

The
FAIRNESS DOCTRINE
DISTRACTION

Josh Silver
Marvin Ammori

Issue Brief – Fairness Doctrine

Summary

For reasons that appear unrelated to any pressing policy decision, the Congress is engaged in a debate over whether to reinstate a long-defunct broadcast regulation known as the Fairness Doctrine.

Established in 1949 and repealed in 1987, the Fairness Doctrine required broadcasters to cover issues of local importance and to offer a balance of perspectives. Strong feelings are held about whether it worked, whether it benefited the public interest, and whether it could legally coexist with the First Amendment. Recently, a number of other public interest policies in broadcasting have been lumped together with the controversy over the Doctrine.

We do not believe the Fairness Doctrine will result in a positive outcome for the public.

- It is untenable to put the federal government in charge of judging fairness in political speech.
- Reinstating the Doctrine will not result in greater viewpoint diversity in broadcasting. Policies that promote diversity should encourage more speech, not less.
- Legal precedent and court opinions indicate a strong likelihood that if the Doctrine were reinstated, it would be overturned.

Congress should recognize that the Fairness Doctrine and the content regulation it represents are in no way tied to other public service obligations required by the Communications Act or proposals designed to increase speech in broadcasting and new media. The Fairness Doctrine debate has become a distraction from these laudable policies that enjoy broad bipartisan support.

- Ownership rules: The government has long limited the number of broadcast stations one company may own in a single city. These rules are designed to promote competition among local providers of information and guard against monopolization of local news production.
- Localism and public service: The FCC — under both Democrats and Republicans — long has promoted localism as the overriding goal of the Communications Act in broadcast policy. These rules require stewards of the public airwaves to give back to their communities in exchange for their licenses. Traditionally, rules governing children’s programming requirements, indecency, and local community engagement have been guided by these principles.

- Network Neutrality: This policy proposal guards the Internet from precisely the kind of content control that the Fairness Doctrine represents. Net Neutrality protects the consumer's right to any online content without intervention. The exact opposite of the Fairness Doctrine, Net Neutrality is by definition content-neutral and designed to protect the Internet as a free marketplace of ideas.

We encourage the Congress and the administration to leave the debate over the Fairness Doctrine in the past and pursue policies that have sound legal, economic, and public interest footing. There is much that could be done to promote speech in our media marketplace – but the Fairness Doctrine is just a distraction.

History

The laws that became known as the Fairness Doctrine were regulations issued by the Federal Communications Commission in 1949. Their purpose was to codify the principle that broadcast media should offer a range of viewpoints to ensure that a scarcity of broadcast licenses would not result in a lack of diversity in the marketplace of ideas.

The Fairness Doctrine had two prongs: It required broadcasters to devote a significant amount of time to coverage of issues of public importance, and broadcasters were obligated to provide reasonably comparable exposure to significant contrasting viewpoints. Throughout its history, the Doctrine caused broadcasters to self-regulate their output, although how severe a “chilling effect” it caused is debatable. As a practical matter, according to the FCC record, very few complaints were ever successfully adjudicated under the Doctrine.

The FCC repealed the Fairness Doctrine in 1987 after the U.S. Court of Appeals for the D.C. Circuit remanded a Fairness Doctrine case to the agency. Congress immediately attempted to reinstate the Doctrine – but that effort was vetoed by President Ronald Reagan. The Fairness Doctrine has now been off the books for more than two decades, though the question of whether it should be restored has flared up in the press and on Capitol Hill.

Most recently, some conservative pundits and politicians have asserted that the Obama administration and the new Congress plan to reinstate the Fairness Doctrine as a means of muzzling conservative talk radio. A pair of bills has been introduced by Republicans in both the House and the Senate to prohibit the FCC from reinstating the Doctrine.¹

It is true that a small handful of Democratic legislators have publicly entertained the idea of bringing back the Doctrine.² However, no legislation has been introduced to do so since the party retook the majority in Congress. Furthermore, President Barack Obama has stated unequivocally

1 Ira Teinowitz, “Bills Would Block FCC on Fairness Doctrine,” *TV Week*, Jan. 7, 2009, available at http://www.tvweek.com/news/2009/01/bills_would_block_fcc_on_fairm.php

2 Craig Aaron, “The Fairness Doctrine: Just Say No,” *Huffington Post*, Feb. 13, 2009, available at http://www.huffingtonpost.com/craig-aaron/the-fairness-doctrine-jus_b_166767.html

— and repeatedly — that he does not support restoring the Fairness Doctrine.³ Acting FCC Chairman Michael Copps has made clear his opposition to the Doctrine as well.⁴

Policy Analysis

The Fairness Doctrine, while originally well-intentioned, is not wise public policy. First, the Doctrine places the FCC in charge of determining what is fair in political speech — a difficult task in the best of circumstances. Placing the government in the role of monitoring and judging political speech will inevitably produce controversy that is impossible to resolve.

Second, the Doctrine is easy to avoid. Because of First Amendment concerns, broadcasters historically were granted wide discretion in implementing the Doctrine. Since a broadcaster must merely present both sides fairly, any show with even the pretense of a counterpoint would easily pass muster; indeed, under the Doctrine, a clearly partisan host could himself characterize the opposing side. Most of the partisan talkers supposedly targeted by the Doctrine would be exempt because their broadcasts either would not be classified as news, or the call-in component of their shows would present an opportunity for balance.

Third, complaints brought under the Doctrine will likely fail. Historically, less than 1 percent of Fairness Doctrine complaints succeeded. For all of these reasons, it is unlikely that a return of the Doctrine would achieve the goals sought by its supporters.

The legislators who support the reinstatement of the Fairness Doctrine may have good intentions. They desire a more diverse marketplace of ideas. But the Fairness Doctrine is not the path to achieve that result.

Underlying the calls to bring back the Fairness Doctrine is a false assumption that its repeal in 1987 was the main cause of the rise of right-wing talk radio. While there is evidence from a study⁵ conducted in the late 1990s that broadcasters increased production of talk radio after 1987 (freed of the alleged chilling effect of the Doctrine), there were other more important factors that led to the dominance of conservative talkers.

The 1990s saw unprecedented consolidation in the radio industry and an overall increase in the number of broadcast licenses issued by the FCC. An explosion of mergers followed the relaxation of ownership caps in the 1996 Telecommunications Act. The new radio giants spawned a market for nationally syndicated content. The conservative talkers were the first to enter this market and to capitalize on the desire for bundled content. The failure of progressive talk radio to find — or be given the opportunity to reach — a similarly large audience is a vexing issue. But the Fairness

3 “White House: Obama Opposes ‘Fairness Doctrine’ Revival,” FoxNews.com, Feb. 18, 2009, available at <http://www.foxnews.com/politics/first100days/2009/02/18/white-house-opposes-fairness-doctrine/>

4 Matt Cover, “Acting FCC Chair Sees Government Role in Pushing ‘Media Diversity,’” CNSNews.com, Feb. 12, 2009, available at <http://www.cnsnews.com/public/content/article.aspx?RsrlD=43414>

5 Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”? Evidence from the Postderegulation Radio Market*, *The Journal of Legal Studies*, XXVI (1) (1997): 279-301.

Doctrine did not cause conservative dominance of talk radio, and bringing it back won't fix the imbalance on the airwaves.

Moreover, even if it were to be reinstated, the Fairness Doctrine is unlikely to withstand a court challenge. The Supreme Court upheld the Doctrine in 1969 in *Red Lion v FCC*.⁶ Since then, that decision has been subject to intense, almost unrelenting critique by First Amendment scholars on both the left and right as well as Supreme Court justices and judges on the D.C. Circuit.⁷

What the Fairness Doctrine Is *Not*

In the recent controversy, some commentators and officials have conflated the Fairness Doctrine with many unrelated rules and regulations that serve very different — and even *opposite* — purposes. Rush Limbaugh has compared the Fairness Doctrine to broadcast requirements for “local content,” “diversity of ownership,” and “public interest” rules.⁸ FCC Commissioner Robert McDowell has compared the Fairness Doctrine to a host of proposed rules he happens to oppose. McDowell has even suggested the Doctrine (which would require the FCC to engage in content regulation) is comparable to Net Neutrality — rules designed to protect the Internet from all forms of interference with content.⁹ The categorical opposition to all FCC policies that can imaginatively be lumped together with the Fairness Doctrine should draw deep skepticism.

Broadcast regulations — such as those governing media ownership limits, indecency and children’s programming requirements — have nothing to do with the Fairness Doctrine and pose no threat of censorship. Local content rules have a long history in almost every medium, especially broadcasting, and have been championed by Republicans and Democrats alike.

For example, as recently as 2004, the FCC instituted a Localism Task Force and opened a proceeding on broadcasters’ commitment to “localism,” or providing local content. The driving force behind the Task Force and the proceeding was FCC Chairman Michael Powell, a Republican appointed by President George W. Bush who later served as John McCain’s lead telecommunications policy adviser in the 2008 campaign. The Powell FCC unanimously stated: “Given the importance of localism, we initiate this proceeding to receive direct input from the public on how broadcasters are serving the interests and needs of their communities; whether we need to adopt new policies, practices, or rules designed directly to promote localism in broadcast television and radio; and what those policies, practices, or rules should be.”¹⁰

Indeed, the very FCC that eliminated the Fairness Doctrine maintained that serving the local public remained a key obligation: “Even as the Commission deregulated many behavioral rules

6 395 U.S. 367

7 *Denver Area Consortium v. FCC*, 518 U.S. 727, 832 (1996) (Thomas, J., concurring and dissenting).
Time Warner Entertainment Co., L.P. v. FCC, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (dissenting opinion).

8 Rush Limbaugh, “Mr. President, Keep the Airwaves Free,” *Wall Street Journal*, Feb. 20, 2009, available at <http://online.wsj.com/article/SB123508978035028163.html>.

9 Matthew Lasar, “FCC’s McDowell: It’s All Fairness Doctrine to Me,” *Ars Technica*, Jan. 30, 2009, available at <http://arstechnica.com/tech-policy/news/2009/01/fccs-mcdowell-its-all-fairness-doctrine-to-me.ars>.

10 In the matter of Broadcast Localism, Notice of Inquiry (rel. July 1, 2004), MB Docket No. 04-233, ¶7.

for broadcasters in the 1980s, it did not deviate from the notion that they must serve their local communities.”¹¹ The FCC noted that localism obligations have been required since the 1934 Communications Act to ensure local content, and that these obligations have been instrumental in the allocation of broadcast licenses to ensure local service. In that proceeding, the Republican-led FCC referred to the many “rules, policies, and procedures [that] reflect the Commission’s overarching goal of establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities.”¹²

There is no political conspiracy to be found here. Neither can the requirement to address local concerns reasonably be read as censorial — no “balance” of competing views is necessary, just attention to local concerns by the broadcaster licensed to use the local public airwaves to act as a public trustee of the community.

Indeed, there’s some irony here: Broadcasters benefit greatly from their perception of being local trustees, often at the expense of their competitors. Television broadcasters (unlike independent cable channels) can force unwilling cable companies to carry their channels, largely to ensure Americans have access to local content. Similarly, the National Association of Broadcasters has consistently advocated for policies prohibiting satellite broadcasters from carrying programming that might substitute for or compete with locally produced content.

Media ownership rules are also *not* censorial. There is nothing partisan about increasing the number and diversity of media owners. Indeed, both William Safire and the National Rifle Association, along with the ACLU and the National Organization for Women, have argued in favor of media ownership limits. Since the very beginning of broadcasting, the FCC has maintained limits on the number of stations one company may own in a local community and the number they may own nationally, to ensure diversity. While media companies would prefer to get larger, there is no plausible argument that ownership limits censor content.

As for the generic negative reaction to all “public interest” rules, the FCC is required by law to ensure that broadcast licenses serve the “public interest, convenience, and necessity.” This requirement has not changed since Congress created the FCC in 1934 and placed this stipulation in Section 309 of the Communications Act. Indeed, the touchstone of the FCC’s regulation is whether the “public interest” is served by a rule, a license grant, a license renewal, a merger transferring a communications license, the entry of a foreign competitor, etc.

Broadcast rules are almost uniformly “public interest” rules, or else the FCC would not have adopted them. For example, one FCC rule requires TV broadcasters to provide three hours of children’s educational programming per week. Another proposed guideline, not yet adopted, would mandate several hours of local news content on TV or radio stations. Neither guideline

¹¹ *Id.* at ¶1

¹² *Id.* at ¶4

prescribes a viewpoint or requires a balance of views. Whether or not such rules would be effective in ensuring educational or local content (broadcasters have claimed to meet their children's obligations with cartoons and soap operas), they are not a means of censorship.

Finally, the Fairness Doctrine has nothing at all to do with Network Neutrality. The Fairness Doctrine put the federal government in the position of judging content and controlling speech. Net Neutrality would prohibit all intervention of public or private entities with the distribution of lawful speech on the Internet. These two policies could not be more different. One is an affirmative obligation on content choices directed by government power. The other is a negative right of access for consumers that prohibits interference with any lawful content from public or private power. Any attempt to equate the two policies is at best a misunderstanding. ✪))