

Book Review of The First Freedom

Arthur B. Hanson

Repository Citation

Arthur B. Hanson, *Book Review of The First Freedom*, 10 Wm. & Mary L. Rev. 254 (1968),
<http://scholarship.law.wm.edu/wmlr/vol10/iss1/20>

BOOK REVIEWS

THE FIRST FREEDOM. By BRYCE W. RUCKER.¹ Carbondale, Illinois: Southern Illinois University Press, 1968. Pp. 299. \$12.50.

The dual problem countenanced by this book is crucial indeed, namely, (1) the decline in the number of daily newspapers in this country, and (2) the phenomenon of common ownership of more than one facet of the radio-newspaper-television mass media complex. Concern has been expressed in many quarters over the possibility that this situation may reduce the exposure to a multiplicity of ideas and views which is the cornerstone of our Republic. Unfortunately, Mr. Rucker's treatment of this intricate problem is generally less than satisfactory.² The work is poorly written and emotionally stratified to an extent which destroys any real worth it might otherwise have had. The research is shallow and makes ill use of readily available data which irrefutably disputes the conclusions reached by the author.

Before discussing whether there has been a movement toward uniformity of ideas by the media, we must examine the causes for the decrease in the number of independent sources of information, first, in the newspaper business, and second, by common ownership of mass media outlets.

The number of locally competing daily newspapers in the United States has declined. Mr. Rucker attributes this decline to "greedy owners" who have "subverted opposition in legal and illegal ways to create exceedingly profitable chains and monopolies." And herein lies one of the author's most serious flaws. The emotional framework superimposed upon Mr. Rucker's presentation of the facts and discussion of their ramifications gets in the way of objective, reasoned analysis.

Indeed, the author's own evidence indicates that there is more involved than nefarious activities of "selfish owners." Newspapers face rapidly increasing costs and decreasing revenues. The costs of newsprint, wages and salaries, which in the aggregate account for at least two-thirds of the expenses of publishing a paper, have risen drastic-

1. Professor of Journalism and Director of Journalism Research, Southern Illinois University.

2. One small but particularly irksome feature of the book is the poor organizational format of the footnotes, which makes reference to them an extremely cumbersome process.

ally in recent years. Modern high-speed printing equipment and computers, necessary to enable the press to compete with other forms of mass communication, are extremely expensive. Revenue from national advertising has plummeted as television has captured that market, and a considerable share of revenue from local advertising has shifted to suburban papers and "shoppers." Revenue from circulation has decreased for many city dailies as a result of population shifts to the suburbs. Furthermore, with virtually every prolonged newspaper strike, many readers are permanently lost, and circulation will approach its prior level only through costly promotional activities such as reader contests and advertising campaigns. And when circulation decreases, for whatever reason, advertising rates go down, thereby compounding the losses to revenue.³

Mr. Rucker ignores the economic pressures created by the very factors which he devotes a chapter to describing,⁴ and attributes the demise of daily newspapers to acts of unfair competition. He writes:

Before we fall victim to the argument that newspaper deaths result inevitably from the trend in American business toward fewer and larger operating units, let us look at some other possible causes. Hints as to how the strong have emasculated the weak newspapers are contained in the thirteen Department of Justice antitrust actions taken against newspapers since 1940. Obviously, the relatively few brought to book represent only a small percentage of the illegal and extralegal plots contrived to bankrupt the opposition and, thus, create highly profitable monopolies. Most newspaper murders are successful; the victims have expired before legal action can be undertaken.⁵

His conclusion, though never clearly stated, is that without acts of unfair competition, the economies of combined operation would not be necessary for continued operation and we would not be faced with failing newspapers and the concurrent trend toward chain ownership and newspaper mergers.

Because he discounts the possibility of newspapers facing financial difficulty in the absence of illegal activity, Mr. Rucker opposes the

3. See generally Statement of Prof. Raymond B. Nixon, *Hearings on S. 1312 Before the Subcomm. of Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2nd Sess., vol. 18 of Official Transcript 2310, 2324-35 (1968).

4. See Chapter Four.

5. Pages 10-11.

"Failing Newspapers Bill,"⁶ which he incorrectly states the American Newspaper Publishers Association "used its influence" to have introduced in Congress. The bill would exempt from the antitrust laws a joint operating arrangement or a merger by a failing newspaper on the assumption that the alternative to allowing such economic self-help would be complete financial failure and cessation of publication.⁷ This is a carefully limited exemption from the antitrust laws and not intended as a sanction for unfair methods of competition or other abusive business practices.⁸ The purpose of this bill is to preserve as many news sources as possible by permitting joint production activity or merger only where the alternative would be the death of a newspaper. In many respects the two levels on which a newspaper competes—news-editorial competition and advertising competition—face

6. S. 1312, 90th Cong., 1st Sess. (1967).

7. Sec. 3. As used in this Act —

* * *

(2) The term "newspaper combination" means (A) the merger or consolidation of two or more newspaper publications or newspaper owners, or (B) the acquisition by one newspaper owner, directly or indirectly, of one or more newspaper publications of one or more other newspaper owners through the acquisition of the whole or any part of the capital stock or assets of such other newspaper owners.

(3) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners pursuant to which there is established for two or more newspaper publications any or all of the following: (A) joint or common facilities for publication; (B) unified operations for the performance of one or more of the following functions: printing, distribution, advertising and circulation solicitation, and bookkeeping; and (C) joint or common establishment of advertising rates, circulation rates, and revenue distribution.

* * *

(6) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, appears unlikely to remain or become a financially sound publication.

* * *

Sec. 4. It shall not be unlawful under any antitrust law for any person to propose, enter into, perform, or enforce the provisions of any contract, agreement, or arrangement for any newspaper combination or any joint newspaper operating arrangement if, at the time at which such contract, agreement, or arrangement is proposed or entered into, not more than one of the newspaper publications affected by such combination or operating arrangement is a publication other than a failing newspaper.

8. *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 173-91 (1967).

different "relevant markets" and are tested by different standards.⁹ Advertising competition between newspapers may be reduced under a joint operating arrangement or merger, although advertising competition remains vigorous between the newspapers and alternative media. The argument in favor of the bill is that this price must be paid in some instances to enable news dissemination competition to continue, and news-editorial competition clearly should take priority over advertising competition in the public policy structure of this country.

Mr. Rucker devotes considerable attention to cross-ownership between newspapers and broadcasting stations. Although a high percentage of radio and television stations were newspaper-owned in the early days, the proportion has declined steadily since 1950, as a result of the burgeoning number of stations.¹⁰ The most undesirable ramification of cross-ownership would be the absence of diversity of views which might result from a central control of all sources of communication. But by the author's own figures, this spectre has not materialized, because in only three cities in this country in 1967 did the sole daily newspaper own majority interests in both the lone television station and the only AM radio station. All three cities, Rock Island, Illinois; Zanesville, Ohio; and Temple, Texas, are located near larger population centers whose media are available.¹¹ In variance with his own evidence, however, Mr. Rucker concludes that "millions of Americans have lost their First Freedom birthright on local issues."

Mr. Rucker's "Blueprint for Action" to combat the ills he finds in mass communication are:

(1) Disclosure of not only the ownership of the media, "but also the communications and noncommunications businesses and industries in which they hold interest."

(2) Revision of tax laws to deprive newspapers of capital gains treatment if they acquire another newspaper. In addition, "inheritance taxes should be revised so heirs are not forced to sell or form trusts to protect their ownerships."

(3) "The postal subsidy should be increased for small, single ownerships and lowered or eliminated for large, multiple ownerships."

9. Markham, *Economic Analysis of Competition in the Daily Newspaper Business*, *id.* pt. 3 at 1422, 1430.

10. Nixon, *supra*, note 3 at 2337-38.

11. Rock Island is across the Mississippi River from Davenport, Iowa; Temple is approximately 25 miles from Waco, Texas; and Zanesville, Ohio is less than 50 miles from Columbus. NATIONAL GEOGRAPHIC ATLAS OF THE WORLD 24, 31, 33 (1963).

(4) Revitalize the Federal Communications Commission.

(5) "Society," perhaps through "our large foundations," should give financial assistance to the weekly press, in which lies "journalism's final chance."

The second and third suggestions to alter the tax and postal laws are not sufficiently spelled out, but they would appear to be of extremely doubtful constitutionality since they would constitute a direct violation of the First Amendment's proscription against Congressional abridgment of a free press,¹² not to mention various lesser flaws such as unreasonable classification and deprivation of due process of law.

Many have suggested strengthening the Federal Communications Commission. Mr. Rucker's proposal is somewhat muddled by his use of innuendo to explain Congressional laxity in following this advice. He remarks:

Congress resists changing these rules because they serve the vested interests of Congressmen. . . . What should we call free radio and television time given to two-thirds of the members of Congress by their local stations? No wonder incumbents almost always win re-election.¹³

The implication is that equal free time is not given to the incumbents' opponents, but such a practice would be in direct violation of the law under existing FCC regulations.¹⁴ If such a practice were followed, it is hard to believe the opposing candidates would fail to complain with prompt vigor before the Commission.

Suggestions (1) and (5) bear an interesting relationship. Mr. Rucker feels the public cannot judge the stand taken by a particular paper or station unless it knows all the owners' other interests. It is interesting to note that nowhere in the book does he disclose, however, that Howard Rusk Long, the Chairman of the Journalism Department in which the author is a Professor and general editor of the series which sponsored this book, as well as author of its Foreword, is an organizer and officer of the International Conference of Weekly Newspaper Editors and has long been active in matters relating to the weekly press. And, not surprisingly, it is the weekly press which the author

12. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

13. Page 224.

14. 47 C.F.R. §§ 73.120 (AM); 73.290 (FM); 73.590 and 73.657 (TV) (1968).

champions as the only communications forum available to the public which is not subservient to either the owner's investments or the threat of lost advertisers.

ARTHUR B. HANSON*

THE WARREN COURT. By ARCHIBALD COX.¹ Cambridge: Harvard University Press, 1968. Pp. 142. \$4.95.

With the prospective completion of Chief Justice Warren's administration on the Supreme Court of the United States, the summary view of the past fifteen years presented here by Professor Cox is particularly timely. It is the most recent in a list² which will almost certainly proliferate in the immediate future, but for a succinct and intelligent summary of the major constitutional decisions of the Warren period there will be few commentaries now or later which will be its peer.

Although it is almost endemic in American public affairs to subject the Supreme Court to a running fire of criticism—some of the commentary of the New Deal period³ was virulent enough to leave still-smouldering embers—the abuse which has been heaped on Earl Warren has only been exceeded by that suffered by John Marshall. While this reviewer has no doubt that history will rank these two men as the greatest Chief Justices to date, it is a poor commentary on American life that the ultimate value of their services must be stated in inverse proportion to the invective they have incurred.

As Professor Cox points out, much of the excoriation of Warren has come from an extremist fringe while “the plan to impeach Chief Justice Marshall was a plank in the political program of the Jeffersonian Democrats.” The highway posters, bumper stickers, matchbook covers and other media of propaganda against the Warren Court have been a shameful manifestation of extremism which has unfortunately

* Member of the District of Columbia, Maryland and Virginia Bars and the American Law Institute, and General Counsel, American Newspaper Publishers Association.

1. Solicitor-General of the United States, 1961-1965; Samuel Williston Professor of Law, Harvard Law School.

2. Cf. BICKEL, *POLITICS AND THE WARREN COURT* (1965); BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); KATCHER, *WARREN: A POLITICAL BIOGRAPHY* (1968); WEAVER, *WARREN: THE MAN, THE COURT, THE ERA* (1968).

3. Cf. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); PEARSON AND ALLEN, *THE NINE OLD MEN* (1937).