

Memorandum Opinion and Order, Federal Communications Commission (1987)

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The Federal Communications Commission's "fairness doctrine" had long required broadcasters who presented views on controversial issues of public importance to grant access to those who held opposing views. The commission ruled that television station WTVH had violated the "fairness doctrine" when it broadcast a series of editorial advertisements advocating the construction of a nuclear plant but failed to broadcast any contrasting viewpoints on the issue. On appeal, the Court of Appeals for the District of Columbia Circuit held that the FCC had acted improperly in not responding to the station's argument that the fairness doctrine violated the First Amendment and remanded the case to the commission for reconsideration. In its 1985 Fairness Report, the commission had already raised questions about the doctrine, concluding that it discouraged broadcasting on controversial issues of public importance and encouraged excessive governmental intrusion into the operations of the electronic press. In light of the importance of the issue, the commission invited comments from the interested members of the public and, based on not only those comments but also its earlier report and its experience in administering the doctrine, issued its opinion.

CONSTITUTIONAL CONSIDERATIONS UNDER RED LION

. . . 37. Eighteen years ago, the Supreme Court, in *Red Lion Broadcasting Co. v. FCC*, clearly articulated a First Amendment standard for evaluating broadcast regulation which provided less protection to the speech of broadcast journalists than that accorded to journalists in other media. The Court held that, "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without government assistance to gain access to those frequencies for expression of their views," the government could require persons who were granted a license to operate "as a proxy or fiduciary with obligations to present those views and voices which are representative of his community." The Court in *Red Lion* expressly stated that it would reconsider its holding "if experience with the administration of [the fairness doctrine] indicates that [it] ha[s] the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues of public importance]."

2. Application of the Red Lion Standard

39. Under the standard enunciated by the Supreme Court for assessing the constitutionality of broadcast regulation, "it is the right of the viewers and listeners and not the broadcasters which are paramount." This standard permits the government to regulate the speech of broadcasters in order to promote the interest of the public in obtaining access to diverse viewpoints.

(a) Chilling Effect of the Doctrine

42. In the *1985 Fairness Report*, the Commission evaluated the efficacy of the fairness doctrine in achieving its regulatory objective. Based upon the compelling evidence of record, the Commission determined that the fairness doctrine, in operation, thwarts the purpose that it is designed to promote. Instead of enhancing the discussion of controversial issues of public importance, the Commission found that the fairness doctrine, in operation, "chills" speech.

43. The Commission documented that the fairness doctrine provides broadcasters with a powerful incentive not to air controversial issue programming above that minimal amount required by the first part of the doctrine. Each time a broadcaster presents what may be construed as a controversial issue of public importance, it runs the risk of a complaint being filed, resulting in litigation and penalties, including loss of license. This risk still exists even if a broadcaster has met its obligations by airing contrasting viewpoints, because the process necessarily involves a vague standard, the application and meaning of which is hard to predict. Therefore, by limiting the amount of controversial issue programming to that required by the first prong (i.e., its obligation to cover controversial issues of vital importance to the community), a licensee is able to lessen the substantial burdens associated with the second prong of the doctrine (i.e., its obligation to present contrasting viewpoints) while conforming to the strict letter of its regulatory obligations. The licensee, consistent with its fairness doctrine obligations, may forego coverage of other issues that, although important, do not rise to the level of being vital.

45. Furthermore, the Commission determined that the doctrine inherently provides incentives that are more favorable to the expression of orthodox and well-established opinion with respect to controversial issues than to less established viewpoints. The Commission pointed out that a number of broadcasters who were denied or threatened with the denial of renewal of their licenses on fairness grounds had provided controversial issue programming far in excess of the typical broadcaster. Yet these broadcasters espoused provocative opinions that many found to be abhorrent and extreme, thereby increasing the probability that these broadcasters would be subject to fairness doctrine challenges. The Commission consequently expressed concern that the doctrine, in operation, may have penalized or impeded the expression of unorthodox or unpopular opinion, depriving the public of debates on issues of public opinion that are “uninhibited, robust, and wide-open.” The doctrine’s encouragement to cover only major or significant viewpoints, with which much of the public will be familiar, inhibits First Amendment goals of ensuring that the public has access to innovative and less popular viewpoints.

46. These various incentives are not merely speculative. The record compiled in the fairness inquiry revealed over 60 reported instances in which the fairness doctrine inhibited broadcasters’ coverage of controversial issues.

(b) The Extent and Necessity of Government Intervention into Editorial Discretion

53. In this regard, the Commission noted that, under the fairness doctrine, a broadcaster is only required to air “*major* viewpoints and shades of opinion” to fulfill its balanced programming obligation under the second part of the doctrine. In administering the fairness doctrine, therefore, the Commission is obliged to differentiate between “significant” viewpoints which warrant presentation to fulfill the balanced programming obligation and those viewpoints that are not deemed “major” and thus need not be presented. The doctrine forces the government to make subjective and vague value judgments among various opinions on controversial issues to determine whether a licensee has complied with its regulatory obligations.

54. In addition, the Commission expressed concern that the fairness doctrine provides a dangerous vehicle—which had been exercised in the past by unscrupulous officials—for the intimidation of broadcasters who criticize governmental policy. It concluded that the inherently subjective evaluation of program content by the Commission in administering the doctrine contravenes fundamental First Amendment principles. We reaffirm these determinations and find

that enforcement of the fairness doctrine necessarily injects the government into the editorial process of broadcast journalists.

61. In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that under the constitutional standard established by *Red Lion* and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

65. We believe that the 1985 *Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press.

72. Today's telecommunications market offers individuals a plethora of information outlets to which they have access on a daily basis. Indeed, this market is strikingly different from even that offered by the daily print media. While there are 11,443 broadcast stations nationwide, recent evidence indicates that there are only 1,657 daily newspapers overall. On a local level, 96% of the public has access to five or more television stations, while only 125 cities have two or more local newspapers. The one-newspaper town is becoming an increasing phenomenon. Our review of the Supreme Court's statements on the relationship between constitutional principles and technological developments leads us to conclude that it would now be appropriate for the Supreme Court to reassess its *Red Lion* decision.

78. Nevertheless, we recognize that technological advancements and the transformation of the telecommunications market described above have not eliminated spectrum scarcity. All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. Although a free enterprise system relies heavily on a system of property rights and voluntary exchange to allocate most of these goods, other methods of allocation, including first-come-first-served, administrative hearings, lotteries, and auctions, are or have been relied on for certain other goods. Whatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.

97. We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intrusion into the editorial discretion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists. The First Amendment was adopted to protect the people *not from journalists, but from government*. It gives the people the right to receive ideas that are unfettered by government interference. We fail to see how that right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media are powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. We

concur. We therefore believe that full First Amendment protections against content regulation should apply equally to the electronic and the printed press.