The Fall of the FCC's Personal Attack and Political Editorial Rules

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"[T]he court hereby . . . issues a writ of mandamus directing the Commission immediately to repeal the personal attack and political editorial rules."[1] With that sentence in *Radio-Television News Directors Association v. FCC* (*RTNDA III*), the D.C. Circuit closed the book last year on one of the longest-running disputes in Federal Communications Commission history, resolving a petition for rulemaking first filed by broadcasters more than twenty years earlier.

The dispute ended, however, not with a bang but a whimper. Despite repeated opportunities and numerous entreaties from the FCC, industry participants, and even members of its own court, no panel of the D.C. Circuit ever resolved the principal issue: whether the personal attack rules and political editorial—or their regulatory cousin, the fairness doctrine—are constitutional. The story of the personal attack and political editorial rules is thus one of lost opportunity. The D.C. Circuit failed to clarify the level of First Amendment scrutiny to be given to regulation of broadcasters, an issue that desperately needed clarifying. More important, the D.C. Circuit interrupted a constitutional conversation between the U.S. Supreme Court and the political branches that would have enabled the Supreme Court to receive essential information regarding the state of technology and its impact on the First Amendment and would have allowed the Court to resolve definitively whether *Red Lion Broadcasting Co. v. FCC*[2] remains good law.

The Rules at Issue

The personal attack and political editorial rules at issue in *RTNDA III*, like the fairness doctrine from which they derive, involve government efforts to regulate the content of broadcasters' speech in an effort to ensure "balanced" coverage of controversial issues. The fairness doctrine required broadcasters to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[3] The personal attack rules required that when an attack is made on the "honesty, character, integrity, or like personal qualities" of an identified individual or group during the coverage of a controversial issue of public importance, the licensee had to promptly notify the attacked party and offer a "reasonable opportunity" to respond.[4] The political editorial rules created a similar "right of reply" in the context of political endorsements, so that when a licensee endorsed or opposed a political candidate, the licensee had to notify the opponents of the candidate endorsed (or the candidate opposed) and offer the candidates or their representative a reasonable opportunity to respond.[5]

As might be expected, disputes regarding the scope of the rules often arose out of heated and divisive debates. Must a broadcaster provide a right of reply when the author of "Goldwater—Extremist on the Right" is accused of having worked for a "Communist-affiliated publication" and having defended Alger Hiss?[6] Must broadcasters that carry cigarette advertising devote significant broadcast time to presenting the case against cigarette smoking?[7] When broadcasters aired Armed Services recruiting announcements during the Vietnam War, were they required to donate time to groups opposing military service or informing the public of alternatives to military service?[8] Did broadcasters provide adequate coverage of the view that nuclear power plants should not be built?[9] The rules thus presented the stark First Amendment conflict between the government's desire to ensure that a "scarce" public resource such as the broadcast spectrum is used "in the public interest" to provide balanced programming and the broadcasters' desire to be free from a significant burden on the exercise of their journalistic freedom and editorial discretion in covering those issues.

Historical Development

The fairness doctrine emerged gradually from regulators' application of the amorphous "public interest standard" to a medium that lacked "enough frequencies within the broadcast band to give each of the various groups of persons in the U.S. a channel on which to operate a broadcast station."[10] Initially, the FCC (and its predecessor the Federal Radio Commission) relied on this scarcity rationale to prohibit the use of stations "exclusively by or in the private interests of individuals or groups."[11] For example, early Commission decisions denied license applications on the ground that the proposed broadcaster's programming focused too narrowly on particular topics, such as labor issues or religious programming.

Over time, however, the Commission began to view the public interest standard as the source of an affirmative obligation on the part of broadcasters to cover "public questions, fairly, objectively, and without bias."[12] This shift in thinking led in 1949 to the *Report on Editorializing by Broadcast Licensees*,[13] which formed the basis for the Commission's subsequent fairness decisions. The report established "the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community."[14] And it imposed a corresponding obligation on broadcasters to "play . . . a conscious and positive role in bringing about balanced presentation of the opposing viewpoints."[15] As it evolved in the wake

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of the 1949 report, however, the fairness doctrine did not restrict the ability of broadcasters to present both sides of an issue themselves or to choose which third party would be most appropriate to present the other side.

By contrast, the personal attack and political editorial rules forced broadcasters in certain situations to provide air time to specific individuals and groups.[16] Those rules evolved from the Commission's observation in the 1949 report that, when fulfilling the requirements of the fairness doctrine, "elementary considerations of fairness may dictate that the time be allocated to a person or group that has been specifically attacked over the station, where otherwise no such obligation would exist."[17] As codified in 1967, the personal attack and political editorial rules vested specific aggrieved individuals (the "attacked" parties or "unendorsed" candidates) with a right of reply. Broadcasters thus not only had to carry messages directly contrary to ones they chose to convey, they had to allow a speaker who was not of their choosing to present that message.

Red Lion Broadcasting Co. v. FCC

In 1969, in *Red Lion*, the U.S. Supreme Court addressed whether the fairness doctrine and the personal attack and political editorial rules imposed burdens on broadcasters so severe that they violated the First Amendment. The case challenged both the Commission's codification of the personal attack and political editorial rules and its decision to require the Red Lion Broadcast Company to give reply time to Fred J. Cook, the author of the aforementioned Barry Goldwater book, who had been accused of having worked for a Communist publication. In a unanimous opinion, the Court rejected the broadcasters' constitutional concerns and upheld the Commission's actions in their entirety.

The dispositive fact for the Court, as it had been for the Commission decades earlier, was scarcity. As the Court viewed it, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[18] Indeed, the Court concluded that "the First Amendment confers no right of licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the government has denied others the right to use."[19] Instead, for the purposes of the First Amendment, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences that is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[20]

The Court did not, however, purport to uphold the rules' constitutionality in perpetuity. The Court cautioned that "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage," the Court would be willing "to reconsider the constitutional implications."[21]

Demise of the Fairness Doctrine

Almost immediately, the Court began to erode the foundations of *Red Lion*, exposing the tension between *Red Lion* and much of the Court's media-related First Amendment jurisprudence. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[22] for example, the Court emphasized Congress's intent to give broadcasters "the widest journalistic freedom consistent with its public obligations," a factor that was notably absent from the *Red Lion* analysis. Justice Stewart expressed "considerable doubt" about *Red Lion* (which he had joined),[23] and Justice Douglas (who did not participate in *Red Lion*) concluded that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines."[24]

In *Miami Herald Publishing Co. v. Tornillo*,[25] the Court unanimously held unconstitutional under the First Amendment a state statute that required newspapers that attacked a political candidate's character to afford that candidate a right of reply. In contrast to *Red Lion*, the Court in *Tornillo* was unmoved by scarcity related arguments that both emphasized the "disappearance of vast numbers of metropolitan newspapers" and contended that "entry into the marketplace of ideas served by the print media [was] almost impossible."[26] Similarly, although the Court in *Red Lion* had characterized the possibility of a chilling effect on broadcasters' speech as "at best speculative,"[27] in *Tornillo* the Court found that same possibility with respect to newspaper editors "inescapabl[e]."[28] Even Justice White, who in *Red Lion* championed the rights of listeners to receive ideas, noted that "the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed."[29]

Finally, in *FCC v. League of Women Voters of California*,[30] the Court acknowledged the "increasing criticism" of the scarcity rationale, but noted that it would not reconsider *Red Lion* absent "some signal" from Congress or the FCC that "technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[31]

The FCC's 1985 Fairness Report

With respect to the fairness doctrine, the FCC would soon send just such a signal. In 1985, the Commission issued a comprehensive reexamination of the fairness doctrine, shaking its foundations and later undermining the personal attack and political editorial rules.[32]

First, relying on evidence supplied by broadcasters, the Commission concluded that the "fairness doctrine chills speech" and "generally operates to inhibit the presentation of controversial issues of public importance."[33] Indeed, in contrast to its position in *Red Lion*, the Commission described that chilling effect as the "inevitable result" of the fairness doctrine, and noted the concern that the views chilled were disproportionately "unorthodox, unpopular, or unestablished."[34]

Second, the Commission concluded that the fairness doctrine's utility had been substantially undermined by the "explosive growth in various communications technologies" since *Red Lion.* The number of radio stations was up 48 percent, and the number of television stations was up 44 percent. Moreover, "substitute electronic technologies"—including principally cable, which had grown from 3.6 million subscribers at the time of *Red Lion* to more than 36 million by 1985—provided a "significant contribution to the marketplace of ideas."[35] The expansion in broadcast and electronic media outlets, in combi-

nation with the thriving print media, led the Commission to conclude that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today."[36]

Third, the Commission recognized that the fairness doctrine had "the inexorable effect of interjecting the Commission into the editorial decision making process" by requiring judgments as to the reasonableness of "selected program formats and spokespersons."[37]

Fourth, the Commission concluded that the doctrine, in conjunction with the "pervasive regulation" that broadcasters face, created a "dangerous opportunity"—exercised by politicians across the political spectrum—to "stifle opinion with which they disagree or to coerce broadcasters to favor particular viewpoints which further partisan political objectives."[38]

Finally, the Commission concluded that retaining the fairness doctrine imposed significant administrative costs on broadcasters and on the Commission that could not be justified.

Despite this thorough critique, however, the Commission chose not to abandon the fairness doctrine. The Commission refused to repeal the doctrine on constitutional grounds, concluding that *Red Lion* is "controlling law unless the Court expressly states otherwise."[39] The Commission also refused to repeal the doctrine on the ground that it no longer served the public interest, concluding that, in light of the "intense congressional interest in the fairness doctrine and the pendency of legislative proposals," it would be "inappropriate" to act on the various proposals to modify or restrict the scope of the fairness doctrine.[40]

The Fairness Doctrine Revisited

The D.C. Circuit, however, would soon frustrate the Commission's efforts to avoid taking a firm stand on the fairness doctrine's continued vitality. In *Meredith Corp. v. FCC*, [41] the Commission sanctioned Meredith because the broadcaster had run three advertisements sponsored by the Energy Association of New York that promoted the Nine Mile II nuclear power plant as "a sound investment for New York's future," but had failed to provide time to the Syracuse Peace Council to reply.[42] Meredith alleged that the sanctions were unconstitutional, but the Commission refused to decide Meredith's constitutional arguments, citing the 1985 report's conclusion that "Congress and the courts are more appropriate venues for reacting to the constitutional questions." Meredith then sought review in the D.C. Circuit.

Citing Justice Brandeis's concurrence in *Ashwander v. TVA*,[43] the D.C. Circuit declined Meredith's request (echoed by amici) to decide the constitutionality of the fairness doctrine. Instead, even though the 1985 fairness report had all but declared the doctrine unconstitutional, the court remanded the case to the Commission for consideration of Meredith's constitutional claims in the first instance.[44] The D.C. Circuit stated that it was "patently obvious" that "non-legislative expressions of congressional concern" had left the Commission reluctant to eliminate the fairness doctrine absent a court order.[45] Nevertheless, the D.C. Circuit stated that it was "aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward."[46] The court noted, however, that the Commission could avoid reaching the merits of Meredith's constitutional arguments if it were to decide on remand that the fairness doctrine was no longer desirable as a matter of policy under the public interest standard.[47]

The Fairness Doctrine Eliminated

Sufficiently chastised, the Commission dutifully reviewed the constitutional and policy underpinnings of the fairness doctrine. At the outset, the Commission rejected the suggestion in *Meredith* that the Commission eliminate the fairness doctrine on policy grounds, rather than constitutional ones, concluding that "the policy and constitutional considerations in this matter are inextricably intertwined."[48]

The Commission then turned to the merits, applied *Red Lion*, and concluded, largely for the reasons set forth in the 1985 fairness report, that the fairness doctrine "contravenes the First Amendment."[49] The Commission further stated that its "preferred constitutional approach" was to overrule *Red Lion* and hold that the First Amendment applied to broadcasters as it did to other members of the media.[50] In so doing, the Commission explicitly sought to "provide the Supreme Court with the signal" referred to in *League of Women Voters*, informing the Court that the expert agency believed that the "explosive growth" in media outlets had undermined the factual foundations of *Red Lion* and should ensure that "listeners and viewers have access to diverse sources of information."[51]

In *Syracuse Peace Council v. FCC*,[52] the D.C. Circuit affirmed. Remarkably, however, a majority of the panel refused to reach the merits of the Commission's constitutional analysis. Adopting a position "urged by no one in the case," the majority cited *Ashwander* and held that if the Commission "would have found that the fairness doctrine did not serve the public interest even if it had foregone its ruminations on the constitutional issue, we must end our inquiry without reaching that issue."[53] After parsing the Commission's opinion, the majority held that the Commission's "intermediate conclusions . . . compel a finding that the doctrine fails to serve the public interest," and the court thus denied the petition for review.[54]

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Judge Starr refused to join the majority's *Ashwander* analysis, concluding that the majority had, "in effect, blue pencil[ed] the Commission's language purporting to base the agency's action on constitutional grounds."[55] Judge Starr concluded that, given the Commission's factual findings, the Commission's conclusion that the fairness doctrine was no longer constitutional under *Red Lion* must be upheld.[56]

Personal Attack and Political Editorial Rules

The demise of the fairness doctrine, however, did not signal the end of the personal attack and political editorial rules, at least not immediately. In both the 1985 fairness report and in *Syracuse*

Peace Council, the Commission made clear that the personal attack and political editorial rules were not at issue and were being addressed in a "separate, pending proceeding."[57] That proceeding, however, would last for more than twenty years, and the Commission would never issue a majority opinion on the constitutionality of the rules.

The challenge to the personal attack and political editorial rules began on August 14, 1980, with a rulemaking petition filed by the National Association of Broadcasters (NAB). In June 1983, the Commission issued a notice of proposed rulemaking and suggested repealing the rules.[58] As it had with respect to the fairness doctrine, the Commission concluded that NAB and the other commenters "have presented a compelling case that the personal attack and political editorial rules do not serve the public interest."[59] The rules "impose individual rights of access contrary to a regulatory scheme that discourages such obligations," and "deprive licensees of the large measure of editorial discretion that Congress intended."[60] The personal attack rule, according to the Commission, rather than serving the public interest, "apparently serves largely as a means to vindicate attacks on personal reputations."[61]

The Commission further concluded that the rules were inconsistent with the First Amendment and cited the Supreme Court's increasing emphasis on the "First Amendment role that Congress envisioned for broadcasters" and the need for broadcasters' "journalistic independence," and emphasized the "impermissible 'chilling effect'" of the rules.[62] The Commission's notice of proposed rulemaking concluded that "the time is ripe to test the validity of the rules under the more exacting framework of current law."[63]

Then nothing. The Commission refused to issue a final order regarding the fate of these rules. The broadcasters twice filed renewed rulemaking petitions—once in August 1987 and again in January 1990—yet the Commission continued to ignore them.

Having lost the momentum to decide the fate of the rules, the Commission then found itself unable to generate a majority either for or against the rules. Prompted in part by a mandamus petition filed by the Radio-Television News Directors Association with the D.C. Circuit, the Commission in November 1996 sought to update the record with respect to the personal attack and political editorial rules.[64] The Commission was operating, however, with only four Commissioners, and, in August 1997, it announced that "a majority of the Commission is unable at this time to agree upon any resolution to the issues presented in this docket."[65] Shortly thereafter, RTNDA refiled its mandamus petition in the D.C. Circuit, and the case was set for argument.

The addition of four new Commissioners—Commissioner Ness was the only holdover—could have broken the stalemate. Chairman Kennard, however, recused himself from proceedings related to the personal attack and political editorial rules, and, on May 8, 1998, the Commission announced that it was deadlocked.[66]

At that point, the D.C. Circuit appeared finally to have had enough, and it ordered the divided Commission to issue statements in support of the respective positions. Commissioners Ness and Tristani voted to retain the rules (while eliminating many of the rules' notice requirements), concluding that the rules remained in the public interest and were constitutional. They rejected the view that *Syracuse Peace Council* required a different result, concluding that in the years since that case both the Supreme Court and Congress had reaffirmed the view—rejected in *Syracuse Peace Council*—that broadcasters could be required to act as "a public fiduciary."[67] In the view of Commissioners Ness and Tristani, the personal attack rules were a "reasonable quid pro quo" in light of the continued scarcity of frequencies and the decision of Congress to set aside a significant portion of vacant spectrum to be used by existing broadcasters.[68] They viewed the greater number of media outlets as largely "irrelevant to the rules at issue, "[69] since the growth in national cable and satellite channels added little to political coverage of local issues and elections, and it was unrealistic to expect other broadcasters or media outlets to respond to personal attacks made by a particular broadcaster.[70] They also found the broadcasters' evidence of a chilling effect "obsolete and untrustworthy."[71]

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Commissioners Powell and Furchtgott-Roth voted to repeal the rules. Echoing much of the analysis in *Syracuse Peace Council*, which they viewed as controlling, Commissioners Powell and Furchtgott-Roth concluded that in light of the "continually advancing state of communications technology" and the increasing number of "communications sources," the personal attack and political editorial rules "disserve the public interest."[72]

The D.C. Circuit in *RTNDA II*, however, again missed an opportunity to put an end to the debate, remanding the issue yet again to the Commission.[73] Although acknowledging that eliminating the fairness doctrine did not inevitably require eliminating the personal attack rules, the court concluded that the joint statement of Commissioners Ness and Tristani failed to provide "affirmative justification of the two rules as being in the public interest, or explanation of why the rules should survive in light of FCC precedent rejecting the fairness doctrine."[74] The court refused to hold the rules unconstitutional, however, noting that the lack of a coherent rationale "renders meaningful judicial review impossible."[75] The court then elected not to vacate the rules pending further proceedings, concluding that "because the rules have been in force for more than thirty years, the more prudent course is to leave the present regulatory regime in effect and order the FCC to provide a more detailed defense."[76] The court ordered the Commission to act "expeditiously."[77]

Expedition remained, however, an elusive quarry. Faced with continuing inaction, the broadcasters filed a petition for mandamus at the D.C. Circuit in June 2000. In mid-September, Chairman Kennard reconsidered his initial recusal and decided to participate in the personal attack and political editorial proceedings.[78] Shortly thereafter, the

Commission suspended the personal attack and political editorial rules for sixty days while the Commission sought to "refresh the record" regarding the rules' desirability and constitutionality.[79] Commissioners Powell and Furchtgott-Roth dissented. They chastised the majority for virtually ignoring the D.C. Circuit's mandamus order for more than a year, and characterized the FCC's order as "a day late and a dollar short."[80]

One week later, in *RTNDA III*, the D.C. Circuit agreed. Based on the Commission's delay, the court concluded that "its remand order for expeditious action was ignored."[81] Moreover, the court found the Commission's order inadequate, because it sought merely to refresh the record without guaranteeing expeditious action once the record was refreshed and without suspending the rules until a final decision was made. In light of the Commission's "delay [of] final action for two decades, to the detriment of petitioners," the court concluded that "extraordinary action . . . is warranted" and ordered the Commission to repeal the personal attack and political editorial rules "immediately."[82]

Ashwander and the Dangling Conversation

In the disputes over the fairness doctrine and the personal attack and political editorial rules, the Commission's actions over the last twenty years are certainly subject to criticism. In the face of increasing concern that its rules were suspect as a matter of both the public interest and constitutional law, the Commission failed to act definitively and expeditiously to allow a prompt and conclusive resolution. The D.C. Circuit all but stated in *Meredith* that the Commission bowed to political pressure in declining to eliminate the fairness doctrine in 1985, and it concluded in *RTNDA III* that the Commission had essentially ignored an explicit court order to act expeditiously. These actions by the Commission at first delayed, and ultimately denied, resolution of the substantial constitutional issues presented.

But the Commission does not bear all the blame. On at least three separate occasions, the D.C. Circuit refused explicit invitations from the parties and declined to resolve the substantial constitutional issues presented, twice remanding to the Commission for further proceedings and once deciding the issue on public interest grounds, rather than constitutional ones.

The principal justification for the D.C. Circuit's actions was the invocation of the venerable duty, formulated in *Ashwander*, to "avoid unnecessary constitutional adjudication, particularly when the constitutional question has grave implications."[83] Although usually a salutary restraint on judicial constitutional decision making, for a number of reasons application of the duty of constitutional avoidance was particularly inappropriate in these circumstances.

First, the application of *Ashwander* effectively extended a regime that the broadcasters alleged violated core First Amendment protections. Normally, courts apply *Ashwander* to strike down or narrow a statute or regulation on nonconstitutional grounds, providing relief without resolving the constitutional question.[84] With regard to the fairness doctrine and the personal attack and political editorial rules, however, the court's avoidance of the constitutional issues repeatedly left the challenged rules untouched. In *Meredith*, for example, the court's remand left the fairness doctrine in place, and the court's decision in *RTNDA II* did the same with respect to the personal attack and political editorial rules. Even in *Syracuse Peace Council*, which affirmed the Commission's repeal of the fairness doctrine, the D.C. Circuit's refusal to resolve definitively the First Amendment issue surely prolonged the existence of the related personal attack and political editorial rules. Exacerbating the D.C. Circuit's overreliance on *Ashwander* was its refusal in *Meredith* and *RTNDA II* to vacate the rules pending remand, which would have minimized the likelihood of damage to First Amendment rights. Instead, as a result of the D.C. Circuit's remands to the Commission, broadcasters remained subject to rules that were alleged to burden significantly their First Amendment rights.

Second, the costs of overrelying on *Ashwander* seem particularly hard to justify in light of the strength of the constitutional claim. *Red Lion* was under assault virtually from the beginning. As noted, members of the Supreme Court appeared to express misgivings right from the start, and academic commentary was unabashedly critical of the Court's scarcity rationale.[85] Members of the Commission throughout these proceedings stated clearly that they believed the fairness doctrine and the personal attack and political editorial rules were unconstitutional even assuming *Red Lion* to be good law, and they further suggested that *Red Lion* should no longer govern.

Judges on the D.C. Circuit had been no less harsh. The court's opinion in *Telecommunications Research and Action Center*, for example, stated that "the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference," and it noted that applying scarcity as an analytic tool "inevitably leads to strained and artificial results."[86] Judge Starr, the only judge to reach the merits of the constitutional issues over the two decades, affirmed the Commission's conclusion that the fairness doctrine violated the First Amendment. In light of the virtually unanimous opinion that *Red Lion*, at a minimum, deserved another look, *Ashwander* should not have provided a substantial barrier to review.

Third, the invocation of *Ashwander* was particularly inappropriate because the court was forced to ignore or effectively rewrite the Commission's decisions in order to avoid the constitutional questions. In *Syracuse Peace Council*, for example, the Commission had explicitly rejected an invitation to decide the public interest question apart from the constitutional question, stating that it would be "difficult, if not impossible" to separate the two, and it expressly concluded that the fairness doctrine "contravenes the First Amendment."[87] As Judge Starr persuasively argued in dissent, the majority's effort to treat the public interest and First Amendment analyses as logically independent not only rewrote the Commission's decision, it did so in a way that seemed highly artificial, largely because the constitutional and public interest principles were in fact so closely intertwined.

The D.C. Circuit's application of *Ashwander* in *Meredith* was similarly strained. In refusing to address Meredith's constitutional claims, the Commission relied on the 1985 fairness report. In light of that report's detailed analysis, there was little to be gained by sending the matter back to the Commission. The Commission's views on all of the relevant legal and factual issues had

been expressed unambiguously. Returning the matter to the Commission was thus an empty exercise.

The same was true in *RTNDA II.* The court may have found the statements of Commissioners Ness and Tristani unpersuasive, but it could not plausibly be contended that the two had not said all they could say about the continuing justifications for the personal attack rules or the reason those rules should survive in light of the fairness doctrine's demise.[88] Little was to be gained by a remand.

In each of these cases, the Commission had clearly given its best view of the factual and legal issues relevant to the First Amendment analysis. Unsurprisingly, none of the court's decisions resulted in a different or improved analysis from the Commission. Applying *Ashwander* thus served mainly to delay the inevitable.[89]

Finally, and perhaps most important, the application of *Ashwander* was particularly inappropriate in light of the specific calls from the Supreme Court for Congress and the FCC to reevaluate *Red Lion*'s factual foundation. The Court recognized repeatedly that the practical effects of the rules impact the constitutional analysis. In *Red Lion*, the Court noted that "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[90] In *CBS v. DNC*, the Court similarly stated that "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[91] And, most significantly, in *League of Women Voters of California*,[92] the Court refused to reconsider *Red Lion* "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[93]

The FCC responded to the Supreme Court's concerns by expressly sending a "signal" that it no longer believed that *Red Lion*'s factual predicate remained in place. In light of the Supreme Court's explicit call for agency guidance and the agency's explicit response, *Ashwander* should have applied with significantly less force. Whether or not the D.C. Circuit agreed that the factual predicate for *Red Lion* remained, the invocation of *Ashwander* had the effect of preventing the FCC from responding to the Supreme Court's explicit invitation and prevented that Court—the only court that could definitively resolve the question of *Red Lion*'s status—from weighing in on the issue.

The consequences of the D.C. Circuit's aggressive reliance on *Ashwander* were severe. The failure to address the constitutional issues quickly and decisively left broadcasters subject for more than twenty years to a regime that they, members of the D.C. Circuit and the Supreme Court, and numerous Commissioners believed likely violated the First Amendment. Indeed, if the Court had been permitted to reach the merits, it almost certainly would have struck down the rules. *Red Lion* has become an increasingly isolated precedent. The Court has refused to extend it to new media such as cable (in *Turner Broadcasting Co. v. FCC*[94]) or the Internet (in *ACLU v. Reno*[95]), and several Justices have criticized attempts to distinguish among types of media as "dubious from their infancy."[96] That is unsurprising, because its principal justifications are difficult to square with the remainder of the Court's First Amendment doctrine. Consider scarcity, the central justification offered in *Red Lion.* For the Court, scarcity was critical because it meant that certain voices could not get on the air. Against that backdrop, the Court concluded that nothing in the First Amendment prevented the government from requiring a broadcaster to "present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[97]

By applying *Ashwander*, the D.C. Circuit left in place rules that the Commission found that chilled protected speech.

Even at the time the broadcasters filed their petition, however, the significant number of new broadcast stations and the explosion in other electronic media outlets such as cable rendered the scarcity justification implausible.[98] Since then, of course, the case for scarcity has grown substantially weaker. Cable television is available to almost 97 percent of households that have at least one television, and more than 67 percent of such households subscribe to cable.[99] Virtually all cable systems have access to thirty or more cable channels,[100] and the conversion to digital programming along with the development of digital compression, multiplexing, and other technological advancements continue to expand cable capacity exponentially.[101] Moreover, the Internet has emerged as a force on the political scene, allowing virtually anyone and any point of view access to America's living rooms. The fear that scarce broadcast spectrum will prevent certain voices from entering the debate seems, at the very least, antiquated.

Other rationales fare no better. The Supreme Court has suggested at times that the "invasiveness" of broadcasting might justify increased regulation.[102] But the Court has refused to extend *Red Lion* to cable television, which seems equally invasive.[103] The Court has also observed that government regulation of broadcasters is inevitable "if intelligible communication is to be had."[104] But the need for some regulation of technical standards to avoid interference hardly justifies the vastly different regulation of content. Finally, the Court has termed the chilling effect caused by government-imposed rights of reply or fairness obligations "speculative." The Court has not, however, in *Red Lion* or at any time since, made any effort to explain why such a chilling effect is for broadcasters "speculative" but is for newspapers "inescapable."

Given the flimsiness of the justification for treating broadcasters differently and the extent to which *Red Lion* departs from the rest of the Court's First Amendment jurisprudence, then, the Court in all likelihood would have struck down the rules and reconsidered the premises of *Red Lion* and the reduced standard of First Amendment review. By applying *Ashwander*, the D.C.

Circuit thus left in place rules that the Commission found that chilled protected speech, disproportionately chilled unorthodox and unpopular viewpoints, and subjected broadcasters to intense and inappropriate political pressure, and that the Court almost certainly would have invalidated. The D.C. Circuit's application of *Ashwander* and its refusal to vacate the rules pending further review thus trammeled broadcasters' First Amendment rights.

More broadly, the D.C. Circuit cut short an essential conversation between the Supreme Court and the political branches on the meaning of the First Amendment.[105] The interpretation of the First Amendment in the context of changing technology is one that requires the Court to proceed with caution. The rapid nature of technological change makes the declaration of inflexible principles difficult, if not impossible, and the Court as an institution is ill-suited to anticipate the impact of changes of technology on constitutional doctrine. The Court must rely on the political branches for the factual background critical to the constitutional analysis, and the political branches must alert the Court when, in their view, doctrine is substantially out of step with technology. For this system to function effectively, the Court must provide opportunities for those branches to send that message to the Court.

In the context of broadcaster regulation, the Supreme Court, to its credit, recognized this explicitly and sought a signal that would enable the Court to reconsider, and possibly alter, its vision of the First Amendment in the context of rapid technological change. With the Court eager for information and the political branches eager to provide it, the D.C. Circuit's overreliance on *Ashwander* cut short the necessary conversation that would have enabled the Court to update its jurisprudence to take account of the changes in the last three or four decades. That is a real opportunity lost, and broadcasters, regulators, viewers, and the Constitution are the worse off for it.

Endnotes

1. Radio-Television News Directors Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000).

2. 395 U.S. 367 (1969).

3. 47 C.F.R. § 73.1910.

4. *See* 47 C.F.R. § 73.1920(a) (1999). The rules exclude, inter alia, personal attacks made in "bona fide newscasts," "bona fide news interviews," and "on-the-spot coverage of bona fide news events." *See* 47 C.F.R. § 73.1920(b). At the time the D.C. Circuit struck down the personal attack rules, § 73.1920 read as follows:

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the persons or groups attacked:
>
> (1) Notification of the date, time and identification of the broadcast;
>
> (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
>
> (3) An offer of a reasonable opportunity to respond over the licensee's facilities.
>
> (b) The provisions of paragraph (a) of this Section shall not apply to broadcast material that falls within one or more of the following categories:
>
> (1) Personal attacks on foreign groups or foreign public figures;
>
> (2) Personal attacks occurring during uses by legally qualified candidates;
>
> (3) Personal attacks made during broadcasts not included in (b)(2) and made by legally qualified candidates, their authorized spokesperson, or those associated with them in the campaign, on other such candidates, their authorized spokesperson or persons associated with the candidates in the campaign; and
>
> (4) Bona fide newscasts, bona fide news interviews, and on-the spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs.
>
> (c) The provisions of paragraph (a) of this section shall be applicable to editorials of the licensee, except in the case of noncommercial educational stations since they are precluded from editorializing (section 399(a), Communications Act).

5. See 47 C.F.R. § 73.1930. At the time the D.C. Circuit struck down the political editorial rules, they read as follows:

> (a) Where a licensee, in an editorial,
>
> (1) Endorses or,
>
> (2) Opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to, respectively,
>
> (i) the other qualified candidate or candidates for the same office or,
>
> (ii) the candidate opposed in the editorial,
>
> (A) notification of the date and the time of the editorial,
>
> (B) a script or tape of the editorial and
>
> (C) an offer of a reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities. Where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.
>
> (b) Inasmuch as noncommercial educational stations may not engage in editorializing or support or oppose any candidate for political office (§ 399(a), Communications Act), the provisions of paragraph (a), above, do not apply to such stations.

6. *Red Lion*, 395 U.S. at 371–72.

7. Banzhaf v. FCC, 405 F.2d 1082, 1085 (D.C. Cir. 1968).

8. Green v. FCC, 447 F.2d 323, 324 (D.C. Cir. 1971).

9. Meredith Corp. v. FCC, 809 F.2d 863, 865–66 (D.C. Cir. 1987).

10. *In re* Inquiry Into the General Fairness Doctrine Obligations of Broadcast Licensees, 49 Fed. Reg. 20317, ¶ 12 (1984) (quoting early decision of the Federal Radio Commission).

11. *Id.* at n.12 (same).

12. *Id.* ¶ 15.

13. 13 F.C.C. 1246 (1949).

14. *Id.* at 1249 (¶ 6).

15. *Id.* at 1251 (¶ 9).

16. *See* 47 C.F.R. §§ 73.1920, 73.1930 (1999).

17. 13 F.C.C. at 1252 (¶ (10).

18. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388.

19. *Id.* at 391.

20. *Id.* at 390.

21. *Id.* at 393.

22. *Id.* at 393.

23. 412 U.S. 94 (1973).

24. *Id.* at 138 (Stewart, J., concurring).

25. *Id.* at 148 (Douglas, J., concurring).

26. 418 U.S. 241 (1974).

27. *Id.* at 251.

28. *Id.* at 257 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1954)).

29. *Id.* at 260 (White, J., concurring).

30. 468 U.S. 364 (1984).

31. *Id.* at 376 n.11.

32. *In re* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 142 (1985).

33. *Id.* ¶ 61.

34. *Id.* ¶ 69.

35. *Id.* ¶ 105.

36. *Id.* ¶ 5.

37. *Id.* ¶ 72.

38. *Id.* ¶ 74.

39. *Id.* ¶ 15.

40. *Id.* ¶ 176.

41. 809 F.2d 863 (D.C. Cir. 1987).

42. *Id.* at 865–66.

43. 297 U.S. 288 (1936).

44. 809 F.2d at 872.

45. *Id.* at 873.

46. *Id.* at 874.

47. Two other cases similarly narrowed the Commission's ability to avoid the merits of the fairness doctrine. First, in *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), the

D.C. Circuit held that certain amendments to the Communications Act added in 1959 did not make the fairness doctrine a binding statutory obligation, but instead merely ratified the Commission's longstanding view that the public interest standard authorized the fairness doctrine. That holding eliminated what some parties had perceived to be a significant constraint on the Commission's authority to eliminate the fairness doctrine. Five judges dissented from the denial of the petition for rehearing en banc. *See* Telecommunications Research and Action Center v. FCC, 806 F.2d 1115 (D.C. Cir. 1986). Four months later, in *Radio-Television News Directors Association v. FCC* (*RTNDA I*), 809 F.2d 860 (D.C. Cir. 1987), the D.C. Circuit rejected a Commission request to dismiss a petition for review challenging the 1985 fairness report. The court agreed with the FCC that petitioners' constitutional challenge to the Report must be dismissed because the report "did not alter the legal obligations imposed by the fairness doctrine" and thus was not reviewable agency action. *Id.* at 862–63. The court held, however, that petitioners' contention that the Commission had acted arbitrarily by failing to institute a rulemaking proceeding was fit for review, and it ordered further briefing.

48. 2 F.C.C.R. 5043, ¶ 21.

49. *Id.* ¶ 9.

50. *Id.* ¶ 62.

51. *Id.* ¶¶ 65–66.

52. 867 F.2d 654 (D.C. Cir. 1989).

53. *Id.* at 657.

54. *Id.* at 659.

55. *Id.* at 673.

56. Judge Wald, who joined with Judge Williams to create a majority with respect to the *Ashwander* analysis, dissented with respect to the Commission's decision to eliminate the first prong of the fairness doctrine, i.e., the requirement that broadcasters "provide coverage of vitally important controversial issues of interest in the community served by the licensees." Judge Starr agreed with Judge Williams that the elimination was not arbitrary in light of the "explosive growth in media outlets" and the "removal of the deterrent to controversial public issue programming" that had been imposed by the fairness doctrine's second prong.

57. *See* 1985 Fairness Report, 102 F.C.C.R. 142, at n.313 (review of fairness doctrine "does not include the Personal Attack Rule, which is the subject of a separate, pending proceeding"); *see also Syracuse Peace Council*, 2 F.C.C.R. 5043, at n.75.

58. *In re* Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28295 (1983).

59. *Id.* ¶ 52.

60. *Id.*

61. *Id.*

62. *Id.* ¶¶ 14, 17, 52.

63. *Id.* ¶ 13.

64. In February 1997, the D.C. Circuit denied the broadcasters' request for mandamus, but did so "without prejudice to its renewal should the Federal Communications Commission fail to make significant progress, within the next six months, toward the possible repeal or modification of the personal attack and political editorial rules." *In re* Radio-Television News Directors Ass'n, 1997 WL 150084, at *1 (D.C. Cir. 1997).

65. 12 F.C.C.R. 11956 (1997).

66. 13 F.C.C.R. 11809 (1998).

67. Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani Concerning the Political Editorial and Personal Attack Rules, Gen. Docket No. 83–484, ¶¶ 4, 54, 65 (June 22, 1998).

68. *Id.* ¶ 55.

69. *Id.* ¶ 59.

70. *Id.*

71. *Id.* ¶ 33.

72. Joint Statement of Commissioners Powell and Furchtgott-Roth, Gen. Docket No. 83–484, ¶¶ 4, 54, 65 (June 22, 1998).

73. Radio-Television New Directors Association v. FCC, 184 F.3d 872 (D.C. Cir. 1999).

74. *Id.* at 875.

75. *Id.* at 887.

76. *Id.* at 888.

77. *Id.*

78. Chairman Kennard stated that his prior work on the personal attack and political editorial rules on behalf of NAB had initially led him to recuse "out of an abundance of caution," but that the continuing deadlock at the Commission had led him to reconsider. *See* Statement of FCC Chairman William E. Kennard Concerning his Participation in the Personal Attack and Political Editorial Rule Proceeding (Sept. 18, 2000).

79. *In re* Repeal or Modification of the Personal Attack and Political Editorial Rules, MM Docket No. 83–484, 2000 WL 1468707 (Oct. 4, 2000).

80. *Id.* (Separate Statement of Commissioner Michael K. Powell, dissenting).

81. 229 F.3d at 271.

82. *Id.* at 272.

83. 809 F.2d at 870 (citing *Ashwander v. TVA*, 297 U.S. 288, 345–48 (1935) (Brandeis, J, concurring)).

84. *See, e.g.*, Crosby v. National Foreign Trade Council, 120 S. Ct. 2288, 2294 n.8 (2000); Department of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343–44 (1999); Lowe v. SEC, 472 U.S. 181, 190 n.24, 211 (1985).

85. *See, e.g.*, Turner Broadcasting System v. FCC, 512 U.S. 622, 638 n.5 (1994).

86. 801 F.2d at 508; *see also* Action for Children's Television v. FCC, 58 F.3d 654, 672–77 (Edwards, C.J., dissenting) (arguing that relaxed First Amendment scrutiny of regulation of broadcasters cannot be justified); Strauss Communications, Inc. v. FCC, 530 F.2d 1001, 1008 (D.C. Cir. 1976) ("[I]mportant questions continue to haunt this area of the law. The doctrine and the rule do, after all, involve the Government to a significant degree in policing the content of communication . . . [and there are] abiding First Amendment difficulties.").

87. 2 F.C.C.R. 5043, ¶ 19.

88. *See* Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani ¶¶ 52–62 (concluding that the repeal of the fairness doctrine did not require repeal of the personal attack and political editorial rules).

89. Moreover, Judge Starr indicated in *Syracuse Peace Council* that *Ashwander* should have applied with less force for another reason, namely, that the court was being asked only to affirm the conclusion that, *under the facts found by the* Commission, the rules were unconstitutional. The court was not being asked, therefore, to set forth a holding that would necessarily preclude the Commission from reimposing the rules at a later date. *See Syracuse Peace Council*, 867 F.2d at 681 n.9.

90. 395 U.S. at 393.

91. 412 U.S. at 102.

92 468 U.S. 364 (1984),

93. 468 U.S. at 376.

94. 512 U.S. 622, 338 (1994).

95. 521 U.S. 844 (1997).

96. Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 813 (1996) (Thomas, J., dissenting).

97. 395 U.S. at 389.

98. *See, e.g., supra* p. 8 (last paragraph).

99. *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00–132, 2001 WL 12938, ¶¶ 18–19 (rel. Jan 8, 2001).

100. *Id.* ¶ 20.

101. *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 13 F.C.C.R. 1034, ¶¶ 171–173 (1998).

102. *See* ACLU v. Reno, 521 U.S. 844, 868 (1997) (quoting Sable Communications v. FCC, 492 U.S. 115, 128 (1989)).

103. *See Action for Children's Television*, 58 F.3d at 676–77 (Edwards, C.J., dissenting).

104. 395 U.S. at 388.

105. *See generally* Gregory P. Magarian, *Respecting Legislative Precommitment and Protecting Constitutional Freedoms: How to Apply the Religious Freedom Restoration Act to Federal Law*, 99 MICH. L. REV. ___ (forthcoming August 2001) ("Scholars have argued persuasively that the working relationship between the Court and the political branches is dialogic.").