

Unshackling Speech

A Manifesto
for Media Freedom

by Brian C. Anderson
and Adam D. Thierer

Encounter. 200 pp. \$21.95

Reviewed by
David L. Lange

THE FIRST AMENDMENT says: "Congress shall make no law abridging freedom of speech or of the press." Justice Hugo Black, who served on the Supreme Court from 1937 until his death in 1971, famously thought that "no law" meant *no law*. In Black's view, the Amendment constrains congressional power absolutely. It does not matter whether government means to do good or ill; if a law abridges expression, not merely is it impermissible but it has actually gone beyond the reach of the lawmaker.

Most Justices who have considered the language, however, have concluded that its meaning is more elastic than absolute. In this less literal approach, they have followed the lead of Oliver Wendell Holmes, who thought that the Constitution should be interpreted generally through a system of balances in which rights are measured against the necessity of laws. Congress is thus free to abridge freedom when, on balance, the need to do so is more important than the freedom itself. The trick is not to go too far. And who decides how far is too far? Well, Congress first, of course, but ultimately the Court. The rest of us are mainly bystanders.

Yet a handful of us have persisted in thinking that Black had it right all along. So it is especially welcome to encounter a small book that still savors a bit of an absolute regard for the First Amendment. In *A Manifesto for Media Freedom*, Brian An-

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derson and Adam Thierer—respectively, the editor of the Manhattan Institute’s *City Journal* and a senior fellow at the Progress & Freedom Foundation—offer a polemic that in essence, if not quite by design, takes seriously the constraint embodied in the text. Their subjects are the “fairness doctrine,” “Internet neutrality,” the problematic content and effects of new media, and the recent ill-judged attempt to regulate speech in the course of campaigns for federal office through legislation popularly referred to as “McCain-Feingold.”

In each of these settings, sentiments on the political Left or Right, but mainly on the Left, have favored regulations that would abridge expression for the sake of some interest said to be more important. Four freedom-centered arguments animate the authors’ responses to these schemes.

The first is a spirited rejoinder to

proposals to re-impose the so-called “fairness doctrine” that once governed broadcast radio and television. This was an FCC regulation obliging broadcast licensees to seek out and cover all matters of substantial public concern, and to do so in ways assuring that all important points of view were “fairly” represented. The Supreme Court upheld the doctrine in 1969, mainly on the ground that the limited number of airwaves available for broadcast justified an intrusion into editorial discretion of a sort that had never been allowed in the case of print media. The doctrine survived until 1987, when the FCC announced it would no longer enforce it since broadcast media were now numerous and diverse enough to make such an affirmative requirement unnecessary.

In the intervening years, media content has flourished, some of it worthwhile, some of it terrible, but

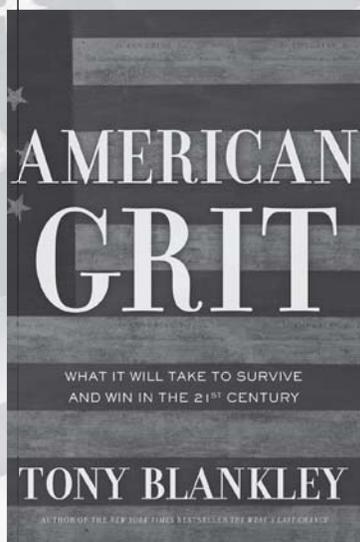
most of it blessedly free from government intervention. Talk radio has expanded beyond anyone’s expectations, driven especially by partisans on the Right (Rush Limbaugh arguably foremost among them) whose daily shows attract audiences of gargantuan dimensions. The same cannot be said for the Left. Try though they may, left-wing commentators (like Al Franken, who may have abandoned radio for politics) cannot seem to attract listeners commensurate in numbers with their adversaries on the Right. Since this strikes them as plainly unfair, liberal activists and politicians have proposed restoring the fairness doctrine to its one-time central role.

In response, Anderson and Thierer offer data that leave no room for doubt concerning the unprecedented multiplicity of media outlets. This ought to be enough in itself to tip the balance against the proponents. But who can say how the drama will play out in Congress or the Court? The authors at least have done what they can do, suggesting—in an insight that underscores the entirety of this book—that advocates of increased media regulation actually share a “pure elitism” that diminishes us as it elevates them. “[I]t seems they won’t rest until all of us are watching, reading, and listening to the content they prefer.”

MEANWHILE, agitation for a fairness doctrine of a somewhat different stripe threatens now to bring the Internet similarly under the control of those who know what is best for us. “Network neutrality” is the term of art in this setting; what it embraces is a regulatory regime amounting to common-carrier status for Internet providers, who, on the model of the telecommunications industry, would be obliged by law to offer access to their services on terms leaving little or no room for variations in service according to contract.

In First Amendment terms, this is a bit more complicated than the

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fairness doctrine. Few observers ever suggested that the telephone industry was a species of “the press,” and few would have thought common-carrier regulations abridged freedom of expression. The regulations may (or may not) have been bad policy, or bad economics, but an abridgement of speech or of the press? Not in the view of most who thought about the matter.

Against this background, Anderson and Thierer’s second argument, though not quite as clearly focused as the first, is nevertheless especially useful. Cutting through the thicket of argument and counter-argument that has grown up around the Internet-neutrality movement, they see that ultimately the proponents of regulation are after a goal that is once again fundamentally antipathetic to freedom of expression. Their aim is not really common carriage but, rather, “to get hold of modern media infrastructure. . . . If they succeed in placing net-neutrality mandates on the books, we’ll all be forced to be ‘fair,’ which sounds a lot like being forced to be free.”

IN THEIR remaining chapters, Anderson and Thierer offer two additional arguments—perhaps less urgent than the first two but by no means insignificant.

One is in response to what they call “neophobia,” a rag-bag crammed with other proposals to regulate the new media, the lot of them grounded in a fear of what these media may portend. The authors emphatically do not share this apprehension. Here at last is an expressive universe of incredible richness, to which they say: “*Don’t fear it.*” Instead, embrace it as it is: “Never has it been easier to become an informed democratic citizen.” For that matter, never has it been easier to contribute to the democratic dialogue.

True, that dialogue is more fiercely partisan and distracting. And that is but one among many new challenges we must face. Do the unhealthy offerings in the new media

(including CD’s and DVD’s, cable and satellite programs, and video games) threaten our children’s innocence? Do MySpace and Facebook encourage predators to seduce the unwary? Then, write Anderson and Thierer, we must act like adults and parents again, and remove the threats one by one as they appear and if need be—the authors imply—one household at a time. But let us not make the mistake of hobbling the greatest explosion in media diversity the world has ever known.

Finally, the authors urge, let us get rid of the speech-suppressive aspects of the Bipartisan Campaign Reform Act of 2002, a benighted piece of legislation chiefly identified with its principal sponsors, Senators John McCain and Russ Feingold. Of this, probably, the less said here the better, though the authors spell it all out in embarrassing detail. (Did McCain really tell Don Imus that “I would rather have a clean government than one where, quote, First Amendment rights are being respected”?)

There is ample room for blame on all sides in this particular story, with the ultimate responsibility surely lying at the feet of those Justices of the Supreme Court who upheld most of the legislation. For their own part, Anderson and Thierer clearly share the warning of Justice Clarence Thomas, whose dissenting words pointed to the implications of the decision for freedom of speech more generally: “Although today’s opinion does not expressly strip the press of First Amendment protection, there is no principle of law or logic that would prevent the application of the Court’s reasoning in that setting. The press now operates at the whim of Congress.”

Or, more precisely, at the whim of the Court itself—which is where we came in. For, as long as the First Amendment means whatever the Court says it means, rather than what the Amendment itself says, we will all be at the mercy of the kind of political militancy that Anderson

and Thierer denounce. In some sense they plainly understand this, even though they do not say so directly and even though their objections are grounded within the framework of the Amendment as it has descended to us since Holmes first began to meddle with its meaning in 1919. They might have written an even more powerful book had they thought it useful to address this underlying issue in interpretation. But the thrust of their arguments carries them in the right direction, and the manifesto they have given us is powerful enough just as it is. It fully deserves to be read and re-read. And so, meanwhile, does the First Amendment.