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THE EVOLVING "COMMUNICATIONS MARKETPLACE": RETHINKING BROADCAST FAIRNESS TWO DECADES AFTER SYRACUSE PEACE COUNCIL

by

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In the four decades before the Fairness Doctrine was eliminated by the Federal Communications Commission ("FCC" or "Commission") in their 1987 *Syracuse Peace Council* Opinion and Order,[1] broadcasters had been formally required to air controversial issues of public importance and provide reasonable opportunities for the presentation of opposing views as part of their public interest duties. A Syracuse, New York, television station had carried advertisements promoting a new nuclear power plant. When the station contested its Fairness Doctrine requirement to air a response from a group opposing the plant, the Court of Appeals instructed the FCC to justify why the doctrine was needed.[2] The deregulation-minded, Reagan-era FCC concluded that it was no longer needed.[3]

Because broadcasters use the public airwaves, they are required by the Communications Act to serve the public interest, convenience and necessity.[4] This public interest standard is the foundation of broadcast regulation in the United States, and prior to the deregulation of the 1980s, the FCC viewed the Fairness Doctrine as an indispensable element of broadcasters' public interest responsibilities. The U.S. Supreme Court upheld the Fairness Doctrine as constitutional in 1969.[5] But when the FCC revisited the Fairness Doctrine two decades later they concluded it was no longer needed because technological advances and growth in the number of media voices available ensured broadcast diversity and fairness.

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[1] In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, 2 F.C.C.Rcd 5043 (1987).

[2] *See* Meredith Corp. v. FCC, 809 F.2d 874 (D.C. Cir. 1987).

[3] *See* Syracuse Peace Council, 2 F.C.C.Rcd. 5057 (1987).

[4] *See* 47 U.S.C. 307 (a), "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant Therefore a station license provided for by this Act." Also *see NBC v. U.S.,* 319 U.S. 190 (1943).

[5] *See* Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

This article argues that broadcast regulators—the FCC and Congress—should implement some form of fairness rules or legislation. Regulators should establish minimum standards for good faith attempts at fairness when programs deal with controversial public issues, and require response opportunity for those who are personally attacked. This argument rests on two prongs. First, the historical record (congressional debate and other public statements) shows numerous examples illustrating key lawmakers' belief that fairness in the discussion of political and other important public issues should be protected. There is evidence that those who shaped and created U.S. broadcast law—Clarence Dill, Wallace White, Herbert Hoover, Ewin Davis, Robert Howell and others—intended fairness to be a fundamental part of the public interest mandate. Those using the public airwaves would be required to serve the public interest, and fairness would be an important part of serving the public interest. The legislative intent of the 1927 Radio Act and the 1934 Communications Act provides valuable context for considering the necessity and extent of the present-day fairness rules.

Second, much of the FCC's rationale for eliminating the doctrine is faulty or has become outdated. The Commission noted that the broadcast industry had changed significantly in the nearly 20 years since the Supreme Court upheld the Fairness Doctrine in 1969. However, the industry has continued to change over the two decades since the FCC eliminated the doctrine. In fact, the "transformation in the communications marketplace"[6] argument used to kill the Fairness Doctrine is actually a good justification for new fairness requirements in 2008. This more recent transformation has been one of significant ownership consolidation and shrinking diversity.[7] Even a casual survey of present-day talk radio and broadcast news programming reveals a significant lack of viewpoint diversity. These changes in the media

[6] Syracuse Peace Council, 2 F.C.C.Rcd 5043, 5048 (1987).

[7] Clear Channel Communications, which owned 43 radio stations and 16 television stations in 1995, increased those numbers to nearly 1,200 radio and 42 television stations by 2006, *see* http://www.freepress.net/ownership/chart.php?chart=radio. *See also* S. Derek Turner & Mark Cooper, *Out of The Picture: Minority & Female TV Station Ownership in the United States, Current Status, Comparative Statistical Analysis & the Effects of FCC Policy and Media Consolidation*, FREEPRESS, October 2006, http://www.freepress.net/content/ownership (discussing a 2006 survey of U.S. television station ownership which found that of 1,349 full-power commercial television stations, only 67 (4.97 percent) were owned by women and only 44 (3.26) were owned by minorities); S. Derek Turner, *Off The Dial: Female and Minority Radio Station Ownership in the United States, How FCC Policy and Media Consolidation Diminished Diversity on the Public Airwaves, Review of Current Status and Comparative Statistical Analysis*, FREEPRESS, June 2007. http://www.freepress.net/content/ownership (discussing a 2007 survey of radio station ownership which found that while women comprise 51 percent of the U.S. population, they own just 6 percent of all full-power commercial radio stations, and while racial or ethnic minorities comprise 33 percent of the population, they own just 7.7 percent of radio stations).

landscape over the 21 years since *Syracuse Peace Council* have seriously eroded the "technological advances/media voices" rationale.[8]

After tracing the origin and development of broadcast fairness rules and the Fairness Doctrine, as originally conceived, this article addresses the public statements of key lawmakers responsible for the 1927 Radio Act and 1934 Communications Act. Also, it includes discussions of the 1987 elimination of the doctrine and a critique of the *Syracuse Peace Council* decision.

I
ORIGINS OF BROADCAST FAIRNESS RULES

Congress, the courts, and the FCC have traditionally viewed fairness, access and freedom from censorship as fundamental elements of broadcasting regulations. Section 315 and Section 312 of the 1934 Communications Act[9] provide broad access for political candidates. Section 18 of the 1927 Radio Act[10] provided similar political access. In addition, throughout much of the twentieth century, the Fairness Doctrine provided for fair discussion of public issues by citizens who were not political candidates. Broadcasters were bound to a set of rules designed to ensure that controversial issues of public importance and personal attacks were dealt with fairly.

The origins of the Fairness Doctrine go back to the 1940s, but the issue of fairness in political broadcasting is as old as broadcasting itself. When Secretary of Commerce Herbert Hoover[11] convened the four National Radio Conferences in 1922-1925 where government and industry leaders could work to develop the first broadcast legislation, the issues of political censorship and discrimination by broadcasters were discussed. Access and fairness also dominated much of the debate leading to passage of the 1927 Radio Act.[12]

In the early days of broadcasting there was no formal fairness policy or "doctrine," but the Federal Radio Commission ("FRC") enforced fairness under the general requirement that broadcasters serve the public interest. In

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[8] Syracuse Peace Council, at 5048.

[9] Communications Act of 1934, 47 U.S.C. § 151 (2006).

[10] Radio Act of 1927, *U. S. Statutes at Large* 44 (1927): 1162 (repealed by Communications Act of 1934, 47 U.S.C. § 151).

[11] Hoover was in charge of broadcast regulation under the ineffective 1912 Radio Act. Radio Act of 1912, *U. S. Statutes at Large* 37 (1912): 302.

[12] *See* LOUISE M. BENJAMIN, FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935 32-54 (Southern Illinois University Pres 2001); STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA (University of California Press 1978); David H. Ostroff, *Equal Time: Origins of Section 18 of the Radio Act of 1927*, 24 JOURNAL OF BROADCASTING 367 (1980).

1928, the FRC ruled that a Socialist station in New York could broadcast its party message, but it must also show "due regard for the opinions of others."[13] The following year the FRC told the Chicago Federation of Labor that its station should appeal to the general public and serve the public interest, rather than benefiting narrow group or class interests.[14] Also in 1929, in assessing the competing claims of three Chicago area stations wishing to make modifications to their facilities, the Commission provided guidance on the meaning of the public interest and broadcast fairness, known as the *Great Lakes Statement.*[15] The FRC said allowing one-sided presentations of political issues would not be good service to the public, and public interest requires ample play for the free and fair competition of opposing views. The Commission also noted that the fairness principle applied not only to candidates, but also to all discussions of issues of importance to the public.[16] As a result of these early decisions, the basic principles of the Fairness Doctrine were in place by 1929.

Congress attempted to elevate the fairness principle to the level of statutory law in 1932, when it passed an amendment adding the language "It shall be deemed in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions"[17] to Section 18 of the Radio Act. In 1933, President Herbert Hoover pocket-vetoed the amendment, along with other lame-duck legislation passed by the Democrat-controlled Congress. It is difficult to reconcile Hoover's veto with his many prior public statements regarding fairness and the public interest. It may be that he feared the amendment would virtually reduce broadcasters to common carrier status,[18] or that the state of the economy in 1933 and his contentious relationship with the Democrat-controlled Congress[19] prompted him to use the veto somewhat

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[13] 2 F.R.C. 155 (1928).

[14] 3 F.R.C. 36 (1929).

[15] *See* In the Matter of the Application of Great Lakes Broadcasting Co., 3 F.R.C. 32 (1929).

[16] *Id.*

[17] H.R. Rep. No. 72-2106 (1933).

[18] 47 U.S.C. § 201 (2008). Title II, Sec. 3 (b) of the 1934 Communications Act specifically exempts broadcasters from common carrier regulation.

[19] *See generally* HARRIS GAYLORD. WARREN, HERBERT HOOVER AND THE GREAT DEPRESSION 151 (Greenwood Press 1980) (1959) (chronicling Hoover's difficulties with the Democratic-controlled lame duck Congress. "The many hearings and investigations were proof enough that Hoover would have difficulty with the Seventy Second Congress. Party factions and coalitions . . . and the lack of control in either chamber of Congress compounded the President's troubles."); HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933 217 (MacMillin 1952) (Hoover believed Democrats, and some older members of his own party, in Congress were sabotaging his efforts to deal with the Depression. He wrote in his memoirs that during his final two years as president the Democratic Congress was "bent on the ruin of the administration," and he

indiscriminately. In addition, key legislators believed the 1927 Radio Act already required stations to provide fair access to non-candidates. In their view it was not necessary to add a fairness amendment since the Radio Act was left intact when it was transplanted into the 1934 Act. Whatever the reason, when President Franklin Roosevelt signed the 1934 Communications Act into law, the amendment was not added to Section 18 when it became Section 315.[20]

In 1938 the FCC again emphasized that, due to spectrum scarcity, serving the public interest meant broad programming for the general public, not propaganda meant to further the interests of the licensee. The Commission denied a license application from a fundamentalist religious group that indicated it would only air programming that was in accord with its beliefs.[21] In its 1940 Annual Report, the FCC said broadcasters have discretion in determining which specific groups or individuals get to use their station facilities, but serving the public interest meant furnishing well-rounded rather than one-sided discussions of public questions.[22]

The following year, in what came to be known as the *Mayflower* Statement[23], the FCC took a significant step toward creation of what would become the Fairness Doctrine. While renewing the license of station WAAB in Boston, the Commission warned that WAAB must stop broadcasting editorials (as it had done regularly in 1937 and 1938). The Commission said truly free radio can not be used to advocate the causes of the licensee. It further explained that the public interest requires licensees to provide full and equal opportunity for presentation of all sides of public issues. "The public interest—not the private—is paramount."[24] The decision was widely interpreted as an absolute ban on broadcasting editorials.

In 1945 the Commission explicitly stated broadcasters' affirmative obligation to present important public issues, a duty implied in the 1929 *Great Lakes* Statement.[25] In *Great Lakes,* the FCC said it is "the duty of each licensee to be sensitive to the problems of public concern in the community and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof . . ."[26] The Commission also established that it would look

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accused "older Republican elements of the party in Congress" of "surreptitious encouragement to the opposition and refusal to "defend the administration").

[20] 78 Cong. Rec. 10988 (1934).

[21] *See* Young People's Association for Propagation of the Gospel, 6 F.C.C. 178 (1938).

[22] 6 F.C.C. Ann. Rep. 55 (1940).

[23] *See* Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941).

[24] *Id.* at 340.

[25] *See supra* note 15.

[26] United Broadcasting Co., 10 F.C.C. 517 (1945).

at fairness in stations' overall programming rather than requiring balance in individual programs. The Commission's 1946 Public Service Responsibility of Broadcast Licensees[27] report also emphasized the affirmative duty of broadcasters to present controversial public issues. Broadcasters who attempted to avoid problems by avoiding controversial community issues were not serving the public interest

II
THE FAIRNESS DOCTRINE

The 1949 Report on Editorializing by Broadcasting Licensees,[28] which had come about as a result of free speech concerns over the *Mayflower* editorial ban, concluded that broadcasters could air editorials expressing the views of licensees. However, such editorials were to be just one part of the larger duty to devote reasonable time to presentation of differing views on public issues. The FCC's official Fairness Doctrine policy imposed two requirements on broadcasters: present controversial issues of public importance and allow reasonable opportunity for opposing views.[29] The Report said a reasonableness standard would be used for judging stations' fairness compliance.[30] The Commission said there could be no all-embracing formula. Unlike the Section 315[31] and Section 312[32] access and fairness rules,

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[27] *See Public Service Responsibility of Broadcast Licensees, March 7, 1946, in* DOCUMENTS OF AMERICAN BROADCASTING 151, 152 (Frank J. Kahn ed., 1973).

[28] 13 F.C.C. 1246 (1949).

[29] *Id.* at 1249.

[30] *Id.* at 1251.

[31] 47 U.S.C. § 315 (a) reads as follows: If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provision of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. 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. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

[32] 47 U.S.C. § 312 (a) (7) requires broadcasters to "allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

which provided access and response opportunities to political candidates, this approach extended fairness and access to non-candidates for the discussion of any issues of public importance. Broadcasters were required to play a "conscious and positive role" in presenting opposing views, and make their facilities "available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise."[33]

After previous unsuccessful attempts to add Fairness Doctrine-type amendments to the Radio Act in the 1920s and 1930s, in 1959 Congress added language to Section 315 of the Communications Act that would effectually codify the Doctrine. Section 315 (a) (4) contained the following passage:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[34]

The Commission, in a 1963 letter to Congressman Oren Harris, explained that the Fairness Doctrine had become a "specific statutory obligation."[35] Under this interpretation, which would stand until the 1980s, the 1959 amendment seemingly elevated the doctrine from an FCC policy to statutory law.

In 1964 the FCC issued a Fairness Primer[36] to help broadcasters better understand the intent and application of the Fairness Doctrine. The primer included summaries of over 10 years of FCC rulings intended to clarify the definition of controversial issues of public importance, and provide reasonable opportunity for the presentation of contrasting viewpoints. It also emphasized that broadcasters were free to editorialize as long as they complied with the Fairness Doctrine, and it contained a section on the personal attack principle.

In 1967, the Commission issued formal rules on personal attacks and political editorials—Fairness Doctrine corollaries.[37] The personal attack rule required broadcasters to notify and offer reasonable response time within one week to persons or groups who were attacked during presentations of

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[33] Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1248-1250 (1949).
[34] 47 U.S.C.A. § 315 (a) (4).
[35] 40 F.C.C. 582 (1963).
[36] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).
[37] 32 Fed. Reg. 10305-06 (1967).

controversial issues of public importance. The political editorial rules required licensees who endorsed or opposed candidates in broadcast editorials to notify the candidates and offer reasonable opportunity for them or their representatives to respond. Both rules also required stations to provide tape copies or transcripts of what had been said in a timely manner. The Commission stressed that political editorials and personal attacks were not prohibited, but when they were aired, stations must comply with the notification and response requirements. The FCC also emphasized that the personal attack rule was part of the Fairness Doctrine.[38]

The Fairness Doctrine withstood challenge by a radio station in 1969 when the U.S. Supreme Court upheld it as constitutional in *Red Lion Broadcasting v. FCC*.[39] A Pennsylvania radio station owned by Red Lion aired a "Christian Crusade" broadcast in 1964 in which Reverend Billy James Hargis personally attacked Fred J. Cook. Hargis claimed that Cook, author of a book titled "Barry Goldwater—Extremist on the Right,"[40] had worked for a Communist publication and was attempting to smear Arizona Senator and 1964 Republican Presidential candidate Barry Goldwater. When Cook was denied free time to respond, he complained to the FCC, which told Red Lion it must give Cook reply time under its Fairness Doctrine obligations. Red Lion appealed arguing the doctrine and its personal attack rules were not authorized by Congress and violated the First Amendment. The Supreme Court held that, because the spectrum is limited, the personal attack rules and the Fairness Doctrine did not violate the First Amendment rights of broadcasters.

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[41]

The Court said it is the First Amendment rights of the viewing and listening public, and not the rights of the broadcasters, that are most important.[42] The Court also said the Commission did not exceed its authority, and "the doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority."[43]

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[38] *Id.* at 10303. Also *see* SIMMONS, *supra* note 12, at 76-77.
[39] 395 U.S. 367 (1969).
[40] FRED J. COOK, BARRY GOLDWATER – EXTREMIST ON THE RIGHT, (Grove Press 1964).
[41] *Id.* at 389.
[42] *See Id.* at 390.
[43] *Id.* at 386.

In 1974, following a review of the Fairness Doctrine, the FCC issued a Fairness Report.[44] The report quoted from the 1949 Editorializing report[45] and re-emphasized the importance of airing controversial issues and providing opportunity for opposing views. The Commission, quoting a 1970 opinion, said observing this fairness principle is "the single most important requirement of operation in the public interest—the *sine qua non* for grant of a renewal of license."[46] The report also reiterated that the FCC expected fairness in overall programming rather than individual programs, and that it would rely on citizen complaints rather than directly monitoring programming. In addition, only complaints containing clear evidence of violation would be forwarded to stations. The FCC noted that in 1973 only 94 of 2,400 complaints it received were forwarded to stations for their comments. The Fairness Report also addressed questions of when issues become controversial issues of public importance under the Fairness Doctrine. The Commission left such interpretations largely up to broadcasters, but it noted they should measure the degree of attention paid to an issue by government officials, community leaders, and the media.

As *Red Lion* illustrated, the Fairness Doctrine was far from popular with many broadcasters (and some media scholars). Critics have argued that because of the Doctrine's vagueness and the challenges of compliance, it was simply impossible for the FCC to enforce broadcast fairness.[47] Thomas G. Krattenmaker and Lucas A. Powe, Jr., who advocate newspaper-style First Amendment rights for broadcasters, noted that "notwithstanding those rather impressive credentials as a symbol of virtuous aspirations, the Fairness Doctrine will not and cannot work."[48] Others argued politicians and supporters used it as a tool to inundate stations with complaints in an attempt to manipulate them into not airing programs with viewpoints they did not like.[49] Bolstered by the hands-off de-regulation philosophy of the Reagan-era FCC of the 1980s, opponents of the Fairness Doctrine went on the offensive against the Doctrine. FCC Chairman Mark Fowler (communications counsel for the Reagan presidential campaigns) exemplified this regulatory philosophy

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[44] Fairness Report of 1974, 48 F.C.C.2d 1 (1974).

[45] Report on Editorializing by Broadcast Licensees, *supra* note 27.

[46] Fairness Report of 1974at 10, quoting Committee for the Fair Broadcasting of Controversial Issues, Memorandum Opinion and Order, 25 F.C.C.2d 283 (1970).

[47] *See* SIMMONS, *supra* note 12, at 80-92.

[48] THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 240 (AEI Press 1994).

[49] *See* FORD ROWAN, BROADCAST FAIRNESS: DOCTRINE – PRACTICE - PROSPECTS: A REAPPRAISAL OF THE FAIRNESS DOCTRINE AND EQUAL TIME RULE 189 (Longman 1984); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 142-161 (University of California Press 1987).

when he observed in a 1981 magazine interview that television is just another appliance, and characterized it as nothing more than a toaster with pictures.[50]

In 1985 the FCC issued another Fairness Report.[51] Just 11 years after calling the Fairness Doctrine indispensable—the *sine qua non* for license renewal—the report said it was no longer needed. The Commission reasoned that the increase in the number of broadcast voices and cable channels over the past decade had produced sufficient viewpoint diversity to ensure fairness. The market would naturally produce fairness through numbers and diversity. The report noted the increase in media outlets, including a more than 40 percent increase in the number of radio and television stations in the years since *Red Lion* was decided.

Despite the FCC's view that the doctrine was obsolete, it did not immediately repeal the doctrine. The Commission, citing uncertainty about whether the Fairness Doctrine was codified as part of Section 315, announced it would continue enforcing the doctrine while Congress reviewed it.[52] However, following an opinion from the D.C. Circuit of the U.S. Court of Appeals, the FCC eliminated the Fairness Doctrine in 1987.[53] In *TRAC v. FCC*[54] the court had held that the 1959 amendment only ratified "the Commission's long-standing position that the public interest standard authorizes the fairness doctrine." Despite the long-standing belief that Section 315 (a) (4) codified the doctrine, the court said Congress did not make the doctrine a statutory requirement. The FCC was free to adopt or reject the Fairness Doctrine if they determined it no longer served the public interest.[55]

The *Syracuse Peace Council* Opinion and Order formally eliminated the Fairness Doctrine requirements. The FCC decision to eliminate the doctrine was subsequently judicially upheld when the D.C. Circuit agreed with critics who argued the doctrine chilled speech and was unnecessary due to the growth in the number of media outlets.[56]

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[50] *See Voices of Reason - Excerpts of Interviews With Various Personalities From 1968 to 1998,* REASON MAGAZINE, *available at* http://www.reason.com/news/show/30830.html. Also *see* Peter J. Boyer, *Under Fowler, T.V. Treated as Commerce,* N.Y. TIMES, Jan 19, 1987, at C15.

[51] Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985).

[52] *See Id.* at 148.

[53] *See* Syracuse Peace Council, 2 F.C.C.Rcd 5043 (1987).

[54] 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).

[55] *See id.,* at 517-518.

[56] *See* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

The Fairness Doctrine was gone, but the 1967 personal attack/editorial rules remained. Broadcast groups had been lobbying against the rules for years, but the FCC was divided over whether or not the rules served the public interest.[57] In 1999 the D.C. Circuit told the FCC, in light of the elimination of the Fairness Doctrine, to provide some public interest rationale for keeping the personal attack/editorial rules. When the FCC failed to respond by October 2000, the court ordered it to repeal the personal attack and political editorial rules.[58]

III
FAIRNESS AS A FOUNDING PRINCIPLE

Establishing any lawmakers' original intent is difficult, whether the founders who wrote the U.S. Constitution or those who created the founding principles of U.S. broadcast law. Individuals can have differing interpretations and motivations when it comes to laws, principles and ideals, particularly vague concepts such as public interest. In addition, many lawmakers who vote for or against legislation do so without publicly expressing their motives or views. However, statements and testimony of the key figures that wrote and interpreted the first broadcast laws reveals strong support for protecting broadcast fairness.

The statements of men such as Clarence Dill, Wallace White, Herbert Hoover, Ewin Davis, James Watson, and Robert Howell carry particular weight because of their unique expertise. They dominated the discussion, frequently explaining the finer technical points and policy implications to lawmakers. One representative described the radio bill as being "replete with intricate legal and scientific problems."[59] The majority of legislators in both houses deferred to the judgment of White and Dill. With little input from their colleagues, they coauthored the bill that would become the 1927 Radio Act. Broadcast historian Donald Godfrey wrote that Davis, Dill and Watson were "key people" who had "major influence" and "significant impact" on the 1927 Radio Act. [60] Hoover, thanks largely to his role in promoting public interest legislation at the four radio conferences and in numerous public statements, has been called "Father of the American System of Free Broadcasting."[61]

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[57] *See* Repeal or Modification of the Personal Attack and Political Editorial Rules, 12 F.C.C.Rcd. 497 (1988).
[58] *See* Radio-Television News Directors Assoc. v. FCC, 229 F.3d 269 (D.C. Cir. 2000).
[59] 67 Cong. Rec. 5487 (1926).
[60] Donald G. Godfrey, *The 1927 Radio Act: People and Politics*, 4 JOURNALISM HISTORY 75 (1977).
[61] C. M. Jansky, Jr., *The Contribution of Herbert Hoover to Broadcasting*, 1 JOURNAL OF BROADCASTING 249 (1957).

Herbert Hoover's attendees at the radio conferences, industry leaders who publicly espoused opinions, Radio Act co-authors Representative Wallace White and Senator Clarence Dill, and other key legislators responsible for enacting the 1927 Radio Act, believed that because the spectrum is public property, broadcasting should serve the public interest. Their views have been well documented, and while Hoover and industry leaders were not always in perfect agreement (especially when it came to public service and content control), there was a broad consensus that limited spectrum space should not be used for purposes that do not serve the larger public interest. Dill characterized the public interest standard as a Magna Charta for radio listeners in his book, *Radio Law: Practice & Procedure*, by stating that if the Magna Charta is "properly interpreted, it made the interest of and the service to the people who listen to radio broadcasts the controlling consideration in the granting of the privilege of using broadcasting facilities."[62] Dill characterized the privilege of using a broadcast frequency as "a great gift to confer upon a licensee."[63] Throughout virtually all of the history of U.S. broadcasting prior to *Syracuse Peace Council*, access and fairness were considered fundamental elements of the public interest ideal.

A. Forging Legislation

Testifying before the House Committee on the Merchant Marine and Fisheries seven months before the third radio conference in 1924, Hoover said, "We cannot allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public."[64] A few days later in a statement to the *New York World,* he said government authority was needed to "enable us to keep the ether open to everybody."[65] Hoover felt strongly that protecting listeners' rights was part of the larger public interest. Addressing the Fourth National Radio Conference in 1925, he emphasized that freedom of the air meant freedom for both broadcasters and listeners. "Certainly in radio I believe in freedom for the listener."[66] One day after the conclusion of the conference, in a November 12 radio address, Hoover again emphasized the listeners' dominant interests in

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[62] CLARENCE. C. DILL, RADIO LAW: PRACTICE AND PROCEDURE 89 (National Law Book Co. 1938).
[63] *Id.*
[64] Statement by Secretary Hoover at Hearings Before the Committee on the Merchant Marine and Fisheries on H.R. 7357, *To Regulate Radio Communication, and for Other Purposes,* March 11, 1924, Herbert Hoover Presidential Library [hereinafter HHPL], commerce papers, box 489.
[65] *The Government's Duty is to Keep the Ether Open and Free to All*, N.Y. WORLD, March 16, 1924, HHPL, Bible, No. 364.
[66] Fourth National Radio Conference, *Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio*, 1925, 6, HHPL, commerce papers, box 496.

radio, and warned that each broadcaster "must perform the service which he had promised or his life as a broadcaster will end."[67]

Fairness was also an important issue for many of the legislators grappling with the bills that would eventually lead to the 1927 Radio Act. Senate co-author Clarence Dill expressed concern over the challenge of protecting broadcasters' freedom while also safeguarding fairness and the general public interest. "We must steer the legislative ship between the Scylla of too much regulation and the Charybdis of the grasping selfishness of private monopoly."[68] Representative Ewin Davis argued that broadcasters had already formed a powerful monopoly and were using their stations for selfish purposes not in the public interest. He advocated regulating radio as a public utility.

> We are going to have to regulate the rates and the service, to force them to give equal service and equal treatment to all . . . They can permit the proponents of a measure to be heard and can refuse to grant the opposition a hearing.[69]

Davis also cited committee testimony in which an AT&T executive had testified that his company had rejected a great many requests to use its stations and edited speakers' statements as a matter of policy. He said he was opposed to government censorship but "I am even more opposed to private censorship over what American citizens may broadcast to other American citizens."[70] Texas Democrat Luther Johnson offered an equal opportunity amendment that would have required stations to offer equal facilities and rates without discrimination to all political parties and candidates and to those for and against "all political questions or issues."[71] However, the amendment was offered during a discussion of radio licenses and the chair ruled it was not germane. The final House bill contained no provisions specifically addressing political broadcasting.

When the Senate took up Clarence Dill's radio bill, it placed more emphasis on political and "issue" broadcasting. Senators Thomas Heflin and James Watson expressed concern at the prospect of a small group of wealthy citizens controlling broadcasting and exercising undue influence over public opinion.[72] Heflin argued, "We ought not to let anyone have a monopoly of the

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[67] Radio Address, November 12, 1925, HHPL, commerce papers, box 496.
[68] 67 Cong. Rec. 12335 (1926).
[69] *Id.* at 5483.
[70] *Id.* at 5484.
[71] *Id.* at 5560.
[72] *See Id.* at 12356-12357.

air."[73] Senator Robert Howell argued that it was a "matter of tremendous importance"[74] to include a Fairness Doctrine-style provision that would ensure equal treatment of candidates and provide access for discussion of public issues by non-candidates. He added that this could not be "emphasized too strongly."[75] Howell was also concerned with censorship. "Are we content to the building up of a great publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?"[76]

An amendment by Dill preserved the equal opportunity for candidates with no censorship provision while eliminating the Fairness Doctrine.[77] Despite pleas from the ACLU and the National Council on Freedom From Censorship,[78] Dill had decided that requiring stations to provide equal opportunity for discussion of public questions and issues might lead to unreasonable demands for opportunities to reply because "public questions" could be broadly interpreted. He feared stations might have to devote all their time to public discussions or prohibit all such discussion in order to comply.[79] However, Dill did not strongly oppose such a requirement. He preferred to wait and let the FRC get established and then possibly amend the Act later to ensure fair opportunity for issue discussion if necessary.[80] The Senate passed the bill with Dill's amendment and sent it to the conference committee where the candidate access provision became Section 18 of the 1927 Radio Act.[81]

B. The 1934 Communications Act

The 1934 Communications Act[82] created the Federal Communications Commission and brought telephone, and other wire communications under its control. With regard to broadcasting, the 1927 Radio Act was transplanted into the new act largely in tact. Discussion of equal opportunity for discussion of public issues had continued after passage of the 1927 Act, as Dill had suggested it should. In fact, a number of public comments from legislators suggest they felt broadcasters already had a duty to provide equal opportunity for discussion of public issues as part of their general public interest responsibilities. During Senate Committee hearings in 1930, Dill agreed with an FRC commissioner who believed Section 18 could be interpreted to extend

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[73] *Id.* at 12357.
[74] *Id.* at 12504.
[75] *Id.*
[76] *Id.* at 12503.
[77] *See Id.* at 12358.
[78] *See* BENJAMIN, *supra* note 12, at 192-195.
[79] See 67 Cong. Rec. 12504 (1926).
[80] *See Id.*
[81] Radio Act of 1927, *U. S. Statutes at Large* 44 (1927): 1162.
[82] Communications Act of 1934, *U. S. Statutes at Large* 48 (1934): 1064; 47 U.S.C. § 151.

equal opportunity to discussion of issues as well as to candidates. Dill also expressed his view that the FRC had the authority to make a rule specifically requiring stations to provide equal opportunity for fair discussion of public issues.[83]

Two years later (as noted earlier) Congress passed an amendment that would have formally extended equal opportunity to issues—a 1932 Fairness Doctrine—but President Hoover did not sign it into law. Again, a number of comments offered during debate on the amendment reveal a broad belief among legislators that the FRC already had authority and a duty under the public interest mandate to make stations provide fair access. The proposed amendment merely restated that authority. Representative Davis said the amendment made no change in the substantive law, and it had "the unqualified endorsement of the Federal Radio Commission and their counsel"[84] in its entirety. At one point, Representative Lehlbach said, "This bill contains only matter that is absolutely uncontroversial and is necessary for the proper administration of the radio laws."[85] These statements suggest that the FRC and the legislators who enacted the 1927 Radio Act did indeed believe broadcasters had a duty to provide fair access for discussion of public issues as well as access for candidates, even though only candidates were specifically mentioned in Section 18. One can reasonably speculate that this belief is why equal access was not explicitly extended to non-candidates when Section 18 became Section 315 of the 1934 Act. Many lawmakers, including Senator Dill, believed fairness in discussions of public issues was already mandated. Speaking on the equal opportunity amendment in February 1932 Representative Harold McGugin said freedom of speech was "worthless" without "reasonable freedom of access to radio."[86]

Despite the broad belief that the public interest required opportunity for discussion of public issues, many broadcasters also interpreted their public interest responsibilities to mean protecting listeners from "undesirable" discussions. Broadcast historian Louise Benjamin documented numerous examples of direct censorship in the early 1930s. Specifically, speeches critical of the government and discussions of pacifism, Socialism, birth control, race relations, and eliminating Prohibition were discouraged or outright cancelled by broadcasters.[87] McGugin's February 1932 comments below illustrate how passionate some lawmakers felt about protecting free public discussion from censorship imposed by private broadcasters.

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[83] *See* H. R. Rep. No. 7716 72d Cong. 2d Sess. (1933).
[84] 75 Cong. Rec. 3680-3681 (1932).
[85] *Id.* at 3684.
[86] *Id.* at 3692.
[87] See BENJAMIN, *supra* note 12, at 135-150, 197.

> I believe we are considering something that strikes at the very roots of government itself . . . In this modern age there is no freedom of speech worthy of the name unless there is reasonable freedom of access to radio. The right and privilege to stand on the street corner and talk no longer fills the bill . . . With the coming of radio we have virtually seen air of the country monopolized and turned over to the largest stations, such as the one that my friend from New York has just described; but, my friends that wonderful station . . . which belongs to General Electric, will never use its facilities to appeal for the rights of the people of this country. The facilities of that station will be used to spread propaganda to lull the people to sleep while monopoly or concentrated greed takes unfair advantage of the country. The hope of freedom of speech is going to rest back in the little, free, independent radio stations in the country.[88]

On June 19th Congress passed the 1934 Communications Act. When the Act was being debated early in June, Representative Louis McFadden had tried unsuccessfully to add a House version of equal opportunity access for candidates and other non-candidate speakers sponsored by religious, charitable or educational organizations.[89] Ultimately, neither the Senate nor House versions of equal opportunity for issue discussion were included in the final version of the Act. However, this can likely be attributed more to reluctance to substantively alter portions of the Radio Act in a large, comprehensive, unifying bill[90] than to opposition to broadcast fairness. Congress was also focusing ever more on emergency social legislation as the Great Depression continued to worsen. There was broad support in the late 1920s and early 1930s for the general principle that serving the public interest meant providing opportunity for non-candidates to discuss public issues as well as fair access for candidates. Broadcast law scholar and Fairness Doctrine critic Steven Simmons concluded:

> In light of the broad "public interest, convenience, and necessity" standard, the deference in the debates to the development of regulations by the FRC and FCC, the 1932 bill including a fairness mandate that most congressmen agreed did not change the substantive law, and the problems the radio legislation addressed, there is support for the Supreme Court's

[88] 75 Cong. Rec. 3692 (1932).
[89] *See* 78 Cong. Rec. 10307-10309 (1934).
[90] *See Id.* at 10987. Statements accompanying the House Conference Report on S. 3285 characterized the bill that would become the 1934 Communications Act as merely repealing the 1927 Radio Act and reenacting it as title III of the new Act.

opinion of the late 1960s that the FCC could impose the fairness doctrine based on the "statutory authority" of the public interest standard in the 1934 Act.[91]

IV
ELIMINATING THE FAIRNESS DOCTRINE

The FCC's 1985 *Fairness Report*, which marked the beginning of the end of the Fairness Doctrine, represented more than a change in regulatory philosophy. It also represented a reversal of six decades of commitment to the ideal of promoting fairness in the discussion of important public issues over the public airwaves. The Commission offered a number of reasons for eliminating the Fairness Doctrine in its 1987 *Syracuse Peace Council*[92] decision. Citing its 1985 report, the FCC said scarcity was no longer an issue due to the growth of diverse sources of information and viewpoints in the years since *Red Lion* was decided. It noted that in 1987 there were 1,315 television stations (54 percent increase) and 10,128 radio stations (57 percent increase).[93] Citing Judge Bork's argument in *TRAC v. FCC* that scarcity is a universal fact, the Commission concluded that spectrum scarcity was no different from limits on newsprint and ink, or any other scarce limited resources.[94] The Commission also pointed to the growth of cable and satellite communications to justify its argument that "government regulation such as the fairness doctrine is not necessary to ensure that the public has access to the marketplace of ideas."[95]

The FCC also argued that the Fairness Doctrine led to inappropriate government intrusion on the editorial discretion of broadcast journalists, requiring regulators to "second guess" their decisions.[96] In addition, the Commission argued that the doctrine actually chilled speech rather than promoted it because broadcasters avoided particularly controversial issues out of fear of complaints and subsequent FCC punishment.[97] As a result, broadcasters had an incentive to air only orthodox views on controversial issues while avoiding more provocative opinions. In short, the 1987 FCC concluded the Fairness Doctrine was an unnecessary burden on broadcasters that infringed their First Amendment rights and chilled expression. It was no longer part of serving the public interest—the *sine qua non* of a license renewal.

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[91] SIMMONS, *supra* note 12, at 30.
[92] 2 F.C.C.Rcd 5043 (1987).
[93] *See Id.* at 5051.
[94] *See Id.* at 5055.
[95] *Id.* at 5051.
[96] *Id.* at 5051-5052.
[97] *See Id.* at 5049.

A. Critique of *Syracuse Peace Council*

There are a number of problems with the Commission's *Syracuse Peace Council* analysis of the Fairness Doctrine. First and foremost, while emphasizing the growth of media voices, the analysis minimizes the public interest responsibility that goes with using the spectrum, a limited public resource. It is true that many resources are economically and physically scarce, but most are not public property. The broadcast spectrum, unlike newsprint and most other limited resources, is public property. The government regulates how it is used, but the spectrum belongs to the public—as surely as Yellow Stone National Park belongs to the public. Growth in cable and satellite channels available to information consumers does not change the fact that commercial broadcasters are allowed to use limited public property for profit. As a result, they have a duty to put the interests of the public before their own. In 1990 Congress said commercial broadcasters have a public interest duty to air educational children's programming, instead of leaving it to cable channels and noncommercial channels.[98] Even though a growing number of other potential sources of children's programming had emerged, broadcasters using the public airwaves still had a public interest duty to air children's programming. Similarly, one can argue commercial broadcasters still have a public interest responsibility to provide access and fairness in airing public issues, no matter how many other "voices" might be available in the media marketplace.

The media voices argument carries even less weight when one considers the rapid concentration of media ownership in the years since 1987, particularly after passage of 1996 Telecommunications Act.[99] Under the current philosophy of increasingly relaxed ownership and licensing rules, having more stations available does not equate to more viewpoints. For example, Clear Channel Communications, which owned 43 radio stations and 16 television stations in 1995, increased those numbers to nearly 1,200 radio and 42 television stations by 2006.[100] Between 1996 and 2002 the number of U.S. commercial radio stations increased 5.4 percent while the number of station owners decreased 34 percent.[101] As one observer noted, "Outlet diversity should not be presumed to guarantee viewpoint diversity in a highly concentrated industry in which profit drives the content chosen."[102]

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[98] 1990 Children's Television Act, 47 U.S.C. §§ 303a, 303b, 394.

[99] Pub. L. 104-104, 110 Stat. 56, (1996), 47 U.S.C. 609.

[100] *See Who Owns the Media?*, FREEPRESS, http://www.freepress.net/ownership/chart/radio.

[101] *See* George Williams & Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance,* http://www.fcc.gov/ownership/studies.html.

[102] Ann L. Plamondon, *Proposed Changes in Media Ownership Rules*, COMMUNICATIONS AND THE LAW 93 (August 2003).

Ownership diversity was a long-time pre-2000s FCC goal[103] The U.S. Supreme Court addressed media diversity in a 1945 newspaper competition case. In *Associated Press v. United States*[104] the Court said, "The widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[105] In 1978 the Court described the Commission's traditional approach to ownership diversity as follows.

> In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.[106]

While focusing on total numbers and ignoring the "antagonistic" aspect of "diversity" the Commission in recent years has minimized the value traditionally placed on true viewpoint diversity.

Diversity has clearly been hindered by ownership concentration. A 2006 survey of U.S. television station ownership found that of 1,349 full-power commercial television stations, only 67 (4.97 percent) were owned by women and only 44 (3.26) were owned by minorities.[107] A 2007 survey of radio station ownership found that while women comprise 51 percent of the U.S. population, they own just 6 percent of all full-power commercial radio stations, and while racial or ethnic minorities comprise 33 percent of the population, they own just 7.7 percent of radio stations.[108]

There may be more gasoline stations in a given community than in the past, but if they all get their fuel from a handful of owner/suppliers, consumers do not have diversity in their fuel choices. The same holds true for

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[103] Writing the 5-4 majority opinion for the U.S. Supreme Court in Metro Broadcasting v. FCC, 497 U.S. 547, 580-581 (1990), Justice Brennan cited evidence suggesting "an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities."

[104] 326 U.S. 1 (1945).

[105] *Id.* at 20.

[106] FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978).

[107] *See* S. Derek Turner & Mark Cooper, *Out of The Picture: Minority & Female TV Station Ownership in the United States, Current Status, Comparative Statistical Analysis & the Effects of FCC Policy and Media Consolidation*, FREEPRESS, October 2006 http://www.freepress.net/content/ownership.

[108] *See* S. Derek Turner, *Off The Dial: Female and Minority Radio Station Ownership in the United States, How FCC Policy and Media Consolidation Diminished Diversity on the Public Airwaves, Review of Current Status and Comparative Statistical Analysis*, FREEPRESS, June 2007, http://www.freepress.net/content/ownership.

radio stations. A 2006 study conducted by the Future of Music Coalition found the following: just fifteen radio formats make up 76 percent of commercial programming and radio formats with different names can overlap up to 80 percent in terms of the songs played on them; large ownership groups tend to program heavily in just eight formats; only small ownership groups offer niche music formats such as classical, jazz, and folk, and they provide more public interest programming—children's, religious, foreign language and ethnic-community programming.[109]

Adequate access and scarcity are relative terms. As one observer noted in 2007, "The FCC typically receives tens of thousands of inquiries from persons wishing to start radio stations . . . though in many cities years will go by without a single frequency becoming available."[110] The FCC's Internet web site warns prospective applicants for broadcast licenses that "frequencies for these services are always in heavy demand."[111] When the Fairness Doctrine was adopted in 1949 the FCC Annual Report noted the demand for frequencies far exceeds the supply.[112] At that time there were about 4,000 broadcast stations on the air (AM, FM, and TV) with the Commission receiving 6,300 new license applications.[113] In 2006, with approximately 13,500 radio stations on the air, the FCC received approximately 30,000 inquiries from persons seeking to start radio broadcast stations. As the Commission noted some six decades ago, demand for frequencies far exceeds the supply. There is no denying broadcast licenses are scarce.

In arguing the Fairness Doctrine intruded on broadcasters' editorial discretion, the Commission frequently used terms such as "broadcast journalists" and "electronic press"[114] to emphasize the doctrine's adverse impact on broadcast news. The Commission even cited the landmark print media case *Miami Herald v. Tornillo*[115]) in its argument against government intrusion on broadcast journalists' editorial discretion. However, this approach ignores the numerous opinion and entertainment programs that routinely

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[109] *See* Peter DiCola, *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry*, FUTURE OF MUSIC COALITION, December 2006 http://www.futureofmusic.org/research/radiostudy06.cfm.

[110] JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 361 (Wadsworth Publishers, 5th ed. 2004).

[111] *How to Apply for a Broadcast Station*, FCC, http://www.fcc.gov/mb/audio/howtoapply.html.

[112] *See* FCC Fifteenth Annual Report, 1 (1949), *available at* www.fcc.gov/mb/audio/decdoc/annual_reports.html.

[113] *See Id.* at 18.

[114] Syracuse Peace Council, 5050-5052, 5055-5057.

[115] 418 U.S. 241 (1974) (the Supreme Court struck down a state statute that extended the Fairness Doctrine right of access rules to require newspapers to give political candidates equal opportunity to respond to unfavorable coverage.)

include political and other controversial topics, as well as personal attacks. Rush Limbaugh, the controversial and highly successful nationally syndicated conservative radio host has characterized his political talk show as an entertainment program, not news. In a 2003 interview with *Mediaweek* magazine he said, "I'm proud to be an entertainer. This is showbiz. At the same time, I believe everything I say."[116] While there can be no single standard for what constitutes news or journalism, the Commission's approach elevates potentially all broadcast programming—news, documentary, opinion, entertainment, and "showbiz"—to an equal level of "journalism."

As for the FCC being forced by the Fairness Doctrine to "second guess" broadcasters, one can argue that such second-guessing could also be called exercising judgment and "enforcing" rules and laws. The Commission frequently "second guesses" broadcasters' programming in determining if they have violated rules or laws, whether it is in children's programming/advertising limits, indecency, political broadcasting rules or other areas. Such "second-guessing" is one of the primary responsibilities of the FCC.

The FCC's *Syracuse Peace Council* analysis relied heavily on the argument that the Fairness Doctrine chilled speech because broadcasters feared penalties and avoided controversial issues.[117] This problem could likely have been mitigated had the FCC simply adjusted its enforcement to place more emphasis on the first part of the doctrine (must present controversial issues) while providing more flexibility for good faith attempts to comply with the second part (provide opportunity for opposing views). Just because a law or policy is difficult to comply with or enforce does not mean it is not necessary. Children's broadcasting, political broadcasting, indecency and false advertising are all challenging areas of regulation that are sometimes unpopular with those who are regulated. Nevertheless, regulations remain and are enforced because they are needed and, most important, because they serve the public interest. Highway speed limits are difficult to enforce and frequently unpopular, and yet they remain because they are needed to protect the public interest. If all laws and regulations could be eliminated because they are unpopular or difficult to enforce, there would be very few indeed.

It should be emphasized again that broadcasters were required to comply with the Fairness Doctrine in exchange for getting to use the limited public airwaves. Ultimately, if broadcasters believed their public interest Fairness Doctrine responsibilities were excessively onerous, they could have

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[116] Phil Brennan, *Rush: He's Changed the World of Talk Radio*, NEWSMAX, August 2003, http://archive.newsmax.com/archives/articles/2003/8/12/172826.shtml.
[117] Syracuse Peace Council, 5049.

gotten out of the broadcasting business and opted for a venture that does not require the use of a limited public resource. As Hoover explained in 1925, broadcasters must put the interests of the public before their own or their "life as a broadcaster will end."[118]

The Commission also cited stations' reluctance to air truly provocative controversial opinions and fears of numerous unfairness complaints as a reason for eliminating the Fairness Doctrine.[119] However, significant problems remain today, and are exacerbated without the doctrine. Stations can now air provocative, unorthodox, or extreme views and personal attacks with absolutely no requirement to air counter opinions to balance them. Or perhaps even worse, with no requirement to air controversial issues at all, stations fearing alienating sections of their audience can avoid airing any controversial public affairs programming. The Fairness Doctrine, even with its imperfections, served the public far better than either of these two more broadcaster-friendly alternatives. As one scholar noted, the Fairness Doctrine's "past problems seem to rest more with inconsistent application than with theoretical problems."[120]

V
CONCLUSION

Those who crafted and implemented the first broadcasting laws made a public interest promise to the people. That promise included a principle of fairness in the discussion of important public issues. The record of the congressional debates, the FRC and FCC and the courts makes this clear. The 1927 Radio Act and the 1934 Communications Act gave the Commission great flexibility in applying the public interest standard, but it is difficult to imagine that Congress intended that flexibility to mean the Commission could abandon long-standing principles because broadcasters did not like them, or more stations became available, or regulations were unpopular with broadcasters and difficult to enforce. The Section 312 and 315 candidate access rules have frequently been difficult to interpret and enforce but they have not been eliminated. A cynic might argue Congress protects them because they protect Congress. However, they also serve the public interest by promoting the free flow of candidates' political speech via broadcasting. Fairness and access rules serve the public by guaranteeing that broadcasters using the public airwaves fairly present important controversial public issues.

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[118] Radio Address, November 12, 1925, HHPL, commerce papers, box 496.
[119] Syracuse Peace Council, at 5049.
[120] PLAMONDON, *supra* note 87, at 93.

Many of the justifications for eliminating the Fairness Doctrine could also be used to argue for repeal of candidate access and fairness rules—or almost any broadcast regulation. The Section 315 and 312 rules require broadcasters to provide mandatory access for federal candidates and reasonable response opportunities when opposing candidates use a station. In addition, stations have no power to censor candidates' advertisements. As a result stations have been forced to air afternoon political television advertisements containing depictions of aborted fetuses[121] and a white racist candidate ranting on the radio, "you cannot have law and order and niggers too."[122] These requirements could certainly be characterized as government intrusion on the editorial discretion of the "broadcast press." It is inconsistent to argue that basic fairness requirements are an inappropriate intrusion on broadcasters' editorial discretion, but forcing them to air the political advertisements described above is not. If the candidate access rules serve the public interest by promoting the free flow of candidates' political speech via broadcasting then fairness and access rules for non-candidates also serve the public interest by guaranteeing that broadcasters using the public airwaves fairly present discussion of important controversial public issues.

Even in an environment that includes mass media undreamed of in the 1920s, the original public interest model should guide all regulation of broadcasting. Cable, satellites and the Internet allow broad access to news, opinion and all types of information, but free over-the-air broadcasting remains as the most basic and accessible-to-all mass communication medium. The FCC's own consumer education campaign[123] on the transition to digital television is evidence of the ongoing importance the Commission places on free over-the-air broadcasting. Regulation of indecency and children's programming reflects an understanding of the unique role of broadcasting in American society and broadcasters' public interest responsibility. It is difficult to reconcile the fairness intent of the authors of the 1927 and 1934 Acts with the total elimination of access and fairness requirements for discussion of public issues. Fairness rules are needed.

During the 2004 presidential campaign the Sinclair Broadcasting Group tried to use the public airwaves for partisan political purposes. Sinclair ordered its 62 television stations to air a factually questionable anti-Kerry

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[121] *See* Daniel Becker v. FCC, 95 F.3d 75 (D.C. Cir. 1996).

[122] *See* Letter to Lonnie King, 36 F.C.C.2d 635 (1972).

[123] Public Notice, MEDIA BUREAU ANNOUNCES EFFECTIVE DATE FOR THE RULES IN THE DTV CONSUMER EDUCATION INITIATIVE, March 28, 2008, MB Docket No. 07-148. *See also, The Digital Television Transition, What You Need to Know About DTV*, http://www.dtv.gov.

program in primetime without commercials two weeks before the election.[124] There is no current FCC policy regarding fairness of such programs. Sinclair ultimately responded to economic pressure pulling the program when boycotts were threatened. A 2007 study by the progressive Center for American Progress found that of the 257 news talk radio stations owned by the top five commercial station owners, 91 percent of the total weekday talk radio programming is conservative.[125] It would not matter if the 91 percent conservative were progressive, liberal, socialist or communist; such imbalance, in any form, does not serve the public interest. It is precisely the kind of ideological "private censorship" that Senator Robert Howell warned against in 1926. "Are we content to the building up of a great publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?"[126] His question is just as relevant today as it was in 1926.

Ultimately, media consumers will seek out the kinds of information and viewpoints they desire, but by mandating minimal fairness standards Congress and the FCC could increase the opportunities for broadcast viewers and listeners to become aware of new ideas and viewpoints they had not previously considered. The "widest possible"[127] multitude of diverse and "antagonistic" voices is needed to adequately feed the marketplace of ideas, which is so vital to a healthy democracy.

The current lack of ideological balance, along with the challenge of maintaining viewpoint diversity in the face of ever increasing ownership concentration, illustrates the ongoing need for fairness rules for those broadcasters licensed to use the public airwaves. It might not be necessary to bring back the Fairness Doctrine exactly as it existed in 1987. It is also not necessary to reduce broadcasters to common carriers, promising access to every person, in order to ensure fairness. However, it is reasonable to require broadcasters to provide access opportunity when a person is personally attacked. And it is certainly reasonable to establish minimum standards for good faith attempts at balanced programming when dealing with controversial issues of public importance. Broadcasters owe these things to the public.

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[124] *Sinclair Under Fire for Kerry Film: Partisan Feud Erupts, 2 Federal Probes Filed Over Plan to air Anti-Kerry Film Weeks Before Election*, CNNMONEY, October 12, 2004, http://money.cnn.com/2004/10/12/news/newsmakers/sinclair_kerry.

[125] John Halpin, James Heidbreder, Mark Lloyd, Paul Woodhull, Ben Scott, Josh Silver, & S. Derek Turner, *The Structural Imbalance of Political Talk Radio,* AMERICANPROGRESS, June 20, 2007, http://www.americanprogress.org/issues/2007/06/talk_radio.html.

[126] 67 Cong. Rec. 12503 (1926).

[127] Associated Press v. United States, 326 U.S. 1, 20 (1945).

Culture, language, politics and technology change, but in a democracy dependent on mass communication the founding principles of broadcast access and fairness should not. A television is not merely a toaster with pictures. In totally eliminating the Fairness Doctrine and two of its key corollaries, regulators abandoned fundamental public interest fairness principles established by those who originally hammered out and interpreted the laws of U.S. broadcasting.