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# *Red Lion and Pacifica: Are they Relics?*

L.A. Powe, Jr.\*

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Geoffrey Stone's fine keynote address offers a superb summary of the lessons of twentieth century First Amendment litigation.<sup>1</sup> Like Stone's monumental *Perilous Times*<sup>2</sup> and his Chicago predecessor Harry Kalven's *A Worthy Tradition*,<sup>3</sup> Stone is largely celebratory of the Supreme Court and its more modern interpretations of the First Amendment. Much of my work on the First Amendment has a different focus. There is precious little in the broadcast jurisprudence to celebrate because of the Court's conclusion that "[i]t is well settled that the First Amendment has a special meaning in the broadcasting context."<sup>4</sup> In applying this "special" meaning, the Court's two major decisions, *Red Lion Broadcasting v. FCC*<sup>5</sup> and *FCC v. Pacifica Foundation*,<sup>6</sup> constitute an embarrassment—for "special" in fact means decidedly less.

Stone noted, albeit without mentioning broadcasting, that there are special areas where First Amendment doctrine is modified.<sup>7</sup> But it is Orwellian to decide that the medium from which most Americans receive

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1. See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273 (2009).

2. GEOFFREY R. STONE, *PERILOUS TIMES* (2004).

3. HARRY KALVEN, JR., *A WORTHY TRADITION* (1988).

4. *FCC v. Pacifica Found.*, 438 U.S. 726, 742 n.17 (1978).

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

6. 438 U.S. 726 (1978).

7. Stone, *supra* note 1, at 276.

most of their news and most of their entertainment is a special area. It would be much more realistic to state that everything else is special because its influence is limited. Broadcasting is the central area of the First Amendment where government supervision of speech has a constitutional mandate.

In 1969, *Red Lion* sustained the FCC's personal attack rules, whereby if a person was attacked during the discussion of a controversial issue of public importance, that individual was entitled to free airtime to respond.<sup>8</sup> The personal attack rule was a recent off-shoot of the more famous Fairness Doctrine, which required broadcasters to air information about controversial issues of public importance and to present opposing viewpoints on those issues selected for airing.<sup>9</sup>

Nine years later, *Pacifica* sustained the ability of the FCC to penalize a station that aired programming that the FCC deemed indecent.<sup>10</sup> A New York City station aired a twelve-minute satiric monologue by comedian George Carlin entitled "Filthy Words" at 2:00 p.m. on a Tuesday in October.<sup>11</sup> The monologue repeatedly used seven words that Carlin prophetically claimed "you couldn't say on the public, ah, airwaves."<sup>12</sup>

Both *Red Lion* and *Pacifica* raised two issues (although the Court did not separate them out). First, is there a distinction between broadcasting and other forms of communication (especially the print media)? Second, assuming there is a distinction, is it constitutionally relevant for First Amendment purposes? Both cases answered both questions in the affirmative.

## I. *RED LION*

The distinction between broadcasting and everything else in *Red Lion* was scarcity.<sup>13</sup> That was the conclusion of the Court in *NBC v. United States*,<sup>14</sup> but it was one that ignored that in the twenty-six years since *NBC*, in front of the Justices' eyes, the FCC had overseen the development and expansion of FM radio, VHF television, and UHF television. The Court unanimously announced through Justice White that broadcasting was a

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8. *Red Lion*, 395 U.S. at 378–79.

9. *Id.* at 375–379.

10. *Pacifica*, 438 U.S. at 738.

11. *Id.* at 729–30.

12. *Id.* at 729.

13. *Red Lion*, 395 U.S. at 389–90.

14. 319 U.S. 190, 226 (1943) ("Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.").

“scarce resource.”<sup>15</sup> Therefore, presumably, other means of communication were not. Unfortunately, “scarce resource” is an unhelpful assertion because all resources are scarce, albeit some more so than others. If Justice White wanted to articulate further he could have noted that Americans got most of their news and entertainment from a scarce two and a half networks: CBS, NBC, and ABC (ABC, the “Almost Broadcasting Company,” counts as only half a network because it was waiting for Farrah Fawcett to make it a competitive network). That would, unfortunately, require ignoring that Red Lion was an AM radio station in rural Pennsylvania.

Robert Bork, who unlike Justice White had economics training, subsequently observed that “[t]he attempt to use a universal fact [physical scarcity] as a distinguishing principle necessarily leads to analytical confusion.”<sup>16</sup> So I won’t continue to dwell on scarcity.<sup>17</sup> The Court was sure broadcasting was different, and that in turn justified and necessitated a different First Amendment.<sup>18</sup>

There was no doubt that *Red Lion* had violated the FCC’s personal attack rules when it refused free airtime to respond.<sup>19</sup> Nevertheless, the AM station in a tiny hamlet near York, Pennsylvania could offer a perfectly framed First Amendment defense: no speaker can be forced by the government to say something that the speaker does not wish to say.<sup>20</sup> But because of differences between broadcasting and other means of communication, the claim had no force.<sup>21</sup> Instead, the Court announced a special First Amendment for broadcasting.

Three words dominate the Court’s First Amendment discussion—words that would never appear in any other First Amendment context: license, licensed, and licensee.<sup>22</sup> As we all learn as freshlaws, licensees are on a shorter leash than owners. Indeed, a broadcaster is a “fiduciary.”<sup>23</sup> It is true that in the older days one could hear newspapers claiming that they were

15. *Red Lion*, 395 U.S. at 376. The holding was 7-0 because William O. Douglas did not participate and Abe Fortas had already resigned.

16. *Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).

17. But imagine if someone today tried to explain to newspaper, magazine, or book publishers that broadcasting was scarce and print was not.

18. *See Red Lion*, 395 U.S. at 386.

19. *See id.* at 378–79.

20. *See id.* at 386; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

21. *Red Lion*, 395 U.S. at 386.

22. *Id.* at 388–89.

23. *Id.* at 389.

fiduciaries of the public trust, but this was different. A broadcaster is a “fiduciary with obligations”—meaning legally enforceable obligations.<sup>24</sup> A broadcaster must implement “the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences.”<sup>25</sup>

So far so good. “[T]he 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.”<sup>26</sup> Next should have come a discussion of democratic deliberation, individual liberty, and perhaps the search for truth. But no; instead, the concern was monopolization (as if Red Lion Broadcasting could dominate any real market).<sup>27</sup> In the most important and instructive sentence in broadcast jurisprudence, White asserted that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>28</sup>

Now the Court’s earlier statement about a broadcaster being a “fiduciary with obligations” comes into better relief. Viewers and listeners are the beneficiaries of the trust. The broadcaster, as trustee, must do everything in its benefit, and should it fail to do so, a neutral body—in this case the FCC—will step in to enforce the trust.

The trustee model is a far cry from the earlier fusion of right and remedy whereby listeners could tune out, viewers could switch, and readers could cease. Now, if the Court is taken at its word, we need not switch. I turn on the radio, get Rush Limbaugh, and scream “I want Rachel Maddow.” Instead of hunting for “Air America,” I call on the government to intervene. It will not only decide my rights (do I get Maddow even if millions mistakenly prefer Limbaugh?) but also determine my remedy. The Court’s public trustee model invites and requires government to play a central role in broadcast regulation.

Finally, the Court came to the chilling effect argument that the rules would cause broadcasters to self-censor and minimize controversy.<sup>29</sup> Justice White did not think it had happened or that it would happen, but noted that in any event there was a ready remedy.<sup>30</sup> If FCC regulation of broadcasters chilled their speech, then the FCC could warm them up—by yanking their license if necessary.<sup>31</sup>

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24. *Id.*

25. *Id.* at 390.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 392–93.

30. *Id.* at 393–94.

31. *Id.* at 394.

The six Justices joining Justice White's opinion did so immediately after his initial circulation, and they could scarcely contain their enthusiasm.<sup>32</sup> Instead of the usual "I agree" or "Join me" which Chief Justice Warren and Justice Thurgood Marshall sent, the others gushed.<sup>33</sup> Justice Black referred to the "comprehensive discussion of the vital and important issues involved in this case."<sup>34</sup> Justice Harlan thought the "opinion displayed 'great wisdom and skill.'"<sup>35</sup> Justice Brennan found it "a truly superb opinion."<sup>36</sup> Justice Stewart thought it was "a very thorough and thoughtful job."<sup>37</sup>

Brennan's comment is perhaps the strangest because he had pioneered the chilling effect doctrine<sup>38</sup> and made it a central part of the First Amendment in *New York Times v. Sullivan*.<sup>39</sup> The chilling effect had to be minimized lest speech fail to be "uninhibited, robust, and wide-open."<sup>40</sup> *New York Times* had cleared away over a century of libel law to free the press from self-censorship. Could anyone seriously believe that newspapers lived in fear of self-censorship but that broadcasters were of a hardier breed? Nor did *Red Lion* square well with *Brandenburg v. Ohio*, a decision handed down the same day as *Red Lion* and that protected a Klansman in his rantings against blacks and Jews.<sup>41</sup> Five years after *Red Lion*, the Court decided *Miami Herald Publishing Co. v. Tornillo*, which unanimously struck down a Florida right to reply statute that was just like the personal attack rules in *Red Lion*.<sup>42</sup> *Red Lion* was not cited.

It is no surprise that Bill Clinton's recounting of his White House years takes dead aim at the Office of Independent Counsel under Ken Starr.<sup>43</sup> Clinton characterizes Starr as an out-of-control puritanical fanatic engaged in a political mission for the Republican Party.<sup>44</sup> Now suppose the rule of *Red Lion* applied across the board. Under such circumstances, Clinton's

32. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 332–33 (2000).

33. *Id.* at 333.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Spieser v. Randall*, 357 U.S. 513, 526 (1958).

39. 376 U.S. 254, 279 (1964).

40. *Id.* at 270.

41. 395 U.S. 444, 444–46 (1969).

42. 418 U.S. 241, 258 (1974).

43. BILL CLINTON, MY LIFE 613, 709–10 (2004).

44. *Id.* Not quite in my words, but that is a fair characterization of Clinton's many comments about Starr.

various passages would be countered by a description of Starr as a conscientious ex-judge dealing honestly, in trying circumstances, with a stonewalling and lying administration whipping up the press against him. We intuitively know that there is something wrong about forcing Clinton to be fair—and that something is the First Amendment. It should be no less of a First Amendment in the broadcast context.

## II. *PACIFICA*

Justice Stevens's plurality offered two reasons why broadcasting was different from all other means of communication.<sup>45</sup> First, it enjoys a "uniquely pervasive presence in the lives of all Americans" and can become an intruder in our homes.<sup>46</sup> Second, it is "uniquely accessible to children."<sup>47</sup> Obviously the latter is more limited than the former, but both rest (at least to some extent) on the assertion of uniqueness—a claim that could be made about speaking, reading a newspaper, or meditating on the various injustices of life (like youth being wasted on the young). Uniqueness is doing some heavy lifting without discussion of why other forms of uniqueness do not qualify as well.

The careless use of words continues with the suggestion that a radio (in my case a Bose) is an intruder in the home. For my Bose Intruder to have entered my house, I had to find a print advertisement, call an 800 number, provide credit card information as an agreement to pay, await shipment, open the package, plug the Bose Intruder into a socket, turn the radio on, and select a station. If there were an actual intruder in my house, I would call 911. If an invited guest became offensive, I would ask the person to leave. It is indeed true that within the home an individual's "right to be left alone plainly outweighs the First Amendment rights"<sup>48</sup> of any speaker wishing to communicate there, but that does not authorize prior government censorship. The homeowner must do something—such as throwing the radio in the garbage—if it were truly an intruder. I have yet to see or read about that being done.

Well then, how about pervasive presence (even if it is stripped of its uniqueness)? A radio is certainly around, but so are my *New York Times* and *National Geographic*. The latter two have somewhat more staying power than a broadcast program that vanishes as soon as it ends. But maybe, like *Red Lion*, there is a bit of nostalgia in what the Justices remember, and radio

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45. *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978).

46. *Id.* at 748–49.

47. *Id.* at 749.

48. *Id.* at 748.

was pervasive for them. Try to explain the pervasiveness of radio to anyone who has come of age since Al Gore invented the internet. It cannot be done. Thus, like scarcity, the passage of time has eroded the intellectual foundations of a type of regulation.

As a parent and a grandparent, I not only concede but applaud the fact that television (but not radio) is uniquely accessible to children. What a babysitter. At least as to pre-teens, supervision is necessary, and the Court rightly notes that when adults are irresponsible, the state maintains an interest in the well-being of the children,<sup>49</sup> but the action in supervising radio hardly shades children from parents who use four-letter words (or other children who do). Nor is television the only source of unsupervised information. A child could have picked up a copy of the September 1976 newspaper showing the Vice President of the United States giving the finger to a heckling audience.<sup>50</sup> Or perhaps the mail came with a Victoria's Secret catalogue and there is no adult in the vicinity. These go in part to what the Court means by "uniquely accessible."<sup>51</sup> While I think the Justices meant to underscore access; in fact, the better assumption is that children can understand what they choose to watch (or else they will not watch it).

With the Justices sure that radio was different, they easily built a different First Amendment. While the FCC could ban assaultive non-obscene speech at times when children were likely to be in the audience,<sup>52</sup> it escaped notice that 2 p.m. on a Tuesday in October should be a time when few, if any, children are listening to radio—because of a little institution we call "school" (where the children will learn various four-letter words in the halls and on the playground).

The First Amendment "modifications" were nowhere near as great with *Pacifica*. The FCC claimed that it could suppress "indecentcy"—material that depicts or "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs."<sup>53</sup> Justice Stevens asserted that "[t]hese words offend for the same reasons that obscenity offends."<sup>54</sup> There was no further explanation or evidence, especially about the effects of hearing

49. *Id.* at 749–50 (citing *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)).

50. *See, e.g.,* Rudy Abramson, *Rockefeller, Dole Team Up in Togetherness Show*, L.A. TIMES, Sept. 17, 1976 at A20.

51. *Pacifica*, 428 U.S. at 728.

52. *See id.* at 726.

53. *Id.* at 732 (quoting *Pacifica Found. Station, WBAI (FM)*, 56 F.C.C. 2d 94, 98 (1975)).

54. *Id.* at 746.



indecenty on either the young or the old.<sup>55</sup> We know obscenity is material that the public would rather live without, but outside of obscenity, someone being offended has not been an acceptable reason for suppressing speech. Thus, *Cohen v. California*<sup>56</sup> protected Paul Cohen when he wore a jacket emblazoned with “Fuck the Draft” in a courthouse. Justice Stevens offered some transparently thin distinctions of *Cohen*,<sup>57</sup> but if people who must be in a courthouse can avert their eyes to avoid Cohen’s jacket, then they could also change the channel when Pacifica airs Carlin’s monologue. Indeed, there is no explanation of why the complaining listener did not change the offending station.

### III. UPDATING INDECENCY

The Reagan FCC, under pressure from religious conservatives, untethered indecency from Carlin’s seven dirty words and instead adopted a “generic definition of broadcast indecency.”<sup>58</sup> The main target was a radio broadcast of a play, “The Jerker,” that was simultaneously playing live in New York to favorable reviews.<sup>59</sup> Two gay men, dying of AIDS, discuss their sexual fantasies in graphic detail over the telephone.<sup>60</sup> A companion case, the first to involve the highly popular—and offensive—Howard Stern, raised the issue of how a top rated program could be patently offensive by contemporary community standards.<sup>61</sup> The answer was that the standards were those of the five politically pressurable commissioners at 1919 M Street, N.W., the then home of the FCC.

Subsequently, the George W. Bush FCC drove Stern to satellite radio by imposing enormous fines on the owners of the stations that carried his broadcast.<sup>62</sup> The new fines were a gift from Congress designed to assist the FCC in driving indecency from the air.<sup>63</sup>

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55. The FCC stated that “[o]bnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions.” *Pacifica*, 56 F.C.C. 2d at 98. Like the Court, it offered no evidence for its conclusion.

56. 403 U.S. 15 (1971).

57. *Pacifica*, 438 U.S. at 747 n.25.

58. New Indecency Enforcement Standards To Be Applied to All Broad. and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987).

59. THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 109 (1994).

60. *Id.*

61. See Infinity Broad. Corp. of Pa., 2 F.C.C.R. 2705 (1987).

62. See Bill Carter & Jeff Leeds, *Howard Stern Signs Rich Deal in Jump to Satellite Radio*, N.Y. TIMES, Oct. 7, 2004, at A1.

63. See Broadcast Decency Enforcement Act of 2005, 47 U.S.C.A. § 503(b)(2)(C) (West Supp. 2008).

The battle against indecency reached its zenith (or nadir) when the FCC, again spurred on by religious activists, levied a \$550,000 fine against CBS over the Janet Jackson “wardrobe malfunction” at the Super Bowl half-time show<sup>64</sup> (even though it occurred so briefly that only the quickest pair of eyes could have detected what happened—perhaps this is why it was the most TiVoed segment ever).<sup>65</sup> Latching on to *Pacifica*’s statement that indecent language is akin to an assault, the FCC moved on to find that the airing of “fleeting expletives” (basically some version of “fuck” that was unanticipated and not offered in a sexual manner) was also an offensive that could carry huge financial penalties.<sup>66</sup> The FCC believes “fuck” always carries sexual connotations even when it does not.<sup>67</sup> The Second Circuit found the FCC’s explanation of the move from generic obscenity to fleeting expletives to be arbitrary and capricious under the Administrative Procedure Act.<sup>68</sup> The Third Circuit agreed and voided the wardrobe malfunction fine against CBS.<sup>69</sup> At the FCC’s behest, the Supreme Court has agreed to review the fleeting expletives case.<sup>70</sup> Therein lies an opportunity to affirm the FCC’s expansion of *Pacifica* or to limit the FCC (but probably not revisit *Pacifica*).

#### IV. FAIRNESS AS A TAX<sup>71</sup>

With the exception of news departments, the Fairness Doctrine enjoyed wide support at the time of *Red Lion*.<sup>72</sup> Its name bespoke everything—who

64. See Geraldine Fabrikant, *CBS Fined Over Super Bowl Halftime Incident*, N.Y. TIMES, Sept. 23, 2004, at C1.

65. CNN.com, *TiVo: Jackson Stunt Most Replayed Moment Ever*, Feb. 3, 2004, <http://www.cnn.com/2004/TECH/ptech/02/03/television.tivo.reut/index.html>.

66. At the 2003 Golden Globe Awards, Bono stated in his acceptance speech, “[T]his is really, really fucking brilliant. Really, really, great.” *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 451 (2d Cir. 2007). Similarly, Cher stated on the 2002 Billboard Music Awards: “People have been telling me I’m on the way out every year, right? So fuck ‘em.” *Id.* at 452. On the same program a year later, Nicole Richie stated: “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.” *Id.*

67. For example, Nicole Richie’s statement. See *supra* note 66.

68. *Fox Television Stations*, 489 F.3d at 462.

69. *CBS, Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), cert. granted, 128 S. Ct. 1647 (U.S. Mar. 17, 2008) (No. 07-582).

70. *Id.*

71. It has been twenty-one years since the Fairness Doctrine was repealed. The new era can now legally drink. For the fullest picture and latest scholarly description of the Fairness Doctrine, see KRATTENMAKER & POWE, *supra* note 59, at ch. 9, on which this summary is based.

72. In 1972, my first year of teaching broadcasting, I also accepted it without question.

after all could be against fairness?<sup>73</sup> The FCC explained that the Fairness Doctrine was the cornerstone of the public interest standard. It is “the single most important requirement of operation in the public interest—the ‘*sine qua non*’ for grant of renewal of license.”<sup>74</sup> With that belief and the Court’s imprimatur, the FCC entered into the period of the most active enforcement of the doctrine. The FCC and its supporters were wedded to the nirvana theory that because the Fairness Doctrine had the lofty goals of full and fair coverage of controversial issues, it therefore achieved them.<sup>75</sup>

In retrospect, it was clear that only half of the Fairness Doctrine was enforceable. The requirement that a licensee broadcast controversial issues of public importance could not be enforced either because every station was in compliance (by offering a couple of minutes of news) or because there was no way to determine whether an issue should have been discussed. Only once in the history of the doctrine was the Fairness Doctrine’s first part enforced. It involved strip mining in West Virginia, and the FCC determined that during the relevant period, WHAR, a local radio station, had the duty to broadcast something about the issue.<sup>76</sup> How did the FCC know that strip mining was controversial in the local community? Simple, the local newspaper ran front-page stories on it for nine of eleven days.<sup>77</sup> Because the newspaper covered it extensively, the radio station was required to do so too.<sup>78</sup> Who was the person so incensed that the newspaper was covering the issue but a radio station was not? She was the non-Honolulu Congresswoman from Hawaii.<sup>79</sup>

WHAR was a total aberration; the FCC’s stated position was of having “no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.”<sup>80</sup> So much for the Court’s statement about the public’s “right to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences.”<sup>81</sup> Thus, the FCC recognized, as most people believed, that the Fairness Doctrine was about relative fairness, and contrary to popular belief, there never was an equal time aspect to the Fairness Doctrine.

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73. If Stephen Colbert were doing “The Word,” the printed answer would be “Republicans.”

74. Comm. for the Fair Broad. of Controversial Issues, 25 F.C.C. 2d 283, 292 (1970).

75. KRATTENMAKER & POWE, *supra* note 59, at 241.

76. See Radio Station WHAR, 59 F.C.C. 2d 987 (1976).

77. *Id.* at 988.

78. *Id.* at 997.

79. KRATTENMAKER & POWE, *supra* note 59, at 247 n.38.

80. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Commc’ns Act, 48 F.C.C. 2d 1, 10 (1974) [hereinafter 1974 Fairness Doctrine Report].

81. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

Therefore, any station that eschewed controversy avoided any Fairness Doctrine enforcement. Instead, the doctrine was aimed at stations airing biased or misleading programs. The most a station could gain from this is the adherence of those already ideologically committed to the distorted views.<sup>82</sup>

Naysayers, initially limited to broadcasters and their news personnel, asserted that the Fairness Doctrine had a chilling effect on airing controversial programming.<sup>83</sup> Supporters countered with Justice White's twin assertions that there was no evidence of any chilling effect and that the FCC could handle such a problem.<sup>84</sup> The FCC answered the chilling effect argument in 1974 by explaining that a chill would be "inconsistent with the broadcaster's role as a public trustee."<sup>85</sup> But that was no answer. "The question under discussion was not whether a chill is inconsistent with the public trustee model, but rather whether the Fairness Doctrine in fact inhibited licensees from performing their trustee obligations."<sup>86</sup>

The FCC's enforcement efforts started to create the missing evidence about a potential chill. Under FCC rules, a complainant had to first contact the station to see if the issue could be resolved between the two.<sup>87</sup> If that failed, then an attorney in the Broadcast Bureau<sup>88</sup> made an initial decision about merit that could have required further elaboration from the station.<sup>89</sup> By that point in time, management time and legal fees would have been expended. This was a tax if the complaint turned out to be meritless.

KREM in Spokane, Washington editorialized in favor of Expo 74.<sup>90</sup> Four people claiming to represent all Spokane environmental groups demanded airtime, but the general manager refused.<sup>91</sup> Responding to the FCC took 480 hours of management time and \$20,000 in legal fees.<sup>92</sup> The station prevailed, but its license renewal was held up during the process (and the general manager, who was right, was fired).<sup>93</sup>

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82. This perhaps explains the success of Rush Limbaugh.

83. See KRATTENMAKER & POWE, *supra* note 59, at 251-53.

84. *Id.*

85. 1974 Fairness Doctrine Report, *supra* note 80, at 7.

86. KRATTENMAKER & POWE, *supra* note 59, at 252.

87. *Id.* at 245.

88. Now the Mass Media Bureau.

89. *Id.*

90. *Id.* at 251.

91. *Id.*

92. *Id.*

93. *Id.*

NBC and CBS were engaged in lengthy litigation with private interest groups that were offended that they were not presented in a more positive light.<sup>94</sup> The most important case dealt with the Peabody Award winning program *Pensions: The Broken Promise*.<sup>95</sup> In an exposé of the problems with private pension plans, both the FCC and the D.C. Circuit demanded that the network find a means to say something nice about private pensions.<sup>96</sup> David Brinkley queried whether a program on shoddy highway construction had to offer viewers pictures of properly built roads.<sup>97</sup> The FCC and the D.C. Circuit put news documentaries at risk at the exact time there was major criticism of the networks for producing too few hard-hitting news documentaries.

But in fact only one station lost its license because of Fairness Doctrine violations. The station, WXUR, aired more controversial programming than virtually any station in the nation, which turned out to be its undoing.<sup>98</sup> The FCC expressly rejected the relevancy of the fact—found by the hearing examiner—that listeners could find alternative viewpoints all over the Philadelphia market on other stations and in other media.<sup>99</sup> The Fairness Doctrine does not care about an overall market; rather, it demands that each station see that its audience gets compliance coverage. The defeat of WXUR at the D.C. Circuit<sup>100</sup> underscored a clear message—if a station avoided controversy, then it also avoided punishment. In the tight world of broadcasting where everyone read *Broadcasting* magazine,<sup>101</sup> everyone knew the stories and their lessons.

A chilling effect does not render a law unconstitutional; otherwise, *New York Times v. Sullivan* would have demanded the abolition of libel. Rather, if a chilling effect is shown, the benefits of regulation must outweigh the harms caused by the chill. Thus, as the costs of the Fairness Doctrine became more apparent, the benefits received scrutiny. Supporters described a doctrine that did not exist.

As too often described, the Fairness Doctrine (1) grants access to the air (and therefore to the listening and viewing public) to those

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94. See *Am. Sec. Council Educ. Found. v. FCC*, 607 F.2d 438 (D.C. Cir. 1979); *NBC v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974).

95. *NBC*, 516 F.2d at 1105.

96. See *id.* at 1109, 1130.

97. *Id.* at 1124 n.76.

98. See KRATTENMAKER & POWE, *supra* note 59, at 266–67.

99. *Brandywine-Main Line Radio, Inc.*, 24 F.C.C. 2d 18, 31 (1970), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972).

100. *Id.*

101. *Broadcasting* has since changed its name to *Broadcasting & Cable*.

who would be otherwise excluded; (2) allows, in the words of the head of the Media Access Project, groups to “speak with their own unedited voices”; and (3) “never prevents any speech [but instead] only adds more voices or representative views to the debate.”<sup>102</sup>

Each of those assertions was demonstrably wrong,<sup>103</sup> and the FCC, just a decade after praising the doctrine, commenced an inquiry into whether it should be changed or eliminated.<sup>104</sup>

In 1987, the FCC repealed the Fairness Doctrine,<sup>105</sup> having concluded that the chilling effect was “widespread,”<sup>106</sup> and therefore the Fairness Doctrine did more harm than good. The Democratic-controlled Congress then codified the doctrine, but President Reagan vetoed the bill.<sup>107</sup> By comparing radio programming from 1975 to 1995 with the tremendous increase in informational programming coming after repeal, Thomas Hazlett and David Sosa subsequently demonstrated that the doctrine had operated as a tax on controversy, and therefore dampened the willingness of stations to air controversial programs.<sup>108</sup>

A dramatic consequence of the Fairness Doctrine’s repeal was the rise of talk radio in the 1990s. Previously there had been discussions about unheard voices, and the underlying assumption was that they were on the left—but talk radio went right. It turned out that many conservatives believed that their voices were not being heard and that ABC, CBS, and NBC, as well as the major newspapers, were liberal organs, slighting conservative issues and viewpoints. Thus, they migrated to talk radio to listen to Rush Limbaugh and his imitators (programming that would have been impossible before the repeal). Liberals were then stunned to learn that

102. KRATTENMAKER & POWE, *supra* note 59, at 243 (footnotes omitted).

103. *See id.* at 243–244.

104. *See* Inquiry into Section 73.910 of the Commission’s Rules and Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C. 2d 143 (1985) [hereinafter 1985 Fairness Doctrine Report].

105. Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff’d*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

106. 1985 Fairness Doctrine Report, *supra* note 104, at 169 n.97.

107. Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 26, 1987). Nelson Lund, now a professor of law at George Mason University, wrote the veto message. *Id.* In a conversation many years ago, he informed me that he was unaware of the scholarly literature supporting his position at the time.

108. *See* Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”?* *Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997).

a liberal alternative, Air America, could not make a go of it.<sup>109</sup> Perhaps liberals got their information from other sources than AM radio, such as NPR and PBS.

During the first half of 2007, some Democrats suggested reinstating the Fairness Doctrine to deal with right-wing talk radio and its supposed ability to energize conservative voters.<sup>110</sup> If the Fairness Doctrine were readopted, talk radio as it exists would have to change. There is little doubt that liberal activists would pour over everything Limbaugh and others say, demanding response time early and often. Stations would have to grant it (lest they otherwise be stripped of their license), and that would change the flow and feel of the various programs (or perhaps all responses could be bundled and put on a dead hour each day). The programs would probably lose some listeners, and therefore be less profitable. The “fairness tax” would work. Exactly what First Amendment benefits would be gained by denying willing listeners their choice of programming is a mystery. The purpose of readopting the Fairness Doctrine is precisely to inhibit controversy.

There is no specific proposal yet to recreate the Fairness Doctrine, and with a Republican president, it would likely be vetoed again. Republican Mike Pence of Indiana has a bill to bar reviving the doctrine,<sup>111</sup> but it is unlikely that Democrats will flock in support.<sup>112</sup> Should there be a Democratic Congress and a Democratic President in 2009, it might not be out of the question to see a revival of the doctrine. On one level, that would be a huge plus because it would give the Supreme Court a chance to overrule *Red Lion* and officially bring broadcasting under the First Amendment. That would make Stone’s celebratory story even better.

## V. WHAT THE COURT DIDN’T KNOW AND DIDN’T DISCUSS

Rather than end on this hopeful note, it is worthwhile to revisit *Red Lion* and *Pacifica* because within each is a hidden lesson on why a full First Amendment protection for broadcasting would have been appropriate. I have treated *Red Lion* and *Pacifica* on their own terms, just as the Court did. But like so many First Amendment cases, the underlying facts paint a richer

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109. See Jeff Leeds, *Air America, Home of Liberal Talk, Files for Bankruptcy Protection*, N.Y. TIMES, Oct. 13, 2006, at B7.

110. One must note that since Limbaugh went national, the Republican presidential candidate has only once garnered fifty percent of the popular vote. Nor has any Republican candidate achieved the percentage of the vote that George H.W. Bush won in 1988, the last election before the effects of Fairness Doctrine’s repeal were felt.

111. Broadcaster Freedom Act of 2008, H.R. 2905, 110th Cong. (2007).

112. See, e.g., *DTV Transition Top Priority for Next Congress*, AIDES SAY, COMM. DAILY, Feb. 27, 2008.

picture of why the robust First Amendment celebrated by Stone is important to our nation.

*Red Lion's* antecedents were in the battle to secure ratification of the Nuclear Test Ban Treaty during the summer of 1963. Right-wing radio—yes, it existed before Rush Limbaugh and company—was adamantly opposed to the treaty.<sup>113</sup> At President Kennedy's behest, an organization was formed to promote ratification of the treaty.<sup>114</sup> This group used the Fairness Doctrine to demand that the right-wing radio stations, when airing programs by Carl McIntire, the Reverend Billy James Hargis, and other prominent opponents of the treaty, provide time for pro-treaty arguments.<sup>115</sup> The FCC agreed, and expanded the Fairness Doctrine to require broadcasters to offer free airtime if no one would pay to present the opposing viewpoint.<sup>116</sup>

The lesson of demanding free airtime to dampen the enthusiasm of broadcasters to take one side of an issue was quickly expanded to prepare for the 1964 presidential race. Kennedy aide Kenneth O'Donnell had a meeting with a representative of the Democratic National Committee (DNC) to prepare to use the Fairness Doctrine "to counter the radical right" during the upcoming election season.<sup>117</sup> Ultimately the DNC decided to monitor as many right-wing stations as it could.<sup>118</sup> The DNC also engaged maverick newsman Fred Cook to write a biography of Republican candidate Barry Goldwater, a hatchet job entitled *Barry Goldwater: Extremist of the Right*,<sup>119</sup> of which the DNC purchased 72,000 copies at twelve cents each.<sup>120</sup> Cook also produced an article for his usual employer *The Nation* entitled *Hate Clubs of the Air*.<sup>121</sup> The article discussed right-wing radio and indeed stated that the DNC was monitoring the stations.<sup>122</sup> It also encouraged "liberal forces" to demand "equal time" from radio stations under the Fairness Doctrine.<sup>123</sup> Copies of the article were sent to state Democratic leaders

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113. FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* 32–34 (1975).

114. *Id.*

115. *Id.*

116. *Cullman Broadcasting Co.*, 40 F.C.C. 576, 577 (1963).

117. FRIENDLY, *supra* note 113, at 33.

118. *Id.* at 34–35.

119. FRED J., COOK, *BARRY GOLDWATER: EXTREMIST OF THE RIGHT* (1964).

120. FRIENDLY, *supra* note 113, at 35–36.

121. Fred J., Cook, *Hate Clubs of the Air*, *THE NATION*, May 25, 1964.

122. *Id.* at 524–25.

123. *Id.* at 526.



nationwide and to the right-wing stations.<sup>124</sup> A letter from the DNC accompanied the latter, pointing out that demands would be made in the event of attacks on Democratic candidates or their programs.<sup>125</sup>

The DNC succeeded and obtained 1700 hours of free airtime from the right-wing stations to respond to the right-wing stations' attacks on Democrats.<sup>126</sup> Bill Ruder, an Assistant Secretary of Commerce under Kennedy, said it best: "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."<sup>127</sup> The chilling effect worked (what's new?); "[e]ven more important than the free radio time was the effectiveness of this operation in inhibiting the political activity of these right-wing broadcast[ers]."<sup>128</sup>

Hargis, who had been one of the targets of the *Hate Clubs* article, was offended by the Goldwater book and blasted Cook for two minutes on a taped program (of fifteen minutes) as a dishonest writer who falsified his stories.<sup>129</sup> Hargis's tape aired on Red Lion three weeks after Lyndon Johnson's landslide victory.<sup>130</sup> The DNC had not pulled the plug and was still monitoring the stations.<sup>131</sup> It informed Cook of the personal attack.<sup>132</sup> Cook wrote to all the stations that aired Hargis's program demanding free airtime.<sup>133</sup> Some complied, some did not respond, and fifteen, including Red Lion, offered airtime at normal rates.<sup>134</sup> Red Lion's rate was \$7.50 for fifteen minutes, but it kindly offered Cook free time if he could not afford it.<sup>135</sup>

Cook, with a little help from the DNC, instead went to the FCC.<sup>136</sup> The eighty-two year-old owner of Red Lion decided to fight.<sup>137</sup> He hadn't known of the DNC operation but felt "harassed."<sup>138</sup> "I have never before been subjected to such religious and political persecution."<sup>139</sup> Neither the

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124. FRIENDLY, *supra* note 113, at 38.

125. *Id.*

126. *Id.* at 41.

127. *Id.* at 39.

128. *Id.* at 41.

129. FRED J. COOK, MAVERICK 305 (1984).

130. FRIENDLY, *supra* note 113, at 42.

131. *Id.*

132. *Id.*

133. COOK, *supra* note 129, at 306-07.

134. *Id.* at 307-08.

135. FRIENDLY, *supra* note 113, at 44-45.

136. *Id.*; see also COOK, *supra* note 129, at 307-08.

137. FRIENDLY, *supra* note 113, at 45-46; see also COOK, *supra* note 129, at 308.

138. FRIENDLY, *supra* note 113, at 45.

139. *Id.*

lawyers for the FCC nor Red Lion—and therefore not the Justices of the Supreme Court—were aware of these facts. Fred Friendly’s investigatory prowess brought them to light years later.<sup>140</sup> Justice White’s easy dismissal of any chilling effect was decisively wrong in the very case he asserted it.

After the decision came down, Red Lion offered Cook fifteen minutes of free air time, which he declined.<sup>141</sup>

The facts of *Pacifica* are simpler. Carlin’s broadcast aired in late October.<sup>142</sup> Six weeks later, the FCC received a letter from a man complaining “that he had heard the broadcast while driving with his young son.”<sup>143</sup> The unidentified man was John R. Douglas, a member of the national planning board of Morality in Media.<sup>144</sup> The typical *Pacifica* listener (and the station never had a large audience) was culturally (and politically) on the left. If Douglas was actually listening to *Pacifica*, it was to be offended in the hopes that he could prevent regular listeners from accessing programming they found worthwhile.<sup>145</sup> The fact that it took six weeks to complain to the FCC suggests, at least to me, that he had not been listening, but instead learned of the broadcast some time later. Then there is the lack of candor about his “young” son, who at the time of the broadcast was fifteen years old.<sup>146</sup> One suspects he had heard the four-letter words well before *Pacifica* aired them.

The FCC sat on Douglas’s complaint for fourteen months.<sup>147</sup> During that time, FCC Chairman Richard Wiley jawboned the networks to do something about violence on television.<sup>148</sup> He claimed to see “dark clouds” on the horizon if broadcasters did not act to show “taste, discretion and decency.”<sup>149</sup> Wiley was more or less successful. The networks agreed to a “family viewing hour” at the inception of prime time where a family could

140. In his autobiography, *Maverick*, Cook denies he was a part of a DNC conspiracy and that he acted independently. COOK, *supra* note 129, at 309–11. Yet his version of the events and Friendly’s are remarkably close, and as between the two, I would choose the person who had no interest to be self-serving.

141. *Id.* at 309.

142. FCC v. *Pacifica Found.*, 438 U.S. 726, 729 (1978)

143. LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 186 (1987) (quoting *Pacifica*, 438 U.S. at 730).

144. *Id.* at 186.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 187.

149. *Id.*

watch television without the slightest concern over inappropriate content.<sup>150</sup> As the chief CBS censor put it, safe “for the most uptight parent you can imagine watching the show with his children.”<sup>151</sup> The dark clouds Wiley saw had been at the House and Senate Communications subcommittees where the FCC was being pushed to do something about gratuitous sex and violence on television.<sup>152</sup> There was even a credible threat to cut off FCC funding.<sup>153</sup> The rights of the viewers and listeners may be paramount to those of the broadcasters, but both are trumped by the right of the FCC, succumbing to Congressional pressure, to censor.

The FCC attached *Pacifica* to the “family viewing hour” and reported to Congress that it had clarified its indecency rules by banning the words Carlin used (except for possible late night broadcasts).<sup>154</sup> The “as broadcast” conclusions of Justice Stevens’s opinion were no part of the FCC ruling.<sup>155</sup> But by the time *Pacifica* came down, Democrats were in charge, and they limited the decision to Carlin’s seven dirty words, and then only when said en masse.<sup>156</sup> At the FCC, at least, indecency enforcement is a Republican “values” issue.

## VI. CONCLUSION

Short of Supreme Court decisions correcting earlier mistakes, maybe the problem could be solved by two Republican versus Democrat debates. First, which mouth is more dangerous to the nation’s health and welfare—Sean Hannity’s or Bono’s? Followed by a second debate on what more endangers the country—Rush Limbaugh’s demonization of the domestic terrorist group loosely known as liberals or Janet Jackson’s wardrobe malfunction? [P]MSNBC’s Keith Olbermann should host the first, and Fox News’ Bill O’Reilly the second. Jon Stewart and Stephen Colbert will be the impartial judges.

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150. *Id.*

151. L.A. Powe, Jr., “Or of the [Broadcast] Press,” 55 TEX. L. REV. 39, 50 n.84 (1976).

152. POWE, *supra* note 143, at 187.

153. *Id.*

154. *Id.*

155. *Id.* at 188–89.

156. *Id.*