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With Due Regard for the Opinions of Others

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House Commerce Committee Chairman John Dingell was livid. "I knew those lickspittles would do something like this," he said. Senate Commerce Committee Chairman Ernest Hollings shared the outrage if not the rhetoric. The action, he said, was "wrongheaded, misguided and illogical." Their comments were directed at the Federal Communications Commission, which repealed the Fairness Doctrine in August 1987.

The way for repeal had been paved by a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, which had ruled a year earlier that the Fairness Doctrine was an FCC directive, not a law. *Telecommunications Research Action Center v FCC* 801 F2d 501. As a result, the FCC was free to abolish the 60-year-old broadcasting doctrine by administrative fiat.

In the spring and summer of last year, Hollings led a campaign to codify the Fairness Doctrine, steering it through Congress only to be frustrated by a presidential veto. For its part, the FCC asked for comments on whether continuing to enforce the doctrine would be unconstitutional and contrary to the public interest. When congressional sponsors of a bill to save the doctrine fell eight votes short of override, the FCC acted.

Hollings still believes he can resuscitate the doctrine. And in September, the D.C. Circuit will hear arguments from supporters of the doctrine to invalidate the commission's repeal. *Geller v FCC* (Civ No. 87-1544). The FCC, meanwhile, is considering repeal of the Personal Attack Rule and the Political Editorial Rule, two corollaries of the fairness requirement.

What is the Fairness Doctrine, and why does anyone care about it? The doctrine requires FCC-licensed broadcasters to present programming about controversial issues, and in so doing to offer a range of views. Its supporters include not only a majority of the Senate and House, but also many broadcast journalists and media-fearing public citizens from Ralph Nader to Phyllis Schlafly. Sixteen former FCC commissioners, who agreed to little on the commission and less since, have banded together in support of fairness.

"A range of views on controversial issues" sounds reasonable enough. Isn't that what responsible, ethical journalists do anyway? Ethics aside, isn't that the way to boost ratings?

The fight over the Fairness Doctrine is about nothing less than possession of the First Amendment: Who gets to have, and express, opinions in America. As is often the case, to frame the issue is to decide it: Where you stand is a function of where you sit.

Those who are not FCC licensees, and whose views are seldom aired, see the Fairness Doctrine as affirmative protection of their freedom, not only to contribute to the community's marketplace of ideas, but to be exposed to a wide range of views. As the Supreme Court put the argument:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain . . . their collective right to have the medium function consistently with the . . . purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here. *Red Lion Broadcasting Co. v FCC* (1969) 395 US 367.

On the other hand, those who have licenses are quite comfortable with controlling their stations' programming. They consider the First Amendment a negative protection from the very kind of government participation in programming represented by the Fairness Doctrine. Their views have had an impact on some economically disinterested liberals, academics and judges of varying degrees of sophistication.

Listening to these arguments, U.S. Court of Appeals Judge Skelly J. Wright of the D.C. Circuit observed in a speech, "In the current debate over the broadcast media .. . each debater claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication."

Indeed they are. Occasionally courts must balance an individual's First Amendment rights against other state interests. But how should they balance one individual's First Amendment arguments against another individual's First Amendment arguments? Perhaps we should begin at the beginning: the early days of radio.

Before the introduction of radio in the 1920s, the government had a number of communication policy options. Congress could have agreed with the Navy and let it control all broadcasting as "wireless telegraphy." It could have supported AT&T's proposal that broadcast signals become a common carrier, an idea some urge for today's cable television. It could have auctioned off frequencies to the highest bidder, or allocated stations to institutions such as universities, churches,
labor unions and political parties. It could have created an American BBC or promoted viewer control.

What Congress chose was a broadcasting system in which private citizens would be licensed to use public property-- the "airwaves." Broadcasters could make private profit, but only as public trustees of this valuable and politically powerful community resource. Section 301 of the Communications Act of 1934 (47 USC §301) still provides for "the control of the United States over all . . . radio transmission" and for "the use of such channels, but not the ownership thereof . . . under licenses granted by Federal authority."

The government was expressly prohibited from censoring programs. But licensees would be expected to serve the public irnterest in exchange for their privileges. And regulations could minimize potential abuse.

Since 1928, among these regulations has been a cluster of policies known as the Fairness Doctrine. It is analytically useful to treat the policies individually. Some apply to candidates for political office, some to everyone and some to the presentation of issues. Some require station owners to permit the appearance of specific individuals; others merely compel the broadcast of additional material.

The equal opportunity doctrine, often misnamed "equal time," does not require broadcasters to sell time to candidates. 47 USC §315. It triggers such rights once one candidate for a given office has been granted time. Section 312, by contrast, gives candidates for federal office a legally enforceable right to buy time regardless of circumstance. Like equal opportunity, the personal attack doctrine triggers rights in the specific party attacked. 47 CFR §73.1920. The political editorial doctrine creates comparable rights in candidates suffering the brunt of broadcasters' editorials. 47 CFR §73.1930.

The general Fairness Doctrine can be traced to the FCC's 1949 *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, and Congress' 1959 amendment to 47 USC §315(a) requiring broadcasters "to afford reasonable opportunity for discussion of conflicting views on issues of public importance."

The requirements are not limited to candidates or editorials, do not involve attacks, and do not trigger individuals' rights. The Fairness Doctrine only requires that broadcasters: (1) provide programs about controversial issues of public importance, and (2) in doing so, ensure that contrasting points of view are presented.

Broadcasters need not be "fair." The FCC does not designate formats, topics, scheduling or guests. There is no restriction on broadcasters' freedom to express ideas, but only on their power to censor. Fairness does not require equal balance. It does not address individual programs, only overall programming. In sum, the doctrine requires little more than what any journalist would search for anyway: stories that attract audiences and spokespersons that reflect and provoke controversy.

Most broadcast stations find it virtually impossible *not* to comply with the Fairness Doctrine. Thousands of complaints were received by the FCC from 1970 to 1978, of which 64 resulted in license revocation. Of those, only three involved fairness complaints, and each of them was decided on other grounds. In fact, since 1927 only one station has lost a license in a fairness controversy--and that decision relied more on licensee misrepresentation and deliberate violations than on an isolated fairness violation.

The FCC’s present attitude toward fairness illustrates the shift from a trusteeship to a marketplace approach to broadcast regulation that began in the early 1970s. Deregulation actually began under FCC chairmen Richard Wiley and Charles Ferris. Nevertheless, the policy shift is most closely identified with President Reagan's first FCC chairman, Mark S. Fowler--characterized by critics as "the James Watt of the airwaves." In a separate statement attached to the 1985 *Fairness Report*, Fowler stated his intention to "reverse course, and head ballistically toward liberty of the press for radio and television." 102 FCC2d 251.

In 1970 and at the time of the 1974 *Fairness Report*, 48 FCC2d 1, the FCC regarded fairness as "the single most important requirement of operation in the public interest--the sine qua non.” By 1985, a politically reconstituted commission saw the doctrine as probably unconstitutional, clearly not in the public interest, and unnecessary given "the multiplicity of voices in the marketplace today."

In its 1985 *Fairness Doctrine Report*, 102 FCC2d 145, the FCC concluded, "The Fairness Doctrine--in stark contravention of its purpose--operates as a pervasive and significant impediment to the broadcasting of controversial

issues of public importance." But it promised to continue enforcing the doctrine, citing Congress' "intense interest" as the reason.

Until recently, few doubted the congressional and constitutional authority for the Fairness Doctrine. That the FCC should concern itself with programming was settled by Justice Felix Frankfurter's opinion in *NBC v U.S.* (1943) 319 US 190: "But the [Communications] Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." And however shocked broadcasters may have been, the 8-0 *Red Lion* decision seemed to establish the constitutionality of the Fairness Doctrine as well.

But the doctrine's moorings are coming loose in the gale-force winds from the FCC, broadcasters and political opponents. Although the Supreme Court never overruled *Red Lion*, it has given hints of wanting to distance itself from the decision. In dicta, even the *Red Lion* court suggested that "if experience" found "the net effect is reducing rather than enhancing . . . coverage, there will be time enough to reconsider the constitutional implications.*'

In *CBS v Democratic Nat'l Comm*. (1973) 412 US 94, justice Potter Stewart said in a concurring opinion that he had joined the *Red Lion* majority "with considerable doubt," and Justice William 0. Douglas added that he had not participated in the decision "and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime."

The court's opinion in *Miami Herald Publishing Co. v Tornillo* (1974) 418 US 241, suggested striking parallels to *Red Lion*'s consideration of the personal attack doctrine. A Florida statute gave political candidates a legally enforceable right of reply to newspaper attacks. State legislative candidate Patrick Tornillo sued the *Miami Herald*, which challenged the statute on First Amendment grounds, and won. The core question, said the court, was "compelling editors or publishers to publish that which 'reason tells them should not be published.'" It concluded, "The choice of material to go into a newspaper . . .--whether fair or unfair--constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press."

If it's true for newspapers, broadcasters asked, why not for us?

In *FCC v League of Women Voters of Cal.* (1984) 468 US 364, the court sent a double message to the FCC suggesting that it might be open to a policy

shift. While recognizing the scarcity rationale, the court overturned a statute precluding public broadcasters from editorializing. But then in two footnotes the justices gratuitously raised questions about that rationale. "We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcasting regulation may be required." The next footnote further encouraged critics, noting the FCC's suspicions that the doctrine "impeded, rather than furthered, First Amendment objectives," and adding that if "the Commission . . . decides) [s] to modify or abandon these rules . . . we express no view on the legality of either course."

Despite the public interest and constitutional challenges, the statutory foundation of the Fairness Doctrine seemed secure in § 315 (a). In the *CBS* case, the Supreme Court characterized the language added in 1959 as Congress' effort "to give statutory approval to the Fairness Doctrine." But U.S. Court of Appeals Judge Robert Bork of the D.C. Circuit was not persuaded.

Siding with the commission's refusal to apply the Fairness Doctrine to teletext material in the 1986 *TRAC* case, Bork wrote, "We do not believe that language adopted in 1959 made the Fairness Doctrine a binding statutory obligation" because the doctrine was imposed "under" not "by" the Communications Act of 1934. The amendment merely "ratified the Commission's longstanding position that the public interest standard *authorizes* the Fairness Doctrine" (emphasis added). Bork also explicitly challenged the scarcity rationale, arguing that it is unclear why scarcity "justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media." Five of the 11 sitting appeals court judges voted for a rehearing en banc, which was denied, as was a petition for certiorari.

Finally, the case against fairness was put most directly by a court in *Meredith Corp. v FCC* (DC Cir 1987) 809 F2d 863. This was a broadcaster's appeal of a relatively routine adverse FCC Fairness Doctrine ruling (a 13:1 ratio of programming that a particular nuclear power plant was "a sound investment for New York"). The court, in remanding the constitutional question to the FCC, suggested to the commission that it might find "the doctrine cannot be enforced because it is contrary to the public interest and thereby avoid the constitutional issue."

On remand, the commission voted unanimously that the Fairness Doctrine was not only contrary to the public interest, but also unconstitutional.

Syracuse Peace Council v WTVH (1987) 2 FCC Rcd 5043. What Commissioner Mark Fowler had promised six year earlier, Commissioner Dennis R. Patrick delivered. "We had absolutely no excuse, no legal reason," Patrick told *Business Week*, not to kill the doctrine.

The argument over the Fairness Doctrine continues, but still without joining of the issue.

Fairness bashers think the First Amendment protects them from government involvement of any kind. Fairness supporters say the purposes of the First Amendment require FCC procedural policies encouraging robust, wide-open debate--especially in oligopolistic communication channels. It is duplicitous, they argue, to equate FCC policies "enhancing" with those "abridging" free speech.

Although the Supreme Court in *FCC v Pacifica Foundation* (1973) 438 US 726, relied on broadcasting's pervasiveness and impact on children as a regulatory rationale, scarcity remains the primary justification for regulating broadcasters. But in a country with only 1,600 newspapers and more than 11,000 broadcast stations, Fairness Doctrine opponents say the scarcity argument is an idea whose time has passed.

In a constitutional sense, however, there is as much scarcity now as ever. More people would like broadcast stations than there are licenses available. The licenses are still a creation of the government. The FCC still decides which bands will be used for radio and television broadcasts, which cities and licensees get them, the width of the bands, power of the transmissions and height of the antenna. And the government still sends to the penitentiary any competitor playing private enterprise on a monopolist's channel.

It doesn't sound like an open marketplace to the defenders of the Fairness Doctrine. And until the technology really does provide one, or until broadcasters share some of their license benefits, a little fairness doesn't strike advocates as much of a burden to ask in return.

Repeal of the Fairness Doctrine may be a pyrrhic victory for broadcasters. Its existence gave the audience very little. But its removal leaves a very empty place in the First Amendment that courts and Congress may now feel compelled to fill with even more effective public rights.

However it comes out, this fight is over more than what the 1928 Federal Radio Commission called "due regard for the opinions of others." It's a struggle for nothing less than possession of the First Amendment.