

# ABOUT THOSE “PUBLIC” AIRWAVES

## THE DISCREDITED NOTIONS BEHIND THE FAIRNESS DOCTRINE

CHARLES J. SYKES

Last year, in the midst of her successful campaign to take control of the state senate, Democratic leader Judy Robson took time out to send an extraordinary appeal to “progressive” activists:

Republicans no longer need to rely solely on a couple of talking heads in Milwaukee to tout their failed policies and misplaced priorities. *(Editor’s note: I assume this refers at least in part to me.)*

The GOP is plotting a massive takeover of Wisconsin airwaves. This stop-at-nothing assault has triggered an epic battle to ensure media outlets across the state don't become mouthpieces for the narrow, misguided, and divisive agenda embraced solely by extremists on the radical right.

Wisconsin doesn't need more venom-spewing radio talkers. Wisconsin doesn't deserve airwaves with nothing but vitriol. . . .

Should the same people who want to write discrimination into the state constitution, take us back to the Dark Ages with the death penalty, and stop stem cell research be in charge of programming the radio station in your hometown? Their politics of divide and conquer can no longer be propagated over what are supposed to be publicly owned airwaves. . . .



The future Senate Majority Leader waxed prophetic:

Imagine . . . national progressive talk combined with local hosts that feature honest news from across the state, nation, and world.

Senate Democrats have not stood alone in this progressive endeavor . . . we are working with the founders of Air America radio, Anita and Shelly

Drobny, to identify and acquire other Wisconsin radio stations for progressive formats. Their company, Nova M., has already begun radio acquisition discussions in several communities. We believe Democrats, progressives, and libertarians across the state are ready to help raise funds and build the grassroots support needed to ensure the success of this endeavor. . . .

It's time that we stand up and secure our own future. It's time to bring an honest, progressive alternative to Wisconsin's airwaves. . . .

Sincerely,  
Judy Robson  
Senate Democratic Leader

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That was Plan A.

### **Plan B**

As Robson's perfervid letter made clear, "progressives" are obsessed with the continuing success of conservative talk radio and the concomitant failure of the left to find an on-air alternative.

Along with many of her fellow liberals, she seems to believe that with the exception of *ABC, CBS, NBC, CNN, The New York Times, The Washington Post, The Los Angeles Times, The Chicago Tribune, The Capital Times, Public Television, Public Radio, Time, Newsweek, The Today Show, Al Franken, Michael Moore, Hollywood, prime time television, Maureen Dowd, John Nichols, Dave Zweifel, the Rolling Stone, the Nation, and the internet*—liberals just can't get their message out.

But despite their fondest wishes, Air America—despite the hype and the urgent fund-raising appeals—has been a colossal bust. The failure of the alternative "progressive" network has caused "progressives" to turn to Plan B: the return of the Fairness Doctrine.

Leading Senate Democrats, including Dianne Feinstein, John Kerry, and Richard Durbin have all endorsed resurrecting the hoary, discarded rule, whose restoration appears to resonate deeply with the movement's liberal base. The Center for American Progress, a think-tank with close ties to Hillary Rodham Clinton, has added weight to the push, arguing that conservative dominance of the radio airwaves was not a matter of market choices, but "regulatory failures," caused in part by the repeal of the Fairness Doctrine—which once required broadcasters to present both sides of controversial issues.

But "fairness" is a misnomer here: What the return of the Fairness Doctrine really means is the return of heavy-handed, content-based speech regulation by the Federal Communications Commission. Before its repeal in 1987, it was aimed not merely at greater government control of speech, but government *suppression of certain kinds of speech.*

Democratic administrations used the doctrine to intimidate right wing broadcasters; Republicans used it to threaten left-wing media. All in the name of "fairness."

At best, the Fairness Doctrine would be Affirmative Action for Air America. At worst, it would be a cudgel to bludgeon troublesome political opponents, a symbol of the extraordinary willingness of politicians to use their power to gag the political speech of critics.

But the problems for the progressive's Plan B run even deeper.

Despite the current enthusiasm for its restoration, the Fairness Doctrine is both legally and technologically obsolete, based on principles that have already been rejected by the courts, and justifications that have been swept away by the transformation in the media over the last two decades.

At the time the doctrine was first promulgated, there were only three networks and a mere handful of broadcast outlets. Today there are hundreds: satellite radio, cable television, and the internet. The case for government control has never been weaker.

### **Regulate, litigate, chill**

The original Fairness Doctrine was written in 1949, when the Federal Communications Commission issued a rule that required broadcasters to devote a certain amount of time to discussions of public affairs "of interest to the community served by the particular station." The commission also tacked on a requirement that broadcasters present "the different attitudes and viewpoints concerning those vital and often controversial issues which are held by the various groups which make up the community."

In 1969, the U.S. Supreme Court upheld the constitutionality of the rule in a case of on-air "personal attack." The decision seemed to treat broadcasters as essentially public utilities. In *Red Lion Broadcasting Co. v. FCC*, the justices ruled that:

There is nothing in the First Amendment which prevents the Government from

requiring a licensee to share his frequency with others. . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.<sup>1</sup>

Although the justices upheld the doctrine, the Court also warned that its approval was conditional: if its enforcement ever restrained speech, the justices warned, its constitutionality should be reconsidered.

Indeed, in practice, the doctrine demonstrably did *not* lead to freer debate or more vigorous public debate. Enforcing fairness, in reality, required the government to employ the equivalent of speech police.

The *National Review's* Byron York quotes Jim McKinney, the former head of FCC's Mass Media Bureau, describing how the regulators responded to a complaint based on the doctrine. First bureaucrats would have to determine whether the questionable opinion dealt with an issue of local importance in the community. Second, they had to see how that issue was treated by other media in the community, as well, as by the broadcaster.

"That required them to get local newspapers and listen to tape recordings that a complainant sent in, and ask the broadcaster to provide any other material they had done on the same topic."

Then McKinney recalls, regulators would literally "pull out stop watches. They would get out the tape and they would start timing how many minutes and seconds a broadcaster had devoted to the issue. . . . And then, depending on how that came out, they would either close the investigation, or they would prepare an item for the commission to take an enforcement action."<sup>2</sup>

If the goal was to foster a more vigorous

debate, the Fairness Doctrine failed miserably; if it was to chill the expression of inconvenient opinion, it was demonstrably successful. Throughout the 1970s and 1980s, broadcasters, who were fearful of the time and the cost of compliance, simply opted to shut down controversial debate, avoiding whenever possible the discussion of issues that might trigger the regulatory nightmare. As a result, rarely did politicians have to worry about being pilloried or even criticized by radio hosts or even by on-air editorialists, whose weak and insipid commentary became monuments to the chilling effect of the Fairness Doctrine.

Under the reign of the Fairness Doctrine radio went silent on controversial issues and the AM band in particular remained a vast and neglected wasteland until 1987, when the rule was lifted.

#### What bright line?

Even though the doctrine was not dropped until 1987, it had been on a collision course with the Constitution for years.

Communications law expert Fred Cate notes that the First Amendment—

"Congress shall make no law . . . abridging the freedom of speech or of the press"—does not confer a right of access to a diversity of views.<sup>3</sup> To the contrary, he notes, "the U.S. Supreme Court has repeatedly asserted that the First Amendment was fashioned to assure *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people."<sup>4</sup>

Specifically, the Court had ruled that any sort of Fairness Doctrine for newspapers was patently a violation of the First Amendment. In *Miami Herald Publishing Company v. Tornillo*, the justices ruled that a law granting a right-of-reply to the content of a newspaper was "governmental coercion" and contravened "the express provisions of the First Amendment

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and the judicial loss on that amendment developed over the years." Any attempt to legislate "a right of reply," the Court held, inevitably "intrude[d] into the function of editors."

Compelling newspapers "to print that which it would not otherwise print," the justices ruled, would have the effect of reducing public debate and the free exchange of ideas. "[U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced."

Writing for a unanimous court, Chief Justice Warren Burger wrote: "Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate."<sup>5</sup>

He could have been writing the epitaph for the Fairness Doctrine. But the ruling applied only to non-broadcast media.

A fairness doctrine for other forms of speech was unconstitutional, the Court had said, but the regulation of broadcast speech still hung by a tenuous thread.

But is there indeed a bright line between the protected speech of the press, cable, and satellite on the one hand and speech that is broadcast through the air?

Is there something about broadcast that makes it uniquely subject to government censorship and control? Is radio uniquely exempted from constitutional protections extended to virtually every other form of expression?

Supporters of the Fairness Doctrine argued then, and now, that broadcast speech is uniquely subject to government regulation because it is carried over what Robson called the "publicly owned airwaves." According to this argument, the scarcity of spots on radio and television spectrum justified government regulation, exempted broadcast speech from the First Amendment protections enjoyed by newspapers, the internet, or disseminated on cable, or via satellite.

For "progressive" advocates of the Fairness Doctrine, broadcast stands alone.

But should it?

The First Amendment was written at a time when ideas could be expressed and disseminated in only two ways: through speech or through the press. The first amendment absolutely bars Congress from limiting either sort of expression. But liberals, who are usually enamored of the idea of a "living constitution," ironically become the strictest of strict constructionists when they argue that because broadcast is not specifically mentioned, the government has the power to gag speech transmitted through the airwaves.

Can anyone seriously doubt that if radio had existed in colonial times, the Founders would not have extended the ban on government speech suppression to broadcast as well? By the constrained logic of the left that excluded broadcasting from constitutional protection, there is no constitutional authorization for the federal government to create an Air Force, since there were no air planes in 1787, and no such force is explicitly mentioned in the constitution.

But does the fact that broadcasters use "public owned airwaves" justify government regulation of the content of their speech?

Indeed, the argument that the airwaves are "public," undermines itself. Far from granting the government greater powers for regulation, the fact that airwaves are public ought to give such speech even greater protection. Private individuals or entities can limit speech, but not the government: speech in a private mall or office can be regulated; but speech in the public square enjoys special protections, precisely because it is public, where the powers of the censor are the most tightly constrained.

For example, a private property owner can ban an anti-war march on his property, but a city government cannot ban outbreaks of dissent in public places, except under extraordinary circumstances. A private college can limit speech; a public university has far less authority, precisely because it is public. In the same vein: civil rights demonstrations on public streets cannot be compelled to also provide an equal number of signs, speakers, or chants to opponents or vice versa.

It is precisely because the speech is in a public venue that it is most protected, not vice versa, as Fairness Doctrine advocates would have it.

It gets worse.

The argument that broadcast speech can be regulated because it is carried on “public airwaves,” could also be applied to newspapers that are, after all, delivered using publicly-owned roads; cable stations are transmitted over government-sanctioned cable lines; satellites transmit through the (publicly owned?) atmosphere; and magazines and other materials are sent through the U.S. Mail. Are they also subject to government regulation because of their mode of dissemination?

Should activists who use the mails to propagate their causes be compelled to send an equal number of letters advocating the other side? And what of cell-phone users, whose conversations presumably also take place over “public airwaves”?

#### Shaky legal ground

The courts have repeatedly addressed the flaws in the defenses of the doctrine. In the mid-1980s, the Court of Appeals for the D.C. Circuit specifically rejected the argument that the government’s granting of usable frequencies to broadcasters was a justification for granting broadcast speech a lesser standard of free speech protections.

“A publisher can deliver his newspapers only because the government provides streets and regulates traffic on the streets by allocating rights of way,” the judges wrote. “Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government’s function in allocating broadcast frequencies, could justify regulation of the content of the newspaper to ensure that it serves the needs of the citizens.”<sup>6</sup>

But what about the argument that government regulation of broadcast is justified by the “scarcity” of spots on the broadcast spectrum?

The same court ruled that:

There is nothing uniquely scarce about the broadcast spectrum. Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Company v. the United States*, and it appears currently “the number of broadcast . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried.”<sup>7</sup> Indeed, many markets have a far greater number of broadcasting stations than newspapers.<sup>8</sup>

The court went on to find:

The basic difficulty in this entire area is that the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference . . . .

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a

way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wished to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, you can hardly explain regulation in one context and not another.

By 2007, the argument that broadcast scarcity justifies government regulation seems even more absurd. What after all is scarcer than daily newspapers? Most cities may have half a dozen television outlets, several dozen radio stations, and hundreds of cable channels but are unlikely to have more than a single

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daily paper. In the digital age, the notion that government should regulate speech on radio because it is scarce, but not in newspapers, has become increasingly untenable.

### The end of “fairness”

In abolishing the Fairness Doctrine, the FCC acknowledged all of these logical and constitutional flaws. In August 1987, by a 4-0 vote, the FCC decided that:

[T]he intrusion by government into the content of programming occasioned by the enforcement of [the Fairness Doctrine] restricts the journalistic freedom of broadcasters . . . [and] actually inhibits the presentation of controversial issues of public importance to the detriment of the public and the degradation of the editorial prerogative of broadcast journalists.<sup>10</sup>

Commissioners took note of both recent court decisions and the flood of new technologies: “[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision,” the FCC declared, “together with a consideration of fundamental capital First Amendment principles provides an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*.”

Most important of all, the FCC declared that “the constitutional principles applicable to the printed press should be equally applicable to the electronic press.”

Twenty years later that principle remains unchallenged, except by politicians anxious to use their clout to bring back the speech police with their tape recorders and stop watches.

A reliable measure of the actual impact of the Doctrine was what happened when it was repealed: a veritable explosion of outlets—radio, television, cable, wireless, and satellite—and the spread of over-the-air debate and exchange of ideas that would have been unimaginable under the smothering influence of the Fairness Doctrine.

But what would happen if Democrats do, in fact, succeed in restoring the Fairness Doctrine?

By the left’s own account, the regulators will be quite busy: the liberal Center for American Progress estimates that more than 1,700 radio stations around the country have some form of talk show, with 50 million listeners a week. Each weekday, they figure, more than 2,824 hours of political talk (most of it conservative) are broadcast on those stations.<sup>11</sup>

On an annual basis that comes to 146,848 hours of regulated speech, requiring mountains of tape machines and stop watches—and an almost unimaginable explosion in the number of speech policeman needed to maintain “fairness.”

But in an era of podcasts, cable, satellites, and the internet, attempting to regulate speech is like trying to put smoke back in a bottle—even in the name of a goal as seemingly attractive, but elusive, as “fairness.” In the unlikely event that the new regime survived constitutional challenge, a restored Fairness Doctrine would probably merely shift the raucous political debate from broadcast to the internet, satellite radio, and cable.

The speech police would find that their prey had fled. But isn’t that what the Founders had in the mind?

As Justice Potter Stewart wrote:

Those 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 far too fragile to be left for a government bureaucracy to accomplish.<sup>12</sup>

### Notes

1. *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367 (1969).
2. Byron York, “An Unfair Doctrine,” *National Review*, July 10, 2007.
3. Fred Cate, “The First Amendment and Compulsory Access to Cable Television,” <http://www.annenbergnorthwestern.edu/pubs/cable/cable09.htm#29>
4. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (emphasis added); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

5. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1971).
6. *Telecommunications Research & Action Center v. Federal Communications Commission*, 801 F.2d 501 (D.C. Cir.), petition for reh'g en banc denied, 806 F. 2d 1115 (D.C. Cir. 1986), cert.denied, 482 U.S. 918 (1987); *Branch v. Federal Communications Commission*, 824 F2d 37 (D.C. Cir.), cert.denied, 485 U.S. 959 (1988); *Meredith Corp. v. Federal Communications Commission*, 809 F.2d 863 (D.C. Cir. 1987).
7. *Loveday v. FCC*, 707 F. 2d 1443, 1459 (D.C. Cir.), cert.denied, 464 U.S. 1008 (1983) (citing *National Broadcasting Co. , Inc v. United States*, 319 U.S. 190 (1943)).
8. 801 F.2d at 509 m. 4 (citations omitted).
9. *Id.* at 508 (footnote omitted).
10. *Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, 5056,63 Rad. Reg 2d (P&F) 541, 583 (1987).
11. John Halpin, James Heidbreder, Mark Lloyd, Paul Woodhull, Ben Scott, Josh Silver, S. Derek Turner, "The Structural Imbalance of Political Talk Radio," June 20, 2007, Center for American Progress.
12. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 145-46 (1973) (Stewart, J., concurring).