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Back to Muzak? Congress and the Un-Fairness Doctrine

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Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.

—Bill Ruder, Democratic campaign consultant and Assistant Secretary of Commerce, Kennedy Administration[1]

The main thing is the Post is going to have damnable, damnable problems out of [its Watergate coverage]. They have a television station…and they are going to have to get it renewed."

—President Richard Nixon[2]

Should the federal government mandate "fairness" in broadcasting? "Yes," say some Members of Congress, including Speaker of the House Nancy Pelosi, who reportedly said this week that House leaders would "aggressively pursue" legislation to reinstate the "Fairness Doctrine."[3] Until it was abolished in 1987, this Federal Communications Commission rule required broadcasters to air all sides of controversial issues.

At first glance, the rule may sound innocuous. Fairness is, after all, a basic American value. But as a matter of principle, any such government controls on media content is anathema to constitutional guarantees of free speech. And in practice, the so-called fairness doctrine was deeply unfair.

Dulling Down Broadcasting. Rather than foster full and fair discussion of public issues, the real effect of the Fairness Doctrine was to discourage discussion of controversial issues of any kind. It's no coincidence that such media as talk radio—virtually non-existent while the rule was in place—flowered after its repeal. Rather than the vast wasteland of bland muzak-like discussion it was before, broadcasting—especially radio—has become a platform for vibrant and controversial debate on countless issues.

The Fairness Doctrine was developed by the FCC over a long period, based on its broad authority under the Communications Act to regulate the airwaves. The rule was first articulated in 1949, when television was in its infancy and radio meant a handful of AM stations in each market. In its final form, the rule required broadcasters to "afford reasonable opportunity for discussion of contrasting points of view on controversial matters of public importance."[4]

The vagueness of the standard left quite a bit of uncertainty. What is a "reasonable" opportunity? How many "contrasting" views? Station managers whose programming ventured too far into contro-

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versial subjects could quite easily find themselves subject to a fairness doctrine challenge. And even if the challenge ultimately failed, the cost of defending against it could be substantial. So the safe route for most was to stay far away from controversy. As a result, policy discussion on the airwaves for decades was, for the most part, as bland as cottage cheese.

Political Abuse. This "chilling" effect was exacerbated by political abuse of the system. Politicians of both parties used the doctrine to further their political ends. Political strategists for Kennedy and Johnson, for example, consciously used the Fairness Doctrine to cow political opponents. According to statements from party activists, there was an explicit strategy to raise the cost of critical programming, and thus get it dropped entirely. "Perhaps…our tactics were too aggressive," one party operative is quoted as saying, "but we were up against ultra-right preachers who were saying vicious things about Kennedy and Johnson."[5]

The political use of the Fairness Doctrine was brought to new heights by President Richard Nixon. According to Jesse Walker of *Reason* magazine, "private activists directed by the Republican National Committee regularly filed Fairness Doctrine challenges against stations whose reporting angered the White House."[6]

Demise of the Fairness Doctrine. The constitutionality of the Fairness Doctrine was challenged in the 1969 case *Red Lion v. FCC*[7], involving a religious broadcaster who was fined by the FCC for not providing a person criticized on the air an opportunity to reply. The Supreme Court upheld the rule, reasoning that because broadcast frequencies were scarce, the government may intervene in broadcast media in ways that would not be allowed toward traditional media, such as newspapers.

The decision in *Red Lion*, however, has been subject to intense criticism.[8] And in 1987, the FCC rescinded the Fairness Doctrine, finding it to be contrary to the Constitution as well as bad policy.[9] In its landmark decision, the Commission wrote:

> We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intrusion into the editorial discretion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists.[10]

The FCC's decision to rescind the doctrine was later upheld by a federal appeals court. In so doing, however, the court did not pass judgment on the constitutionality of the rule and instead relied on

1. Quoted in Jesse Walker, "Tuning Out Free Speech," *The American Conservative*, April 23, 2007, at *www.amconmag.com/2007/2007_04_23/article3.html*.
2. Quoted in Thomas W. Hazlett and David W. Sosa, "Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting," Cato Institute *Policy Analysis* No. 270, March 19, 1997.
3. See "Her Royal Fairness, *The American Spectator*, May 14, 2007, at *www.spectator.org/dsp_article.asp?art_id=11427*.
4. For general background on the development of the rule, see Museum of Broadcast Communications, "Fairness Doctrine" at *http://www.museum.tv/archives/etv/F/htmlF/fairnessdoct/fairnessdoct.htm*.
5. Quoted in Jesse Walker, "Tuning Out Free Speech," *The American Conservative*, April 23, 2007, at *www.amconmag.com/2007/2007_04_23/article3.html*.
6. *Ibid*.
7. *Red Lion v. FCC*, 395 U.S. 367 (1969).
8. See, e.g.., William Van Alstyne, The Mobius Strip of the First Amendment: Perspectives on *Red Lion*, 29 S. Carolina. L. Rev. 539, 547-48 (1978) (listing many of the leading articles in the first decade after the decision) at *http://eprints.law.duke.edu/archive/00000564/01/29_S._C._L._Rev._539_(1978-1979).pdf*).
9. The agency had originally declined to consider the question of whether the rule was constitutional. In early 1987, however, a federal court held that the FCC could not enforce the doctrine unless it considered the constitutional objections. *Meredith v. FCC*, 809 F. 2d 863 (1987).
10. *Syracuse Peace Council*, 2 FCC Reports 5043 (1987).

the FCC's policy findings that it did not serve the public interest.[11]

Red Lion is still formally in place. But in years since, the basic "spectrum scarcity" rationale of *Red Lion* (and thus the constitutionality of fairness rules) has become ever weaker. Not only have new broadcast frequencies—such as the UHF television and FM radio bands—been put into use, but entirely new systems such as cable TV and satellite radio have been created, offering consumers hundreds of channels when before they only had a handful.[12] And the Internet has made notions of scarcity almost meaningless.[13]

At the same time, broadcasters—especially radio broadcasters—became much more willing to air controversial points of view, in large part because of the repeal of the FCC's fairness rule. Most notably, talk radio, which had been a relatively rare format, exploded in scope and popularity. In 1990, there were some 400 stations with a talk show format nationwide. By 2006, there were more than 1,400 stations devoted entirely to talk formats.[14] Programming shed its cottage cheese-like character, as controversial new hosts, such as Rush Limbaugh, gained airtime and the freedom to express strong opinions and views without fear of regulatory reprisal. According to the Project for Excellence in Journalism:

> With the [Fairness] Doctrine's repeal, radio shows could become more one-sided, more free-wheeling, ideological and political. And it didn't take long. One of the first to gain popularity under the new rules was a new voice out of California named Rush Limbaugh. Within a year or two of the new rules, Limbaugh's provocative denunciations of Democrats became a phenomenon. Stations quickly began to pick up his syndicated show, and other conservative names followed his lead. Being controversial seemed a plus.[15]

Not all the changes, of course, were due to the Fairness Doctrine repeal. Other factors, such as the rise of FM radio, were at work. But, as documented by economists Thomas Hazlett and David W. Sosa, the regulatory change had a substantial causal effect.[16]

Government-Enforced "Balance." Many supporters of the Fairness Doctrine are concerned about this explosion of information because they see it as the wrong kind of information. Many are frankly concerned about the amount of "conservative" programming, especially in talk radio, and would like to see a different balance.

Certainly, conservative-oriented talk radio has been more successful than left-leaning radio programming. But broadcasting is only one small part of today's media universe, which includes not just radio and television broadcasting but print, cable, and Internet sources. Conservatives have had no lock on opportunities, even in radio. Programming with a liberal bent, from Mario Cuomo's show to Air America, has been given opportunities and will get more.

Moreover, arguments that the Fairness Doctrine is needed because certain types of media are too conservative, too negative, too partisan, or too any-

11. *Syracuse Peace Council*, 867 F. 2d 654 (D.C. Cir. (1989)).
12. Many believe that due to these developments, combined with the longstanding legal criticism of the Red Lion case, were it to be reconsidered today, it would be decided differently. A study published two years ago by the FCC itself makes this case convincingly. See, John W. Berresford, "The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed," FCC Media Bureau Staff Research Paper, March 2005, at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf*.
13. See Adam D. Thierer, "The Media Cornucopia," *City Journal*, Spring 2007, at *www.city-journal.org/html/17_2_media.html*.
14. Project on Excellence in Journalism, "The State of the News Media 2007: An Annual Report on American Journalism, Talk Radio page, at *www.stateofthenewsmedia.org/2007/narrative_radio_talk_radio.asp?cat=8&media=9*.
15. Project on Excellence in Journalism, "The State of the News Media 2007: An Annual Report on American Journalism, Talk Radio page, at */www.stateofthenewsmedia.org/2007/narrative_radio_talk_radio.asp?cat=8&media=9*.
16. Thomas W. Hazlett and David W. Sosa, "Was the Fairness Doctrine a "Chilling Effect? Evidence from the Post-deregulation Radio Market," 26 *Journal of Legal Studies* 279 (1997).

thing actually strengthen the case against the regulation. Any law that is targeted at media based on the content of what is being said raises greater constitutional concerns and is much less likely to pass constitutional muster—and for good reason. Regulating speech in order to alter its content is exactly the sort of meddling that the First Amendment is meant to prohibit. It is simply not the job of politicians to "correct" the mix of opinions being expressed in the marketplace of ideas, even if—and especially if—they disagree with those opinions.

Conclusion. The Federal Communications Commission did the right thing 20 years ago in throwing this unnecessary, counter-productive, and unwise restriction on speech into the regulatory dustbin. It should be left there. To do otherwise would be dangerous and unconstitutional.

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