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Broadcast Localism and the Lessons of the Fairness Doctrine

by John Samples

Executive Summary

The First Amendment to the U.S. Constitution recognizes a laissez-faire policy toward speech and the press. The Framers of the Bill of Rights worried that the self-interest of politicians fostered suppression of speech. In contrast, some constitutional theorists have argued that the Constitution empowers, rather than restricts, the federal government to manage speech in order to attain the values implicit in the First Amendment.

The government managed broadcast speech for some time, in part through the Fairness Doctrine, which was said to promote balanced public debate and "an uninhibited marketplace of ideas." The history of the Fairness Doctrine confirms the validity of the concerns of the Framers of the First Amendment, because federal officials and their agents used and sought to use the Fairness Doctrine to silence critics of three presidencies. Broadcasters adapted to the Fairness Doctrine by avoiding controversial speech, thereby chilling public debate on vital matters.

The Federal Communications Commission is proposing to manage broadcast speech by imposing localism requirements, including content requirements and advisory boards to oversee managing stations. This proposal limits the editorial independence of license holders to serve the public interest. The history of the Fairness Doctrine suggests that federal officials who make and enforce such policies are more concerned with limiting political debate than they are with advancing local concerns or the public interest. Like the Fairness Doctrine, the FCC's localism initiative poses the risk of restricting speech. Our unhappy experience with the Fairness Doctrine suggests that imposing localism mandates on broadcasters is unlikely to serve the public interest in constitutional propriety and uninhibited political debate.

John Samples is director of the Center for Representative Government at the Cato Institute and the author of The Fallacy of Campaign Finance Reform *(University of Chicago Press, 2006).*

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Introduction

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The American Founders saw the Constitution as a social contract whereby the people delegated some of their powers to create a government to protect their natural rights. If the people did not delegate a power, the government could not exercise it. The original Constitution included no such power over speech and the press. Hence, the federal government could "make no law" on either topic. The First Amendment recognized, rather than created, this constraint on government.[1] This freedom created a press whose reporting was independent of government control. The First Amendment in this way recognized that laissez faire was the only legitimate policy toward speech and the press.

People who hold political power generally do not favor a laissez faire policy toward speech. Allowing citizens to say or print what they wish leads to criticism of government policies or even electoral competition for those holding power. Governments prefer to manage speech both to gain consent to policies and to avoid losing power. Officials manage speech by prohibiting or inhibiting disfavored ideas or arguments. Public officials rarely overtly argue they should be given the power to manage speech to restrict the marketplace of ideas. Instead, advocates argue that such control would advance important values like the public interest or democracy—ideals that are said to be slighted by the laissez faire demands of the First Amendment. We should wonder, however, if self-interested politicians are likely to manage speech to achieve some common purpose or ideal. Might they not simply suppress speech to serve their own self-interests in policy or electoral success?

Congress and the Federal Communications Commission have long managed speech broadcast over the public airwaves. From 1949 to 1987, the FCC enforced the Fairness Doctrine, which required broadcasters who present a point of view on public matters to offer an opportunity for a contrasting view to be heard. By its nature, the Fairness Doctrine compromised the editorial independence of broadcasters. Following the 2006 and 2008 elections, several members of Congress seem intent on reviving the Fairness Doctrine through legislation or regulation.[2] A return to the Fairness Doctrine per se seems less likely for the near future. Several proposed regulations, however, may serve as a close substitute for the Fairness Doctrine.[3]

In particular, for five years the FCC has been investigating whether "broadcasters are appropriately addressing the needs of their local communities."[4] It concluded that the responsiveness of broadcasters has been less than ideal, and that FCC policies should change to foster more responsiveness to local audiences. To improve licensees' performance, the FCC has proposed that they should be required to meet quarterly with "a permanent advisory board made up of officials and other leaders from the service area of its broadcast station."[5] It is also seriously considering requiring broadcasters to devote specified amounts of time to local programming.[6]

These "localism" mandates are similar to the Fairness Doctrine in three ways. First, advocates see both policies as solutions to the same "problem": the alleged domination of broadcasting by a single point of view—political conservatism. Jacob Hacker and Paul Pierson complain that without a fairness mandate "the airwaves are now flooded with highly partisan statements on matters of national importance, much of it voicing an a*vowedly right-of-center view*" [emphasis added].[7] Similarly, a recent study of talk radio by the Center for American Progress concludes that conservatives dominate the format. In response, the authors call for "steps to increase localism and diversify radio station ownership to better meet local and community needs."[8] Second, both policies compromise the editorial independence of broadcasters to attain their goals. The Fairness Doctrine placed editorial judgment under the influence of the FCC, while localism seeks to make broadcasters accountable to local adviso-

ry boards. Third, both policies assume that broadcasters responding to market signals will not satisfy the public's desire for "fairness" or "localism" without government intervention.

But localism and the Fairness Doctrine differ in one important respect. The FCC enforced the Fairness Doctrine for almost 40 years, a history that informs how the policy actually worked in practice. Mandated localism for broadcasters has not yet been enforced by the agency.[9] Given the similarities of the two policies, an assessment of the theory and practice of the Fairness Doctrine may provide some insight into likely consequences of adopting broadcast localism.

The Theory of Managed Speech

The systematic management of speech by the federal government began during the early days of radio in the 1920s. As the market for radio developed and the number of stations increased, interference among radio transmissions became more and more of a problem. After some debate, Congress enacted the Radio Act of 1927, which created the Federal Radio Commission, an independent agency with the authority to license radio stations. Sections 18 and 29 of the law denied the new agency power to censor broadcasting. Those sections also required licensees to grant equal time to candidates for office and proscribed obscene or profane language over the airwaves. Section 11 of the 1927 law required the commission to grant a license if "public convenience, interest, or necessity would be served by the granting thereof."[10] Section 13 prohibited the commission from licensing "any person or corporation which had been found guilty of monopolizing or attempting to monopolize radio communication."

From early on, the government seized the power to decide who would communicate in the new medium of radio and how they would communicate. The federal government would manage speech in these ways to preclude interference among transmissions, prevent private monopolies, and realize the public interest. In 1934, Congress subsumed the Radio Act into a new communications law that also created the Federal Communications Commission. The earlier framework of oversight of speech continued in the new law, thereby empowering the FCC.

The FCC first set out the Fairness Doctrine in its 1949 report on "Editorializing by Broadcast Licensees." Congress endorsed the doctrine 10 years later as an amendment to section 315(a) of the Communications Act of 1934. The policy required that if a broadcaster presents one viewpoint, it would have "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." When the FCC found that a broadcaster had violated the Fairness Doctrine, it usually ordered the party in question to present opposing viewpoints. If the broadcaster refused to present another viewpoint, the FCC had the power to revoke or deny its license. Violating the Fairness Doctrine thus could easily complicate continuing in the broadcasting business.[11]

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The Supreme Court upheld the constitutionality of the Fairness Doctrine in 1969. In *Red Lion Broadcasting Co. v. FCC*, Justice Byron White's majority opinion argued that the scarcity of opportunities to broadcast speech justified government regulation of speech in the public interest. The Fairness Doctrine essentially required broadcasters to act as trustees for the airwaves for those who could not gain access. To assure broadcasters met those obligations, the FCC could force them to air views they otherwise would avoid. To justify such coercion, Justice White focused on the rights of listeners and the goals of the First Amendment as opposed to the rights of speakers and the language of the Constitution:

> But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the

> broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[12]

The FCC thus has the power to manage public debate over the airwaves in order to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." Just as the Radio Act of 1927 ostensibly precluded censorship, *Red Lion* denied the FCC and the federal government the power to monopolize the media.

Some scholars would develop an alternative to the laissez faire interpretation of the First Amendment, an alternative that appears quite similar to the *Red Lion* dicta. They argued that the First Amendment should be understood not as a restriction on government but rather as a way to empower government to realize what the *Red Lion* Court called "the ends and purposes of the First Amendment." The First Amendment, on this interpretation, increased the power and ambit of the state rather than limiting it.[13] These theorists saw a parallel in recent American history. Just as the New Deal ended economic laissez faire, *Red Lion* looked forward to an end of laissez faire in speech and the press.[14] Indeed, federal communications law and *Red Lion* did end laissez faire in broadcasting: enforcing licensing and the Fairness Doctrine gave the federal government, not the broadcasters, ultimate control over the content of the relevant media.

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Managed speech advocates expected such government oversight would realize First Amendment values by requiring more varied sources of political speech. Whereas before only one voice might have been heard, the FCC would now require two under the Fairness Doctrine. The result of managed speech, it could be argued, need not be less speech.

But if the goal of managing speech is an improved public debate, could the government also restrict some speakers as a means to that end? Normatively, the government might limit those who are speaking "too much" or whose publishing dominates public debate about an issue. Such restrictions would be affirmatively required if they were necessary to achieve the goal of a rich public debate by ending a monopoly on speaking, and perhaps would create a more equal expression of voices.[15] Limiting freedom of speech then would not be a mistake or a violation of rights. Instead, restrictions on speech would be needed to serve democracy or the values underlying the First Amendment.

I now turn to the Fairness Doctrine in practice. Did the FCC's management of speech under this policy enable "an uninhibited marketplace of ideas"? Did the Fairness Doctrine lessen speech? If so, did such restrictions make public debates more democratic? Finally, did the costs associated with the Fairness Doctrine have a chilling effect on speech?

A Brief History of Managed Speech

Early Censorship

The Radio Act of 1927 explicitly denied that the medium's regulator had the power to censor broadcasts. Nonetheless, censorship happened. In 1924, H. V. Kaltenborn, a radio personality in New York, criticized Secretary of State Charles Evans Hughes for refusing to recognize the Soviet Union. When Hughes heard the criticism, he called a representative of AT&T, the owner of the station, who in turn let it be known that "this fellow Kaltenborn should not be allowed to criticize a cabinet member" over the radio. Kaltenborn's contract was cancelled. In 1926, the socialist leader Norman Thomas had a speech prepared for radio abruptly postponed. Thomas concluded that no radio outlet would allow criticism of an

administration when its license lay within the ambit of a cabinet official. In 1933, the restrictions shifted to conservative critics of the New Deal. Harold A. Lafount, the head of the Federal Radio Commission, told radio stations it was "their patriotic, if not bound and legal duty" to refuse broadcasting facilities to advertisers who ignored or defied the industry codes set out by the National Recovery Administration. CBS then cancelled a broadcast by a critic of those codes.[16] In 1940, the FCC granted renewal of a radio license contingent on the station in question abandoning editorials. Other license holders took the lesson to heart and stopped broadcasting editorials and started avoiding controversial programming. The FCC's understanding of its mission at this time is revealing: "Though we may not censor, it is our duty to see that broadcast licenses do not afford mere personal organs, and also to see that a standard of refinement fitting our day and generation is maintained."[17] In other words, a station would not be permitted to broadcast only the views of its owner and thus become "a mere personal organ." A broadcaster would also be obligated to observe community standards in regard to content and presentation. Since the FCC had adopted these standards for broadcasters and held power over their licenses, the agency had power to discourage disfavored speech—a power commonly called censorship. The management of speech early in the history of the FCC indicates a propensity to suppress views counter to the views of those who hold power or contrary to community standards, and not an effort to create a rich public debate or an uninhibited marketplace of ideas.

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The Kennedy-Johnson Gambit

The FCC adopted the Fairness Doctrine in 1949. From 1963 to 1973, three administrations used the policy to harass their critics. In 1963, the Kennedy administration wished to negotiate a limited nuclear test ban treaty with the Soviet Union and to persuade the Senate to ratify the agreement.[18] The administration worried that conservative broadcasters might influence public opinion and thereby complicate or preclude ratification and, more generally, their efforts at détente. Indeed, the president himself had said privately that the FCC and the "proper" Senate committees should act against efforts to "spread right-wing propaganda" critical of his administration.[19] Members of the administration, acting in concert with the Democratic National Committee, set up the Citizens Committee for a Nuclear Test Ban Treaty. This group purported to be nonpartisan; its research, publicity, and arguments, however, were prepared by Ruder and Finn, the public relations firm for the DNC. Each time a conservative commentator attacked the treaty, the Citizens Committee demanded time to respond and followed up with their arguments and information. The strategy was successful. Public opinion favored the administration, and the Senate overwhelmingly ratified the treaty in the early fall of 1963. The Fairness Doctrine had been successfully used to "provide support for the president's programs."[20]

The administration and the DNC decided to continue the attack on their conservative critics with the help of the Fairness Doctrine. They believed that regularly investigating and monitoring conservative critics of the administration would diminish opposition to Kennedy's reelection and to his proposals, including Medicare and the sale of wheat to the Soviet Union. The campaign strategists for Kennedy (and later Lyndon Johnson) directed surrogates to demand time from radio and television stations in order to respond to conservative broadcasts and then to threaten FCC action if the requests were not honored. Bill Ruder, a public relations specialist active in the effort, later described its purpose:

> Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.[21]

Allies of the Kennedy administration thus saw the Fairness Doctrine as a way to sup-

press the speech of disfavored critics of its policies. The authors of this attack on free speech felt justified because they were silencing “ultra-right-wing preachers who were saying vicious things about Kennedy and Johnson.”[22]

The Kennedy contingent was counting on the Fairness Doctrine having a “chilling effect” on disfavored speech. Broadcasters might conclude that the costs of complying with the policy were greater than the benefits of airing controversial speech. The broadcaster would then avoid that loss by simply refusing to air the speech that might prompt accusations of imbalance.

The Fairness Doctrine imposed three kinds of costs on broadcasters: transaction costs, opportunity costs, and investment costs. When the doctrine was enforced, license holders might have to pay the costs of dealing with an accusation of unbalanced coverage. David M. Coyne describes such transaction costs in 1981 dollars: “The broadcaster must devote the time of key personnel to the investigation of the complaint, prepare correspondence with the FCC, and consult attorneys both locally and in Washington. This activity can cost a small broadcaster $20,000 or more, and more than $100,000 if a major network becomes involved.”[23] If the FCC decided against a licensee, the broadcaster would be required to “devote valuable air time, often at no charge to the speaker, to the presentation of an opposing viewpoint.” The opportunity cost of airing the speaker would be the foregone advertising revenue or perhaps the lost opportunity to air programming favored by the license holder.[24] Broadcasters also had to consider the possibility that falling short of fairness would lead to revocation of a license or a refusal to renew a license. Absent the license, the values of shares in a broadcasting company would fall to zero. To be sure, the FCC rarely revoked licenses for failing to comply with its Fairness Doctrine.[25] Yet the possibility existed, and the probability of the loss of the license multiplied by the value of a company suggested a significant cost on broadcasters. Of these, the Kennedy team was banking on transaction costs and opportunity costs to restrict the speech of their opponents.

During and shortly after the 1964 presidential campaign, DNC chairman John M. Bailey made enforcing the Fairness Doctrine a top concern. Bailey specified 10 radio stations that he claimed regularly ignored the Fairness Doctrine while broadcasting criticisms of the administration. Among Bailey’s targets were the Manion Forum, a series of anti-communist broadcasts created by Clarence Manion, the former dean of the law school at the University of Notre Dame, and the broadcasts of Billy James Hargis, a conservative minister.[26] In one broadcast, Hargis raised questions about the character of journalist and political operative Fred J. Cook, who had written a book attacking Barry Goldwater. At the behest of the DNC, Cook demanded air time from WGCB, a small station in Pennsylvania that ran a tape of the Hargis broadcast. The station refused, and Cook sued to force the station to provide the time. In fact, the DNC had decided to make an example of WGCB and its owner, Red Lion Broadcasting, “to weaken and intimidate right-wing broadcasters for future elections.”[27] This case led to the *Red Lion* decision discussed earlier.

This Kennedy-Johnson gambit indirectly affected political speech. Gradually, more and more radio stations refused to carry the programs of conservative commentators like Hargis and Clarence Manion. The stations feared costly litigation, lost advertising revenue, and faced possible fines or license suspensions from the FCC.[28] Journalist Fred Friendly concluded: “This campaign in 1964 against right-wing broadcasts was at the time considered a success by its creators.” In a report to the Democratic National Committee, the leaders of the campaign proudly noted: “Even more important than the free radio time was the effectiveness of this operation in *inhibiting* the political activity of these right-wing broadcasts [emphasis added].”[29]

The First Amendment problems of this period did not stop there. The FCC did not want to be accused of a political or partisan bias in regulating broadcasting. After 1964,

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the agency began to grant greater discretion to the National Association of Broadcasters to regulate the content of their member stations' programs. The NAB came up with a code of ethics that included stricter regulations on broadcasting personal attacks. As applied, the code had the intentional or unintentional effect of discouraging the most conservative broadcasts.[30]

The Nixon Effort

The Nixon administration and the television networks had been quarreling for some time prior to the election of 1972. The administration looked for ways to force the networks to provide favorable coverage. For example, during the intense anti-war demonstrations of October 1969, President Nixon told his staff to take "specific action relating to what could be considered unfair network news coverage"—not once, but 21 times.[31] In December, after the election, Clay T. Whitehead, the head of the White House Office of Telecommunications Policy, delivered a speech in Indianapolis proposing changes in the Communications Act of 1934. When their licenses were up for renewal, local stations would be required to demonstrate that they were "substantially attuned to the needs and interests of the community" and had offered a reasonable opportunity for the "presentation of conflicting views on controversial issues." Local station managers and network officials would be held responsible for "all programming, including the programs that come from the network." Those who did not correct imbalances or bias in network political coverage would be "held fully accountable at license renewal time." The policy would have bite. If a station could not demonstrate meaningful service to all elements of its community, the license should be taken away by the FCC. Along with that threat came two offers: the license period for stations would be extended, and challenges to license renewal would become harder to sustain.[32]

Earlier in American history, it had been the political left that had raised concerns about a private monopoly over the airwaves. Now Whitehead traced the problems in media bias to "excessive concentration of control over broadcasting," presumably by the networks. Such control, he argued, was as bad when it came from New York as when exercised by Washington. Whitehead had taken up the anti-monopoly cause and ended up with something like the "right to hear" interpretation of the First Amendment as articulated in *Red Lion*: the purpose of the First Amendment was to provide an audience with diverse views by preventing monopoly control over information, including control by private actors, in this case network reporters thought to be on the political left. Until this time, the Nixon administration had opposed the Fairness Doctrine. Now the administration saw the value in forcing broadcasters to present different views: "The Fairness Doctrine became the Holy Writ; and the 'King Richard version' called for local stations to enforce it on pain of being put out of business if they did not."[33]

The news media did not capitulate. A *Washington Post* editorial captures the spirit of the harsh response that met Whitehead's speech: "the administration is endangering not simply the independence of network news organizations, but the fundamental liberties of the citizens of this country as well."[34] NBC president Julian Goodman said: "Some federal government officials are waging a continuing campaign aimed at intimidating and discrediting the news media, and the public has expressed very little concern." Robert G. Fichtenberg, chairman of the freedom of information committee of the American Society of Newspaper Editors, called the proposed licensing standards "one of the most ominous attacks yet on the people's right to a free flow of information and views."[35]

Following these and similar responses, Whitehead explained that he only had "intended to remind licensees of their responsibilities to correct faults in the broadcasting system that are not (and should not) be reachable by the regulatory process of government."[36] In March 1973, the Nixon administration introduced legislation that would extend the term of a broadcasting license from three to five years. Whitehead's other propos-

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als regarding the standard for renewing licenses were not included in the proposed legislation nor were they mentioned again by the administration.[37]

The Nixon team appeared to have lost the battle. Did they, nonetheless, win the war? They would have won if the media had restrained itself after its initial resistance in order to avoid future attacks through the licensing process of the FCC. The Whitehead matter quickly gave way to the rising tide of what would become the Watergate flood. However, during that period there is little evidence that the media restrained itself for fear of the Nixon administration.

Other Cases

During these years, the Fairness Doctrine collided with the First Amendment at other times. In these cases, however, the government did not act systematically to advance the agenda of a president or an administration. In the mid-1960s the Reverend Carl McIntire, a conservative evangelist, tried to buy WXUR, a radio station in Philadelphia. Many civic groups in that city opposed his effort. The FCC approved the transfer of the license to McIntire but warned him to meet the obligations of the Fairness Doctrine. In fact, the content of WXUR's broadcasts did not comport with the Fairness Doctrine, and when WXUR applied for renewal of its license the FCC held hearings and decided to deny the renewal because of the station's violation of the Fairness Doctrine. McIntire appealed to the courts, lost his initial case, and was denied an appeal to the Supreme Court. His license to broadcast was revoked.[38]

In early 1974, ABC cancelled an episode of a talk show hosted by Dick Cavett that featured interviews with radical leaders Jerry Rubin, Tom Hayden, and Rennie Davis. A network executive said at the time, "Our obligation is to inform the public fairly and in a balanced manner, and the statements made on the program could not wait two weeks for the opposing viewpoints." It was, protested Cavett, a "landmark precedent in program censorship."[39] The reference to "our obligation" could refer to duties voluntarily taken on by the network, but it seems more likely that the obligation in question grew out of the Fairness Doctrine. Accordingly, the Cavett show cancellation appears to be a result of the network's desire to avoid controversial programming in light of oversight by the federal authorities.

In the late 1970s, James Robison, a Southern Baptist, preached fundamentalist theology and conservative politics on his weekly television program, *Restoration with James Robison*. In February 1979, he sharply attacked a local gay-rights group in the Dallas–Fort Worth area, stipulating that homosexuality was "perversion of the highest order." Citing the Fairness Doctrine, the gay community responded with a petition to station WFAA, which carried Robison's program, WFAA, for time to respond to his statements. Other groups attacked by Robison (including the Christian Scientists and Mormons) had successfully claimed free time to respond. WFAA not only granted the request, but also canceled Robison's program. It was later reinstated, but several other stations around the country subsequently refused to air it.[40]

An FCC investigation in 1985 found that the Fairness Doctrine had affected the struggle over a California referendum about glass recycling. The beverage industry had put together advertising to oppose the bill in question. The side favoring bottle recycling learned about the planned advertisements and demanded response time from 500 broadcasters in the form of twice the amount of airtime free from any station accepting the industry's commercials. Two-thirds of the stations thereafter refused to run the bottle industry's advertisements.[41]

In several prominent cases from the 1970s, politically active people tried to use the Fairness Doctrine to limit the freedom of the press, but failed. The Democratic Party sought a right for Democrats to respond to President Nixon's statements on television under the Fairness Doctrine. The Supreme Court ultimately denied the plaintiffs had such a right.[42] In the early 1970s, a conservative group filed a complaint against CBS, arguing that the net-

work had violated the Fairness Doctrine by ignoring hawkish positions on national security issues. The complaint was ultimately dismissed by both the FCC and, on appeal, by the courts.[43] I have found no evidence to suggest the complaint changed the way that CBS reported on national security issues.

The End of the Fairness Doctrine

The Fairness Doctrine died in the 1980s. Ronald Reagan had run against an overly intrusive federal government and, once in office, he sought to cut back Washington's ambit, including governance of the airwaves. In August 1985, the FCC published a report arguing that the Fairness Doctrine did not serve the public interest and, in fact, had a significant chilling effect on freedom of speech. In 1987, the agency formally repealed the Fairness Doctrine.[44] A year later the U.S. Court of Appeals for the District of Columbia affirmed the FCC's power to repeal the Fairness Doctrine.[45]

In late 1987, Congress passed legislation to reinstate the policy, but it was vetoed by Reagan. In the Senate, however, the bill had received only 59 votes—8 short of the necessary number to override the presidential veto.[46] The reinstatement bill was supported by most Democrats but opposed by a majority of Republicans. However, the law attracted some GOP and conservative support; John Danforth (R-MO), the ranking Republican on the Senate Commerce Committee, spoke in its favor.[47] Conservative leader Phyllis Schlafly, echoing the Nixon administration 15 years earlier, lamented the loss of the policy in light of what she called the "monopoly power" of the television networks.[48]

In President Reagan's veto message, he said "This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment." Congress relented, lacking the votes to override the veto.[49] A later effort, in 1989, also failed under the threat of a presidential veto.[50]

When the Clinton administration took office, the veto threat disappeared, and many experts thought the Fairness Doctrine would be revived. Some in Congress were eager to return to a regime of managed speech. Representative Bill Hefner (D-NC), the sponsor of the The Fairness in Broadcasting Act of 1993, predicted that his bill would control "TV and radio talk shows that often . . . make inflammatory and derogatory remarks about our public officials."[51] Talk radio hosts, however, fostered a public outcry against the policy, and Congress did nothing.[52] The election results of 1994 then precluded reinstating the policy until the election of a Democratic Congress in 2006 and a Democratic president in 2008.

Lessons for Localism

How well did the federal government manage speech from the 1920s to the demise of the Fairness Doctrine in 1987? The most systematic consequences of managed speech emerged from the early 1960s to 1973. Each administration during that era tried to use the Fairness Doctrine to intimidate its critics. The success of such intimidation varied with the size of its target. Application of the Fairness Doctrine certainly chilled the speech of politically marginal speakers like conservative anti-communist preachers and anachronistic sixties radicals, but it failed to control speech when it was used against the television networks by the Nixon administration. Support for the Fairness Doctrine often broke down along partisan or ideological lines: liberal Democrats favored it, whereas Republicans did not (apart from the Nixon period). Those divisions largely remain today. Yet the Fairness Doctrine was applied to both parties—and to liberals as well as to conservatives. History provides little reason to believe that only the speech of conservatives or Republicans will be restricted by a revived Fairness Doctrine.

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Some politicians used the Fairness Doctrine to systematically intimidate their critics. The managerial interpretation of the First Amendment—the philosophical background for the Fairness Doctrine—promised more speakers and no suppression of speech except to enhance public debate. It did not deliver on

that promise. Instead, political leaders managed speech in order to suppress views that they expected would complicate achieving their political goals.

The logic of this failure should not be surprising. The managerial interpretation of the First Amendment assumes government officials will create a rich public debate by fostering more competition in the marketplace of ideas. It assumes that public officials will seek the public interest in proposing and implementing regulations. However, more competition in the marketplace of ideas will make it more difficult for public officials to achieve their policy goals, as we saw in the case of President Kennedy and the nuclear test ban treaty. In practice, would politicians provide the public good of more competition in political speech, or would they follow their own self interests in realizing their policy agendas? Politicians face the following choice: they can apply the Fairness Doctrine to increase speech and thereby complicate achieving their political goals, or they can use the policy to chill and suppress speech criticizing their policy agendas. Not surprisingly, many government officials pursued the latter path by using the Fairness Doctrine to restrict the marketplace of ideas. Why would anyone expect another outcome? The First Amendment restricts the power of public officials over speech precisely because the interests of the rulers do not coincide with the interests of the governed. The history of the Fairness Doctrine supports this old truth about politics and speech. The word "fairness" changed nothing.

Nonetheless, supporters might argue that the Fairness Doctrine policy did increase the number of speakers on the radio and television. If one speaker was heard, the Fairness Doctrine required a second view. Looked at this way, the speakers suppressed by the Fairness Doctrine should be balanced against the speakers required by the policy to get an overall estimate of its effect on First Amendment values. But government officials used the Fairness Doctrine to suppress dissent from their policies, not to achieve a "rich public debate" about their proposals. Suppressed speech was not an unfortunate error to be balanced by the benefits of the policy; it was the purpose of the Fairness Doctrine. In any case, after the removal of the Fairness Doctrine, opinion-oriented programming grew rapidly and the number of radio talk shows increased from 400 to more than 900.[53] Similarly, Thomas Hazlett and David Sosa found that the elimination of the Fairness Doctrine led to more information programming on radio stations. They found that the date associated with a strong increase in informational formats was 1987, the year the Fairness Doctrine ended.[54] This evidence suggests that the Fairness Doctrine on the whole reduced in general the quantity of speech on the airwaves.

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Conclusion

History suggests that the Fairness Doctrine served as a way for presidential administrations to systematically reduce or intimidate dissent of their policies. The doctrine also haphazardly restricted the speech of marginal individuals on the left and the right. The most frequently targeted speakers were conservative Christian ministers with a strong hostility to communism. The Fairness Doctrine appears to have limited the speech and the influence of such individuals. When applied to more established players like the television networks, the policy failed to silence its targets.

The current period seems similar to the Kennedy era: a new liberal president is pushing an ambitious agenda and fears the influence of conservative critics. Now, as then, the president's political allies hope to manage speech with the help of the FCC. Newly empowered advisory boards could demand that license holders broadcast critics of the president's critics during the time set aside for local programming. Should a broadcaster refuse to follow that advice, the renewal of its license could easily come into question. After all, as members of the advisory board might testify, the licenseholder had refused to meet the needs of its local audience. The broadcaster might also choose to stay on the good side of its advisory

board by deciding not to air "unfair" attacks on the president or his administration. Some may find this scenario unlikely. But the history of the Fairness Doctrine suggests that the word "localism" will be defined in practice as the "raw political advantage" of those in charge of managing speech.

Both the Fairness Doctrine and the localism proposal share a common weakness: they make broadcasters subservient to politics. The Fairness Doctrine proved useful to national administrations in pursuit of policy objectives. Localism in practice will give power over broadcasting to highly organized local groups who may use that power for national or local ends.

The history of the Fairness Doctrine indicates the wisdom of denying political leaders the power to manage speech. Political leaders seek to continue to hold power and to advance their policy goals. They have little interest in public debates about their policies or their continuance in office. It is folly, therefore, to give them control over political speech. It is also folly to expect that public officials will truly aim at fairness or localism when they do regulate speech. Political leaders are likely to manage speech for their own political ends rather than the public good. Broadcast localism, like the Fairness Doctrine, is likely to do significant harm to freedom of speech. Policymakers who are aware of history will recall the lessons of the Fairness Doctrine and reject localism mandates for broadcasters.

Notes

1. Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, CT: Yale University Press, 1999), pp. 19–20.

2. Sen. Deborah Stabenow (D-MI) and Sen. Tom Harkin (D-IA) have called for reviving the policy. See "Democrats Consider Reviving 'Fairness Doctrine,'" Foxnews.com, February 12, 2009, http://www.foxnews.com/politics/2009/02/12/dems-consider-reviving-fairness-doctrine/. Rep. Louise Slaughter (D-NY) has introduced legislation to reinstate the Fairness Doctrine. See the transcript of her conversation with Bill Moyers, "What Happened to Fairness?" http://www.pbs.org/now/politics/slaughter.html.

3. Jesse Walker identifies a number of regulatory proposals that might work in ways similar to the Fairness Doctrine. See "Beyond the Fairness Doctrine," *Reason* 40 (November 2008): 36–45.

4. Federal Communications Commission, "Report on Broadcast Localism and Notice of Proposed Rulemaking," FCC 07-218, January 24, 2008, p. 2.

5. Ibid., p. 14.

6. Ibid., pp. 22, 56. Licensees would be required to broadcast minimum amounts of local programming. Those that met the programming guidelines would face a less demanding process for renewing their licenses. Those who failed to meet the guidelines would have their application for renewal judged by the entire commission.

7. Jacob S. Hacker and Paul Pierson, *Off Center: The Republican Revolution and the Erosion of American Democracy* (New Haven, CT: Yale University Press, 2005), pp. 218–19. Like Hacker and Pierson, Barker associates these failures in speech with conservatives, libertarians, and populists who engage in "ideologically biased programming." See David C. Barker, *Rushed to Judgment: Talk Radio, Persuasion, and American Political Behavior* (New York: Columbia University Press, 2002), p. 16.

8. John Halpin et al., *The Structural Imbalance of Political Talk Radio*, Center for American Progress, June 20, 2007.

9. Some broadcasters have created local advisory boards voluntarily.

10. Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, MA: Harvard University Press, 1983), pp. 118–19.

11. David M. Coyne, "The Future of Content Regulation in Broadcasting," *California Law Review* 69 (March 1981): 561–63.

12. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) 390.

13. Owen Fiss, "Why the State?" *Harvard Law Review* 100 (1987): 785.

14. Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993), p. 34.

15. Owen Fiss, "Free Speech and Social Structure," *Iowa Law Review* 71 (1986): 1415.

16. De Sola Pool, pp. 121–28.

17. Adrian Cronauer, "The Fairness Doctrine: A Solution in Search of a Problem," *Federal Communi-*

cations Law Journal 47 (October 1994).

18. This section depends on Fred W. Friendly, *The Good Guys, the Bad Guys, and the First Amendment* (New York: Random House, 1976), pp. 28–38.

19. Friendly, p. 33. As Friendly notes, Kennedy's comments were reported publicly.

20. Ibid., p. 34.

21. Ibid., p. 39.

22. Ibid., p. 41. (Quoting Martin Firestone, a participant in the scheme.)

23. Coyne, p. 593. See also Steven J. Simmons, *The Fairness Doctrine and the Media* (Berkeley: University of California Press, 1978), p. 217.

24. Coyne, p. 593. Note also the opportunity cost of the paternalism inherent in the Fairness Doctrine. The broadcaster made money by airing programs that an audience in fact wanted to hear or see. The Fairness Doctrine in this case would require airing a program that Congress and the regulatory agency believe the audience *should* want to hear or see. The opportunity cost to the audience was the lost fulfillment of their desire. This cost, however, need not directly affect a license holder's decision whether to broadcast speech.

25. By 1981, one scholar found that the FCC had denied only one license renewal on Fairness Doctrine grounds and had revoked no licenses for violating the Fairness Doctrine. Coyne: 561–63.

26. On Manion, see Rick Perlstein, *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* (New York: Hill and Wang, 2001), pp. 6–12. For Hargis, see John Harold Redekop, *The American Far Right: A Case Study of Billy James Hargis and Christian Crusade* (Grand Rapids, MI: W. B. Eerdmans, 1968).

27. Sean J. Savage, *JFK, LBJ, and the Democratic Party* (Albany, NY: State University of New York Press, 2004), pp. 212–14.

28. Ibid.

29. Friendly, pp. 41–42.

30. Savage, pp. 212–14.

31. Jesse Walker, *Rebels on the Air: An Alternative History of Radio in America* (New York: New York University Press, 2001), p. 85.

32. "Restrained Freedom," *Time*, January 1, 1973; and "Dr. Whitehead and the First Amendment," *Washington Post*, December 22, 1972, p. A22.

33. Joseph C. Spear, *Presidents and the Press: The Nixon Legacy* (Cambridge, MA: MIT Press, 1984), p. 151; see also William E. Porter, *Assault on the Media: The Nixon Years* (Ann Arbor, MI: University of Michigan Press, 1976), pp. 172–74. The full text of Whitehead's speech may be found in Porter, pp. 300–304.

34. "Dr. Whitehead and the First Amendment," *Washington Post*, December 22, 1972, p. A22.

35. C. Whitehead, director of White House Office of Telecommunications Policy (speeches proposing changes in the process of renewing licenses, 1974). In *Historic documents of 1973* (Washington: CQ Press, 1974), http://library.cqpress.com/cqpac/hsdc73-0012001568.

36. "Broadcast Licenses," CQ Press Electronic Library, *CQ Almanac* Online Edition, http://library.cqpress.com/cqalmanac/cqal73-1228516. Originally published in *CQ Almanac 1973* (Washington: Congressional Quarterly, 1974).

37. Ibid.

38. Thomas G. Krattenmaker and Lucas A. Powe Jr., *Regulating Broadcast Programming* (Washington: American Enterprise Institute, 1985), pp. 172–74. See also Walker, *Rebels on the Air*, p. 198.

39. See Les Brown, "Cavett Calls Cancelled Program 'Harmless,'" *New York Times*, February 9, 1974, p. 58; Spear, p. 173. The program was eventually broadcast in an altered form with a period for rebuttal comments by conservatives. See "Cavett's Revised Radicals Show Now Set for March 21 by A.B.C.," *New York Times*, February 27, 1974, p. 78.

40. Randall Herbert Balmer, ed., *Encyclopedia of Evangelicalism*, revised and expanded, (Waco, TX: Baylor University, 2004), pp. 587–88.

41. Thomas W. Hazlett and David W. Sosa, "Was the Fairness Doctrine a 'Chilling Effect'? Evidence from the Postderegulation Radio Market," *The Journal of Legal Studies* 26 (January 1997): 286.

42. Friendly, pp. 133–37.

43. Krattenmaker and Powe, pp. 262–63; Friendly, pp. 168ff.

44. Cronauer.

45. Paul Starobin, "'Fairness Doctrine' Has Had a Tangled Past," *CQ Weekly Online*, p. 482, http://library.cqpress.com/cqweekly/WR100402749. The question presented to the court was whether

Congress had codified the policy in 1959. If it had, the FCC could not repeal it without congressional approval. The court decided Congress had not codified the doctrine.

46. Paul Starobin, "Senate Votes to Make 'Fairness Doctrine' Law," *CQ Weekly Online*, p. 785, http://library.cqpress.com/cqweekly/WR100409841.

47. Helen Dewar, "Senate Backs Retention of 'Fairness Doctrine'," *Washington Post*, April 22, 1986, p. A6.

48. Starobin, "Senate Votes to Make 'Fairness Doctrine' Law," p. 785.

49. Starobin, "'Fairness Doctrine' Has Had a Tangled Past," p. 482.

50. Cronauer, especially note 66.

51. Hazlett and Sosa, p. 301.

52. Cronauer, especially note 66.

53. Ibid., especially note 63.

54. Hazlett and Sosa, pp. 296–98.

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