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The Fairness Doctrine: An Archaic Policy That Violates the First Amendment

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Introduction

In recent months, several Democratic leaders in Congress have called for reinstatement of the Fairness Doctrine,[1] an antiquated Federal Communications Commission (FCC) rule dating back to the 1940s that was abandoned during the Reagan administration. In theory, the Fairness Doctrine was designed to enhance political discourse by requiring television and radio broadcast stations to provide "fair" coverage of controversial issues of public importance.[2] In practice, however, the Fairness Doctrine stifled political debate and forced broadcasters to significantly limit their coverage of controversial topics. After nearly four decades of experience in applying the Fairness Doctrine, the FCC concluded in 1985 that the Fairness Doctrine "inhibits the presentation of controversial issues of public importance . . . impedes the public's access to the marketplace of ideas and poses an unwarranted intrusion upon the journalistic freedom of broadcasters."[3]

It is abundantly clear that, if the Fairness Doctrine were reimposed today, it would have the same chilling effect on broadcast television and radio programming that it previously had. The Fairness Doctrine is disturbingly reminiscent of George Orwell's classic *1984* in which "Big Brother" was always watching and listening to ensure that no one dared to question the government.[4] The Fairness Doctrine is nothing more than a thinly-veiled attempt by some members of Congress to silence those who disagree with them, particularly conservative talk radio show hosts.[5] As one Congressman recently observed, "attempts to restore the Fairness Doctrine are based in attempts to reduce public speech, not enhance it."[6]

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[1] *See, e.g.,* Alexander Bolton, *GOP Preps For Talk Radio Confrontation*, The Hill, June 27, 2007, *at* http://thehill.com/leading-the-news/gop-preps-for-talk-radio-confrontation-2007-06-27.html (last visited July 27, 2007); *Her Royal Fairness,* American Spectator, May 14, 2007, *at* http://www.spectator.org/dsp_article.asp?art_id=11427 (last visited July 27, 2007).

[2] *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 145 (F.C.C. 1985), at ¶ 3 [hereinafter "1985 FCC Report"].

[3] *Id.* at ¶ 6.

[4] George Orwell, *1984* (1949).

[5] *See, e.g., Her Royal Fairness*, *supra* note 1.

[6] Jeff Kosseff, *To Balance the Airwaves, Liberals Seek Revival of Fairness Doctrine*, Newhouse News Service, July 9, 2007.

The White House recently noted in a public statement that, since the Fairness Doctrine was repealed, "the multiplicity of voices has significantly increased—and the case for the Fairness Doctrine is weaker than ever. Reinstating the Fairness Doctrine would muzzle political debate and free speech."[7] As a result, the President stated that he "would veto any legislation reinstating the Fairness Doctrine."[8] Moreover, current FCC Chairman Kevin Martin, in a July 23, 2007 letter to Congressman Mike Pence, reiterated that the Fairness Doctrine would only stifle political and public interest discussion of issues.[9] The marketplace—not government fiat and regulation—best serves the free exchange of all ideas.

This memorandum explains why the Fairness Doctrine suppresses discussion of important public policy issues and would violate the First Amendment if reenacted. The memorandum begins in Section I by discussing the FCC's determination in 1985 that the Fairness Doctrine should be abandoned because it did not further the public interest. Section II of the memorandum describes how the financial burden the Fairness Doctrine imposed upon broadcasters forced them to self-censor their discussion of controversial issues. Section III then explains that the Fairness Doctrine has been used as a tool to silence broadcasters critical of government policies and would be used for this purpose again if it were reinstated.

Section IV of the memorandum discusses why allowing the marketplace to determine the value of broadcast programming is a much sounder public policy than having government censors review the content of speech and impose an abstract notion of "fairness." Section V then observes that the proliferation of media technology since the Fairness Doctrine was first implemented during the 1940s has eliminated any need or justification for the Fairness Doctrine. The memorandum concludes in Section VI by explaining that reimposing the Fairness Doctrine would violate the First Amendment by substantially chilling public debate on controversial issues of importance.

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit, public interest law firm. Our organization exists to educate the public and the government about the constitutional rights of citizens, particularly in the context of the expression of religious sentiments. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. For example, in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987), the Court unanimously struck down a public airport's ban on First Amendment activities. In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court held by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause. In *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), the Court unanimously held that denying a church access to public school premises to show a film series on parenting violated the

[7] Allan B. Hubbard, Assistant to the President for Economic Policy, Director, National Economic Council, *White House Statement of July 13, 2007 Regarding the Fairness Doctrine*.
[8] *Id.*
[9] *See* Kara Rowland, *FCC Chairman Rejects "Fairness Doctrine"*, July 27, 2007, *at* http://www.washingtontimes.com/article/20070727/BUSINESS/107270047/1006/business (last visited July 28, 2007).

First Amendment. Also, in *McConnell v. FEC*, 540 U.S. 93 (2003), the Court unanimously held that minors enjoy the protection of the First Amendment.

I. The Fairness Doctrine Was Abandoned in 1985 Once it Became Clear That it Had a Chilling Effect on Broadcasters' Freedom of Speech.

While proponents of the Fairness Doctrine argue that it is intended to increase the public's ability to receive a variety of viewpoints on controversial issues, experience has shown that it has the opposite effect. When it was in effect, the Fairness Doctrine forced broadcasters to self-censor and limit their coverage of controversial subjects. A return to the Fairness Doctrine would certainly have the same effect.

The Fairness Doctrine was formally adopted in 1949. It required broadcasters to provide coverage of controversial issues important to the community as well as a reasonable opportunity for contrasting viewpoints to be heard.[10] The Doctrine was based on the theory that it would "enhance rather than abridge the freedoms of speech and press protected by the First Amendment."[11]

When the Supreme Court reviewed the Fairness Doctrine in 1969 in *Red Lion Broadcasting Co. v. FCC*, it considered the argument that "broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective."[12] The Court declared that "[s]uch a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled."[13] The Court then observed:

> At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. . . . [I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. . . .[14]

The Fairness Doctrine's "net effect of reducing rather than enhancing the volume and quality of coverage" became readily apparent after the *Red Lion* case was decided. Just four years later, Justice Douglas's concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic National Committee*[15] eloquently explained why "censorship or editing or the screening by Government of what licensees may broadcast"—through the Fairness Doctrine or otherwise—"goes against the grain of the First Amendment."[16] Justice Douglas observed:

> *The Fairness Doctrine has no place in our First Amendment regime*. It puts the head of the camel inside the tent and enables administration after administration

[10] 1985 FCC Report at ¶ 3.
[11] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).
[12] *Id.* at 393.
[13] *Id.*
[14] *Id.*
[15] 412 U.S. 94 (1973).
[16] *Id.* at 158 (Douglas, J., concurring).

> to toy with TV or radio in order to serve its sordid or its benevolent ends. In 1973—as in other years—there is clamoring to make TV and radio emit the messages that console certain groups. There are charges that these mass media are too slanted, too partisan, too hostile in their approach to candidates and the issues.[17]

Justice Douglas put the Fairness Doctrine in the larger context of the First Amendment's prohibition against government censorship of political and other speech:

> [T]he prospect of putting Government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take Government off the backs of people. . . . *[I]t is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press*. . . .[18]

In 1984, the Supreme Court noted that the Fairness Doctrine would likely violate the First Amendment if it had a chilling effect on free speech.[19] While the Court upheld the Fairness Doctrine in *Red Lion* based on the assumption that it "advanced the substantial governmental interest in ensuring balanced presentations of views,"[20] the FCC had tentatively concluded in 1983 that "the [Fairness Doctrine] rules, by effectively chilling speech, do not serve the public interest . . . ."[21] In light of the FCC's findings, the Supreme Court observed "[a]s we recognized in *Red Lion*, . . . were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in that case."[22]

In 1985, the FCC explained in a detailed report that the Fairness Doctrine greatly inhibited the free speech of broadcasters and limited the amount of coverage given to controversial issues of public importance.[23] The report explained:

> [I]n the intervening sixteen years [since *Red Lion*,] the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas. In addition, . . . compelling evidence . . . demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance . . . impedes the public's access to the marketplace of ideas

[17] *Id.* at 154 (Douglas, J., concurring) (emphasis added).
[18] *Id.* at 162 (Douglas, J., concurring) (emphasis added).
[19] *See League of Women Voters v. FCC*, 468 U.S. 364, 378 n.12 (1984).
[20] *Id.* at 378.
[21] *Id.* at 378 n.12 (citing FCC, *Notice of Proposed Rulemaking In Re Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed. Reg. 28298, 28301 (F.C.C. 1983)).
[22] *Id.* (quoting *Red Lion Broad. Co.*, 395 U.S. at 393).
[23] 1985 FCC Report at ¶ 6.

> and poses an unwarranted intrusion upon the journalistic freedom of broadcasters.[24]

The FCC concluded, "[a]fter careful evaluation of the evidence of record, our experience in enforcing the fairness doctrine, and fundamental constitutional principles, we find that the fairness doctrine disserves the public interest."[25]

> The FCC's 1985 report was based upon several factors:
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> First, in recent years there has been a significant increase in the number and types of information sources. As a consequence, we believe that the public has access to a multitude of viewpoints without the need or danger of regulatory intervention.
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> Second, the evidence in this proceeding demonstrates that the fairness doctrine in operation thwarts the laudatory purpose it is designed to promote. Instead of furthering the discussion of public issues, the fairness doctrine inhibits broadcasters from presenting controversial issues of public importance. As a consequence, broadcasters are burdened with counterproductive regulatory restraints and the public is deprived of a marketplace of ideas unencumbered by the hand of government.
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> Third, the restrictions on the journalistic freedoms of broadcasters resulting from enforcement of the fairness doctrine contravene fundamental constitutional principles, accord a dangerous opportunity for governmental abuse and impose unnecessary economic costs on both the broadcasters and the Commission. Finally, we believe the record in this proceeding raises significant issues regarding the constitutionality of the fairness doctrine in light of First Amendment concerns.[26]

In light of the FCC's findings, it formally repealed the Fairness Doctrine in 1987.[27]

II. The Financial Cost of Compliance With the Fairness Doctrine and Potential Litigation Forced Broadcasters to Self-Censor.

While supporters of the Fairness Doctrine claim that it is necessary to encourage "fair" debate on issues of public importance, it has had the opposite effect. When the Fairness Doctrine was in place, it "stifled the free market in opinion and effectively [pushed] politics to little-watched schedules. . . . Stations presented only as much public debate as they needed to secure renewal of their public licenses."[28] Under the Fairness Doctrine, many broadcasters "changed or limited their programming rather than deal with the full scope of controversy. And smaller

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[24] *Id.*
[25] *Id.* at ¶ 175.
[26] *Id.* at ¶¶ 137-40.
[27] *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989); *In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5043 (1987).
[28] Editorial, Bruce Chapman, *We Need a Fairness Doctrine for Media*, The Seattle Post-Intelligencer, July 11, 2007, at B7.

stations were constrained financially from turning over free air to anyone demanding 'equal time.'"[29]

The financial cost of defending against claims of alleged violations of the Fairness Doctrine was quite substantial, especially for smaller broadcasters. For example, in 1978, a Fairness Doctrine complaint was brought against a television station in Spokane, Washington.[30] Although the FCC ultimately concluded that the station had not violated the Fairness Doctrine, the station incurred $20,000 in legal expenses to defend itself.[31] Similarly, NBC was challenged under the Fairness Doctrine for airing a controversial program.[32] NBC ultimately won in court after several years and over $100,000 in legal costs.[33]

As one commentator has explained:

> [Under the Fairness Doctrine,] it dawned on the owners of radio and television stations that strong opinions would invite strong rebuttals, and their stations might wind up filling hours of valuable air time with point-and-counterpoint social and political commentary—instead of something as rewarding as advertising. And that the best way to avoid such costly rebuttals was to avoid voicing any strong opinions at all.[34]

The 1985 FCC report illustrated the "timid approach" taken by many broadcasters under the Fairness Doctrine.

> What the Federal Communications Commission discovered after days and days of hearings is that most broadcasters, especially in smaller areas where they cannot afford $5,000, or $10,000, or $100,000 in legal fees to contest one of these fairness issues, simply avoid controversial topics and nobody sues.[35]

One television station manager explained that "it [was] standard practice for the station not to accept nationally produced programming which discuss[ed] controversial subjects."[36] Another broadcaster stated that his news staff "avoid[ed] controversial issues as a matter of routine because of the Fairness Doctrine."[37] The malleable concept of broadcast "fairness" inevitably leads to self-censorship:

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[29] Opinion, *Pulling the Plug; Fairness Doctrine Should Rest in Peace*, The Gazette (Colorado Springs), July 6, 2007, *at* http://www.gazette.com/opinion/radio_24498___article.html/doctrine_stations.html (last visited July 27, 2007).
[30] 1985 FCC Report at ¶ 35.
[31] *Id.*
[32] *Id.* at ¶ 36.
[33] *Id.*
[34] Editorial, *Fairness Doctrine Won't be Revived; Democrats Fail to Resurrect Unfair Law the Federal Communications Commission Killed in 1987*, Grand Rapid Press (Michigan), July 9, 2007, at A9.
[35] Fairness in Broadcasting Act of 1987, S. 742, 100th Cong., 1st Sess., 133 Cong. Rec. 8438 (1987).
[36] 1985 FCC Report at ¶ 42, n.100.
[37] *Id.* at ¶ 42, n.101.

> How much of what is said on a topic is enough? How many sides are there to an argument? Must a conservative talk host have a liberal co-host? Do radio callers who disagree with talk show hosts count as "the other side?" Must every station with four conservative talk shows add four liberal talk shows? Who decides? Is that fair? [38]

"Rather than risk running afoul of FCC fairness enforcers, many stations simply, and quite smartly, refused to deal with [controversial] issues."[39]

III. The Fairness Doctrine Has Been Used as a Weapon to Silence Political Opponents.

It is common knowledge that, "[o]ver and over again, attempts have been made to use the [FCC] as a political weapon against the opposition, whether to the left or to the right."[40] Politicians on both sides of the aisle discovered that the Fairness Doctrine was a particularly effective tool for silencing political opponents.[41] For example, one official in the Kennedy administration stated, "[o]ur massive strategy was to use the Fairness Doctrine to challenge and harass rightwing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."[42] On the other hand, "President Nixon directed his staff to use the fairness doctrine to regularly combat what he considered unfair news coverage concerning Vietnam in 1969."[43]

History has shown that

> the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.[44]

Recent efforts to reinstate the Fairness Doctrine are simply bald attempts to use the power of the government to silence the voices of conservative broadcasters critical of liberal policies. A senior advisor to House Speaker Pelosi recently stated, "[c]onservative radio is a huge threat and political advantage for Republicans and we have had to find a way to limit it."[45] While the infamous Sedition Act of 1798 "was intended only to muzzle newspaper publishers who were

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[38] *Pulling the Plug*, *supra* note 29.
[39] *Id.*
[40] *Columbia Broad. Sys.*, 412 U.S. at 167 (Douglas, J., concurring).
[41] Senate Republican Policy Committee, *The Fairness Doctrine: Unfair, Outdated, and Incoherent*, at 4 (July 24, 2007), *at* http://rpc.senate.gov/_files/072407FairnessDoctrinePL.pdf (last visited July 27, 2007) [hereinafter "SRPC Report"].
[42] *Id.* (quotation omitted).
[43] *Id.*
[44] *Columbia Broad. Sys.*, 412 U.S. at 164-65 (Douglas, J., concurring).
[45] *Her Royal Fairness*, *supra* note 1.

chronically critical of President John Adams," the Fairness Doctrine is "intended only to muzzle right-wing talk-radio hosts who are chronically critical of Democrats in Congress."[46]

The true purpose of calls to reinstate the Fairness Doctrine became abundantly clear after Americans successfully pressured their Senators to reject an immigration "reform" bill that was widely criticized on talk radio shows. In response, some supporters of the bill called for reinstatement of the Fairness Doctrine as a way to help suppress the public's opposition to future bills.[47] Fortunately, however, other supporters of the bill acknowledged that government censorship of the content of political debate would harm the democratic process. As Senator Kyl explained, "[t]he worst thing that we could do is try to impose the Fairness Doctrine."[48] He noted, "[s]ome Democrats may not like talk radio, but that does not give them the right to use the heavy hand of government to regulate it."[49] In other words, "[t]he best response to an idea one detests is not to suppress it, but to offer a better idea."[50]

IV. Allowing the Free Market to Determine "Fairness" in Broadcasting, Rather than the Government, Better Serves the Public Interest and the Free Exchange of Ideas.

Almost ninety years ago, Justice Holmes noted that political discourse is advanced when the government allows the free market to determine the value of ideas:

> [People have come to believe that] the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[51]

The repeal of the Fairness Doctrine greatly improved discussion on controversial issues by allowing the market to judge whether a particular broadcaster was offering content that furthered the public interest. "Where freedom of speech and freedom of the press is respected, the public marketplace decides—not politicians and certainly not bureaucrats at the FCC."[52] Broadcast radio—and particularly talk radio—has blossomed since broadcasters no longer have to fear reprisal by the government or political opponents through manufactured Fairness Doctrine

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[46] Opinion, John Seigenthaler, *Push for New "Fairness Doctrine" Aimed at Right-Wing Radio*, Asbury Park Press (New Jersey), July 11, 2007.

[47] *See, e.g.*, Rasmussen Reports, *Americans See Liberal Media Bias on TV News*, July 13, 2007, *at* http://www.rasmussenreports.com/public_content/politics/americans_see_liberal_media_bias_on_tv_news (last visited July 27, 2007) ("Media fairness has emerged as a debate on Capitol Hill following the recent debate on immigration when public opinion overwhelmed the will of the Senate. Some lawmakers have called for a re-introduction of the 'Fairness Doctrine' requiring stations to air competing points of view").

[48] Daniel Gonzalez, *Migrant-Bill Backlash Targets Talk Radio; Media Critics Press for Change in Broadcasting Law*, Ariz. Republic, July 10, 2007, at 1.

[49] Rob Hotakainen, *Fairness on Radio: Just Sour Grapes?; Talk Show Hosts Scoff at Push to Bring Back Old FCC Regulations*, Modesto Bee, July 9, 2007, at A1.

[50] *Fairness Doctrine Won't be Revived*, *supra* note 34.

[51] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[52] *Pulling the Plug*, *supra* note 29.

complaints.[53] While there were less than 100 talk radio programs nationwide in 1980, "[t]oday, more than 1,400 stations feature the talk format exclusively."[54] It is unsurprising that abandoning the Fairness Doctrine has led to a much greater volume of broadcast discussion of controversial issues.

Those who seek to reimpose the Fairness Doctrine often cite to the fact that, by and large, conservative talk shows have won "the competition of the market." "The repeal of the Fairness Doctrine in 1987 is generally acknowledged to be the spark that lit the conservative talk radio flame."[55] By honing in on the success of conservative talk radio, supporters of the Fairness Doctrine ignore the fact that most forms of traditional media promote a liberal viewpoint. "Many conservatives believe that talk radio took on its current form precisely because an alternative was needed to the traditional media outlets."[56] In other words, the emergence of conservative talk radio is the free market's way of providing some level of "fairness" to the overall media picture.

One commentator has aptly noted that, to be truly "fair," the Fairness Doctrine would have to be applied to cable television, the print media, and movies in order to ensure that conservative voices receive equal time.[57] For example, one recent national survey found that "Americans tend to believe that the *New York Times*, *Washington Post*, and their local newspaper all show a bias in favor of liberals."[58] Another survey found that Americans believe that CNN, National Public Radio (NPR),[59] and the three major broadcast networks (ABC, CBS, and NBC) all deliver news with a bias in favor of liberals, while Fox News promotes a conservative viewpoint.[60] Many other studies have produced similar findings.[61] While there has never been a shortage of media outlets through which liberals may promote their viewpoints, conservative talk radio has been successful simply because it helps provide some degree of media balance.

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[53] Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. Legal Stud. 279, 301 (1997).

[54] Brian C. Anderson, *The Plot to Shush Rush and O'Reilly*, City J., Winter 2006, *at* http://www.city-journal.org/html/16_1_rush_oreilly.html (last visited July 27, 2007).

[55] Gilbert Cruz, *GOP Rallies Behind Talk Radio*, TIME, Jun. 28, 2007, *at* http://www.time.com/time/politics/article/0,8599,1638662,00.html (last visited July 27, 2007).

[56] Rasmussen Reports, *Public Divided on Fairness Doctrine*, July 14, 2007, *at* http://www.rasmussenreports.com/public_content/politics/public_divided_on_fairness_doctrine (last visited July 27, 2007).

[57] Chapman, *supra* note 28.

[58] Rasmussen Reports, *New York Times, Washington Post, and Local Newspapers Seen as Having Liberal Bias*, July 15, 2007, *at* http://www.rasmussenreports.com/public_content/politics/new_york_times_washington_post_and_local_newspapers_seen_as_having_liberal_bias (last visited July 27, 2007).

[59] "Increasingly, [NPR's] sponsors range from foundations with an ideological ax to grind to law firms and national teachers unions. Conservatives find that stories they care about just don't make it onto NPR schedules. When the rare conservative gets invited to participate on an NPR issues panel, somehow there are two or three liberals facing him, with a liberal host recognizing the speakers." Chapman, *supra* note 28.

[60] *Americans See Liberal Media Bias on TV News*, *supra* note 47.

[61] *See, e.g.*, The Harris Poll, *News Reporting Is Perceived As Biased, Though Less Agreement On Whether it is Liberal Or Conservative Bias*, Jun. 30, 2006, *at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=679 (a majority of those who are "heavy" consumers of news believe that there is a liberal bias in news reporting); Tim Groseclose & Jeffrey Milyo, *A Measure of Media Bias*, 120 Q.J. of Econ. 1191, 1191 (2005), *at* http://www.polisci.ucla.edu/faculty/groseclose/ Media.Bias.pdf (a study on media bias revealed a strong liberal bias in all of the news outlets examined except for *Fox News' Special Report* and the *Washington Times*).

The Fairness Doctrine is unnecessary because consumers already impose their own sense of "fairness" by tuning into speakers that share their viewpoints and tuning out those that do not. It is unsurprising that people "select news sources based upon their political preferences."[62] For example, a June 2004 report revealed that CNN viewers supported John Kerry by a 63% to 26% margin, and those who regularly listened to NPR supported Kerry by a 68% to 27% margin.[63] On the other hand, Fox News viewers supported President Bush by a 65% to 28% margin, and those who regularly listened to Christian radio stations preferred Bush by a 71% to 23% margin.[64] Thus, if a person disagrees with Rush Limbaugh or Sean Hannity, he is free to tune into NPR, watch news on CNN or a broadcast network, or find news from countless other sources that are more consistent with his political preferences. Having the government impose an abstract notion of "fairness" is not the answer. "The challenge now is not for *government* to figure out how to balance the scales but for *readers, listeners and viewers* to sample a good balance of the viewpoints available, to become, in other words, wise consumers in the teeming marketplace of ideas."[65]

It is a simple fact that "consumer preference drives programming decisions. Licensees respond to consumer preferences because audience size, or ratings, significantly affects a licensee's advertising revenue."[66] The success of conservative talk radio—and failure of liberal talk radio—is driven by consumer preference. Conservative talk radio listeners outnumber liberal listeners by roughly a two-to-one margin.[67] A 2004 Report explained that talk radio has emerged as a conservative counterpart to NPR:

> Talk radio is holding onto its corner of the media market. 17% of the public regularly listens to radio shows that invite listeners to call in to discuss current events, public issues and politics. The talk radio audience remains a distinct group; it is mostly male, middle-aged, well-educated and conservative. Among those who regularly listen to talk radio, 41% are Republican and 28% are Democrats. Furthermore, 45% describe themselves as conservatives, compared with 18% who say they are liberal.
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> National Public Radio's audience is holding steady as well: 16% of Americans regularly listen to NPR. In contrast to the talk radio audience, the NPR audience is fairly young, well-educated and Democratic. Fully 41% of regular NPR listeners are Democrats, 24% are Republicans.[68]

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[62] *Americans See Liberal Media Bias on TV News*, *supra* note 47.
[63] Rasmussen Reports, *Fox Fans Favor Bush 65% to 28%; CNN Fans Favor Kerry 63% to 26%*, June 17, 2004, *at* http://www.rasmussenreports.com/public_content/politics/fox_fans_favor_bush_65_to_28 (last visited July 27, 2007).
[64] *Id.*
[65] Opinion, *Let Consumers Decide*, Rochester Democrat & Chron., July 9, 2007, at 10A (emphasis added).
[66] SRPC Report at 7.
[67] Pew Research Center for the People & the Press, *Maturing Internet News Audience – Broader Than Deep; Online Papers Modestly Boost Newspaper Readership*, July 30, 2006, *at* http://people-press.org/reports/pdf/282.pdf (last visited July 27, 2007).
[68] Pew Research Center for the People & the Press, *Online News Audience Larger, More Diverse; News Audiences Increasingly Politicized*, Jun. 8, 2004, *at* http://people-press.org/reports/pdf/215.pdf (last visited July 27, 2007).

Ratings and listener preference explain why conservative talk radio has succeeded and liberal talk radio has failed. For example, the liberal Air America failed miserably in New York City due to a lack of listeners.

> In its first quarter, Air America started with a 2.6 percent rating, peaking at 2.8 percent in the summer of 2004. By late 2005 and early 2006 the ratings fell to 1.8 and 1.9 percent respectively. The ratings for the New York City area channel that carried Air America fell to levels ***below*** those for their previous format: Caribbean music and talk.[69]

One commentator has observed, "It's the simple laws of supply and demand . . . No one wants to listen to liberal talk radio. It's been tried and has mostly failed. . . . Liberals have NPR, PBS and the broadcast networks."[70] Another has noted, "there's no doubt that liberals have been left behind in the world of talk radio, and that it makes perfect economic sense."[71]

On the other hand, Rush Limbaugh's great success is the result of a large base of conservative listeners. While 78% of Rush Limbaugh's listeners are conservative, only 3% are liberal.[72] After some supporters of the recent failed immigration bill looked to the Fairness Doctrine as a tool to muzzle conservative opposition to future bills,[73] one commentator noted, "it's not that (conservative talk hosts) Rush Limbaugh or Sean Hannity convinced millions and millions of Americans that this bill was bad. . . . These people most likely didn't like this bill to begin with, and it was listening to Rush and whomever that spawned them into action."[74]

It is clear that, if the Fairness Doctrine were reimposed, virtually all of Rush Limbaugh and Sean Hannity's listeners would tune out once the government-mandated liberal programming began. It is also clear that some stations would be forced to cut back on popular conservative programming due to the financial burden they would bear by being forced to air unpopular liberal programming.

V. The Exponential Growth of Media Technology Since the 1940s, and the 1980s, Has Made the Fairness Doctrine Antiquated and Obsolete.

The emergence of countless technological advances since the Fairness Doctrine was first implemented in 1949—and since it was abandoned in 1987—has eliminated any justification for the Fairness Doctrine. In the early 1970s, the Supreme Court observed, "[t]he broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily

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[69] SRPC Report at 7 (citing Byron York, *A Year After the Hype, Liberal Radio's Down in NYC*, The Hill, Apr. 28, 2005; *Why Air America Doesn't Fly*, City J., Apr. 21, 2005).
[70] Editorial, *A Warning to Talk Radio; Fed Up With the Conservative Monopoly on the Airwaves, Democrats Hinted that Bringing Back the Fairness Doctrine to Even the Playing Field Might be a Good Idea*, USA Today, July 12, 2007, at 11A.
[71] Hotakainen, *supra* note 49.
[72] *Maturing Internet News Audience*, *supra* note 67.
[73] *Americans See Liberal Media Bias on TV News*, *supra* note 47.
[74] Hotakainen, *supra* note 49.

so now, and *those acceptable today may well be outmoded 10 years hence*."[75] When the FCC recommended repeal of the Fairness Doctrine in 1985, it observed, "in recent years there has been a significant increase in the number and types of information sources. As a consequence, we believe that the public has access to a multitude of viewpoints without the need or danger of regulatory intervention."[76] The massive growth of communications technology since 1985 has greatly expanded the public's "access to a multitude of viewpoints."

> The evolution of technology since the fairness doctrine was implemented is dramatic. The development of radio and television technology has created many more outlets from which the public can receive public interest content. The radio and television markets have expanded so greatly, and are now so diverse, that the market is able to provide diverse media inputs free from unnecessary regulation. As a result, technology ensures that the fairness doctrine is a 1940's regulation, which has no place in 21st century society.[77]

There is simply no need for the Fairness Doctrine in modern American society because "the public has plenty of options to hear competing points of view."[78]

> There has never been more opportunity for vigorous public debate than we have today . . . . You have satellite radio. You have cable TV. You have the Internet, the blogosphere, and 10,000 radio stations. You have Air America. You have blossoming religious broadcasters. You have very successful conservative commentators. In the radio world, there is a lot of variety.[79]

Americans have a seemingly limitless number of options to choose from when it comes to discussion of controversial issues. While print newspapers and broadcast television and radio are still relevant media, they are now in competition with cable and satellite television and radio as well as Internet news sources and web logs.[80] Given the wide variety of news sources Americans now have to choose from, it is clear that "[t]he Fairness Doctrine isn't progressive. It's regressive. It's a throwback to an era when the broadcast outlets and sources for information were few."[81]

The emergence of countless Internet websites devoted to political news and discussion further demonstrates the lack of any need for the Fairness Doctrine. For example, two months before the 2004 Presidential election, CBS's Dan Rather publicized memos critical of President Bush's service in the Texas Air National Guard that were allegedly written by the late Lieutenant

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[75] *Columbia Broad. Sys.*, 412 U.S. at 102 (emphasis added). Justice Douglas observed in 1973 that "[broadcast] [s]carcity may soon be a constraint of the past . . . . It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television." *Id.* at 158, n.8 (Douglas, J., concurring) (citations omitted).
[76] 1985 FCC Report at ¶ 138.
[77] SRPC Report at 5.
[78] *Pulling the Plug*, *supra* note 29.
[79] Kosseff, *supra* note 6.
[80] *See, e.g.*, SRPC Report at 5-6.
[81] *A Warning to Talk Radio*, *supra* note 70.

Colonel Jerry B. Killian.[82] Within hours, conservative websites such as Free Republic and Power Line Blog began to question the memos' accuracy, noting that their typography did not match those used by typewriters of the early 1970s.[83] It soon became clear that the memos were forgeries, and Dan Rather publicly apologized for his use of the documents.[84] "Rathergate," as the scandal became known, is a perfect example of how the marketplace of ideas is the best test of fairness in broadcasting, not a government-imposed regulatory scheme.

VI. Reinstating the Fairness Doctrine Would Violate the First Amendment by Reducing, Rather Than Enhancing, Broadcasters' Discussion of Controversial Issues.

The chilling effect on public debate imposed by the Fairness Doctrine is exactly the kind of evil that the First Amendment was designed to prevent. Proponents of the Fairness Doctrine are unable to demonstrate that the Fairness Doctrine is necessary to remedy any significant harm. The Supreme Court has noted in the context of broadcast regulation that

> [w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[85]

Even where a content-based regulation may be said to promote a compelling interest, "the 'danger of censorship' presented by a facially content-based statute requires that that weapon be employed only where it is 'necessary to serve the asserted [compelling] interest.'"[86] The key question is "whether content discrimination is reasonably necessary to achieve [the government's] compelling interests. . . ."[87] The Fairness Doctrine does not promote any compelling government interest, and it is certainly not "reasonably necessary" to achieve such an interest. Experience has shown that the Fairness Doctrine has "the net effect of reducing rather than enhancing the volume and quality of coverage" of controversial issues.[88] The fact that some Democrats believe that "[c]onservative radio is a huge threat and *political advantage for Republicans*"[89] does not rise to the level of creating a compelling government interest.

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[82] *See, e.g.*, Dave Eberhart, *How the Blogs Torpedoed Dan Rather*, Jan. 31, 2005, *at* http://www.newsmax.com/archives/articles/2005/1/28/172943.shtml (last visited July 27, 2007); Marguerite Reardon, *Network TV Bigwigs Rail Against Bloggers; News Anchors Slam Online Attacks Against Dan Rather After His "60 Minutes" Report About President Bush's National Guard Service*, Oct. 4, 2004, *at* http://news.com.com/Network+TV+bigwigs+rail+against+bloggers/2100-1025_3-5395911.html (last visited July 27, 2007); John Borland, *Bloggers Drive Hoax Probe Into Bush Memos*, Sept. 10, 2004, *at* http://news.com.com/Bloggers+drive+hoax+probe+into+Bush+memos/2100-1028_3-5362393.html (last visited July 27, 2007); James Rosen, *FOX Interviews Commander's Son*, Sept. 10, 2004, *at* http://www.foxnews.com/story/0,2933,132047,00.html (last visited July 27, 2007).

[83] *Id.*

[84] *Dan Rather Statement on Memos; Newsman No Longer Has Confidence in Authenticity of Bush Guard Documents*, *at* http://www.cbsnews.com/stories/2004/09/20/politics/main644546.shtml (last visited July 27, 2007).

[85] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (citations omitted).

[86] *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (citations omitted).

[87] *Id.* at 395-96.

[88] *See Red Lion Broad. Co.*, 395 U.S. at 393.

[89] *Her Royal Fairness*, *supra* note 1 (emphasis added).

The Fairness Doctrine is quite similar in principle to government regulation of print media in the name of "fairness." The same "cry of protest" against broadcasters made by supporters of the Fairness Doctrine "has gone up against the newspapers and magazines" for centuries, yet government censorship of such publications in the name of "fairness" would obviously violate the First Amendment.[90] For example, while Thomas Jefferson once said that he "deplore[d] . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them," he noted that "[i]t is . . . an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost."[91]

> [T]he fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications. That fear was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people.[92]

In other words,

> [b]oth TV and radio news broadcasts frequently tip the news one direction or another and even try to turn a public figure into a character of disrepute. Yet so do the newspapers and the magazines and other segments of the press. The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of Government.[93]

In *Miami Herald Publishing Co. v. Tornillo*,[94] the Supreme Court considered "whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press."[95] Supporters of the statute "argue[d] that government has an obligation to ensure that a wide variety of views reach the public."[96] The Court struck down the statute, however, holding that "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[97] The Court explained:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, *editors might well conclude that the safe course is to avoid controversy*. Therefore, under the operation of the Florida statute, political and electoral coverage would be

[90] *Columbia Broad. Sys.*, 412 U.S. at 155 (Douglas, J., concurring).
[91] *Id.* at 153 (Douglas, J., concurring) (quoting T. Jefferson, *Democracy* 150-51 (Padover ed. 1939)).
[92] *Id.* at 148 (Douglas, J., concurring).
[93] *Id.* at 155 (Douglas, J., concurring).
[94] 418 U.S. 241 (1974).
[95] *Id.* at 243.
[96] *Id.* at 247-48.
[97] *Id.* at 256.

> blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[98]

Like the Fairness Doctrine, the right to reply statute in *Tornillo* placed a significant financial burden upon speakers by requiring them to subsidize an unwanted message.[99] The Fairness Doctrine had a similar chilling effect on discussion of controversial issues because "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."[100] While the Supreme Court has noted that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper,"[101] the freedom of speech would similarly be endangered by reinstatement of the Fairness Doctrine.

The Supreme Court has repeatedly emphasized that content-based regulation of private expression often violates the First Amendment. The Court has stated,

> [a]s a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[102]

"The essence of [the First Amendment's] protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."[103] Government licensing of private expression "presents peculiar dangers to constitutionally protected speech" because "'[t]he censor's business is to censor,' and a licensing body likely will overestimate the dangers of controversial speech . . . ."[104] The First Amendment prevents the government from restricting speech to minimize "the rough-and-tumble of politics."[105] The Court recently noted that, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor."[106]

While the public nature of broadcast airwaves necessitates some level of government regulation to prevent "confusion and chaos,"[107] this does not justify reimposition of the Fairness Doctrine.

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[98] *Id.* at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)) (emphasis added).
[99] *See id.* at 256.
[100] *NAACP v. Button*, 371 U.S. 415, 433 (1963).
[101] *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (quoting 2 Z. Chafee, *Government and Mass Communications* 633 (1947)).
[102] *Reno v. ACLU*, 521 U.S. 844, 885 (1997).
[103] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) (plurality opinion).
[104] *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *Freedman v. Maryland*, 380 U.S. 51 (1965)).
[105] *Republican Party of Minnesota v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).
[106] *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2007 U.S. LEXIS 8515, at *47.
[107] *See Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 212 (1943).

> It is said, of course, that Government can control the broadcasters because their channels are in the public domain in the sense that they use the airspace that is the common heritage of all the people. *But parks are also in the public domain. Yet people who speak there do not come under Government censorship*. It is the tradition of Hyde Park, not the tradition of the censor, that is reflected in the First Amendment. TV and radio broadcasters are a vital part of the press [and] . . . the First Amendment allows no Government control over it . . . .[108]

The free market—*i.e.*, the American viewing and listening public—is in the best position to determine which broadcast programs are worth keeping and which ones are not.

Conclusion

Regardless of whether "the life of the law" has been logic, experience, or both,[109] the Fairness Doctrine is simply bad policy. Experience has shown that the Fairness Doctrine greatly limits political debate and encourages self-censorship. This is consistent with the theoretical underpinning of the First Amendment that democracy flourishes when there is a free exchange of ideas largely uninhibited by government censorship. Only compelling interests of the highest order justify content-based restrictions on political speech, and the Fairness Doctrine does not pass this stringent test. In light of the vast array of media technologies that are currently available to the American public—and the continued development of new media technologies—the Fairness Doctrine is an unnecessary relic of the past that should not be reinstituted.

[108] *Columbia Broad. Sys.*, 412 U.S. at 162 (Douglas, J., concurring) (citations omitted) (emphasis added).
[109] *See Hein v. Freedom From Religion Found.*, 127 S. Ct. 2553, 2007 U.S. LEXIS 8512, at *88-89 (Scalia, J., concurring in the judgment) (quoting Holmes, *The Common Law* 1 (1881)).