# THE FAIRNESS DOCTRINE: A FLAWED MEANS TO ATTAIN A NOBLE GOAL

MARVIN AMMORI*

TABLE OF CONTENTS



## INTRODUCTION

This Paper is a response to the current, but largely manufactured, controversy over whether or not to revive the long-dead Fairness Doctrine. In 2007 and 2008, right-wing radio hosts and bloggers used this controversy as a partisan wedge to detract from more pressing and timely media policy issues. The Fairness Doctrine was a regulation that the Federal Communications Commission (FCC) repealed in 1987. While in effect, the Fairness Doctrine required broadcasters (1) to devote a reasonable percentage of time to the coverage of public issues and (2) to cover these issues in a way that provides an opportunity for the presentation of contrasting points of view.[1] The Doctrine was "concerned

* Assistant Professor, University of Nebraska–Lincoln College of Law, Faculty

with controversial issues of both local and national importance."[2]

In recent months, right-wing talk radio hosts have been talking a lot about the Fairness Doctrine, claiming both that Democrats seek to reinstate the Doctrine and that the goal of such reinstatement is mainly to kill right-wing radio.[3] Indeed, one sitting FCC Commissioner decided to one-up even the right-wing shock jocks and claimed that Democrats would implement a Fairness Doctrine for Internet and new media as well as old.[4] While the talk radio hosts and disingenuous bureaucrats tell an entertaining story, neither of their claims is accurate. First, with the exception of a few comments, Democrats have not attempted to reinstate the Fairness Doctrine and have not introduced any bill to do so.[5] The 2008 Democratic presidential nominee and President-elect Barack Obama unequivocally opposes any attempt to reinstate the Fairness Doctrine.[6] Second, the Fairness Doctrine would not silence conservative radio even if it were reinstated. Accordingly, there is no conspiracy to reinstate the Fairness Doctrine or to kill talk radio. Indeed, while the Fairness Doctrine sought to advance a noble goal—ensuring public access to public information and diverse viewpoints—the Doctrine is no longer an effective means for doing so. Rather than following the lead of talk show hosts debating a doctrine repealed twenty years ago, legislators should focus on current media policies that can enhance the public's access to public information and

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Advisor, Space & Telecomm Law Program. Also serves as counsel for the consumer group Free Press.

1. *See, e.g.*, The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 48 F.C.C.2d 1, 7 (1974) (Fairness Report) (explaining broadcasters' duties under the Fairness Doctrine).

2. The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 89 F.C.C.2d 916, 925 (1982) (Memorandum Opinion and Order).

3. *See, e.g.*, James Gattuso, *Beyond Talk Radio: Fairness Doctrine Taking a Beating in Blogosphere Too*, TECHNOLOGY LIBERATION FRONT, June 28, 2007, http://techliberation.com/2007/06/28/beyond-talk-radio-fairness-doctrine-taking-a-beating-in-blogosphere-too/ (claiming that talk-radio-show hosts are against revival of the Fairness Doctrine); Michelle Malkin, *Fairness Doctrine Watch: A "Progressive" Attack on Talk Radio*, MICHELLEMALKIN.COM, June 21, 2007 (and other posts on the page), http://michellemalkin.com/2007/06/21/fairness-doctrine-watch-a-progressive-attack-on-talk-radio/ (arguing that the left wants to address the "lack of ideological diversity" in radio).

4. Posting of jstearns to Save the Internet Blog, http://www.savetheinternet.com/blog (Aug. 13, 2008, 13:34 EST); Matthew Lasar, *Fairness Doctrine Panic Hits FCC, Spreads Through Blogosphere*, ARSTECHNICA, August 17, 2008, http://arstechnica.com/news.ars/post/20080817-fairness-doctrine-panic-hits-fcc-spreads-through-blogosphere.html.

5. Just about every one of these comments can be found in SENATE REPUBLICAN POLICY COMMITTEE, THE FAIRNESS DOCTRINE: UNFAIR, OUTDATED, AND INCOHERENT 3 (2007).

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

diverse viewpoints without the drawbacks of the Fairness Doctrine.

This Paper has three primary parts. First, it rebuts the conservative messages about the Fairness Doctrine. Neither Congress nor the FCC will likely impose the Fairness Doctrine, and support for the Doctrine did not historically, and should not now, track partisan lines. Second, though the Doctrine's goals are praiseworthy, the Doctrine would be an ineffective means to attain those goals. As the Doctrine's history until 1987 shows, the Doctrine is easy to avoid, is difficult to enforce, and is at most a second-best solution. Third, as a result of its ineffectiveness, Congress and the FCC should focus on more effective means of fostering local and national public information and diversity of viewpoints, primarily by fostering responsiveness to local tastes and diverse and antagonistic sources of information. More effective means would include implementing strict ownership limits, authorizing community radio, and encouraging open, high-speed Internet access.

## I. THE FAIRNESS DOCTRINE WILL NOT BE IMPOSED AND SHOULD NOT BE PARTISAN

The Fairness Doctrine will not be readopted. The conservative buzz on this issue derives from no more than a few isolated quotes over the past several months by 5 of the 284 Democrats in Congress. Several legislators have merely suggested that they would consider or look into imposing the Fairness Doctrine,[7] but not a single legislator has introduced a bill to reinstitute the Fairness Doctrine. Indeed, the only legislative activity in this area has involved attempts by Republicans to foreclose the FCC from reinstituting the Fairness Doctrine[8]—even though Democrats had not acted to reinstitute it, and the Republican FCC chairman said he would not act to reinstitute it.[9] The current Fairness Doctrine controversy consists largely of talk radio's sound and fury about nothing.

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7. These quotations can be found, for example, on the website of Congressman Mike Pence. *See* Mike Pence, Fairness Doctrine Democrat's Quotes, http://mikepence.house.gov/ConstituentServices/democratquotes.htm (last visited Aug. 22, 2008). According to this page, several legislators believed that Nancy Pelosi and Steny Hoyer also supported reviving the Doctrine. *Id.*

8. *See, e.g.*, John Eggerton, *House Passes Amendment Disallowing Funding for Fairness Doctrine*, BROADCASTING & CABLE, June 28, 2007, http://www.broadcastingcable.com/article/CA6456430.html (explaining that the House recently passed an amendment to an appropriations bill with a 310–15 vote, which prevents any money from being spent on reviving the Fairness Doctrine).

9. *See* John Eggerton, *Martin Reinforces Opposition to Fairness Doctrine*, BROADCASTING & CABLE, July 26, 2007, http://www.broadcastingcable.com/article/CA6463549.html?rssid=193 (quoting FCC Chairman Kevin Martin's statement that he sees "no compelling reason to reinstate the Fairness Doctrine in today's broadcast environment, and believe[s] that such a step would inhibit the robust discussion of issues of public concern over the nation's airwaves").

Moreover, when the Fairness Doctrine was being enforced, it was not a partisan issue. Conservatives supported and opposed it, as did liberals. As one conservative opponent of the Doctrine has noted, "Many conservatives embraced the Fairness Doctrine during its life and even lamented its demise, viewing the doctrine as a handy club to be wielded against 'liberal' programming, especially at the network level."[10] At the same time, a wide range of liberal scholars have strongly opposed the Doctrine.[11] In 1987, the FCC voted to repeal the Doctrine by a 4–0 vote, even though only three Commissioners were Republicans. Following that vote, the Senate passed a bill reinstating the Fairness Doctrine, which was cosponsored by a Democratic Senator and a Republican Senator; the House passed an identical bill, but the legislation was ultimately vetoed.[12] Moreover, the Fairness Doctrine has received considerable support from both conservative and liberal nonprofit groups attempting to disseminate their messages.[13]

Not only has the Fairness Doctrine not historically been partisan, it should not now be a partisan issue because it formally applies to conservative and liberal programming alike. It would apply to Ed Schultz, *Democracy Now*, Pacifica, and Air America no less than it would to Rush

10. E. Brandt Gustavson, *The Fairness Doctrine: Once and Future Threat to Speech, Religion*, *in* SPEAKING FREELY: THE PUBLIC INTEREST IN UNFETTERED SPEECH; ESSAYS FROM A CONSERVATIVE PERSPECTIVE 87, 88 (1995).

11. Professors Harry Kalven, Herbert Wechsler, and Archibald Cox filed amici briefs for the broadcasters to argue that the Court should strike down the Fairness Doctrine. *See* Brief for Respondent Radio Television News Directors Ass'n, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (Mar. 22, 1969); Brief for Respondent Columbia Broadcasting System, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). Professor Laurence Tribe also believes the doctrine is unconstitutional. *See* Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, http://www.epic.org/free_speech/tribe.html (last visited Nov. 22, 2008).

Other liberal scholars have suggested the Fairness Doctrine, while not unconstitutional, is still bad policy. *See, e.g.*, Yochai Benkler, *Free Markets vs. Free Speech: A Resilient* Red Lion *and Its Critics*, 8 INT'L J.L. & INFO. TECH. 214, 214–15 (2000) (reviewing ROBERT CORN-REVERE, RATIONALES AND RATIONALIZATIONS, REGULATING THE ELECTRONIC MEDIA (1997)) (arguing that several scholars have taken aim at the Supreme Court's logic in *Red Lion*); *see also* Jack M. Balkin, *The Fairness Doctrine, Part I*, BALKINIZATION.COM, July 28, 2007, http://balkin.blogspot.com/2007/07/fairness-doctrine-part-i.html (arguing that the Fairness Doctrine is bad public policy, but is not facially unconstitutional).

12. Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 29, 1987). The Senate sponsors of the bill were John Danforth and Daniel Inouye. For a discussion of the issues underlying the opposition to the Fairness Doctrine, see Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licenses, 102 F.C.C.2d 143, 226 (1986) [hereinafter *General Fairness Doctrine Obligations*].

13. *See, e.g.*, FORD ROWAN, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 73–74 (1984) (listing the groups that are the Media Access Project's clients as an example of those that have supported the Fairness Doctrine).

Limbaugh, Sean Hannity, and Michael Savage. While AM talk radio is overwhelmingly conservative, not all FM radio and broadcast television are similarly conservative. Furthermore, programming complaints would come from liberal *and* conservative groups because groups on both sides of every issue—from gun control to abortion to the Iraq war—can file complaints. In addition to nonprofit groups, corporations can file their own complaints. That is, corporations can dispute stories discussing global warming, wages, downsizing, environmental harms, accounting fraud, or tax avoidance.[14]

Rather than being a partisan attempt to silence speech, the Fairness Doctrine should be seen as a well-intentioned, if flawed, means to ensure that the public receives diverse viewpoints in the presentation of public information.

## II. THE FAIRNESS DOCTRINE WILL NOT ACHIEVE ITS PRAISEWORTHY GOALS

If the Fairness Doctrine attempts to ensure that the listening public receive news about controversial public affairs and diverse views about that news, it is seeking to achieve praiseworthy goals. When Americans are exposed to diverse views about public matters, they can better debate policy issues, hold elected officials to account, and reach consensus on matters of vital public importance.[15]

But the Fairness Doctrine likely will not *increase* such diverse coverage for at least three reasons:[16] it is easy to avoid, it is difficult to enforce, and it is at most second-best when compared to the option of diverse speakers.

### *A. The Fairness Doctrine Is Easy to Avoid*

First, the Fairness Doctrine is easy to avoid. Because it requires ample play for diversity of views, the Fairness Doctrine would require difficult judgment calls. Much of the discretion for making those judgments must

14. *See, e.g.*, *id*. at 75–76 (discussing an aluminum company's negotiating with ABC in response to a *20/20* segment on the dangers of aluminum wiring).

15. For in-depth academic discussions, see CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xi (1993) (arguing that the First Amendment is a significant barrier to official censorship); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 29 (2001) (arguing that a market-focused information policy with highly concentrated markets comes at the significant cost of personal autonomy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (arguing that one of the four functions of speech is to spread political truths and asserting that this aspect is "different from any other form of human activity").

16. In repealing the Doctrine, the FCC concluded the Doctrine resulted in less, not more, diverse news. *See General Fairness Doctrine Obligations*, *supra* note 12, at 159 (asserting that the Fairness Doctrine may prevent a licensee from "presenting controversial issues of public importance").

be left to the broadcasters. These judgments include whether the issue is even controversial; whether a specific subissue is controversial; whether a diversity of views has indeed been presented; whether enough time for each view has been allotted; whether enough different views have been presented; and whether a local issue is important to the community. If the government makes these judgments, then government officials would play far too great a role in determining the news, in ways that would threaten private provision of the news. So broadcasters must have some considerable discretion in making these judgments to reduce the threat of government censorship.

If the broadcasters receive considerable discretion, as they did when the Fairness Doctrine was being enforced,[17] then the Doctrine is easy to avoid. The Fairness Doctrine permits the broadcaster to cover different points of view and does not generally authorize *other* people to present those views.[18] So the broadcaster controls the presentation. If a news reporter covered a controversy, that reporter could merely follow the usual journalistic ethic of seeking neutrality and objectivity in presenting both sides of a story.[19] Moreover, if the broadcaster wanted to present one view, it could undercut rival views with relative ease. The broadcast could present the rival's views itself or choose spokespersons for those views; in choosing spokespersons, it could select the least articulate, least coherent, and less (or more) extreme spokespersons, as it chose.[20]

If those imposing the Fairness Doctrine seek not to promote diverse views but to silence talk radio, the Fairness Doctrine will likely fail in that regard as well. Partisan talk show hosts would still be able to convey their views clearly, to the exclusion of other views. As Professor Jack Balkin of Yale Law School has observed, "Rush Limbaugh might have to invite a series of liberal patsies to give their views, which he could bully, make fun of, or talk past."[21] As he noted, a radio version of *Hannity and Colmes*

17. *See* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com (July 27, 2007, 19:34 EST) (quoting authors and noting that, when the Fairness Doctrine was being enforced, "surprisingly little balance [was] necessary to meet the obligation to cover all significant sides of an issue").

18. The broadcaster had to permit certain persons to advocate their views under two subdoctrines: the personal-attack and political-editorial rules. Both were far narrower than the Fairness Doctrine and rarely applied. *See* Balkin *supra* note 11; STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 10 (1978) (stating the two subdoctrines are "applicable in a limited number of situations").

19. *See* Balkin, *supra* note 11 (noting an example where the "traditional journalistic neutrality/objectivity" satisfied the Fairness Doctrine).

20. *See* Volokh, *supra* note 17 (questioning whether a broadcaster's discretion will allow broadcasters to select "rival speakers who are just inarticulate or foolish" to present a rival viewpoint); Balkin, *supra* note 11 (stating that licensees determined the sides to a relevant issue and then decided who would represent those sides).

21. Balkin, *supra* note 11.

would probably meet the Fairness Doctrine for that reason—though Colmes is more moderate and less articulate than the conservative Hannity.[22] Indeed, Limbaugh need not invite any liberals and could offer his own account of "liberal views, which would no doubt be highly amusing to his audience."[23] So broadcasters could easily avoid the Fairness Doctrine because of the necessary discretion they receive in presenting diverse views.

### *B. The Fairness Doctrine Would Once Again Rarely Be Enforced*

Second, the later history of the Fairness Doctrine demonstrates that the Doctrine was difficult to enforce and therefore infrequently enforced. While the FCC received many complaints, far fewer than 1% of them succeeded.

The FCC did not rely on an internal FCC content police, but rather enforced the Doctrine through its action on viewer complaints. Before the early 1960s, there were "few fairness complaints," but then the number of filed complaints soared.[24] In 1963, the FCC decided to address Fairness Doctrine complaints as they were filed, rather than to continue the previous practice of considering the complaints at license renewal.[25] While the number of complaints quickly rose from 233 complaints in 1960 to 1,632 in 1969,[26] very few complaints succeeded.

The FCC's process resulted in very few adverse rulings against broadcasters. Complaints by telephone were not even addressed unless supported by extensive documentation. Written complaints fared little better.[27] They were considered by a broadcast analyst first. In reviewing these complaints, the analyst typically found half to lack all merit and filed those complaints in a "No Response Necessary" file.[28] Of the rest, another half would receive an 8330-FD document, which explained that the complaint was too vague, therefore inadequate, and sought the necessary specific information.[29] "Most" recipients of these letters did not follow

22. *Id.*
23. *Id.*
24. SIMMONS, *supra* note 18, at 11, 14 n.20.
25. *Id.* at 14 n.20.
26. *Id.* at 214.
27. *See* ROWAN, *supra* note 13, at 52–53 (describing the process through which written complaints were processed while noting, however, that only 1,000–2,000 of the 10,000 complaints the FCC received in an election year were actually complaint letters).
28. *See id.* (noting that complaints placed in the "No Response Necessary" files included those that were sent to the FCC for information, those that were general and did not address a particular network or station, and "crank" letters).
29. *See id.* at 53 (outlining the additional information that a complainant must provide to satisfy the FCC's specificity requirements).

up.[30] The analyst could refer other complaints to lawyers in the Fairness/Political Broadcasting Branch; these lawyers would often also request more information from the complainant or simply send a Form 8330-FD. Either way, again, most complainants did not follow up at that point.[31] In most cases, the station had never been asked to respond or had never even received a copy of the complaint, though the FCC would file the complaint in the station's public files.[32] These responses accounted for more than 99% of written complaints.[33] When faced with the less than 1% of complaints that complied with all the requirements and were sufficiently specific, the FCC would ask the broadcaster to respond.[34] After briefing, the staff would rule on the complaint. While the ruling was appealable to the FCC Commissioners, the Commissioners generally upheld staff decisions.[35]

This process resulted in a handful of adverse rulings a year. One scholar noted that in 1976, less than one tenth of one percent of complaints resulted in a station inquiry.[36] Out of over 41,000 complaints, only 24 resulted in station inquiries, and only 16 of those resulted in adverse rulings.[37] In 1975, there were a little over 3,000 complaints, with only 10 adverse rulings, and in 1974, there were 1,874 complaints, and 6 adverse rulings.[38] The odds became even worse in subsequent years, with the success rate falling from 1 in 1,000 to 1 in 2,000.[39] In 1980, 10,000 complaints resulted in 6 adverse rulings, and in 1981, almost 6,000 complaints resulted in only 3 adverse rulings—all based on issue advertising, not programming imbalance.[40] Generally, individuals' chance of success was "virtually nil," as most would give up before the ruling stage, while nonprofit groups,

30. *See id.* (stating the reason "most people" do not respond to the form is because the FCC requires precision in the description of the complaint in order to "relieve broadcasters of the burden of disproving vague complaints").

31. *See id.* (explaining that most complainants never follow up even where their complaint raises a question that an analyst or legal technician cannot answer).

32. *See id.* at 54 (describing the process that the FCC uses in filing most complaints and staff responses).

33. *See id.* (noting that in 99.5% of all Fairness Doctrine complaints the station need not do anything in response).

34. *See id.* (noting that only those complaints that "compl[y] with all the requirements" can build a case strong enough to require a reply from the station).

35. *See id.* at 53–54 (noting that the right of appeal from a staff decision is of questionable utility given that "staff decisions [were] upheld in all [eighteen] Fairness cases appealed to the full commission from 1979 to 1981").

36. SIMMONS, *supra* note 18, at 210.

37. *See id.* (examining fairness complaints during the mid-1970s).

38. *See id.* (analyzing the number of the complaints in the mid-1970s and describing the small number of station inquiries as "striking").

39. ROWAN, *supra* note 13, at 62.

40. *Id.*

mainly "single-issue" groups, had a marginally higher chance.[41] They would often receive some success through negotiating informally with broadcasters, but they were negotiating in the shadow of what was, to the nonprofits, unsympathetic law.[42] The main reason for the high rate of failure was the FCC's complaint-discouraging policies. The FCC sought to protect broadcasters from harassment by eliminating vague or inappropriate complaints, and most complaints failed because the FCC conferred considerable discretion on broadcasters in presenting diverse views.

Indeed, the FCC's policy on devoting time to covering controversial issues made that prong of the Fairness Doctrine almost unenforceable. Even though the FCC once said that "the single most important requirement of operation in the public interest"[43] was to devote a reasonable amount of time to coverage of controversial issues of public importance, the FCC explicitly refused to "interfere with the broadcaster's journalistic discretion in this area except in the rare case . . . ."[44] As a result, the FCC would "presume compliance with [the prong] unless a complainant [could] substantially indicate otherwise."[45]

Finally, resolution of complaints was slow. Even those few organizations that did pursue and win their fairness complaints had to press their claims for months or years. In 1973, the average time between airing a program and the final resolution was approximately eight months, and in 1984, the average time was more than a year.[46]

### *C. The Fairness Doctrine Is at Most a Second-Best Solution for a Concentrated Speech Market*

Third, even the early history of the Fairness Doctrine demonstrates it was always a second-best option. The best option was to use the spectrum not for a few "balanced" speakers but for many diverse and antagonistic speakers.

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41. *See id.* at 62, 73 (stating that the reason that small, locally organized groups are more successful is that these groups "can afford, or at least have access to, expert legal counsel" and are "in a position to jump when something airs that appears to deal with 'their' issue").

42. *See generally id.* at 71–87 (chronicling various organizations' attempts to settle Fairness Doctrine disputes with broadcasters informally).

43. Complaints of Comm. for the Fair Broad. of Controversial Issues, 25 F.C.C.2d 283, 292 (1970) (Memorandum Opinion and Order) (citation omitted).

44. The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 89 F.C.C.2d 916, 920 (1982) (Memorandum Opinion and Order).

45. *Id.*

46. *See* ROWAN, *supra* note 13, at 54 (noting that the author's review of FCC rulings just prior to the book's 1984 publication indicated that the then-current resolution time was more than one year).

The Fairness Doctrine developed from 1929 to 1949—the year the FCC recapitulated its evolving Doctrine. The Fairness Doctrine was imposed "at the outset," when the FCC and its predecessor agency, the Federal Radio Commission (FRC), reallocated broadcasting licenses in the late 1920s and early 1930s. Because the spectrum was congested with users, the FCC reallocated licensees, largely disfavoring the existing nonprofit and educational users and favoring large commercial networks. In reallocating the licenses in its 1929 *Third Annual Report*, the FCC stated, "In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views . . . ."[47] For the next ten years, the FCC enunciated this fairness concept in license renewals. In 1940, it described the duty of "well-rounded rather than one-sided discussions of public questions."[48] In 1949, the Commission summarized its policy in its *Report on Editorializing*.[49]

"Balance" was required because so few speakers were being licensed. In the late 1920s, when the FCC reallocated licensees, its stated preference for "balance" was based on—one supposed—favoring large commercial broadcasters over ideological nonprofit organizations.[50] In 1928, with perhaps so many broadcasters on air that listeners often received static, the FRC announced a reallocation plan to alter the frequencies of 94% of broadcasters and, over the next several years, to severely reduce the number of broadcasters.[51] The plan and its implementation favored large commercial broadcasters over smaller noncommercial broadcasters because the plan assigned fewer and more powerful licenses.[52] Within a year of implementing the plan, there were 100 fewer broadcasters.[53] In defending the reallocation, the FRC claimed that stations best served the public interest if they served the entire public, notably with "a well-rounded program" of entertainment and cultural programming, such as the programs

47. Great Lakes Broad. Co., 3 FRC ANN. REP. 32, 33 (1929).

48. 6 FCC ANN. REP. 55 (1940).

49. *See generally* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949) (Report of the Commission) (reexamining the Commission's position on broadcasters' obligations and ultimately determining that the broadcast licensees are the ones who must "be responsible for the selection of the particular news items to be reported").

50. ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY 26–27 (1993).

51. *See id.* at 25 (recounting the Federal Radio Commission's (FRC) decision to implement the reallocation plan General Order 40 and the FRC's public assertions that the plan was the only reasonable way to provide good broadcasting to the listening public).

52. *See id.* at 26 (explaining that the FRC initially maintained that it was in the public interest that more highly capitalized stations get the limited slots that the reallocation created because those stations "had the equipment to take advantage of [those] slots").

53. *See id.* (stating that the number of stations after the reallocation declined despite the FRC's never having rejected a license renewal application).

endorsed by the Fairness Doctrine.[54] By contrast, the FRC claimed that "propaganda" stations, meaning merely those stations disseminating particular viewpoints, such as today's talk radio stations, did not best serve the public interest. As the FRC chose to allocate fewer, more powerful licenses, it claimed that there was "not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station . . . ."[55] In the 1929 *Third Annual Report*, in which the FRC first announced the fairness concept, also stated that a commercial station providing well-rounded programs has "a claim of preference over a propaganda station" for a license, even if the ideological station accompanied its "messages with entertainment and other program features of interest to the public," because of the ideological station's "temptation not to be fair to opposing schools of thought."[56] In implementing its reallocation, the FRC required broadcasters to share the same frequencies and would divide the hours based on which licensee was most worthy. When the FRC renewed licenses every three months and determined the balance of hours per broadcaster, it consistently favored the "balanced" commercial stations over the ideological nonprofit stations. For example, on WGN, the nonprofit Voice of Labor lost a hearing for more hours against the *Chicago Tribune*.[57] As George Will recently noted, the FRC in 1928 decided that the programming on WEVD, a New York station licensed to the Socialist Party, was not in the public interest and warned the station to show "due regard for the opinions of others."[58]

The Fairness Doctrine, which commercial broadcasters embraced to claim that they served the public interest, was never the ideal policy solution. The better option was to have unfettered exchange of views by different speakers, including nonprofit and for-profit ideological speakers. Faced with the technology of the 1920s, the FRC concluded that not every school of thought could have its own mouthpiece, so the few lucky commercial licensees would have to present competing views. As discussed above, imposing this obligation on licensees was largely ineffective.

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54. *See id.* at 27 (outlining and explaining the criteria that the FRC found important in determining which stations best served the public interest).

55. *Id.*

56. *Id.* at 28; *see also id.* (quoting the FRC's *Third Annual Report* for the proposition that general public service stations take precedence over propaganda stations "for access to the same channel").

57. *See id.* (asserting that the nonprofit stations often fell victim to one of the two networks); *see also* SIMMONS, *supra* note 18, at 34.

58. George F. Will, *Fraudulent "Fairness,"* NEWSWEEK.COM, May 7, 2007, http://www.newsweek.com/id/35081/output/print; Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35, 44 (1998) (citation omitted).

With today's technology, however, government can pursue better policy options that are more likely to enhance the public's exposure to public information and diverse viewpoints.

## III. THERE ARE MORE APPROPRIATE MEANS TO ENSURE ACCESS TO DIVERSE VIEWPOINTS AND INFORMATION ABOUT LOCAL ISSUES

Rather than join talk show hosts and bloggers in discussing a policy abandoned in the 1980s, Congress should implement policies that would actually result in diverse viewpoints. Congress should not attempt to regulate (ineffectively) a few broadcasters for diverse viewpoints, but should ensure that more and more speakers are free to reach their intended audiences with their public messages. The American communications system generally seeks political truth not through a few regulated speakers but through diverse speakers. The Supreme Court has repeatedly endorsed what "has long been a basic tenet of national communications policy," which is "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[59] The Court has stated, similarly, that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[60] Another basic tenet, which has been part of broadcast policy from the outset of regulation, has been to foster local information sources and local information.[61]

Congress should favor policies that increase the diversity of sources. These include media ownership limits, low power FM, and open-Internet initiatives.

### *A. Media Ownership Limits*

Congress should act quickly to pass a bill eliminating the FCC's quadrennial reviews and retaining, or tightening, the broadcast ownership limits as they existed in 2002. It should also require the FCC to perform a study to determine how the digital transition may necessitate even stricter ownership limits. Congress or the FCC should also initiate an inquiry into

59. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) (quoting Assoc. Press v. United States, 326 U.S. 1, 20 (1945)). For a discussion of how this principle animates communications policy, see Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 446 (1999).

60. *Turner*, 512 U.S. at 663.

61. *See, e.g.*, Broad. Localism, 19 F.C.C.R. 12,425, 12,425 (2004) (Notice of Inquiry) (asserting that broadcast licensees "must air programming that is responsive to the interests and needs of their communities of license").

how the ownership relationships between station owners and program syndicators affects the radio market.

### *B. Low Power FM*

Congress should act quickly to pass legislation permitting the FCC to license additional low power radio stations to local nonprofit organizations in more towns and cities.

### *C. Open-Internet Initiatives*

Most importantly, Congress should take steps to ensure that all members of the public have access to open, high-speed Internet. The Internet can provide an open platform for many diverse and antagonistic speakers. Congress can ensure a competitive market in Internet delivery and open platforms by adopting rules that ensure network neutrality (building on the foundation of a recent, celebrated decision against Comcast's blocking of peer-to-peer technologies),[62] supporting community broadband, providing more access to unlicensed spectrum (such as in the television white spaces), and imposing wholesale and open-device obligations on licensed wireless providers (for example, in the 700 MHz auction).[63]

## CONCLUSION

Debate about the Fairness Doctrine is a red herring, as the Doctrine will not and should not be reinstated. Assertions by conservatives that Democrats are attempting to reinstate the Fairness Doctrine are inaccurate. The Doctrine is easy to avoid and difficult to enforce, making reinstatement of the Doctrine ineffective at best. Rather than debate a doctrine that will not pass, Congress and the FCC should encourage diverse ownership of traditional media and open, high-speed Internet access as the most appropriate means of making diverse viewpoints available to the public. The history of the Fairness Doctrine's inability to achieve its intentions as well as the lack of any recent effort to bring it back are evidence that the Fairness Doctrine was noble in its intentions but lacking in its execution.

62. *See generally* Formal Complaint of Free Press, No. EB-08-IH-1518 (Aug. 20, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf; Posting of Lawrence Lessig to Lessig Blog, http://lessig.org/blog/ (Aug. 20, 2008, 17:54 EST).

63. For a discussion of these issues, see, for example, *Communications, Broadband and Competitiveness: How Does the U.S. Measure Up?: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) (statement of Ben Scott, Policy Director, Free Press), *available at* http://www.freepress.net/files/42407bssentestimony.pdf.