

# The Thing That Would Not Die: With Media Saturation, Why Does the Fairness Doctrine Keep Returning?

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“Fairness” is an ideal that most people would like media outlets to embrace, but as a federal policy for television and radio, it's been dead for more than 20 years.

Yet despite that, the rule known as the Fairness Doctrine won't go away.

Democratic U.S. senators including Dick Durbin of Illinois and John Kerry of Massachusetts have advocated reinstating the Fairness Doctrine, and it's often promoted as a balance to the continued efforts of the Federal Communications Commission (FCC) to relax media-ownership restrictions.

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And according to a recent survey, nearly half of Americans support the idea as a government mandate.

It's unlikely the Fairness Doctrine will be resurrected any time soon. The House resoundingly, preemptively blocked it last year, and both John McCain and Barack Obama oppose it. And while the FCC could theoretically impose it on its own, it would run into staunch political resistance in Congress.

Yet the Fairness Doctrine is worth talking about and considering, in part because on the surface it *seems* so anachronistic. Why should the government impose a "fairness" requirement when our current media environment provides an outlet for seemingly every possible perspective?

## **Spectrum Scarcity**

From 1949 to 1987, the Federal Communications Commission had the Fairness Doctrine as a rule.

The rule had several forms, but as Steve Rendall, a senior analyst with the liberal Fairness & Accuracy in Reporting (FAIR), summarized in a 2005 article: "The Fairness Doctrine had two basic elements: It required broadcasters to devote some of their airtime to discussing controversial matters of public interest, and to air contrasting views regarding those matters. Stations were given wide latitude as to how to provide contrasting views: It could be done through news segments, public-affairs shows, or editorials."

The first premise for the Fairness Doctrine is that television and radio stations use airwaves that belong to the public.

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The second premise is that the available space for television and radio signals is limited. This is known as "spectrum scarcity," meaning that there are a finite number of frequencies in any given market, and that the government must take some role in regulating them through broadcast licenses.

"The government has given monopoly rights of free speech to those who hold the license," Rendall said last week.

As the Supreme Court ruled in 1969 in affirming the Fairness Doctrine: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

This is why broadcast television and radio are different from newspapers' or citizens' rights to free speech. Everybody can distribute printed material, and everybody can speak on a street corner. But, as Rendall pointed out, if you try broadcasting a radio or television signal without a license, you'll be arrested. "There is no free speech on the airwaves," he said.

Broadcasting is a privilege rather than a right, and the government has traditionally required broadcasters to operate in the public interest as a condition of holding a license.

In return, the public has rights, too, Rendall said. The Fairness Doctrine told "citizens and community groups that they have a right to ask something of the trustees of the publicly owned airwaves," he said. If their perspectives weren't being represented, they could complain to the broadcast station. If they didn't get a satisfactory resolution, they could complain to the FCC, which could then force a broadcaster to represent different viewpoints on a particular topic.

Despite the proliferation of new media, the premises of the Fairness Doctrine remain. "Spectrum scarcity hasn't changed," Rendall said. "It's a law of physics. You don't have more radio spectrum."

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Yet from a practical perspective, the Fairness Doctrine looks and feels like a relic of pre-digital age.

The four decades it was in place largely preceded the deep penetration of cable television, thus making the "spectrum scarcity" argument relevant. The limited number of broadcast licenses mirrored the public's sparse choices for television and radio news.

The time since the FCC abandoned the Fairness Doctrine - as part of the larger movement toward deregulation - has seen an explosion of widely used entertainment and news options beyond terrestrial television and radio stations: satellite radio, cable television, satellite television, and the Internet.

So while the theoretical and legal foundations of the Fairness Doctrine are still sound, on the surface it doesn't make much sense in our current media climate.

## **Growing Support and Political Obstacles**

The political interest of Democrats in reinstating the rule is easy to discern: the dominance of conservative shows on talk radio. If the Fairness Doctrine is in place, those voices would be silenced or at least balanced on broadcast radio and television.

But public support for the Fairness Doctrine seems to be growing, as well.

Last month, Rasmussen Reports released a survey addressing the Fairness Doctrine: "Nearly half of Americans (47 percent) believe the government should require all radio and television stations to offer equal amounts of conservative and liberal political commentary

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... . Thirty-nine percent say leave radio and TV alone ... .&quot;

In 2007, 41 percent supported this broad concept of government-required fairness in broadcast media, while 41 percent opposed it.

The support that Rasmussen found was not in a vacuum. The company reported that the public understands that there's no scarcity of opinion diversity in media overall: &quot;At the same time, 71 percent say it is already possible for just about any political view to be heard in today's media ... . Twenty percent do not agree.&quot;

The Fairness Doctrine could come back through several channels. Congress could make the Fairness Doctrine law, as it tried to do several times after the FCC abandoned it in 1987. Or the FCC could simply re-adopt the Fairness Doctrine as a rule.

But neither is likely to happen soon. Last year, the House voted 309 to 115 to prohibit the FCC from using funds to re-implement the Fairness Doctrine or its equivalent. That vote symbolizes the political opposition to the Fairness Doctrine. Representatives of the Quad Cities - both Democrats - were split on the vote, with Bruce Braley of Iowa voting against blocking the Fairness Doctrine, and Phil Hare of Illinois voting in favor.

## Back-Door Efforts

James L. Gattuso, a senior research fellow in regulatory policy from the conservative Heritage Foundation, said he doubts the Fairness Doctrine as it previously existed is going to return.

Yet he said he's concerned that the FCC, through its &quot;localism&quot; and &quot;enhanced disclosure&quot; initiatives - neither of which has been finalized or put in place

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yet, according to an FCC spokesperson - will create a back-door equivalent of the Fairness Doctrine.

"There is a real danger of the Fairness Doctrine coming back in effect," Gattuso said. The tightening of public-interest requirements and re-licensing procedures, he said, is "aimed at strengthening political control of the content of radio and television broadcasting. That, I think, is tantamount to reinstitution of the Fairness Doctrine. ... I think it's clearly leading to that. ... There's an interest in government controls on the content of broadcast in order to mandate a type of fairness, a perceived fairness."

Kristopher Jones, the director of media relations for the National Association of Broadcasters, doesn't equate new public-interest requirements with the return of the Fairness Doctrine, but he claimed that broadcast outlets are essentially self-regulating.

"Broadcasters are vested wholly in their community," Jones said. "Broadcasters have no quarrel with serving the public interest. We know that is the lifeblood of our business. Our concern is that the new FCC rules are massive in their scale and scope and would burden broadcasters. To comply with this mandate, they would have to allocate resources to file paperwork with the FCC, resources that could be allocated to serving the community, to gathering news, to disseminating life-saving information during times of emergency ... . To divert the attention of a broadcast station from serving the community to filing paperwork telling how they're serving the community is wrongheaded."

Larry Rosmilso, the manager of WQAD TV who has been in broadcasting since the early 1970s, suggested that those concerns were overblown. Paperwork is the cost of doing business in broadcasting, he said: "We're used to that."

Still, FAIR's Rendall said that he prefers the Fairness Doctrine to some regulatory equivalent.

"One of the things I like about the Fairness Doctrine ... is how lightly it treads on the First Amendment," he said. "There is no monitoring group at the FCC that looks at it [initially]. It [the effectiveness of the Fairness Doctrine] completely depends on citizens or citizens' groups to notice that their views are not being put on the air. ... It encourages

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dialogue.&quot;

## Equal Megaphones?

Conservatives generally oppose the Fairness Doctrine - and not just because they're so thoroughly dominating talk radio. Aside from a general disposition against regulation, they argue that it's unnecessary.

&quot;The scarcity argument is certainly gone if it ever was a factor,&quot; Gattuso said. &quot;And it's not just that there's more TV and radio stations. ... There's more sources of news overall. You have hundreds of channels where you once had a handful that were all allocated by the government. And then you add in the Internet, which gives you really a limitless number of channels. The question of scarcity really has disappeared.&quot;

This argument is founded on the idea that across all media - and not just the broadcast outlets that were covered by the Fairness Doctrine - there is virtually limitless variety in the perspectives represented.

As the Heritage Foundation wrote in a 1993 paper: &quot;Even if it may once have been possible to monopolize the airwaves, and to deny access to certain viewpoints, that is impossible today.&quot;

This basically circumvents the question of spectrum scarcity by saying that the less-regulated marketplace - cable, satellite, and the Internet - has made the issue of what's broadcast over public airwaves moot on a national level.

It doesn't address the dearth of local news and a lack of diversity of perspectives among local broadcast-license holders.

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And FAIR's Rendall said that no outlet can match the reach of broadcast television and radio. Bill O'Reilly might be the king of cable talk, but the CBS evening news has nearly three times as many viewers, he said, and the nightly newscasts for the three major networks reach 20 million people each day. (That's still less than 10 percent of the U.S. adult population.) "The notion that these other media are picking up some slack and have become equal megaphones for ideas and for news and political discussion is nonsense," he said. "Broadcast is where it's at. Broadcasting is still the biggest, most-far-reaching media in the country."

The other main argument against the Fairness Doctrine is that it had a chilling effect - that broadcasters shied away from controversial topics to avoid having to present multiple perspectives.

"It never really accomplished what the proponents said it did," Gattuso said. "It didn't encourage debate, presentation of both sides of controversial issues. What it did really was discourage producers from presenting any sides of controversial issues."

"We're concerned that reinstatement of it would chill speech," added Jones of the National Association of Broadcasters. "A doctrine such as this actually has the opposite effect of what its intended objective is." Broadcasters "would avoid covering the [controversial] issue altogether to keep themselves out of trouble."

FAIR's Rendall argued that this is less a problem with the Fairness Doctrine than with citizens' use of it. For the Fairness Doctrine to be effective, citizens had to complain to broadcasters and then to the FCC.

"It required that broadcasters cover issues of public concern using differing points of view," he said. "When people say it had a chilling effect ... well that would be a violation of the Fairness Doctrine. That was the point." For example, the 1959 amendment to the Communication Act of 1934 read: "A broadcast licensee shall afford reasonable opportunity for discussion of conflicting views on matters of public importance."



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Critics further note that three presidential administrations - those of Kennedy, Johnson, and Nixon - abused the Fairness Doctrine, using it to silence critical broadcasters. A Kennedy administration official was quoted as saying: "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters in the hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."

"Those guys were breaking the law," Rendall said, and that's not a reason to dispense with the Fairness Doctrine.

Yet even supporters of the Fairness Doctrine think it's less effective than rules that combat conglomeration and facilitate greater ownership by women, racial minorities, and small businesses - who would theoretically add voices currently excluded by corporate media.

"Ideally for us, we'd like to see broadcast ownership diversified to the point that you wouldn't need the Fairness Doctrine at all," Rendall said.

In the absence of that, though, FAIR supports the Fairness Doctrine as "a weak measure meant to bring a little more diversity to the airwaves."