

The Fairness Doctrine

Background

The Fairness Doctrine was developed by the Federal Communications Commission (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."ⁱ

Because "fairness" is a basic American value, the Fairness Doctrine at first glance may seem innocuous. 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.

Part of the problem with the Fairness Doctrine is the vagueness of its standards. What is a "reasonable" opportunity? How many "contrasting" views? 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. Station managers whose programming ventured too far into controversial 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.

During its 38 years of existence, abuse of the Fairness Doctrine was committed by both political parties. During the presidencies of John F. Kennedy and Lyndon Johnson, Democrats used the Doctrine to make

ISSUE SNAPSHOT

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it risky for political opponents to broadcast openly critical programming. "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."ⁱⁱ

Republicans also used the Fairness Doctrine to advance their own political ends during Richard Nixon's tenure as president. 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."ⁱⁱⁱ

A Legal Challenge: The constitutionality of the Fairness Doctrine was challenged in the 1969 case *Red Lion v. FCC*, 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.

GUIDE TO THE ISSUES

The decision in *Red Lion*, however, has been subject to intense criticism. And in 1987, the FCC rescinded the Fairness Doctrine, finding it to be contrary to the Constitution as well as bad policy. 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.^{iv}

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

Red Lion is still formally in place. But in the 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. And the Internet has made notions of scarcity almost meaningless.

Policy Consideration

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 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 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 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 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.

Recommendation

The Fairness Doctrine should remain rescinded.

Further Reading

- James L. Gattuso, "Back to Muzak? Congress and the Un-Fairness Doctrine." Heritage Foundation *WebMemo* #1472, May 23, 2007. Available at <http://tinyurl.com/4lmcvjr>. Access verified February 12, 2011.

ⁱ For general background on the development of the rule, see Museum of Broadcast Communications, "Fairness Doctrine" at <http://tinyurl.com/27z77lr>.

ⁱⁱ Jesse Walker, "Tuning Out Free Speech." *The American Conservative*, April 23, 2007. Available at <http://tinyurl.com/62g6oq8>. Access verified February 12, 2011.

ⁱⁱⁱ *Ibid.*

^{iv} *Syracuse Peace Council*, 2 FCC Reports 5043 (1987).