

# THE FUTURE OF “FAIR AND BALANCED”: THE FAIRNESS DOCTRINE, NET NEUTRALITY, AND THE INTERNET

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## ABSTRACT

*In recent months, different groups—pundits, politicians, and even an FCC Commissioner—have discussed resurrecting the now-defunct Fairness Doctrine and applying it to Internet communication. This iBrief responds to the novel application of the Doctrine to the Internet in three parts. First, this iBrief will review the history and legal rationale that supported the Fairness Doctrine, with a particular emphasis on emerging technologies. Second, this iBrief applies these legal arguments to the evolving structure of the Internet. Third, this iBrief will consider what we can learn about Net Neutrality through an analogy to the Fairness Doctrine. This iBrief concludes that, while the Fairness Doctrine is not appropriate to use on the Internet in its present form, the arguments for the Doctrine could affect the debate surrounding Net Neutrality, depending on how the Obama Administration implements Net Neutrality.*

## INTRODUCTION

¶1 In August 2008, Federal Communications Commission (FCC) Commissioner Robert McDowell gave a speech at the Heritage Foundation saying that the FCC may reinstate the so-called “Fairness Doctrine” and extend it beyond broadcast media to the Internet.<sup>2</sup> McDowell warned the conservative bloggers in his audience that the Internet version of the doctrine would be intertwined with net neutrality, and may end with the “government dictating content policy.”<sup>3</sup>

¶2 Almost immediately, bloggers responded to McDowell’s comments with sharply different answers. Rob Topolski of Free Press said that

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<sup>2</sup> Jeff Poor, *FCC Commissioner: Return of Fairness Doctrine Could Control Web Content*, BUS. & MEDIA INST., Aug. 13, 2008, <http://www.businessandmedia.org/printer/2008/20080812160747.aspx>.

<sup>3</sup> *Id.*

McDowell's statement was "the stupidest thing I've heard this week. . . . The Fairness Doctrine, if applied on the Internet, would *violate* Network Neutrality principles."<sup>4</sup> Matthew Lasar, writing for Ars Technica, accused McDowell of scaremongering by inciting a classic Republican "Fairness Doctrine Panic."<sup>5</sup> Supporting McDowell's theory on the interconnectedness of the Fairness Doctrine and Net Neutrality, however, was James Gattuso of the Technology Liberation Front, who said that McDowell "deserves kudos for raising the alarm bells on this aspect of net neutrality."<sup>6</sup>

¶3 This iBrief begins by analyzing the technical, legal, and historical background of the Fairness Doctrine. On its face, the Fairness Doctrine is a simple, two-prong requirement for broadcasters: they must provide information on issues of public importance, and their discussion of these issues must be balanced.<sup>7</sup> However, "fairness" is relative, and the FCC stopped enforcing the Doctrine when it found that the Doctrine did more to inhibit discussion than promote it.<sup>8</sup>

¶4 Next, this iBrief applies the Fairness Doctrine to the unregulated Internet as it stands today. By illustrating the substantial differences between television and radio broadcasters, who were subject to the Doctrine twenty years ago, and those who post information on the Internet today, this iBrief shows that applying the Fairness Doctrine to the Internet cannot survive the intermediate scrutiny analysis that underlies content-neutral First Amendment jurisprudence.

¶5 Finally, this iBrief weighs the connections between Net Neutrality and broadcasting regulation.<sup>9</sup> Although there are substantial differences between the Fairness Doctrine and Net Neutrality, their goals and methodologies are similar: spreading diverse opinions through government

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<sup>4</sup> Matthew Lasar, *Fairness Doctrine Panic Hits FCC, Spreads Through Blogosphere*, ARSTECHNICA, Aug. 17, 2008, <http://arstechnica.com/news.ars/post/20080817-fairness-doctrine-panic-hits-fcc-spreads-through-blogosphere.html>.

<sup>5</sup> *Id.*

<sup>6</sup> James Gattuso, *FCC's McDowell on Fairness and Neutrality*, TECH. LIBERATION FRONT, Aug. 13, 2008, <http://techliberation.com/2008/08/13/fccs-mcdowell-on-fairness-and-neutrality>.

<sup>7</sup> See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969); Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, FED. COMM. L.J. 51, 52 (1994–1995).

<sup>8</sup> See Cronauer, *supra* note 7, at 54.

<sup>9</sup> This iBrief takes no position on the benefits or harms of Net Neutrality; rather, it outlines the legal arguments for both sides, and the application of the Fairness Doctrine line of cases to this debate.

regulation. The Fairness Doctrine cannot be applied to the Internet, but it is likely that some form of Net Neutrality can survive constitutional muster.

## I. THE PAST: THE HISTORY AND LEGAL BACKGROUND OF THE FAIRNESS DOCTRINE

### A. *The History of the Fairness Doctrine*

¶6 Enshrined in the First Amendment, the freedom of the press has been a core element of America's legal and political landscape.<sup>10</sup> Although the First Amendment nominally protects all speech, it has always given its greatest protections to political speech.<sup>11</sup> In addition, the freedom of the press has always included the freedom to exclude non-newsworthy items from publication.<sup>12</sup> For the first 150 years of American history, when the media was exclusively in print form, the Court rarely questioned this protection.

¶7 With the increasing use of radio in the 1920s, the freedom that protected the print media conflicted with evolving technology.<sup>13</sup> When newspapers were the main form of spreading information, there was no problem with papers physically crowding each other out. However, there are only so many radio wave bands, and the earliest commercial and civilian broadcasters competed for the same portion of the unregulated spectrum.<sup>14</sup> This was an archetypal tragedy of the commons,<sup>15</sup> and different parties fought to be heard over the airwaves by strengthening their transmissions, which polluted the spectrum even more.<sup>16</sup>

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<sup>10</sup> U.S. CONST. amend. I. *See also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 133 (1973) (J. Stewart, concurring) ("The First Amendment prohibits the Government from imposing controls upon the press. Private broadcasters are surely part of the press.") (citation omitted).

<sup>11</sup> *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (giving restraints upon core political speech "exacting scrutiny").

<sup>12</sup> *See, e.g.,* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254–55 (1974) (citing Assoc. Press v. United States, 326 U.S. 1, 20 n.18 (1945); Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973)).

<sup>13</sup> Cronauer, *supra* note 7, at 58.

<sup>14</sup> *Id.* Justice Frankfurter described the pre-1927 situation by writing, "[T]he radio spectrum is simply not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another." *Id.* at 59–60 (quoting Nat'l. Broad. Co. v. United States, 139 U.S. 190, 213 (1943)).

<sup>15</sup> RONALD J. KROTOSZYNSKI, JR. ET AL., THE FIRST AMENDMENT: CASES AND THEORY 428 (2008).

<sup>16</sup> Cronauer, *supra* note 7, at 57.

¶8 With the radio waves descending into chaos, broadcasters asked the federal government to regulate the spectrum.<sup>17</sup> The Senate first passed a joint resolution declaring the spectrum to be “the inalienable possession of the people of the United States.”<sup>18</sup> Congress then passed the Radio Act of 1927, giving the government the power to license and regulate radio stations.<sup>19</sup> However, the Radio Act did more than compensate for conflict between signals; it also gave the government the power to regulate the programming of stations.<sup>20</sup> In 1959, Congress broadened the FCC’s power to regulate content by giving broadcasters an “obligation . . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”<sup>21</sup> From this last sentence, the FCC created the Fairness Doctrine.

### *B. The Legal Background of the Fairness Doctrine*

¶9 The FCC’s Fairness Doctrine had two main components. First, a broadcaster had to broadcast information on issues of public importance, and such coverage must have accurately reflected opposing views on those issues.<sup>22</sup> If private parties did not purchase such programming, or the news was not inherently even-handed, the broadcaster would have to create such programming on its own initiative, and at its own expense.<sup>23</sup> Second, when a person involved in a public issue was attacked on air, the station would have to provide the attacked party a transcript of the attack and an equal opportunity to respond to the attack on the same station.<sup>24</sup> This personal attack rule also included editorials and endorsements for political candidates; if a broadcaster endorsed one candidate, the station would have to give the opposing candidate equal time to respond to the editorial.<sup>25</sup>

¶10 Broadcasters challenged the constitutionality of the Fairness Doctrine as inconsistent with the First Amendment; however, the Supreme Court upheld the Doctrine for two reasons. In the seminal *Red Lion* case, the Court held that the statutory mandate for the FCC to protect the “‘public interest’ in broadcasting clearly encompassed the presentation of vigorous debate of controversial issues of importance and concern to the public.”<sup>26</sup>

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<sup>17</sup> *Id.* at 58.

<sup>18</sup> *Id.* (quoting R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 6 (1959)).

<sup>19</sup> Radio Act of 1927, 44 Stat. 1162 (1927) (repealed 1934) available at <http://showcase.netins.net/web/akline/pdf/1927act.pdf>.

<sup>20</sup> *Id.* § 4; Cronauer, *supra* note 7, at 58.

<sup>21</sup> 47 U.S.C. § 315(a) (2008).

<sup>22</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969).

<sup>23</sup> *Id.* at 377–78.

<sup>24</sup> *See id.* at 378.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 385.

In weighing the dual protections of the First Amendment, the Court held that the public's right to have diverse perspectives on important issues trumps the broadcasters' freedom of the press.<sup>27</sup>

¶11 Second, the Court recognized that the inherent differences between broadcasters and the print media require governmental intervention to ensure that all voices are heard.<sup>28</sup> The Court held that, “[w]here 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.”<sup>29</sup> To uphold this different treatment for broadcasters, the Court distinguished the broadcast media from the print media in three specific ways: the problem of interference between signals (spectrum problems), the lack of equipment and knowledge of how to broadcast (technical problems), and the requirement of substantial resources to broadcast with any effectiveness (economic/representativeness problems).<sup>30</sup>

¶12 During the next decade-and-a-half, the Supreme Court further clarified its position on the Fairness Doctrine while reaffirming its core holding: the unique limits of broadcasting merited the Fairness Doctrine restrictions.<sup>31</sup> The Court added a fourth criterion to its *Red Lion* distinction between print and broadcast media, the “captive audience” element, in *Columbia Broadcasting System v. Democratic National Committee*.<sup>32</sup> In print media, the reader is free to ignore articles and advertisements, and read at his leisure; “reading requires an affirmative act.”<sup>33</sup> However, with television and radio, the captive audience can avoid undesired programming or bias “only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda . . . but it may reasonably be thought greater than the impact of the written word.”<sup>34</sup>

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<sup>27</sup> *Id.* at 390 (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”).

<sup>28</sup> *See id.* at 388.

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

<sup>30</sup> *See id.*

<sup>31</sup> Additionally, the District of Columbia Court of Appeals consistently upheld the Fairness Doctrine against First Amendment challenges. *See, e.g.*, *Telecomm. Res. & Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986); *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

<sup>32</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973).

<sup>33</sup> *Id.* at 128.

<sup>34</sup> *Id.* (quoting *Banzhaf v. FCC*, 405 F.2d 1082, 1100–01 (D.C. Cir. 1968)).

### C. *The Death of the Fairness Doctrine*

¶13 Ever since its first decision in *Red Lion*, however, the Court has left two large openings for finding the Fairness Doctrine unconstitutional. First, *Red Lion* recognized that the underlying purpose of the Fairness Doctrine was to increase fair coverage of public issues; if the Doctrine's requirements ever interfered with this goal, it could be an opportunity to challenge it. The Court noted in dicta that:

[S]hould [spectrum] licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled. . . . And if experience with the administration of these 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.<sup>35</sup>

While the Court did not explicitly say that a chilling effect from the Fairness Doctrine would automatically make it constitutionally invalid, the Court intentionally flagged this as a potential argument against the Doctrine in the future.<sup>36</sup>

¶14 The second opening for finding the Fairness Doctrine unconstitutional lies in the technical evolution in the broadcast market. In large part, the Fairness Doctrine was always found constitutional because of the FCC's claims to the inherent technical and market limits of broadcasting; if these were overcome, the Doctrine would be more vulnerable to an attack in court.<sup>37</sup> Since the Fairness Doctrine's legitimacy was based primarily on "the scarcity of radio frequencies," it stands to reason that if radio frequencies were no longer scarce, the basis for the Doctrine would substantially weaken.<sup>38</sup>

¶15 Taking advantage of these openings in *Red Lion*, the FCC produced a 1985 report on the Fairness Doctrine that paired the Court's reasoning with recent developments in technology.<sup>39</sup> First, responding to the concerns of *Red Lion*, the FCC found that the Doctrine had a "chilling effect" on free speech and programming decisions by broadcast stations.<sup>40</sup> The FCC found that the costs for stations who violated the Doctrine were unnecessarily

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<sup>35</sup> *Red Lion*, 395 U.S. at 393. See also *FCC v. League of Women Voters of California*, 468 U.S. 364, 378–79 (1984).

<sup>36</sup> See *Red Lion*, 395 U.S. at 393.

<sup>37</sup> *Id.* at 390.

<sup>38</sup> *Id.*

<sup>39</sup> See *In re Inquiry into Section 73.1910 of the Commission's Rules and Regs Concerning the Gen. Fairness Doctrine Obligations of Brdst. Licensees*, 102 F.C.C.2d 142, 143 (1985) [hereinafter *FCC Fairness Doctrine Report*].

<sup>40</sup> *Id.* ¶ 33.

severe (a potential loss of a broadcasting license), but even the legal costs when the stations were in the right were so high as to discourage the stations to carry more than a minimum of public interest broadcasting.<sup>41</sup> Even though the FCC rarely investigated or ruled against broadcasters under the Fairness Doctrine, the Commission found clear evidence that broadcasters nevertheless considered the Doctrine a “significant inhibiting factor” in their treatment of public issues.<sup>42</sup> Moreover, even an unfounded complaint can sully the reputation of a station in the broadcast market, and thereby discourage the presentation of issues of public importance.<sup>43</sup>

¶16 Focusing on television, the report noted that ninety-six percent of households could receive five or more broadcast signals, compared to fifty-nine percent in 1964.<sup>44</sup> In large part, this increase was due to technological improvements that made the UHF band viable.<sup>45</sup> Furthermore, with non-spectrum technological developments including the expansion of cable television<sup>46</sup> and the creation of videocassette recorders (VCRs),<sup>47</sup> the FCC found that the 1985 communications landscape was much broader and more diverse than the *Red Lion* world. Accordingly, the FCC determined that the technical limits that had given a handful of broadcasters near-universal power had been overcome, and the Fairness Doctrine “can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the viewing and listening public.”<sup>48</sup>

¶17 Relying on the 1985 report, the FCC officially concluded that “the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest,” and that it would no longer enforce the Doctrine.<sup>49</sup> Since 1985, the Court has not considered any serious cases based on the Fairness Doctrine, and this section of the law has been largely dormant.<sup>50</sup>

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<sup>41</sup> *Id.* ¶¶ 35–36.

<sup>42</sup> *Id.* ¶ 37.

<sup>43</sup> *Id.* ¶ 39.

<sup>44</sup> *Id.* ¶ 99.

<sup>45</sup> *Id.* ¶ 100.

<sup>46</sup> *Id.* ¶ 107.

<sup>47</sup> *Id.* ¶ 115.

<sup>48</sup> *Id.* ¶ 19.

<sup>49</sup> *In re* Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043 ¶ 2 (1987).

<sup>50</sup> *Cf.* *Satellite Broad. & Comm’n Assn. v. FCC*, 275 F.3d 337 (4th Cir. 2001) (discussing the Fairness Doctrine, but ultimately distinguishing the case before the Circuit Court from the Fairness Doctrine).

## II. THE PRESENT: APPLYING THE FAIRNESS DOCTRINE TO TODAY'S INTERNET

### A. *The Fight to Bring "Fairness" Back*<sup>51</sup>

¶18 Throughout its history, both the political right and left have tried to use the Fairness Doctrine to their political benefit.<sup>52</sup> However, the most recent push for a resurrection of the Doctrine has been from Democrats responding to the strong right-wing talk radio and news cycles. So far, Senators Charles Schumer, Dick Durbin, and Dianne Feinstein—all Democrats—have said they want the FCC to reinstate the Fairness Doctrine.<sup>53</sup> Moreover, a group of Democrats has unsuccessfully tried to legislate the Fairness Doctrine into law.<sup>54</sup>

¶19 Conversely, Republicans have recently opposed the Fairness Doctrine. During the 110th Congress, a group of Republican Senators proposed the Broadcaster Freedom Act of 2007.<sup>55</sup> This bill would have removed the FCC's discretionary authority to reinstate the Fairness Doctrine.<sup>56</sup>

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<sup>51</sup> The 1985 FCC report also implied that any application of the Fairness Doctrine to the Internet would follow the same criteria as for broadcast media. *See FCC Fairness Doctrine Report, supra* note 39 ¶ 122 ("As a final matter home computer systems have played a significant role in adding to the information services marketplace. However, we do not find these services to be significant contributors to media diversity at this time.").

<sup>52</sup> Steve Rendall, *The Fairness Doctrine: How We Lost It, and Why We Need It Back*, COMMONDREAMS.ORG, Feb. 12, 2005, <http://www.commondreams.org/views05/0212-03.htm> ("Over the years, [the Fairness Doctrine] had been supported by grassroots groups across the political spectrum, including the ACLU, National Rifle Association and the right-wing Accuracy in Media."). *See also* Cronaeur, *supra* note 7, at 55 (demonstrating how both President Kennedy and Vice-President Agnew used the Doctrine to threaten the broadcast media).

<sup>53</sup> Bob Cusack, *Schumer on Fox: Fairness Doctrine "Fair and Balanced,"* THE HILL, Nov. 4, 2008, available at <http://thehill.com/leading-the-news/schumer-defends-fairness-doctrine-as-fair-and-balanced-2008-11-04.html>. However, Democratic support for the Doctrine is not universal; through a spokesman, President-Elect Obama has stated that he "does not support reimposing the Fairness Doctrine on broadcasters." Jesse Walker, *Beyond the Fairness Doctrine*, REASON, Nov. 2008, at 36, available at <http://www.reason.com/news/show/129228.html>.

<sup>54</sup> *See* Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. (2005); Meaningful Expression of Democracy in America Act, H.R. 4710, 108th Cong. (2004).

<sup>55</sup> Broadcaster Freedom Act of 2007, S. 1748, 110th Cong.

<sup>56</sup> *See id.* For the companion bill in the House of Representatives, *see* Broadcaster Freedom Act of 2007, H.R. 2905, 110th Cong.



¶20 Regardless of the political wrangling, it is likely that the Court will strike down any attempt to apply the Fairness Doctrine to the Internet as inconsistent with *Red Lion*. In the following sections, this iBrief outlines particular problems with expanding the broadcasting paradigm of the Fairness Doctrine to the Internet.

*B. Who to Regulate—Who “Broadcasts” the Internet?*

¶21 The first, and largest, problem is that the Internet “decouples” the strong link between transmission and content; therefore, there is nothing on the Internet that is directly analogous to a television or radio broadcaster. Television broadcasters both transmit data and control its content, so that when a person watches NBC, they are only seeing NBC’s programming. Conversely, on the Internet, the signal comes to a home from an Internet Service Provider (ISP), such as AT&T, Comcast, Road Runner, or Verizon.<sup>57</sup> However, once a consumer has a signal, they can view any content at all—even content created by a competing ISP. While the Fairness Doctrine puts the obligation on the broadcaster to ensure that content is balanced, ISPs have no control over the content of websites that people view, so it is inherently impossible for ISPs to ensure that the websites people view are internally balanced.

¶22 Approaching this from a different angle, the government could force the website hosts to ensure that content on each website is balanced. After all, they are the ones who provide the content a way to reach individual consumers, so they are more comparable to a “broadcaster” as understood by the Fairness Doctrine. However, this solution is also impractical. In the competitive webhosting industry, the only way most companies can remain profitable is through economies of scale.<sup>58</sup> WildWestDomains.com alone hosts nineteen percent of all of the websites in the world, with over twenty million sites.<sup>59</sup> Yahoo, which purchased one of the largest domestic website hosts, Geocities, in 1999,<sup>60</sup> has just under 2.5 million sites.<sup>61</sup> Requiring these companies to monitor each website, and ensure that they have balanced content regarding issues of public importance would be a significant cost increase for these companies.

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<sup>57</sup> Alex Goldman, *Top 23 U.S. ISPs by Subscriber: Q3 2008*, ISP-PLANET, Dec. 2, 2008, <http://www.isp-planet.com/research/rankings/usa.html>.

<sup>58</sup> Philbert Shih, *The Web Hosting Price War*, WEB HOST INDUS. REV., Oct. 25, 2004, at 34, available at <http://whirmagazine.texterity.com/whirmagazine/200409/>.

<sup>59</sup> WebHosting.Info, *Top Webhosts Worldwide*, <http://www.webhosting.info/webhosts/tophosts/global/> (last visited Nov. 30, 2008).

<sup>60</sup> *Yahoo Fires 200 From GeoCities Staff, Takes \$68 Million Acquisition Charge*, CHATANOOGA TIMES FREE PRESS, May 29, 1999, at C2.

<sup>61</sup> WebHosting.Info, *supra* note 59.

Monitoring would likely discourage many website developers from creating sites, and thereby hurt these companies, and, in the long run, the diversity of the Internet.

¶23 Finally, the Fairness Doctrine could be applied to the webmasters who create the websites but do not host them. However, since many websites are just the thoughts of the person who created them, webmasters are more like individual speakers than broadcasters. Under the Fairness Doctrine, the typical remedy was to give the other side direct access to the airwaves so a biased broadcaster did not misstate the slighted party's views.<sup>62</sup> To impose this on webmasters, especially small ones, would require them to find people who espouse entirely different views, and then give them space on a webpage—a burden that would undoubtedly chill the entrepreneurial spirit that drives Internet communications.

### C. Intermediate Scrutiny

¶24 Even if the government were to get past the inherent question of “who to regulate and implement the Fairness Doctrine,” it would still need to survive judicial scrutiny. In *United States v. O'Brien*,<sup>63</sup> the Supreme Court held that content-neutral regulations of speech are subject to intermediate scrutiny.<sup>64</sup> Under *O'Brien*, a content-neutral regulation of speech must fulfill four requirements to be constitutional:

1. it must be “within the constitutional powers of the Government;”
2. it must further “an important or substantial government interest;”
3. the government interest must be “unrelated to the suppression of free expression;” and
4. the restriction on First Amendment freedoms must be “no greater than is essential to the furtherance of that interest.”<sup>65</sup>

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<sup>62</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–74 (1969).

<sup>63</sup> 391 U.S. 367 (1968).

<sup>64</sup> See *id.* at 377. For the purpose of this article, I am assuming *arguendo* that the Fairness Doctrine is content neutral; if it is not, it is subject to more exacting scrutiny, and would surely not survive. See generally Geoffrey R. Stone, *Content Neutral Regulations*, 54 U. CHI. L. REV. 46 (1987); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

<sup>65</sup> *Red Lion*, 391 U.S. at 377.

While *O'Brien* was originally about symbolic communication in burning draft cards, its intermediate scrutiny test has been applied to modern communications as well.<sup>66</sup>

¶25 In analyzing Net Neutrality in light of the *O'Brien* standards, the government's ability to regulate the Internet is soundly within its Constitutional powers, under both the Commerce Clause<sup>67</sup> and the Court's long acceptance of such regulations.<sup>68</sup> Additionally, the promotion of diverse points of view is recognized as a substantial government interests.<sup>69</sup> The government interest is ostensibly unrelated to suppressing free expression; the stated purpose is to promote more diverse expression of views. The Court has rejected arguments that the purpose of the Fairness Doctrine is to suppress freedom of speech, holding instead that the rights of the general public trump the broadcaster's freedom of the press.<sup>70</sup> However, the argument that this suppression is no greater than necessary rings hollow, with the immense amount of work that this suppression would put on website hosts.

#### *D. Scarcity and Technical Hurdles*

¶26 The Fairness Doctrine was predicated upon a scarcity rationale: since there is a limit to the amount of broadcast spectrum, the government must intervene to ensure that the few people who can broadcast do not force their political ideology on others who cannot.<sup>71</sup> However, scarcity is not an issue with the Internet. As of November 2008, there were over 185 million different websites.<sup>72</sup> Although neither Yahoo nor Google advertises the sizes of their Internet indexes, in 2005 Yahoo revealed that it has over 19.2 billion different webpages.<sup>73</sup> If the FCC found that the 1,208 channels in its 1987 report were enough to eliminate the scarcity rationale, then surely the billions of webpages now in existence should remove any fear of scarcity.<sup>74</sup>

¶27 In *Red Lion*, the Fairness Doctrine was also supported by the idea that, even if there were a number of broadcast channels, those doing the

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<sup>66</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

<sup>67</sup> See U.S. CONST. art. I, § 8, cl. 3. See also Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 904(2).

<sup>68</sup> See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion*, 395 U.S. 367.

<sup>69</sup> See *Red Lion*, 395 U.S. at 385.

<sup>70</sup> See *supra* note 29 and accompanying text.

<sup>71</sup> See *supra* notes 29, 30, 39 and accompanying text.

<sup>72</sup> *November 2008 Web Server Survey*, NETCRAFT, <http://news.netcraft.com/archives/2008/11/index.html> (last visited Nov. 30, 2008).

<sup>73</sup> Yahoo! Search Blog, *Our Blog is Growing Up and So Has Our Index*, <http://www.ysearchblog.com/archives/000172.html> (Aug. 8, 2005).

<sup>74</sup> *FCC Fairness Doctrine Report*, *supra* note 39, at 97.

broadcasting were largely those with the financial and technical means, and they were not representative of the general public.<sup>75</sup> However, the Internet is inherently unregulated and populist. With free hosting services and public computer terminals in many libraries, a person can create a website literally for free. Moreover, social networking sites marketed to teens—like MySpace and Facebook—prove that setting up a website is so easy that, quite literally, a child could do it.

*E. Is the Internet Even a “Broadcast” Medium?*

¶28 Although the Supreme Court has upheld the Fairness Doctrine as applied to television and radio, the Court has asserted that the Doctrine does not, and cannot, apply to print media.<sup>76</sup> In *Tornillo*, a Florida statute implementing a right of reply for newspaper editorials which endorsed one candidate for public office over another was held unconstitutional because it “operates as a command in the same sense as a statute or regulation forbidding [a newspaper] to publish specified matter.”<sup>77</sup> Even though this provision was virtually identical to the constitutional Fairness Doctrine, the Court nevertheless held that print media has different standards.

¶29 Classifying the Internet as either a print or broadcast medium is challenging, because the Internet is a mixed medium. A consumer can read news, listen to audio, watch video, and post messages in a blog within a single website.<sup>78</sup> Because newspapers are exempt from the Fairness Doctrine, but broadcast stations are not, the logical question is whether the Internet is more like a newspaper or a broadcast station. If it is closer to a newspaper, then the *Miami Herald* standards would govern, and the Internet would be protected from the Fairness Doctrine.

¶30 When compared against the criteria that the Court has considered relevant, it is clear that the Internet is much closer to a newspaper than a television broadcast. In *Columbia Broadcasting System*, the Court used the “captive audience” standard to justify applying the Fairness Doctrine to television but not print media. Like print media, the Internet has no “captive audience;” the viewer is free to skip to different videos, articles, or webpages at his whim, and there is no forced order of consumption. Admittedly, a website designer can force a viewer to click through a number of links to get to his desired content, but a newspaper editor can just as easily bury a story on an internal page of the newspaper. Moreover,

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<sup>75</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

<sup>76</sup> *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>77</sup> *Id.* at 256.

<sup>78</sup> *E.g.*, CNN Home Page, <http://www.cnn.com>; MSNBC Home Page, <http://www.msnbc.msn.com>.

unlike broadcast content, which is “in the air” and “omnipresent,”<sup>79</sup> Internet users can easily ignore content that they wish to avoid by never viewing a particular webpage.

### III. THE FUTURE: THE FAIRNESS DOCTRINE, NET NEUTRALITY, AND TOMORROW’S INTERNET

¶31 In his comments to the Heritage Foundation, Commissioner McDowell implied that not only could the Fairness Doctrine be extended to the Internet, but it could be “intertwined into the Net Neutrality battle.”<sup>80</sup> Like the rest of McDowell’s comments, this was highly controversial but not entirely irrational. While it is highly unlikely that the Supreme Court would allow Congress or the FCC to implement the Fairness Doctrine directly on the Internet, it is possible that many of the same principles could be used to justify legislating some form of Net Neutrality. The debate is confusing, in large part because both sides are blurring the meaning of “Net Neutrality” to force their own agenda. Overall, while the Fairness Doctrine cannot be constitutionally applied to the Internet per se, it is possible that Net Neutrality could be.

#### A. Defining Net Neutrality

¶32 The biggest problem behind any discussion of Net Neutrality is the lack of a clear definition. To alleviate some of this confusion, this iBrief will divide Net Neutrality into two different concepts: content neutrality and packet neutrality.

##### 1. Content Neutrality

¶33 This iBrief will define content neutrality as preventing “Internet providers from blocking, speeding up or slowing down Web content based on its source, ownership or destination.”<sup>81</sup> As its name implies, content neutrality means that an ISP cannot slow down data transmission based on the content of a message. Under content neutrality, an email message from the Democratic National Committee is given the same treatment as a message from the Republican National Committee, and an Internet video from Greenpeace is transmitted at the same speed as a video from the National Rifle Association. However, under content neutrality, the ISP could slow down transmission of all videos, or all audio clips, so long as it

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<sup>79</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 128 (1973) (internal quotations omitted).

<sup>80</sup> Poor, *supra* note 2.

<sup>81</sup> My definition of “content neutrality” is adopted from the Net Neutrality definition used by the Save the Internet Coalition. Save the Internet, Frequently Asked Questions, <http://www.savetheInternet.com/faq> (last visited Nov. 30, 2008).

treats them the same regardless of content or creator. In essence, the ISPs could discriminate *amongst* categories (videos, emails, etc), but not *within* a category.

## 2. Packet Neutrality

¶34 Conversely, this article defines packet neutrality as treating all individual packets of data the same, regardless of either content or category.<sup>82</sup> Under packet neutrality, a video that is eight megabytes will take eight times as long as an email that is one megabyte. The packet neutrality standard lets content providers supply any kind of information without fear that ISPs will intentionally modify data flow at all. This is the most “open” form of transferring information, and is how the Internet operates now.

### B. Why Would the Net Be Anything But Neutral?

¶35 Although the Internet is currently packet-neutral, ISPs hope to start charging content providers for speedy access to the Internet; those who pay ISPs would have their content transferred to consumers faster, whereas those who did not would see their packets move slower.<sup>83</sup> Currently, ISPs are beholden to their paying consumers; they have no incentive to move some content faster than others, since they are only responding to consumer tastes rather than content providers’ desires.

¶36 ISPs argue that they desperately need this extra income to cover the cost of laying additional Internet cable. When the Internet was originally built, no one foresaw that people would share and stream billions of videos across its lines. Accordingly, it was not built to handle such data, and the entire Internet is slowing down as a result.<sup>84</sup> Compared to the Pacific Rim and Europe, America has much slower data speeds, due largely to older physical data infrastructure.<sup>85</sup> According to EDUCASE, an organization dedicated to distance learning over the Internet, it will cost over \$100 billion to bring the U.S. Internet grid up to fiber optic speed and bring it in

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<sup>82</sup> A “packet” of data is a byte of data, or a binary string consisting of 8 bits. This is the typical size used to hold one character, and it is the basic building block of all Internet and computer communication. Netfronts – Internet Terms Glossary, <http://netfronts.com/guides/glossary.htm> (last visited Nov. 30, 2008).

<sup>83</sup> See Aman Batheja, *Idea of Web express lane sparks hot debate*, SEATTLE TIMES, Mar. 13, 2006, at E4.

<sup>84</sup> *Online Overload: Smart Networks . . . or Net Neutrality?*, HANDS OFF THE INTERNET, [http://www.handsoff.org/hoti\\_docs/quick\\_facts/internet\\_capacity.pdf](http://www.handsoff.org/hoti_docs/quick_facts/internet_capacity.pdf).

<sup>85</sup> See *Seeing the Hearing is Believing*, HANDS OFF THE INTERNET, <http://handsoff.org/blog/category/tiered-service> (May 11, 2007).

line with other countries.<sup>86</sup> Since many content providers (Google, Yahoo, Microsoft, etc.) have made billions by accessing the otherwise free Internet, ISPs reason that these companies should help to offset these costs. Moreover, many of these same content providers are responsible for the exponential increases in data moving across the Internet, which is the very reason why more cable is necessary in the first place.<sup>87</sup>

¶37 Conversely, those arguing for Net Neutrality believe that allowing ISPs to regulate content would benefit a handful of larger corporations at the expense of smaller ones, and would bring back the same regulatory problems that haunted television.<sup>88</sup> They claim that millions of small businesses also offer content, and by charging content providers, the government would harm these small businesses and put them at a disadvantage compared to larger companies, which could pay for higher-speed access.<sup>89</sup> Unlike those who oppose Net Neutrality—businesses and telecom companies—the coalition supporting Net Neutrality is truly diverse, with members from across the political spectrum.<sup>90</sup> They liken the information “superhighway” to a real “highway,” and believe that the government should ensure that Americans have equal access to their destination on both.<sup>91</sup>

### C. The Fairness Doctrine Standards Applied to Net Neutrality

¶38 The first step in evaluating the legality of content-neutral restrictions is to see if they pass the *O’Brien* intermediate scrutiny test.<sup>92</sup> As for applying the Fairness Doctrine to the Internet generally, the ability to regulate the Internet passes the first three steps of the *O’Brien* analysis.<sup>93</sup> However, while the Fairness Doctrine fails the fourth point—that this intervention is no greater than necessary—both content and packet neutrality pass this standard. In either method, the government is forcing ISPs to refrain from doing something, rather than affirmatively repressing content. Unlike broadcast stations, where there is a limit to what can be

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<sup>86</sup> JOHN WINDHAUSEN, A BLUEPRINT FOR BIG BROADBAND 1 (2008), <http://net.educause.edu/ir/library/pdf/EPO0801.pdf>.

<sup>87</sup> See *Online Overload*, *supra* note 84.

<sup>88</sup> Save the Internet, *supra* note 81.

<sup>89</sup> *Id.*

<sup>90</sup> See Save the Internet: Join Us, <http://www.savetheInternet.com/about> (last visited Nov. 30, 2008). However, a large number of the supporters are also interested in preserving business models based on free Internet access. See Open Internet Coalition: Who We Are, <http://www.openinternetcoalition.com/index.cfm?objectid=0016502C-F1F6-6035-B1264DD29499E9D0> (last visited Nov. 30, 2008).

<sup>91</sup> *Id.*

<sup>92</sup> See *supra* text accompanying notes 63–70.

<sup>93</sup> See *id.*

broadcast, Net Neutrality neither requires ISPs to transmit nor to refrain from transmitting data.

*D. The Future of Net Neutrality*

¶39 So far, many ISPs insist that they have no intention of engaging in content discrimination.<sup>94</sup> To date, the only reported telecom action in the United States resembling non-content neutral behavior was Verizon's short-lived refusal to give the National Abortion Rights Action League ("NARAL") the ability to use a mass-text messaging program.<sup>95</sup> The only reported example of Internet-based content discrimination was in Canada, where a Canadian ISP locked in a labor dispute blocked access to websites supporting its workers.<sup>96</sup>

¶40 While ISPs ardently support content neutrality, they remain clear about their opposition to packet neutrality. In 2007, Comcast was found to be intentionally slowing peer-to-peer ("P2P") communications.<sup>97</sup> Although the FCC ruled against Comcast, the ISP is appealing the Commission's ruling in a closely-watched case currently before the District of Columbia Circuit.<sup>98</sup> For now, Comcast has changed to packet-neutral slowing: those using high amounts of bandwidth for an extended period will have their

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<sup>94</sup> See, e.g., Ryan Singel, *Former Prosecutor: ISP Content Filtering Might be a 'Five Year Felony'*, THREAT LEVEL, May 22, 2008, <http://blog.wired.com/27bstroke6/2008/05/isp-content-f-1.html> (noting that Verizon now has no plans to build filters to examine Internet content). For the purposes of this article, I will not discuss ISPs' potential plans to filter out illegally-transferred copyrighted content; although this is a form of content filtering, it is not meant to affect public/political discourse, and therefore is a tangential issue. For more information on this topic, see Brad Stone, *AT&T and Other I.S.P.'s May Be Getting Ready to Filter*, BITSBLOG, Jan. 8, 2008, <http://bits.blogs.nytimes.com/2008/01/08/att-and-other-isps-may-be-getting-ready-to-filter>.

<sup>95</sup> Adam Liptak, *Verizon Rejects Text Messages From an Abortion Rights Group*, N.Y. TIMES, Sep. 27, 2007, at A1. Due to poor publicity, Verizon acquiesced and gave NARAL the ability to send text messages; Megan McArdle, *Verizon accepts NARAL's text messages after all*, ASYMMETRICAL INFO., Sept. 27, 2007, [http://meganmcardle.theatlantic.com/archives/2007/09/verizon\\_accepts\\_narals\\_text\\_messages.php](http://meganmcardle.theatlantic.com/archives/2007/09/verizon_accepts_narals_text_messages.php).

<sup>96</sup> Paul Cesarini, *Dueling Data*, CHRON HIGHER EDUC., Nov. 14, 2008, at 13.

<sup>97</sup> Cecilia Kang, *Telecom Warily Waits on "Wired" President*, WASHINGTON POST, Nov. 14, 2008, at D2.

<sup>98</sup> *Id.* See also *Comcast: Not-So-Brief Brief Roundup*, CYBERLAW CASES, Oct. 9, 2009, <http://cyberlawcases.com/2009/10/09/comcast-not-so-brief-brief-roundup>.



traffic slowed, regardless of their content.<sup>99</sup> This problem remains, however; independent testing indicates that ISPs throughout the United States are fighting against packet neutrality, typically by slowing P2P communications.<sup>100</sup>

¶41 In the next four years, Net Neutrality is all but guaranteed to emerge as one of the leading issues in American telecommunications law. President Obama has clearly stated his support of Net Neutrality,<sup>101</sup> and support for Net Neutrality crosses partisan lines.<sup>102</sup> However, using the blanket term Net Neutrality has obscured whether people support content neutrality (like most First Amendment advocates and small businesses) or packet neutrality (like most of the major content providers)—a debate which is sure to play out as different groups weigh in on new Congressional legislation or FCC regulations.

¶42 Nevertheless, it is equally clear that the Fairness Doctrine is not coming back, and certainly will not be expanded to the Internet (except possibly as Net Neutrality). President Obama opposes it, the political right scorns it, and the Internet's current variety and diversity cannot justify it.

#### CONCLUSION

¶43 In his comments to the Heritage Foundation, Commissioner McDowell was incorrect in suggesting that the Fairness Doctrine would be applied to the Internet under the guise of Net Neutrality. As this note has shown, Net Neutrality—equalizing Internet data speeds—is dramatically different from the Fairness Doctrine, which mandates balanced coverage of public issues. However, McDowell's comments did have a kernel of truth; the same principles underlying the Fairness Doctrine also apply to the legal and policy arguments surrounding Net Neutrality. While any attempt to bring the Fairness Doctrine back will almost certainly fail, it is quite possible that a modern court could find government-imposed Net Neutrality constitutional. One thing is for certain, however; in the coming months, Net Neutrality proponents need to decide if they will accept a “content” or “packet” formulation of Net Neutrality, as this will dramatically affect how they argue for its passage, both legally and with the American public.

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<sup>99</sup> See Jason Chen, *Comcast Opens Curtains On How They Filter Your Traffic*, GIZMODO, Sept. 19, 2008, <http://gizmodo.com/5052628/comcast-opens-curtains-on-how-they-filter-your-traffic>.

<sup>100</sup> See Krishna P. Gummadi, *Glasnost: Results From Tests for BitTorrent Traffic Blocking*, MAX PLANCK INST., <http://broadband.mpi-sws.org/transparency/results/> (last visited Nov. 30, 2008).

<sup>101</sup> See Walker, *supra* note 53; see also Cecilia Kang, *supra* note 97.

<sup>102</sup> See Bob Cusack, *supra* note 52.