



# Fairness Doctrine: History and Constitutional Issues

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## Summary

The Fairness Doctrine was a policy of the Federal Communications Commission (FCC or Commission) that required broadcast licensees to cover issues of public importance and to do so in a fair manner. Issues of public importance were not limited to political campaigns. Nuclear plant construction, workers' rights, and other issues of focus for a particular community could gain the status of an issue that broadcasters were required to cover. Therefore, the Fairness Doctrine was distinct from the so-called "equal time" rule, which requires broadcasters to grant equal time to qualified candidates for public office, because the Fairness Doctrine applied to a much broader range of topics.

In 1987, after a period of study, the FCC repealed the Fairness Doctrine. The FCC found that the doctrine likely violated the free speech rights of broadcasters, led to less speech about issues of public importance over broadcast airwaves, and was no longer required because of the increase in competition among mass media. The repeal of the doctrine did not end the debate among lawmakers, scholars, and others about its constitutionality and impact on the availability of diverse information to the public.

The debate in Congress regarding whether to reinstate the doctrine continues today. Recently, Chairman Upton of the House Subcommittee on Communications and Technology sent a letter to FCC Chairman Genachowski urging the Commission to remove the regulations relating to the Fairness Doctrine from the Code of Federal Regulations. Chairman Genachowski responded by reasserting his lack of support for the Fairness Doctrine and agreeing to begin the process of repealing the regulations.

Any attempt to reinstate the Fairness Doctrine likely would be met with a constitutional challenge. Those opposing the doctrine would argue that it violates their First Amendment rights. In 1969, the Supreme Court upheld the constitutionality of the Fairness Doctrine, but applied a lower standard of scrutiny to the First Amendment rights of broadcasters than it applies to other media. Since that decision, the Supreme Court's reasoning for applying a lower constitutional standard to broadcasters' speech has been questioned. Furthermore, when repealing the doctrine, the FCC found that, as the law stood in 1987, the Fairness Doctrine violated the First Amendment even when applying the lower standard of scrutiny to the doctrine. No reviewing court has examined the validity of the agency's findings on the constitutional issue. Therefore, whether a newly instituted Fairness Doctrine would survive constitutional scrutiny remains an open question.

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## **Introduction**

For over 30 years, the Federal Communications Commission (FCC or Commission) required broadcast licensees to present controversial issues of public importance and to do so in a manner that was fair and balanced. This requirement came to be known as the “Fairness Doctrine.” In practice, it required broadcasters to identify issues of public importance, decide to cover those issues, and then to afford the best representatives of the opposing views on the issue the opportunity to present their case to the community.

Many broadcasters complained that the Fairness Doctrine was overly burdensome and inhibited their ability to cover issues of public importance. Those in favor of the doctrine believed that it ensured vibrant discussion over the public airwaves. After a number of proceedings examining the effects of the Fairness Doctrine on broadcasters, the FCC abolished the doctrine in 1987. The FCC reasoned that increased competition in the marketplace, First Amendment concerns, and evidence that the Fairness Doctrine actually chilled speech rather than facilitating it justified abandoning the policy.

Discussion continues among scholars and lawmakers regarding the Fairness Doctrine’s effectiveness, constitutionality, and reinstatement. Some believe the Fairness Doctrine should be resurrected to promote public discourse, while others believe the doctrine should never be reinstated because it inhibits the free exchange of ideas. For example, as recently as the 109<sup>th</sup> Congress, bills were introduced in Congress to reinstate the Fairness Doctrine. On the other hand, in the 111<sup>th</sup> Congress, there have been a number of bills introduced that would prevent the FCC from reinstating the Fairness Doctrine.

This report will discuss the history of the Fairness Doctrine, enforcement of the doctrine by the FCC, abolition of it by the FCC, efforts to effect and to prevent its reinstatement, and potential constitutional issues with reinstating the doctrine as applied to broadcasters and as applied to satellite and cable television providers. It will be updated as warranted.

## **The Fairness Doctrine**

### **Foundations of the Fairness Doctrine**

Early communications legislation established the American system for broadcasting, in which licenses to broadcast are granted to private individuals (or corporations).<sup>1</sup> Those without a license are not permitted to broadcast.<sup>2</sup> This scheme prevents interference from competing broadcasters. It also guarantees that some speakers who wish to communicate via broadcast airwaves cannot do so.

Recognizing that this structure prevented many who would wish to communicate via broadcast from doing so, and that individuals who were able to obtain a license had control over the content the stations broadcast, Congress required that broadcast licenses may be granted only when the

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<sup>1</sup> See The Radio Act of 1927, P.L. 69-632, ch. 169, 44 Stat. 1162 (1927).

<sup>2</sup> 47 U.S.C. § 301.

licenses serve the public interest.<sup>3</sup> The FCC is charged with enforcing this provision by considering the public interest when granting licenses to broadcasters, renewing them, and modifying them.<sup>4</sup> Furthermore, the FCC is required “from time to time, as public convenience, interest or necessity requires” to promulgate “such rules and regulations and prescribe such restrictions and conditions ... as may be necessary to carry out the provisions of” the Communications Act.<sup>5</sup> The Supreme Court has noted that these provisions provide the FCC with an expansive mandate to ensure that broadcast stations operate in the public interest.<sup>6</sup>

In the spirit of this broad mandate, the FCC favored granting and renewing licenses to broadcast stations that presented more than one viewpoint in their programming. This preference evolved over time. In 1949, finding its authority in the public interest obligations imposed upon broadcasters by the Communications Act, the FCC issued a report entitled *In the Matter of Editorializing by Broadcast Licensees*.<sup>7</sup> The report affirmatively established the duty of broadcast licensees to cover controversial issues of public importance in a fair and balanced manner. The obligation is known as the Fairness Doctrine.<sup>8</sup>

The Fairness Doctrine consisted of two basic requirements:

(1) that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance; and

(2) that in doing so, [the broadcaster must be] fair – that is, [the broadcaster] must affirmatively endeavor to make ... facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.<sup>9</sup>

These obligations were not satisfied by simply granting air time to those who requested it in order to respond to an issue previously discussed during the broadcaster’s regular programming.<sup>10</sup> Broadcasters instead had the affirmative duty to determine what the appropriate opposing viewpoints were on these controversial issues, and who was best suited to present them.<sup>11</sup> If sponsored programming was not an option, the broadcasters had to provide it at their own expense.<sup>12</sup>

Further requirements of the Fairness Doctrine were eventually codified into regulation. The personal attack rule stated that when personal attacks were made on individuals involved in public issues, the broadcaster had to, within one week of the broadcast, notify the person attacked, provide him with a copy of the broadcast (either script or tape), and allow him an

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<sup>3</sup> 47 U.S.C. § 307.

<sup>4</sup> 47 U.S.C. §§ 307, 309.

<sup>5</sup> 47 U.S.C. § 303.

<sup>6</sup> *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 219 (1943).

<sup>7</sup> 13 FCC Rept. 1246 (1949) [hereinafter “Report on Editorializing”].

<sup>8</sup> *Id.*

<sup>9</sup> Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

<sup>10</sup> Report on Editorializing, 13 FCC at 1249.

<sup>11</sup> *Id.*

<sup>12</sup> This obligation is widely referred to as the Cullman Doctrine, because it originated in the FCC decision *Cullman Broadcasting Co.*, 40 FCC 576 (1976).

opportunity to respond over the broadcaster's facilities.<sup>13</sup> The political editorial rule required that when a broadcaster endorsed a particular political candidate, the broadcaster was required to provide the other qualified candidates for the same office (or their representatives) the opportunity to respond over the broadcaster's facilities.<sup>14</sup>

Congress amended Section 315 of the Communications Act in 1959 to include what seemed to be a tacit approval of the FCC's Fairness Doctrine.<sup>15</sup> Section 315 imposes the requirement upon broadcasters to grant equal broadcasting time to political candidates with certain exceptions. The amendment pertaining to the Fairness Doctrine states the following:

Nothing in the foregoing sentence [creating exemptions from the equal time requirements] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

In its report on the amendment, the House explained that this provision "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934."<sup>16</sup> Debate arose in subsequent years over whether this addition to Section 315 codified the Fairness Doctrine, or merely stated Congress's intent to avoid interference with the FCC's enforcement of the Fairness Doctrine. This debate will be addressed in full in the section of this report addressing the repeal of the Fairness Doctrine.

## **Enforcement of the Fairness Doctrine**

In reviewing particular broadcasts for potential violations of the Fairness Doctrine, the FCC looked to whether the licensee had acted "reasonably and in good faith to present a fair cross-section of opinion on the controversial issue."<sup>17</sup> The FCC emphasized that harmless errors and honest mistakes were not actionable and that the merits of the actual competing viewpoints presented were not under review by the agency. By way of example, in the course of enforcing the doctrine, the FCC found that the establishment of a National Fair Employment Practices Commission was an issue of public importance that triggered Fairness Doctrine obligations, as were issues such as the potential institution of pay TV, a nutritionist giving advice about diet and health, programs describing socialist forms of government, etc.<sup>18</sup> Consequences for failure to comply with the Fairness Doctrine could have ranged anywhere from a requirement that time be granted to unaired viewpoints, to punishment as severe as a loss of license or a substantial demerit in a comparative renewal proceeding.<sup>19</sup>

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<sup>13</sup> 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679.

<sup>14</sup> *Id.*

<sup>15</sup> 47 U.S.C. § 315; 47 C.F.R. § 73.1910 (1985).

<sup>16</sup> H.Rept. 86-1069, 86<sup>th</sup> Cong., 1<sup>st</sup> sess., August 27, 1959 at 5.

<sup>17</sup> Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 (1964).

<sup>18</sup> *Id.*

<sup>19</sup> See *In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd 5272 (1987).

## Red Lion Broadcasting Co., Inc. v. FCC

In *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission (Red Lion)*, decided in 1969, the Supreme Court took up two questions related to the Fairness Doctrine. First, the Court addressed whether the FCC had the authority to create and to enforce the Fairness Doctrine.<sup>20</sup> Second, the Court examined whether requiring broadcasters to cover issues of public importance and to present opposing views on those issues fairly violated the broadcasters' First Amendment rights to free speech.

Specifically at issue in *Red Lion* were the personal attack and political editorial rules noted above. Two separate cases had been consolidated for review by the Supreme Court. In the first case, the Red Lion Broadcasting Company (a Pennsylvania radio station) had broadcast a program in which Reverend Billy James Hargis described author Fred J. Cook as having been fired for making false charges against city officials, having worked for a Communist-affiliated publication, having defended Alger Hiss, and having attacked J. Edgar Hoover.<sup>21</sup> Cook heard the broadcast and demanded reply time, but the station refused. The FCC found that the station had failed to meet its obligations under the Fairness Doctrine, a decision that was upheld on appeal to the Court of Appeals for the D.C. Circuit. The broadcast station appealed to the Supreme Court. The second case was a direct challenge to the constitutionality of the political editorial and personal attack regulation. The regulations were held to be unconstitutional under the First Amendment by the Seventh Circuit Court of Appeals and the FCC appealed.

The Supreme Court found that the FCC was within its authority to implement the regulations at issue in the second case and to issue the decision in *Red Lion*.<sup>22</sup> In the estimation of the Court, the agency was implementing the policy of Congress "rather than embarking on a frolic of its own." The Court traced the history of the Fairness Doctrine, noting that broadcast spectrum was originally unregulated and the result was chaos. The Court found that Congress decided that the best solution was to take control of access to the broadcast spectrum and regulate its allocation in a manner consistent with the public interest. Congress granted the power to choose broadcast licensees to the FCC and instructed the agency to consider the public interest when exercising that power.

In order to exercise that authority, the Supreme Court noted that the FCC needed to determine what broadcasting in the public interest meant. From its inception, the FCC (and its predecessor agency, the Federal Radio Commission) held the view that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies ... to all discussion of issues of importance to the public."<sup>23</sup> Enforcement of this general policy continued until the FCC issued its report *In the Matter of Editorializing by Broadcast Licensees* in 1949, which set out the basic requirements of the Fairness Doctrine as it would exist throughout its life.<sup>24</sup> Then in 1959, Congress chose to include in its amendment to Section 315 of the Communications Act of 1934 a specific ratification of the Fairness Doctrine. In

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<sup>20</sup> 395 U.S. 367 (1969).

<sup>21</sup> *Id.* at 371-373.

<sup>22</sup> *Id.* at 375-386.

<sup>23</sup> *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993, cert. dismissed, 281 U.S. 706 (1930).

<sup>24</sup> Report on Editorializing, 13 FCC at 1246 - 1270.

light of this evidence, the Supreme Court held that the Fairness Doctrine was a legitimate exercise of the FCC's congressionally delegated authority.

The broadcasters also argued that the Fairness Doctrine impinged upon their First Amendment right to freedom of speech. They contended that it was their right to broadcast whatever they chose and to exclude whom they wished from their frequencies. The Supreme Court rejected this argument for a number of reasons, but the most often cited has come to be known as the scarcity rationale. The Court said:

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 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.<sup>25</sup>

The Supreme Court, therefore, upheld the constitutionality of the Fairness Doctrine and the personal attack/political editorial regulation. However, the history of the doctrine would not end there.

## Repeal by the FCC

In the 1980s, the FCC began to question the continued necessity of the Fairness Doctrine. As a result, the Commission undertook to examine its application of the Fairness Doctrine, the doctrine's effects on broadcasters, and the constitutionality of the doctrine in light of developments in First Amendment law.<sup>26</sup> In 1985, the FCC released an order addressing three main questions related to the Fairness Doctrine: (1) whether the doctrine was constitutionally permissible under then-current marketplace conditions and First Amendment Jurisprudence; (2) whether the doctrine actually chilled rather than encouraged free speech; and, (3) whether the doctrine was codified into law by either Section 315 or the general public interest standard in the Communications Act.<sup>27</sup>

The Commission acknowledged that the Supreme Court had upheld the constitutionality of the Fairness Doctrine in *Red Lion*, but determined nonetheless that the constitutionality of the Fairness Doctrine had become suspect.<sup>28</sup> The Commission looked to the development of First Amendment law following the *Red Lion* decision and determined that the evolution of free speech in mass communications cases along with developments in broadcast technology potentially undermined the constitutionality of the Fairness Doctrine.<sup>29</sup> The FCC recognized, however, that it is the province of the courts to pass upon the constitutionality of its policies and declined to pass on the constitutionality of the doctrine.

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<sup>25</sup> *Id.* at 390 (citations omitted).

<sup>26</sup> General Fairness Doctrine Obligations of Broadcast Licensees, Report, 50 Fed. Reg. 35418 (1985).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 35420.

<sup>29</sup> *Id.*



The Commission examined the effect of its enforcement of the Fairness Doctrine upon broadcasters and came to the conclusion that the doctrine chilled speech substantially.<sup>30</sup> The Commission noted that enforcement actions usually occurred under the second prong of the Fairness Doctrine. In other words, broadcasters most often were determined to have violated the doctrine by failing to provide all valid opposing viewpoints air time on a given issue. Broadcasters rarely faced enforcement for failing to address issues of public importance in the first place. As a result, broadcasters could avoid the expense of defending enforcement actions by simply refusing to cover issues of public importance. As evidence, the Commission noted instances cited in the comments of planned coverage of issues of public importance being jettisoned for fear of Fairness Doctrine lawsuits,<sup>31</sup> as well as refusals on the part of broadcasters to carry certain paid programming that they feared would trigger their Fairness Doctrine obligations.<sup>32</sup>

The Commission could not determine, however, whether the Fairness Doctrine had been codified by Congress in Section 315 of the Communications Act.<sup>33</sup> The agency observed that the legislative language was ambiguous as to whether Congress had intended to approve the Commission's authority to enforce the doctrine or to create a new statutory requirement.<sup>34</sup> Evidence culled from the legislative history also was of little help in determining the intent of Section 315.<sup>35</sup> Furthermore, pending before Congress at the time were bills related to the Fairness Doctrine. Accordingly, the FCC declined to repeal the doctrine in 1985, and chose to wait for further guidance from Congress on the issue.<sup>36</sup> Despite declining to repeal the doctrine, the agency made clear its belief that the most effective way to encourage the free exchange of ideas over broadcast was to have an open and unregulated marketplace of ideas.

In 1986, the U.S. Court of Appeals for the District of Columbia held that Congress had not codified the Fairness Doctrine.<sup>37</sup> Section 315, according to the court, "ratified the Commission's longstanding position that the public interest standard authorize[d] the Fairness Doctrine," but did

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<sup>30</sup> *Id.* at 35422.

<sup>31</sup> For example, the Commission cited a Southern California radio station that decided not to air a series on religious cults despite having already invested resources in its preparation. The decision, according to the radio station, was based upon the assessment of costs related to a potential Fairness Doctrine challenge. *Id.* at 35427.

<sup>32</sup> Specifically, the Commission cited comments from organizations such as the Glass Packaging Institute and the National Rifle Association. These commenters had documented difficulty in placing advertisements related to ballot measures due to Fairness Doctrine concerns. *Id.* at 35429.

<sup>33</sup> *Id.* at 35453.

<sup>34</sup> *Id.* at 35448.

<sup>35</sup> *Id.* at 35449. The Senate Committee Report provided that

In recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad-encompassing duty of providing a fair cross-section of opinion ... S.Rep.No. 562, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 13 (1959).

This language appears to suggest that Congress did not intend to codify the Fairness Doctrine. However, in debate on the floor, some Members indicated their belief that the Fairness Doctrine amendment would codify the doctrine. One Member said, for example, that the Fairness Doctrine amendment "was the one condition we could write into the law to make sure the Federal Communications Commission would give the matter the right interpretation." 105 Cong. Rec. 17,778 (1959).

<sup>36</sup> 50 Fed. Reg. at 35453.

<sup>37</sup> *Telecommunications Research and Action Center v. Federal Communications Commission*, 801 F.2d 501, 516 (1986); cert. denied, 482 U.S. 919 (1987).

not “create [or] impose any obligation” on the Commission to enforce the Fairness Doctrine.<sup>38</sup> The Supreme Court declined to review this case.

Following this decision, Congress directed the FCC to examine alternatives to the Fairness Doctrine and to submit a report to Congress on the subject.<sup>39</sup> The FCC opened a proceeding seeking public comment on alternative means of administration and enforcement of the Fairness Doctrine.<sup>40</sup> Alternatives were analyzed including abandoning a case-by-case enforcement approach, replacing the doctrine with open access time for all members of the public, doing away with the personal attack rule, and eliminating certain other aspects of the doctrine.<sup>41</sup> The Commission rejected each of these alternatives for various reasons. This, however, was not the proceeding in which the Commission repealed the Fairness Doctrine.

The repeal of the doctrine occurred later in 1987. In a complaint against the television station WTVH Syracuse, NY, the FCC declined to sanction the broadcast station for a violation of the Fairness Doctrine, because the agency determined that the Fairness Doctrine violated the First Amendment.<sup>42</sup> The FCC repeated its findings from its 1985 report and argued that the scarcity rationale underpinning the Supreme Court’s *Red Lion* decision was no longer valid. The agency also noted that

the doctrine’s affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control. Throughout most of our history, the principal function of the First Amendment has been to protect the free marketplace of ideas by precluding government intrusion.<sup>43</sup>

The Fairness Doctrine, on the other hand, requires the government to make subjective judgments regarding which issues are of public importance and which points of view on those issues are significant enough to require broadcasters to cover them. The Commission expressed discomfort with its role in the editorial decisions being made by broadcasters and posited that such government involvement in these decisions ran contrary to the First Amendment.<sup>44</sup>

The Commission noted that many of the regulations it applies to broadcasters would be unconstitutional if applied to print media. The Commission also recognized, however, that speech restrictions placed upon broadcasters were subject to a lesser degree of constitutional scrutiny than restrictions placed on print media. The agency therefore conducted its analysis of the constitutionality of the Fairness Doctrine under the standard set forth in *Red Lion* and examined

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<sup>38</sup> *Id.* 517-518.

<sup>39</sup> Making Continuing Appropriations for Fiscal Year 1987, P.L. 99-500. *See also*, Conference Report to Accompany H.J.Res. 738, H.Rept. 99-1005, 99<sup>th</sup> Cong., 2d Sess. (1986).

<sup>40</sup> Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees in MM Docket No. 97-26, 2 FCC Rcd 1532 (1987).

<sup>41</sup> In the Matter of Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees. 2 FCC Rcd 5272 (1987).

<sup>42</sup> In re Complaint of Syracuse Peach Council against Television Station WTVH Syracuse, New York, 2 FCC Rcd 5043 (1987).

<sup>43</sup> *Id.* at 5056.

<sup>44</sup> *Id.* at 5044.

whether the Fairness Doctrine was “narrowly tailored to achieve a substantial government interest.”<sup>45</sup>

The Fairness Doctrine was promulgated and enforced by the Commission in order to serve the public interest in access to an open and robust marketplace of ideas. The Commission had determined that the doctrine chilled the speech of broadcasters and inhibited free and open debate on the public airwaves. In the Commission’s estimation, therefore, the Fairness Doctrine actually disserved the public interest and did not advance the substantial government interest in ensuring public access to diverse debate on the airwaves.<sup>46</sup> The Commission further argued that the Supreme Court should reconsider its application of a lower degree of First Amendment protection to broadcasters and that the First Amendment should protect media equally regardless of their delivery method.<sup>47</sup> This case was appealed to the D.C. Circuit Court of Appeals. The court upheld the order of the FCC, but did not reach the constitutional issue.<sup>48</sup>

## Constitutional Issues

### Application of the Fairness Doctrine to Broadcast Licensees

Because of the FCC ruling determining that the Fairness Doctrine violated the First Amendment, it is likely that any reinstatement of the doctrine, either by Congress or by the FCC, would be met by a court challenge on First Amendment grounds. Such a challenge may reach the Supreme Court of the United States, inviting the Court to reconsider *Red Lion*. In reviewing the constitutionality of the Fairness Doctrine as applied to broadcast licensees, the Court would likely be faced with two questions: (1) what standard of constitutional scrutiny to apply, and (2) whether the Fairness Doctrine withstands the chosen level of scrutiny.

### Standard of Scrutiny

Government restrictions upon speech that are dependent upon the content of that speech are normally accorded strict scrutiny, the highest level of constitutional analysis and the most difficult for a law to survive.<sup>49</sup> The Fairness Doctrine is a content-based restriction on speech because it requires a government agent, the FCC, to examine the speech of private actors and to make subjective judgments regarding the fairness of the speech. In most circumstances, such a restriction would be reviewed under strict scrutiny, which requires the government to prove that the law is necessary to achieve a compelling government interest, and that the law is the least restrictive means of achieving that interest.<sup>50</sup> The Supreme Court has struck down laws similar to the Fairness Doctrine when applying strict scrutiny.<sup>51</sup> It seems, therefore, that if the Supreme Court were to apply strict scrutiny to the Fairness Doctrine the doctrine would be struck down.

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<sup>45</sup> *Id.* at 5049.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 5058.

<sup>48</sup> *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1988).

<sup>49</sup> *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1986).

<sup>50</sup> *Id.*

<sup>51</sup> *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a Florida law that required (continued...))

In *Red Lion*, however, the Supreme Court determined that restrictions on the speech of broadcasters should be accorded a lesser standard of constitutional scrutiny, known as intermediate scrutiny.<sup>52</sup> Intermediate scrutiny requires the government to prove that the restriction on speech advances a substantial government interest and that the law is narrowly tailored (though not necessarily the least restrictive alternative) to achieve that interest. The Supreme Court reasoned that the scarcity of broadcast spectrum and the need to assure public access to a variety of viewpoints over the broadcast spectrum provided a basis for applying intermediate scrutiny in these circumstances.<sup>53</sup>

The FCC argued in its 1987 decision that the scarcity rationale was no longer applicable.<sup>54</sup> The agency noted an increase in the number of broadcast stations since the *Red Lion* decision. The agency also noted the increase in information sources and viewpoints available to the public via cable and satellite channels. Today, a party arguing against the scarcity rationale could take note of the dramatic increase in the ease of the communication of ideas via the Internet. It could be argued that these technological advances render the scarcity rationale obsolete.

The Supreme Court has had the opportunity to address this argument repeatedly and has consistently reaffirmed the validity of the scarcity rationale.<sup>55</sup> Despite the increased number of broadcast outlets and the increase in methods of mass information delivery (including cable, satellite, and the Internet), the fact remains, according to the Court, that not every individual who wishes to operate a broadcast station may do so.<sup>56</sup> The Supreme Court also has said that broadcast content is unique in American media.<sup>57</sup> It is free over the air to anyone with a television or a radio within range of a signal. Broadcast, therefore, is distinct from cable, satellite, and the Internet, which are all services for which consumers must pay. Another possible reason the court may be disinclined to repudiate the scarcity rationale is the increased consolidation in ownership of media outlets, including broadcast stations.<sup>58</sup> If many of the broadcast stations across the country are owned by the same few large corporations, the argument that there exists an increased number of information sources in the broadcast marketplace may be more difficult for the Court to accept.

It is possible that, in light of the proliferation of different types of media outlets since *Red Lion*, the Supreme Court will abandon the scarcity rationale for applying a lower standard of scrutiny to restrictions on broadcasters' speech. If the scarcity rationale is abandoned, the Court will likely begin to apply strict scrutiny to broadcaster speech restrictions like the Fairness Doctrine. Because the Supreme Court has struck down regulations similar to the Fairness Doctrine when

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(...continued)

newspapers to allow individuals space to reply to attacks made against them in the publication).

<sup>52</sup> *Red Lion*, 395 U.S. at 386.

<sup>53</sup> *Id.*; *Columbia Broadcasting System Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) (holding that [broadcast] frequencies are a scarce resource).

<sup>54</sup> *In re Complaint of Syracuse Peace Council*, 2 FCC Rcd at 5048.

<sup>55</sup> See e.g. *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down a ban on editorializing by non-commercial broadcasters); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding regulations of indecent content over broadcast).

<sup>56</sup> *CBS v. FCC*, 412 U.S. at 101.

<sup>57</sup> *FCC v. Pacifica Foundation*, 438 U.S. at 748-749 (noting that broadcast stations have established a uniquely pervasive presence in the lives of all Americans).

<sup>58</sup> See, *Free Press, Who Owns the Media?* <http://www.freepress.net/resources/ownership>.

applied to other types of media, it seems unlikely that the Fairness Doctrine would survive review under strict scrutiny.<sup>59</sup>

It is also possible that the Supreme Court will maintain the scarcity rationale for applying a lower standard of scrutiny to restrictions on broadcasters' speech and will continue to apply intermediate scrutiny to the Fairness Doctrine.

## **The Constitutionality of the Fairness Doctrine as Applied to Broadcast Licensees**

Assuming that the Supreme Court would continue to apply intermediate scrutiny to government restrictions on broadcasters' speech, the Court would then need to decide whether the Fairness Doctrine withstands such scrutiny. The Court may choose to uphold *Red Lion* and the Fairness Doctrine under the principle of *stare decisis*, which requires courts to adhere to precedent.<sup>60</sup> The Court also may choose to analyze a newly established Fairness Doctrine in light of evidence regarding its effects on speech that has developed since the *Red Lion* decision. To do so, it would have to answer two questions: (1) whether the Fairness Doctrine advances a substantial government interest, and (2) whether the doctrine is narrowly tailored to achieve that interest.

### ***Substantial Interest***

The government has a well-established substantial interest in ensuring access of the public to a diversity of viewpoints and information sources in a robust marketplace of ideas.<sup>61</sup> If the Supreme Court determines that the Fairness Doctrine chills speech rather than encourages a robust exchange of ideas, it is likely that the Court would conclude that the Fairness Doctrine does not advance the government's interest in a well-informed citizenry and is unconstitutional. If, however, the Court finds that the Fairness Doctrine continues to advance a substantial government interest, the Court would move on to the next step in the constitutional analysis.

The Fairness Doctrine was originally promulgated under the FCC's authority to grant licenses to broadcasters that serve the public interest.<sup>62</sup> The public interest standard in the Communications Act necessarily implicates the First Amendment.<sup>63</sup> The Fairness Doctrine was intended to advance the government interest in ensuring the presence of a diversity of viewpoints over broadcast stations and to prevent broadcasters from monopolizing the airwaves with their personal interests.<sup>64</sup> Under this theory, the public's right to receive information would be protected from any tendency on the part of broadcasters only to communicate information of which they approved or agreed. Citing this reasoning, the Supreme Court, in *Red Lion*, upheld the constitutionality of the Fairness Doctrine.

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<sup>59</sup> See *FCC v. Pacifica*, 438 U.S. at 748 (noting that the First amendment protects publishers from being required to print replies, but provides broadcasters with no such protections); *Miami v. Tornillo*, 418 U.S. at 241 (invalidating a law that required newspapers to respond to personal attacks).

<sup>60</sup> Black's Law Dictionary 661 (2d Pocket ed. 2001).

<sup>61</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>62</sup> In the Matter of Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).

<sup>63</sup> *FCC v. League of Women Voters*, 468 U.S. at 377.

<sup>64</sup> See Report on Editorializing, 13 FCC at 1246.

Opponents of the Fairness Doctrine have argued that the doctrine actually inhibits the free exchange of ideas over the broadcast airwaves. The *Red Lion* Court noted in particular that, at the time the decision was rendered, there was no evidence that the Fairness Doctrine chilled speech.<sup>65</sup> The Court observed that, if such a theory were proven true, the FCC was not powerless to insist that broadcasters give coverage to issues of public importance.

In its 1985 report and 1987 decision repealing the doctrine, the FCC cited numerous instances in which broadcasters claimed to have refused to air certain pieces or cover issues for fear of Fairness Doctrine enforcement.<sup>66</sup> The agency further noted that the cost of defending Fairness Doctrine complaints could amount to significant sums of money and manpower, and could deter coverage of issues of public importance even further.<sup>67</sup> The FCC also noted the disparity between enforcement of the first prong of the doctrine (which requires coverage of issues of public importance) and the second prong (which requires significant views on those issues to be given fair coverage).<sup>68</sup> The agency explained that its own difficulty in enforcing the first prong arose because it received far fewer complaints regarding the failure to cover an important issue. Therefore, broadcasters could avoid enforcement actions for violations of the Fairness Doctrine by simply not covering the issue of public importance at all. The FCC may not be able to rectify this enforcement disparity in a cost-efficient manner, because any solution would require the agency to monitor the programming of all broadcasters at all times and to know which issues are of most importance to which communities. Such constant and far-reaching oversight may be beyond the capacity of any agency.

However, unlike other regulations on broadcaster speech that have been struck down, the Fairness Doctrine requires that speech be answered with more speech.<sup>69</sup> This aspect of the doctrine has been cited approvingly by the Supreme Court. The Fairness Doctrine does not single out any one point of view as objectionable or off-limits.<sup>70</sup> Instead, it requires that all significant points of view on issues of public importance receive broadcast time. This is a tenet at the core of the First Amendment, and it could be argued that the doctrine achieved its goal of raising the level of debate on the broadcast airwaves, despite the FCC's findings in the 1980s.

If the Supreme Court is persuaded by the argument that the Fairness Doctrine chills speech rather than encourages a robust exchange of ideas, the Court may find that the doctrine does not advance the government's interest in a well-informed citizenry. If the Court finds the doctrine does not advance that substantial government interest, the Court will strike it down as unconstitutional. If, however, the Court is persuaded by the argument it accepted in *Red Lion* (that the Fairness Doctrine advances the substantial government interest in a robust marketplace of ideas), the Court would move on to the next step in the constitutional analysis.

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<sup>65</sup> *Red Lion*, 395 U.S. at 393-394.

<sup>66</sup> *General Fairness Doctrine Obligations of Broadcast Licensees*, Report, 50 Fed. Reg. at 35418; *In re Complaint of Syracuse Peach Council against Television Station WTVH Syracuse, New York*, 2 FCC Rcd. at 5043.

<sup>67</sup> *General Fairness Doctrine Obligations of Broadcast Licensees*, Report, 50 Fed. Reg. at 35418.

<sup>68</sup> *Id.* at 35422.

<sup>69</sup> See *FCC v. League of Women Voters*, 468 U.S. at 372.

<sup>70</sup> See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. at 10416.

### *Narrow Tailoring*

The next question the Court would address is whether the Fairness Doctrine would be narrowly tailored to achieve the government's interest. Under the previous enforcement regime the FCC examined each potential violation of the Fairness Doctrine on a case-by-case basis.<sup>71</sup> This tactic led to a measure of flexibility in penalties for violators and in the evolution of the doctrine.<sup>72</sup> Such flexibility enabled the Commission to be more responsive in its enforcement and to tailor each enforcement proceeding to the facts at issue in each case. In upholding the previous regime, the Supreme Court noted that it did not approve of each and every application of the Fairness Doctrine, but, because of the chosen method of enforcement, such approval was not required to uphold the doctrine in general.<sup>73</sup> If this enforcement regime is chosen once again, it is likely that the Court will follow its reasoning in *Red Lion* and deem the doctrine to be narrowly tailored. However, other methods of enforcement that are less well tailored are conceivable, and have been considered by the FCC.<sup>74</sup> Whether the Fairness Doctrine as newly established would be narrowly tailored will therefore depend upon the enforcement regime chosen by Congress or the FCC.

## **Application of the Fairness Doctrine to Cable and Satellite Providers**

It does not appear that the Fairness Doctrine may be applied constitutionally to cable or satellite service providers. The Supreme Court has held that content-based restrictions on the speech of cable and satellite providers are subject to strict scrutiny.<sup>75</sup> Strict scrutiny requires that the restriction at issue advance a compelling government interest and that the restriction be the least restrictive means of achieving that interest.

Content-based regulations of speech in the print media are accorded strict scrutiny. The Supreme Court has recognized that regulations similar to the Fairness Doctrine, when applied to the print media, are not constitutional.<sup>76</sup> If regulations similar to the Fairness Doctrine could not withstand strict scrutiny when applied to the print media, it appears unlikely that similar regulations would withstand such scrutiny when applied to cable or satellite providers.

## **Continuing Congressional Debate**

Since the repeal of the Fairness Doctrine, debate among legislators regarding whether to reinstate the doctrine has continued. Below are the bills related to the Fairness Doctrine that were

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<sup>71</sup> In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 2 FCC Red 5272 (1987).

<sup>72</sup> *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. at 10416.

<sup>73</sup> *Red Lion*, 395 U.S. at 396.

<sup>74</sup> See *In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Red at 5272.

<sup>75</sup> *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

<sup>76</sup> See *FCC v. Pacifica*, 438 U.S. at 748 (noting that the First amendment protects publishers from being required to print replies, but provides broadcasters with no such protections); *Miami v. Tornillo*, 418 U.S. at 241 (invalidating a law that required newspapers to allow individuals to respond to personal attacks).

introduced in the most recent Congresses, as well as a discussion of the recent correspondence between the chairman of the House Subcommittee on Communications and Technology and Chairman Genachowski.

## **111<sup>th</sup> Congress**

### **H.R. 226, Broadcaster Freedom Act of 2009**

This bill would deprive the FCC of the authority to re-promulgate or reinstate the Fairness Doctrine.

### **S. 34, S. 62 Broadcaster Freedom Act of 2009**

These bills are identical to the House bill of the same name.

### **S. 160, District of Columbia Voting Rights Act of 2009 (Engrossed as Agreed to or Passed by the Senate)**

Section 10 of the District of Columbia Voting Rights Act of 2009, as it was passed by the Senate, would create a new section in the Communications Act, Section 303A. Section 303A would prevent the FCC from reinstating “the requirement that broadcasters present or ascertain opposing viewpoints on issues of public importance” or “any similar requirement that broadcasters meet programming quotas or guidelines for issues of public importance.”

Section 9 of the same bill makes clear that “[n]othing in section 303A shall be construed to limit the authority of the Commission regarding matters unrelated to a requirement that broadcasters present or ascertain opposing viewpoints on issues of public importance.”

These sections, taken together, appear to prevent the FCC from reinstating the Fairness Doctrine, or any similar requirement upon broadcasters in the future.

## **112<sup>th</sup> Congress**

### **H.R. 642, Broadcaster Freedom Act of 2011**

This bill would deprive the FCC of the authority to re-promulgate or reinstate the Fairness Doctrine.

### **Commission Letter Regarding Repeal of Regulations**

On May 31, 2011, Chairman Upton of the House Subcommittee on Communications and Technology, along with other members of the Energy and Commerce Committee, sent a letter to the chairman of the FCC urging the Commission to remove the rules in the Code of Federal Regulations that reference the Fairness Doctrine, as well as the political-editorial and personal



attack rules (47 C.F.R. §§ 73.1910, 76.209, 76.1612, 76.1613).<sup>77</sup> While these rules are largely regarded as dead letters, the chairman, nonetheless, asked that, in light of President Obama's executive order asking agencies to remove unwarranted regulations, the Commission begin with removing these regulations that most agree should no longer be enforced.

On June 6, 2011, Chairman Julius Genachowski responded indicating that Commission staff is expected to recommend the removal of these regulations from the Code of Federal Regulations.<sup>78</sup> Chairman Genachowski also expressed his support for the removal of those regulations. The letter also identified a number of statutory provision that Congress might consider amending or removing due to their obsolescence.

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<sup>77</sup> Letter from Rep. Fred Upton, Chairman, House Subcommittee on Communications and Technology, to the Honorable Julius Genachowski, Chairman, Federal Communications Commission (May 31, 2011) *available at* <http://republicans.energycommerce.house.gov/Media/file/Letters/112th/053111fccfairnessdoctrine.pdf>.

<sup>78</sup> Letter from the Honorable Julius Genachowski, Chairman, Federal Communications Commission to Rep. Fred Upton, Chairman, House Subcommittee on Communications and Technology (June 6, 2011) *available at* <http://republicans.energycommerce.house.gov/Media/file/Letters/112th/060611fccfairnessdoctrine.pdf>.

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