THE FAIRNESS DOCTRINE:

ABOLISHING THE ILLUSION OF FAIRNESS

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Repeal the Fairness Doctrine.

Why?

Because it is an unconstitutional, arbitrary and discriminatory restraint on the broadcast media, stifling debate and impairing the people's right to know.

Although the broadcasting industry is shackled in many ways, this article is not intended as a comprehensive discussion of all the extraordinary restraints, but rather sets forth basic arguments and current trends supporting the abolition of one particular restraint peculiar to radio and television--the so-called Fairness Doctrine.

History

Considered drastic at the time, the results of the enactment of the Radio Act of 1927 seem mostly accepted today. A part of the Act's ever growing control of the media rests in the Fairness Doctrine, which, in theory, imposes an obligation on the broadcaster to present contrasting responsible points of view on controversial issues of public importance. In practice, it has the opposite effect.

The development of the Doctrine is a disputed issue. The Federal Communications Commission maintains that the Doctrine has been in effect since the earliest decisions in 1927. After U.S. v. Paramount Pictures[1], which held that the First Amendment applied to broadcasting, the Commission published the Editorializing Report in 1949 as the basic expression of policy for the Doctrine. It culminated the hearings on the relationships between editorializing and a broadcaster's obligations under the Act, and effectively reversed Mayflower Broadcasting Company[2] which had imposed a ban on broadcast editorializing as inherently unfair. Stations could now editorialize but must be fair about it.

In 1964, attempting to provide more specific guidelines, the Commission published the Fairness Primer[3], a pot pourri of ad hoc rulings delineating the thrust of the Doctrine, so that the broadcaster could deduce the rule applicable to his present case.

Congress, in effect, recognized the Fairness Doctrine in 1959, in its amendment to Section 315 of the Communications Act. Although the Commission has interpreted the Amendment as ratifying the Doctrine, it is not apparent whether

Congress meant to endorse it or merely state that 315 as amended would not thwart the Doctrine.[4]

While Section 315 contains provisions for specific applications of fairness in political situations, the Fairness Doctrine is more general. The Doctrine does not require that a station give equal time to opposing views, only that issues be given fair treatment. Nor does the Doctrine require a station to offer time to any outside individual or group. A station has supposedly met its obligation if its programming reflects fairness over a reasonable period of time.

With reference to personal attacks, however, the rule is quite specific in that a station must offer rebuttal time and a script or tape of the program to a specific individual or group attacked by the station. This fixed regulation prescribing definite duties is substantially what the Supreme Court deemed not applicable to newspapers in its Tornillo decision.

Scarcity

Defenses of the Fairness Doctrine are often marked by obscure rhetoric regarding public interest, but the real heart of the regulatory clout comes from the scarcity argument. Since there are a limited number of frequencies to be alloted from the broadcast band (a scarce commodity), it is argued that there must be some independent group to dole out the available slots; the guidelines being public interest, convenience and necessity.

Observe how great a structure the Commission builds on the weakest of foundations, the scarcity principle:

> We fully realize that freedom of the radio is included among the freedoms protected against governmental abridgement by the First Amendment . . . but this does not mean that freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest.[5]

But this structure is built on sand. The Fairness Doctrine was originally designed to avoid chaos in use of the airwaves and thereby to allow diversity of voices to be heard. But times have clearly changed since the great Marconi scandals, and the number of frequencies in use today is convincing evidence that scarcity is not a valid ground for enforced fairness. While scarcity may require government rationing, it does not support this degree of governmental interference.

Speaking in May of 1974, CBS Chairman William Paley, noted that in 1927, there were 677 broadcast stations, and 1,949 daily newspapers. In 1974 there were 8,434 broadcast stations and 1,774 daily newspapers. These facts disclose a net increase of 1146% in broadcast stations and a 9%

net decrease in daily newspapers. With the advent of cable TV, the potential for spectrum increase is almost limitless.

If a justification of the Fairness Doctrine was to promote diversity of opinion, why not apply it to the print media? The Founding Fathers knew that a controlled press was an ineffectual press and an ineffectual press cannot provide the diversity of views from which an informed public opinion must arise. Without the excuse of scarcity, regulation of the broadcaster is left marked as the dangerous, opinion stifling concept that it is.

In light of the astounding increase in the number of stations, it is significant that of the 555 million man-hours per average week Americans spend watching TV news, the vast majority, 394 million, are spent on local news and the remainder with the networks. The same ratio applies to radio. Note that newspapers only own 19% of TV stations and 7% of radio stations and that there are a number of national wire services along with national general news weeklies, not to mention the quarterly, monthly, weekly and bi-weekly publications, and one has a giant spector that reports, analyzes and discusses the issues.[6] The potential for consistent distortion or misuse of its function by any major news source is virtually non-existent. Our news pluralism is the basic safeguard of freedom from abuse by the press.

Justice Bryon R. White, who wrote the Red Lion decision which gave judicial credence to the Fairness Doctrine, stated that the "First Amendment stands as a virtually insurmountable barrier between the Government and the print media so far as governmental tampering in advance of publication with news and editorial content is concerned."[7]

In November, 1973, the Association of Trial Lawyers of America stated that "When deprived of the 'public utility' approach [scarcity principle], Congress and the courts must return to the First Amendment and apply its benefits to all media."[8]

Impact

Why the discrimination? If there is a logical answer, it lies in the superior impact of the broadcast medium--the first true mass medium. However, when one talks of impact, one comes perilously close to saying government regulation of speech is especially needed when the means of speech is particularly effective. Following this reasoning, we would carefully regulate a Webster, Lincoln or Martin Luther King and leave the speakers of less import to speak out to their heart's content--unregulated. Lincoln's second inaugural would have scarcely satisfied a bureaucrat as "non-controversial"!

It is true that the electronic media's impact is great, but to date the Commission has consistently ignored the other media. If the public's right to receive diverse and well balanced views is the key consideration, why isn't all the other information available to the public thrown into the pool for consideration? Why is the broadcast medium

singled out to be silent in the name of fairness? There is also perhaps an overemphasis by the Commission of the media's ability to make decisions for us. It should not be assumed that a TV viewer is a fool, incapable of thinking for himself.

Economics

Although the impact and scarcity arguments used by defenders of the Doctrine are central, there is also an economic one: not everyone can go out and broadcast--it is not economically feasible. But how economically feasible is starting or running a daily newspaper? Of the estimated 800 automated radio stations in the United States, each can be operated by one person.[9] Add a technician, salesman and announcer and you're in business. Can a newspaper do the same?

A person with a hand-held megaphone walking up and down the street accomplishes the same function to the same degree. Though newspapers have more space and flexibility than the broadcaster, Chief Justice Burger, in the recent Miami Herald v. Tornillo decision asserted, ". . . it is not correct to say that a newspaper, as an economic reality, can proceed to an infinite expansion of its column space to accommodate the replies that a Government Agency determines or a statute commands the readers should have available."[10]

Discrimination

At issue in Tornillo was a 1913 Florida statute requiring newspapers to afford free reply-space to candidates attacked by that paper--in effect, a Fairness Doctrine for personal attacks. Though the Court focused on the print medium, there is no logical reason why its analysis is not applicable to the broadcasting medium.

Speaking for a unanimous Court, Justice Burger said, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and, like many other virtues, it cannot be legislated."[11] No mention was made of Red Lion Broadcasting, which, in 1969, set the Fairness Doctrine on judicially firm ground as applied to the broadcaster.

Echoing an argument used to justify the Fairness Doctrine, Mr. Tornillo maintained the Florida law did not violate the First Amendment because it did not restrict the newspaper's right to publish what it pleased. "This begs the core question," said Justice Burger. "Compelling editors and publishers to publish that which 'reason tells them should not be published' is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding [the Miami Herald] from publishing specified matter."[12]

The decision itself was brief for one of such magnitude. It indicated just how abhorrent the idea of a controlled press was to the Court. During oral arguments Justice Rehnquist observed, "The only entity the First Amendment is directed against is the Government. The Miami Herald

can chill anybody it wants to."[13] Justice Marshall also noted, if newspapers are required to publish what they do not want to publish, "that is governmental control."[14]

Governmental control of newspapers for the alleged purpose of promoting fairness is censorship plain and simple. In Tornillo, the Supreme Court avoided the tragic mistake of extending the Fairness Doctrine to print.

The prohibitions and requirements imposed on the broadcaster clearly are a line of discrimination between the print and broadcast media. There is "the equal treatment of issues" concept; a ban on military recruitment ads; a ban on cigarette commercials; a spending limit for political candidates; a requirement that the candidates must be given the lowest unit rate charge; and finally, reasonable access requirements for all candidates, despite their platforms.

Are any of these regulations applicable to the print medium? No. The people who complain about poor quality television and demand fairness are not likely to get upset over poor quality in newspapers, books, or magazines. Those disturbed that their town has only two or three networks are not generally dismayed over the mere one or two newspapers in that same town or the existence of only two major political parties.

In the 1973 case of Business Executives' Move for Viet Nam Peace v. F.C.C., (B.E.M. v. F.C.C.), Mr. Justice Douglas, concurring, said that the government had no more authority over broadcasters than it does over newspapers. "The Fairness Doctrine has no place in our First Amendment regime."[15]

Don't Bite the Hand that Feeds You

It is fairly simple to ascertain that discrimination exists and to what extent. One can even give short range solutions. The real dilemma, however, concerns not the inequity between the various media forms but rather the fundamental right which the First Amendment protects--free speech.

It is slickly called the Fairness Doctrine, but it is essentially unfair in that those who ultimately control the media (the government) also determine what is fair. It is a common adage: You don't bite the hand that feeds you, and a broadcaster is not likely to argue with a government which licenses him. In the Chief Justice Earl Warren Conference on Advocacy held in June of 1973 it was reported: "Diversity of expression is not to be found in a tightly regulated medium, where fears of censorship, governmental interference, and the possibility of losing one's license reduce creativity to a common blandness, so as not to incur the wrath of the regulator."[16] It appears, then, that fairness should be determined by those responsible for media operations, NOT a government agency imposing its arbitrary standards.

Raised Eyebrow Control

Though at times most subtle, this backhanded censorship or "raised eyebrow" control is quite effective. It is the type of control caused by the fear of loss of license. "In terrorem control," as Commissioner Glen Robinson once called it, provides that if the Commission is notified of a fairness breach, it need not wield its entire administrative club. A short letter to the station manager or a call to his attorney expressing concern is most efficient.

F.C.C. Chairman Wiley, in a speech to Ohio University students in June of 1974, stated that of the 2500 Fairness Doctrine complaints in the previous year, the Commission issued only 109 formal rulings, leaves one to ponder what happened in the other 2,391 cases. The mere threat of an agency hearing regardless of the outcome is enough to send many broadcasters scurrying to present the other side of an issue whether they agree or not--and whether it is a crackpot minority view or not.

That is the real vice of the Doctrine--the inhibiting effect on any editor knowing he could incur a large legal bill by presenting any story which is likely to be challenged formally by a dissenting group, however small.

A case in point is the NBC News production, "Pensions: The Broken Promise." Aired in September, 1972, the program described the plight of many Americans under private pension systems. Challenged by A.I.M. (Accuracy in Media), a small consumerist watchdog, the F.C.C. eight months later upheld the complaint that private pension plans had been unfairly maligned. The staff ruling was issued, ironically, the same day the program received a Peabody Award as a "shining example of constructive and superlative investigative reporting." Seven months later, the F.C.C., after reviewing the staff's findings, gave NBC 20 days to decide how it was going to fulfill its Fairness Doctrine obligations. Appeals are being taken. It is ironic to note that one of the first acts President Ford undertook upon assuming office, was to sign a pension reform bill.

The two years of heavy legal expense confronting a poorer station would probably prohibit even considering such a program. The Doctrine result is to lessen discussion, rather than increase it. To avoid problems the broadcaster ceases to air anything controversial.

Newton Minow, a former F.C.C. chariman, once called television a "Vast Wasteland." Even if that is correct in the eyes of some, its cause is not lack of creativity on the part of the industry but rather fear of government censorship in the guise of the Fairness Doctrine. Nothing is immune--a news editorial, cigarette advertisement, or the type of guests required on Dick Cavett's talk show. Thus the contradiction: paralyzed growth and phony blandness instead of diversified opinion.

The reaction to this contradiction is a concern over further erosion of First Amendment rights and the expansion of governmental control. William Paley, in his speech at Syracuse University, stated "the very fact that the Fairness

Doctrine confers ona Government agency the power to sit in judgment over news broadcasts makes it a tempting device for use by any administration in power to influence the content of broadcast journalism." He added that, "the threat of the Fairness Doctrine lies in the inescapable impression that there are those in positions of power and trust who are from all appearances, against a free press--and they are against it not just because they know it will distort some facts, but because they know it will disclose others."[17]

It is a Madisonian concept that the wider an audience's freedom of choice, the wider the range of opinion, and the greater amount of criticism and scrutiny. This desirable goal does not need the help of the Government as it is in a station's rational self-interest to program fairly. Networks thrive on good ratings. One network-owned and operated station in Chicago makes at least one half to two thirds of its profit during prime news hours. The polls indicate the public wants objectivity. Hence it would be economic suicide not to be objective. Our country's news gathering system is geared to investigative reporting, making the media another check on our political structure, which is inefficient at best in regulating itself.

Trend

With the arguments for abolition posited, what is the current trend with regard to the Doctrine? Three years ago, the Fairness Doctrine was out of control. It was invoked by groups and individuals claiming broadcasters were unfair in coverage of controversial issues. Public interest groups used it as a springboard to attack commercials claiming they raised controversial issues. Access groups used it to demand camera time directly. Some courts were ready to comply.

Now it appears that the trend has been reversed. First, there was the Tornillo case outlawing the Fairness Doctrine for print. Next, there was the D.C. Appeals Court ruling which rejected the idea that Chevron gasoline commercials raised an air pollution issue. Add the 1973 B.E.M. Supreme Court opinion scuttling the concept of free public access to the media and the new F.C.C. Fairness Doctrine Report released in mid 1974, which inter alia rejects the historic 1967 cigarette commercial ban as precedent, and it seems that the attitudes once friendly toward the Doctrine are now wavering. There is also a growing army massing to destroy the Doctrine: the industry flanked by former Senator Ervin (D., N.C.) and Senator Proxmire (D., Wis.); Chief Judge Bazelon and Justice Douglas; and even from the F.C.C. itself via its newest Commissioner, Glen O. Robinson.

Some former supporters who have misgivings are Dean Burch, former Chairman of the Commission and Clay T. Whitehead, former head of the Office of Telecommunications Policy. The others make up a list which the industry press labels a "litany."

Currently, Senator William Proxmire is drafting legislation

to abolish the Doctrine. Indications are it may run into stiff opposition in the Senate Communication Subcommittee led by a proponent of the Doctrine, John O. Pastore (D.,R.I.). Says Proxmire, "It may take two or three years. It may take 20 but it is bound to win . . . the idea is right. Its time has come."[18] And to quote the editors of Broadcasting Magazine "You can't have a First Amendment and a Fairness Doctrine too."[19]

A preliminary glance at the essence of the proposed bill gives an indication of its scope. Tentatively dubbed the "First Amendment Clarification Act of 1975," the bill would:

- Remove Section 315 and the Fairness Doctrine from the Communications Act.

- Drop the terms "public interest," "convenience," and "necessity" as it is applied to the broadcaster. Substitute public entitlement to the "best possible technical quality in broadcasting." The purpose here is specifically to withdraw any content control power from the F.C.C.

- Specify that broadcasters are entitled not only to free speech protection but also free press.

- Repeal the requirement that broadcasters must offer time to federal candidates for office,

- And repeal the political editorial prohibiton on non-commercial broadcasters.

The bill would not impose any counterbalancing obligations on the broadcaster to offset the freedoms granted. To do so would put the broadcaster back in the same second class boat. Eliminating the constraints built up over the last half century merely places the broadcaster back on par with all other citizens who enjoy First Amendment protection.

Looking at the law in light of Tornillo, some conclusions can be drawn. Tornillo underscores the scarcity basis of Red Lion. The dilemma is that the Court in Red Lion took the issue of scarcity out of its role as a factual question, transforming it into a legal one. Assuming Justice White knew that there was no scarcity or, if so, one that could not last indefinitely in the face of technology, one must confront the idea that the Court was attempting to make the broadcast medium a separate animal which is subject to governmental control.

In his dissent in Brandywine-Main Line Radio v. F.C.C., Chief Judge Bazelon has the more logical approach. He maintains it is ludicrous to construct an arbitrary distinction between broadcasting and print, and that it is time to put the issue of scarcity back into the factual realm either by judicial process, by legislation, or by the Commission. Senator Proxmire hasttaken up banner and as Senator Ervin said, "It's time the Congress had its say on Fairness."[20]

Alternatives

In addition to Proxmire's crusade, there are many other short term solutions suggested, among them: counter-advertising, fairness considerations only at license renewal time, placing a burden on the F.C.C. to prove scarcity in any particular location, or proving competent views are not available. The long range solution, however, rests in eliminating the content control power held by the F.C.C. This could involve making the Commission a quasi-judicial review board to regulate frequency trespassing and technical standards--a sort of traffic cop.

Other alternatives include "grandfathering" all existing licenses with new frequencies being auctioned off, the proceeds going to public broadcasting. Or allocating frequencies in the same way the Government grants mineral rights. The key consideration is to give outright ownership with complete private property rights. Any system of leasing the airwaves still yields the problem of Big Brother landlord controlling the property's use. The first step toward any of these suggestions is dumping the Fairness Doctrine.

Conclusion

But why go to the bother of repealing some vague doctrine not even formed in a statute?

To many the reasons are clear. While each decision separately poses little threat to ideas of freedom, together, they become a cancerous growth which threatens the very essence of the First Amendment.

Although the Fairness Doctrine was designed to make the medium more diverse or more responsive or fairer, in most cases it has produced results far worse than the alleged situation it intended to correct. In choosing a program, the broadcaster is met with the possibility that if he touches any significant public issue, he may be required to provide time to opposing views. The problem is that any topic worthy of presentation is likely to have an opposing view. A requirement to give time to an opposing view in the name of fairness is repugnant in light of the First Amendment--especially when the broadcasters are required to be "fair" by someone else's standards--and the someone else happens to be the federal government.

There is a need for an uninhibited press wielding a free investigative scalpel. Without it, there might never have been a Watergate investigation, an impeachment process, or a Presidential resignation. Who knows what other corruption would have been hidden without the free press? Teapot Dome, the Dupont Munitions scandal, the exposure of the Tweed Ring, are precious milestones of achievements of the free press.

As CBS's William Paley put it, "The Fairness Doctrine is a mechanism for Government suppression of free press." It is now time to emancipate the broadcaster by freeing him from the chains of the Fairness Doctrine.

Footnotes

1. 334 U.S. 131, 166 (1948).

2. 8 FCC 333 (1940).

3. Fairness Doctrine, 2 P & F Radio Reg. 2d 1901 (1964).

4. See Dean, Political Broadcasting: The Communications Act of 1934 Reviewed, 20 Fed. Comm. B.J. 16, 29-31 (1966).

5. Editorializing Report 1 P & F Radio Reg. 91:210-211 (1949).

6. Facts also from May 31, 1974 Speech at Syracuse University by William Paley. Reported in Broadcasting Magazine, June 3, 1974, p. 31.

7. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 389 (1969).

8. Reported in Broadcasting Magazine, November 26, 1973 p. 23.

9. Reported in Broadcasting Magazine, September 23, 1974, p. 33.

10. Miami Herald v. Tornillo, ____ U.S. ____, 41 L. Ed. 2d 730, 94 S. Ct. ____ (1974).

11. Ibid.

12. Ibid.

13. Reported in Broadcasting Magazine, April 22, 1974, p. 56.

14. Ibid.

15. Business Executives' Move for Viet Nam Peace v. F.C.C., 412 U.S. 94, 154 (1973).

16. Reported in Broadcasting Magazine, November 26, 1973, p. 23.

17. Reported in Broadcasting Magazine, June 3, 1974, p. 31.

18. Reported in Broadcasting Magazine, July 22, 1974, p. 13.

19. "In all Fairness" (Editorial) Broadcasting Magazine, July 9, 1972, p. 58.

20. Reported in Broadcasting Magazine, November 27, 1972, p. 67.