Legally Speaking

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"Fairness(?)" Doctrine

At this writing we now have a new president-elect, and both houses of Congress now dominated by the Democratic Party. It is not my place to offer comment on this, but I did want to examine briefly one of its possible consequences. Rep Dennis Kucinich has suggested, and Speaker of the House Nancy Pelosi has implicitly endorsed, restoration of the so-called Fairness Doctrine.

That sounds like a good thing, doesn't it? Who, after all, opposes fairness? Are we now living under the aegis of the *Un*fairness Doctrine? Aren't we Americans all about "fairness." But in practice, the Fairness Doctrine represents governmental interference in the marketplace of ideas, and something that can and has been abused for entirely partisan purposes.

The doctrine formally originated in 1949 when television was in its infancy, there was no satellite radio, no FM to speak of, and the nation had only a handful of AM radio stations. The FCC's idea was pretty simple – since there was such a limited supply of media, it made sense (at the time) to ensure that it was not dominated by a single point of view. In 1949, this meant no more than a radio station was to "afford reasonable opportunity for discussion of contrasting points of view on controversial matters of public importance." In practice, however, it was vulnerable to abuse as unpopular points of view (at least from the standpoint of the government) could be challenged through the simple expedient of demanding equal time with any given station, and taking them to court if they refused. It didn't really matter if the challenge won or lost because even successful defenses were protracted and very expensive. In a moment of rare bureaucratic candor, Bill Ruder, who was the Assistant Secretary of Commerce in the Kennedy administration and a campaign advisor to the Lyndon Johnson, admitted:

> 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.

Jumping on dissenting viewpoints was not the exclusive inclination of the Democrats. It is well documented that the Nixon administration used it to club what it viewed to be unfair coverage or criticism of the administration and the Vietnam War. The common denominator was that the initiative to stifle disagreeable voices originated with the government in power.

Unsurprisingly, in 1969 the doctrine was challenged in the U.S. Supreme court in a case called *Red Lion v. FCC*. *Red Lion* was one of the earliest outlets for the conservative Christian right. Voting 8-0, the Court rejected a First Amendment challenge to the doctrine, reasoning that the comparative scarcity of commercial media outlets justified the intrusion. Of course, this was well before satellite radio, the internet, cable, and was

at the infancy even of FM broadcasts. The Court's rationale therefore came in part from a factual context that presumed a scarcity of media outlets that is not the case today.

That said, *Red Lion* remains the law of the land in this case. It took the FCC during the Reagan administration to decide that the doctrine actually inhibited *all* speech in political and cultural affairs and was thus contrary to the Constitution. It rescinded the doctrine in 1987. From that point forward talk radio has exploded, from fewer than 400 stations to well over 1400. The most successful of these has been conservative talk radio, which has grown increasingly bold in its outspoken partisanship.

That liberal talk radio has not enjoyed comparable commercial success also is well understood, so that a resumption of the Fairness Doctrine might well prove an attractive idea to the party that now holds the trifecta of power in Washington, and there would be little to stop them. Even though it might seem like the exact kind of abuse of governmental power the First Amendment was designed to proscribe, *Red Lion,* however distinguishable, remains the law of the land unless and until a challenge reaches the Court – and even then the Court need not decide the case at all if it is disinclined to overrule itself.

Still, it is a constitutional truth that First Amendment challenges are most sympathetically heard where it appears that the restriction on speech is content-oriented. Targeting one media spectrum—talk radio—because it is dominated by a particular viewpoint appears to be content-motivated. It must therefore meet the highest standard of First Amendment jurisprudence—strict scrutiny--and the government is obliged to satisfy the Court that there is a compelling need for the regulation. This might be tougher today with the profusion of media spectra than it was in 1969.

But given the present make-up of the Supreme Court, and its likely changes in the coming years, don't bet on it.