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Part 1: INTRODUCTION

On August 4 of this year, we celebrate the 20th anniversary of the date on which American broadcasters were reunited with their constitutional birthright: full First Amendment freedom.

In 1987 I was privileged to chair the FCC commission. As twenty years have passed, we thought it an appropriate time to describe how the Commission reached its decision and to offer some observations about the subsequent history.

Surprisingly, since agreeing to speak, some members of congress have resurrected this issue by proposing to codify the doctrine. I suspect they are not motivated solely by the desire to make these remarks more timely and better attended.

For whatever reason, the role of the government in the regulation of our press has been raised again.

And thus, it is out of a sense of both historical interest and current topicality that we look back.

Part 2: Background

The origins of the Fairness Doctrine lie in the FCC's 1949 "report on editorializing by broadcast licensees," 13 FCC 1246. Over time it evolved to encompass two discreet elements:

- (1) An affirmative obligation to cover controversial issues of public importance to the community; and
- (2) A related "access" element requiring the broadcaster to provide a reasonable opportunity for the presentation of contrasting viewpoints on those issues, even if air time had to be granted for free.

Most would agree that the doctrine encompassed journalistic principles to which most broadcasters would subscribe anyway.

The problem arose from federal enforcement.

The rule empowered the commission---indeed, upon the filing of a complaint, required the commission---to involve itself in certain key question of content and editorial discretion.

At risk of losing their licenses, broadcasters could be, and were, called upon to defend not only the degree to which they had devoted airtime to covering important public issues but, most problematically, their reasonableness in offering air time to contrasting perspectives on those issues.

This brought a federal agency in to second-guess a broadcaster's judgments as to what issues were sufficiently important to a community to warrant coverage.

Worse, it involved the federal government in deciding which of the potentially many contrasting views warranted airtime -- for how long, by whom, and in what context.

Those subtle judgments, at the heart of the editorial function, were to be assessed by federal officials thousands of miles removed from those communities.

Before its abolition in 1987, "fairness" complaints had been filed in thousands of FCC proceedings, generally at the time of a station's application for renewal. The stakes were high for the broadcaster.

Losing the license to broadcast---silencing the speaker entirely and inflicting a financial penalty measured in millions of dollars---was a real threat.

To avoid even the possibility of such dire consequences, stations expended hundreds of thousands of dollars in attorneys' fees and lost staff time.

But these direct costs grossly understate the true costs of the Fairness Doctrine.

Radio and TV station owners quickly learned that license challenges thrived on controversial news coverage. When a broadcaster simply presented a modicum of bland, uncontroversial "top of the hour" news, and some opinion on very safe issues, the requirements of the Doctrine were cheaply satisfied. Requests for presentation of the opposing views were nil as no hornets' nests were riled. There just weren't many contrasting views to be aired when it came to naming that new park.

License renewals were assured.

It was a much safer and much cheaper strategy--- for broadcasters.

But it was an extremely expensive strategy for the public. Because the cost to society included the issues not covered, the controversies not engaged, the information not conveyed.

To avoid the tax, controversy was avoided and free speech was chilled. Stations imposed internal constraints and avoided airing news or informational programming for fear of entanglement in the regulatory web of Washington.

These indirect costs were borne by the American public and by the electronic press as an institution, whose status as a second class citizen was enshrined by the enforcement of a doctrine which would be unconstitutional without question if applied to the print press.

Inevitably, the constitutionality of the doctrine was challenged.

In *Red Lion co. vs. FCC*, 395 U.S. 367 (1969), a broadcaster challenged application of the Fairness Doctrine on First Amendment grounds.

While acknowledging that similar federal involvement in the editorial discretion of print journalists would not be tolerated under our constitution, the court accepted an argument that the scarcity of radio frequencies, licensed exclusively to a given broadcaster in the “public interest” allowed for an exception, shielding the doctrine from the First Amendment’s blanket prohibition on federal abridgement of a free press.

In reaching its decision, the court relied heavily on the FCC’s assurance that the net effect of the doctrine was to increase the coverage of controversial issues.

As if inviting reconsideration based on new or better data, the court added:

“...if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.”

By the early 1980s, the commission believed it had sufficient experience in enforcing the doctrine to proffer the evidence the *Red Lion* court had solicited.

In its 1985 fairness doctrine report, 102 FCC 2d 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.”

The commission's conclusion was based on the testimony of countless broadcasters who had declined to cover issues for fear of federal entanglements.

The commission concluded that the net effect of the doctrine was not to expand the coverage of controversial issues by broadcasters, but to reduce it – creating a “chilling effect” on speech protected by the First Amendment.

The commission went on to document a host of additional problems with the doctrine's enforcement, including

- Use of fairness complaints as a weapon to discourage a broadcaster from airing a disfavored opinion; and
- The effect of the doctrine in favoring only orthodox perspectives. This resulted from the fact that a broadcaster could not be expected to air every contrasting view—hence the obligation attached only to “significant” or “major” opposing perspectives. And, of course, commission officials in Washington, as opposed to editors in the communities, were the final arbiters of what was major and what was minor....

The commission's '85 report also documented explosive media growth and questioned the scarcity rationale.

The commission concluded: “we believe that the same factors which demonstrate that the Fairness Doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law.”

Interestingly, despite these findings on the merits, the commission opined that its authority to eliminate the doctrine was an issue “not easily resolved” and, citing congress' intense interest in the subject, concluded: “it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine.”

In substance, we concluded it was bad policy and probably unconstitutional, but bowed to congress, and resolved to keep enforcing it.

And we did.

In 1984, the commission had found a TV station in New York in violation of the fairness doctrine for running a paid ad advocating construction of a nuclear power plant while declining to run a piece opposing the construction.

(It may help to elucidate the complexity of “fairness enforcement” to note that this case turned on defining the issue: if the issue was the soundness of nuclear as an investment, the station would lose; if the issue was the need to eliminate reliance on foreign oil, it won.....the station lost, presumably because the FCC knew just what real “issues of local importance” were in Syracuse during the summer of '82.)

Between our finding of a fairness violation and the station's request for reconsideration, the commission released its '85 fairness report concluding, as noted, that the doctrine was terrible public policy and probably unconstitutional.

Understandably, this irritated the broadcaster, Meredith, which amended its petition for reconsideration to raise the constitutional question.....

As in, "well, gee guys, why are you enforcing a doctrine you believe disserves the public interest and is probably unconstitutional??"

The commission denied reconsideration, affirmed its finding of a violation, and refused to rule on Meredith's constitutional claim, contending that congress and the courts were the better venue to resolve the constitutional question.

The United States Circuit Court for the District of Columbia disagreed.

In January of 1987, the DC Circuit remanded the Meredith case to the FCC and directed us to address the constitutional challenge.

The court noted the Fairness Doctrine was FCC policy, not statutory law (Telecommunications Research and Action Center v. FCC, 801 f.2d 501) and that the commission itself had "largely undermined the legitimacy of its own rule....[by a] report that eviscerates the rationale for its existing regulations." Meredith Corporation v. FCC, 809 f.2d 863.

In a stinging rebuke to the FCC, the court reprimanded the commission for ducking the issue:

"...we are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward."

When I was sworn in as chairman, this remand order was literally on my desk.....and I was soon to learn just how "politically awkward" it would become.

Part 3: THE DECISION

Upon becoming chairman, I had my own scarcity problem.

The commission faced a host of important issues from overseeing the transition to competitive telephony to ongoing broadcast and cable deregulation.

And every new chairman has a finite amount of political capital, and time, to expend on his or her highest priorities. They are the scarce, but precious, coin of the realm.

And it was clear that, should we address the fairness issue on the merits, not deferring to congress as we had done in 1985, we were in for a bruising battle---one likely to use most--if not all--of my political capital on the Hill and earn me, in some powerful quarters, permanent political enemies.

Why?

Both houses of Congress had voted to codify the Fairness Doctrine in June 1987. A veto by President Reagan put the issue back on our plate, but the congressional vote made it clear that a majority in congress---with broad support in both parties---wanted the Fairness Doctrine to remain the law.

Members were not shy about making their opinions known. Both formally in oversight proceedings and informally in discussion, many members had made their views very clear.

The commission found no safe harbor in the broader body of interested parties. The comments in the '85 inquiry had been roughly evenly divided. And nothing much changed in '87.

While the broadcast industry generally supported repeal, some expressed the view informally that accepting a fairness obligation to avoid spectrum fees “wasn’t a bad trade.”

Not from their perspective, but then again, the First Amendment wasn’t theirs to trade.

Strange bed fellows---left and right--- found themselves in unholy alliances to preserve federal control over the press. Each constituency hoped to use the Doctrine to very different effect.

But the most distressing discussions I had were with those who stated quite clearly that they supported the Fairness Doctrine because it gave them a federal club with which to discourage broadcasters from airing perspectives they found politically offensive.

In this context, I had conservatives complain what the liberal networks might do, and liberals recoil at the thought of unconstrained media conglomerates.

Those discussions were not about diversity, or access, or robust debate. It was about using the federal government to control speech.....just what, as I recall, the founding fathers feared.

And so it was clear, going in, that our reconsideration of *Meredith v FCC* was fraught with political peril.

And yet, as the court of appeals had made clear, it was an issue that had to be engaged without further delay.

And while I claim no particular prescience, I think we all understood that this was an important issue, with great potential for the good. I can't say that, for me, it was a difficult decision. It wasn't.

The combination of constitutional gravity and political sensitivity guided our approach:

- we addressed all claims, including the constitutional challenge;
- we gathered another round of public comments;
- we directed the staff to evaluate all evidence in the record and to make recommendations on the merits, straight up, without regard for politics that swirled about us;
 - As to timing, the issue would be neither rushed nor delayed relative to any other matter but presented when it was ready.

A unanimous commission adopted its decision Aug. 4, 1987.

I won't take the time to review the final Order in any detail here.

Suffice it to say that the commission first accepted for purposes of its analysis, that *Red Lion* and its scarcity rationale were still controlling precedent. But *Red Lion* was expressly conditioned upon there being no evidence the doctrine "chills" speech. We found, based on the '85 study and comments in the '87 proceeding, overwhelming evidence that the net effect of the doctrine was to discourage the coverage of controversial issues.

Thus, the commission found the Fairness Doctrine unconstitutional even by the tolerant standard of *Red Lion*.

But the commission did not stop there. The order challenged the underlying scarcity premise of *Red Lion*.

We argued that explosive growth in media rendered federal fairness regulation of broadcasters unnecessary and therefore not, in constitutional terms, “narrowly tailored to achieve the objective” of viewpoint diversity.

For these reasons, and a host of others, the commission found the Doctrine unconstitutional and inconsistent with the public interest.

I found, upon rereading the decision after all these years, that it is very well reasoned and, to me, quite persuasive.

As I said, we reached our decision on August 4. On August 5 all hell broke loose. House Commerce Chairman John Dingell held a press conference to call us all “lickspittles.” Senate Commerce Chairman Ernest Hollings called us “wrongheaded, misguided and illogical.”

And then it got nasty.

Oversight hearings were held. Investigations were conducted. Motives and processes were questioned.

But in the end, what the congress found was that four bureaucrats had complied with a court order to resolve a constitutional challenge to one of their own regulations, and that, in doing so, they had voted their consciences.

Part 4: LOOKING BACK

Twenty years of history since the abolition of this rule provide both the means to evaluate our deregulatory policy with empirical data.

The evidence upon which the commission acted was essentially “negative” in nature. We had direct and abundant testimony about what broadcasters did not air, and did not cover, as a result of the doctrine and the fear of federal entanglement.

That evidence was attacked by critics as “anecdotal.” In some sense, that was correct. While the doctrine remained in effect, fundamentally, we could only search for evidence of its effect one story at a time.

With the Doctrine in place, it was not possible to do a controlled experiment. Because all radio and TV stations were governed by the same policy, we did not have comparative data that would highlight the effect of the doctrine.

Of course, the decision to abolish the Fairness Doctrine generated that data. It tee-ed up the question that students of the Fairness Doctrine – including, perhaps, the nine justices of the U.S. Supreme Court – would logically ask: would abolition of the Doctrine result in more coverage of controversial issues, more debate, more opinion and exchange?

If so, this broad industry data would confirm what the anecdotal evidence had suggested: the Fairness Doctrine chills speech.

The answer was “Yes.”

When you drop the requirement for free response time,
when you remove the obligation to present significant contrasting views,
when you remove the regulatory and financial risk associated with controversial editorials,
when you stop taxing speech, you get more of it.

In an exhaustive study published in the Journal of Legal Studies in 1997, Drs. Tom Hazlett and David Sosa documented a dramatic increase in informational programming on radio after the elimination of the Fairness Doctrine.

Most impressively, the percentage of AM stations programming news, talk and public affairs jumped from just over 7% in 1987 to over 27% in 1995. To put that in perspective, in 1975 there were no AM stations in America with a news/talk format. In 1995 there were 854.

Of course, the fact that the elimination of the Fairness Doctrine spurred an abundance of programming aimed squarely at our most important and controversial issues is no longer seriously debated.

Indeed, the new proponents of content controls cite the elimination of the doctrine as a primary cause of a talk radio’s phenomenal growth...and they are right. When discussion is tax free, it abounds.

And more news/talk, more discussion of controversial issues was what we all said we wanted.

But some see a problem-----some don’t like the content. It is too conservative, or too helpful to political opponents.

So now they want to bring back the Fairness Doctrine. Maybe no talk was better than all this talk we don’t agree with.

PART 5: LOOKING FORWARD

Which raises the question: We have looked at the decision and the past twenty years--- what about the future?

When I look at this issue from my current perspective, far removed in time and space from the those controversial days at the FCC, the issues and the answers seem much simpler and clearer.

I will lay them out in three broad conclusions:

First: the Fairness Doctrine was unconstitutional on its face.

The First Amendment provides that congress shall make no law abridging freedom of speech or of the press. Period.

The FCC derives its authority from congress. Its regulations have the force of federal law unless reversed by congress.

So the constitutional issues presented are analytically—if not politically—straightforward:

Is discussion of controversial public issues “speech” within the meaning of the First Amendment? Clearly, indeed, it is speech which lies at the very heart of the democratic process.

Are broadcasters part of the press?

To suggest otherwise is to suggest the framers of our constitution intended to protect from federal coercion only those who used the technology of the day---a proposition absurd on its face;

For surely what they intended to protect from federal influence was a process, a process of debate and discussion and disagreement, good analysis and bad, reassuring and offensive.

Most of all, they sought to protect the right of a free people, through their press in whatever form it took, to question and challenge and confront their government, including their then elected representatives in that government.

Pretty much exactly what’s going on today, much to the chagrin of some members of Congress.

The final constitutional question is whether the Fairness Doctrine “abridges” the freedom of that press.

It is on this piece of the puzzle that we spend the bulk of our time debating. We have now demonstrated that the doctrine abridged speech because it discouraged coverage of issues, and the creation of informational formats broadcasters would otherwise have provided.

But it’s much easier than that.

The Fairness Doctrine abridged press freedom on its face by directing broadcasters who chose to cover an issue, to cover both sides. Maybe they did not desire to cover both sides. Maybe they felt strongly their broadcast communities would benefit greatly from hearing only one side, the one they felt was right?

Maybe the other side was the conventional wisdom and needed no promotion, maybe that other side was well represented, even dominant in the communities’ print media (you know, the one not burdened by the Fairness Doctrine).

After all, Alexander Hamilton in penning the federalist papers was not required to summarize the case for decentralized power...

Our founding fathers had an abiding belief that it was through the conflict of ideas, strongly held and boldly presented, that truth would emerge.

They believed, as Judge Bazelon wrote, that “Truth and fairness have a too uncertain quality to permit the government to define them....” Bazelon, “FCC Regulation of the Telecommunications Press,” 75 Duke L.J. 213, 236 (1975).

It follows for me that the Fairness Doctrine was unconstitutional on its face.

Because broadcasters -- as citizens and as members of the press -- should be able to say what they think without regulatory sanction. If they choose to represent one perspective, so be it. There are plenty of additional perspectives out there.

But this conclusion requires the second proposition:

Red Lion is bad law, both factually and conceptually. It should no longer cloud our thinking about First Amendment issues and the electronic media.

In order to conclude, as we did in 1987, that the Fairness Doctrine was unconstitutional, we had to deal with the Red Lion decision which came out the other way.

We did so by accepting Red Lion’s assumption that broadcasters were entitled to a lesser degree of First Amendment protection, a different standard of review, while attacking the factual assumptions of scarcity and “no chilling effect.” See the Commissions 1987 decision at pg 21.

As we have seen, both factual assumptions were in error in 1987 and are even more so in error today.

Numerically, there simply is no longer any meaningful scarcity. Red lion was based upon the scarcity of broadcast frequencies “in the present state of commercially acceptable technology as of 1969.” Red lion broadcasting co. V. FCC, 395 U.S. 367 at 389.

Well, technology has changed. In 1969 there were 6,595 radio stations in the U.S. Now there are 13, 837. In 1969, there were 837 television stations. Now there are 1,756. And these are just full power stations.

Of course since this is all about insuring the audience has access to diverse sources of news, information and perspective, we cannot limit ourselves to broadcast technologies.

There is a high degree of substitutability among media by consumers seeking access to information. [See FCC media working group’s consumer substitution among media, September 2002.]

Besides radio and tv, the average American has access to over 100 channels of cable or direct broadcast satellite and, of course, to the internet---delivering literally millions of sources news, information and perspective at click of a mouse.

The simple fact is, there is no scarcity of diverse news, information, and opinion within the electronic media marketplace. And the number of these sources continues to expand as technology improves.

The second factual assumption of Red Lion was that the doctrine would increase, not decrease, the supply of controversial issue programming. As we have discussed, this factual assumption was also in error.

But let me address for a moment the more fundamental conceptual issue: the standard of review postulated by the Red Lion.

That court held that broadcasters are not entitled to the full measure of First Amendment protection enjoyed by their print colleagues ---that an “access” requirement for broadcasters, clearly unconstitutional in the print context, might be acceptable for the electronic press.

The commission was required to accept Red Lion’s lesser standard of review for broadcasters in reaching its 1987 decision.

I am not so constrained in my remarks today.

And I think it is important to address this issue directly. Because if we accept j compromised press freedoms for one member of the media, it threatens every member of the media.

As more and more Americans receive their news and information electronically, as the technology of delivery morphs and mixes from analog to digital; from print to broadcast to cable retransmission; from over the air to internet re dissemination, who can say what “standard of review” applies?

Is it the simple and clear words of the First Amendment---“no law”—or is it some lesser standard which looks to shifting factual circumstances or the impact on the audience as distinguished from the freedom of the speaker?

Red Lion was wrong not just factually, but conceptually and, I believe, legally in articulating a lesser standard of review for the broadcast media.

The notion of scarcity as an excuse to dilute free speech press rights was never compelling.

Key resources are generally economically scarce---including the inputs necessary to build a broadcast entity: bricks, mortar, human talent and money.

The truth is the vast majority of broadcast properties in the market today were purchased from the previous owners, not licensed by the FCC directly.

So the real barrier to entry here is like any other business: money.

When pressed, the proponents of “scarcity” fall back on licensing---the FCC licenses one user among many would be users. Demand exceeds supply; everyone can’t have one so you have to share---even your free speech rights.

This argument fails for two reasons: first, it is the ultimate bootstrap argument---demand exceeds supply in the licensing process only because of the way we choose (among many viable alternatives) to license.

Because we give licenses away, at least initially, demand exceeds supply. That always happens when you artificially hold the price of a valuable resource to zero. Once the license trades in the market, demand equals supply, exactly.

So if there is any licensing scarcity, we create it. Not a strong reason to compromise the First Amendment.

Maybe more fundamentally, our constitution does not allow the government to condition access to public resources on giving up the Bill of Rights.

In summary, both the factual and the conceptual model articulated by Red Lion were flawed. I believe it highly likely that the current court would reject Red Lion and its implied assumption that there is more than one First Amendment.

My third and final point stands, hopefully, above the rest. Over and above constitutional precedent, technologies and numbers and all the rest

My third point is about policy, it's about what is right for the country, for the press, and for the citizens who rely on that press.

Twenty years of perspective, for me at least, have made this issue even clearer.

Federal regulation of the press, or the content of speech, is bad public policy. There are narrow exceptions to be sure---for obscenity, for crime.

But that is not what we have been talking about this morning.

What we have been talking about is the federal government's role in how the press, in all of its forms today and tomorrow, reports news, analyzes issues, and critiques its elected leaders.

My view is that the government has no role there. None.

And the reasons for that conclusion go beyond the inevitable "chilling" effect of any such federal involvement.

All regulations have unintended consequences---the Fairness Doctrine was no different.

While it was intended to encourage the broadcast of more perspectives, it was used by Democratic and Republican administrations alike as a tool to discourage the broadcast of objectionable perspectives. [See Fred Friendly, *The Good Guys, the Bad Guys, and the First Amendment* (New York: Random House, 1976).]

An assistant cabinet secretary in the Kennedy administration was quoted on this point: "our ...strategy was to use the fairness doctrine to challenge and harass right wing broadcasters in the hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue." (Quoted in *ibid*, p. 39.)

The Nixon administration used the Fairness Doctrine to discourage broadcasters who had criticized his Vietnam strategies. *Columbia Broadcasting System Inc. v. FCC* 454 F.2d 1018

This is, of course, is exactly the sort of conduct our constitution's framers sought to avoid with our First Amendment.

The most surprising and, to me, discouraging aspect of the current debate regarding the Fairness Doctrine concerns the motives: it appears that altering the perceived right-wing bias of AM radio is the inspiration for at least some of those who seek to re-establish federal oversight of content.

My response to those who fear the conservative bent of AM radio is the same one I gave my conservative friends in '87 when they urged retention of the fairness doctrine to help restrain the "liberal" broadcast networks:

The only thing worse than a media dominated by your philosophical opponents is a media regulated by the federal government.

As Justice Douglas said, in noting that he would not have voted to uphold the Fairness Doctrine,

"The prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the fairness doctrine. The struggle for liberty has been a struggle against government." *Columbia broadcasting system, inc. v. democratic national committee*, 412 U.S. at 154.

It is worth noting that the cry to re-impose the Fairness Doctrine comes from inside the Washington beltway: from incumbents and professional policy wonks.

Outside Washington, there is no fear. Because the citizens of this country are smart; they see through the bias, and the bluster, where they exist.

And they are going to be just fine as long as they have a rich, diverse and free press. They do today. Lets hope we keep it that way.

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