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THE FIRST AMENDMENT APPLIED TO BROADCASTING: A FEW MISGIVINGS

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I have a very few rather iconoclastic and irreverent comments. There are three major reasons for having misgivings about a proposal that the First Amendment should be used as an instrument for deregulating the radio and television industries. The issue is not just the fairness doctrine¹ but the entire constitutive scheme, the basis of which is that the licensee is a trustee with public responsibility.

The first reason is this: When the proposal is made that the First Amendment regime applicable to the press should simply be transferred to broadcasting, I inescapably ask myself the question "Do I like the content of that regime?" Should that regime be extended to another industry? Misgivings about that regime become a factor in the equation. It seems to me relevant, therefore, that our legal regime has, on the print media side, contributed to the creation of an institution that is virulently unfair, entirely unsubstantive, and basically hostile to the world of ideas, one that is irresponsible and extremely and uncontrollably powerful.

The "big print" media are a major constitutive force in the debasement of our public life. This is primarily because our media are so unsubstantive. This is an irony in view of the First Amendment's ideal. The point of the First Amendment is to create an open forum for ideas, but the one thing the public press apparently fears and hates most is any actual reference to substantive ideas. The press seems to me to be interested predominantly in issues of personality, of who is up, who is down, not what is said, but who has said it, and what that indicates about the flow of political life.

Is it the case that our existing First Amendment regime contributes to this debasement? I think so. The decision in *Miami Herald Publishing Co. v. Tornillo*,² which takes pressure off the press to be a forum, a place where there is actually a First Amendment debate, seems to me to contribute to the sense

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1. 47 U.S.C. § 315 (1982) & 47 C.F.R. §§ 73.1910-73.1940 (1985).

2. 418 U.S. 241 (1974).

that the press is entitled by the *First Amendment* to be unfair, to give no play to debate or variety, and to be insensitive to the problematical nature of ideas and opinions. The man from Mars would think it odd that it is the First Amendment, which is supposed to create a forum for ideas, that guarantees the right of each publication to shut down the open forum for the debate of ideas.

Similarly, there is an irony about *New York Times Co. v. Sullivan*.³ Why should the First Amendment so freely guarantee the robust and uninhibited practice of lying? It is odd to say that there should be no chill, or only minimal chill, on the right of the press to tell untruths. The part of *New York Times* that says you have to prove actual malice and that negligence is not malice seems to be a step in the wrong direction from the very viewpoint of First Amendment ideals. These cases seem to me to give cause for misgivings about the notion that we should revolutionize the broadcast side and buy into a universe which has created such a problematical institution in American life.

A second misgiving derives from the fact that it is a myth that if we adopt an undiluted First Amendment universe for broadcasting, that is the equivalent of saying that we have deregulated broadcasting. All that we have done is substitute regulation by the courts for regulation by the combination of president, agency, and Congress that we now have on the broadcast side. It is not the case that on the press side there is no regulation. Rather, the courts exercise huge ad hoc discretion in overriding state and federal legislative and administrative judgments as to how much speech is permissible and what can and cannot be forbidden. The reason is that the First Amendment, unhappily, does not generate fixed rules; it generates rules that turn out to be differences of degree. In the end, many scholars who are in disagreement are reduced to saying there are differences of degree and somebody has to decide what degree is acceptable. It does not seem possible that Richard Epstein's notion, that if you drive these theories hard one gets determinative rules, can be correct. It very much depends who is doing the driving and on the political climate in the judiciary.

The question is whether one trusts the courts more than the legislatures in drawing these distinctions of degree. Underlying

3. 376 U.S. 254 (1964).

this is an institutional and methodological point. It is one of the striking features of discourse in American constitutional law that we think that the courts do not count as government when we talk about the powers of government. We are always asking whether the government should be restrained from doing something, and somehow the courts are always outside the sphere of those who count as coercers when they are issuing decrees. Government by judges is as much government, is as much coercion, as any other type of government, particularly in an era where interpretivism is a difficult line to maintain and where most differences are differences of degree. Suppose the court says that the First Amendment prevents the state of Utah from legislating to exclude pornographic shows from cable television. Once the court has made such a ruling, there will be glowing editorials about how this prevents the government from abridging our freedom. What has happened, however, is that a local community, through various processes that are both complicated and untidy, has reached a judgment about how it wants its life to be regulated, and nine elderly justices from thousands of miles away swoop down and say, "Oh no, you can't do that." That is very coercive. That also is government.

Under the Fein proposal, the Supreme Court, rather than the combination of Congress, agency, president and, if you will, public opinion, will make these decisions. The question then is: "Will the people—the industry, the listeners, and others—have a more responsive symbiotic relationship with the courts than with the group of actors—Congress, state legislatures, governors, administrative agencies—that have been the regulators heretofore?" The problem of deregulation is the problem of adapting a historically complicated, peculiar institution or set of institutions to an atmosphere of changing technology. What evidence is there that the courts have the ability in any kind of sensitive or knowledgeable way to understand where deregulation should go, how fast it should go, and where it should be?

A third misgiving surrounds the proposition that there are no relevant distinctions between the print media and broadcasting. And the question of course is whether any distinctions are meaningful distinctions in terms of the First Amendment.

Print media and broadcasting are very different institutions. They are different partly because, historically, the law has created different constitutive atmospheres, so that they have de-

veloped in different ways. For fifty years the broadcast industry has been a part of a structure that has pervasive and continuous interaction with government and government decisionmaking. In order to exist, the broadcast industry must enter into complex forms of cooperation with the public sector in a continuing way. (This does not exist with the print media. The fact that the Post Office subsidizes some classes of mail is not a relevant form of interaction.) Allocating the broadcast spectrum, both in terms of horizontal rules and vertical rules, and the decision whether the spectrum should be allocated in a way that enables local broadcasting to flourish or whether broadcasting should be regional or even national—these are constitutive decisions that the industry cannot make on its own. There are too many interrelated aspects involved. On the cable side, there are aspects of a natural monopoly. Unlike setting up a newspaper vending box where you put in your twenty-five cents, there are not many opportunities in a single city to install a cable system. Further, broadcasting is an industry that, for better or worse, is suffused with enormous governmental ownership and subsidy.

There is a common intuition, common to many civilized societies, that we have in broadcasting, and particularly in television, a kind of resource which deserves a more complicated and variegated system of distribution of ownership and control than the press model would permit.

Finally, let me say a word about the “chilling effect” of regulation. Radio and television stations are pretty timid, but the point of comparison for First Amendment purposes is the print media. Is the Washington Post more open to fair debate than CBS? Having spent two years in Washington in this administration, I would be horrified if I thought that the Washington Post could buy CBS and be entirely free from governmental restraints in what it is allowed to say about the administration’s policies. There would *not* necessarily be an *increase* in debate if the First Amendment were used to deregulate broadcasting. There is less public debate and public programming in a small local newspaper than on the small local television or radio station. The fact is that if we import conventional First Amendment doctrine into the broadcast industry, the chances are that the amount of debate on political ideas will go down substantially. Public affairs broadcasting, which is not commercially

very remunerative, now goes on because of agency and governmental pressure. That is not a chilling effect.

Within the mass media, where does the First Amendment function best? Where does one see a maximum of the flow and debate of ideas? My perception is that the best job is done in public radio and public television. Yet these are the most governmentally scrutinized of the mass media. Government, not only through the FCC rules, but through statutory rules and subsidy, has an enormous impact on public radio and television. And there seems to be an odd and ironic discontinuity between conventional First Amendment theory and the way that these industries have in fact historically functioned.

