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# Fairness and the Public Trustee Concept: Time to Move On

Henry Geller\*

My brief comments on Mr. Cronauer's comprehensive constitutional assault on the Fairness Doctrine center on two points: (1) too little attention is paid to the relationship between the doctrine and the public trustee concept; and (2) policy considerations pertinent to that concept should be determinative of the fairness dispute.

## THE PUBLIC TRUSTEE CONCEPT

The Supreme Court has several times set out the rationale for the governmental regulatory regime for broadcasting. Radio is inherently not open to all. More people want to broadcast than there are available frequencies, and the government, therefore, chooses one entity, and—to prevent engineering chaos—enjoins all others from using the frequency. This scarcity—based not on the number of broadcast outlets or a comparison of those outlets with other media, but on the number of those who seek broadcast outlets compared to the number of frequencies available—is the “unique characteristic” of radio that supports its regulatory scheme.<sup>1</sup> It is undisputed that this same scarcity—more people wanting to broadcast than there are available frequencies—exists today.

In conferring these scarce privileges, the government could have required licensees to operate as common carriers. Or, as Mr. Justice White pointed out in *Red Lion*:

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government surely could have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.<sup>2</sup>

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1. *See Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 376-77 (1969); *NBC v. United States*, 319 U.S. 190, 226 (1943).

2. *Red Lion*, 395 U.S. at 390-91.

The government instead decided upon a public interest licensing scheme. The broadcaster pays no money for this scarce privilege. But it receives no property right in the frequency—"no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use."<sup>3</sup> Rather, to protect the First Amendment rights of others, the broadcaster receives only a short term license and volunteers to serve the public interest—to be a "fiduciary" for its community.<sup>4</sup>

The Fairness Doctrine is an integral and inevitable facet of this public trustee obligation. A licensee must devote reasonable time to discussion of controversial issues of public importance if it is to serve the public interest and must do so fairly by affording a reasonable opportunity for conflicting views. Otherwise, rather than being fiduciaries for their communities, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."<sup>5</sup>

The leading case graphically points this out.<sup>6</sup> The licensee, WLBT-TV, Jackson, Mississippi, vigorously espoused only the segregationist point of view and presented only the White Citizens Council, never the NAACP.<sup>7</sup> The court of appeals held that compliance with the Fairness Doctrine is the "sine qua non" of every broadcast licensee,<sup>8</sup> and that unlike a newspaper, a broadcast station "is a public trust subject to termination for breach of duty."<sup>9</sup> Without the Fairness Doctrine, a broadcaster could assert to the Federal Communications Commission (FCC or Commission) at renewal, "I am a racist and agree only with that viewpoint, so that is all that I will present," and the agency would have to renew that broadcaster's license—the antithesis of a public trustee—as serving the public interest.

#### CONSTITUTIONALITY OF THE FAIRNESS DOCTRINE

Mr. Cronauer is thus attacking the constitutionality of not only the Fairness Doctrine but of the entire public trustee concept. Since that concept interferes with editorial autonomy by requiring equal opportunities for candidates (which the Court held to be indistinguishable from fairness

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3. *Id.* at 391.

4. *Id.* at 389.

5. *Id.* at 392.

6. *Office of Comm. of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

7. *Id.* at 998.

8. *Id.* at 1009.

9. *Id.* at 1003.

“in terms of constitutional principles”<sup>10</sup> or community-issue oriented programming, the entire regulatory scheme is rendered nugatory. But this flies in the face of *Red Lion*, where the Court squarely upheld the constitutionality of the public trustee concept and fairness. Recently in the case *Metro Broadcasting*, the Supreme Court again cited and relied upon the public trustee concept and all its underpinnings.<sup>11</sup>

It is argued that there is now a veritable explosion of broadcast services. But there are still many more people who want to broadcast than available frequencies. Further, the argument ignores the critical fact that *Red Lion* was a radio case. In 1969 there were roughly 6900 radio stations; today there are over 11,500.<sup>12</sup> It cannot be seriously asserted that the doctrine is constitutional at 7000 stations but unconstitutional at 11,500.

The argument that the doctrine chills rather than promotes debate has been vigorously disputed by congressional committee reports,<sup>13</sup> and has never been sustained in court review.<sup>14</sup> In any event, the Commission should implement the doctrine in a way that eliminates or markedly reduces any limited chilling effects and still accomplishes the governmental interest—that the broadcaster act as a public fiduciary.<sup>15</sup> The Commission, therefore, should not act on a case-by-case basis to determine fairness as to each complaint; it is then not implementing the doctrine in a fashion narrowly tailored to the goal. The goal is not to effect perfect fairness on every issue covered by a licensee; that entails a deep intrusion into daily editorial decisions, contrary to *CBS, Inc. v. Democratic National Committee*.<sup>16</sup> Rather, the essential goal is to assure that overall the licensee acts consistently with its public fiduciary responsibility, so that WLBT-TV situations are remedied. In order to allow maximum breathing room for robust, wide-open debate, the FCC should review fairness matters at

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10. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 391 (1969).

11. *Metro Brdcast., Inc. v. FCC*, 497 U.S. 547 (1990).

12. 1 BROADCASTING & CABLE Y.B. B-604 (1994).

13. *See, e.g.*, H.R. REP. NO. 108, 100th Cong., 1st Sess. 20-25 (1987); S. REP. NO. 34, 100th Cong., 1st Sess. 28-32 (1987).

14. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 665 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Red Lion*, 395 U.S. at 393. The Commission itself acknowledged that the doctrine simply represents “sound journalistic practice.” In Re Complaint of Syracuse Peace Council against TV Station WTVH Syracuse, N.Y., *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, para. 93 (1987), *recons. denied*, 3 FCC Rcd. 2035, para. 6 (1988), *aff’d sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654, 665 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). For the Author’s own analysis of this issue, see generally HENRY GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION* (1973).

15. *See FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984) (calling for action in this sensitive area “narrowly tailored” to the substantial governmental interest).

16. *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. 94, 127 (1973).

renewal only under a *New York Times Co. v. Sullivan* standard,<sup>17</sup> determining whether the licensee has acted with malice in this area (i.e., deliberately violating the Fairness Doctrine as established by independent extrinsic evidence or a pattern of acting in reckless disregard of the doctrine.)<sup>18</sup>

Mr. Cronauer argues for elimination of the Fairness Doctrine on constitutional grounds. While I have disputed those grounds, I also would eliminate the doctrine, but on policy grounds. As shown, it is an integral part of the public trustee concept, and that concept has failed as a matter of policy.

The commercial broadcaster faces strong competitive pressures. Presentation of public service programming generally garners smaller audiences and thus is not as profitable to the commercial broadcaster. If the broadcaster is to forego maximizing its profit, there must be objective, effective regulations requiring public service programming from all licensees (e.g., regulation requiring a reasonable amount of local or informational programming—including for children—during the time periods 6 a.m. to midnight and in prime time). The situation here is no different from that as to pollution controls. The competitive industry structure does not assure against pollution of the air or water; only clear regulation, applicable reasonably and fairly to all, can accomplish that.

The FCC, however, has never adopted objective, effective standards of public service for broadcasting. On the contrary, it has specifically rejected such an approach and deliberately followed vague standards.<sup>19</sup> Today the FCC receives no programming information when it grants an initial license.<sup>20</sup> As a result of the FCC's 1981 Radio Deregulation<sup>21</sup> and 1984 Television Deregulation proceedings,<sup>22</sup> the Commission renews all

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17. *New York Times*, 376 U.S. 254 (1964).

18. The FCC rejected this approach. See *In re Inquiry into Section 73.1910 of the Commission's Rules and Regs. Concerning Alternatives to the Gen. Fairness Doctrine Obligations of Brcdst. Licensees*, *Report of the Commission*, 2 FCC Rcd. 5272, para. 53 (1987); see also *Syracuse Peace Council v. FCC*, 867 F.2d 654, 665-66 (D.C. Cir. 1989) (affirming the rejection) *cert. denied* 493 U.S. 1019 (1990).

19. *National Black Media Coalition v. FCC*, 589 F.2d 578, 580-81 (D.C. Cir. 1978).

20. *Office of Comm. of the United Church of Christ v. FCC*, 911 F.2d 803, 809-12 (D.C. Cir. 1990).

21. *In re Deregulation of Radio*, *Memorandum Opinion and Order*, 87 F.C.C.2d 797 (1981); *In re Deregulation of Radio*, *Report and Order*, 84 F.C.C.2d 968, paras. 69-72, 114-15 (1980).

22. *In re Revision of Requirements for Commercial TV Stations*, *Memorandum Opinion and Order*, 104 F.C.C.2d 358 (1986); *In re Revision of Programming and Ascertainment Requirements for Commercial TV*, *Report and Order*, 98 F.C.C.2d 1076 (1984) [hereinafter *Report and Order*].

broadcast licenses with only a postcard before it and thus has no knowledge of public service activities, with one exception.<sup>23</sup> It places “near total reliance” on the public to bring to its attention inadequate performance.<sup>24</sup> Such reliance misplaces FCC responsibility; the public is not motivated to inspect station records of public service. The FCC initially promised random audits of stations,<sup>25</sup> but never conducted a single one. It then did away with even this aspect of regulation, contending the marketplace was working.<sup>26</sup> It has never monitored the results of its deregulatory actions. Its comparative hearing process is in shambles, and its comparative renewal effort has been a total failure.<sup>27</sup>

It makes no sense to try to impose effective, behavioral regulation for the first time in this decade when conventional television faces such fierce and increasing competition, and viewership is declining rather than growing. It would be much sounder to truly deregulate broadcasting by eliminating the public trustee requirement and in its place substituting a reasonable spectrum fee imposed on existing stations (and an auction for all new frequency assignments), with the sums so obtained dedicated to public telecommunications (noncommercial operations on conventional broadcasting, cable, DBS, VCR, etc.).

The spectrum usage fee, based on a percentage of gross revenue, can be established by Congress at a reasonable figure without disrupting the industry (e.g., 1 percent for radio; 2 or 3 percent for television). Those figures today would net roughly \$90 million in radio and \$500 to \$800 million in television.<sup>28</sup> The fee could be the subject of a long-term contract (e.g., 15 years) between the FCC and the broadcaster, so that it is not subject to the vagaries of government policy changes toward the media.

For the first time, we would have a structure that works to accomplish explicit policy goals. The commercial system would continue to do what it already does—deliver a great variety of entertainment and news-type programs. The noncommercial system would have the funds to accomplish

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23. Under the Children’s Television Act of 1990, the television broadcast licensee must make a public service showing as to children. Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (Supp. IV 1992)). The efficacy of this requirement is still in doubt.

24. See *Office of Comm. of the United Church of Christ v. FCC*, 707 F.2d 1413, 1441-42 (D.C. Cir. 1983), *later proceeding*, 779 F.2d 702, 710 (D.C. Cir. 1985).

25. See *Radio Brdcast. Serv.: Revision of App’ns for Renewal of License of Commercial and Noncommercial AM, FM, and TV Licenses*, *Report and Order*, 46 Fed. Reg. 26,236, 49 Rad. Reg.2d (P & F) 740, para. 31 (1981).

26. *Report and Order*, *supra* note 22, paras. 80-83.

27. See *FCC Freezes Comparative Proceedings in Response to Court Integration Ruling*, COMM. DAILY, Feb. 28, 1994, at 3.

28. 62 TELEVISION AND CABLE Y.B. 1, 13-14 (1994).

its goals—to supply needed public service such as educational programming for children, cultural fare, minority presentations, and in-depth informational programs. The current First Amendment strains would be eliminated. For only by ending the public interest licensing scheme can broadcast journalists be placed on the same footing as their print counterparts. Removing the Fairness Doctrine would not accomplish this, since an administration intending to chill opposition would not seek to skew fairness rulings, which are subject to searching judicial scrutiny, but would try to manipulate the public trustee process, such as in the comparative renewal area.<sup>29</sup>

By acting in this fashion, Congress would be adopting essentially the print model for broadcasting (thus very largely removing the present First Amendment strains), would be ending the asymmetric regulation of broadcast and cable (the viewer makes no distinction between the two), and would rationalize the public interest goals for this sector by directly promoting and thus obtaining public service.

The broadcasters would oppose this revision. They like being called public trustees as long as the concept is never really enforced, and they would certainly oppose any spectrum fee, no matter what the First Amendment gains may be. The bottom line for them is the bottom line. They have great clout with Congress, and it will be an uphill battle, to say the least, to obtain the needed reform. In the end, the driving forces of technology and the market will eventually sweep away this ineffectual regulatory scheme, but it may take a decade or more to accomplish this and to end the present regulatory charade.<sup>30</sup>

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29. See generally Henry Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471, 498 n.143 (1975).

30. For a more complete discussion of this reform, see Henry Geller, *Broadcasting*, in 1 NEW DIRECTIONS IN TELECOMMUNICATIONS POLICY 125 (Paula R. Newberg ed., 1989).