

1969

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Catholic University Law Review

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Recommended Citation

Catholic University Law Review, *The Federal Communications Commission and Cigarette Advertising*, 19 Cath. U. L. Rev. 255 (1970).

Available at: <https://scholarship.law.edu/lawreview/vol19/iss2/8>

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of government is just as applicable to the District after the cession as it had been applicable to the states of Maryland and Virginia before the cession, and therefore the citizens of the ceded territory did not relinquish their right to said form of government.

In conclusion, it appears that the federal courts have a duty under the Constitution to re-evaluate the status of the District of Columbia in regard to article IV, section 4. In light of the decisions in *Baker v. Carr* and more recently *Powell v. McCormack*, the courts, if given the opportunity, should reconsider the rationale of cases such as *Hobson v. Tobriner*. Chief Justice Marshall's opinion in *Marbury v. Madison* states: "If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."⁶⁴ The government of the District of Columbia was created by an ordinary act of Congress; it is within the capacity of the courts to test that act for its constitutionality under article IV, section 4. Both Congress and the President have failed to provide the District with a representative government, and any change in the near future is not apparent. The unconstitutionality of the District government speaks for itself, since it is neither representative nor is it popularly elected. There does not seem to be any persuasive reason why the courts cannot handle such an issue, except the fear of overruling the precedent set in *Luther v. Borden*. Unless the courts act on the problem posed by the form of government in the Nation's Capital, some citizens will never realize true democracy.

The Federal Communications Commission and Cigarette Advertising

In 1934 Congress established the Federal Communications Commission (FCC) and directed it to observe the "public interest" in its regulation of the broadcasting industry.¹ Aiming to fulfill this broad congressional directive, the FCC in recent years has taken two controversial steps in an effort to regulate the advertising of cigarettes on radio and television. One was the so-called "cigarette decision" in which the FCC held that the presentation of cigarette commercials constituted an exposition of one side of a controversial issue of public importance and thus imposed an affirmative duty on a broad-

64. 5 U.S. (1 Cranch) 137, 178 (1803).

1. See 47 U.S.C. §§ 151, 307, 309(a), 403, 407, 409 (1964).

cast licensee to present contrasting views.² The other step, which has received severe criticism from Congress, broadcasters and the tobacco industry was the issuance of a proposed rule which would entirely prohibit the broadcast of cigarette advertisements.³ This article will examine these actions of the FCC with particular emphasis on the Fairness Doctrine and the first amendment implications of the Commission's position on this matter.

The Fairness Doctrine and Cigarette Advertising

The Fairness Doctrine,⁴ as defined by the FCC, requires that when a broadcast station presents one side of a controversial issue of public importance, reasonable opportunity must be afforded for the presentation of contrasting views. The FCC has stressed that the "keystone" of this doctrine is the

development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day It is this right of the public to be informed, rather than [the] right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.⁵

The application of this doctrine to cigarette advertising resulted from a complaint filed with the FCC by Mr. John Banzhaf, III against television station WCBS-TV, a New York licensee.⁶ In response to this complaint, the FCC issued a letter ruling requiring licensees which present cigarette advertisements to inform their audience that "however enjoyable, such

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

3. Notice of Proposed Rule Making, 34 Fed. Reg. 1959 (1969).

4. This doctrine evolved from numerous decisions, approached on a case-by-case basis, requiring fairness in the handling of controversial issues. This article does not undertake a detailed explanation of the nature and development of the doctrine, but limits discussion to a brief description of its purpose and its relation to the 1959 amendment to the Communications Act of 1934. It should be emphasized that the Fairness Doctrine is distinct from the equal-time requirements for political candidates (47 U.S.C. § 315 (1964)) and the political editorial and personal attack rules of Part 73 of the FCC Regulations (47 C.F.R. § 73.657 (Supp. 1969)), which are particular aspects of the general Fairness Doctrine.

5. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

6. See 32 Fed. Reg. 13162 (1967). It was alleged in this complaint that WCBS-TV, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded him or some other responsible spokesman an opportunity to present contrasting views on the issue of the virtues and values of smoking. The Commission sustained this complaint, but refused to require equal time for presentation of the anti-smoking position.

This ruling was issued without affording interested persons an opportunity to reply in a formal hearing or to file comments in a rule making proceeding. The Commission justified its action by stating that interested parties were given the opportunity to express their viewpoints in the form of petitions for reconsideration of the ruling. *Id.* at 13172.

smoking may be a hazard to the smoker's health."⁷ The Commission later clarified this ruling and its authority for making such a ruling in a lengthy Memorandum Opinion and Order, released September 15, 1967.⁸ The Commission stated that:

There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" (§ 315 (a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health.⁹

This position was sustained in *Banzhaf v. FCC*,¹⁰ where the Court of Appeals for the District of Columbia Circuit held that the FCC ruling did not violate the licensees' first amendment rights and, in addition, that the preemptive provision of the Federal Cigarette Labeling and Advertising Act¹¹ (Cigarette Act) did not preclude the Commission's action. Challenges to this decision by the Tobacco Institute, eight cigarette companies, the three major television networks and a local television station were dismissed when the Supreme Court declined to review the case by denying their petitions for writs of certiorari.¹² In their petitions to the Court, the petitioners argued, *inter alia*, that: (1) The FCC lacked the statutory authority to promulgate its cigarette ruling; (2) The ruling conflicted with the preemption provisions of the Cigarette Act; and (3) The ruling contravened the free speech guarantees of the first amendment.¹³

Similar issues had been raised in the recently decided case of *Red Lion Broadcasting Co. v. FCC*,¹⁴ where the Supreme Court upheld the validity and constitutionality of the Fairness Doctrine as applied to personal attacks and

7. Letter to TV Station WCBS-TV, 8 F.C.C.2d 381, 382 (1967).

8. 32 Fed. Reg. 13162.

9. *Id.* at 13173.

10. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

11. 15 U.S.C. § 1334 (Supp. IV, 1969).

12. The petitioners had originally appealed from the Commission's order denying their petitions for reconsideration. Their requests for review of this order were consolidated and decided along with Mr. Banzhaf's complaint that the anti-smoking forces should have been granted equal time by the Commission. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968). The petitions for certiorari, which were filed by the Tobacco Institute, Inc., the National Association of Broadcasters, the American Broadcasting Company and the National Broadcasting Company, were denied by the Supreme Court. 396 U.S. 842 (1969).

13. 38 U.S.L.W. 3008 (1969). Petitioners also assailed the lack of procedural due process which, it was alleged, is inherent in the doctrine. *Id.* Discussion of this fifth amendment issue is, however, beyond the scope of this article.

14. 395 U.S. 367 (1969).

political editorials. In holding that the FCC possessed the statutory authority to promulgate the Fairness Doctrine, the Supreme Court accepted the FCC's contention that the 1959 amendment¹⁵ to Section 315 of the Communications Act represented a congressional ratification of the Fairness Doctrine, which had existed previously as an implied administrative policy for over 40 years.¹⁶ Furthermore, this amendment, construed in light of the statutory requirements that the FCC promulgate such rules and regulations as the public convenience, interest or necessity requires and consider the "public interest" in the course of granting licenses, supported the view that the Fairness Doctrine itself inhered in the public interest.¹⁷ Consequently, the Court held that the formulation and invocation of the Fairness Doctrine was a legitimate exercise of congressionally delegated authority.¹⁸

Nevertheless, the Supreme Court's refusal to hear *Banzhaf* may reflect the Court's view that the *Red Lion* decision sufficiently controls the issues raised by *Banzhaf*.¹⁹ Moreover, the Court may have felt that the petitioners' argument that the preemption provision of the Cigarette Act precluded the cigarette ruling, had been rendered moot by the termination of this provision on July 1, 1969. It should be noted, however, that the *Red Lion* Court specifically restricted its holding to situations involving personal attacks and political editorials and did not discuss the Fairness Doctrine as applied to commercial advertising.²⁰ It is submitted that *Red Lion* does not ade-

15. 73 Stat. 557 (1959). This amendment provided that:

Nothing . . . shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. (Emphasis added).

See H.R. REP. NO. 1069, 86th Cong., 1st Sess. 5 (1959). In this report it is maintained that the amendment is merely a restatement of the basic policy of fairness which is imposed on broadcasters under the Communications Act of 1934.

16. H.R. REP. NO. 257, 91st Cong., 1st Sess. 79 (1969).

17. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-80 (1969).

18. *Id.* at 385.

19. The Solicitor General was invited to file a memorandum expressing the views of the respondents with respect to the applicability of the *Red Lion* decision to these appeals. 395 U.S. 973 (1969). In this memorandum, the Government argued that "the *Red Lion* decision's endorsement of the public interest mandate, as 'a broad one, a power not niggardly but expansive,' serving the First Amendment rather than conflicting with it, firmly supports its exercise in the ruling attacked in these cases." Supp. Memo. for the United States and the FCC at 2, *Tobacco Institute, Inc. v. FCC*, Nos. 47, 48, 49, 51 (U.S., filed Aug. 6, 1969). See also H.R. REP. NO. 289, 91st Cong., 1st Sess. 3 (1969).

20. The Court stated that "the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the [personal attack and political editorializing] regulations . . . are both authorized by Congress and enhance rather than abridge the freedoms of speech . . . protected by the First Amendment." 395 U.S. at 375.

quately resolve the issues raised in *Banzhaf* and that the Supreme Court's denial of certiorari is unfortunate in view of the constitutional questions which have been raised and the need for clarification of the proper scope of the Fairness Doctrine. Despite the fact that the Supreme Court in *Red Lion* had indicated that future fairness rulings would be subject to close judicial scrutiny,²¹ it has declined to review the most significant application of the Fairness Doctrine since its inception.

Furthermore, the reluctance of the court of appeals in *Banzhaf* to rely solely on the Fairness Doctrine as authority for the FCC ruling necessitates a reappraisal of this issue by the Supreme Court in light of its construction of the 1959 amendment of the Communications Act²² in *Red Lion*. The court of appeals in *Banzhaf* considered the specifics of the Fairness Doctrine irrelevant and found authority for the ruling in the congressional mandate that the FCC regulate in the public interest, convenience and necessity. The court stated that "[w]hatever else it may mean . . . the public interest indisputably includes the public health."²³ This reliance on the public interest standard and the court's failure to consider the ruling as an extension of the Fairness Doctrine was understandable in view of the uncertainty as to the constitutionality of the doctrine at the time of the *Banzhaf* decision.²⁴ Although the Supreme Court had often held that the public interest standard constituted a broad and expansive delegation of power,²⁵ the *Banzhaf* court recognized its indefiniteness and warned that "our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminatory a lens than the 'public interest' or even the 'public health.'"²⁶ Consequently, there was a definite need for the Supreme Court's determination of whether the basic authority for the "cigarette ruling" rested upon the public interest standard, the con-

21. In deciding *Red Lion*, the Court did "not approve every aspect of the fairness doctrine . . . [or] ratify every past and future decision by the FCC with regard to programming." *Id.* at 396.

22. It was held that "the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard." *Id.* at 380. This would apparently allow the Supreme Court to find justification for the cigarette ruling in the narrower and more precise Fairness Doctrine rather than the public interest standard.

23. 405 F.2d at 1096. The court concluded that it was unnecessary to determine the specific statutory authority for the FCC ruling, since the Fairness Doctrine itself finds its authority in the public interest standard. *Id.* at 1092-93.

24. At the time of this decision, the Supreme Court had agreed to review *Red Lion Broadcasting Co. v. FCC*, 389 U.S. 968 (1967), which had also been considered by the Court of Appeals for the District of Columbia Circuit, 381 F.2d 908 (1967).

25. See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *FRC v. Nelson Bros. Bond & Mtge. Co.*, 289 U.S. 266, 282 (1933).

26. 405 F.2d at 1099.

gressionally approved Fairness Doctrine, or the simultaneous application of these distinct delegations of power.

Moreover, the Supreme Court's failure in *Red Lion* to clarify the proper scope of the Fairness Doctrine has increased the fears and suspicions of broadcasters and congressmen²⁷ alike that the FCC will extend the doctrine to other areas of programming and advertising. The Commission had attempted to allay such fears by stressing that its holding was limited to the unique situation²⁸ presented by cigarette advertisements.²⁹ They justified their action by relying on the 1964 Report of the Surgeon General's Advisory Committee on Smoking and Health and the enactment of the Federal Cigarette Labeling and Advertising Act. These departmental³⁰ and congressional³¹ findings asserted that the normal use of cigarettes constituted a potential health hazard.

Previously, the FCC had applied the Fairness Doctrine to other controversial issues of public importance: civil rights, racial integration, the banning of nuclear testing, "krebiozen," medical advice and pay TV.³² In view of these historical fairness rulings and the *Red Lion* decision, does the recent affirmance of the cigarette ruling in *Banzhaf* portend extension of the Fairness Doctrine? Former FCC Chairman Rosel Hyde recently assured the House Interstate and Foreign Commerce Committee that the Commission was not considering the application of the Fairness Doctrine to other products which may be injurious to health.³³ Nevertheless, he did not rule out

27. See House debates on H.R. 6543, 115 CONG. REC. H4880-4917 (daily ed. June 17, 1969); 115 CONG. REC. H4939-64 (daily ed. June 18, 1969).

28. *But see In re Morris*, 11 F.C.C. 197 (1946) where, in a decision issued prior to the formal adoption of the Fairness Doctrine in 1949, the FCC implied that the fairness requirement applied to the advertising of alcoholic beverages. See also STAFF OF SENATE COMM. ON COMMERCE, 90TH CONG., 2D SESS., REPORT ON FAIRNESS DOCTRINE 50-51 (Comm. Print 1968), where it was suggested that "[p]hilosophically, the [*Banzhaf*] decision, taken with *Morris*, might logically be extended to cover a multitude of other products and services."

29. 32 Fed. Reg. 13162, 13170 (1967). In restricting its holding, the Commission rejected the petitioners' claim that the logical extension of this ruling would apply the Fairness Doctrine "to a host of other products, such as: automobiles, food with a high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles and even table salt." *Id.*

30. HEW, REPORT ON SMOKING AND HEALTH OF THE SURGEON GENERAL'S ADVISORY COMMITTEE (1964). In this report, the Committee recognized that "[c]igarette smoking [was] a health hazard of sufficient importance in the United States to warrant appropriate remedial action." *Id.* pt. I, at 33.

31. S. REP. NO. 195, 89th Cong., 1st Sess. 2-6 (1965).

32. 29 Fed. Reg. 10415 (1964).

33. See *Hearings on H.R. 643, 1237, 3055, 6543 Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. ser. 91-10, pt. 1, at 219 (1969) [hereinafter cited as *1969 Hearings*]. He justified its application to cigarette advertising on the ground that the normal use of cigarettes constitutes a potential health hazard and that 75 percent of the advertising budget for cigarettes is expended

future extensions of this doctrine, stating that “[w]e will become concerned at such time as HEW makes a finding that the sale of the product is injurious to public health.”³⁴ As a result, the uncertainty which the above question raises for the broadcasting industry and the widespread congressional concern in this matter indicated the desirability of Supreme Court review of *Banzhaf* in order to define the proper scope of the Fairness Doctrine.

Commercial Advertising and the First Amendment

Another issue which was not adequately resolved by the *Banzhaf* court is the extent of first amendment protection to be afforded commercial advertising. In *Valentine v. Christensen*,³⁵ the Supreme Court held that the commercial promotion of goods and services is not entitled to first amendment protection. This case involved the distribution of handbills bearing commercial advertising matter in violation of a municipal ordinance. In upholding the constitutionality of that ordinance, the Court stated that it was “clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”³⁶ This “lesser first amendment protection that the law affords to commercial advertising cannot be explained [simply] on the ground that advertising is intended to influence private economic decisions.”³⁷ This is apparent in view of several Supreme Court cases which implicitly rejected the “purely commercial advertising” standard which was established in *Valentine*. These cases stressed the irrelevance of the profit motive in determining entitlement to first amendment protection.³⁸ Prior to these decisions, the Supreme Court had conceded that there may be some kinds of commercial activity which are protected by the first amendment and “[w]here the line shall be placed in a particular [case] rests, not

for radio and television commercials. *Id.*

Nevertheless, the broadcasting industry is acutely concerned with possible extension of this doctrine to other products (*e.g.*, drugs, beer, cholesterol products, cyclamate, monosodium glutamate) and to program content (*e.g.*, programs depicting violence). See discussion *supra* note 29.

34. 1969 Hearings 223.

35. 316 U.S. 52 (1942).

36. *Id.* at 54.

37. Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1202-03 (1965). This note suggests that the profit motive distinction as a basis for denying an individual first amendment protection is defective “is irrelevant to the reasons why social, religious, or political expression is protected.” *Id.*

38. See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964), which held that the fact that statements of opinion appear in a paid newspaper advertisement is immaterial from a first amendment standpoint; *Smith v. California*, 361 U.S. 147, 150 (1959), which held that the commercial motive of an author does not deprive his material of constitutional protection. *But cf.* *Breard v. Alexandria*, 341 U.S. 622, 642 (1951); *Martin v. City of Struthers*, 319 U.S. 141, 142 n.1 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 110-11 (1943); *Jamison v. Texas*, 318 U.S. 413, 417 (1943).

on such generalities, but on the concrete clash of particular interests and the community's . . . [interests]."³⁹ The complete erosion of the *Valentine* standard was expressly noted in Justice Douglas' concurring opinion in *Cammarano v. United States*,⁴⁰ where he referred to *Valentine* as a "casual, almost offhand [opinion, which] . . . has not survived reflection."⁴¹ The validity of this standard was further undermined by decisions which provided that the profit motive does not lessen the first amendment protection of motion-pictures⁴² and newspapers.⁴³ Thus, the reliance on *Valentine* by the Commission, in both its Memorandum Opinion and Order,⁴⁴ and its Notice of Proposed Rule Making,⁴⁵ and by the court in *Banzhaf*, is wholly misplaced. As a result, consideration by the Supreme Court of the precedential value of *Valentine* is necessary in order to determine the relevance of the first amendment to the content of product advertising.

With particular reference to commercial advertising over the air waves, it is important to note that Congress, by enacting Section 326 of the Communications Act,⁴⁶ "wished to emphasize that the radio industry, though subject to regulation by the FCC, was to be afforded the same protection by the first amendment as other communications media not governmentally controlled."⁴⁷ In addition, the Supreme Court has long held that broadcasting is clearly a medium affected by a first amendment interest.⁴⁸

From this discussion, it appears that the strongest argument that was raised by the appellants in *Banzhaf* was that the cigarette ruling contravened their first amendment rights and violated the censorship provision of the Communications Act. However, this contention was properly rejected. Con-

39. *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

40. 358 U.S. 498 (1959).

41. *Id.* at 514. Justice Douglas stated further that:

The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive. *Id.*

42. *See Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

43. *See Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

44. 32 Fed. Reg. 13162 (1967).

45. 34 Fed. Reg. 1959 (1969).

46. 47 U.S.C. § 326 (1964). This section provides: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

47. Comment, *The Federal Communications Commission and Program Regulation—Violation of the First Amendment?* 41 NEB. L. REV. 826, 837 (1962).

48. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

trary to petitioners' assertion that the ruling would have a "chilling effect" on the exercise of their first amendment freedoms by making broadcasters reluctant to carry cigarette advertising, compliance with the ruling has been effected not by restricting cigarette advertising, but by carrying rebuttal advertising.

It is nevertheless submitted that the fact that broadcasters are paid for the commercials they exhibit is irrelevant and any reliance on *Valentine* should have been avoided. Likewise, the scarcity of frequencies in the electromagnetic spectrum, which originally necessitated the licensing of such frequencies by the Commission, is equally insufficient justification for the curtailment of first amendment rights. Courts should not "tolerate immediately the conclusion that since broadcasting presents its own unique problems, unique restraints ought to be imposed."⁴⁹ Certainly restraints similar to the FCC fairness requirement could not be constitutionally applied to other methods of communication. It is generally accepted that "there is no real debate as to the constitutionality of fairness as applied to the newspapers; the real core of controversy revolves around radio and television broadcasters."⁵⁰ The *Banzhaf* court specifically recognized that the first amendment restricts Government regulation of the printed media.⁵¹

Consequently, the better approach to a resolution of the constitutional problems raised by *Banzhaf* would have been to consider the cigarette ruling as an application of the congressionally and judicially approved Fairness Doctrine. This would obviate any reliance on the vague public interest standard which is a dubious basis for denial of first amendment rights. Since the justification for the Fairness Doctrine is the need for an informed public opinion, it is entirely consistent with the first amendment goal of providing a variety of views and "producing an informed public capable of conducting its own affairs"⁵² In particular, the doctrine was extended to cigarette advertising in order to promote intensive education concerning the possible health hazards of smoking. This objective is compatible with the first amendment and the Cigarette Act, which uphold the right of an individual "to know that smoking may be hazardous to his health."⁵³ Therefore, the best reason advanced for rejecting the petitioners' first amendment argument

49. Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 757 (1964).

50. *Id.* at 756.

51. Citing *Near v. Minnesota*, 283 U.S. 697 (1931), the court stated: "The First Amendment is unmistakably hostile to governmental controls over the content of the press, but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish." 405 F.2d at 1100.

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

53. S. REP. NO. 195, 89th Cong., 1st Sess. 4 (1965).

is that "the Doctrine tends to serve more than it disserves the amendment's underlying purposes."⁵⁴

On the other hand, the FCC's proposed rule, which would ban cigarette advertising entirely, raises stronger first amendment objections. Should this proposed rule ever be adopted, it will unquestionably be subjected to legal challenge. Unlike the cigarette ruling, it is banning a particular form of speech. Not only does this speech involve commercial advertising, which is arguably entitled to first amendment protection, but also a controversial issue of public importance.⁵⁵ In addition, the fact that the ban would have a severe economic impact on the broadcast and tobacco industries cannot be overlooked. Surely, such drastic action does not represent the *reasonable* exercise of governmental control which is required when restricting freedoms secured by the first amendment. Consequently, the FCC's proposed rule, while exemplifying a courageous and sincere attempt to protect the nation's health,⁵⁶ would abridge the first amendment freedom of speech and violate Section 326 of the Communications Act prohibiting censorship.

Legislative Developments

In related legislative developments, the House recently passed H.R. 6543, which would extend, until July 1, 1975, certain provisions of the Federal Cigarette Labeling and Advertising Act of 1965. The extended provisions include the disputed preemption provision, which terminated on July 1, 1969. The Commission apparently is awaiting Senate action on this bill⁵⁷ before proceeding with its proposed rule, in accordance with the statement of pur-

54. Note, *Fairness, Freedom and Cigarette Advertising: A Defense of the Federal Communications Commission*, 67 COLUM. L. REV. 1470, 1484 (1967).

Applying Professor Meiklejohn's interpretation of the first amendment and Professor Miller's theory of new constitutionalism, one author discusses the proposition that the Fairness Doctrine is not only consistent with, but also compelled by, the first amendment. Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 30 (1961).

55. The Commission's position with respect to the relevancy of the first amendment to cigarette advertising is inconsistent. First, they have held that cigarette advertisements constitute not only advertising, but also a controversial issue of public importance. On the other hand, the Commission asserts that, since it is merely commercial advertising, it should be afforded a lesser protection under the first amendment.

56. The FCC's motivation in proposing this ban is not to be questioned. Chairman Hyde explained that the Commission was not only authorized but compelled to act as a result of the congressional mandate to regulate in the public interest. See 1969 *Hearings* 204-05.

57. Hearings were held on this bill by the Consumer Subcommittee of the Senate Commerce Committee on July 22, 1969, under the chairmanship of Senator Frank Moss. In view of Senator Moss' statement that, "I want to serve notice here and now that I shall do all within my power to see that no such law to continue the ban [on administrative action] passes," made it unlikely that this bill would be reported out of the Senate Commerce Committee with the preemption provision. 115 CONG. REC. S1124 (daily ed. Jan. 31, 1969).

The Senate Commerce Committee reported out H.R. 6543 with amendments on

pose contained in its Notice of Proposed Rule Making.⁵⁸ Their present inactivity is entirely consistent with their position that the preemption provision of the Federal Cigarette Labeling and Advertising Act, as well as the similar provision in H.R. 6543 precludes effectuation of their proposed rule.⁵⁹ On the other hand, during the floor debate of this bill, Congressman Eckhardt stressed that neither the original act nor the proposed legislation limits the FCC's authority to ban cigarette advertising entirely.⁶⁰ In order to clarify this matter, he introduced a floor amendment which would prohibit the FCC from imposing such a ban. This amendment, along with several others,⁶¹ was defeated. Many congressmen who favor H.R. 6543 feel that their legislative prerogatives have been usurped by the FCC, or that the FCC is discriminating against a lawful commodity.⁶²

Other legislation which would direct the FCC to establish regulations prohibiting certain broadcasting of cigarette advertisements has not been re-

December 5, 1969. S. REP. NO. 91-566, 91st Cong., 1st Sess. (1969). This version, which was amended on the floor of the Senate and passed December 12, 1969, would prohibit the advertising of cigarettes on radio and television on or after January 1, 1971. If this provision is retained by the conference committee and subsequently approved by the President, it would raise the same first amendment problems as the FCC's proposed rule.

Senator Moss expressed his awareness of the constitutional problems involved during the debate of the bill. He stated that, "there can be no doubt that grave constitutional questions arise from a Federal prohibition of advertising a lawful product—a step unprecedented in the acts of Congress, so far as I know." 115 CONG. REC. S16666 (daily ed. Dec. 12, 1969). In favoring voluntary action on the part of the broadcasting and tobacco industries to cease the advertising of cigarettes, he urged approval of an amendment granting antitrust immunity to these industries. Due to adverse reaction on the part of his fellow Senators, the amendment was withdrawn. *Id.* at S16680-82.

58. 34 Fed. Reg. 1959 (1969). The FCC announced that "Congress should be fully apprised of any administrative action which this agency might take, assuming the absence of a contrary congressional direction." *Id.*

However, it is apparent that the secondary purpose of this notice was to reiterate the Commission's suggestion that voluntary industry action in eliminating cigarette commercials would obviate any congressional or administrative activity in this area.

President Nixon has indicated that he would support a proposal to exempt from the antitrust laws any agreement reached by the cigarette industry. The broadcast industry has opposed this antitrust exemption and the major networks have been unable to decide whether or not to require cigarette manufacturers to honor their advertising commitments. Washington Post, Oct. 30, 1969, § A, at 3, col. 1.

59. See generally 1969 Hearings 199, 214, 216, 236.

60. 115 CONG. REC. H4953 (daily ed. June 18, 1969). See also H.R. REP. NO. 289, 91st Cong., 1st Sess. 3 (1969), where it is stated that the "question of a ban on cigarette advertising is not treated in the Federal Cigarette Labeling and Advertising Act." The fact that the absence of a relevant provision was based upon the premise that no attempt would be made to ban cigarette advertising is insignificant. It is submitted that the Cigarette Act and H.R. 6543 do not prevent the FCC from imposing its ban, since they lack an express provision indicating Congress' intent to preclude such a ban.

61. See 115 CONG. REC. H4917 (daily ed. June 17, 1969) for a summary of the proposed floor amendments to H.R. 6543.

62. See 115 CONG. REC. H4939-64 (daily ed. June 18, 1969).

ported out of committee.⁶³ These bills stress the importance of protecting the youth of our country against the hazards of smoking and would accomplish this objective by restricting cigarette advertisements to those hours and programs which do not appeal to children of elementary or secondary school age. This approach represents a legitimate attempt to minimize the impact of cigarette advertisements on children,⁶⁴ and also recognizes the broadcaster's first amendment right to advertise a product, which is legal to manufacture and sell.⁶⁵ Another bill⁶⁶ was proposed which would specifically overrule the *Banzhaf* decision by nullifying the requirement that broadcasters present anti-cigarette commercials, and by providing that product advertising shall not be deemed to constitute the discussion of issues of public importance requiring a presentation of contrary views.

It must be concluded that the responsibility for resolving the numerous problems associated with cigarette advertising rests with Congress. There are several factors which emphasize the need for a comprehensive congressional solution: (1) the complexity of the scientific and medical problem presented by cigarette smoking; (2) the adverse financial impact upon the broadcast and tobacco industries which would be caused by a total ban on cigarette advertising; and (3) the fact that Congress intends to preclude piecemeal approaches by the FCC and the FTC by preempting the field. However, H.R. 6543, as passed by the House, is altogether inadequate and its passage would represent a decisive victory for the tobacco industry.⁶⁷ While purporting to attack the problems presented by cigarette smoking, this bill is actually intended to prevent the FTC and the FCC from proposing quasi-legislative solutions. Therefore, in view of Congress' refusal to pass legislation realistically designed to solve this critical public health problem, the cigarette industry should be subjected to the normal regulatory processes and governed by reasonable federal regulations.

63. H.R. 1237, 3056, 3817, 91st Cong., 1st Sess. (1969).

64. Testifying before the House Committee on Interstate and Foreign Commerce, Rosel Hyde, former Chairman of the FCC, rejected the approach taken by the sponsors of these bills. See *1969 Hearings* 194-98, 205.

65. The broadcaster's first amendment rights are not weakened by public health considerations in view of HEW's failure to categorize cigarette smoking as an absolute and proven health hazard. Instead, HEW relied on statistical probabilities in its 1964 Surgeon General's Advisory Committee Report on Smoking and Health, as well as its 1967 and 1968 annual reports to Congress.

In order to elicit conclusive findings regarding the relationship of smoking to health, Congressman Preyer, an admittedly confused member of the House Interstate and Foreign Commerce Committee, recently introduced a resolution, H.J. Res. 969, which would establish a Scientific Research Commission on Smoking and Health for the purpose of determining whether such a relationship actually exists. 115 CONG. REC. H10002 (daily ed. Oct. 23, 1969).

66. H.R. 381, 91st Cong., 1st Sess. (1969).

67. 115 CONG. REC. H4907 (daily ed. June 17, 1969) (remarks of Mr. Dingell).