

Comment

The Fairness Doctrine: The BCS of American Politics

In most sports, the team that wins the most games is either crowned champion or goes into a playoff with other outstanding teams. College football is not like most sports. On January 2, 2009, the University of Utah's football team completed an undefeated season by beating the University of Alabama in the 2009 Sugar Bowl.¹ Six days later, two one-loss teams played for the Bowl Championship Series (BCS) National Championship; Utah was not invited.² Unlike in most sports, many teams in college football—those from the “mid-major conferences”³—begin the season with no chance at a championship, even if they win all of their games. The BCS ranking system, created a decade ago by the major conferences to choose the teams that play for the official national championship, has never given a mid-major school a spot in the

1. *Utah Secures Perfect Season With Sugar Bowl Win Over Alabama*, ESPN, Jan. 2, 2009, <http://sports.espn.go.com/ncf/recap?gameId=290020333>.

2. See Pete Thamel, *Florida Raises Another Trophy*, N.Y. TIMES, Jan. 9, 2009, at B10, available at [http://www.nytimes.com/2009/01/09/sports/ncaaf/football/09bcs.html?_r=1&em;Voters Give Florida No. 1 Ranking; Perfect Utah is No. 2](http://www.nytimes.com/2009/01/09/sports/ncaaf/football/09bcs.html?_r=1&em;Voters%20Give%20Florida%20No.%201%20Ranking;Perfect%20Utah%20is%20No.%202), ESPN, Jan. 9, 2009, <http://sports.espn.go.com/ncf/news/story?id=3820715>.

3. Jim Litke, *BCS Should Reconsider 'Plus-one' Game—And Fast*, INT'L HERALD TRIBUNE, Dec. 1, 2008 (on file with Author).

game.⁴ This is despite five perfect seasons by mid-major teams since the BCS was created.⁵ Unfortunately, this sort of fundamental unfairness is not limited to the sporting world. For many decades, the federal government enforced regulations that allowed political operatives to harass opposing voices on radio and television and to silence broadcasters who aired unorthodox and unpopular viewpoints.⁶ The “fairness doctrine” was rightly tossed on the ash heap of history more than twenty years ago, but politicians—salivating over the power to silence their critics—continue to call for its return.⁷

I. INTRODUCTION

The First Amendment⁸ severely restricts the government’s ability to regulate the content of most forms of political speech.⁹ Generally, the government cannot regulate speech in ways that favor some viewpoints over others.¹⁰ Viewpoints that are broadcast on radio or television, however, are not like most forms of political speech.¹¹ Chief Justice Burger wrote that federal regulation of broadcasting presents “an unusual order of First Amendment values.”¹² The order is so unusual, in fact, that the government can regulate the *content* of broadcast political speech in ways that are unequivocally unconstitutional if applied to any other form of communication.¹³

4. See BCSFootball.org, BCS, Alliance & Coalition Games Year-by-Year, <http://www.bcsfootball.org/bcsfb/timeline>. The major conferences include about half of the teams that compete in college football’s highest level, NCAA Division I Football Bowl Subdivision (formerly Division I-A). See BCSFootball.org, BCS Selection Procedures, <http://www.bcsfootball.org/bcsfb/eligibility>; MyWay.com, College Football Division FBS Team List, http://sports.myway.com/cfb/team_list_divisionfbs.html.

5. Adam Rittenberg, *Notre Dame Has Been Treated Well During BCS Era*, ESPN, May 22, 2008, <http://sports.espn.go.com/ncf/news/story?id=3406481> (1998 Tulane, 1999 Marshall, 2004 Utah); BCSFootball.org, BCS, Alliance & Coalition Games Year-by-Year, <http://www.bcsfootball.org/bcsfb/timeline> (2006 Boise State); Thamel, *supra* note 2 (2008 Utah).

6. See *infra* Section II.

7. See *infra* Section III.

8. U.S. CONST. amend. I.

9. See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375-76 (1984); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

10. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

11. “Broadcasting” within this Article means traditional broadcast television and radio. It does not encompass cable television or satellite television and radio, which are beyond the regulatory reach of the fairness doctrine.

12. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 101 (1973).

13. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (Regarding the internet, “governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“It has yet to be demonstrated how governmental regulation of [the newspaper editorial]

The fairness doctrine was a Federal Communications Commission (FCC) regulation that required broadcasters to provide news and issue programming that was—naturally—fair and that presented opposing viewpoints on controversial issues.¹⁴ The policy had its roots in the Progressive political movement of the 1920s and was long believed to be in the public interest.¹⁵ At first glance, the goal was admittedly laudable. What reasonable person is against fairness in political discourse? As the quote often mis-attributed to Voltaire goes, “I disapprove of what you say, but I will defend to the death your right to say it.”¹⁶

The problems with this seemingly reasonable policy, however, are many. There is much misinformation and misunderstanding polluting the public debate about the fairness doctrine, a debate that took on a more urgent tone with Barack Obama’s election in November 2008.¹⁷ The fairness doctrine grew out of an unprecedented and legally unsound theory of the First Amendment that was properly rejected in the 1980s. It did not protect the fairness of political discourse in any way. In fact, to borrow a sports analogy, it provided mainstream politicians with a permanent slot in the playoffs while denying others any real chance to compete. Finally, far from enhancing broadcast political programming, the policy actually dulled the political discourse available to the listening public.

Part II of this Article examines three aspects of the history of the fairness doctrine as a component of federal broadcasting regulation: (1) how the FCC acquired the awesome power to review the content of political speech and silence those broadcasters who were not “fair” enough, (2) how bureaucrats and political operatives used and misused this power to manipulate the programming available to the listening public during the mid-to-late twentieth century, and (3) how President Ronald Reagan’s FCC gave up the power. Part III follows with a brief discussion of the current hope or fear that the new administration will

process can be exercised consistent with First Amendment guarantees of a free press.”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969) (holding “that the Congress and the [Federal Communications] Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials”).

14. See *infra* notes 128-48 and accompanying text.

15. See *id.*

16. Evelyn Beatrice Hall: Information From Answers.com, <http://www.answers.com/topic/evelyn-beatrice-hall>.

17. E.g., Clint Bolick, *Obama and the Fairness Doctrine*, FORBES, Nov. 22, 2008, http://www.forbes.com/2008/11/21/fairness-doctrine-obama-oped-cx_cb_1122bolick.html.

reinstate the doctrine and explains why this octogenarian of a regulation is not good public policy for the internet age.

II. THE COMPETING PHILOSOPHIES OF BROADCASTING REGULATION

“Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: ____.” . . . [T]he Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the “fairness” of political debate.¹⁸

Justice Scalia was discussing campaign finance reform in this passage.¹⁹ However, his words eloquently express the fundamental flaw in American broadcasting regulation for most of the twentieth century: a government of opinionated officials cannot be expected to use the power of the state to ensure that political discourse is fair and the opinions of the powerless are heard.

A. *Prior to 1927: The Right to Transmit*

In the first decade of the twentieth century, the radio spectrum²⁰ was “a new, wide-open frontier, akin to the American West,” free of government regulation and largely independent of corporate influence.²¹ Wireless communication grew naturally as amateur hobbyists built their own radio transmitters and exchanged messages with other hobbyists. In the early days of radio, there were few people broadcasting—transmitting signals not directed at any particular receiving party but instead to whomever wished to tune in—and no limitations on what could be sent over the airwaves.²² Anyone with a transmitter and an opinion was perfectly within his rights to broadcast his political views,

18. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 679-80 (1990) (Scalia, J., dissenting).

19. *See id.*

20. “Spectrum” is probably the most technical term in this Article, but the reader seeking in-depth background information on radio technology should see United States Early Radio History, <http://www.earlyradiohistory.us/>.

21. HUGH R. SLOTTEN, *RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920-1960*, at 7 (2000).

22. DOUGLAS B. CRAIG, *FRESIDE POLITICS: RADIO AND POLITICAL CULTURE IN THE UNITED STATES, 1920-1940*, at 4-5 (2000).

just as today citizens are generally free to publish their thoughts in print or on the internet.²³ At this point in the history of radio, however, not many people were listening. That soon changed.

Shortly after the early amateur enthusiasts took to the airwaves, commercial and military interests began to see the potential of wireless communication. Private shipping companies and the United States Navy began to use radio technology for ship-to-ship and ship-to-shore communication.²⁴ Unfortunately, some amateur broadcasters, upset by commercial and military intrusion onto their unregulated playground, succumbed to “antiauthoritarian sentiment” and tried to make the new medium less useful to the competition by creating signal interference and making obscene transmissions.²⁵ Most regrettably, some amateurs made fake distress calls that sent the Navy and United States Coast Guard on hopeless rescue missions.²⁶ Ironically, these misguided attempts to preserve the freedom of the airwaves provided the earliest justification for federal broadcasting regulation: preventing malicious interference with legitimate transmissions.

In direct response to the Navy’s complaints of malicious interference, Congress enacted the first major regulatory scheme for radio communication with the Radio Act of 1912 (the 1912 Act).²⁷ Importantly, this legislation did not expressly give the federal government ownership of the airwaves; that was yet to come. Instead, the 1912 Act simply required all radio operators to be licensed by the Secretary of Commerce and Labor.²⁸ Licensed operators were required to follow certain rules specified in the 1912 Act to keep their licenses, but the 1912 Act did not give the Secretary the power to deny licenses outright.²⁹ Congress retained, at least in form, the theory that the radio spectrum was the property of the people, and that all people had a right to use it.³⁰ However, in effect the 1912 Act created the first of many barriers preventing the people from speaking over their airwaves. Indeed, Congress gave commercial and military operators exclusive use of the

23. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

24. CRAIG, *supra* note 22, at 5.

25. SLOTTEN, *supra* note 21, at 7.

26. *Id.*

27. Act of August 13, 1912, ch. 287, 37 Stat. 302.

28. *Id.* § 1, 37 Stat. at 302.

29. *Id.* § 4, 37 Stat. at 304-08.

30. SLOTTEN, *supra* note 21, at 8 (“[The act] upheld the conviction that . . . the spectrum belonged to the people.”).

choice frequencies in the spectrum, while amateur users were relegated to the minimally useful shortwave band.³¹

Despite limiting access to the airwaves and solving the immediate problem of malicious interference, the 1912 Act soon proved inadequate. A later member of Congress said that the 1912 Act all but continued the pre-regulation reality that “anyone who will may transmit.”³² This approach was workable when broadcasting was merely a novelty and there was plenty of room on the airwaves for all commercial stations, small or large, but the approach started to crumble after World War I.³³ While Congress seemingly cleared the airwaves by excluding amateur operators, it had not foreseen the potential for explosive growth in commercial broadcasting; in fact, the 1912 Act did not even mention broadcasting.³⁴

On November 4, 1920, station KDKA in Pittsburgh, Pennsylvania, made America’s first scheduled radio broadcast.³⁵ Broadcasting grew slowly for a few months and then suddenly exploded like nothing before or since.³⁶ Secretary of Commerce (later President) Herbert Hoover called the expansion of radio in 1921-1922 “one of the most astounding things that has come under my observation of American life.”³⁷ Secretary Hoover estimated that in one year, the number of American households with radios increased from fifty thousand to six hundred thousand.³⁸ Correspondingly, the number of licensed commercial stations increased from thirty to over five hundred during 1922.³⁹ Radio rapidly became a major business. However, under the right-to-transmit philosophy of the 1912 Act, “anyone with a radio transmitter, ranging from college students experimenting in science classes, to amateur inventors who ordered kits, to newspaper-operated stations, could broadcast.”⁴⁰ The 1912 Act had been designed to deal with interference between point-to-point transmitters and was ill-suited to

31. *Id.*

32. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 n.5 (1969) (quoting 67 CONG. REC. 5479 (1926) (statement of Rep. White)).

33. *See Nat’l Broad. Co. v. United States*, 319 U.S. 190, 210-12 (1943).

34. *See Act of Aug. 13, 1912*, § 1, 37 Stat. at 302.

35. CRAIG, *supra* note 22, at 8.

36. SLOTTEN, *supra* note 21, at 15.

37. *Id.*

38. *Id.*

39. CRAIG, *supra* note 22, at 9.

40. Mark Goodman, *The Radio Act of 1927 as a Product of Progressivism*, 2 MEDIA HISTORY MONOGRAPHS No. 2 (1998-1999), available at <http://www.scripps.ohiou.edu/mediahistory/mhmjour2-2.htm>.

handle interference caused by hundreds of competing broadcasters transmitting on the same limited range of frequencies.

In direct contravention of the right-to-transmit philosophy of the 1912 Act, Secretary Hoover attempted to limit interference by denying some license applications. When one of these denials was challenged in court, Secretary Hoover claimed a general authority under the 1912 Act to regulate broadcasting.⁴¹ However, in 1923 the United States Court of Appeals for the District of Columbia Circuit held that the 1912 Act gave the Secretary of Commerce no general power to regulate radio.⁴² Instead, the court held that “Congress intended to fully regulate the business of radio [communications], without leaving it to the discretion of an executive officer.”⁴³ Congress had acknowledged each citizen’s right to use the airwaves and did not give the Secretary power to take away that right.

Forbidden to deny qualified applicants, Secretary Hoover sought to solve the interference problem by allocating the available frequencies among all licensed broadcasters, assigning a specific frequency and hours of operation to each station.⁴⁴ However, three years after the court of appeals found no authority under the 1912 Act to deny applications, the United States District Court for the Northern District of Illinois held that the Secretary of Commerce also had no authority to allocate frequencies among broadcasters and to enforce his assignments.⁴⁵

Thus, in 1926, if a college student wanted to broadcast his thoughts about Prohibition⁴⁶ on the same frequency as the National Broadcasting Company’s music programming, the company had no legal process to exclude him. This was not good for the growing radio industry. The resulting “cacophony of competing voices” on the air made broadcasts unclear and unpredictable.⁴⁷ It soon became obvious that “the radio spectrum simply [was] not large enough to accommodate everybody” who wanted to broadcast.⁴⁸ Perhaps more importantly, “[t]he undisciplined and unregulated voice of the public interfered with corporate goals of delivering programming and advertising on a dependable schedule to a mass audience.”⁴⁹

41. *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1004 (D.C. Cir. 1923).

42. *Id.* at 1007.

43. *Id.* at 1006.

44. *United States v. Zenith Radio Corp.*, 12 F.2d 614, 616-17 (N.D. Ill. 1926).

45. *Id.* at 617.

46. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

47. *Red Lion*, 395 U.S. at 376.

48. *Nat’l Broad. Co.*, 319 U.S. at 213.

49. *Goodman*, *supra* note 40.

The people owned the airwaves, but the airwaves were scarce and would not be filled with useful programming under the 1912 Act's right-to-transmit approach. This scarcity problem motivated Congress's second effort at radio regulation in 1927 and formed the basic rationale on which all three branches of the federal government would support the domination of mainstream political views on the airwaves for the next sixty years: (1) the statutory frequency allocation scheme for broadcasting still in place today; (2) the executive branch's enforcement of content restrictions on broadcast political programming, including the fairness doctrine; and (3) the half-century of judicial acquiescence in the restriction of broadcast political speech.

B. 1927-1987: Congress Shall Make No Law Abridging the Freedom of . . . Listening?

1. Statutory Authority: The Radio Act of 1927 and the Communications Act of 1934. In 1927 nearly a quarter of American households owned a radio.⁵⁰ The scarcity of broadcast frequencies made the fifteen-year-old Radio Act of 1912 and its right-to-transmit approach woefully inadequate to prevent broadcast interference. If all of those households were to receive worthwhile programming, access to the airwaves had to be limited so that each station could broadcast free of interference from others.⁵¹

The regulatory scheme that Secretary Hoover tried in vain to implement under the 1912 Act—federal divvying-up of the airwaves—was far from his only option, but it reflected the dominant political philosophy of his time. Secretary Hoover was “a self-described ‘independent progressive,’” the latter a loaded term with many historical connotations in American politics.⁵² During this period, progressive ideology was characterized by “members of the middle class threatened by the corruption and immorality of changing social systems.”⁵³ This class of people had inherited the Victorian generation's “faith in individualism” and generally believed in the traditional American values of free speech and political dissent.⁵⁴ However, they “found that too much individualism and too much freedom threatened social harmo-

50. CRAIG, *supra* note 22, at 12.

51. *Nat'l Broad. Co.*, 319 U.S. at 212-13.

52. Goodman, *supra* note 40 (quoting RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 290 (Vintage Books, 1958) (1948)).

53. *Id.*

54. *Id.*

ny.”⁵⁵ Therefore, their core value was “societal control through federal power”—that is, they believed that only government bureaucracy could protect the middle class from social upheaval.⁵⁶ This predisposition against unbounded free speech was bolstered by the unprecedented chaos on the airwaves in the mid-1920s and greatly affected the congressional debate on the future of radio. In considering the new legislative scheme, “what was crucial was that Congressmen, regardless of party, accepted a Progressive way of thinking about the role and mechanisms of government.”⁵⁷ Specifically, most agreed that “the federal government should be in control of radio.”⁵⁸

However, widespread acceptance of an expanded role for the federal government in the radio industry did not solve the obvious problem with federal allocation of the limited broadcast spectrum: the First Amendment.⁵⁹ The 1912 Act, for all its flaws, did have the virtue of being constitutional. The Secretary of Commerce could not keep qualified broadcasters off the airwaves,⁶⁰ so Congress had made no law “abridging the freedom of speech, or of the press.”⁶¹ The explicit purpose of the First Amendment is to deny Congress the power to silence anyone’s views, but solving the radio scarcity problem with a federal bureaucracy required the government to deny some people access to the airwaves. The First Amendment issue had to be, and was, at the forefront of the congressional debate.⁶²

The first constitutional issue Congress had to resolve was how to forbid some people from broadcasting without abridging their freedom of speech, and the Progressives—already skeptical about how broad the First Amendment’s protections should be—were ready with a solution. Secretary Hoover, along with his allies in Congress, Maine Representative Wallace White and Washington Senator Clarence Dill, promoted a novel constitutional theory.⁶³ In 1925 Secretary Hoover explained, “We hear a great deal about the freedom of the air, but there are two parties to freedom of the air, and to freedom of speech for that matter. There is the speechmaker and the listener. Certainly in radio I believe in

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. U.S. CONST. amend. I.

60. *Intercity Radio Co.*, 286 F. at 1007.

61. U.S. CONST. amend. I.

62. Goodman, *supra* note 40.

63. *Id.*

freedom for the listener.”⁶⁴ Representative White echoed this sentiment, saying “the right of the public to service is superior to the right of any individual to [broadcast].”⁶⁵ Under this theory, which was adopted by Congress in the new legislation⁶⁶ and endorsed by the judiciary years later,⁶⁷ the old understanding of free speech was obsolete.⁶⁸ Essentially, the Progressives “created a right to listen and equated it with freedom of speech.”⁶⁹

Given the public’s new constitutional right to listen, Congress had to answer a more difficult constitutional question: *the right to listen to what?*⁷⁰ From the outset, it was a foregone conclusion that the right to listen would not encompass a wide variety of political speech in a country with an entrenched two-party system. “Improper speech” had no place on American radio, and there were many suggestions about the types of speech that belonged in that category.⁷¹ Some congressmen wanted to ensure that “audiences heard only the morally ‘right’ kind of material.”⁷² Particularly, South Carolina Senator Coleman Blease, who was worried that someone on the radio might “say ‘he came from a monkey,’” introduced an amendment to ban discussion of evolution on the radio.⁷³ Others in Congress sought to use the federal takeover to silence certain improper political views. For instance, Texas Senator Earle Mayfield wanted to exclude those whose broadcasts advocated “bolshevism or communism.”⁷⁴ Ironically, some of those so eager to censor the political content of broadcasts also feared that large companies would conspire to gain monopolistic control over the airwaves and slant their political programming to affect the outcome of policy debates and elections.⁷⁵ The legislation pushed by Representative White and Senator Dill harmonized these different goals for the federal

64. *Id.* (quoting 2 HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933, at 144 (MacMillan, 1952)).

65. *Id.* (quoting 67 CONG. REC. 5479 (1926)).

66. See Radio Act of 1927, ch. 169, 44 Stat. 1162.

67. *E.g.*, *Red Lion*, 395 U.S. at 390 (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”).

68. Goodman, *supra* note 40.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* This amendment was probably unconstitutional even under the new Progressive understanding of the First Amendment, but Senator Blease cited a higher authority, saying, “On this proposition I am on the side of Jesus Christ.” *Id.* (quoting 67 CONG. REC. 12615 (1926)).

74. *Id.* (quoting 67 CONG. REC. 12502 (1927)).

75. *Id.*

takeover with a quintessentially Progressive solution: a powerful executive bureaucracy that ensured quality programming for the public, gave special protection from monopolistic companies to entrenched political interests, and made it easy to exclude radical ideas and programming.

The Radio Act of 1927 (the 1927 Act)⁷⁶ had two key structural components that addressed the inadequacies of the 1912 Act. First, the legislation created an executive agency, the Federal Radio Commission (FRC), and granted it the authority to create a comprehensive regulatory scheme for radio⁷⁷—a power that Secretary Hoover lacked under the 1912 Act. Second, Congress claimed the airwaves as exclusive federal property and empowered the new FRC to license a *limited* number of broadcasters to use the spectrum⁷⁸—another power lacking under the 1912 Act. But the most important part of the 1927 Act was the standard, or the lack thereof, that Congress gave the FRC to use in choosing whom to allow on the radio.

The 1927 Act instructed the FRC to issue broadcast licenses only as the “public convenience, interest, or necessity require[d].”⁷⁹ By leaving these terms undefined, however, Congress actually left the five-member FRC “free to control radio to serve whatever interests it deemed were within the scope of public interest, convenience, and necessity as long as the commission did not deny ‘free speech’ to broadcasters.”⁸⁰ The Progressives ensured that the public could receive quality radio programming, but “[t]he real winners were the Progressives who would be doing the regulation.”⁸¹

The vague “public interest” standard gave the FRC immense power over the content of radio programming, but the two major parties in Congress provided themselves a trap door through the FRC’s control and simultaneously slammed the door in the face of all out-of-the-mainstream political opposition. Section 18 of the 1927 Act required stations which allowed any “*legally qualified* candidate for any public office” to use their facilities to then “afford equal opportunities to all other such candidates for that office.”⁸² Obviously, if the government licensed

76. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927).

77. *See id.* §§ 3-5, 44 Stat. at 1162-65.

78. *See id.* § 1, 44 Stat. at 1162 (“[T]his Act is intended . . . to maintain the control of the United States over all the channels of . . . radio transmission; and to provide for the use of such channels, but not the ownership thereof, . . . under licenses granted by Federal authority.”).

79. *Id.* § 4, 44 Stat. at 1163.

80. Goodman, *supra* note 40 (quoting Radio Act of 1927 § 29, 44 Stat. at 1173).

81. *Id.*

82. Radio Act of 1927 § 18, 44 Stat. at 1170 (emphasis added).

some station operators and excluded others, it had to ensure that a licensed station would not become a campaign organ for a single political candidate.⁸³ However, Representative White believed that section 18 would “encourage[] mainstream political debate between Republicans and Democrats through a national medium while the language permitted the exclusion of fringe candidates.”⁸⁴ From the Progressive perspective, the FRC would ideally use the public interest standard to “deny the public access to the ideas of their enemies, such as unions, socialists, communists, evolutionists, improper thinkers, non-Christians, and immigrants.”⁸⁵ It did not take long.

Notwithstanding the 1927 Act’s protection of the mainstream parties, Congress was well aware of the potential for abuse inherent in giving an executive agency broad power over broadcasting. From the beginning in 1927, Congress sought to prevent one political party from dominating the regulatory body. The 1927 Act provided that no “more than three commissioners [out of five] shall be members of the same political party.”⁸⁶ With the Communications Act of 1934,⁸⁷ Congress replaced the FRC with the Federal Communications Commission (FCC),⁸⁸ increased the number of commissioners from five to seven,⁸⁹ and forbade more than four members of the seven-member FCC to be from the same political party.⁹⁰ Like the fairness that the FRC and FCC would impose on the content of radio programming, however, this balance benefited primarily the parties that created it. In the seventy-five year history of the FCC, there have been only two commissioners who were not Republican or Democrat.⁹¹ The first served less than four years just after World War II, and the second left the Commission in 1956; since then, the FCC has been totally controlled by members of the two major parties.⁹²

2. Executive Enforcement from 1927-1949: Broadcasting in the (Mainstream) Public Interest. Almost immediately after Congress

83. Goodman, *supra* note 40.

84. *Id.*

85. *Id.*

86. Radio Act of 1927 § 3, 44 Stat. at 1163.

87. Communications Act of 1934, ch. 652, 48 Stat. 1064.

88. *Id.* § 1, 48 Stat. at 1064.

89. *Id.* § 4(a), 48 Stat. at 1066.

90. *Id.* § 4(b), 48 Stat. at 1066-67.

91. See Federal Communications Commission, Complete List of FCC Commissioners from 1934 to Present [hereinafter FCC List], <http://www.fcc.gov/commissioners/commishlist.html>.

92. *Id.*

put the executive branch in control of radio, the FRC officially adopted the idea that only ideologically balanced political coverage could be in the public interest; partisan broadcasters, particularly those with unpopular views, were soon under fire. In 1928 the FRC gave New York radio station WEVD a “stern warning that [it] must ‘operate with due regard for the opinions of others.’”⁹³ The station was owned by the Socialist Party, and the FRC found that WEVD’s programming did not serve the public interest because it reflected the Socialist Party’s agenda.⁹⁴ One year later, the FRC expressed the same sentiment when it refused to grant a license for greater power and longer hours to Chicago station WCFL, owned by the Chicago Federation of Labor.⁹⁵ The FRC found that WCFL “was run ‘for the exclusive benefit of organized labor.’”⁹⁶ In denying WCFL’s application, the FRC explained that it believed the public interest was served only when “‘all stations . . . cater to the general public and serve the public interest as against group or class interest.’”⁹⁷

A case the next year showed how the public interest standard applied in a nonpolitical context. The FRC’s decision and reasoning in *KFKB Broadcasting Ass’n v. FRC*,⁹⁸ which involved no political speech, illustrates how a more limited interpretation of the public interest standard might have advanced the public’s right to listen without requiring an executive agency to evaluate the content of political speech.

In *KFKB* the United States Court of Appeals for the District of Columbia Circuit upheld the FRC’s refusal to renew Kansas station KFKB’s license on the grounds that the licensee was not operating the station in the public interest.⁹⁹ The licensee, Dr. J.R. Brinkley, appears to have been a sort of modern snake oil salesman. He devised a collection of medicinal cocktails that were organized into numbered prescriptions, and he maintained a network of pharmacists that distributed the prescriptions to the public. On his thrice-daily, thirty-minute broadcasts on KFKB, Brinkley read letters from listeners

93. Thomas W. Hazlett & David W. Sosa, *Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting*, Cato Policy Analysis No. 270 (1997), available at <http://www.cato.org/pubs/pas/pa-270.html> (quoting Fed. Radio Comm’n Order, 2 F.R.C. 156 (1928)).

94. *Id.*

95. *Id.*

96. *Id.* (quoting *Great Lakes Broad. Co.*, 3 F.R.C. 32 (1929), *rev’d on other grounds*, *Great Lakes Broad. Co. v. Fed. Radio Comm’n*, 37 F.2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930)).

97. *Id.* (quoting *Great Lakes Broad. Co.*, 3 F.R.C. at 36).

98. 47 F.2d 670 (D.C. Cir. 1931).

99. *Id.* at 670-71, 672.

describing medical symptoms, and he suggested one or more of his prescriptions as a remedy. His ownership interests in the station and the pharmacy association showed that he was profiting from the operation.¹⁰⁰

In 1930 the FRC refused to renew Brinkley's license for KFKB because he was not operating the station in the public interest; Brinkley appealed.¹⁰¹ The FRC contended, and the court of appeals agreed, that Brinkley's broadcasts of medical advice without ever seeing the patient and his scheme to personally profit from the broadcasts were not in the public interest.¹⁰² The FRC had cautioned broadcasters not to use too much broadcast time on "matters of a distinctly private nature which are not only uninteresting, but also distasteful to the listening public."¹⁰³

KFKB was a clear case in which the programming decisions of the licensee betrayed a desire not to serve the public with responsible broadcasting but instead to advance the licensee's separate business interests.¹⁰⁴ The FRC and the FCC could have limited their application of the public interest standard to this private-versus-public-interest evaluation, but instead they embraced the power to evaluate the viewpoints broadcasted over the next few decades.

While Brinkley was curing the physical ills of the people of Kansas, a controversial minister in California was busy denouncing the moral ills of Prohibition-era Los Angeles.¹⁰⁵ Reverend Robert "Fighting Bob" Schuler, minister of the Trinity Methodist Church and de facto manager of station KGEF, used his time on the airwaves to condemn many powerful figures in Los Angeles, including judges, the board of health, labor leaders, and Catholic and Jewish leaders.¹⁰⁶ The harsh nature of his speech—and perhaps the influence of those he criticized—prompted "[n]umerous citizens of Los Angeles" to protest the renewal of his broadcast license.¹⁰⁷ The FRC's hearing on the renewal apparently drew a lot of attention; the testimony of ninety witnesses resulted in a record of more than one thousand pages. The FRC

100. *Id.* at 670-71.

101. *Id.* at 671.

102. *Id.* at 671, 672.

103. *Id.* at 672 (misquoted in original) (quoting 2 FRC ANN. REP. 169 (1928), available at http://www.fcc.gov/mb/audio/decdoc/annual_reports.html).

104. *Id.*

105. See *Trinity Methodist Church, S. v. FRC*, 62 F.2d 850, 850, 852 (D.C. Cir. 1932).

106. *Id.*; John Dart, *Church on the Way Launches Radio Station Offering Ministry, Music*, L.A. TIMES, July 19, 1997, at B-4, available at <http://articles.latimes.com/1997/jul/19/local/me-14323>.

107. *Trinity Methodist Church*, 62 F.2d at 850.

ultimately refused to renew the license, finding that KGEF's programming did not serve the public interest¹⁰⁸ (no doubt to the delight of those Schuler targeted for criticism).

On appeal, Schuler argued that the First Amendment protected his speech, but in affirming the FRC's decision, the District of Columbia Circuit relied on a simplistic analogy to slander and libel law.¹⁰⁹ Because Schuler's accusations were "without facts to sustain or to justify them,"¹¹⁰ his right to free speech was subject to his responsibility for abuse of that right by broadcasting "defamatory and untrue matter."¹¹¹ The court of appeals reduced the justification for Schuler's broadcasts to "patriotic zeal" and implied by omission that there was no evidence to support his accusations.¹¹² However, it seems unlikely that a court that took "great pains to examine carefully the record of a thousand pages"¹¹³ from the testimony of nearly one hundred witnesses could find nothing more than misplaced patriotic zeal in Schuler's broadcasts.

Notably, the court of appeals did not mention fairness or one-sidedness in Schuler's broadcasts. Instead, the court held that Schuler could not "continue to indulge his strictures upon the characters of men in public office" on the airwaves because his lack of factual support justified the FRC's conclusion that his station did not serve the public interest.¹¹⁴ Just a couple of years earlier, the FRC had simply required WEVD (the socialist station) and WCFL (the organized labor station) to remedy their one-sided programming by presenting other sides.¹¹⁵ Schuler's zealotry, however, was apparently incapable of serving the public interest regardless of whether he balanced his presentation. But half a century later, "Fighting Bob" was partially vindicated. In the 1985 report that started the delicate process of repealing the fairness doctrine, the FCC recognized that Schuler's radical viewpoint, more than any other factor, prompted the FRC's refusal to renew his license.¹¹⁶ It was not just political radicals that had to fear the bureaucrats, however.

108. *Id.* at 851.

109. *See id.*

110. *Id.* at 852.

111. *Id.* at 851.

112. *Id.* at 852.

113. *Id.* at 851.

114. *Id.* at 853.

115. *See supra* notes 93-97 and accompanying text.

116. *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, 189 & n.169 (1985) [hereinafter 1985 Fairness Report].

A few years later, the new FCC, filled with commissioners appointed by President Franklin D. Roosevelt,¹¹⁷ enforced the developing fairness requirement against mainstream critics of the President, and in the process they adopted the most speech-restrictive interpretation of the public interest standard before or since. A regional network of radio stations in New England, the Yankee Network, made a habit of broadcasting right-wing (that is, anti-Roosevelt) editorials and political endorsements with no effort to make a balanced presentation of views.¹¹⁸ At a formal license renewal hearing for one of the network's stations, the FCC effectively outlawed editorializing by broadcasters and decreed that the public interest required all discussion of public issues to be in the form of an objective newscast: "[O]ne licensed to operate in the public domain . . . assume[s] the obligation of presenting all sides of important public questions, fairly, objectively, and without bias. The public interest—not the private—is paramount."¹¹⁹ Despite the Yankee Network's violation of this interpretation of the public interest, the FCC renewed the station's license on the condition that the network permanently refrain from editorializing. The FCC thereby avoided an overtly partisan revocation of the station's license while still shielding the President from the Yankee Network's sharp criticism and possibly scaring off other broadcast licensees who might have editorialized against the President.¹²⁰

The "*Mayflower Doctrine*" that came from this opinion lasted for ten years.¹²¹ There was disagreement even during that time whether the FCC had actually intended to forbid all editorializing by licensees, and the FCC itself never resolved that question.¹²² In any case, this period represented the height (or depth) of the executive branch's restriction of political speech on the radio, and a United States Supreme Court decision in 1943 suggested that the Court would do nothing to stop it. In *National Broadcasting Co. v. United States*,¹²³ the Court addressed the constitutionality of denying access to the airwaves under the Communications Act of 1934.¹²⁴ Justice Frankfurter's majority opinion quickly dismissed the claim that the FCC's authority to deny licenses

117. See FCC List, *supra* note 91.

118. Hazlett & Sosa, *supra* note 93.

119. *Id.* (misquoted in original) (quoting *Mayflower Broad. Corp.*, 8 F.C.C. 333, 340 (1940)).

120. *Id.*

121. See *id.*

122. See *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1259-62 (1949) [hereinafter 1949 Report].

123. 319 U.S. 190 (1943).

124. See *id.* at 226-27.

violated the applicants' right to free speech.¹²⁵ The Court accepted the spectrum scarcity rationale—the public's right to listen—as a sufficient constitutional justification for the public interest standard, reasoning that “[u]nlike other modes of expression, radio inherently is not available to all,” and that therefore “some who wish to use it must be denied.”¹²⁶ The Court noted in dicta that the issue would be “wholly different” if Congress had authorized the FCC to issue licenses on the basis of “political, economic or social views.”¹²⁷ Of course, Congress had not explicitly done so in the Communications Act of 1934; instead, the FRC and FCC simply considered political content as part of the public interest inquiry.

3. 1949-1974: The Fairness Doctrine, *Red Lion*, and the Chilling Effect. The decision in *National Broadcasting Co.* and the *Mayflower* Doctrine left unclear for a decade whether broadcast licensees themselves were allowed to editorialize.¹²⁸ The FCC answered this question in the 1949 Report *In re Editorializing by Broadcasting Licensees*¹²⁹ and, in the process, extended the reach of the scarcity rationale to create the modern fairness doctrine.¹³⁰ The scarcity of useful broadcast frequencies previously formed the foundation only for limiting access to the airwaves and for requiring broadcasters to act in the public interest, but with this report the scarcity rationale became the express justification for executive branch oversight of political speech on the airwaves.¹³¹ The FCC concluded that “the paramount right of the public in a free society [is] to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning . . . controversial [public] issues.”¹³² Therefore, the report outlined a two-pronged framework that the FCC intended to use to protect the public from unfair political coverage.¹³³

The first prong of the fairness doctrine concerned what a station must broadcast.¹³⁴ The FCC imposed on broadcasters an affirmative responsibility to make “reasonable provision for the discussion of controversial issues of public importance in the community served, and

125. *Id.* at 227.

126. *Id.* at 226.

127. *Id.*

128. See 1949 Report, 13 F.C.C. at 1259-62.

129. 13 F.C.C. 1246 (1949).

130. See *id.* at 1249-52.

131. See *id.* at 1250-51.

132. *Id.* at 1249.

133. See *id.* at 1249-52.

134. See *id.* at 1249.

to make sufficient time available for full discussion thereof.”¹³⁵ The FCC accompanied this directive with stern language,¹³⁶ but it proved to have no teeth; in the next forty years, the FCC held a licensee in violation of the first prong only once.¹³⁷ While this half of the fairness doctrine gave broadcasters little incentive to air controversial viewpoints, the other half might have created a large disincentive to do so.¹³⁸

The second prong of the fairness doctrine dictated how broadcasters had to present those issues of public importance identified in the first prong.¹³⁹ The FCC described the importance of free speech on public issues, and reasoned that radio could only be preserved as a medium of free speech if broadcasters “afford[ed] a reasonable opportunity for the presentation of all responsible positions” on the issues identified under the first prong.¹⁴⁰

Following in the footsteps of Congress, which passed into law the vague public interest standard, the FCC did not provide a clear test for determining whether a broadcaster met the fairness obligation. Instead, the report mentioned several different ways in which controversial issues and viewpoints could be integrated into a station’s programming and concluded that the public interest required broadcasters to retain wide latitude in making programming decisions.¹⁴¹ Nonetheless, over the next forty years, this prong became the source of the most controversy surrounding the fairness doctrine.

The 1949 Report’s formulation of the fairness doctrine permanently solidified the hold of the mainstream two-party system on the broadcast industry. The report states that the public interest can *only* be served by the presentation of “varying and conflicting views held by responsible elements of the community.”¹⁴² Here, the Progressive ideal of radio as a forum for mainstream debate between Republicans and Democrats—to the exclusion of all others—shines through in the FCC’s language. In the same breath that it waxed eloquent on the importance of free speech, the FCC implied that the public interest required some views to be heard while others could safely be ignored. As the FCC itself recognized many years later, this created a two-tiered First Amendment protection in broadcasting: the public was constitutionally entitled to hear

135. *Id.*

136. *See id.* at 1249-50.

137. *The Impact of Deregulation of the Fairness Doctrine on the Broadcast Industry and on the Public*, 47 ADMIN. L. REV. 625, 631 (1995).

138. *Id.* at 635.

139. *See* 1949 Report, 13 F.C.C. at 1250.

140. *Id.*

141. *See id.* at 1250-52.

142. *Id.* at 1247.

mainstream viewpoints on the radio, but broadcasters were free to exclude viewpoints if the FCC was convinced they were not important enough to air.¹⁴³

Having declared itself the arbiter of political fairness on the American airwaves in 1949, the FCC adopted a two-stage process for enforcing its fairness doctrine. The process began with a complaint filed by any citizen or group aggrieved by unfairness on the radio. The FCC evaluated the complaints and sometimes granted a hearing if it found one necessary. Out of these hearings could come a ruling in favor of either the licensee (that the programming did not violate the fairness doctrine) or the complainant (that the programming did violate the fairness doctrine). A licensee losing at this stage was subject to penalties ranging from the costs of responding to the complaint to giving free air time to the complainant. Finally, if a licensee refused to abide by the FCC's ruling, the commission could exercise its greatest power and revoke or refuse to renew a station's license. The costs associated with a real or merely threatened fairness doctrine complaint probably gave pause to any broadcaster, and partisan interests were quick to take advantage of the leverage this regulatory scheme provided over political opponents.¹⁴⁴

In 1959 Congress endorsed the fairness doctrine when it amended the statutory "equal-time" rule in the Communications Act of 1934.¹⁴⁵ The new provisions limited the application of the equal-time rule, exempting "bona-fide newscast[s]" from demands for free reply time.¹⁴⁶ Importantly, Congress added the language, "Nothing in [this amendment] shall be construed as relieving broadcasters . . . 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."¹⁴⁷ While this language clearly approved the FCC's formulation of the fairness doctrine, a court later held that Congress only meant to approve, not to enact as statutory law, the fairness doctrine.¹⁴⁸

Twenty years after the 1949 Report created the fairness doctrine—with the American public's ears safely insulated from improper

143. See *infra* notes 217-224 and accompanying text.

144. Hazlett & Sosa, *supra* note 93.

145. See Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557.

146. *Id.* § 1, 73 Stat. at 557.

147. *Id.* (emphasis added).

148. *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 801 F.2d 501, 517-18 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); but see *Red Lion*, 395 U.S. at 380 ("[T]he amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard.").

political views—the two major parties began to use the fairness doctrine to snipe at each other’s supporters, and litigation followed closely behind. In 1969 the United States Supreme Court heard a direct constitutional challenge to the doctrine in the most important and controversial case to date on federal broadcasting regulation. In *Red Lion Broadcasting Co. v. FCC*,¹⁴⁹ the Court upheld the constitutionality of the fairness doctrine in a unanimous decision that reiterated the scarcity rationale and explicitly adopted the Progressive right-to-listen theory of the First Amendment.¹⁵⁰ However, the real story of *Red Lion* began much earlier than the specific litigation in that case and shows how the fairness doctrine was abused for partisan purposes.

In 1962 the nuclear test ban treaty favored by President John F. Kennedy’s administration was a hot-button topic, one that was “under sustained attack from conservative broadcasters across the country.”¹⁵¹ One strategy used by the administration and the Democratic National Committee (DNC) to “counter the radical right” was a campaign of targeted fairness doctrine complaints against opponents of the treaty.¹⁵² The complaints were made by the Citizens Committee for a Nuclear Test Ban Treaty, an organization established and funded by the DNC. The committee organized a campaign wherein someone demanded free reply time whenever a broadcaster denounced the treaty on-air. Whether this effort successfully intimidated conservative broadcasters is impossible to measure, but the United States Senate eventually ratified the treaty.¹⁵³

Two years later, during the 1964 presidential campaign, Democratic interests implemented a successful strategy that took advantage of the cost of responding to fairness doctrine demands and the peculiar economics of radio. While the large national networks dominated the airwaves, a number of smaller operations still produced programming, including conservative opinion programming, and bought airtime on small stations on a cash basis. Democrats believed they could exploit the financial impotence of these stations.¹⁵⁴ An influential book on this subject quoted a Kennedy administration official on the effort: “Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters in the hope that the challenges would be

149. 395 U.S. 367 (1969).

150. *See id.* at 375.

151. Hazlett & Sosa, *supra* note 93.

152. *Id.* (quoting FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* 33 (Random House 1976)).

153. *Id.*

154. *Id.*

so costly to them that they would be inhibited and decide it was too expensive to continue.”¹⁵⁵

To implement this plan, Democrats formed a “professional listening post” to monitor conservative broadcasters.¹⁵⁶ At the same time, the DNC prepared a fairness doctrine kit, to be distributed at party conferences, that explained the formal requirements for demanding free airtime. Nationwide, this effort generated over one thousand demand letters to radio stations, and Democrats received more than sixteen hundred hours of free airtime.¹⁵⁷

Part of the DNC’s strategy to exploit the fairness doctrine led to the *Red Lion* litigation. During the 1964 campaign, the DNC funded the literary efforts of author Fred Cook, who published “Hate Clubs of the Air,” an article critical of conservative broadcasters.¹⁵⁸ A DNC staffer later recalled that the committee mailed thousands of copies of the article to radio stations together with a letter threatening demands for free air time when stations carried conservative commentary.¹⁵⁹ The same year, Cook wrote a book critical of Republican presidential candidate Barry Goldwater entitled *Goldwater-Extremist on the Right*.¹⁶⁰

The DNC ensured the publication of Cook’s book by preordering fifty thousand copies, and it was listening on November 27, 1964, when the Reverend Billy James Hargis responded to the book on his *Christian Crusade* radio program.¹⁶¹ One of the stations that broadcast the program was Pennsylvania’s WGCB, licensed to the Red Lion Broadcasting Company (Red Lion). In the program, Hargis lobbed a variety of charges at Cook.¹⁶² According to Hargis, Cook (1) had been fired by the *New York World Telegram* for falsely accusing a New York City official; (2) then worked for *THE NATION*, a “scurrilous publication[] of the left which . . . championed many communist causes”; (3) had penned “an article absolving Alger Hiss of any wrong doing”; and (4) “wrote the book [*Goldwater—Extremist on the Right*] to smear and destroy Barry Goldwater.”¹⁶³ The DNC helped Cook demand free reply time pursuant to the fairness doctrine’s personal attack component. Red Lion refused after a series of letters between it, Cook, and the FCC. In 1965

155. *Id.* (misquoted in original) (quoting FRIENDLY, *supra* note 152, at 39).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Red Lion*, 395 U.S. at 371; Hazlett & Sosa, *supra* note 93.

161. *Red Lion*, 395 U.S. at 371; Hazlett & Sosa, *supra* note 93.

162. *Red Lion*, 395 U.S. at 371.

163. *Id.* at 371 & n.2.

the FCC formally declared that Red Lion's refusal violated the fairness doctrine, and the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision in 1967.¹⁶⁴

Shortly after the FCC's formal decision against Red Lion, the agency proposed new rules to clarify two components of the fairness doctrine: the "personal attack" and "licensee editorial" rules. The final version of the personal attack rule essentially required broadcasters to take affirmative steps to offer free reply time to individuals who were attacked on-air. If a licensee editorialized in support of or against a candidate for office, the licensee editorial rule required similar affirmative steps to offer free time to the other candidates for that office.¹⁶⁵ After the FCC adopted the new rules in 1967, the Radio Television News Directors Association (RTNDA) challenged them on First Amendment grounds. In 1968, the United States Court of Appeals for the Seventh Circuit held that the rules unconstitutionally abridged the freedoms of speech and the press.¹⁶⁶

In *Red Lion*, Justice White's opinion for a unanimous Supreme Court was a consolidated resolution of the Red Lion and RTNDA cases.¹⁶⁷ For the first time, the Court addressed whether the scarcity rationale, earlier held to be a sufficient constitutional justification for denying access to the airwaves under the FCC licensing scheme,¹⁶⁸ could justify federal regulation of the *content* of broadcasts.¹⁶⁹ Based on reasoning that "applies generally to political broadcasting regulation" today,¹⁷⁰ the Court held that the specific application of the fairness doctrine against Red Lion and the new rules promulgated by the FCC were both constitutional because they "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."¹⁷¹ Justice White based his conclusion on the scarcity rationale:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole

164. *Id.* at 371-73; Hazlett & Sosa, *supra* note 93.

165. *Red Lion*, 395 U.S. at 373-75. While these rules were specific components of the larger fairness doctrine and required balance to be achieved by time offered to the specific person attacked (generally, the doctrine allowed licensees to decide who would present opposing viewpoints), the Supreme Court held that this was no "critical distinction" for constitutional purposes. *Id.* at 378-79.

166. *Id.* at 373.

167. *See id.* at 369-71, 401.

168. *Nat'l Broad. Co.*, 319 U.S. at 226-27; *TRAC*, 801 F.2d at 506 n.2.

169. *See Red Lion*, 395 U.S. at 375.

170. *TRAC*, 801 F.2d at 506 & n.1.

171. *Red Lion*, 395 U.S. at 375.

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. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.¹⁷²

In dicta, however, Justice White acknowledged the argument that the fairness doctrine might discourage broadcasters from covering controversial issues because of the cost of responding to fairness doctrine complaints.¹⁷³ While Justice White concluded that “[t]he fairness doctrine in the past has had no such overall effect,” he suggested that the doctrine might be later held unconstitutional if it reduced the quantity and quality of political coverage.¹⁷⁴ This came to be called the “chilling effect” of the fairness doctrine, and despite Justice White’s finding to the contrary, it may have started even before the Court decided *Red Lion*.¹⁷⁵

Cook’s fairness doctrine challenge did more than just get the author time to respond to Hargis. The majority of stations that had previously carried Hargis’s program removed him from their schedules, and Hargis said years later that many stations were still afraid to air his commentary.¹⁷⁶ In one sense, the fairness doctrine in this case enhanced the speech available to the public; it ensured access to Cook’s views on the same stations that broadcast Hargis’s criticism. More importantly, the fairness doctrine and the *Red Lion* litigation created disincentives that dulled political content on the radio in the future. Licensees could air controversial political programming, even presenting more than one side, and face the possibility of costly litigation. The more attractive alternative was to avoid controversy altogether by airing neither Hargis’s nor Cook’s views, nor any other controversial viewpoint. This effect is exactly what Justice White could not find, and the FCC recognized its existence years later.¹⁷⁷

Misuse of the fairness doctrine for partisan purposes was not limited to Democratic administrations or to small broadcasters not affiliated with the major national networks. In fact, President Richard Nixon’s administration directly targeted CBS, NBC, and ABC by wielding fairness doctrine threats, actual complaints, and FCC license renewal challenges to gain leverage over network executives and to encourage

172. *Id.* at 390.

173. *See id.* at 392-93.

174. *See id.* at 393.

175. Hazlett & Sosa, *supra* note 93.

176. *Id.* & n. 41.

177. *Id.*; *see infra* notes 208-224 and accompanying text.

more favorable news coverage.¹⁷⁸ Beginning in September 1970, a Nixon administration official met informally but regularly with the chairman or president of each of the three major networks in an effort “to directly intimidate broadcast executives in the hope that they would eventually tone down the unfavorable coverage of the administration by their news units.”¹⁷⁹ At the same time, the administration organized a campaign to challenge the license renewal applications of unfriendly broadcasters, including several television stations owned by the *Washington Post*, the newspaper that published highly critical coverage of the Watergate scandal.¹⁸⁰ The Nixon staffers’ success in greatly increasing the cost of the licensing procedures for the *Post*’s television stations showed that misuse of the fairness doctrine could reach beyond the broadcasting industry to editorial decision-makers at newspapers.¹⁸¹ However, the FCC’s broad power and the potential for abuse of the fairness doctrine reached a high-water mark during the Nixon administration. Just four years after *Red Lion*, the Supreme Court issued an opinion that began the process of whittling away at the FCC’s power over political programming.

In 1973 the Court held in *Columbia Broadcasting System v. Democratic National Committee*¹⁸² that nothing in the United States Constitution or the public interest standard required broadcast licensees to accept paid editorial advertisements on controversial issues.¹⁸³ In the fairness doctrine context, however, the most notable words came from the dissent. Justice Brennan, who joined the unanimous *Red Lion* opinion, expressly recognized the effect on nonmainstream viewpoints of the doctrine he had voted to uphold:

Under the Fairness Doctrine, the broadcaster is required to present only “representative community views and voices on controversial issues” of public importance. Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those “views and voices” that are already established, while failing to provide for exposure of the public to those “views and voices” that are novel, unorthodox, or unrepresentative of prevailing opinion.¹⁸⁴

178. Hazlett & Sosa, *supra* note 93.

179. *Id.*

180. *Id.*

181. *Id.*

182. 412 U.S. 94 (1973).

183. *See id.* at 121-32.

184. *Id.* at 190 (Brennan, J., dissenting) (quoting *In Re Democratic Nat’l Comm.*, 25 F.C.C.2d 216, 222 (1970)).

Nearly fifty years after Congress set out to silence improper views on the airwaves, the Supreme Court, or at least part of it, had finally taken notice. In the mid-1970s, the fairness doctrine's long decline began.

4. 1974: The FCC and the Supreme Court Create More Questions Than Answers. In 1974 the FCC itself implicitly recognized Justice Brennan's point in his dissent in *Columbia Broadcasting System* in a major report evaluating the fairness doctrine and providing a detailed explanation of its requirements.¹⁸⁵ In the section of the report that explained licensees' obligation to make a reasonable effort to present opposing viewpoints (the second prong), the FCC cautioned, "The broadcast[er] should be alert to the possibility that a particular issue may involve more than two opposing viewpoints," but also explained that "the broadcaster . . . is not expected to present the views of all political parties no matter how small or insignificant."¹⁸⁶ Instead, the FCC implicitly concluded that the public interest and the public's First Amendment right to hear opposing viewpoints on the airwaves only required licensees to make "a good faith effort to identify the *major* viewpoints"¹⁸⁷ and a "determination as to which shades of opinion are of *sufficient public importance* to warrant coverage."¹⁸⁸ Therefore, those with unpopular viewpoints had no way to demand a license to broadcast and no enforceable right to be represented on someone else's station; the public's right to listen to "proper" views trumped the right to speak "improper" views.

Also in 1974, the Supreme Court confronted a First Amendment case that differed in principle from *Red Lion* only in that it involved print media instead of broadcast media.¹⁸⁹ This time the Court strongly reinforced the traditional First Amendment principle that the government cannot regulate the content of political speech in print media, in effect drawing a stark line between print and broadcast media.¹⁹⁰

In *Miami Herald Publishing Co. v. Tornillo*,¹⁹¹ a Florida statute required newspapers that printed attacks on candidates for political office to either provide reply space equal to the space consumed by the

185. See *In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974) [hereinafter 1974 Fairness Report].

186. *Id.* at 14, 15.

187. *Id.* at 15.

188. *Id.* (emphasis added).

189. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

190. *Id.* at 258.

191. 418 U.S. 241 (1974).

attack or face criminal charges.¹⁹² This rule was indistinguishable in principle from the similar component of the fairness doctrine and had been in place since 1913. When the *Miami Herald* newspaper printed an attack on Pat Tornillo, a candidate for the Florida House of Representatives, he went to court and sought to have the Florida statute enforced against the newspaper.¹⁹³

The case made its way to the Florida Supreme Court, which decided, using reasoning eerily similar to the *Red Lion* opinion, that the statute did not violate the First and Fourteenth Amendments.¹⁹⁴ The Florida court held that the statute enhanced speech and “furthered the ‘broad societal interest in the free flow of information to the public.’”¹⁹⁵ In a unanimous opinion by Chief Justice Burger, the United States Supreme Court held the statute unconstitutional.¹⁹⁶

Chief Justice Burger took lengthy notice of the argument that the purpose of the First Amendment—a true marketplace of ideas—could only be vindicated in the modern world by a right of access to the press because media ownership was highly concentrated and publishing one’s opinions had a prohibitively high cost.¹⁹⁷ This argument was in principle indistinguishable from the rationale underlying the fairness doctrine and the Court’s decision in *Red Lion*.¹⁹⁸ The tension between *Red Lion* and *Tornillo* sparked many academic efforts to explain, defend, or decry the Court’s reasoning,¹⁹⁹ but the importance of *Tornillo* within the scope of this Article is that the Court made a constitutional distinction between broadcast political speech (protected only by the FCC) and all other forms of political speech (protected by strict application of the First Amendment). The importance of the distinction, and the reasoning—or lack thereof—behind it, was greatly reduced in the 1980s when the FCC repealed the fairness doctrine.

192. *Id.* at 247.

193. *Id.* at 243-44.

194. *Id.* at 245. The Florida Supreme Court held that the statute was constitutional because “free speech was enhanced and not abridged by the Florida right-of-reply statute.” *Id.* (quoting *Tornillo v. Miami Herald Publ’g Co.*, 287 So. 2d 78, 82 (Fla. 1973)).

195. *Id.* (quoting *Tornillo*, 287 So. 2d at 82).

196. *Id.* at 258.

197. *See id.* at 247-54.

198. *See supra* notes 167-172 and accompanying text.

199. *See* William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539, 547 & n.49 (1978) (citing many articles discussing *Red Lion* and *Tornillo*).

C. 1987-Present: *The Marketplace of Ideas*

A variety of forces combined in the late 1970s to make the fairness doctrine, and many other restrictive FCC policies, increasingly unpopular. The general deregulatory atmosphere and the recent abuses of the fairness doctrine and FCC licensing authority led politicians from both major parties to favor dialing back the heavy federal grip on the airwaves.²⁰⁰ However, the “sea change” really began when President Reagan’s first three FCC appointments took office in 1981.²⁰¹ The FCC, under Chairman Mark Fowler,²⁰² “reject[ed] the viability of regulation,” and instead began to “advocate[] a reliance on marketplace forces to achieve public interest goals.”²⁰³ The 1981 FCC report and order *In re Deregulation of Radio*²⁰⁴ made a variety of changes that significantly reduced the regulatory burden on broadcasters,²⁰⁵ but the FCC still believed that Congress had codified the fairness doctrine with the 1959 amendments to the equal-time rule.²⁰⁶ Thus, as early as 1981, the FCC called on Congress to repeal the fairness doctrine by statute.²⁰⁷

1. The 1985 Fairness Report. In 1984 the FCC began a formal evaluation of the fairness doctrine. It heard testimony from broadcasters, including household names such as CBS anchorman Dan Rather and *Meet the Press* moderator Bill Monroe, suggesting that the fairness doctrine dulled political coverage in broadcast news. Specifically, Rather testified about his experiences transitioning from newspaper to broadcast.²⁰⁸ In the broadcast newsroom, “[n]ot only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders.”²⁰⁹ Rather also recalled “newsroom conversations about what the FCC implications of

200. Hazlett & Sosa, *supra* note 93. Henry Geller, a Carter administration official who had previously been a strong advocate of federal content controls, later said, “[B]ehavioral regulation sucks. The one thing that works is competition.” *Id.* n.56 (quoting *Who’s Who: Who Are You Gonna Call? Here Are the Bell Ringers.*, NAT’L L.J., May 1, 1995, at A24).

201. *Id.*; FCC List, *supra* note 91.

202. FCC List, *supra* note 91.

203. Hazlett & Sosa, *supra* note 93.

204. 84 F.C.C.2d 968 (1981).

205. Hazlett & Sosa, *supra* note 93.

206. *See TRAC*, 801 F.2d at 517-18.

207. *Ark. AFL-CIO v. FCC*, 11 F.3d 1430, 1434 (8th Cir. 1993).

208. Hazlett & Sosa, *supra* note 93; 1985 Fairness Report, 102 F.C.C.2d at 171 & n.102.

209. 1985 Fairness Report, 102 F.C.C.2d at 171.

broadcasting a particular report would be.”²¹⁰ Monroe said that television station managers “were a little afraid of government . . . [and] conscious of government looking over their shoulder.”²¹¹

Considering this and other evidence about broadcast and nonbroadcast news sources, the FCC concluded in its 1985 Fairness Report²¹² that “the public [interest] in viewpoint diversity is fully served by the multiplicity of voices in the marketplace.”²¹³ The FCC found that the first prong of the fairness doctrine, requiring coverage of controversial issues, had little effect because licensees had wide latitude in deciding how to comply.²¹⁴ Most importantly, however, the FCC found that the second prong of the fairness doctrine, requiring presentation of opposing viewpoints, had a chilling effect on news coverage because the cost of responding to fairness doctrine demands and complaints and the threat of losing a broadcasting license made any programming on a controversial subject a financial liability.²¹⁵ Therefore, the FCC concluded that the doctrine disserved the public interest because “in net effect the fairness doctrine often discourages the presentation of controversial issue programming.”²¹⁶

Notably, after nearly sixty years of suppressing improper viewpoints with its policies, the FCC finally explicitly recognized what Justice Brennan saw in 1973. Part of the evidence that led the FCC to conclude that the second prong of the fairness doctrine had a chilling effect concerned nonmainstream viewpoints; specifically, the report outlined two ways in which the doctrine chilled the presentation of “unorthodox, unpopular, or unestablished” viewpoints.²¹⁷

The FCC first recognized, quoting its 1974 Fairness Report, that the fairness doctrine only required the presentation of “‘major’ or ‘significant’ opinions,” and “inexorably favor[ed]” the former as a matter of policy.²¹⁸ The regulatory distinction between major viewpoints and not-so-major viewpoints obligated broadcasters to label opinions before deciding what to broadcast, allowing them to discard unpopular opinions.²¹⁹ Necessarily, then, any fairness complaint against the broadcaster required the FCC to perform “the dangerous task of evaluating the

210. *Id.*

211. *Id.* at 171 n.102.

212. 102 F.C.C.2d 142 (1985).

213. *Id.* at 147.

214. Hazlett & Sosa, *supra* note 93.

215. *Id.*

216. 1985 Fairness Report, 102 F.C.C.2d at 161.

217. *Id.* at 188.

218. *Id.* (quoting 1974 Fairness Report, 48 F.C.C.2d at 15).

219. *See id.* at 188-89.

merits of particular viewpoints” to decide whether the broadcaster had acted reasonably.²²⁰ Second, the FCC recognized that its own enforcement of the doctrine had “screened out” controversial opinions “in favor of the dreary blandness of a more acceptable opinion.”²²¹ Over the years, the licensees who were subject to adverse administrative action were often those that presented more, not less, coverage of controversial issues of public importance, albeit with emphasis on less popular viewpoints.²²² In contrast, licensees that merely provided bland, minimally adequate coverage of controversial issues almost never faced adverse administrative action.²²³ The FCC concluded that to the extent the fairness doctrine favored some views over others, it disserved the public interest.²²⁴ The 1985 Fairness Report marked the first time in the history of federal broadcasting regulation that the majority of any federal adjudicatory body recognized that the fairness doctrine completely stripped First Amendment protection (in the broadcast media) from unorthodox and unpopular viewpoints.

Despite its conclusions, the FCC did not purport to repeal the fairness doctrine because (1) it believed Congress might have codified the doctrine in the 1959 amendments to 47 U.S.C. § 315²²⁵ and (2) it did not believe that it should repeal the doctrine unilaterally because of the “intense Congressional interest” in the doctrine at the time.²²⁶ The 1985 Fairness Report instead set the table for the series of court of appeals cases that ultimately allowed the FCC to return to, and overturn, the fairness doctrine.

2. *Telecommunications Research & Action Center v. FCC.* The first of three decisions by the United States Court of Appeals for the District of Columbia Circuit that cleared the way for the FCC to repeal the fairness doctrine was *Telecommunications Research & Action Center v. FCC (TRAC)*.²²⁷ In this 1986 case, Judge Bork wrote for himself and

220. *Id.* at 189.

221. *Id.* (quoting *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 78 (D.C. Cir. 1972) (Bazelon, C.J., dissenting)).

222. *Id.* The report cited cases where the FCC had made adverse licensing decisions for an evangelist station and a station that presented segregationist views. *Id.* at 189 nn.168-69. The report also cited “Fighting Bob” Schuler’s case. *See id.*; *see also supra* notes 105-115 and accompanying text.

223. *See* 1985 Fairness Report, 102 F.C.C.2d at 189.

224. *Id.* at 190.

225. Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (1959).

226. 1985 Fairness Report, 102 F.C.C.2d at 246-47.

227. 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

then-Judge Scalia²²⁸ as the majority of a three-judge panel that held the 1959 amendments to the Communications Act of 1934 did not codify the fairness doctrine, removing the statutory barrier to an executive repeal of the doctrine.²²⁹

TRAC grew out of the FCC's decision about whether to apply the fairness doctrine to a new technology called "teletext," which allowed televisions to display menus and screens of text which were broadcast over the same airwaves as television signals.²³⁰ *TRAC* presented two questions: (1) whether the statutory access and equal time provisions applicable to broadcasts applied to teletext services and (2) whether Congress codified the fairness doctrine in 1959 (and therefore it applied to teletext services), or alternatively whether the doctrine should apply to teletext anyway.²³¹ The FCC concluded that neither statutory provision applied. Most importantly, the FCC concluded that the fairness doctrine had not been codified by the 1959 amendments, and that it was therefore free to decline to apply the fairness doctrine to teletext services if the rationale for the doctrine did not extend to the newer technology. Unsurprisingly, given the 1985 Fairness Report criticizing the doctrine, the FCC concluded that the principles underlying the constitutionality of the fairness doctrine as applied to traditional broadcasts (the permissive *Red Lion* standard) did not apply to teletext. Instead, it found that teletext was analytically a print medium governed by the strict *Tornillo* standard and declined to apply the doctrine to the new technology to avoid arguable unconstitutionality.²³²

Judge Bork agreed with the FCC, holding that Congress had never codified the fairness doctrine.²³³ However, Judge Bork disagreed with the FCC's conclusion that the rationale underlying the constitutionality of the fairness doctrine in traditional broadcasting did not apply to teletext technology.²³⁴ The court of appeals held that because teletext

228. President Reagan elevated then-Judge Scalia to the Supreme Court in 1986, and he was sworn in just one week after the opinion in *TRAC* was issued. Supreme Court Historical Society, *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf>. Judge Bork was nominated for the Supreme Court by President Reagan in 1987, but he was not confirmed by the United States Senate, which expressed much concern about his ideological positions. HENRY B. HOGUE, SUPREME COURT NOMINATIONS NOT CONFIRMED, 1789-2007 15 (Congressional Research Service 2008), available at <http://www.fas.org/sgp/crs/misc/RL31171.pdf>.

229. *TRAC*, 801 F.2d at 517-18.

230. *Id.* at 502.

231. *Id.* at 502-03.

232. *Id.* at 503-06.

233. *Id.* at 517-18.

234. *See id.* at 506-09.

was clearly transmitted on the scarce broadcast spectrum, it had to fall on the *Red Lion* side of the First Amendment line, however indefensible the rationale for that line might be.²³⁵ Even though the FCC lost this case, the first major barrier to repealing the fairness doctrine was removed when the court of appeals held that the doctrine was not statutory law; as the FCC's own administrative creation, the doctrine was subject to reconsideration by the FCC itself.²³⁶ In a footnote, Judge Bork paved the way for clearing the other barrier identified in the 1985 Fairness Report: the FCC's authority to find that the doctrine was unconstitutional under *Red Lion* because of a chilling effect on free speech.²³⁷

3. *Meredith Corp. v. FCC.* In 1987 in *Meredith Corp. v. FCC*,²³⁸ the District of Columbia Circuit removed the final barrier stopping the FCC from repealing the fairness doctrine when it resolved a case that began long before either the *TRAC* opinion or the 1985 Fairness Report were issued. In 1982 New York television station WTVH, owned by Meredith Corporation (Meredith), broadcast advertisements by a group favoring the construction of a nuclear power plant. Syracuse Peace Council (SPC), a group opposed to the plant, made a fairness doctrine complaint to the FCC when Meredith refused to allow it free reply time. In December 1984 the FCC held that Meredith had violated the fairness doctrine.²³⁹

While Meredith's motion for reconsideration based on a new argument that the doctrine was unconstitutional was still pending almost a year later, the FCC released the 1985 Fairness Report, calling into question the constitutionality of the doctrine.²⁴⁰ However, two months after issuing the report, the FCC denied Meredith's motion for reconsideration and declined to rule on its constitutional argument because "Congress and the courts are more appropriate venues for reacting to the constitutional questions."²⁴¹ The court of appeals held that the FCC was required to consider Meredith's constitutional argument, or alternatively, to consider whether the fairness doctrine still served the public interest.²⁴² Thus, the court of appeals set the table for the FCC to repeal the fairness doctrine.

235. *Id.* at 509.

236. *See Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987).

237. *TRAC*, 801 F.2d at 509 n.5.

238. 809 F.2d 863 (D.C. Cir. 1987).

239. *Id.* at 865-66.

240. *Id.* at 866-67.

241. *Id.* at 867-68.

242. *Id.* at 874.

4. *Syracuse Peace Council v. FCC*. Now court-ordered to consider the constitutionality of the fairness doctrine, or at least whether it continued to serve the public interest, the FCC in 1987 repealed the doctrine as contrary to the public interest, “[a]lthough [it] somewhat entangled its public interest and constitutional findings.”²⁴³ The FCC concluded, “[T]he fairness doctrine chills speech and . . . under existing Supreme Court precedent, as set forth in *Red Lion* . . . contravenes the First Amendment and thereby disserves the public interest.”²⁴⁴ This language sounded a lot like a finding that the doctrine was unconstitutional, but as the court of appeals noted, the FCC was permitted to consider constitutional values as part of the public interest calculation.²⁴⁵ After all, promoting the First Amendment value of free speech was the original justification for the fairness doctrine; it made those lucky few with broadcast licenses public trustees charged with vindicating the public’s constitutional right to a diverse array of viewpoints on the airwaves.²⁴⁶ However, the FCC simply concluded that the chilling effect of the doctrine deprived the public of the diversity that it would otherwise have access to.²⁴⁷

The court of appeals recognized that the FCC was free to repeal the doctrine as contrary to the public interest so long as its decision was not arbitrary or capricious.²⁴⁸ This is an important point; the court of appeals did not necessarily agree with the FCC’s reasoning for repealing the doctrine.²⁴⁹ It simply concluded that the FCC’s decision met the minimum standard for an executive agency’s change of position on a matter of policy.²⁵⁰ Thus, after sixty years with its fingers in the political-content pie, the executive branch backed away, licked its fingers, and set broadcasters free. But the story of the fairness doctrine did not end with the withdrawal of the FCC. Congress, a distant observer of the executive branch’s forays into speech content for most of the twentieth century, quickly (but unsuccessfully) tried to step in after *Syracuse Peace Council*, and there have been similarly unsuccessful congressional efforts to reinstate the fairness doctrine ever since.

243. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 655-56 (D.C. Cir. 1989).

244. *Id.* at 657 (quoting *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5057 (1987)).

245. *See id.* at 658.

246. *See id.*

247. *Id.* at 659.

248. *Id.* at 657.

249. *See id.*

250. *See id.* at 669.

5. Efforts to Reinstate the Fairness Doctrine. Soon after the FCC's decision to repeal the fairness doctrine, Congress passed the Fairness in Broadcasting Act of 1987.²⁵¹ This legislation would have reinstated the fairness doctrine by statute, but President Reagan vetoed the bill.²⁵² In a stern rebuke of the Senate accompanying his veto, President Reagan highlighted the upside-down constitutional theory behind the fairness doctrine:

In any other medium besides broadcasting, such Federal policing of the editorial judgment of journalists would be unthinkable. The framers of the First Amendment, confident that public debate would be freer and healthier without the kind of interference represented by the "fairness doctrine," chose to forbid such regulations in the clearest terms: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

. . . .
 . . . [W]e must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum *as a whole*, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.

[The Fairness in Broadcasting Act] simply cannot be reconciled with the freedom of speech and the press secured by our Constitution. It is, in my judgment, unconstitutional.²⁵³

During the next administration, another attempt to reinstate the fairness doctrine faltered when President George H. W. Bush threatened a veto.²⁵⁴ However, congressional enthusiasm for the discredited policy has not abated. More recently, the Media Ownership Reform Act of 2005,²⁵⁵ sponsored by sixteen members of Congress, would have reinstated the doctrine,²⁵⁶ but President George W. Bush threatened

251. S. 742, 100th Cong. (1987); H.R. 1934, 100th Cong. (1987).

252. Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715, 715-16 (June 19, 1987).

253. *Id.* (quoting U.S. CONST. amend. I.).

254. *Bush no fan of Fairness Doctrine*, WORLDNETDAILY, July 21, 2007, http://www.wnd.com/news/article.asp?ARTICLE_ID=56778 (briefly noting that the first President Bush threatened to veto in 1991).

255. H.R. 3302, 109th Cong. (2005).

256. *See id.* § 3 ("A broadcast licensee shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The enforcement and application of the requirement imposed by this subsection shall be consistent with the rules and policies of the [Federal Communications] Commission in effect on January 1, 1987.").

to follow in his father's footsteps and veto any such attempt.²⁵⁷ At present, all efforts to reinstate the fairness doctrine by statute have failed, but such efforts are far from over.

III. THE FAIRNESS DOCTRINE IN THE TWENTY-FIRST CENTURY

A. Congressional Desire to Reinstate the Fairness Doctrine Despite the recognition by many that the fairness doctrine failed to encourage robust and balanced political debate and all but eliminated the First Amendment's²⁵⁸ protections for nonmainstream viewpoints in broadcasting, and despite the failure of all previous congressional efforts to reinstate the doctrine, the idea still has support at the highest levels in Congress. Within the past two years at least three high-ranking Democrats—House Speaker Nancy Pelosi, former presidential candidate Senator John Kerry, and Senator Richard Durbin—have expressed support for reinstating the doctrine.²⁵⁹ In June 2008 a member of Barack Obama's presidential campaign staff said that Obama opposed any effort to reinstate the doctrine,²⁶⁰ but this gave little comfort to those who oppose the policy.²⁶¹

Republicans are particularly fearful of a revival of the fairness doctrine.²⁶² A slightly absurd May 2008 news story illustrates the serious effect that a reinstated fairness doctrine is intended to—and probably would—have on commercial talk radio. In Aspen-Pitkin County Airport in Aspen, Colorado, passengers are greeted by a rotation

257. John Eggerton, *President Says He Would Veto Fairness-Doctrine Imposition*, BROAD. & CABLE, March 11, 2008, <http://www.broadcastingcable.com/article/CA6540224.html>.

258. U.S. CONST. amend. I.

259. John Gizzi, *Pelosi Supports 'Fairness Doctrine'*, HumanEvents.com, June 25, 2008, <http://www.humanevents.com/article.php?id=27185>; John Eggerton, *Kerry Wants Fairness Doctrine Reimposed*, BROAD. & CABLE, June 27, 2007, <http://www.broadcastingcable.com/article/CA6456031.html>; Alexander Bolton, *GOP Preps for Talk Radio Confrontation*, THE HILL, June 27, 2007, <http://thehill.com/leading-the-news/gop-preps-for-talk-radio-confrontation-2007-06-27.html>.

260. John Eggerton, *Obama Does Not Support Return of Fairness Doctrine*, BROAD. & CABLE, June 25, 2008, <http://www.broadcastingcable.com/article/CA6573406.html>.

261. See Brian C. Anderson, *Dems Get Set to Muzzle the Right*, N.Y. POST, Oct. 20, 2008, http://www.nypost.com/seven/10202008/postopinion/opedcolumnists/dems_get_set_to_muzzle_the_right_134399.htm?page=0; George F. Will, Editorial, *McCain's Closing Argument*, WASH. POST, Sept. 18, 2008, at A21, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/17/AR2008091702975.html>.

262. See, e.g., Protect Fairness—Fight the Fairness Doctrine, <http://www.protectfairness.com>.

of celebrity recordings over the airport's public address system.²⁶³ Pat Bingham, Pitkin County's community relations coordinator, was excited to add to the rotation a recording from a celebrity she met at a party in 2007.²⁶⁴ "Hello, this is Sen. [sic] John McCain. Effective immediately, the Transportation Security Administration has limited the items you may take on board the aircraft. Please see a TSA representative for more information."²⁶⁵

Predictably, a passenger complained that the airport was endorsing Senator McCain's presidential campaign by playing the recording, despite its decidedly nonpolitical content.²⁶⁶ The airport removed Senator McCain's recording from the rotation instead of risking more complaints; as Bingham said, the county "didn't want to offend anyone."²⁶⁷ Bingham regretted that she had not foreseen the problem: "I should have gotten Hillary Clinton and Barack Obama to do one. Then it would have been equal time."²⁶⁸ Instead, Aspen visitors who arrive by air have to make do with (presumably) non-offensive celebrities. This result—officials deciding not to air any controversial viewpoints because they fear costly demands of equal access from the other side—is exactly the result Republicans fear a reinstated fairness doctrine is intended to have on talk radio.²⁶⁹

For their part, some Democrats have bolstered this fear. Representative Louise Slaughter, who sponsored the 2005 bill to reinstate the fairness doctrine, said of conservative talk radio, "[It is] a waste of good broadcast time, and a waste of our airwaves."²⁷⁰ Al Franken, former talk show host and possibly the next United States Senator from

263. Mike McPhee, *Aspen Airport Grounds its McCain Hello*, DENVER POST, May 7, 2008, http://www.denverpost.com/headlines/ci_9174512. The airport had a diverse collection of celebrity recordings, including actors, musicians, athletes, a famous yodeler, and local elected officials. Deb Stanley, *Is That McCain's Voice on the Airport Speaker?*, TheDenverChannel.com, May 6, 2008, <http://www.thedenverchannel.com/news/16175931/detail.html?rss=den&psp=news>.

264. Stanley, *supra* note 263.

265. McPhee, *supra* note 263.

266. See Don Frederick, *John McCain Gets Muted in Aspen*, L.A. TIMES, June 5, 2008, <http://latimesblogs.latimes.com/washington/2008/06/john-mccain-get.html>.

267. *Id.*

268. *Id.*

269. See Stephanie Mencimer, *Are the Dems Plotting to Hush Rush?*, MOTHER JONES, Nov. 11, 2008, http://www.motherjones.com/washington_dispatch/2008/11/democrats-rush-limbaugh-fairnessdoctrine.html.

270. Joseph Klein, *Hillary and the Fairness Doctrine*, FRONT PAGE MAGAZINE, Jan. 22, 2007, <http://www.frontpagemag.com/Articles/Read.aspx?GUID=020587bb-8256-4c27-bcb7-7bc64ee75a3e>.

Minnesota,²⁷¹ said, “You shouldn’t be able to lie on the air You can’t utter obscenities in a broadcast, so why should you be able to lie? You should be fined for lying.”²⁷² Democratic Senator Dianne Feinstein recently said, “[T]alk radio tends to be one-sided. It also tends to be dwelling in hyperbole. It’s explosive. It pushes people to, I think, extreme views without a lot of information.”²⁷³ Of course, these comments all stem from the 800-pound gorilla in the room—the conventional wisdom that since the FCC abolished the fairness doctrine in 1987, talk radio has been dominated by Republican or conservative viewpoints²⁷⁴ and Democrat or liberal radio programming does not attract large audiences.²⁷⁵ This perception might not be entirely true,²⁷⁶ but it clearly motivates much of the mainstream support for and opposition to reinstating the fairness doctrine.

Apart from partisan politics, however, the more important point is that the sentiments expressed by Senator Feinstein, Representative Slaughter, and Al Franken reflect the same attitude toward freedom of speech that the Progressives of the 1920s had when they crafted the federal regulatory scheme and the public interest standard: that the federal government can and should identify improper political speech and keep it off the airwaves.²⁷⁷ Many of today’s leaders seem to have taken as a given that the FCC—armed with a new fairness doctrine—will silence broadcasters who are politically unbalanced, inflammatory, or just sharply critical of the status quo. This view highlights the two fundamental problems with the fairness doctrine: (1) the belief that bureaucrats are best suited to evaluate the propriety of broadcast programming and (2) the belief that they *should*. History has shown that neither is true.

The only two possible rationales members of Congress might have for reinstating the fairness doctrine are a sincere belief that the public will be better informed by an increased diversity of viewpoints on the radio

271. See Kevin Duchschere, *Senate Recount: Coleman Adds Legal Star Power to Team*, STAR TRIBUNE (Minneapolis-St. Paul), Jan. 16, 2009, <http://www.startribune.com/politics/national/senate/37722979.html?page=1&c=y>.

272. John Fund, Editorial, *‘Fairness’ is Foul*, WALL ST. J., Oct. 29, 2007, <http://www.opinionjournal.com/diary/?id=110010795>.

273. Transcript: Sens. Lott, Feinstein on ‘FOX News Sunday’, FOX NEWS, June 24, 2007, <http://www.foxnews.com/story/0,2933,286442,00.html>.

274. See Michael Medved, Editorial, *Will Talk Radio Get Wake-up Call?*, USA TODAY, Dec. 4, 2008, <http://blogs.usatoday.com/oped/2008/12/will-talk-radio.html>.

275. Jed Babbin & Rowan Scarborough, *The Unfairness Doctrine*, HUMAN EVENTS, Jan. 12, 2009, <http://www.humanevents.com/article.php?id=30238&s=rcmc>.

276. See *infra* notes 278-288 and accompanying text.

277. See *supra* notes 52-81 and accompanying text.

or a desire to reproduce the chilling effect and reduce the influence of talk radio on American politics. The fairness doctrine would serve neither purpose.

B. The Fairness Doctrine Was and Still Is Bad Public Policy

From the outset, it is important in analyzing both rationales that the conventional wisdom about the conservative dominance of talk radio may not be so wise. It is at least an oversimplification of American politics, which has many more shades than just red and blue, and it reflects a bias against non-mainstream views that would be familiar to the politicians that sought to “encourage[] mainstream political debate between Republicans and Democrats through a national medium while . . . exclu[ding] fringe candidates.”²⁷⁸ Among the twenty-five highest-rated talk radio hosts, one source suggests there are nineteen conservatives.²⁷⁹ However, on that list are one “independent conservative,”²⁸⁰ a “traditionalist,”²⁸¹ a libertarian,²⁸² and a “militant moderate,”²⁸³ some of whom might take issue with being shoe-horned into red-state America. The self-described conservatives are by no means uniform in ideology, either. Top-rated Rush Limbaugh’s²⁸⁴ criticism of Republican presidential candidate John McCain was withering at times,²⁸⁵ and third-rated Michael Savage²⁸⁶ “champions the environment and animal rights,”²⁸⁷ among other examples. The fairness doctrine always painted with broad strokes, however, and required programming directors to choose between the different opinions on public issues. The chilling effect resulted, dulling mainstream political programming and often silencing unpopular viewpoints. There is no reason to believe a

278. Goodman, *supra* note 40.

279. See BRIAN FITZPATRICK, UNMASKING THE MYTHS BEHIND THE FAIRNESS DOCTRINE 12 (Media Research Center 2008), available at http://www.cultureandmediainstitute.org/specialreports/2008/Fairness_Doctrine/CMI_FairnessDoctrine_Single.pdf.

280. The Official Home Page of Jerry Doyle, <http://www.jerrydoyle.com/site>; see FITZPATRICK, *supra* note 279, at 12.

281. Bill O’Reilly’s ‘Culture Warrior’, FOX NEWS, Oct. 3, 2006, <http://www.foxnews.com/story/0,2933,215827,00.html>; see FITZPATRICK, *supra* note 279, at 12.

282. Boortz Bio on Boortz.com, <http://boortz.com/more/bio.html>; see FITZPATRICK, *supra* note 279, at 12.

283. Jim Bohannon: Cast and Crew, <http://www.jimbohannonshow.com/pg/jsp/jimbo/castandcrew.jsp?showcrew=tjbs>; see FITZPATRICK, *supra* note 279, at 12.

284. FITZPATRICK, *supra* note 279, at 12.

285. The John McCain Legacy Project, Jan. 19, 2009, http://www.rushlimbaugh.com/home/daily/site_011909/content/01125109.guest.html.

286. See FITZPATRICK, *supra* note 279, at 12.

287. Conservative Talk Show Host Michael Savage, <http://www.michaelsavage.wnd.com/?pageId=10>.

reinstated doctrine would be any better at preserving viewpoint diversity than the original.²⁸⁸

1. The Public Would Not Be Better Informed. Justice Scalia was right.²⁸⁹ The government cannot be trusted to ensure the fairness of political debate. The fairness doctrine was a failed experiment in top-down democracy. It was supposed to enhance the people's access to the information they need to govern themselves. Instead of ensuring through regulation that broadcasters provided a broad range of viewpoints on a wide slate of controversial public issues, the fairness doctrine best served the entrenched and powerful. In other words, "The real winners were the Progressives who [were] doing the regulation."²⁹⁰ It bolstered political orthodoxy and dulled political debate by chilling controversial speech on the airwaves, denying new and different ideas a real chance at the American public's ears. There are two reasons why this chilling effect could be even stronger today.

First, the fairness doctrine was long gone before the internet and mobile communication devices came into widespread use. The Kennedy and Nixon administrations coordinated their efforts to use (or abuse) the fairness doctrine against their political enemies from the top down because there was not really another way. Administration officials worked with party officials to ensure that the general membership received the necessary phone numbers and names of licensees about whom to complain.²⁹¹

Coordinating this sort of effort would be much easier today. Technological advances have made the world a faster-moving and more interconnected place. Today there exists a more broad-based and efficient activist community that can use the doctrine to pressure broadcasters. Party officials would not have to coordinate efforts to make fairness complaints; citizens across the country could use websites, e-mail, and other instant communication methods to spread the word. And the word would spread more quickly and more widely than was ever possible in the twentieth century, allowing more partisans to join the effort.

The second reason the fairness doctrine could have an even stronger chilling effect today is the prevalence of unorthodox views and independent-minded public figures in the marketplace of ideas. The fairness doctrine previously operated in a vacuum where the only competition

288. See *supra* notes 208-224 and accompanying text.

289. See *supra* note 18 and accompanying text.

290. Goodman, *supra* note 40.

291. Hazlett & Sosa, *supra* note 93.

was print media and word of mouth. The FCC made sure no one became too outspoken on the airwaves, so the citizen looking for a different perspective had to talk to someone or locate a physical copy of a book or magazine—and that was not always a safe option for political radicals.²⁹² In the early and mid-twentieth century, it could have been fairly said that the orthodoxy was so strong, and some views truly so rare, that only a few viewpoints merited consideration on the broadcast news.

Today, however, many sources of unorthodox views can literally fall into the lap of any American with a laptop computer and an internet connection. Further, even if talk radio is predominantly conservative, a wide range of opinion on the airwaves falls outside the center-right and center-left positions of the two major parties. If the fairness doctrine is reinstated, someone (probably many people) will post instructions for making fairness doctrine complaints online. Those who hold nonmainstream viewpoints will not sit quietly on the sidelines if the broadcast media presents only two sides of every story. There will probably be fairness complaints on a level that would have been unimaginable even during the Kennedy and Nixon years. The threat of complaints through the internet alone may be enough to bring back the chilling effect and could force broadcasters into even more bland political coverage than the FCC found in 1985.

From the opposite perspective, if Republican and Democrat partisans re-acquire the ability to snipe at each other through fairness doctrine threats and complaints, they can only rationally be expected to demand equal time for their party orthodoxy. However, they very well could unite, in a perverse sense, in making fairness challenges against disloyal peers and members of third parties. Republican presidential candidate Ron Paul was no friend of either mainstream party line; he drew as much ire from fellow Republicans as from Democrats.²⁹³ United States Senator Joe Lieberman, a former Democrat, seemed less popular with his old party than President George W. Bush.²⁹⁴ With the fairness doctrine in place again, an unopposed appearance by either of these men, or many others like them, could be expected to draw fairness complaints

292. See, e.g., Anne Westbrook Green, *H. A. Allen: The Lawyer and the Man*, 16 J. S. LEGAL HIST. 152-54 (2009) (criminal charges brought against individuals for being in possession of “radical” literature).

293. See, e.g., Andrew Malcom, *Ron Paul, Dr. No-body, Beats Rudy and Fred—Again*, L.A. TIMES, Jan. 16, 2008, <http://latimesblogs.latimes.com/washington/2008/01/ronpaul-scores.html>.

294. See, e.g., Joe Conason, *Joe Lieberman, Ideological Turncoat*, SALON, May 23, 2008, <http://www.salon.com/opinion/conason/2008/05/23/liberman/>.

from both major parties. The arguments are not hard to see. Republicans might charge that Paul and Lieberman are too liberal to effectively convey the GOP's viewpoint. Democrats might contend that Lieberman left their party and that Paul was never a member. These political games—which are inevitable—could only further chill the desire of licensees to broadcast controversial programming.

2. The Chilling Effect Would Return But Might Not Weaken Conservative Talk Radio. One difference between today and the era of the fairness doctrine has such an obvious effect on the viability of the fairness doctrine that it could be easily overlooked—not seeing the forest for the trees, as it were. The growth of communication technology—from cable television to satellite television, radio to the internet, and video-on-demand services—has given broadcast journalists a choice Dan Rather did not have when he went from newspaper to television news: the opportunity to look for greener, less-regulated pastures.²⁹⁵ Even if the desire of those who support reinstating the fairness doctrine is to weaken the influence of conservative talk radio by diluting a monolithic conservative voice with others on a balanced basis, the fairness doctrine may not do it.

What will happen if the fairness doctrine succeeds in forcing radio licensees to balance their programming? There is already a good example for what happens in the radio business when a popular host is forced off the airwaves. Shock jock Howard Stern left traditional FCC-controlled broadcasting for free-speech-loving satellite radio,²⁹⁶ and not only is he still on the air, but he is now more free to air controversial programming. If conservative talk radio hosts are forced off broadcast stations by a reinstated fairness doctrine, some might relocate to satellite radio, which is largely outside the reach of federal regulators. Of course, it is possible that relocated shows might not garner similar audiences; Stern's ratings dropped dramatically after his move to satellite.²⁹⁷ However, the popularity of the conservative talk format—Rush Limbaugh has at least fourteen million listeners a week²⁹⁸—and its undeniable place in American political debate could instead contribute to rapid growth in satellite subscriber numbers, even

295. See *supra* notes 203-211 and accompanying text.

296. Howard Stern and Sirius Announce the Most Important Deal in Radio History, Oct. 6, 2004, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=PresReleAsset&cid=1097008921509>.

297. Bruce Simmons, *Is Howard Stern Still Ratings Material? Is Satellite Radio What it Could Be?*, ASSOCIATED CONTENT, Oct. 18, 2008, http://www.associatedcontent.com/article/1122301/is_howard_stern_still_ratings_material.html?singlepage=true&cat=9.

298. FITZPATRICK, *supra* note 279, at 12.

if overall audience numbers suffer. Further, those less popular viewpoints shut out by a reinstated fairness doctrine could find an audience on satellite radio, particularly if popular mainstream programs move away from traditional broadcast stations.

Whether motivated by a misunderstanding of history or an outright desire to silence political opponents, the politicians who support reinstating the fairness doctrine are likely to be disappointed. American politics might not have changed too much since the doctrine's heyday, in the sense that elected officials are still willing to say that censorship advances the freedom of speech, but the broadcasting industry and the public's access to information have changed dramatically. The fairness doctrine is no longer viable either as a tool to increase the diversity of viewpoints available to the American public or as a tool to deny the public access to disfavored political views.

C. There are Better Alternatives Than the Traditional Fairness Doctrine

Perhaps the most interesting aspect of the current debate over the wisdom of reinstating the fairness doctrine is that despite the evidence that it was a policy failure and would continue to be so, no one seems to want to change it. There are reasonable alternatives to the traditional formulation of the fairness doctrine that could avoid the problems the traditional doctrine would create if reinstated.

If one's goal is truly a reasonable balance of viewpoints available to the public, there are three problems with the current marketplace approach to broadcast speech. First, licensees driven by a pure profit motive do not present balanced programming schedules. This is so because some programs attract a bigger audience than others, and most of the programs in the former category advocate conservative positions. Licensees choose to air the programs that draw the biggest audiences and command the most advertising dollars. So long as programs presenting opposing viewpoints continue to fail to attract large audiences, there will not be any greater balance on the airwaves.

Second, under the marketplace approach, licensees do not have to manage their programming according to a profit motive, so opposing viewpoints can be excluded altogether without recourse. Some fear that concentrated radio station ownership allows partisan interests to schedule exclusively one-sided programming regardless of audience size. Whether the licensees simply make less money as a sacrifice for the cause, or are even subsidized, the public has little recourse to get opposing viewpoints on the air.

Finally, a problem related to both of the preceding points is that the current imbalance, whatever its cause, entrenches conservative

viewpoints. Ratings are undoubtedly easier to come by for established stars like Rush Limbaugh, Sean Hannity, and Bill O'Reilly. Commentators offering a different viewpoint might be equally talented and entertaining but lack the established star power that guarantees large audience figures.

The traditional fairness doctrine, no doubt, would solve these problems—at least in the sense that it would guarantee access for opposing mainstream viewpoints regardless of the relative popularity of the commentators themselves. However, the fairness doctrine comes with its own set of problems and the real possibility that the audience figures for news and talk radio will decrease dramatically. To avoid those problems but still give the public access to opposing views, regulators could borrow another idea from the world of sports: subsidization.

In college athletics, some sports generate more income (from ticket sales, merchandising, etc.) than the programs cost to operate. Other sports cost more than they generate. Thus, profitable programs such as men's football and basketball generate the funding for unprofitable sports such as tennis.²⁹⁹ The rationale for this is that the other sports offer a valuable option for the student body and a valuable experience for those who compete, and there is little reason why the same model could not be applied to political broadcasting.

The FCC could require broadcast licensees who choose to air one-sided or otherwise unbalanced political programming to simply subsidize the cost of providing the public with opposing viewpoints. The fairness doctrine required each individual station to provide balance within its own programming lineup, but that idea developed when there were just over two thousand radio stations in the entire country. Today, there are roughly twice as many Americans³⁰⁰ but nearly seven times as many radio stations—about 13,500.³⁰¹ Today, the FCC could give licensees the option of complying with the fairness doctrine on a single station or paying for a second equal-time station in the same market.³⁰²

Concerns about public awareness of the alternative station could be easily addressed by mandatory advertising, perhaps at the beginning of

299. See, e.g., Greg Wilson, *Athletics Profit as Univ. Faces Cuts*, RED AND BLACK, Oct. 8, 2008, available at <http://www.redandblack.com/news/2008/10/08/News/> (follow "Athletics profit as Univ. faces cuts" hyperlink).

300. See U.S. Census Bureau, *Historical National Population Estimates: July 1, 1900 to July 1, 1999 (2000)*, <http://www.census.gov/popest/archives/1990s/popclockest.txt>.

301. News Generation, Inc., *Radio Media Relations—Radio Facts and Figures*, http://www.newsgeneration.com/radio_resources/info.htm.

302. There may be technical objections to this proposal, but they are beyond the scope of this Article.

each commercial break on the primary station. If there is not a second frequency available in a particular market, the licensee would simply be obligated to comply with his fairness obligations on the primary station alone until he could gain the license for a second facility. Access to the second facility could be handled under the established fairness doctrine model, leaving the total balance up to the licensee's reasonable, good faith effort to comply, subject to fairness complaints.

Those who wish to bring back the fairness doctrine apparently do not wish to change it, and so this proposal does not change the underlying principle of the doctrine with which these politicians are so enamored. However, instead of imposing a doctrine that is known to chill political speech overall—and that overtly disfavors the broadcasting of unorthodox opinions—the public's right to listen to a fair variety of opposing viewpoints on the radio could be vindicated by simply allowing compliance on the aggregate programming of two stations instead of one. Then again, perhaps those politicians are like the major college football powerhouses that designed the Bowl Championship Series; they do not want to even the playing field—they want to kick everyone else off of it.

IV. CONCLUSION

There are many similarities between college football's Bowl Championship Series (BCS) and the fairness doctrine. Both systems were created in response to public concern about chaos and ineffectiveness in the old system. Football fans wanted to see a true championship game rather than split national championships, and the traditional bowl system failed to deliver more often than not. Similarly, radio listeners in the 1920s wanted more predictable signals without interference, and the right of every citizen to broadcast made that difficult. Both systems succeeded in establishing order and predictability; the two top-ranked teams play for the BCS championship every year, and broadcast radio and television are a fixture in virtually every American home because of their reliability.

However, the BCS and the fairness doctrine share a sinister quality as well. Both systems primarily benefited the powerful interests that created them. The BCS virtually guaranteed that teams from the major football conferences would play for every national championship, and the fairness doctrine guaranteed that the American people would primarily hear the mainstream views of the two major political parties on the radio.

There is, though, one very critical distinction between the two. When the BCS systematically excludes the University of Utah from the national championship game, that university misses out on some money and prestige, the players lose a chance they have earned, and college

football perhaps takes a hit to its reputation, but no one is really harmed. However, when the fairness doctrine systematically dulls political discourse and excludes unorthodox views from broadcast programming, the right to free speech in America is harmed, and our position as the bastion of freedom in an oppressive world suffers. The BCS may be the worst system for picking a college football national champion, except for all the other systems that have been tried. In contrast, the fairness doctrine is the *best* system for protecting freedom of speech, except for all the other systems that have been tried. The fairness doctrine should be left where we find it today—in the dustbin of history.

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