such a regulation, moreover, would impose serious burdens on interstate publications which might impair the proper functioning of a free press.

While Bigelow renounced the old commercial speech doctrine, its mandate for the future is not entirely clear. The Court refused to adopt

---

75 The diverse motives, means, and messages of advertising may make speech "commercial" in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.

76 Id.
77 Id. at 826-27.
78 Id. at 822.
79 The Court noted that Bigelow's prosecution "incurred more serious First Amendment overtones" because his "interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner." Id. at 828.
79 Id. at 827-28.
80 Id. at 824-25.
81 Id. at 828-29.
82 Bigelow also provides some support for the freedom of broadcasters to air commercials of their choosing. A broadcaster could argue that, just as Bigelow's right to publish was protected, his first amendment right in airing product commercials should not be interfered with by the government's fairness doctrine. Also, the statute in Bigelow, unlike the fairness doctrine, actually prohibited the publication of the advertisement altogether and
the position that commercial speech per se is protected. Instead it adopted an intermediate position which requires an assessment of the first amendment interests involved in the expression on a case-by-case basis. Such an ad hoc balancing approach\textsuperscript{85} represents a departure from the "definitional balancing" usually associated with first amendment analysis.\textsuperscript{84} Ordinarily, regulations affecting protected expression are tested under a strict scrutiny standard, in which the state must assert a compelling interest to justify the infringement.\textsuperscript{85} Unfortunately, in Bigelow there was no occasion to measure the strength of the constitutional protection that attached to the advertisement because the asserted state interest was of little import.

Another question left unanswered by the Bigelow decision is the range of commercial speech entitled to protection. As the dissent points out, the ad in Bigelow was a classic commercial proposition directed toward the exchange of services rather than the exchange of ideas.\textsuperscript{86} The majority's rationale for extending first amendment protection was that the ad contained information of value to the public on abortion. The information, moreover, was of potential interest "not only to readers possibly in need of the services offered, but also to those with a general curiosity about . . . the subject matter or the law of another State and its development, and to readers seeking reform in Virginia."\textsuperscript{87}

This rationale for extending protection to the Bigelow ad does offer some guidance. From one perspective, the Court may be pointing to the distinction between informational advertising and advertising which is merely repetitive and want-creating. The difficulty with such a dis-

\textsuperscript{87}Id. at 831-32.
tinction is that even the repetitive, want-creating advertisement may also provide information essential to customers. From another perspective, however, the decision suggests a more viable distinction. By noting that the Bigelow ad concerned reform in abortion law, the Court may be limiting first amendment protection to advertisements for products and services which are subjects of public debate. Not only is this a more feasible distinction, but it comports with the Court's previously expressed view of the first amendment: protected speech is that which either has a direct relevance to the self-governing decisions a citizen must make or which in some way better prepares him to make those decisions.88

This latter interpretation of Bigelow carries far reaching implications for the future of the fairness doctrine. The FCC's decision to remove product commercials from fairness scrutiny was predicated on the traditional commercial speech doctrine and its notion that the first amendment protects only political, and not commercial, expression. Bigelow expressly repudiated that premise. The decision furthermore acknowledged that in some situations advertising for products or services can have a bearing on political decisions and thus invoke the public's right to know under the first amendment. If fairness balancing is required whenever a broadcast presentation deals with an issue in regard to which the public has a right to receive information, then advertisements which implicate the public's right to know should likewise trigger the fairness doctrine. At the very least, Bigelow suggests that the FCC cannot entirely avoid the task of assessing the first amendment interests involved in commercial expression.

This assessment of the first amendment interests in commercial expression must begin, as Bigelow indicates, with the self-government theory of the first amendment. Possible criteria for a "controversial product" therefore might be whether the product was related to: (1) the subject of an upcoming public vote or referendum, (2) an election issue in a campaign for public office, (3) the subject of pending legislation or legislative hearings on the local, state, or federal level, or (4) the subject of heated public debate in the station's service area.

These criteria are consistent with the prevailing interpretation of the first amendment and its goal of securing a fully informed electorate. They are not substantially different from those factors already set forth by the Commission to determine a controversial issue of public importance in other areas of expression in which the fairness doctrine is applied.89 The suggested criteria are also specific and narrowly drawn,

88 See note 52 supra & text accompanying.
89 See Fairness Report at 26376.
thus accomplishing the purpose of the fairness doctrine with minimal harm to the broadcaster's competing first amendment interest. The proposed model, moreover, provides workable boundaries. Certainly it is more tangible than the FCC's directness standard or the discredited "public interest-public health" test. The approach suggested here would in fact exclude the majority of product-service commercials from the purview of the fairness doctrine. It would not permit the existence of an established government policy to determine whether a position should require fairness rebuttal. Nor would fairness obligations be invoked merely because an advertisement was false or misleading, or because an advertisement was arguably informative. Under the proposed criteria, the use of the touted product must be the subject of debate within the local, state, or national political arena in order to invoke the fairness doctrine.

The Competing Considerations

It is not enough to advance the first amendment as grounds for extending fairness doctrine protection to certain forms of commercial expression. Bigelow also calls for a balancing of the competing considerations. The Commission's reasons for excluding product commercials from fairness scrutiny must be weighed against the public's right to hear fairness rebuttal. A careful examination indicates that the justifications cited by the FCC in its Fairness Report do not rise to the level of a governmental interest compelling enough to support the blanket removal of product advertising from the purview of the fairness doctrine.

1. Economic Effects

The Commission's primary justification for its limitation on the fairness doctrine is that application of the doctrine to product commercials would have an adverse effect on the economic base of the broad-

---


91 See notes 31-33 supra & text accompanying.

92 See notes 24-26 & 28-30 supra & text accompanying.

93 Even if the expression involved in product advertising does not trigger strict scrutiny under the first amendment, the Commission's distinction between editorial and institutional advertising on the one hand and ordinary product advertising on the other may not be sufficiently compelling to withstand a challenge on equal protection grounds. In distinguishing standard product commercials from other types of advertising, the Commission has discriminated in favor of product advertisers, allowing them to air their views without rebuttal, while others must submit their opinions to public debate under the fairness doctrine.
The adverse effect on broadcast income could conceivably occur in two ways. One fear is that advertisers will shift their buying to the nonregulated media rather than subject their product claims to debate. The other fear is that application of the fairness doctrine to product commercials carries the potential for imposing a further cost on the licensee by its encroachment on commercial and broadcasting time.

Both of these contentions are questionable. There is no indication that counter-ads will necessarily replace time previously sold to advertisers. As to the fear that advertisers would abandon broadcasting, the only available empirical evidence cuts the other way. The amount of cigarette advertising was not substantially affected by the Banzhaf ruling, which suggests that from the advertiser's point of view the advantages of using the media with the greatest impact will outweigh the costs of incurring counter-ads. The dire predictions of network bankruptcy are also predicated on the assumption that fairness would be extended to countless products without discrimination. Under the proposed criteria, however, only a limited number of product commercials would actually trigger fairness obligations. Whether the broadcast media could survive the additional cost that might be imposed by counter-advertising is, in any event, mere speculation, for the extent of the cost will ultimately depend on which products are found to be controversial. The most that can be said with confidence is that it is impossible to predict the effect of future fairness decisions on broadcast income. Consequently, a more plausible solution would be for the FCC to assess

---

94 The concern for maintaining the institutional viability of the press was recognized in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973). The Court implied that if an institutional or financial threat to the press could be shown, it would render unconstitutional an otherwise valid regulation of commercial speech. Id. at 823-83.


96 Under the principle in Cullman Broadcasting Co., Inc., 40 F.C.C. 576 (1963), the broadcaster must bear the cost of reply programming if paid sponsorship is not found. Because few consumer groups can afford the cost of sponsoring any counter-programming, the licensee not only pays for most of this programming, but, it is argued, gives up air time that other paying advertisers might buy.

97 If counter-advertising does not replace time previously sold to advertisers, there admittedly may be some deterioration of broadcast programming. Counter-ads would force some reduction in expenses and this would most likely occur in the area of news and public affairs programming, where costs are disproportionate to the time involved. See Loevinger, The Politics of Advertising, 15 WM. & MARY L. REV. 1, 10-11 (1973).

98 The miniscule effect of the Banzhaf ruling on the amount of cigarette advertising is documented in Note, And Now A Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising, 60 CALIF. L. REV. 1416, 1446 n. 172 (1972).

the impact of counter-advertising on a case-by-case basis as the need arises.

2. Administrative Difficulties

The Fairness Report pointed to the number of product commercials and the potential fairness disputes that might arise as another reason for refusing to apply the doctrine to this area. The Commission concluded that the solution should therefore rest with the legislature.

Admittedly, practical difficulties in implementation exist, but the problems are not insurmountable. Criteria for defining a controversial product have already been outlined. Moreover, by permitting fairness review of institutional advertising, the Commission may merely have generated administrative problems as serious as those associated with a review of product commercials. The line between institutional advertising and simple product promotion is not always clear. Yet the FCC will now have to make those fine distinctions because such vastly different consequences are triggered according to the label which is affixed to a given commercial. The model suggested here for applying the fairness doctrine to product advertising would not cause greater administrative burdens than those which would accompany the Commission's attempt to apply a categorical distinction.

3. Dangers of Extended Governmental Control

The danger of extending government regulation and control over the broadcasting industry is another concern which shaped the FCC's decision. Conceivably, an extension of the fairness doctrine to product commercials could have a chilling effect by involving the Commission in day-to-day decisions that are at the heart of the commercially sponsored system of broadcasting. In other words, there is the fear of unbridled agency discretion and a resulting potential for government censorship.

These fears have led to the recent debate over the constitutionality of the fairness doctrine. Yet whatever may be the merit of such chal-

---

100 An example of the difficulty in categorizing advertisements is the commercial which raised fairness considerations in United People, Dayton, Ohio, 32 F.C.C.2d 124 (1971). At issue was a television announcement advocating contributions to the local United Appeal. The advertisement was institutional in the sense that it promoted the image of United Appeal by emphasizing the organization's many worthwhile activities. But the advertisement also promoted a product or service, that is, the use of a particular charity to distribute donations.

101 Challenges to the constitutionality of fairness regulation have focused primarily on the soundness of the scarcity rationale and the doctrine's chilling effect. Among commentators there has been widespread criticism of the scarcity rationale for differences in treat-
lenges, they bear no special relevance to the application of the fairness doctrine to product commercials. The argument against the doctrine's continued viability applies to all aspects of the fairness doctrine equally and provides no basis for singling out product commercials. Moreover, ways exist to offset the dangers associated with expansive governmental regulation.

One way the FCC can alleviate the doctrine's potentially repressive effect is to formulate clear standards as to what constitutes a controversial issue of public importance. The model suggested herein for applying the fairness doctrine to product advertising is a step in this direction. The Commission can also adopt minimum standards for what will be considered a reasonable, good faith effort to air contrasting opinion. These and other ascertainable guidelines would build safeguards into the doctrine that minimize the discretion of appointed agency commissioners.

---

102 It is beyond the scope of this note to discuss the constitutionality of the fairness doctrine, a subject which has already been given extensive treatment in the literature. See note 101 supra. This discussion is predicated on the existing regulatory framework and the constitutionality of the fairness doctrine as announced by Red Lion.

103 See note 90 supra & text accompanying.
The dangers of unlimited agency discretion and the doctrine's potential inhibitory effect are offset also by the fact that the broadcaster retains substantial journalistic discretion. Under the present regulatory scheme, the Commission is not entitled to substitute its judgment on program content for that of the broadcast licensee. This limitation was recently affirmed by the District of Columbia Circuit Court. Although the decision was later vacated on rehearing because of mootness, National Broadcasting Co., Inc. v. FCC prescribes the standard for FCC review of broadcaster compliance with the fairness doctrine. The Commission had concluded that a network's determination concerning the subject matter of its documentary on pensions was unreasonable. Chiding the Commission for going beyond its scope of review, the court stated that the agency's authority is strictly limited to reviewing the licensee's decision for abuse of discretion. If this principle is sustained in the future, broadcasters will have even less reason to assert that the fairness doctrine has a chilling effect.

4. Achieving the Purpose of the Fairness Doctrine

Another concern expressed by the FCC is that counter-ads are not likely to be informative and would result in abusive criticism rather than intelligent debate. Although this concern is not without merit, it too applies to all counter-advertising and certainly offers no basis for isolating replies to product commercials from replies to editorial or institutional advertising. Contrary to the Commission's contention, a product commercial which projects a favorable image of a product does in fact present one side of the product use issue. By promoting the desirability of the product, the commercial affirmatively advocates its use. Also, the Commission's contention that the counter-ad is not likely to be informative overlooks the important role which the broadcaster plays in selecting the rebuttal presentation. The licensee has the editorial discretion to weed out abusive criticism and to select the spot announcement that presents the opposing viewpoint in the most appropriate and tasteful manner.

104 The stated standard for review is whether the licensee has made a reasonable, good faith determination. FAIRNESS REPORT, at 26375.
106 In a memorandum opinion and order affirming the decision of its staff, the Commission rejected NBC's determination that the subject of the documentary was "some problems in some pension plans." It concluded that the "overwhelming weight" of the "anti-pensions" statements required further presentation of contrasting views. Accuracy in Media, 44 F.C.C.2d 1027 (1973).
107 516 F.2d at 1122-25, 1133.
108 See note 7 supra.
5. Competing First Amendment Interests

Finally, there must be a balancing of the first amendment interests which compete for broadcast time. The public's right to free speech and to receive information must be weighed against the broadcaster's right to independent journalistic discretion under the free press clause.

The FCC has stated that product advertising access would have only marginal benefits in achieving first amendment goals, because product promotion is not ordinarily associated with any of the interests which the first amendment seeks to protect. That premise has now been discredited. The Supreme Court in Bigelow explicitly confirmed that speech related to the sale of products or services is not valueless in the marketplace of ideas. Indeed, commercial expression is important in many ways. As one commentator has noted, rational economic discrimination adds to the development of an individual's intellectual and rational capabilities, which are closely associated with the capacity to make political decisions. Informed economic choice, which furthers the social interest in the most efficient allocation of resources, is surely as valuable to a democratic capitalist society as informed political choice. Moreover, advertising aids the individual in achieving a materially satisfying life by providing the consumer with a flow of essential information about new products and services and the relative merits of competing products. In this regard, advertising may have an even greater impact on the individual's welfare than political decisions.

These considerations, of course, must be examined in view of the broadcaster's first amendment interest. The purpose of the freedom of the press clause is to protect independent journalistic discretion. From one perspective, advertising access does not contravene the broad-

\[109\] See note 58 supra & text accompanying.
\[110\] 421 U.S. at 826.
\[111\] For these reasons, the writer proposes an alternative to Meiklejohn's view of the first amendment. Although he also regards self-government as the goal of the first amendment, he extends it to private as well as public self-government. See Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429, 439-45 (1971).
\[112\] For these reasons, the Supreme Court has now adopted the position that a free flow of commercial information is indispensable to an informed citizen. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817, 1826-27 (1976).
\[113\] In the past the justification asserted for extending the fairness doctrine to product commercials was that the broadcaster's commercial messages were not protected under the first amendment and so fairness restrictions on his freedom in this area were permissible. See, e.g., Banzhaf v. FCC 405 F.2d 1082, 1101-02 (D.C. Cir. 1968). By the same token, saying commercial advertising is sufficient to trigger the public's right to know under the first amendment must also mean that such advertising is sufficiently "speech" for the broadcaster to receive first amendment protection. See note 82 supra.
caster's editorial judgment because it only affects time allocation and not what the broadcaster chooses to present on his own programming. However, even if the broadcaster's editorial judgment were implicated in this area, the fairness doctrine model proposed herein would minimize the infringement. By allowing fairness rebuttal only when the product's use is a hotly debated political issue, the model has built-in limitations along the lines suggested in Bigelow. Fairness would apply only where the public's need to know is the greatest. Moreover, if there is a question of weighing competing first amendment interests, the balance struck by Red Lion is controlling. As interpreted by Red Lion, the purpose of the first amendment is to secure truth in the marketplace of ideas and to create a fully informed electorate. Red Lion's mandate is clear: government-imposed fairness restrictions on the broadcaster are lawful in order to protect the paramount interests of the public in free expression.

CONCLUSION

As mediators for the competing interests in broadcast time, the fairness doctrine and the agency charged with its administration have had to walk a delicate tightrope. In announcing a change of fairness policy with regard to product commercials, the FCC sought to simplify this difficult task. The decision to remove product and service advertisements from fairness scrutiny was based on the assumption that the public's first amendment right to robust debate does not extend to commercial expression. The Supreme Court's rejection of that premise in Bigelow v. Virginia casts serious doubts on the Commission's treatment of product and service advertisements. Indeed, Bigelow suggests that the statutory and constitutional parameters of the fairness doctrine must now be redefined.

SUSAN T. EDLAVITCH

114 The opposed view is that the broadcaster's journalistic discretion is, in fact, nullified by the requirement of counter-time, because the station is being forced to share its space with persons of the government's choosing. See Bazelon, FCC Regulation of the Telecommunications Press, 1975 DUKE L.J. 213, 235.
115 See notes 44-53 supra & text accompanying.