Fake News, Personal Attacks, and Ideological Media Run Amok –

It is Time for Fairness Doctrine 2.0

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Abstract

From 1949 to 1987, a regulation known as the "Fairness Doctrine" required radio and television stations to offer response time to those attacked by a broadcast editorial or commentary and required radio and television stations to offer differing views of issues of public concern. The Supreme Court upheld this rule against a First Amendment challenge, noting that the unique aspects of broadcasters justified this requirement. Ultimately, the rule was rescinded by the Federal Communications Commission on the ground that it was no longer needed because the growth of broadcasters rendered it outdated. The FCC determination also questioned its constitutionality. In more recent years, the expansion and influence of talk radio and cable news commentators coupled with the election of Donald Trump as president created a more toxic political environment with certain commentators employing distortions and even lies in their broadcasts and cablecasts. This paper advocates a return of the Fairness Doctrine, crafted to include cable television and streamed broadcasts deriving from cable as an effective way to allow opposing viewpoints for audiences that are effectively limited from access to those views because of the of ideological bent of the radio stations and cable services they watch. The article will demonstrate that a resurrection of the Fairness Doctrine is important for the future of the electorate and would be constitutionally valid.

Introduction

Two days before a mob composed of several thousand supporters of former President Donald Trump invaded the United States Capitol, upending the nation's peaceful transition of power and leaving at least five people dead, the right-wing radio star Glenn Beck delivered this message to his flock of 10.5 million listener. He said "it is time to fight. It is time to rip and claw and rake. . . "It is time to go to war, as the left went to war four years ago."[1] A few weeks earlier, the late Rush Limbaugh, then the nation's most popular talk radio host with an audience of over 15 million a week, told listeners that then President-Elect Joseph Biden "didn't win this thing fair and square, and we are not going to be docile like we've been in the past, and go away and wait till the next election."[2] A New York Times analysis of broadcast transcripts found that, on "The Sean Hannity Show," which is carried by more than 600 radio stations, the election was referred to as fraudulent, rigged, stolen or illegal in 35 out of the 45 episodes in that period, including comments from guests

[1] *See* Michael M. Grynbaum, Tiffany Hsu, Katie Robertson, and Keith Collins, *How Right-Wing Radio Stoked Anger Before the Capitol Siege,* The New York Times, Feb. 10, 2021, https://www.nytimes.com/2021/02/10/business/media/conservative-talk-radio-capitol-riots.html?action=click&module=Spotlight&pgtype=Homepage accessed (Feb. 10, 2021).
[2] *Id.*

and callers. The same was the case in 32 of 45 episodes of Mr. Limbaugh's program transcribed in that same time span.[3] Just one month before the riots, commentators on Fox and Newsmax ran bogus claims against Smartmatic, a provider of election technology, over its supposed role in alleged voter fraud.[4]

One month before the 2020 Election, Fox News agreed to pay millions of dollars to the family of a murdered Democratic National Committee ("D.N.C.") staff member named Seth Rich, implicitly acknowledging that the network had repeatedly hyped a false claim that the young staff member, was involved in leaking D.N.C. emails during the 2016 presidential campaign.[5] Russian intelligence officers, in fact, had hacked and leaked the e-mails but unfounded rumors about Rich circulated online before Fox commentators picked up the rumor and ran with it. Specifically, commentators Lou Dobbs and Sean Hannity parroted this canard, causing more stress and aggravation to Rich's aggrieved family.[6] The family sued Fox, which settled for an apparently large amount, but the settlement stipulated that it had to be secret until after the election. And the family never received any apology from Hannity. "Apparently, 'sorry' is a hard five-letter word for him."[7]

Even with broad free speech protections found under First Amendment jurisprudence, the ability to spout lies on the air to millions of people is troubling; the deception causes listeners to become suspicious of the electoral system and, resistant to opposing points of view. Such conduct aids in the balkanization of information that has only grown in the last quarter-century. Currently, there is no legal remedy – outside of defamation – to rectify this problem.

In the quaint old days of analog, linear broadcasting – the time of AM radio, black and white over the air television and limited media outlets – there was one way to take some of the sting out of relentless one-sided commentary – and that was a right of access by those with different views. n fact, content controls were just recommended from a social and ethical perspective, but mandated by legal fiat. While such restrictions would not be allowed in the print media, they were justified in the case of over the air broadcasting because the latter differed from print media in form and in substance.

Because radio and television stations were and remain licensed by the government under the purview of the 1934 Communications Act,[8] and subject to rules promulgated by the Federal Communications Commission ("FCC") these entities have been subjected to certain content restrictions were considered constitutionally justifiable. The broadcast access requirement, known

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[3] *Id.*

[4] *See* Leonard Pitts, Jr. *Fox News Didn't Care About Its Lies – Until the Truth of a Billion Dollar Lawsuit Got its Attention,* The Miami Herald, Feb. 9, 2021, https://www.miamiherald.com/opinion/opn-columns-blogs/leonard-pitts-jr/article249129510.html (accessed May 23, 2021).

[5] *See* Ben Smith, *Fox Settled a Lawsuit Over Its Lies; But It Insisted on One Unusual Condition*, The New York Times, Jan. 17, 2021, https://www.nytimes.com/2021/01/17/business/media/fox-news-seth-rich-settlement.html?action=click&module=Top%20Stories&pgtype=Homepage (accessed May 17, 2021).

[6] *Id*. ("Seth Rich was murdered in the early morning of Sunday, July 10, 2016, on a sidewalk in the Bloomingdale neighborhood of Washington, D.C. A story of the murder on Reddit was full of unfounded speculation that the young D.N.C. employee — not the Russians — had been WikiLeaks' source of the hacked emails. Julian Assange of WikiLeaks encouraged the speculation, but it remained low-level chatter . . . for about 10 months. That's when Fox claimed that an anonymous federal investigator had linked Seth Rich to the leak." According to the Times, "[t]he story took off. It was like 'throwing gasoline on a small fire,' Mr. Rich's brother recalled in a telephone interview from his home in Denver. "Fox blew it out of everyone's little echo chamber and put it into the mainstream.")

[7] *Id.*

[8] 48 Stat. 1064 (1934)

as the "Fairness Doctrine" involved a requirement that a broadcast licensee air controversial issues of public importance and then provide reply time for those with differing views.[9]

Print was the gold standard for First Amendment protection – courts were reluctant to impose content restrictions (except for national security purposes),[10] and could only limit speech that was deemed obscene,[11] or incited violence,[12] or violated one's copyright.[13] Courts therefore concluded that laws that required newspapers to provide reply space were also violative of the First Amendment,[14] contradicting the Fairness Doctrine rule in broadcasting.

Less than two decades afterward, the FCC reversed course and abolished the Fairness Doctrine, citing changes in the broadcast industry because of an expansion of viewing or listening opportunities.[15] At the time, most broadcasters and many commentors thought it was a relic of the past and only a few public interest advocates found merit in its continued enforcement.[16]

In the third decade of the 21st century, a vastly different world exists from that of the year 1987, when the FCC eliminated the Fairness Doctrine. Over the air radio and television broadcasting's dominance has faded. Cable, satellite broadcasting, Internet streaming, then social media has revolutionized the way speech is consumed and the way it is disseminated. And it has not always been a pretty picture, especially in the wake of the 2020 election. The cable and online universes have created their own ecosystems, appealing to audiences of particular political ideologies – liberal/left as well as conservative/right. In some cases, they have become breeding grounds of mass prevarication, not just from the former administration, but from other "commentators" and "journalists," causing serious harm to the body politic. And cable networks ideologies are shaped by their audiences,[17] which have become even more polarized in terms of the media they "trust"

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[9] *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 25 R.R. 1901 (1949).

[10] *See* Near v. Minnesota, 283 U.S. 697 (1931) (invalidated a Minnesota state law that enjoined speech that was 'libelous' as determined by a local police, but noted that such restraints may be possible for speech that may endanger national security)

[11] *See* Miller v. California, 413 U.S. 15 (1973) (crafted a three-part test to determine whether speech is obscene by determining (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.)

[12] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) ("the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[13] *See* Harper & Row v. The Nation, 471 U.S. 539 (1985) ("In using generous verbatim unpublished excerpts of an upcoming memoir by former President Gerald Ford's was not a fair use but a copyright violation, therefore not protected by the First Amendment).

[14] *See* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (Florida right of reply law that mandated granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violated the guarantees of a free press).

[15] *See* In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 FCC Rcd 5043, 63 R.R.2d 541, (1987).

[16] *See* Mark Conrad, *The Demise of the Fairness Doctrine – A Blow for Citizen Access*, 41 Fed. Comm. L. Rev. 161, 181 (1989) (noting most broadcast groups were supportive of the decision, but interest group were not).

[17] *See* Amy Mitchell, Jeffrey Gottfried, Jocelyn Kiley, and Katerina Eva Matsa, *Political Polarization and Media Habits,* Pew Center Research Study, Oct. 21, 2014, https://www.journalism.org/2014/10/21/political-polarization-media-habits/ (accessed May 7, 2021) ("When it comes to getting news about politics and government, liberals and conservatives inhabit different worlds. There is little overlap in the news sources they turn to and trust. And whether discussing politics online or with friends, they are more likely than others to interact with like-minded individuals.")

in the wake of the 2020 Election.[18] This atmosphere may well have been a catalyst for the unprecedented attack in the Capital by groups of Trump supporters on the day that the election was formally certified to the winning candidate, Joseph Biden.[19]

The seeds for the insurrection may well have been planted by the stark political divisions and the stoking of these divisions by ideologically driven media. As one commentator put it: "Day after day, hour after hour, Fox [News] gave its viewers something that looked like news or commentary but far too often lacked sufficient adherence to a necessary ingredient: truth. Birtherism. The caravan invasion. Covid denialism. Rampant election fraud. All of these found a comfortable home at Fox. . . . The mob that stormed and desecrated the Capitol on Wednesday could not have existed in a country that hadn't been radicalized by the likes of Sean Hannity, Tucker Carlson and Laura Ingraham, and swayed by biased news coverage."[20] This ideological, talk-radio based approach has made networks like Fox News highly profitable.[21] And even more recently, Fox News ended any pretense of evenhandedness in its commentary (and some say news reporting, too) when its only moderate to liberal commentators departed the network.[22]

This is not to say that similar issues do not happen in cable news networks that identify as "liberal." Issues of undue one-sidedness or commentary-based broadcasts happen on MSNBC and

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[18] See Mark Jurkowitz, Amy Mitchell, Elisa Shearer and Mason Walker, *U.S. Media Polarization and the 2020 Election: A Nation Divided*, Pew Research Center, Jan. 24, 2020, https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/ (accessed May 20, 2020).

[19] *See* Sean Illing, *The Fantasy-Industrial Complex Gave us the Capital Hill Insurrection,* Vox, Jan. 8, 2021 ("the audience has steadily revolted against Fox News since the election, fleeing to more right-wing outlets like Newsmax and One America News (OAN) because of their willingness to go even further than Fox in pushing election-fraud fantasies. Consumers of this stuff have been fed a daily diet of conspiracies and panicked claims about the death of the republic and the plot to steal the election.")

[20] *See* Margaret Sullivan, *The pro-Trump media world peddled the lies that fueled the Capitol mob. Fox News led the way.* The Wash. Post, January 8, 2021, https://www.washingtonpost.com/lifestyle/media/fox-news-blame-capitol-mob-media/2021/01/07/f15f668a-50ee-11eb-b96e-0e54447b23a1_story.html

[21] In the first quarter of 2021, Fox News made up vast majority of Fox Corporation's profits. The cable division that houses the news network generated $899 million in pretax income, accounting for 95 percent of the company's total pretax profit of $567 million. See Edmund Lee, *Fox News Keeps Profits Flowing at Murdoch's Fox Corporation,* The New York Times, May 5, 2021, https://www.nytimes.com/2021/05/05/business/media/fox-corporation-earnings-acquires-outkick.html?action=click&block=more_in_recirc&impression_id=689d8221-aea2-11eb-b72d-37a19c0c7b6f&index=1&pgtype=Article&region=footer (accessed May 6, 2021).

[22] See Michael M. Grynbaum, *Fox News Intensifies its Pro Trump Politics as Dissenters Depart*, The New York Times, May 28, 2021, https://www.nytimes.com/2021/05/28/business/media/trump-fox-news.html (accessed June 29, 2021)) ("The network has rewarded pro-Trump pundits like Greg Gutfeld and Dan Bongino with prize time slots. Some opinion hosts who ventured on-air criticism of the former president have been replaced. And within the Fox News reporting ranks, journalists have privately expressed concern that the network is less committed to straight-ahead news coverage than it was in the past.").

CNN.[23] And not only conservatives have criticized the nature of these commentaries.[24] But because of the role of Fox News (and lesser watched, but more strident and less accurate outlets like Newsmax and OneAmerica), the vitriolic nature of the attacks found in the 2020 election and the events that occurred afterward center on the biases found in these more conservative outlets. One study noted that Fox News created a more dystopian universe post-election rose to the point of propaganda.[25] But this does not mean that the problem is limited to media on the conservative side.

A number of scholars have begun to question the traditional U.S. approach to First Amendment speech and the philosophical and legal reasons behind that ideal.[26] Should there be some requirement to balance speech so that the public can hear more than one voice or ideology in a splintered media environment? And, assuming if that is the case, should the government get back into the content control business in the broadcast and even the online sphere?

The answer to the above questions necessitates the need to implement a new version of the Fairness Doctrine. The Article will discuss: (I) the original justification for content regulations in broadcasting, as opposed to other media, focusing on the original Fairness Doctrine and its requirements; (II) the limited First Amendment rationale for broadcasting; (III) the demise of the Fairness Doctrine and its present ramifications; (IV) cable news and talk radio – the new age of advocacy media; (V) pros and cons of creating Fairness Doctrine 2.0; and (VI) Fairness Doctrine 2.0.

The Social Media universe also involves these issues, but that is a subject that is for another article. The privately owned entities and their control (or lack thereof) of content poses different legal issues that make up this medium and, as one commentator put it, "The differences in scale and scope for implementing a Fairness Doctrine for social media platforms are monumental."[27]

I. Broadcasting, Scarcity, and the Marketplace of Ideas

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[23] *See, e.g. Final Weeks in the Mainstream Press* (discussing media bias in the 2012 Campaign), Pew Research Center, Nov. 16, 2012, https://www.journalism.org/2012/11/16/final-weeks-mainstream-press/ (accessed July 20, 2021) ("Throughout the campaign, the two most popular cable news channels, Fox News and MSNBC, stood out from the rest the media coverage. Fox News was much more positive about Romney than the press as a whole and substantially more negative about Obama. MSNBC was even more overwhelmingly negative about Romney and offered mostly positive coverage about Obama."); *See also* Marty Johnson, *CNN's Don Lemon Explains Handling of Segment after Trump Criticism,* The Hill, Jan. 28, 2020, https://thehill.com/homenews/media/480426-cnns-don-lemon-explains-handling-of-segment-after-trump-criticism (accessed July 20, 2021) ("During a segment on Saturday, Lemon had a panel discussion with GOP strategist Rick Wilson and New York Times columnist and CNN contributor Wajahat Ali. Both Wilson and Ali have been staunch critics of Trump during his presidency. Lemon laughed after Wilson said, 'Trump couldn't find Ukraine on a map if you had the letter 'U' and a picture of an actual physical crane next to it.' Wilson kept going, calling Trump supporters "the credulous boomer rube demo.")

[24] *See Johnson,* n. 23. ([F]ormer CNN senior digital producer Steve Krakauer, criticized the segment and in Tweet that stated: '"If Donald Trump wins re-election this year, I'll remember this brief CNN segment late one Saturday night in January as the perfect encapsulation for why it happened."

[25] *See* Megan Garber, *Do you Speak Fox*, The Atlantic, September 16, 2020, https://www.theatlantic.com/culture/archive/2020/09/fox-news-trump-language-stelter-hoax/616309/ (accessed July 20, 2021). (comparing the ascension of Fox News to a "certain brand of propaganda. It is not the result of top-down efforts to capture hearts and minds; it is the result, instead, of a powerful entity responding to a powerful public.")

[26] *See, e.g.* Tim Wu, *Is the First Amendment Obsolete?,* 117 Mich. L. Rev. 547, 580 (2018) ("emerging methods of speech control present a particularly difficult set of challenges for those who share the commitment to free speech articulated so powerfully in the founding--and increasingly obsolete--generation of First Amendment jurisprudence.")

[27] *See* Philip Napoli, *Lesson for Social Media from the Fairness Doctrine*, Columbia Journalism Review, August 13, 2020, https://www.cjr.org/opinion/social-media-fairness-doctrine.php (accessed July 20, 2021).

The source of First Amendment jurisprudence is the subject of much scholarly literature, as questions about the level of protection and the ideological underpinnings of the First Amendment have been subject to interpretation.[28] Commentators and courts past and present have posited different reasons to justify an expansion notion of free speech. They include access to a diversity of thought (also known as "marketplace of ideas"),[29] a "safety value" to air grievances and question governmental policy without resorting to violence,[30] and "self-governance,"[31] meaning free speech can be a vehicle to inform citizens to aide in their vote for their representatives. Because of these philosophical underpinnings, the courts adopted a very broad level of protection for First Amendment speech and looked askance at governmental attempts to regulate or limit it, especially based on its content.[32] But even for restrictions for speech that are not content-based, the test for justification, while easier, does not mean the restriction is free from constitutional limitation.[33]

Speech protection has evolved over the last century to a point where it occupies a hallow place in the pantheon of Constitutional rights.[34] Even speech that is odious, hateful, racist and anti-

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[28] *See, e.g.* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 919 & n.39 (1993); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. Rev. 1275, 1289, 1292 (1998); Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. Rev. 177, 180, 204 (1984); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 Geo. L.J. 1057, 1079-83 (2009). For more, see Jud Campbell, *Natural Rights and the First Amendment,* 127 Yale L. J. 246, 249 n.3 (2017).

[29] *See* John Stuart Mill ON LIBERTY (1947) p. 16 ("If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."). For a judicial imprimatur, see Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market."); *see also* ACLU v. Reno, 521v U.S. 844, 884 ("The dramatic expansion of this new marketplace of ideas . . . [on] the Internet has been and continues to be phenomenal.

[30] *See* Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) ("fear breeds repression; . . . repression breeds hate; . . . hate menaces stable government; . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and the fitting remedy for evil counsels is good ones.")

[31] *See* Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 21-22 (Harper, 1948, The Lawbook Exchange, 2001)

[32] Hence, the courts have employed what is known as a "strict scrutiny" test regarding content-based restrictions on free speech. It involves two requirements: first, that the governmental interest is "compelling" and second, that the restrictions as "narrowly tailored" to achieve that compelling governmental interest. *See* Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989); *See also* Simon & Schuster v. N.Y. S. Crime Victims Compensation Board, 502 U.S. 105 (1991) (court applied strict scrutiny to N.Y. law requiring publishers contracting with a person "accused or convicted of a crime" for the production of a book or other work describing the crime must pay any moneys owed to that person under the contract to board so victims of the crime could claim it. Court concluded that while a compelling governmental interest existed, the law was not narrowly tailored to meet that interest).

[33] The courts utilize an "intermediate" scrutiny test in such cases. *See* U.S. v. O'Brien, 391 U.S. 367 (1968) (court upheld constitutionality of law prohibiting burning of draft cards, as incidental to speech and concluded that in such cases, "the government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.")

[34] Although the First Amendment was made part of the U.S. Constitution in 1791, it was hardly the central star of constitutional law. See U.S. Const., Amdt.1. In fact, from its adoption to the early part of the 20th century, few cases considered the ramifications of rules that limited free speech. Part of the reason was that the First Amendment did not apply to the states until 1925, when the Supreme Court did so via the "incorporation" of basic constitutional rights through the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652 (1925). Another reason was the relative paucity of Federal and state laws involving speech restrictions or the prosecutions arising from such laws. Before World War I, few, if any such laws existed. Afterwards, forms of sedition laws which prohibited "advocacy" of the overthrow of the government were enacted and once such laws were enacted challenges were inevitable. *See*, e.g.,

Semitic is generally subject to a very high level of protection.[35] Without wading into this discussion, it is safe to say that speech protection expanded in the middle of the 20th Century, covering non-political issues, such as what is legally obscene (which was considerably narrowed and subject to a three-part test),[36] and whether commercial speech should be protected and if so, how much protection should it have.[37]

II. The Limited First Amendment Rationale for Broadcasting – Antiquated . . . Or Maybe Not?

A. The Radio and Television Regulatory Scheme

What we know as "broadcasting" evolved from a technology – the use of sound waves to convey audio and later video. While print speech derived from simple oral communications that was later transcribed into written form and then latter still, was disseminated from mass printing, the technologies were methods to ease dissemination of the speech. However, broadcasting came from a technology with a different purpose. What evolved in the news and entertainment medium was an outgrowth of the "wireless telegraph" first used for distress signals for ships at sea and the U.S. navy wanted such technology under its control.[38] By 1920, after almost a quarter century of existence, the commercial possibilities of a wireless receiver (which now could transmit voice and

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Sedition Act of 1798, Ch. 74, 1 Stat. 596 (1798); *see also* Smith Act, 54 Stat. 670, 18 U.S.C. 2385 (which made it made it a criminal offense to knowingly or willfully to advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the government of the United States or of any state by force or violence, or to organize any association that teaches, advises, or encourages such an overthrow, or to become a member of or to affiliate with any such association."). Other laws, such as state laws that prohibited "syndicalism" were similarly constructed. As a result, the Supreme Court began to formulate a more active First Amendment jurisprudence that shifted into a strong protection for political speech. Courts had to determine what was a "clear and present danger" to society versus what was constitutionally protected, despite being odious and offensive to most people. *See, e.g.* Schenck v. United States, 249 U.S. 47 (1919) (affirming conviction for attempting to disrupt conscription by circulation of leaflets bitterly condemning the draft); Debs v. United States, 249 U.S. 211 (1919) (affirming conviction for attempting to create insubordination in armed forces based on one speech advocating socialism and opposition to war, and praising resistance to the draft); Abrams v. United States, 250 U.S. 616 (1919) (affirming[34] convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers); Dennis v. United States, (affirmed the convictions of Communist Party USA members on charges of conspiracy to violate portions of the Smith Act).

[35] See Brandenburg v. Ohio, 395 U.S. 444 (1969) (government restrictions on political speech and expression in cases where the speech results in "imminent lawless action.").

[36] *See* Miller v. California 413 U.S. 1 (1973)

[37] *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (formally constitutionalized protection for speech that involves a commercial purpose); *See also*, Central Hudson Gas & Elec. v. Public Svce Comm., 447 U.S. 557 (1980) (established that commercial has a lower level of First Amendment protection than other forms of speech).

[38] *See* Linwood S. Howeth, HISTORY OF COMMUNICATIONS-ELECTRONICS IN THE UNITED STATES NAVY, Bureau of Ships and Office of Naval History (1963), reprinted in *History: Early Radio Regulation*, 1902-06, http://www.cybertelecom.org/notes/history_wireless_earlyreg.htm (accessed May 9, 2021). **(**"The principal use of wireless telegraph is now, and long will be, at sea - between ship and ship, or ship and shore. . . . But from ships at sea, out of sight of flags or lights, and beyond the sound of guns, the electric wave, projected through space, invisible and inaudible, can alone convey the distant message (quoting memorandum from Adm. George Dewey, President of the Navy General Board, to President Theodore Roosevelt expressing his views as to the capabilities of his Department operating the Government radio stations along the coasts."). This led to the first major Federal law governing broadcasting, the Radio Act of 1912 which required all seafaring vessels to maintain 24-hour radio watch and keep in contact with nearby ships and coastal radio stations. *See* Pub. L. 264, 37 Stat. 302 (1912).

sound), were unlocked. After a period of technical chaos,[39] Congress enacted the Radio Act of 1927,[40] an omnibus law created a regulatory infrastructure to make sure that signals were standardized in a particular spectrum, interference was limited and the outlets that disseminated programming – be it news, entertainment, or sports – be licensed by the government.

Under pressure from broadcasters and audience alike, Congress enacted, which gave a new five-member commission the power to license (or deny a license) to radio broadcaster and set forth technical standards for the licensees.[41] A few years later, the bulk of the Radio Act was incorporated in the 1934 Communications Act, a more expansive law which remains the bedrock statute for broadcast regulation.[42] The 1934 Act (and before it the 1927 Act) crafted a public trustee model for broadcasters that was not found in print. A centerpiece of that model was the requirement that every broadcast licensee acted "in the public interest, convenience and necessity" a term that was first used in a 19th century law totally unrelated to communications and then adopted in the 1927 Radio Act and copied verbatim in the latter statute though never defined in either law.[43]

The 1934 Act created the FCC and gave it the mandate to establish regulation to ensure that broadcast licensees act in the public interest.[44] Access rules were better received in the broadcast universe as the Fairness Doctrine (as well as the Equal Time provision dealing with political candidates) were promulgated. The question is why? The answer centers around the (then) limited number of broadcasters allowed to have licenses, a "public interest" trustee model and inherent differences in power between print and broadcast. The problem, as noted earlier, was that the "public interest, convenience and necessity" was not defined anywhere in the Radio Act or Communications Act. Compounding the lack of statutory definition, the FCC never attempted to craft an administration guideline for what the standard means and at least one court opined that the standard is so broad that it was incapable of definition.[45]

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[39] At first, licenses began to be awarded by the Department of Commerce, which had such power under a 1912 law. *See* Radio Act of 1912. With an explosion of commercial radio stations in the 1920s, so many stations were operating on the very limited AM band set up for commercial stations that crosstalk and other kinds of interference were common occurrences. *See* Roger Henrich, *The Federal Radio Commission*, The First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/809/federal-radio-commission (accessed May 9, 2021).

[40] 44 Stat. 1170 (1927).

[41] *Id.*

[42] 47 U.S.C. § 301 et seq. The 1934 Act expanded the government's regulatory role to common carriers such as the telephone industry.

[43] *See* Stuart Brotman, *Revising the Broadcast Public Interest Standard in Communications Law and Regulation*, The Brookings Institution, March 23, 2017, https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/ ("One explanation of this absence is that when the drafters of the Radio Act reached an impasse in their attempt to define a standard for the FCC, a young lawyer on loan to the Senate from the Interstate Commerce Commission suggested the words 'public interest, convenience and necessity' (the standard used in the Interstate Commerce Act that created the Interstate Commerce Commission").

[44] *See* 47 U.S.C. § 307(a). *See also* McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956), ("The broad statutory standard of 'public convenience, interest, or necessity.' is not susceptible of precise or comprehensive definition. Its meaning cannot be imprisoned in a formula of general application.")

[45] In fact, the FCC essentially ignored the standard. Max Paglin, who served as the FCC's General Counsel, noted that: "[I]n the FCC's first decade, devising a workable, standard definition of public interest programming was not a priority. To the contrary, although its predecessor had reviewed station programming for public interest content in license renewal proceedings, the FCC discontinued that practice, instead approving license renewal applications in groups, essentially rubberstamping the recommendations of the FCC's engineering, legal, and accounting departments, which performed a content-neutral review of station performance." *See Brotman,* n. 43.

B. The Rise of the Fairness Doctrine – First Amendment Activism or Unconstitutional Interference in Broadcasters' Rights?

As commercial broadcasting grew, it was up to the FCC to come up with standards to regulate the public trustee duties of broadcast licensees, despite the lack of a legislative blueprint on how to do so. Without a definition of "public interest," it had little legislative guidance. However, one early case gave an inkling of the mindset of the FCC at the dawn of broadcast regulation – and could be a precursor of what would happen in the future.

The licenses of two New England radio stations were challenged in 1938 on the ground that that the stations aired "one-sided political viewpoints," and attacked against local and federal politicians that the station owner opposed. The FCC noted that the editorials were "one-sided" and "made no pretense at objective, impartial reporting."[46] The commission concluded that a broadcast licensee had an obligation to present "all sides" of public questions without any bias, as part of the licensing and public trustee system created under the Communications Act.[47] The solution it proposed was to ban editorial opinions.[48]

This result did not help the public interest. It gave stations an excuse to avoid editorials and viewpoints on important public issues. And that is what may have happened.[49] Just four years later, the FCC began to change its outlook, instead focusing on the right to reply rather than a ban on editorializing.[50]

What became the fairness doctrine was codified by regulation in 1949.[51] It imposed two general requirements on broadcasters: (1) devoting a "reasonable amount" of time to covering controversial issues of public importance; and (2) providing a "reasonable opportunity" for citizens to present conflicting views on such issues.[52] These obligations imposed an affirmative duty on broadcasters to determine what the appropriate opposing viewpoints were on these controversial issues, and who was best suited to present them.[53] The reasons for the rule were based on concerns

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[46] *See Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339 (1941). (FCC criticized the present licensee, the Yankee Network, for its acceptance of inflammatory commentaries and editorials.) The FCC stated that 'radio can serve as an instrument of democracy only when devoted to the communication of information and exchange of ideas fairly and objectively presented.' For a detailed discussion, *see* Ian Klein, *Enemy of the People: The Ghost of the F.C.C. Fairness Doctrine in the Age of Alternative Facts,* 42 Hastings Comm. & Ent. L.J. 45 (2020). For an even earlier treatment of this issue, s*ee Great Lakes Broadcasting*, 3 FRC Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.) *cert. denied*, 281 U.S. 706 (1930) (FRC rejected radio station licenses as licensees used their stations "almost exclusively as propaganda outlets for labor interests.").

[47] *See Mayflower Broadcasting,* n. 46.

[48] *Id.*

[49] *See* Klein, at p. 50-51.

[50] *See United Broadcasting Co.*, 10 F.C.C. 515, 518 (1945) (Commission noted "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulation." *See also, In re Petition of Robert Scott*, 11 F.C.C. 372, 376 (1946) (created the "personal attack" rule) and *In re Petition of Sam Morris*, 11 F.C.C. 197, 198 (1946) (response time involving advertisements of issues of public concern). *See* Klein, n. 49 at p. 50.

[51] *See Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 R.R. 1901 (1949).

[52] *Id. See also*, Red Lion Broadcasting v. FCC, 395 U.S. 367, 377 (1969); 1974 Fairness Report, 48 F.C.C.2d 1, 19-27, 30 R.R.2d 1261, 1287-96 (1974), discussed in *Conrad, supra* at n. 21.

[53] *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

of undue market concentration in the radio industry and overly commercial bent.[54] Punishment for violations ranged from a requiring the station to give access to loss of a broadcaster's license.[55]

Broadcast access rules were not limited to the United States. Other countries have adopted policies that have imposed similar requirements. New Zealand's Broadcasting Act of 1989, has a similar Fairness requirement and a right of access for opposing views.[56] Israel has had a similar requirement for its broadcasters.[57] In Japan, broadcasters have been required to ensure that their programming does not harm public safety, is politically fair and does not distort the facts.[58] Other countries have developed industry or governmental regulatory codes to promote "impartiality" in reporting news and public affairs.[59]

The Fairness Doctrine was difficult to enforce because requests had to be initiated by the public and such a request did not ensure success. The Fairness Doctrine's requirement of "reasonable opportunity" resulted in a great deal of discretion in meeting the regulatory obligations.[60] Realizing this, the FCC ultimately fine-tuned the rule by crafting more specific corollaries that applied to particularized situations. One required *free* reply time for those seeking access,[61] and a second, which became known as the 'personal attack' rule, required response time for someone or a member of group if their honesty and character was attacked.[62] This last rule became the

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[54] For an excellent early history of the Fairness Doctrine, see Victor Pickard, *The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse*, 12 Int'l J. of Communication 3434 (2019), https://repository.upenn.edu/asc_papers/745/?utm_source=repository.upenn.edu%2Fasc_papers%2F745&utm_medium=PDF&utm_campaign=PDFCoverPages (accessed May 19, 2021). For a shortened version, see Picard, *The Fairness Doctrine won't Solve All Our Problems – But It Can Foster Needed Debate,* The Washington Post, Feb. 4, 2021, https://www.washingtonpost.com/outlook/2021/02/04/fairness-doctrine-wont-solve-our-problems-it-can-foster-needed-debate/ (accessed May 19, 2021).

[55] *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).

[56] The Broadcasting Act 1989 establishes the "principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest. . . " *See* Broadcasting Act 1989 s 4(1), http://www.legislation.govt.nz/act/public/1989/0025/latest/whole.html, *archived at* https://perma.cc/QZ4F-DYRZ, as cited in Limitations of Freedom of Expression: New Zealand, Library of Congress, https://www.loc.gov/law/help/freedom-expression/newzealand.php#_ftnref21 (accessed May 20, 2021).

[57] *See* Second Israel Broadcasting Authority Law (1990), cited in Amit M. Schejter, The Fairness Doctrine is Dead and Living in Israel, 51 Fed. Comm. L. J. 281, 287 (1999) ("The fairness doctrine is not present in the Israeli law books as such. However, sections of the Broadcasting Authority Law of 1965 and the Second Authority for Radio and Television Law of 1990 adopt general principles of political fairness, as do regulations created by the Second Authority and the Cable Television Council.")

[58] See *Japan Considers Scrapping its Fairness Doctrine for Broadcasters*, Nikkei Asia, March 27, 2018, https://asia.nikkei.com/Politics/Japan-considers-scrapping-its-fairness-doctrine-for-broadcasters (accessed May 21, 2021). That law exempts online services from this requirement.

[59] *See e.g.*, Evan Ruth and Tony Mendel, *Media Regulation in the United Kingdom*, citing ITC Programming Code (UK), section 3 (Impartiality), https://www.article19.org/data/files/pdfs/publications/uk-media-regulation.pdf (accessed May 20, 2021).

[60] *See* 29 Fed. Reg. 10,415-46; *see also* Downs & Karpen, *The Equal Time and Fairness Doctrine: Outdated or Crucial to American Polities in the 1980s*, 4 Comment L.J. 67 (1981), found in *Conrad*, n. 21.

[61] This was known as the "Cullman" rule. *See Cullman Broadcasting*, 40 F.C.C. 576 (1963).

[62] *See* 47 C.F.R. § 73.1290 (1987), as discussed in Conrad, supra at n. 21. 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 or her with a copy of the broadcast (either script or tape), and allow that person an opportunity to respond over the broadcaster 's facilities. *See* Kathleen Ann Ruane, Fairness Doctrine:

centerpiece of the Supreme Court's *Red Lion* decision.

C. *Red Lion Broadcasting v. FCC – The Establishment of a Dated Doctrine*

The Supreme Court has not waded into the scope of broadcast regulation very often. In fact, before *Red Lion,*[63] its last significant case was more than a quarter century before, which justified the FCC's power to regulate radio networks under interstate commerce.[64]

The facts of *Red Lion* centered on a request for reply time by an author attacked in a commentary broadcast on a Pennsylvania radio station.[65] After the station rejected the author's request, he complained to the FCC and, ultimately, the dispute ended in the Supreme Court as a First Amendment challenge by the station and broadcast groups to the Fairness Doctrine. In its ruling justifying the constitutionality of the Fairness Doctrine (and specifically its personal attack rules), the Court determined that due to the inherently "scarce" nature of the broadcast spectrum, coupled with licensee's duty to act in the public interest, the rights of the listeners are paramount, thereby justifying the requirement.[66]

In its rationale, the court noted that unlike print (which could be utilized by anyone with the resources), broadcasting was inherently "scarce" because: (1) there was only so much radio spectrum available; and (2) there were more broadcast licensees who demand that spectrum than licenses to give out, and (3) as part of the license requirement, broadcasters were required to operate in "the public interest" as a condition of maintain their licenses.[67]

The court in *Red Lion* took the easy route to justify the regulation. By saying that the spectrum was scarce, it inserted broadcasting in a different playing field with different rules than in other media. It did not engage in any First Amendment balancing – under either the strict scrutiny or intermediate scrutiny tests, but many commentators have concluded that the court infers an intermediate level of scrutiny, without the categorical test to make that determination.[68] And, significantly, the ruling opened the door for a future court or FCC to conclude that such a rule would no longer be needed if the medium was no longer "scarce." Equally important, it drove a constitutional wedge between over the air radio and television broadcasters and other media,

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History and Constitutional Issues, Congressional Research Service, July 13, 2011, https://fas.org/sgp/crs/misc/R40009.pdf (accessed July 17, 2021).

[63] 395 U.S. 367 (1969).

[64] *See* NBC v. U.S., 319 U.S. 190 (1943) ("The standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is not so vague and indefinite as to create an unconstitutional delegation of legislative authority.")

[65] The licensee, owned by Red Lion Broadcasting Company operated a Pennsylvania radio station. On November 27, 1964, it carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater —Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater." *See Red Lion,* 395 U.S. at 371-72.

[66] 395 U.S. at 390.

[67] 395 U.S. at 400-01 ("In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.").

[68] This is known the *O'Brien* test, which was crafted one year earlier by the court.

rendering a distinction that makes little sense today. It goes without saying that broadcasters were not happy at their "second-level" status of First Amendment protection.[69]

It did not take long for that contrast to be felt. While broadcasters were subject to the Fairness Doctrine, the Supreme Court invalidated a similar requirement for the print media.[70] Despite the similarities between the Florida law that required journals to print the views of unendorsed candidates and the Fairness Doctrine, *Red Lion* was not mentioned in *Miami Herald v. Tornillo*. The five to four ruling disappointed some commentators who sought to extend the Fairness Doctrine to the print media, as they claimed that market domination of large newspapers resulted in a lack of alternate viewpoints.[71]

Red Lion was decided when FM radio was a niche market; cable television was in its infancy, limited to areas of reception difficulty and not yet a programmer; direct broadcast satellite services did not exist; the Internet was years away and Internet streaming decades away.

III. The Demise of the Fairness Doctrine and its Present Ramifications

In the years immediately following the *Red Lion* ruling, the Fairness Doctrine was surprisingly popular among conservatives and their respective political organizations of the day, in part because their views would be more marginalized by the major media of the time without it.[72] Supporters included the National Rifle Association ("NRA") and those who were against the adoption of the Equal Rights Amendment.[73] And the decades of the 1970s and early 1980s constituted the legal heyday of Fairness Doctrine, as the rule was reaffirmed by the courts based on and uniqueness of broadcasting.[74] It even applied to certain kinds of advertisements.[75]

In addition, one court stated that the rule was justified because of the "captive" nature of broadcasting as opposed to print media, noting that in print media, "the reader is free to ignore

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[69] In just one example, Edward O. Fritts, president of the National Association of Broadcasters, said that the doctrine is an infringement on free speech and intrudes on broadcasters' journalistic judgment. *See* Penny Pegano, *Reagan's Veto Kill Fairness Doctrine Bill*,. Los Angeles Times, June 21, 1987 (Retrieved May 5, 2021)

[70] *See* Miami Herald v. Tornillo*,* 418 U.S. 241 (1974). This case involved a Florida statute that required journals to make available space, free of cost, for candidates for nomination or election who were "assailed" by the newspaper. The reply had to appear "in as conspicuous a place and in the same kind of type as the charges which prompted the reply." The Supreme Court, citing First Amendment considerations, concluded that the Florida statute was a government-required mandate that may result in reduced political coverage and commentary to avoid the mandate of the law. "Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," the opinion concluded. *See* 418 U.S. at 257.

[71] With dominant one- or two-newspaper cities, three large television networks and limited broadcasting spectrum available for many different voices, they sought Fairness Doctrine-like rules for all media so that more voices are heard. *See* Jerome Barron, *Access to the Press – A New First Amendment Right*, 80. Harv. Law Rev. 1641 (1967) ("The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum.")

[72] See *Pickard,* n. 54.

[73] *Id.* ("Phyllis Schlafly was a major proponent and used the doctrine to gain media coverage for her Anti-Equal Rights Amendment campaign. Conservative activists like Reed Irvine saw it as a tool for including conservative voices within a media landscape that they perceived as predominantly liberal. Even right-wing groups such as Accuracy in Media and the NRA supported it well into the 1980s.")

[74] *See e.g.,* Telecomm. Res. & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986) (upholding the constitutional underpinnings of the rule).

[75] *See* Station WCBS-TV (Applicability of the Fairness Doctrine to Cigarette Advertising), 9 F.C.C.2d 921, 939, 946 (1967).

articles and advertisements, and read at his leisure."[76] However, with television and radio, the court noted, the captive audience can avoid undesired programming or bias "only by frequently leaving the room, changing the channel, or doing some other such affirmative act."[77]

Since *Red Lion*, the Supreme Court discussed this rationale rarely, but in one case, it did express some skepticism about the continued viability.[78] However, by the mid-1980s the Reagan Administration's FCC specifically addressed doubted the continued viability of the Fairness Doctrine and ultimately determined that "scarcity" no longer existed. In a 1985 Report, the Commission questioned the continued viability of the "scarcity" of broadcast stations, noting that the growth in broadcast outlets in the previous decade gave the public "access to a multitude of viewpoints without the need or danger of regulatory intervention."[79] The report also cast doubt about the doctrine's constitutionality, believing it 'chills' speech and requires the government to act as a de facto censor.[80] Two years later, the FCC formally repealed the Fairness Doctrine in a memorandum opinion involving a three-year dispute over a right of reply request involving air time on a Syracuse, N.Y. television station.[81] The commission essentially followed the conclusions from its 1985 Report, thereby repealing most of the rule as unconstitutional, or a minimum, it was no longer needed because broadcasting is no longer a scarce medium.[82] In ITS 1987 order, the FCC also argued that, rather than opening the airwaves to access of different viewpoints, the Fairness Doctrine "impermissibly chill[ed] and reduce[ed] the discussion of controversial issues of public importance."[83] The FCC even recommended that the Supreme Court reconsider the *Red Lion* ruling, stating that its premise of scarcity should be questioned.[84] While that reconsideration has not occurred, it is safe to say that the scarcity rationale as heretofore considered was far less persuasive in 1987 than it was in 1969.

The 1987 FCC ruling justifiably recognized that broadcasting was entering a different universe than the model anticipated when the Communications Act of 1934 was enacted and when the

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[76] *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117, 128 (1973).

[77] *Id.* For more background, see Sasha Leonhardt, The Future of "Fair and Balanced": The Fairness Doctrine, Net Neutrality and the Internet, 8 Duke L. and Tech. L. Rev. 1 (2009), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1192&context=dltr (accessed May 21, 2021).

[78] In one case, it began to express skepticism of the *Red Lion* rationale. See, e.g. FCC v. League of Women Voters, 468 U.S. 364 (1984) (statute prohibiting noncommercial educational stations from editorializing violated the First Amendment). The majority opinion noted that because of the changes in broadcasting due to the advent of cable and satellites, the Court may be willing to reassess its traditional reliance upon spectrum scarcity if requested to do so by Congress or the FCC.)

[79] *See Conrad,* n. 21 See also, 1985 Fairness Report, 102 F.C.C.2d 145, 58 R.R.2d 1137 (1985).

[80] *Conrad, at 175*, 1985 Fairness Report, 102 F.C.C. 2d at *Id.* at 169-71, 58 R.R.2d at 1159-61.

[81] Television station WTVH in Syracuse, N.Y., broadcast a series of nine paid editorials advocating the construction of a nuclear power plant. After the station failed to air any contrasting viewpoints, the Syracuse Peace Council, an anti-nuclear public interest group, filed a complaint with the Commission. The FCC ruled that the issue was controversial and that the television station had violated the Doctrine. *See In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 FCC Rcd. 5043 (F.C.C.), (Aug. 6, 1987). The history of the dispute was involved. Originally, the FCC concluded that the broadcast licensee had violated the Fairness Doctrine, see Syracuse Peace Council v. Television Station WTVH Syracuse, New York, 99 FCC 2d 1389 (1984), recon. denied, FCC 85–571 (released Oct. 30, 1985).

[82] The 1987 ruling invalidating the Fairness Doctrine was spurred by an appeals court ruling that mandated that the FCC examine the constitutional claims brought by the broadcaster. See Meredith Broadcasting v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

[83] See 2 FCC Rcd 5043, 5047, 63 R.R.2d 541, 558 (1987).

[84] *Id.* at 5053, 63 R.R.2d at 575.

Fairness Doctrine was first promulgated in 1949.[85] With the rapid expansion of cable television as a programmer that began to siphon audiences from over the air broadcasting,[86] and with the growth of the number of radio stations,[87] the FCC could justifiably question how "scarce" broadcasting is. And that was before the birth of the Internet.

One portion of the Fairness Doctrine was kept alive – the personal attack rules – but those rules were also formally repealed in 2000.[88]

IV. Cable News and Talk Radio – The New Age of Advocacy Media

A. Cable Never had a Fairness Doctrine

Cable's complex regulatory regimen (found in the 1992 Cable Television Consumer Protection and Competition Act[89] and the 1996 Telecommunications Act)[90] came after years of scattershot regulatory power.[91] Formally known (along with satellite services) as multi video program distributors ("MVPDs"),[92] it became a force in the 1980s not just as a reception-enhancer, but also as programmer.[93] Cable programmers are not licensed by the FCC and are not required to operate in the "public interest." Therefore, programming that is exclusively from cable services were not subject to the Fairness Doctrine. While cable media has may have differences from its broadcast relatives – more channel capability, a separate pay component composed of subscriber fees and the need to have wiring in local communities – the courts, at times, have also inferred a lessened

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[85] At the time of the ruling, there were more than 1,300 television stations and more than 10,000 radio stations in the United States -- in contrast to 1,700 daily newspapers -- and 95 percent of viewers receive five or more television signals. See Robert D. Hersey, FCC Votes Down Fairness Doctrine in 4-0 Decision, The New York Times, Aug. 5, 1987, https://www.nytimes.com/1987/08/05/arts/fcc-votes-down-fairness-doctrine-in-a-4-0-decision.html

[86] The number of cable television subscribers increased from almost 16 million at the end of 1979 to almost 53 million by the end of 1989. *See History of Cable*, California Cable and Telecommunications Association, https://calcable.org/learn/history-of-cable/

[87] The number of commercial radio stations in the United States rose from just over 7,700 in 1980 to over 10,000 in 1995. *See Number of Commercial Radio Stations in the United States from 1952 to 2019*, Statista, https://www.statista.com/statistics/252235/number-of-commercial-radio-stations-in-the-us/ (accessed May 25, 2021).

[88] The FCC first suspended and then abolished the personal attack rules. *See* Repeal or Modification of the Personal Attack and Political Editorial Rules (Oct. 22, 2000), *https://www.federalregister.gov/documents/2000/10/11/00-26014/repeal-or-modification-of-the-personal-attack-and-political-editorial-rules* (accessed June 29, 2021).

[89] Pub. L. 102-385106 Stat. 1460 (1992)

[90] Pub. L. No. 104-104, 110 Stat. 56 (1996)

[91] Because cable was not considered a "broadcaster" under the 1934 Communications Act, and the agency's power to regulate cable was based on an "ancillary jurisdiction" provision in the Communications Act. *See* U.S. v. Southwestern Cable, 392 U.S. 157, 168 (1968), which subject cable to "ancillary jurisdiction" under 153(a) of the Communications Act. The Court stated: "Indeed, such communications are defined by the Act so as to encompass 'the transmission of ... signals, pictures, and sounds of all kinds,' whether by radio or cable, 'including all instrumentalities, facilities, apparatus, and services ... incidental to such transmission.'" *See also* Mark Conrad, *The Saga of Cable TV's "Must-Carry" Rules: Will a New Phoenix Rise from the Constitutional Ashes?,* 10 Pace L. Rev. 9, 16. Direct jurisdiction over cable came years later in amendments to the act was adopted in the 1980s See Cable Communications Act of 1984, 7 U.S.C. §§ 521-559 (1984), which was supplanted by the 1992 Act, supra, n. 72.

[92] For purposes of this article, I will use the term "cable" instead, as it is more popularly known.

[93] *See 2008 Cable Show: Cable @60 – The 1980s*, Multichannel News, May 16, 2008, https://www.nexttv.com/news/2008-cable-show-cable-60-1980s-335674 (accessed June 29, 2021). ("About 28 new ad-supported cable networks were launched in the last half of the 1980s and cable operators boosted their spending on programming to $3 billion, up 50% from 1984, according to the National Cable Television Association.. . . Meanwhile audience share for the whole day for cable networks doubled to 35% between 1984 and 1990 and cable advertising revenue hit $2.5 billion, up from $800 million in 1985.)."

First Amendment standard for certain content regulations.[94] However, those rules may regulate content on the back end – by making sure that the "pipes" (the cable, or more recently, the Internet) allows all different types of traffic on the highway.

In addition to carrying most over the air television stations in a given market (which has been a boon to those broadcasters who frequently receive payments for such carriage),[95] cable caters to more specialized niche programs,[96] including news. Cable followed the specialization formatting of commercial radio, which relied less and less on network programming and more on crafting certain specific genres. For example, the roots of all-news cable can be the all-news radio stations which date from the 1960s.[97]

While CNN was the first of the major cable news networks, debuting in 1980, it was Fox News, founded in 1996, that became the mainstay of supercharged ideological opinion, starting from as a right learning bias to, at times, all-out ideological propaganda by many of its commentators, including personal attacks against rival politicians and non-politicians.[98] It should be noted that Fox News employs respected journalists, but its core audience watches its commentators dish out their views strongly and sometimes acidly.[99] Fox News is not the only cable news network that lace its programs with commentators. MSNBC, founded in 1996, and CNN do too. However, in terms of audience size, influence and connection with an incendiary President, Fox News sometimes became Donald Trump's mouthpiece.[100] And, further to the right of Fox News is One

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[94] *See* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) (applied an intermediate level of scrutiny in a challenge to provisions of the 1992 Cable Television Consumer Protection and Competition Act which required cable television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations.) *See also* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (which addressed the issue of whether the record contained substantial evidence supporting Congress' that the must carry provisions further important governmental interests in preserving cable carriage of local broadcast stations, and that the provisions are narrowly tailored to promote those interests.)

[95] In earlier years, over the air stations relied on the "must carry" rules that mandated coverage. However, in more recent years, many local over the air stations have decided to negotiate fees to be paid by the cable providers to have such content. This is known as "retransmission consent." This shift led to a significant economic boost for over the air stations. Total paid retransmission fees paid to over the air station owners grew from about $200 million in 2006 to more than $10 billion by 2018. Global expects fees to top $15 billion by 2023. *See* Alex Sherman, How Local TV Stations Plan to Remain Relevant as Viewers Shift to Streaming, CNBC, April 24, 2021, https://www.cnbc.com/2021/04/24/local-tv-stations-plot-to-remain-relevant-in-shift-to-streaming.html (accessed June 14, 2021).

[96] Other Cable channels focus on arts and entertainment, such as HBO, which started broadcasting in 1975 as "Home Box Office." Similarly, Showtime began in 1978. *See* Cable History Time, https://www.cablecenter.org/images/files/pdf/CableHistory/CableTimelineFall2015.pdf (accessed May 16, 2021). Bravo debuted in 1982. Arts and Entertainment Channel in 1984. *Id.* Still others focus on sports, ESPN began broadcasting in 1979 and was acquired by the American Broadcasting Companies (ABC) in 1984. See ESPN, Inc. History, Funding Universe, http://www.fundinguniverse.com/company-histories/espn-inc-history/ (accessed May 15, 2021). Others center around films, such as American Movie Classics debuted in the early 1980s. *Id.*

[97] Group W, the broadcast division of Westinghouse, adopted an all-news format in many of its stations in the 1960s. These stations included WINS-AM ("1010WINS") New York, KYW-AM ("KYW Newsradio 1060") Philadelphia; and KFWB-AM ("KFWB News 98)" Los Angeles. WINS began broadcasting its all-news format in April 1965. In addition, a number of CBS owners and operated stations, including WCBS-AM (New York), WBBM-FM (Chicago) and WEEI-AM Boston began broadcasting in the all-news format. *See All News Radio*, *Wikipedia* https://en.wikipedia.org/wiki/All-news_radio#cite_note-1 (accessed June 12, 2021).

[98] *See* Sean Illing, *How Fox News Evolved into a Propaganda Operation*, Vox, March 22, 2019, https://www.vox.com/2019/3/22/18275835/fox-news-trump-propaganda-tom-rosenstiel (accessed May 24, 2021).

[99] *See* Grynbaum, n.22.

[100] *Id.*

American News Network ("OANN") and Newsmax, which both have spread lies about the November 2020 election.[101]

B. Talk Radio – Growing before *Red Lion* and having a resurgence after the repeal of the Fairness Doctrine

While what we know as talk radio existed during the first few decades of radio existed, but was generally populated with "with many colorful but otherwise harmless characters."[102] However, there were exceptions, notably Father Charles Coughlin, who commanded millions of listeners across the country with pro-Fascist diatribes and anti-Semitic attacks.[103] However, the rise of television created a radio programming void that was ripe for the talk radio format as the network programming and advertisers moved to the new medium. Radio network programming ended, and many stations needed to fill airtime. A first generation of conservative broadcasters purchased airtime from hundreds of stations, cobbling together de facto syndication networks.[104] Even in the 1960s, these hosts displayed considerable political influence, thereby causing concern in both the Kennedy and Johnson Administrations.[105] Rightly or wrongly, the Kennedy Administration encouraged Fairness Doctrine complaints against those stations.[106]

This strategy may have worked because the format waned after *Red Lion* and then had a resurgence in the 1980s – coinciding with the demise of the Fairness Doctrine -- with radio hosts becoming stars and commanding millions of listeners. Unlike the talk radio hosts of an earlier generation – who tended to use the radio time to moralize over the decline of values and religion and rail against Communism – the newer generation, lead by Limbaugh, made liberal bashing an entertaining affair, with sound effects and jargon. As one executive put it, he was "always looking

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[101] *See* Tiffany Hsu, *One America News Spreads Debunked Election Claims,* The New York Times, Nov. 12, 2020, https://www.nytimes.com/2020/11/12/technology/one-america-news-spreads-debunked-elections-claims.html (accessed June 20, 2021). ("One America News has produced a series of videos that include[d] false claims about the integrity of the vote and assertions that Mr. Trump won the election."). Newsmax, another far-right news channel, admitted that it broadcast voter fraud claims against the head of a voting systems company, and admitted there's no evidence any of them were true. *See* Joe Walsh, Newsmax Apologizes to Dominion Exec as it Settles Lawsuit Over False Voter Fraud Claims, Forbes, April 30, 2021, https://www.forbes.com/sites/joewalsh/2021/04/30/newsmax-apologizes-to-dominion-exec-as-it-settles-lawsuit-over-false-voter-fraud-claims/?sh=25620cad15cd (accessed June 20, 2021).

[102] *See* John Schneider, *The Rabble-Rousers of Early Radio Broadcasting*, Radio World, September 4, 2018 · Updated: July 15, 2020, https://www.radioworld.com/columns-and-views/the-rabble-rousers-of-early-radio-broadcasting (accessed June 29, 2021).

[103] *Id.* ("In the later 1930s, Coughlin increasingly targeted Jews while praising Hitler and Mussolini. After one particularly inflammatory and inciting 1938 speech, a number of stations dropped his program, which incensed his faithful followers. At WMCA in New York and WDAS in Pittsburgh, crowds of Coughlin's fans protested outside the studios, yelling anti-Semitic statements, like "Send Jews back where they came from in leaky boats!" and "Wait until Hitler comes over here!" It was later documented that Coughlin was receiving funding from Nazi Germany.")

[104] For more background, *see* Jake Bittle, *The Right's Reign on the Airwaves*, The New Republic, June 1, 2020, https://newrepublic.com/article/157926/rights-reign-air-waves (accessed June 20, 2021). ("The reach of [Carl] McIntire's Twentieth Century Reformation Hour grew from less than 25 stations in 1958 to almost 500 stations in 1964, by which time his daily audience well exceeded 20 million listeners; the overall station reach of conservative broadcasters increased by more than 1,300 percent over the same period, reaching citizens who otherwise weren't being engaged by politicians or the media.")

[105] *Id.* The Kennedy Administration, in particular, politicized the response in aggressive fashion. ("Kennedy directly pushed the IRS to conduct selective audits of conservative radio stations, stripping them of tax-exempt status on the grounds that they engaged in overtly political activity.")

[106] *Id.*

to turn somebody's sacred cow into some delicious hamburgers and a couple of steaks."[107] This approach became (and still is) very lucrative. For example, the top talk radio broadcasts earned up to $80 million in 2020.[108]

B. Net Neutrality and Ownership Controls – A 21st Century version of the Fairness Doctrine? Not so

As online streaming became ubiquitous, concerns were addressed about the ability of private Internet providers to control content. This concern led to idea of "net neutrality." Coined by a professor at Columbia University,[109] a net neutrality rule would require internet service providers like Comcast and Verizon to treat all content flowing through their cables and cell towers equally.[110] In other words, a highway with an equal access to its lanes and an equal speed limit – in effect an anti-discrimination rule for Internet content. The idea, first proposed by the FCC in 2009, was subject to a series of adverse court rulings, then finally upheld, but then was shelved in 2017 by the Trump Administration controlled FCC.[111]

As of the writing of this article, the Biden Administration has advocated the restoration of some version of net neutrality by the FCC.[112] In the meantime, several states, including Oregon and California have enacted their own net neutrality laws, and Governors in other states have issued executive orders barring the awarding of contracts to providers that do not promise to uphold net neutrality.[113]

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[107] *Id.*

[108] In 2014, The list of highly paid hosts include Howard Stern, Rush Limbaugh, Sean Hannity and Glenn Beck. It also includes a non-political entity: Ryan Seacrest. The group collectively earned $280 million. *See* Abram Brown, Meet American's Highest-Earning Radio Hosts: Howard Stern, Rush Limbaugh and More, Forbes, July 13, 2005, https://www.forbes.com/sites/abrambrown/2015/07/13/meet-americas-highest-earning-radio-hosts-howard-stern-rush-limbaugh-and-more/?sh=12d4defa4dd7 (accessed May 16, 2021).

[109] *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecom & High Tech L. 141 (2003).

[110] *See* Klint Finley, *The Wired Guide to Net Neutrality*, Wired, May 5, 2020, https://www.wired.com/story/guide-net-neutrality/ (accessed May 17, 2021).

[111] *See In the Matter of Preserving the Open Internet*, 4 FCC Rcd. 13064 (F.C.C.), 24 F.C.C.R. 13064 (2009). The Commission defined "broadband providers" as a service that "provide[s] the capability to transmit data to and receive data from all or substantially all Internet endpoints." See In the Matter of Preserving the Open Internet, 25 FCC Rcd. 17905, 17932 (2010), cited in Mark Conrad, *New Game in Town: Disseminating Sports Content in a Net Neutrality-Less Era—The Potential Implications for the Post-Broadcasting World*. 29 J. of Legal Aspects of Sport 1, 13 n.55 (2019). This order was struck down by the D.C. Circuit in Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010). A second, more watered-down iteration of the rules was proposed, which was also rejected by the same court. *See In the Matter of Preserving the Open Internet,* 25 FCC Rcd. 17905 (2010) ("The Open Internet Rules"). This order was also rejected by the same D.C. Circuit court in Verizon v. FCC, 740 F. 3d 623 (DC Cir. 2014). A third attempt, albeit based on a different section of the 1996 Communications Act and yet weaker than the first two, survived a legal challenge in U.S. Telecom Assn v. FCC, 825 F. 2d 674 (D.C. Cir. 2016). In 2017, the new FCC chair, commanding a Republican majority, scrapped those rules. See 33 FCC Rcd. 311 (Jan. 4, 2018). See also Conrad, supra. At p. 15-16.

[112] In July 2021, President Biden signed an executive order directed at foster competition in certain industries. The order proposes the reinstatement of net neutrality rules and directs the FCC to take such action. However, the FCC must decide and there is no guarantee it will act soon, as it only had four members (two Democrats and two Republicans) and it would unlikely that either Republican would approve such reinstatement. Even if the commission has its full component of five members, the FCC can change or tweak the rules from those that existed in the Obama Administration. *See* Drew Fitzgerald, *Biden Revives Net Neutrality, Targets Big Broadband Providers,* The Wall Street Journal, July 9, 2021, https://www.wsj.com/articles/biden-revives-net-neutrality-targets-big-broadband-providers-11625858529 (accessed July 25, 2021).

[113] *See* Klint Finley, *States and Cities Keep the Battle for Net Neutrality Alive*, Wired, Jan. 23, 2018, https://www.wired.com/story/states-and-cities-keep-the-battle-for-net-neutrality-alive/?mbid=BottomRelatedStories

Some commentators have identified net neutrality as the 21st Century's version of the Fairness Doctrine.[114] It is not an apt analogy. Net neutrality, and the earlier cable must-carry rules for cable operators, are utility-oriented rules that attempt to keep lines of communication open. But they do not solve communications content biases found in particular programs or networks. A more direct rule is needed, one requiring a newer version of the Fairness Doctrine.

Another false analogy involves the claim that applying venerable rules limiting media consolidation nationally and locally will solve the problem. On the surface, it is an appealing one. The more variety of owners, the greater variety of content, leading to a form of marketplace of ideas. But even if this was the case, FCC policy has trended toward *easing* or limiting these rules leading to that very consolidation.[115]

In the past, the FCC imposed many ownership restrictions on media entities but such restrictions are required to be reviewed by the FCC every four years under the 1996 Telecommunications Act (it was originally two, but later amended).[116] Court challenges to FCC deregulatory proposals have been frequent.[117] After years of circuit court rulings, the U.S. Supreme Court recently ruled that proposals to repeal some of the prior ownership rules were not arbitrary and entitled to deference.[118] However, in my mind, the issues of greater media concentration or not is not particularly relevant here, because the issue of access is not directly related to antitrust or monopolization. One could have 1,000 different owners and 1,000 different entities, but if they espouse similar views or engage in similar commentaries, what is the difference? It is not the market concentration; it is the *information* concentration by one ideological media outlet or another that is at the heart of the problem.

V. Pros and Cons of Creating Fairness Doctrine 2.0

A. The Arguments Against

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[114] *See Leonhardt*, n.77

[115] *See Picard, n. 54.*

[116] 47 USC §202(h). *See,* e.g., *2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order on Reconsideration, 32 FCC Rcd. 9802
(2017) ("2017 Recon Order"), *vacated and remanded*, *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019) ("*Prometheus IV*").

[117] *See, e.g., 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd. 2010 (2008), *aff'd in part remanded in part sub nom.*, *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*"); *see also 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 4371 (2014) ("2014 Order/FNPRM"), *vacated in part remanded in part sub nom.*, *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) ("*Prometheus III*"); *2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order on Reconsideration, 32 FCC Rcd. 9802 (2017) ("2017 Recon Order"), *vacated and remanded*, *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019) ("*Prometheus IV*").

[118] *See FCC v. Prometheus Radio Project* __ U.S. __ , 19-1231 (April 1, 2021) ("In a 2017 order, the FCC concluded that three of its ownership rules no longer served the public interest. The FCC therefore repealed two of those rules—the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule. And the Commission modified the third—the Local Television Ownership Rule . . . The FCC concluded that the three rules were no longer necessary to promote competition, localism, and viewpoint diversity, and that changing the rules was not likely to harm minority and female ownership.")

There are many who are critical of imposing a new Fairness Doctrine[119] and they point out legitimate risks about imposing an imprecise rule that may be difficult to effectively enforce. They note the practical difficulties in applying a governmentally mandated requirement as well as the constitutional free speech arguments.[120] They also say that while the idea may have merits, enforcement has been difficult and inconsistent, and, significantly, there may be more than different opposing views on a topic.[121]

1. Constitutional Problems

It is highly likely that if the Supreme Court will hear a challenge to a new Fairness Doctrine, it may likely reverse *Red Lion* for many of the reasons noted earlier. Over the air broadcasters were the only members of the media subject to it and the vast changes in the media universe makes that distinction increasingly irrelevant. One can access television stations on cable and radio stations online. So, how could it be scarce? And, not only has the Supreme Court rejected such rules for print media,[122] it also reaffirmed the strong First Amendment protection of speech on the Internet.[123] And, during the last half century, First Amendment protection against specific content restrictions has only been reinforced.

2. Governmental Abuse

Another issue – the dovetails the constitutional questions – is how the FCC used the Fairness Doctrine to punish critics of the White House. Probably the greatest attempt to use the Fairness Doctrine as a political sword came in the Kennedy Administration. A report released in 1975 outlined such attempts. Fred Friendly, a former president of CBS News, recounted that the Kennedy and Johnson administrations worked with the Democratic National Committee ("DNC") to encourage free reply time demands to "frighten the broadcasters into refusing to carry the commentaries in question."[124] The DNC was not the only one. Republican groups and others also tried to do the same.[125] Friendly even alleged that the basis of the *Red Lion* case was "instigat[ed] by the Democratic National Committee.[126] While it is true that these commentators – who

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[119] *See* David Oxenford, *The Return of the Fairness Doctrine – What It Was and Why It Won't Return,* Broadcast Law Blog, Feb. 11, 2011, https://www.lexology.com/library/detail.aspx?g=30caddae-9d76-4fd6-8994-041bd3d83828 (accessed May 19, 2021); *Picard,* n. 53.

[120] *Id.* ("But while the Fairness Doctrine in theory would seem easy to apply, there were many battles at the FCC about its application, costing broadcasters many thousands of dollars in legal fees over whether what they aired really did give all sides of an issue an adequate opportunity to have their say. . . ")

[121] *See* Heather Hendershot, *Restoring the Fairness Doctrine Cannot Prevent Another Rush Limbaugh*, The Washington Post, Feb. 19, 2021, https://www.washingtonpost.com/outlook/2021/02/19/restoring-fairness-doctrine-cant-prevent-another-rush-limbaugh/ (accessed May 19, 2021) ("The Fairness Doctrine was a relic of the network era. It required that broadcasters cover issues of public importance, and when they did so, to give both sides of the issues. The doctrine was well intentioned but flawed. First, are there just two points of view on issues, and should both always be aired?")

[122] *See* Miami Herald v. Tornillo, supra.

[123] *See* Reno v. ACLU, 521 U.S. 844 (1997) ("our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

[124] *See* Fred W. Friendly, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 5 (Random House, 1976).

[125] *Id.* At 122-24, 127. This is found in Ben C. Fisher, Book Review: *The Good Guys, The Bad Guys and the First Amendment by Fred. W. Friendly*, 5 Hofsta L. Rev. 447 (1977).

[126] *See Fisher*, n. 118.

sometimes had their own issues of credibility[127] -- flooded the airwaves of small stations with a heavy dose of criticism of the Civil Rights Movement and fearmongering allegations of "Communist influence" worthy of the best Red Baiters, the attempts to use the Fairness Doctrine to limit their effectiveness largely worked.[128] Critics can cite such examples to back their argument that the Fairness Doctrine could be used as retaliation and can stifle speech.[129] A new Fairness Doctrine would have to be enforced in such a way to avoid the potential for such political abuse.

The partisan talk radio of the Rush Limbaugh era is a reincarnation of that pre-*Red Lion* time, but with a different element. It is more "populist" and emotionally compelling and powerful. No longer presiding over a patchwork of poor radio stations, this generation's radio talk show hosts made candidates listen to them, rather than the other way around.

3. Lack of Success

Critics of the Fairness Doctrine note that during its lifetime, it was infrequently used, and its effect was spotty.[130] And that spotty enforcement may have been caused by the difficulties of a system based on viewer complaints to the FCC, rather than an internal agency mechanism.[131] Because of its relatively infrequent enforcement, the times when it was enforced raises issues of consistency and fairness. One scholar noted that in 1976, less than one tenth of one percent of complaints resulted in a station inquiry. Out of over 41,000 complaints, only 24 resulted in station inquiries, and only 16 of those resulted in adverse rulings. In 1975, there were a little over 3,000 complaints, with only 10 adverse rulings, and in 1974, there were 1,874 complaints, and 6 adverse rulings.[132]

There, these critics would ask: if the policy was rarely invoked when it was in effect, how successful could it be in a broadcast and cable universe that is far larger?

B. The Arguments for Reconsideration of the Fairness Doctrine

1. "Scarcity" May Not be a Thing of the Past, but Redefined in a Balkanized System

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[127] *See Hendershot* at n. 112. ("Many of the personalities who ran these shows were poor business executives, and a few were flat-out grifters. Some depended on small donations, others on the benevolence of wealthy patrons. They were fierce individualists who were incapable of collaboration. So the Fairness Doctrine was not their only source of trouble, but it was a key factor in their downfall.")

[128] *Id.* ("The [Fairness Doctrine the policy did aid in silencing anti-communist right-wingers like Clarence Manion, H.L. Hunt, Dan Smoot, Carl McIntire and Billy James Hargis who flooded the airwaves with one-sided diatribes against the Civil Rights movement; entitlement programs; the United Nations; the Kennedy, Johnson and Nixon administrations and even the fluoridation of water.")

[129] *See* Les Brown, *Reported Political Use of Radio Fairness Doctrine Under Kennedy and Johnson is Causing Concern,* The New York Times, March 31, 1975, https://www.nytimes.com/1975/03/31/archives/reported-political-use-of-radio-fairness-doctrine-under-kennedy-and.html (accessed June 20, 2021) ("Henry Geller, the former general counsel of the Federal agency and now with the Rand Corporation, who wrote the F.C.C. decision upholding Mr.. Cook's right of reply, called the newly uncovered information "alarming" and said that "if it [the doctrine] can be used in an interfering way by the Government, then it is dangerous and has to be loosened.").

[130] *See* Marvin Ammori, *The Fairness Doctrine: A Flawed Means to Achieve a Noble Goal,* 60 Admin. L. Rev. 881, 887 (2008) ("This process resulted in a handful of adverse rulings a year..") *See also*, Ford Rowan, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 73–74 (1984)

[131] *Id.*

[132] *See* n. 121.

There is nothing inherently wrong with a news or information service that engages in frequent commentary. However, there is something problematic about stations and networks that push through one narrative – based on consistent messaging and personal attack and block out others. The latter does not fulfill the public interest. It does not lead to a marketplace of ideas. Instead, it results leads to many in the body public who is not informed about different or alternate views on the issue of the day and does not necessary want to hear those views. President Trump's temerity to lie, amplified by his allies on Fox and other media created a false narrative with little opportunity for different opinions.[133] The result was that millions of people think the election was rigged and that Joseph Biden is an illegitimate president.[134] This relates to our question -- should there be access for those wronged to correct the record on the very outlet that disseminated the falsehood – or, in the case of an opinion (as opposed to a lie) to state a different viewpoint?

In what may be the first comprehensive survey of media coverage following the election, the Knight Foundation found that Americans of all political stripes agreed the country is divided — 73% describe it as "deeply divided."[135] Roughly two-thirds of Americans blamed major internet companies and cable TV news "a great deal" for political divisions in this country.[136] Significantly, American relied on cable TV more than other formal news sources for their election news.[137] About two-thirds of Americans felt they were exposed to misinformation during the election campaign. Although Facebook garnered the highest percentage in the survey, in second place were the cable news networks.[138] One positive in the survey is that while Americans believe the nation is deeply divided, they express openness to learning about others who do not share their political views.[139] The last response shows that many American may be attracted to hearing different opinions under a revised Fairness Doctrine.

The 1969 *Red Lion* ruling spoke of the inherent scarcity of the communications media. As I noted earlier, this reliance on scarcity leads to the argument that these kinds of rules cannot be constitutionally mandated if there is no longer scarcity. Certainly, *Red Lion* could be overturned in an era with hundreds of television channels (with greater capacity due to high-definition television standards), thousands of radio stations and millions of independent websites. Notably, significant more and more of these radio and television channels are found online, either as standalone version or parts of streaming services.[140]

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[133] *See Sullivan*, n. 20.

[134] *See The Big Lie: Most Republicans Believe the 2020 Election was Stolen,* PRRI, May 12, 2021, https://www.prri.org/spotlight/the-big-lie-most-republicans-believe-the-2020-election-was-stolen/ (accessed June 29, 2021) ("While less than three in ten Americans (29%) agree with the statement that "the 2020 election was stolen from Donald Trump," two-thirds of Republicans (66%) agree that the election was stolen")/

[135] *See* Jeff Jones, *In Election 2020, How did the Media, Electoral Process Fare? Republicans, Democrats Disagree,* Knight Foundation, December 7, 2020, https://knightfoundation.org/articles/in-election-2020-how-did-the-media-electoral-process-fare-republicans-democrats-disagree/ (accessed June 13, 2021). Seventy-three percent found the national deeply divided and 25% as "divided." Republicans (74%), Democrats (75%) and independents (67%) share the view that the nation is deeply divided.

[136] *Id.* About two-thirds blamed Internet and cable news, while those who blamed newspapers, national network news, and local television news, which came to about 40%.

[137] *Id.* The figure was 64%, followed by national network TV news and major internet companies.

[138] *Id.* The breakdown was 59% of all Americans surveyed, breaking down as follows: 44% of Democrats, 61% of Independents and 77% of Republicans.

[139] *Id.* Twenty-five percent say they have "a great deal," and 51% "a fair amount," of interest in learning about the opinions of people who disagree with them politically.

[140] *See*, e.g. YouTube TV, which offers all of the over the air stations in the New York City – Metropolitan area (ABC7, CBS2, Fox5, My9, NBC4, WLIW, PIX11, Thirteen, Telemundo and WLNY), https://tv.youtube.com/welcome/?gclid=EAIaIQobChMIrNWcrsCY8QIVUsqzCh2FFgLUEAAYASABEgJG9PD_

This point is significant because Internet streaming, in particular, destroys any semblance of a scarcity of broadcast outlets. A New York City parent can access a television station in Manchester, New Hampshire, where his or her son or daughter resides, to find out about weather emergencies; A Los Angeles Dodgers fan living in Atlanta could access a sports talk radio station from that city to hear the latest trade rumors. And, unless there is some form of geo-blocking, a hockey fan can catch a radio broadcast of the Stanley Cup finals while vacationing in Japan.[141] Even if one lives in a community of few licensed television and radio stations, the streaming universe opens that person to a world of thousands of stations, many of which are free. Historically, the Commission has formulated its ownership rules to benefit consumers by promoting the three principal policy goals of localism (along with competition and diversity and formulating ownership rules have typically sought to promote these goals by limiting the numbers and types of media outlets a single party can own.[142] While this is a lofty goal and still good law, technical advances, coupled with the actions of the FCC in deregulating longstanding rules about local and national broadcast ownership, may shove show a change in how we think about localism.

One may have access to many over the air stations and cable programmers, but if the stations have increasingly homogenized programming – or, more ominously, if these local over the air stations are used as a vehicle to propagate certain views, we hardly have an ideal marketplace of ideas. One example is Sinclair Broadcasting, which owns almost 200 television stations in smaller markets and has utilized editorials to propagate the views of its ownership.[143] As one example, Sinclair began sending its stations "must-run" pieces produced at the corporate level that local affiliates were required to air, which were designed to look like news pieces, and to run directly after newscasts that frequently castigated Democratic officeholders.[144]

Many have argued that the FCC's loosening of local and national ownership rules has resulted in a deleterious effect on the marketplace of ideas in broadcasting. The Supreme Court's recent affirmance of the FCC's proposals may signal a greater administrative deference for more consolidation of the industry.[145] But in my mind, this is an antitrust issue rather than a First Amendment one, as it involves market domination. Whether the FCC regulates this or not, mergers are happening in the communications field and are likely to continue with the distinct possibility

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BwE&gclsrc=aw.ds#panel-0 (accessed June 14, 2021). For examples of standalone local stations, see 7online.com (WABC7, New York), https://abc7ny.com/; PIX11 (WPIX, New York), https://pix11.com/. Examples of radio stations online include WQXR-FM, a New York classical radio station, https://www.wqxr.org/.

[141] That is exactly what this author did in 2011, listening to a Vancouver radio feed of the Canucks and Bruins playing for the Stanley Cup.

[142] *See* In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, FCC 10-92A1, p. 6 (May 25, 2010). The idea is found in the legislative history of the 1996. See, (citing H. Rep. No. 104-104 (1996) at 221 ("Localism is an expensive value. We believe it is a vitally important value, however [and] should be preserved and enhanced as we reform our laws for the next century."). *See also*, *FCC v. Nat'l Citizens Comm. For Broad*., 436 U.S. 775, 780 (1978).

[143] Sinclair is the largest owner of television stations in the United States, with 192 stations in 89 markets. It reaches thirty-nine per cent of American viewers (which is the national cap under FCC rules). The company's executive chairman, David D. Smith, is a conservative whose views combine a suspicion of government, an aversion to political correctness, and strong libertarian leanings. *See* Sheelah Kolhatkar, The Growth of Sinclair's Conservative Empire, The New Yorker, Oct. 22, 2018, https://www.newyorker.com/magazine/2018/10/22/the-growth-of-sinclairs-conservative-media-empire (accessed June 22, 2021).

[144] *Id.* In such commentary accused Bernie Sanders and Elizabeth Warren of inciting their "unhinged" supporters to commit violence; in another, he derided the Obama Administration's policy requiring that transgender students have access to their choice of school bathrooms.

[145] *See Prometheus Broadcasting*, *supra* at n. 118.

of the major online services such as Google, Amazon or Apple becoming over the air network, cable service or station owners in the future. But if this would not be the case, the problem of access remains even if every single station and cable services is individually owned. Breaking up media companies is not an answer if too many owners propagate too many similar viewpoints without some access to opposing views.

But let us assume that the court does not overrule *Red Lion* anytime soon, even though it noted misgivings about its continued viability in later cases.[146] So, we can argue that the notion of scarcity remains, but can define it from an orbit that centers on ideological walls rather than the limitation of the spectrum. It may be possible for someone who is relatively unknown, or a limited public figure attacked (for his/her views or otherwise) to seek access in a different media outlet, but that may not solve the problem of access to *this particular* outlet. In that sense, we are back to the scenario of *Red Lion*. A radio station (one of a network of stations carrying the commentary) attacked someone and he or she wishes to reply to the attack. In today's world of cable news, this scenario may be even more important than at the time of *Red Lion*.

Another way to look at scarcity is not the scarcity of what is available, but the scarcity of time for people to view news. There is so only so much time in a day that people can watch the hours of news and commentary on cable news, broadcast television or radio. Because of this "time scarcity" people will likely gravitate to a few sources and often they are the sources that people feel comfortable with. And that comfort can be based on the connection between the biases of the person and the biases of the outlet. One writer coined it "the right of the public to receive objective information."[147] If the viewer is taking a portion of his or her limited time to watch, that person has the obligation to receive different viewpoints in a given outlet.

Even with the absence of scarcity as matter of judicial and policy the free-market, non-regulatory marketplace of idea may not work. First established as a basis for free speech by libertarian philosophers such as John Milton and John Stuart Mill and later utilized by the Supreme Court,[148] this concept centers on the notion that many avenues of comment will lead to "truth."[149] However, if those avenues come from the same direction, that is not necessarily the case. And if people just hear or read those avenues, not only will truth not be found (if one assumes there is such a thing as "truth"), but one side of the coin will be treated as the truth and if falsity or misinformation comes from that side, the results resolve around the events after the 2020 Election, culminating with the assault on January 6, 2021. While the marketplace of ideas sounds like a method to hear many views from many "markets" there is a breakdown when those who control

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[146] *See* FCC v. League of Women Voters, 468 U.S. 364. 376 (1984) (""prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years.")

[147]See JOHN S. BERRESFORD, FEDERAL COMMUNICATIONS COMMITTEE, No. 2005-2, THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING: AN IDEA WHOSE TIME HAS PASSED (2005), as cited in Ian Klein, *Enemy of the People: The Ghost of the F.C.C. Fairness Doctrine in the Age of Alternative Facts,* 42 Hastings Comm and Ent. L. J. 45 (2020).

[148] *See* J. MILTON, AREOPAGITICA (London 1644), in 2 COMPLETE PROSE WORKS OF JOHN MILTON 486 passim (E. Sirluck ed. 1959); J. MILL, On Liberty, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 13-48 (R. McCallum ed. 1948). See also, Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., concurring) ("the best test of truth is the power of thought to get itself accepted in the competition of the market."). For a broader background, see Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L. Rev. 1, 6 (1984).

[149] *See* J. LOCKE, Letter Concerning Toleration, in THE SECOND TREATISE OF GOVERNMENT (AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT) AND A LETTER CONCERNING TOLERATION 125, 139-43 (J. Gough ed. 1966). *See* J. MILL, at 46-47 as cited in Ingber, n. 148.

certain markets control them lockstep and have their own adherents accepting that brand identity. Hence, that is the opposite of the goal of an enlightened citizenry.

B. Is Access Anathema to Free Speech, or does it bolster Free Speech?

In a recent article in the Harvard Law Review, Prof. Lankier discusses an overlooked but important aspect of freedom of speech: that free speech embraces *more* than the text of the First Amendment and therefore, it is a more organic.[150] In her thesis, Prof. Lankier shows that free speech includes a right of access traced to legislation or other policies, rather than a pure reading of the First Amendment. Even if the Fairness Doctrine is not mandated by First Amendment theory, it could be justified under a broader right of access. For example, the 1792 Post Office Act established a right of access for journals to promote freedom of speech, as the Post Office could not simply ban publications without some justification, like obscenity.[151] In addition, the Post Office subsidized the costs for these publications by providing reduced postage rates.[152] Access to the mail resulted in a significant increase in the ability of the print media to be disseminated and many of the arguments for an "open access" post office mirrored those in favor of adoption of the First Amendment.[153]

Additionally, and more significant for the purposes of this article, she points to common carrier laws that require open access through telephone lines or other conduits. Section 202 of the Communications Act of 1934 prevents telephone companies from discrimination by limiting access or charging different rates to customers.[154] Although the Communications Laws differentiate between services deemed common carriers and those considered "informational services," an argument can be made that a broadcaster or cablecaster do share certain characteristics of a common carrier and could be regulated as such. The court in *Red Lion* did not address this point, because it would have had to amend the 1934 and 1996 Acts to redefine broadcasting, which would have been, at least, a very tough political slog. But it does bring into question whether amending the 1934, or even 1996 Acts to categorize broadcasting as a common carrier would result in a post-*Red Lion* justification for a new Fairness Doctrine, eluding the scarcity and standard First Amendment standards used today.

A first cousin of the Fairness Doctrine still exists. That is section 315 of the 1934 Communications Act, the so-called "Equal Time" provision that requires broadcasters, and cable television providers to give "equal opportunities to all other such candidates" running for office if they give access to one such candidate.[155] They are also prohibited from censoring the content of

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[150] *See* Genevieve Lankier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev 2299 (2021).
[151] *Id.* at 2210. ("The very significant changes the Post Office Act made to the postal service had a profound impact on the operation of the public sphere in the United States. The postal subsidies the Act provided newspapers significantly lowered the cost of disseminating news and information through the new, very large republic. By enabling rural newspapers to compete for readers against newspapers in the denser commercial centers, the Act helped create the vibrant, diverse, and decentralized [the] newspaper public sphere. . . ")
[152] *Id.* At 2315.
[153] *Id.* at 2211. ("The prominent politician and scientist Benjamin Rush . . . argued that, in order to prevent the new republic from losing its liberty, the government should ensure that "citizens . . . [have] means of acting in concert with each other," and more specifically should "convey news-papers free of all charge for postage" . . . It was the government's duty, he argued, to ensure that they circulated widely. . . "), citing Benjamin Rush, Address to the People of the United States 3 (Jan. 1787), https://archive.csac.history.wisc.edu/Benjamin_Rush.pdf [https://perma.cc/D73E-8TJN].
[154] *See* 47 U.S.C. § 153(11).
[155] *See* 47 U.S.C. § 315; *see also* 47 C.F.R. § 76.205(a).

the candidate's message must charge candidates the same rates as are charged for comparable use of that airtime, and, close to elections, the lowest rate they charge anyone else for that time.[156] While there are exceptions to these requirements built in the statute,[157] the fact that this provision remains a part of the law demonstrates the belief that certain access requirements can remain relevant in 2021. Commentators have noted the issue of common carrier status as a "back-up" speech requirement with the possibility of a role to prevent undue concentration of media power.[158]

C. Can a New Fairness Doctrine be Considered "Content-Neutral?"

The FCC, in its 1985 Report, assumed that the Fairness Doctrine would be unconstitutional since scarcity disappeared?[159] Many commentators have agreed.[160] However, that may not necessarily be true. Content-based regulations are subject to the exacting standards of strict scrutiny, but those who do not discriminate based on content have been allowed greater governmental deference under intermediate scrutiny. A case can be made that a new Fairness Doctrine should be considered under the second theory.

Much like the "must-carry" rules that were the subject of two Supreme Court challenges,[161] the Fairness Doctrine did not command broadcasters to air *particular* views, but those with *opposing* views on important public issues and, in particular, gave access to those who were personally attacked in a broadcast editorial. The cable television model provides a related, if not exact equivalent by allowing localities to require a cable operator to reserve channels for public, educational and governmental programming.[162] The Cable Act of 1984 permits such requirements, subject to a percentage cap.[163] Furthermore, past, and possibly future net neutrality laws lend themselves to content-neutral designation (although no court has addressed this issue) for the same reason. It is based on equal or at least equitable access, rather than censoring content. The same can be said of broadcast ownership rules and the more recent attempts by the FCC to loosen some

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[156] *See* 47 U.S.C. § 315(a); 47 C.F.R. § 76.205(a); 47 U.S.C. § 315(b); 47 C.F.R. § 76.205(b).

[157] *See* 47 U.S.C. 315(a) ("Appearance by a legally qualified candidate on any (1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection.")

[158] *See* Lankier, supra, n 150.

[159] *See* 1985 Fairness Report, 102 F.C.C.2d 145, 58 R.R.2d 1137 (1985).

[160] *See, e.g.* Nicole Hemmer, *The Fairness Doctrine Sounds a lot Better than it Actually Was*, CNN.com, Jan. 27, 2021, https://www.cnn.com/2021/01/27/opinions/fairness-doctrine-wont-solve-disinformation-hemmer/index.html (accessed July 27, 2021).

[161] *See* Turner Broad. Sys. v. FCC (Turner I), 512 U.S. 622 (1994) (upheld use of intermediate scrutiny) and Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180 (1997) (concluded that the rules justified the test as they were ---

[162] *See* 47 U.S.C. §§ 531, 541(a)(4)(B). *See also,* The Cable Franchising Authority of State and Local Governments and the Communications Act, EveryCRSReport.com, January 3, 2020, https://www.everycrsreport.com/reports/R46147.html#ifn41 (accessed July 5, 2021). ("[T]he FCC has explained that (1) "public" channels are "available for use by the general public" and are "usually administered by the cable operator or by a third party designated by the franchising authority"; (2) "educational" channels are "used by educational institutions" and that the franchising authority or cable operator typically allocates time among "local schools, colleges and universities"; and (3) "governmental" channels are "used for programming by local governments" and generally directly controlled by the local governments. *Public, Educational, and Governmental Access Channels ("PEG Channels")*, Fed. Commc'ns Comm'n, https://www.fcc.gov/media/public-educational-and-governmental-access-channels-peg-channels (last updated Dec. 9, 2015).

[163] 47 U.S.C. 532.

of these rules.[164] Although these are not substitutes for a new Fairness Doctrine, as noted earlier in this article,[165] their existence points to the deference courts may show a new Fairness Doctrine under an intermediate scrutiny standard.

Another way to look at the Fairness Doctrine is to think of it a defamation prevention rule. Defamation and "false light" privacy torts have limited First Amendment protection, especially for those who are not public figures,[166] and while it is true that opinions are exempted from the defamation standards,[167] the exact contours of what is an "opinion" as opposed to "fact" are difficult to determine and even if a statement is considered "opinion," it still has the "capacity to defame."[168] The Supreme Court has not adopted an automatic immunity for opinion; rather, it has concluded that the proper inquiry is whether the statement reasonably would be understood to declare or to imply provable assertions of fact.[169] By giving access to those attacked in an editorial, it may limit the option for such litigation as a better avenue may exist to address the potential harm.

VI. Fairness Doctrine 2.0

While the days of a generalized, limited pipeline of information are long gone, a new Fairness Doctrine to ensure opposing viewpoints of controversial information may be needed more than ever. Fairness Doctrine 2.0 should be adopted by FCC rulemaking, or by Congress as an amendment to the Communications Act. A statutory version would be preferable, as less likely to be altered by a future FCC (as was the case with net neutrality). In fact, bills have been proposed to amend the Communications Act and reimpose the Fairness Doctrine in 2019.[170] Some public interest groups and commentators have also advocated a return for the rule not only in light of the events of January 6, 2021, but also for the years of falsehoods and attacks on certain media occurred well before that time.[171] Fairness Doctrine 2.0 would have the following characteristics:

A. It would apply to traditional broadcast, cable programmers and streaming services that controlled by those broadcasters and cablecasters

It would be impractical to apply a "Fairness" requirement to every single website that contains news and information. The experience with net neutrality is illustrative because of the conflict between "telecommunications services" and "information services." As noted earlier, courts have questioned the FCC's more recent attempts to reclassify online services as a utility (or

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[164] *See* FCC v. Prometheus Broadcasting, n. 118, *supra*. *See also*, FCC v. National Citizens Comm. for Broadcasting, 436 U. S. 775, 780–781, (1978).
[165] *See* notes 119 and 161, *supra*
[166] *See* Gertz v. Robert Welch 403 U.S. 418 U.S. 323 (1974) (requiring a minimum standard for negligence for non-public figures, based on state law, rather than an actual malice standard for public figures); *See also* Time v. Hill, 385 U.S. 374 (1967) (applying the New York Times standard to "falsehoods" on matters of public interest).
[167] *See* Milkovich v. Lorain Journal, 497 U.S. 1, 20 (1990).
[168] *See* Rodney Smolla, 1 Defamation, § 6.60 (2d Ed).
[169] *See Milkovich, n. 167.*
[170] *See Restore the Fairness Doctrine Act*, H.R. 4401 (116th Cong.), summarized at https://www.govtrack.us/congress/bills/116/hr4401/summary (accessed May 19, 2021).
[171] *See* Lew Millenbach, *Viewpoint: American Needs to Reinstate the Fairness Doctrine,* Albany Times-Union, Feb. 22, 2021, https://www.timesunion.com/opinion/article/Viewpoint-America-needs-to-reinstate-the-15970955.php (accessed May 19, 2021); *See also* Steve Almond, *Want to Stop Fake News? Reinstate the Fairness Doctrine*, The Boston Globe, April18, 2018, https://www.bostonglobe.com/opinion/2018/04/17/want-stop-fake-news-reinstate-fairness-doctrine/BpMw4D3s9qLrDwA2geLywN/story.html (accessed May 19, 2021).

"Telecommunications service) subject to greater regulation when such services were first classified as a more speech-based "Information Service."[172] To avoid this problem, the new Fairness Doctrine would apply to content providers that deliver the bulk or a considerable portion of their services via traditional over the air broadcast or coaxial cable or satellite. In other words, radio, television and cable services that also stream content.

B. If a court limits the applicability of the Fairness Doctrine to online services, Congress could create a 'Secondary Common Carrier' to ease statutory and regulatory concerns

Presently, the communications law creates a dichotomy between common carriers and non-common carriers and this division was center to the controversy over net neutrality rules discussed earlier in this article. Congress could amend the 1996 Act to create a new category for cable internet streams called "secondary common carrier." Creating this hybrid category, which would give the FCC greater administrative and constitutional justification to impose a new Fairness Doctrine.

The category could be defined as follows:

"A broadcast, cable or online carrier of content is deemed a Secondary Common Carrier if it utilizes broadcast signals, coaxial or fiber-optic wire or satellite transmission to disseminate this information."

C. A New Fairness Doctrine would pass Constitutional Muster

One can argue there could be constitutional difficulties applying a new Fairness Doctrine to traditionally non-broadcast sources like cable and online. *Red Lion* focused on over the air broadcasters that were occupying "scarce" spectrum space, thereby justifying content-based speech regulations.[173] Cable and online are different. At least one Supreme Court ruling noted that cable speech is subject to the same "strict scrutiny" standard found in non-broadcast speech.[174]

Yet, cable is subject to certain content regulations. For example, the FCC enforces an "equal time" rule for political candidates on cable television, similar to that of what is found in traditional broadcast.[175] Additionally, a provision of the 1996 Telecommunications Act that allows local franchising authorities to require cable franchisees to set aside certain channels for public, educational or governmental use.[176] As these regulations do not specify or restrict particular content, they would be subject to the "intermediate scrutiny" test and an good argument could be made that they are constitution.

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[172] *See* Nat'l Cable Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (upholding the FCC's decision to classify cable modem service as an information service under Title I of the 1996 Telecommunications Act, rather than Title II of the Act)

[173] *See Red Lion,* 395 U.S. at 386-76 ("Although broadcasting is clearly a medium affected by a First Amendment interest, [citation omitted], differences in the characteristics of new media justify differences in the First Amendment standards applied to them.")

[174] *See* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (court invalidated a law to shield children from hearing or seeing sexual images resulting from signal bleed, "which refers to blurred images or sounds that come through to non-subscribers").

[175] *See Program Content Regulations*, FCC.gov. https://www.fcc.gov/media/program-content-regulations (accessed May 24, 2021) (describes the equal time rules for political candidates seeking airtime).

[176] *See* 47 U.S.C. § 531.

The Supreme Court applied and then utilized the intermediate scrutiny test to uphold its "must-carry" rules.[177] The standard could be applied to uphold Fairness Doctrine 2.0 because the proposed rule would not mandate a specific *type* of comment but would give those with opposing views or those personally attacked with access to the media. Looking at the contours of the *O'Brien* test used to determine whether the restriction is constitutional, it can be argued that there is a substantial governmental interest for a new Fairness Doctrine because of the issues generated by the balkanization of cable news and that the requirement of response for personal attacks and opposing views of issues of public concern are not more restrictive than necessary to accomplish the goals of a diversity of viewpoints.

D. The New Fairness Doctrine applies to entities that provide a preponderance of programming that consists of news and public affairs

Given the specialization of the radio and television media that exists today, there are many radio stations and cable programmers which do not devote much attention to news and public affairs. It would be hard to argue that American Movie Classics or a "Top 40" radio station devote much to news and public affairs and, consequently, the new Fairness Doctrine would not apply. Unlike the original rule (which mandated that all licensees devote time to issue of public importance), the new rule would be limited to those formats that are primary news and public affairs. Talk radio that would is largely devoted to news issues would be subject to the rule; sports talk radio would not.

E. Access is required in a situation where the honesty and integrity of an individual or group is attacked

This is an up-to-date version of the "personal attack" rule of the Fairness Doctrine. With the level of attacks on individuals made by political commentators, it mandates that a response be allowed to air when the honesty and character of an individual or group is attacked.[178] Given the kind of personal invective noted in our earlier example and others, this portion of Fairness Doctrine 2.0 may be the most significant component. It allows the aggrieved person or representative to address that very audience of the broadcast where he/she was attacked and in fact may lessen the reliance on defamation (for those attacks deemed false) as a remedy, saving time and money. In addition, it gives the person attacked the public forum to reply to the attack.

To expedite the timing and ease of requests, the broadcaster or cablecaster would create an online registration for the aggrieved party or representative to communicate a request for response time. If the broadcaster/cablecaster has no objections, then the person would be given a reasonable time period to reply. If, however, the broadcaster/cablecaster objects, then the person seeking the time can petition the FCC and the operator may respond under an expedited process, whereby the FCC Media Bureau will render a decision. Appeals can be made to D.C. Circuit Court of Appeals.

F. Access would be required for those responding to an issue of public interest – with a key defense

[177] *See Turner I and Turner II,* n. 161.
[178] *Discussed in* 47 C.F.R. § 73.1290 (1987).

As was the case in the prior Fairness Doctrine, one representing him/herself or an organization would be able to petition the broadcaster or cablecaster for airtime to respond to editorials or commentaries involving issues of public concern. Given the potential for many requests, given the commentaries found on all the major cable news channels, the rule would simply require representative opposing views, rather than all opposing views.

An important immunity would exist if the broadcaster or cablecaster employs counter-commentators or others that can respond to the commentary from a differing point of view during the broadcast. For example, looking at the older cable programs such as "Capital Gang" with several different people discussing current issues, there would not no need to require opposing viewpoints under this rule. Another model would be a broadcast like Bill Maher's program on HBO, which features speakers with different points of view.[179]

G. Access should be free of charge for someone seeking reply time after a personal attack

As was the case in the first iteration of the Fairness Doctrine, a person who is attacked should have be able to get reply time without having to pay for advertising. This requirement derives from an old Fairness Doctrine's "Cullman" rule.[180]

H. The broadcasters' and cablecasters' defense – exposure in other media

One significant change from the old rule would be in the creation of a defense for the broadcaster/cablecaster in cases of personal attack. If the aggrieved party has publicly refuted the claims in other media – including, but not limited to, print broadcast, cable or online, that could serve as a defense to the petition. The FCC would weigh the extent of the person's appearances in other media and whether the exposure would be adequate to give the public knowledge of the response. The specific contours of this defense would be crafted by the FCC.

Conclusion

The open politicization of certain media has caused certain outlets – whether they are radio, over the air television or cable television – to become ideological warriors in the fight for influence, rather than a quest for understanding. As one commentator noted: "When cruelty is refigured as "free speech," and when expertise becomes condescension—and when compassion is weakness and facts are "claims" and incuriosity is liberty and climate change is a con and a plague is a hoax—the new lexicon leaps off the screen."[181] Because of the power of broadcast and cable, through linear and streaming distribution, these events call for a reconsideration of content regulation. While being respectful of First Amendment tradition and the level of constitutional protection of speech, Congress, or the FCC, in the wake of the greatest assault on the U.S. government's structure in decades and certain media's role in pedaling inaccurate and prevarications, should enact a Fairness Doctrine 2.0. This is not an easy decision and one fraught with difficulties in execution. But given the stakes involved, it is necessary.

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[179] *See Real Time with Bill Maher*, HBO.com, https://www.hbo.com/real-time-with-bill-maher (accessed July 31, 2021).
[180] *See Cullman Broadcasting*, 40 F.C.C. 576 (1963), at n. 56.
[181] *See* Garber, at n. 25.