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The First Amendment and the Protection of Unfair Speech

Barbara McDowell*

One is tempted to try to explain the Fairness Doctrine as the product of a generation that had been duped by Orson Welles's *War of the Worlds* broadcast into believing that Martians really had landed in New Jersey. A populace so susceptible to the persuasive power of the electronic media might have seemed particularly in need of protection from bias in the presentation of controversial issues.

That era has long since passed. Americans who have grown up with television and radio—the commercials for products that did not live up to their hype; the quiz shows and news shows whose deceptions were later revealed; the moralizing of televangelists who proved to have feet of clay—are not about to accept their messages uncritically. A cynical 63 percent of viewers queried in a recent Times Mirror survey opined that television news tends to favor one side over the other on political and social issues.¹ Yet, they tune in anyway. They also tune in to Rush Limbaugh and Jerry Brown, Mary Matalin and Jesse Jackson, Jerry Falwell and Howard Stern, and a diverse array of other political and social commentators in the electronic marketplace of ideas.

As Adrian Cronauer explains, whether or not television and radio coverage of public issues is indeed as biased as those in the Times Mirror survey seemed to believe, any such bias is of no proper concern to the government. It is contrary to fundamental First Amendment principles for federal officials to sit as arbiters of “fairness” of news and public-affairs programs, especially when those very officials also have the power to grant or deny the licenses that are essential to broadcasters’ livelihoods.²

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1. Christopher Stern, *Viewers Trust TV News, Support Censorship*, BROADCASTING & CABLE, Mar. 21, 1994, at 32, 32. Americans nonetheless professed more trust for television news than for newspapers, church, or the nation’s leader. *Id.*

2. That fairness cannot be constitutionally enforced by the government does not, of course, mean that fairness cannot and should not be aspired to by broadcasters themselves.

To be sure, the Supreme Court held a quarter-century ago in *Red Lion Broadcasting Co. v. FCC* that the Fairness Doctrine was constitutional.³ At the same time, however, the Court noted that its conclusion could be reconsidered in the future should experience indicate that the Fairness Doctrine had the "net effect of reducing rather than enhancing" the discussion of controversial public issues.⁴ *Red Lion* has since been undermined by an explosion of media outlets, as Mr. Cronauer notes and as the Court itself has seemed to acknowledge.⁵ Moreover, even were these technological developments less dramatic, *Red Lion* still could not be easily reconciled with the Court's more recent First Amendment jurisprudence.

Since *Red Lion*, the Court increasingly has recognized that "broadcasters are entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public [duties].'"⁶ It has thus cautioned against "enlargement of Government control over the content of broadcast discussion of public issues."⁷ For example, in *CBS, Inc. v. Democratic National Committee*, the Court rejected the suggestion that broadcasters be required to accept all paid political advertisements, explaining that such a requirement would unduly intrude on broadcasters' editorial discretion.⁸ Further, in *FCC v. League of Women Voters*, the Court struck down a prohibition on editorializing by public broadcasters who receive federal funds.⁹

The Court emphasized in these cases that, although the broadcast medium may be subject to greater regulation than are other media, any such regulation can be sustained only under a rigorous standard: the regulation must be "narrowly tailored to further a substantial governmental interest"

The codes of ethics applicable to broadcast journalists have long provided that news material should be presented in a manner that is "balanced, accurate and fair." CODE OF BROADCAST NEWS ETHICS OF THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; *see also* SOCIETY OF PROFESSIONAL JOURNALISTS CODE OF ETHICS. It is to be hoped that the electronic marketplace of the future will continue to contain stations practicing responsible journalism that present multiple sides of the issues, as well as the stations envisioned by Mr. Cronauer that will cater to the partisan views of each political, ethnic, or economic faction with sufficient market power.

3. *Red Lion*, 395 U.S. 367 (1969).

4. *Id.* at 393.

5. *See* *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

6. *Id.* at 378 (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 110 (1973))).

7. *Id.* at 379-80 (quoting *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 126 (1973)).

8. *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. at 123-25.

9. *League of Women Voters*, 468 U.S. 364.

that outweighs any countervailing infringement on broadcasters' First Amendment rights.¹⁰

It is difficult to see how the Fairness Doctrine could be sustained today under such a standard. That the government had no legitimate, let alone "substantial," interest in regulating the press for "fairness" seems clear under the Court's post-*Red Lion* decisions in *Miami Herald Publishing Co. v. Tornillo*¹¹ and *Pacific Gas & Electric Co. v. Public Utilities Commission*.¹²

The *Tornillo* case presented a First Amendment challenge to a state "right-of-reply" statute. The statute required a newspaper that had attacked a political candidate's "personal character" or "official record" to, at the candidate's request, "immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type" as the attack.¹³ The statute thus operated as a sort of Fairness Doctrine applicable to newspaper coverage of political candidates. A unanimous Court struck down the statute on First Amendment grounds, declaring that the government cannot compel the press "to publish that which "reason" tells them should not be published."¹⁴ The Court offered two reasons for its decision.

First, the Court explained that a governmentally mandated right-of-reply, rather than increasing the diversity of voices in the media, "inescapably 'dampens the vigor and limits the variety of public debate.'"¹⁵ As the Court noted, whenever a newspaper published news or commentary that was critical of a political candidate, and thus could give rise to a right-of-reply under the statute, the newspaper would risk incurring such penalties as the costs of editing and printing the candidate's reply and the lost space that could otherwise be devoted to material of its own choosing.¹⁶ In view of these potential penalties, "editors might well conclude that the safe course is to avoid controversy," with the result that "political and electoral coverage would be blunted or reduced."¹⁷

Second, the Court explained that "the treatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment," a process that the government must leave

10. *Id.* at 380.

11. *Tornillo*, 418 U.S. 241 (1974).

12. *Pacific Gas & Electric*, 475 U.S. 1 (1986).

13. *Tornillo*, 418 U.S. at 244 n.2 (quoting FLA. STAT. ch. 104.38 (1973)).

14. *Id.* at 256 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)).

15. *Id.* at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

16. *Id.* at 256.

17. *Id.* at 257.

exclusively to the press itself.¹⁸ “It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press”¹⁹

The Court accepted that its decision in *Tornillo* could produce a press that was less fair, less accurate, and less balanced. “A responsible press is an undoubtedly desirable goal,” said the Court, “but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”²⁰ Curiously, while *Tornillo* was decided just five years after *Red Lion*, neither the majority opinion nor the two concurrences even cited *Red Lion*, much less tried to distinguish it.

A decade later in *Pacific Gas & Electric*, the Court considered the constitutionality of a sort of Fairness Doctrine applicable to the space inside a private utility company’s billing envelopes. Pacific Gas & Electric had for many years inserted its own newsletter into the monthly billing envelopes sent to its customers.²¹ The state Public Utilities Commission then directed Pacific Gas & Electric to include in its billing envelopes four times a year the newsletter of a consumer organization with which the utility disagreed.

The Court struck down the requirement on First Amendment grounds, with both the plurality and the concurring justices invoking *Tornillo*. Writing for the four-justice plurality, Justice Powell explained that such “[c]ompelled access” to a communications medium impermissibly “penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.”²² Justice Powell observed that Pacific Gas & Electric might be deterred by the Commission’s order from speaking out on controversial issues, “because access is awarded only to those who disagree with [its] views and who are hostile to [its] interests.”²³ In addition, he noted that Pacific Gas & Electric would be required “to associate with speech with which [it] may disagree,” and thus might have to engage in additional speech of its own in order to distance itself from the consumer organization’s message.²⁴

The plurality attempted to distinguish *Red Lion* in a footnote on the ground that Pacific Gas & Electric’s “billing envelopes do not . . . present the same constraints that justify the result” in that case.²⁵ “No person can

18. *Id.* at 258.

19. *Id.*

20. *Id.* at 256.

21. *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1 (1986).

22. *Id.* at 9 (Powell, J., plurality opinion).

23. *Id.* at 14.

24. *Id.* at 15-16.

25. *Id.* at 10 n.6.

broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails."²⁶ The Court did not explain how, as a practical matter, a citizen would encounter any less onerous "constraints" in mailing a newsletter to all Pacific Gas & Electric customers than in obtaining television or radio time. In any event, as Mr. Cronauer contends and as the Court has implied, the issue is not whether any particular individual's voice is heard, but whether a diversity of viewpoints is presented on a given issue.²⁷

What the Supreme Court said in *Tornillo* and *Pacific Gas & Electric* about the evils of compelled access is, in fact, equally applicable to broadcasters. The Court has never said otherwise. Indeed, the potential to interfere with editorial judgment and to stifle public debate may be even greater with respect to radio and television, both because of the inherent nature of the broadcast medium and because of the government's licensing authority over broadcasters.

The broadcaster's most essential resource—airtime—is even more limited than the publisher's newsprint and ink. The Court recognized as much when striking down the newspaper right-of-reply statute in *Tornillo*, noting that "a newspaper is not subject to the finite technological limitations of time that confront a broadcaster."²⁸ The risk of taking on a controversial subject is thus all the greater for broadcasters because they may be required to expend precious air time on that which "'reason' tells them should not be [aired]."²⁹

Even more significant, however, is the impact of government licensing. The ultimate sanction for Fairness Doctrine violations was, of course, the FCC's refusal to renew the broadcaster's license. In view of the "tremendous potency" of this sanction,³⁰ regardless of the frequency with which it was actually imposed, a broadcaster "might well conclude that the safe course is to avoid controversy."³¹ An additional incentive to timidity was the costs, such as employee time and legal fees, that broadcasters

26. *Id.* (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980)).

27. *See* *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 113 (1973) ("[T]he Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities.").

28. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

29. *Id.* at 256.

30. *See* *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971) (McGowan, J., dissenting), *rev'd sub nom.* *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973).

31. *Tornillo*, 418 U.S. at 257.

incurred in dealing with even those fairness complaints that were eventually deemed meritless.

As Chief Judge Bazelon wrote in this *Journal* fifteen years ago, “[w]hen the right to continue to operate a lucrative broadcast facility turns on periodic government approval, even a governmental ‘raised eyebrow’ can send otherwise intrepid entrepreneurs running for the cover of conformity.”³² A similar response may be seen in broadcasters’ susceptibility to informal pressure from Congress and the FCC on television violence, despite the serious constitutional issues that would be presented by any formal government effort to restrict such material.³³

In addition to its potential for causing broadcasters to engage in self-censorship, the Fairness Doctrine also provided government officials with a means of censoring critical opinions or disfavored broadcasters. As Mr. Cronauer notes, at least two presidential administrations attempted to use the Fairness Doctrine to suppress views that they opposed.³⁴ Officials of less exalted rank also invoked the Fairness Doctrine to serve their political agendas.³⁵ The opportunities for abuse by government officials were enhanced in the final years of the Fairness Doctrine with the FCC’s decision that government agencies, and in particular the Central Intelligence Agency, had standing to prosecute fairness complaints to force greater coverage of the government’s side of an issue.³⁶

In sum, the Fairness Doctrine, like those other means of “[c]ompelled access” to a speaker’s facilities that the Supreme Court had condemned, cannot be reconciled with our traditional understanding of the First Amendment. The constitutional protections of free speech and a free press were designed, after all, to prevent government censorship of speech that was partisan, intemperate, and unfair. As Justice Stewart explained: “Those

32. David Bazelon, *The First Amendment and the “New Media”—New Directions in Regulating Telecommunications* 31 FED. COMM. L.J. 201, 206 (1979) (cited in *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regs. Concerning the Gen. Fairness Doctrine Obligations of Brdcast. Licensees, Report*, 102 F.C.C.2d 143, para. 31 (1985) (proceeding terminated) [hereinafter *Fairness Report*], *petition for review sub. nom. Radio-Television News Directors Assoc. v. FCC*, 809 F.2d 860 (D.C. Cir.), *vacated*, 831 F.2d 1148 (D.C. Cir. 1987)).

33. See *Writers Guild of Am., Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded*, 609 F.2d 355 (9th Cir. 1979); Timothy B. Dyk & Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programming*, 3 J.L. & POL. 625, 636 (1987).

34. See FRED FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 32-42 (1976); see also *Fairness Report*, *supra* note 32, para. 75.

35. See, e.g., *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984); *In re Complaint of Rep. Patsy Mink, Memorandum Opinion & Order*, 59 F.C.C.2d 987, paras. 1-6 (1976).

36. *In re Central Intelligence Agency v. American Brdcast. Cos.*, 58 Rad. Reg. 2d (P & F) 1544, 1548-49 (1985).

who wrote our First Amendment . . . believed that 'fairness' was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice."³⁷

But perhaps it was Justice White, the author of *Red Lion*, who put it most eloquently in his later concurrence in *Tornillo*:

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.³⁸

Just as the government cannot, under the First Amendment, be the censor of what the press may publish and the people may read in the print media, so too the government cannot be the censor of what broadcasters may air and the people may see and hear on television and radio.

37. *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 145-46 (1973) (Stewart, J., concurring).

38. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J., concurring).

