NRB WHITE PAPER

Statutory Reimposition Of The "Fairness Doctrine" Would Be Unconstitutional

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."

(U.S. Constitution, Amendment I)

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EXECUTIVE SUMMARY

Powerful members of Congress are seeking statutory reenactment of the so-called "fairness doctrine"—a program of government regulation of broadcast speech that presents a grave threat to First Amendment guarantees of the freedom of speech and the free exercise of religion. In particular, it would substantially undermine the continued viability of conservative "talk radio" shows, as well as religious broadcasts that directly address such "controversial" topics as abortion, physician-assisted suicide, and varied sexual lifestyles.

In the early days of broadcasting, the fairness doctrine was enacted as a regulatory policy of the Federal Communications Commission.. At that time, it was believed that there was a "scarcity" of radio frequencies and that this unique feature of the broadcast industry justified government regulation of programs dealing with controversial issues of public importance. The Supreme Court accepted the underlying premises of this regulatory program in a decision handed down almost 39 years ago, but it has since become apparent that those premises are no longer valid. Indeed, as a consequence of these changed circumstances, the FCC repealed the doctrine in 1987, concluding that "the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest."

At a bare minimum, any proposal to resurrect this long-defunct policy would encounter the following constitutional difficulties:

1. ***Spectrum "scarcity" is no longer a realistic concern.*** In the past four decades, the country has experienced truly explosive growth in the number of electronic media channels. For example, the number of video channels available in most American homes has grown from only about three or four in the 1960s to more than 104 today. This number will continue to increase with the growth of newer delivery technologies (*e.g.*, fiber-optic television services launched by local exchange carriers).

2. ***In the past, the fairness doctrine had the effect of reducing rather than enhancing coverage of controversial issues.*** It is now clear that, in actual operation, government-enforced fairness caused many licensees to reduce their coverage of public issues. In particular, the doctrine discouraged the presentation of unorthodox and unpopular points of view. This history strongly supports the Supreme Court's general conclusion that a mandated right-of-response inescapably diminishes the discussion of controversial issues.

3. ***Reinstitution of the doctrine would create a potential for politically motivated government intimidation of the broadcast media.*** It has been discovered that at least two U.S. Presidential Administrations effectively used the doctrine to suppress the presentation of controversial views that they opposed. Similarly, current press reports have indicated that the ongoing push for reinstitution of the doctrine is being driven by Democrats' desire to thwart the influence of conservative talk radio by stifling the opposing views of popular political commentators. Reinstitution of the doctrine would revive the possibility of such unfair, unlawful, and anti-democratic censorship.

4. ***Repeal of the doctrine has promoted a healthy expansion of controversial issue programming.*** In the 20 years since the doctrine was repealed, there has been a dramatic

expansion of the kind of "uninhibited, robust, and wide-open" debate the First Amendment was designed to promote. In particular, an explosion in the use of call-in formats has promoted direct citizen participation in national debates in a way that was never before possible.

5. ***Reenactment of the doctrine would present a grave danger to the free exercise of religion.*** In today's cultural environment, traditional or "orthodox" religious teachings are increasingly the subject of controversy and would be regulated by the government under a restored fairness doctrine. Conventional Jewish and Christian teachings relating to such matters as sexual morality, marriage, parental responsibility, and the sanctity of human life are now hotly contested by an increasingly secularized society. In this environment, reinstitution of the fairness doctrine would lead to an unconstitutional "entanglement" of government regulators in religious matters and unconstitutionally infringe on the freedom of religion.

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STATUTORY REIMPOSITION OF THE "FAIRNESS DOCTRINE" WOULD BE UNCONSTITUTIONAL

With the 2008 Presidential election looming on the horizon, some powerful lawmakers have advocated reimposing the so-called "fairness doctrine" on radio and television stations. Specifically, reports have suggested that the Speaker and Majority Leader of the House of Representatives, Nancy Pelosi and Steny Hoyer, intend to "aggressively pursue" reinstatement of the doctrine over the remainder of 2007.[1] This memorandum explains why such legislation would be unconstitutional.

I. Background: Broadcasting and Free Speech

The fairness doctrine was developed by the Federal Communications Commission ("FCC" or "Commission") and its predecessor agency (the Federal Radio Commission) in a series of administrative decisions dating back to the earliest days of radio regulation.[2] Prior to its repeal by the FCC in 1987, the doctrine imposed a two-pronged obligation on broadcasters. First, they were expected to devote a significant amount of airtime to the coverage of controversial issues of public importance.[3] Second, this coverage was required to be "fair" in the sense that it afforded a "reasonable opportunity for the presentation of contrasting viewpoints" on the issues that were discussed.[4] The Commission believed that these regulations were needed to prevent a licensee from monopolizing the airwaves in a manner that would deprive the public of suitable access to the differing "views and voices which are representative of his community."[5]

From the outset, it was apparent that this affirmative use of government power to expand broadcast debate raised "a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control."[6] Indeed, the fundamental objective of the First Amendment is to protect the free marketplace of ideas from interference by the government itself.

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[1] *See* The Prowler, *Her Royal Fairness*, The American Spectator, May 14, 2007, *available at* http://www.spectator.org/dsp_article.asp?art_id=11427 ("Her Royal Fairness").

[2] For a detailed examination of the history of the doctrine, see Notice of Inquiry in Gem Docket No. 84-282. FCC 84-140,49 Fed. Reg. 20317 (May 14. 1984) ("Notice of Inquiry").

[3] The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 FCC2d 1, 9-10 (1974) ("1974 Fairness Report").

[4] *Id.* at 10-21. "Throughout the history of fairness doctrine enforcement, much more attention [was] given to th[e] second obligation . . . than to the first, namely, the affirmative obligation to provide coverage of controversial and important issues. The FCC has only once sustained a complaint relating to the part one obligation." *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

[5] 1974 Fairness Report, 48 FCC2d at 5 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969)).

[6] l974 Fairness Report, 48 FCC2d at 3.

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld the constitutionality of the fairness doctrine *despite* the general First Amendment prohibition on governmental regulation of speech and of the press. This determination was expressly grounded in factual circumstances relating to the broadcast industry as they were found to exist almost four decades ago. In particular, the ruling was premised on a so-called "scarcity of broadcasting frequencies"[7] that was then thought to exist.

In addition, the Court relied upon the FCC's representation that there was no validity to charges that, in operation, the fairness doctrine had the effect of reducing the coverage of controversial issues. The Court recognized that, if such charges proved to be true, "the purpose of the doctrine would be stifled."[8] Although it relied on the agency's assurance that such concerns were "at best speculative,"[9] it noted that "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[10]

Some five years after *Red Lion*, the "paradox" in the Court's differential treatment of the broadcast medium became even more striking. At that time, in *Miami Herald Publishing Co. v. Tornillo*,[11] a unanimous Court invalidated a Florida statute that gave political candidates a right of reply to criticisms and attacks by newspapers. It held that the inevitable effect of a government-mandated right-of-reply would be to reduce press coverage of controversial public issues:

> Faced with penalties that would accrue to any newspaper that published news or commentary within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access *inescapably* "dampens the vigor and limits the variety of public debate."[12]

Thereafter, in *FCC v. League of Women Voters*,[13] the Court indicated once again that the validity of its decision in *Red Lion* was dependent on the factual conclusion that government-mandated fairness actually enhanced the coverage of controversial issues. It emphasized that,

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[7] 395 U.S. at 391, 398-400. The Court itself has recognized that the problems of regulation in this field are rendered especially difficult "because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broadcasting System, Inc v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

[8] 395 U.S. at 392-93.

[9] *Id.* at 393.

[10] *Id.*

[11] 418 U.S. 241 (1974).

[12] 418 U.S. at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 285, 279 (1964) (emphasis added)).

[13] 468 U.S. 364 (1984).

"were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing, rather than enhancing' speech, we would then be forced to reconsider the constitutional basis for our decision in that case."[14]

In a series of administrative orders issued over the following three years, the Commission finally faced up to the task of reevaluating the doctrine in terms of the constitutional principles that had been established by the Supreme Court. First, in a report issued in 1985,[15] and then in its landmark decision in *Syracuse Peace Council*,[16] the FCC examined the three factual predicates to the doctrine's constitutional validity. On the basis of detailed and exhaustive record evidence, it concluded that:

1. dramatic expansion of the information marketplace insured that the public would be sufficiently informed on controversial issues without relying on a government-imposed duty of "fairness;"

2. the operation of the fairness doctrine actually had the effect of reducing the diversity of viewpoints presented to the public; and

3. administration of the fairness doctrine created a danger of politically motivated intimidation of broadcasters by governmental officials.[17]

Accordingly, the Commission found that "the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest."[18] The FCC also predicted that, by repealing the doctrine, the way could be paved for a healthy expansion in broadcast coverage of controversial issues.[19]

As explained more fully below, there is ample support for the FCC's conclusions on each of these points.

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[14] 468 U.S. at 378-79 n.12 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393). Although the Court restated the principles set forth in *Red Lion* in *Metro Broadcasting Co. v. FCC*, 497 U.S. 547, (1990), it did not reassess the underlying factual premises of the doctrine in that opinion.

[15] Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligation of Licenses, 102 FCC2d 145 (1985) ("1985 Fairness Report").

[16] 2 FCC Rcd. 5043 (1987).

[17] 2 FCC Rcd. at 5043 (*summarizing 1985 Fairness Report*, 102 FCC2d at 155-224).

[18] 2 FCC Rcd. at 5043.

[19] 102 FCC2d at 187.

II. Explosive Growth in the Communications Media Renders the Doctrine Unnecessary

In the years since *Red Lion*, outlets for video and audio programming have proliferated beyond the most visionary expectations.[20] In 1969, the great majority of Americans felt fortunate if they could receive as many as three or four television signals. Today, the average U.S. home receives more than 104 television channels.[21] As television broadcasters transition from analog to digital operations, an increasing number of channels are becoming available via multicast programming streams. Video programming is now provided by a veritable "alphabet soup" of alternative multichannel media providers, including direct broadcast satellite ("DBS") services, satellite master antenna television ("SMATV") services, home satellite dishes ("TVROs"), and broadband service providers ("BSPs"). Consequently, more than 94 million television households now subscribe to cable, DBS, or other multichannel video programming distribution services.[22] These choices are further supplemented by wireline video providers, including local telephone companies; Internet-based video; video on-demand; and mobile video systems.[23]

Since 1969, there has also been a dramatic increase in the number of audio outlets. The number of radio stations has more than doubled—from 6,595 to 13,837 stations.[24] Moreover, with the growth of satellite radio, portable audio devices, Internet music services, and subscription music services offered via cable and DBS, there are now thousands more audio options available to the American public.

In these circumstances, it is evident that the FCC was fully warranted in concluding that "the growth of traditional broadcast facilities, as well as the development of new electronic

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[20] In a recent decision involving the FCC's indecency regime, the United States Court of Appeals for the Second Circuit recognized the multiplicity of video outlets existing in today's media marketplace, noting that "[t]he proliferation of satellite and cable television channels—not to mention internet-based video outlets—has begun to erode the 'uniqueness' of broadcast media." *Fox Television Stations, Inc. v. FCC*, No. 06-1760, 2007 U.S. App. LEXIS 12868, at *65 (2d Cir. June 4, 2007).

[21] News Release, The Nielsen Company, Average U.S. Home Now Receives A Record 104.2 TV Channels, According to Nielsen (Mar. 19, 2007), *at* http://www.nielsen.com/media/pr_070319_download.pdf.

[22] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MM Docket No. 05-255 ¶ 8 (2006). Cable has made an enormous contribution to the coverage of controversial public issues. National cable networks providing 24-hour news and information services include CNN; CNN Headline News; C-Span and C-Span II; and CNBC. This coverage is supplemented by extensive discussions of local controversies on public and governmental "access" channels as well as by regular public affairs features on other cable channels (e.g., Pat Robertson's discussion programs on ABC Family) and extensive news/public affairs programming on imported distant broadcasting stations.

[23] Notably, Internet-based video outlets such as YouTube serve to facilitate public political discourse by providing an outlet for user-generated commentary and citizen journalism. Blogs provide yet another outlet for citizen journalists, who are increasingly recognized as important contributors to the media landscape. Earlier this year, for the first time in a federal case, independent bloggers were granted the official credentials of traditional news reporters, to cover the highly publicized perjury trial of I. Lewis Libby, Jr. *See* Scott Shane, *For Bloggers, Libby Trial is Fun and Fodder*, N. Y. Times, Feb. 15, 2007.

[24] FCC News Release, Broadcast Station Totals as of December 31, 2006 (Jan. 26, 2007).

information technologies, provides the public with suitable access to the marketplace of ideas so as to render the Fairness Doctrine unnecessary."[25] In today's burgeoning information marketplace, there simply is no realistic basis for the concern that gave rise to the *Red Lion* decision—*i.e.,* the specter of monopolistic control of the airwaves. Indeed, given the fact that the number of electronic media outlets far *exceeds* the number of daily newspapers, a reimposition of government-mandated access is particularly unjustified.[26]

III. The Fairness Doctrine Would Reduce Rather Than Enhance Coverage of Controversial Issues

As explained above, the Supreme Court has recognized that, "were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]."[27] In its orders setting aside the doctrine, the Commission issued precisely this sort of finding—and based that determination on a compelling factual record. Specifically, the agency found that "the potential of governmental sanction; administrative, legal, and personnel expenses; and reputational costs" created a very real risk "that broadcasters [would] minimize their presentation of controversial issues programming in order to avoid the substantial dangers associated with the fairness doctrine."[28]

The potential for agency sanction was particularly intimidating in view of the fact that the FCC's fairness doctrine enforcement efforts were backed-up by an ultimate threat to a station's prospects for renewal of its operating license. Indeed, the FCC identified "strict adherence to the fairness doctrine … as the *sine qua non* for grant of a renewal of license."[29] In these circumstances, as former Chief Judge David Bazelon has stated, it is hardly surprising that "even a governmental 'raised eyebrow' can send otherwise intrepid entrepreneurs running for the cover

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[25] *1985 Fairness Report*, 102 FCC2d at 197.

[26] It has long been empirically established that the actual scarcity of print outlets is, in fact, far more severe than the physical scarcity of broadcast channels. *See Senate Committee on Commerce, Science, and Transportation, Print and Electronic Media: The Case for First Amendment Parity*, S. Print 98-50, 98th Cong., 1st Sess., 56-59 (1983). Facing formidable competition from the Internet and other alternative media, the newspaper publishing industry has been in decline for a number of years. *See* Katharine Q. Seelye, *Drop in Ad Revenue Raises Tough Question for Newspapers*, N. Y. Times, Mar. 26, 2007; Annys Shin, *Newspaper Circulation Continues to Decline: Internet, Cable Cited as Competition*, Wash. Post, May 3, 2005, at E03; Julia Angwin & Joseph T. Hallinan, *Newspaper Circulation Continues Decline, Forcing Tough Decisions*, Wall St. J., May 2, 2005. With declining circulation and stagnant advertising revenue, "the print newspaper is unquestionably ailing." Project for Excellence in Journalism, *State of the News Media 2007: An Annual Report on American Journalism* (2007), *at* http://www.stateofthenewsmedia.org/2007/narrative_newspapers_intro.asp?cat=1&media=3.

Of course, some would argue that regulation is warranted so long as the "demand" for broadcast channels exceeds the "supply." This argument wholly ignores the fact that content-based broadcast regulations can be upheld only where they are "narrowly tailored" to advance a substantial governmental interest. *FCC v. League of Women Voters*, 468 U.S. at 380. It is clear that, in today's robust and widely diversified electronic media marketplace, no such showing would be possible.

[27] FCC v. League of Women Voters, at 378-79 n.12.

[28] *1985 Fairness Report*, 102 FCC2d at 169.

[29] Committee for the Fair Broadcasting of Controversial Issues, 25 FCC2d 283, 292 (1970).

of conformity" by reducing the vigor and scope of their controversial issue programming to a bare minimum.[30]

Moreover, even when a broadcaster's actions are ultimately vindicated, the process of defending against a fairness complaint can impose very substantial costs. For example, in the mid-1970s, NBC incurred approximately $100,000 in legal costs in successfully defending the "fairness" of an award-winning documentary on abuses in the private pension industry.[31] While expenses in more routine fairness cases have generally been less substantial, they easily can be prohibitively expensive for smaller stations—and represent a major burden and deterrent even for larger and more profitable broadcast entities.[32] When coupled with associated administrative costs (including a substantial drain on the time and energy of top management), these burdens frequently resulted in a decision to minimize the station's array of controversial programming.

It is clear, moreover, that complaining parties have learned how to take advantage of these costs and burdens *for the express purpose* of suppressing speech with which they disagree. Comments filed by the Public Media Center ("PMC"), a group that actively prosecuted fairness complaints, "vividly illustrate[ ] the manner in which a complainant can successfully pressure broadcasters" to engage in self-censorship.[33] PMC reported how a citizen coalition challenged an industry-supported "editorial advertising" campaign in a ballot proposition contest dealing with bottle-deposit policy. PMC described the group's tactics in the following the following terms:

> Ads opposing the beverage deposit—sponsored by an industry group … hit the air in early August. Within ten days, [the pro-bottle bill coalition] sent a letter to all 500 California stations asking for a 2 to 1 ratio in free spot time. *[The Coalition] urged broadcasters to refuse to sell time and therefore avoid a fairness situation at all.*[34]

The Commission also noted PMC's admission that "the majority of the California stations followed the coalition's exhortation. Less than one-third of the stations contacted by the coalition sold ballot advertising to the industry group."[35]

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[30] D. Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 Fed. Comm**.** L.J. 201, 206 (1979). Even short of the ultimate threat to a station's license renewal, potential FCC sanctions retain substantial punch. Given the value that each station places on its broadcast time, even routine orders to provide additional "responsive" programming can prove to be expensive.

[31] *1985 Fairness Report*, 102 FCC2d at 166.

[32] *Id*. at 167.

[33] *Id*. at 176.

[34] *Id*. at 176-77 (emphasis in the original).

[35] *Id*. at 177.

The result, of course, was the exact opposite of the stated objective of the fairness doctrine: the public was deprived of an opportunity to hear a vigorous debate on an important controversial issue.[36]

As described in Part IV, *infra*, other groups (including those backed by two incumbent American Presidents) have used such tactics with similar success. Thus, the mere existence of the fairness doctrine forces station managers to engage in a kind of cost-benefit analysis that is wholly unknown in other segments of the news media.[37] Not surprisingly, the repressive effects of the doctrine are felt most heavily at smaller, less-profitable stations that simply cannot bear the cost of "fairness" enforcement proceedings.

In addition, the fairness doctrine had the effect of "stifling viewpoints which may be unorthodox, unpopular or unestablished."[38] *Brandywine-Main Line, Inc.*, a case involving the license renewal of Radio Station WXUR in Media, Pennsylvania, dramatically illustrates this point. This small, religiously oriented station routinely presented unorthodox views in an extremely provocative manner.[39] It was undisputed that "controversial issue programming was a substantial part of WXUR's total programming" during its term of license.[40] Although the station covered opposing viewpoints, the FCC found that it did not achieve the required level of "fairness" because persons "holding viewpoints contrary to those of the moderator were forced to give their views in an antagonistic setting."[41] As a result, the agency refused to renew the station's license.

In a vigorous dissent to a Court of Appeals decision affirming this action, Chief Judge David Bazelon noted that the FCC's decision caused a substantial net reduction in the controversial issue programming available to the public. He explained that WXUR was:

> a radio station devoted to speaking out and stirring debate on controversial issues. The station ... propagate[d] a viewpoint which was not being heard in the greater Philadelphia area. The

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[36] A recent editorial by Nat Hentoff, who worked as an announcer and reporter at a Boston radio station during the 1940s and 1950s, elucidates how the fairness doctrine prevented broadcasters from taking on controversial topics. After his station received a number of fairness doctrine inquiries from the FCC, Hentoff recalls that: "the boss summoned all of us and commanded that from then on, we ourselves would engage in no controversy at the station." Nat Hentoff, *Squashing the First Amendment: Don't Bring Back "Fairness Doctrine,"* Wash. Times, Jan. 29, 2007, at A17.

[37] *Id*. at 188.

[38] *Id*. at 188.

[39] The licensee's "style of presentation over the air—sometimes so racy as to make the gorge rise—was not what men of refined taste would deem expedient…." 24 FCC2d 18, 130 (1970), *recon. denied*, 27 FCC2d 565 (1971), *aff'd on other grounds*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

[40] As the Commission itself recognized, there was "a strange irony in the fact that WXUR has attempted to do what broadcasters have been exhorted to do and that is to offer vigorous discussion on controversial issues. The station has, in fact, presented such discussion in about the same degree that most stations offer entertainment." 24 FCC2d at 131.

[41] *Id*. at 23.

> record is clear that through its interview and call-in shows it did offer a variety of opinions on a broad range of public issues, and that it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints.
>
> The Commission's decision has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also a robust debate on innumerable controversial issues. It is beyond dispute that the public has lost access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be.[42]

While the regulatory result in WXUR was especially harsh, the Commission now recognizes the fact that, in the past, the advocates of unorthodox or dissenting points of view were frequently singled out as fairness doctrine victims.[43]

As a result, as Judge Bazelon has stated, the administrative history of the doctrine in actual application strongly suggests that "controversial viewpoint[s] [were] being screened out in favor of the dreary blandness of a more acceptable opinion."[44] Indeed, this history amply supports the Supreme Court's own conclusion that a government-mandated right of response "inescapably" diminishes the volume and quality of controversial issue programming.[45]

IV. The Fairness Doctrine Creates a Dangerous Potential for Politically Motivated Intimidation of Broadcasters by Government Officials

As the Commission explained in its *1985 Fairness Report*, "[p]olitical officials have not been loathe to criticize the manner in which broadcasters have aired controversial matters of public concern and at times the criticism has been accompanied by overt pressure to influence the manner in which these issues are covered."[46] Indeed, it has been reported that two Presidential Administrations aggressively used the fairness doctrine to undermine the independence of the broadcast press. A third Administration at least considered implementating a similar program.

During the Kennedy and Johnson years, radio stations that broadcast anti-Administration viewpoints were inundated with fairness doctrine complaints as part of a "massive strategy to challenge and harass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide it was too expensive to continue."[47] This

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[42] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 70 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (emphasis omitted), *cert. denied*, 412 U.S. 922(1973).

[43] *1985 Fairness Report*, 102 FCC2d at 188-90.

[44] *Brandywine-Main Line Radio*, 473 F.2d at 78 (Bazelon, C.J., dissenting).

[45] *Tornillo*, 418 U.S. at 257.

[46] *1985 Fairness Report*, 102 FCC2d at 193 (citations omitted).

[47] *Notice of Inquiry*, 49 Fed. Reg. at 20332.

strategy was said to have been successful in almost all respects.[48] Similarly, an official in the Nixon White House proposed to address his Administration's perception of "unfair coverage" in the broadcast media by establishing "an official monitoring system through the FCC."[49]

Today, advocates for reimposition of the fairness doctrine have gone as far as candidly admitting their desire to use the doctrine as a political weapon to curb the influence of conservative talk radio.[50] A senior advisor to House Speaker Nancy Pelosi revealed that House Democrats' recent decision to push for reimposition of the doctrine stemmed from a desire to limit conservative radio, a "huge threat and political advantage for Republicans," and ensure that Republican presidential candidates' access to media does not give the party an advantage over Democrats in the 2008 campaign. The House Speaker is reportedly focusing on popular conservative "targets" such as Rush Limbaugh and the Salem Radio Network.[51] Along these lines, another congressional staffer was quoted as saying, "[w]e know we can't shut [Rush Limbaugh] up, but we want to make life a bit more difficult for him," highlighting the dangerous potential for politically motivated curtailment of speech in the broadcast arena should the fairness doctrine be reinstated.[52]

It is an inescapable fact of political life that some professional politicians will be tempted to use any leverage that is available to minimize unfavorable broadcast coverage. But, as Chief Judge Bazelon has stated, "[w]ithout the FCC lever to manipulate, we could hope that there would be less chance that the licensees would be forced to kowtow to the wishes of an incumbent politician."[53]

V. In the Twenty Years Since The Doctrine Was Repealed, There Has Been Substantial Expansion In Broadcast Coverage of Controversial Issues

The FCC's prediction that repeal of the doctrine would open the way for more expansive broadcast coverage of controversial issues of public importance was plainly correct. Indeed, in the decade and a half since the doctrine was repealed, the country has witnessed a veritable explosion in the kind of "uninhibited, robust, wide-open" debate that the First Amendment was designed to promote.[54]

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[48] F. W. Friendly, The Good Guys, the Bad Guys and the First Amendment 40-42 (1976).

[49] *See 1985 Fairness Report*, 102 FCC2d at 193. While there is no evidence that such a program was actually implemented at the FCC, the experience of the two preceding Administrations demonstrates that such coercive campaigns can be highly effective even without cooperation from the Commission itself. In any event, a threat of improper influence is inherent in the fact that the commissioners axe political appointees and are subject to many formal and informal pressures from the White House and Capitol Hill. See generally E. Krasnow, L. Longley and H. Terry, *The Politics of Broadcast Regulation* 66-132 (1982).

[50] See Her Royal Fairness.

[51] *Id.*

[52] *Id.*

[53] D. L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213, 239 n.180.

[54] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

One dramatic illustration of this development is provided by the emergence of broadcast call-in shows as a major force in shaping the nation's discussion of public issues. As *Newsweek* magazine first reported in the early 1990s, "[c]all-in democracy ignited the presidential race. Now it's shaking up government, rattling Clinton—and driving Washington's agenda."[55] This medium has promoted direct citizen participation in the political process in a way that was never before possible. Issues that once might have been quietly resolved by politicians themselves on an "inside-the-Beltway" basis can now "generate tidal waves of switchboard-clogging calls and letters-to-your-congressman."[56]

The news/talk/information format, which incorporates call-ins, has for years been one of the most popular format touched by Arbitron—and currently accounts for over 10 percent of the nation's radio stations.[57] In addition, call-ins have become staples on many cable news/talk programs and even have been integrated into the broadcast networks' coverage of special events such as the national political party conventions.

In the meantime, television stations themselves have substantially expanded their coverage of public issues in other formats. National networks feature regular prime-time public affairs programs, such as CBS's "48 Hours" and "60 Minutes," ABC's "20/20," and "Dateline NBC." In addition, ABC, CBS, and NBC affiliates broadcast overnight newscasts that integrate local news with features supplied by the networks.

VI. Reenactment Of The Doctrine Would Present A Grave Danger To The Free Exercise Of Religion

In the United States today, there are some 2,203 religious radio stations[58] and a multitude of religious television stations and networks. In addition, hundreds of religious organizations and institutions produce programs that are aired on secular as well as religious broadcasting stations. This programming is presented in a broad diversity of formats, ranging from worship services to talk shows and from daily Bible studies to sacred or gospel music presentations. As noted above, reports have suggested that, in their pursuit for reinstatement of the fairness doctrine, House Democrats intend to focus on targets such as the rapidly growing Salem Radio Network, which specializes in Christian and conservative talk radio formats and features popular

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55 *The Power of Talk*, Newsweek, Feb. 8, 1993, at 24.

56 *Id*. at 25. For example, established Washington journalists admitted that they were slow to respond to the controversy over Attorney General-nominee Zoe Baird's hiring of illegal aliens as a nanny and a chauffeur. "But out there in talk radio land, Nannygate was the hottest topic around.... It was a populist roar that drowned out the official Beltway explanations—'everybody does it,' 'just a technical violation'—with remarkable swiftness." H. Kurtz, *Talk Radio's Early Word on Zoe Baird; Listeners' 'Nannygate' Reactions Signaled Trouble for Nominee*, Washington Post, Jan. 23, 1993, at B 1. Other issues, such as the House bank scandal and Congressional pay raises have similarly been pushed to the forefront of national debate by call-in show discussions.

57 Arbitron, Radio Today (2007), at http://www.arbitron.com/downloads/radiotoday07.pdf.

58 *Id.*

Christian hosts such as Janet Parshall and Dr. Richard Land.[59] This underscores the potential threat to religious broadcasters, who may find themselves caught in a political crossfire.

If the fairness doctrine were reenacted by Congress, it would present a severe threat to the ability of these religious organizations to present their views over the airwaves free from governmental interference. As exemplified by the *Red Lion* and *Brandywine-Main Line* cases discussed above, the "victims" of fairness doctrine enforcement in the past were frequently small religious stations with limited resources—that were extremely vulnerable to the "chilling" effects associated with the doctrine.[60]

In today's cultural environment, the potential for such interference with religious broadcasting is even greater. This would be true even if these broadcasters generally restricted themselves to the discussion of traditional religious and ethical principles. In a nation that has become increasingly secular in its outlook, many formerly orthodox religious principles have become increasingly "controversial." These include conventional Jewish and Christian teachings relating to such matters as sexual morality, marriage, parental responsibility, and the sanctity of human life.[61] Further, it is easy to imagine that the doctrine could be extended to discussion of rival religious systems (e.g., a Christian pastor's critical examination of Islam).

In these circumstances, a reintroduction of the fairness doctrine would inevitably result in a dangerous and menacing entanglement of government regulators into religious debate and discussion over the airwaves. For example, if a fairness complaint was submitted against a broadcast sermon dealing with moral lessons relating to homosexuality, a team of FCC lawyers would be called upon to review a tape, transcript or summary of the sermon to determine what specific issue had been raised, whether that issue was "controversial," and whether it constituted a matter of "public importance" within the meaning of the agency's regulations.[62] If it was determined that the sermon had indeed presented a viewpoint on a "controversial issue of public importance," the agency would then have to decide whether the station had afforded a "reasonable opportunity" for the presentation of contrasting viewpoints—either in the sermon itself or in other programming.[63] If the opportunity for opposing views was deemed by the FCC to be inadequate, the station would then be ordered to provide additional broadcast time to representatives of such opposing views.

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[59] *See Her Royal Fairness*; *see also* Paul Weyrich, *Preserve Talk Radio: The Threat of Reimposition of the So-called Fairness Doctrine*, Dec. 5, 2006, *at* http://www.freecongress.org/commentaries/2006/061205.aspx (noting that the eradication of the fairness doctrine "paved the way" for conservative talk radio programs, such as *Janet Parshall's America*).

[60] In *Red Lion*, for example, the Supreme Court effectively affirmed the FCC's sanction against radio station WGCB in Pennsylvania for a religious broadcast during its "Christian Crusade" series. *See* 395 U.S. at 371-375.

[61] Indeed, within the religious community itself, these issues are intensely controversial. As a result, evangelical Christians, Orthodox Jews, and conservative Catholics have joined forces in a struggle with their "progressive" counterparts over a broad range of cultural issues. *See generally J. Hunter, Culture Wars: The Struggle to Define America* (1991).

[62] *1974 Fairness Report*, 48 FCC2d at 11-13.

[63] *Id*. at 13-17.

It is significant, moreover, that these regulatory determinations would necessarily be based on criteria that are highly subjective.[64] The hypothetical case of the broadcast sermon dealing with the moral implications of homosexuality illustrates this point. Complainants might claim that such a broadcast raised any of the following "issues": (1) the validity of "alternative" sexual life-styles, including gay marriage and gay adoption; (2) the immorality of stigmatizing individuals whose values and behavior patterns differ from societal norms; (3) the problems associated with private or public sector "discrimination" against such individuals, including discrimination in military service; (4) the validity of transcendent moral values; or even (5) the existence of a God who is the source of such transcendent values.

Governmental evaluation of such complaints would obviously raise extremely serious constitutional issues. Indeed, it is clear that "a comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure that these regulations [were] obeyed" by religious broadcasters.[65] Such a pervasive "entanglement" of government regulators into the speech of religious entities would be incompatible with the religious liberties protected by the First Amendment.[66]

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[64] This is especially true with respect to the determination of the specific issue that supposedly was the subject of the original broadcast or broadcasts. *Id.* at 12-13.

[65] *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

[66] *Id.*

The FCC was entirely correct in its conclusion that the fairness doctrine was inconsistent with both the First Amendment and the public interest. Indeed, as the agency predicted, the repeal of the doctrine has been followed by an expansion in the kind of robust debate that promotes the principles on which this country was founded. As Justice Stewart has stated: "[t]hose who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was too fragile to be left for a government bureaucracy to accomplish."[67] It should go without saying that our nation's religious liberties are far too fragile, and precious, to be left at the mercy of such a bureaucracy.

Congress should not reinstate the fairness doctrine.

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[67] Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 145-46 (1973) (Stewart, J., concurring).

Resolution Supporting Free Speech in Electronic Media

Whereas the National Religious Broadcasters exists primarily to secure and maintain freedom of access to the electronic media for the presentation of the Gospel of the Lord Jesus Christ and for the proclamation of the biblical point of view on world events; and

Whereas Christian broadcasters have fought hard for freedom of access to electronic media in the USA and now benefit from increased access around the world; and

Whereas after the so-called "Fairness Doctrine" was repealed by the FCC in 1987, there has been a healthy increase in expression of all views on various electronic media coupled with unprecedented participation by American citizens; and

Whereas there are more than 10,000 radio and television stations in the United States providing more than adequate fora for the presentation of responsible viewpoints; and

Whereas the "Fairness Doctrine" had a chilling and stifling effect on broadcasters and programmers everywhere during its nearly 40 years of existence; and

Whereas there have been repeated and consistent attempts to reinstate the "Fairness Doctrine," as recently as during the now-adjourned 109th Congress; and

Whereas the new leadership of the U. S. Congress has signaled a propensity toward reinstating the "Fairness Doctrine" during the upcoming 110th Congress: *Therefore, be it*

Resolved that the National Religious Broadcasters strongly opposes any attempt to reinstate or make the "Fairness Doctrine" the law of the land and further pledges to vigorously oppose any such action.

Approved by the Board of Directors on February 16, 2007.