The Fairness Doctrine Redux?

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Does anyone remember the fairness doctrine? I never dreamed I would be writing a column about it in 2009. I thought it had died a natural death in 1987. It may be about to be resurrected.

According to recent news stories, "Democrats and liberals—tired of wrestling with conservative talk radio—have stepped up talk" of bringing the fairness doctrine back. They believe that the doctrine's demise is to blame for talk radio's opinionated, yet highly popular, form. A Reuters article estimates conservatives on talk radio dominate liberals by a ratio of ten to one.

Others, like Andrew Schwartzman of the Media Access Project, have dubbed the discussion of reviving the fairness doctrine "entirely a creation of a bunch of right-wing talk-show hosts trying to make a ruckus." Yet, House Speaker Nancy Pelosi and influential senators like Barbara Boxer and Chuck Schumer are said to favor its return. President Barack Obama does not, at least for now.

But Obama is said to favor "localism," a kind of stepchild of the fairness doctrine. The FCC is considering whether to require broadcasters to create community advisory boards made up of local officials and other community leaders to tell media executives whether their news coverage is addressing the needs of the community. What? Government-mandated community advisory boards that tell broadcasters whether their news coverage is sufficient in the community?

Maybe it's time we dust off our knowledge of the fairness doctrine and learn more about localism.

The seminal case of *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*[1] recounts the history of the fairness doctrine and provides Justice White's ruling that the doctrine was both authorized by Congress and constitutional. The case was really two cases.

The *Red Lion* case involved Reverend Billy James Hargis's attack as part of the Christian Crusade series on Fred J. Cook, the author of the book *Goldwater: Extremist on the Right.* Hargis said that Cook, after being fired by a newspaper for making false charges against city officials, went to work for "the left-wing publication, *The Nation*, one of the most scurrilous publications of the left which has championed many communist causes over the years. . . ." Cook, believing he had been personally attacked, demanded free reply time under the fairness doctrine, which the station refused. The FCC weighed in and agreed with Cook, and the D.C. Circuit upheld the FCC's position as "constitutional and otherwise proper."

The second case involved the Radio and Television News Directors Association's (RTNDA) action to challenge the constitutionality of the FCC's personal attack and political editorializing regulations. These regulations were adopted in 1967 to make the personal attack aspect of the fairness doctrine "more precise and more readily enforceable," and to specify rules relating to political editorials. The Seventh Circuit held the regulations were unconstitutional as abridgments of free speech and press.

Justice White, delivering the opinion for the Court, upheld both the FCC order requiring the Red Lion station to furnish Mr. Cook with a tape, transcript, or summary of the broadcast, and free time to reply, as well as the constitutionality of the FCC regulations on personal attacks and political editorializing. Both, Justice White concluded, were authorized by Congress, and were content-based speech restrictions that enhanced rather than infringed (yes, you read that correctly) freedom of speech and press under the First Amendment.

In a nutshell, the fairness doctrine required broadcasters to present all contrasting points of view in any coverage of a controversial issue of public importance. In upholding it, Justice White reasoned that, for many years, the FCC (and before it, the Federal Radio Commission) imposed on radio and television broadcasters the requirement to discuss public issues and to give each side of those issues fair coverage. The rationale for the fairness doctrine was premised largely on the fact that broadcast frequencies constituted a scarce resource (spectrum scarcity), and without government control, the radio medium would be of little use "because of the cacophony of competing voices, none of which could be clearly and predictably heard." Justice White wrote that, before 1927, "the allocation of frequencies was left entirely to the private sector, and the result was chaos."

Consequently, in the Radio Act of 1927, the Federal Radio Commission was established to allocate frequencies among competing applicants "in a manner responsive to the public 'convenience, interest, or necessity.'" This enactment repudiated the rationale of the 1912 Act, i.e., that "anyone who will may transmit their message," and in its stead substituted the principle that "the right of the public to service is superior to the right of any individual" or station owner. Very shortly thereafter, the Federal Radio Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views," and this principle applies to "all discussions of issues of importance to the public." Through the denial of license renewals and construction permits, the fairness doctrine was enforced.

While the fairness doctrine initially

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required licensees to *refrain from publishing their own views*, as of 1969, it essentially required broadcasters only to give adequate coverage to public issues and to fairly reflect opposing views—even at the broadcaster's own expense if sponsorship was unavailable and on its own initiative if no other source was available.

As Justice White explained, "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive.'" Broadcast frequencies are limited and necessarily considered a public trust, White found. Therefore, the fairness doctrine extends to "all legitimate areas of public importance which are controversial, not just politics."

In rejecting a First Amendment defense to the constitutionality of the doctrine, Justice White reasoned that the "licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens." Rather,

> [i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount, and the public has the right to receive suitable access to social, political, esthetic, moral, and other ideas and experiences, which is crucial. . . . There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Justice White concluded that

> [t]here is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program . . . or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and editorials.

Notably, the fairness doctrine's legislative history contained this important statement: "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience."

Later cases showed the difficult contours of the fairness doctrine. In *Green v. Federal Communications Commission*,[2] for example, the FCC and the courts struggled with whether a broadcast advertisement urging enlistment in the armed services during the Vietnam War triggered application of the doctrine. The court noted the advertisement sought to present "the attractive, positive and advantageous side of military service." Green, chairman of the Peace Committee of the Baltimore Meeting of the Religious Society of Friends, wanted free time to air various spots showing families who had lost loved ones, or a row of gravestones, or contained this warning to young men before they joined the army:

> Chances are, the only job you'll learn is how to kill. Chances are, you'll wind up in Vietnam killing and perhaps getting killed, in a war that doesn't make much sense. Remember this: You may be eligible for military deferment. For free information call 642-1431.

The court, in ruling that the fairness doctrine was not triggered by the enlistment advertisement, held both that Armed Forces recruitment was not a "controversial issue of public importance requiring presentation of conflicting viewpoints," and in any event, the draft and Vietnam war were being covered extensively by licensees, including video of battlefields strewn with dead soldiers.

In reaching its ruling, the *Green* court had to distinguish the *Banzhaf v. FCC* decision,[3] which reached a directly contrary ruling on a cigarette advertisement. The *Green* court held that cigarette advertisements were unlike enlistment advertisements due to the "uniquely serious and well-documented hazards to the public health inherent in cigarette smoking." The *Green* court also had to distinguish the decision in *Retail Store Employees Union v. FCC*.[4] In that case, a labor union challenged a refusal to air announcements urging listeners to boycott a department store engaged in a labor dispute, after the store paid for advertisements asking for public patronage. In remanding the case to the trial court to reconsider the application of the fairness doctrine, the D.C. Circuit required it to "take into account, as an aspect of the 'public interest,' the congressional policy of favoring the equalization of economic bargaining power between workers and their employers." Also pending before the appellate courts at the time were air pollution issues raised by automobile and gasoline advertising in New York City.

In short, the contours of the fairness doctrine were hotly litigated and yielded a wide spectrum of judicial rulings until its demise. In 1985, the FCC released a Fairness Report sounding a death knell for the doctrine. The FCC said the fairness doctrine no longer produced its desired effect and instead caused a "chilling effect" on news coverage that "might" violate the First Amendment. In 1987, the doctrine was abolished.

Recent law review articles explore the resurgent views for and against the fairness doctrine. Compare Professor Magarian's *Substantive Media Regulation in Three Dimensions*[5] with Professor Goodman's *No Time for Equal Time: A Comment on Professor Magarian's Substantive Media Regulation in Three Dimensions*.[6] Professor Magarian's push for its revival stems from a "justifiable and deeply held dissatisfaction with the State of American media," i.e., whether it is "overly commercial, partisan, trivial, and concentrated." This dissatisfaction includes the failure of the media to reveal major errors, such as in the Bush administration's justifications for the Iraq War. Professor Magarian even explores extending the doctrine to "conventional mass media." Professor Goodman disagrees with reviving the doctrine, arguing that there are no differences—either in reach or audience—that can justify government regulatory distinctions

between broadcasters or conventional mass media and other media. And the "abundance of media options" dooms "a government attempt to shape public discourse through targeted content requirements." She concludes that what is "salient in public discourse is much more likely to be affected by search engine algorithms and network traffic management practices than by whether news-producing broadcast stations have to include differing viewpoints."

One thing is clear: the spectrum scarcity on which the fairness doctrine was premised does not exist for the Internet, cable television, and collectively, the conventional mass media at large. With the advent of satellite radio, cellular technology for delivering audio, video, and text as well as voice, and wireless broadband capable of doing the same, it is questionable whether there is any spectrum scarcity in any medium. Groups like the National Association of Broadcasters (NAB) have so far beat back efforts to resurrect the doctrine and vow to continue to fight the FCC's localism proposals. The NAB's David Rehr wrote that "[t]he so-called fairness doctrine would stifle the growth of diverse views and, in effect, make free speech less free." Some station owners agree, saying they would simply drop controversial programming and air.

But we can no longer assume that the fairness doctrine has been safely interred. Last month, Democrats like Iowa Sen. Tom Harkin and Michigan Sen. Debbie Stabenow were still calling for a return to the Fairness Doctrine standards, and New York Democratic Rep. Maurice Hinchey said he wants the doctrine back. It may be rising again—or at least there are some powerful people trying to exhume it—and it would be folly to ignore the lessons of its history.

Endnotes

1. 395 U.S. 367 (1969).
2. 447 F.2d 323 (D.C. Cir. 1971).
3. 405 F.2d 1082 (D.C. Cir. 1968).
4. 436 F.2d 248 (D.C. Cir. 1970).
5. 76 Geo. Wash. L. Rev. 845 (2008).
6. *Id.* at 897.