# DEFINING PUBLIC DISCOURSE:
# THE FAIRNESS DOCTRINE AND EQUAL TIME IN AMERICAN BROADCASTING

by

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## ABSTRACT

This study examines the evolution of federal regulation of news, political and public affairs programming over radio and television. It focuses principally on the Fairness Doctrine, which regulates news and public affairs programming, and on the Equal Time law, which governs political programming.

First, the study analyzes the statutes as regulatory mechanisms, which were enacted in response to the introduction of radio and television in American culture. It explores the hypothesis that Congress and the FCC enacted the Equal Time law and the Fairness Doctrine owing to fears that an unregulated broadcast industry might exert an excessive influence over American public opinion and political institutions.

Second, it examines debates between supporters and critics of both statutes, and places their arguments in the broader context of first amendment law.

Third, it analyzes the validity of the spectrum scarcity rationale for the Fairness Doctrine and the Equal Time law, particularly in light of the such emerging communications technologies as cable television and satellites.

By looking at the origin and historical development of the Fairness Doctrine and the Equal Time law and by evaluating both statute's effectiveness, the study questions their value, force and necessity in the modern media marketplace.

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# INTRODUCTION

Years ago, Supreme Court Justice Louis Brandeis warned that well-intended laws can be the most pernicious. "Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficient...," Brandeis wrote.[1]

This study examines a law and a regulation, which were intended for beneficient purposes. Enacted in an earlier time under different conditions, each attempted to enhance the average citizen's knowledge of the world he lived in and the issues that affect his life. But as time and tide have changed, the utility of the laws has come increasingly into question. What were initially touted as positive effects became more suspect, more partial, more inhibiting, more troubling.

The specific focus of the study is federal regulation of television news and political programming. It explains the evolution of Equal Time, a law regulating political programming, and of the Fairness Doctrine, a regulation which governs tv news and public affairs programming. Equal Time requires

broadcasters to provide political candidates with access to the airwaves on equal terms. The Fairness Doctrine imposes two obligations on broadcasters. First, the Fairness Doctrine requires broadcasters to provide controversial news and public affairs programming. Second, it requires broadcasters to provide access opportunities to issue-oriented citizens or interest groups in response to broadcasters' editorial views.

The study argues that Equal Time and the Fairness Doctrine define public discourse over American radio and television by imposing access obligations on broadcasters and by requirements to present balanced news. It shows that Equal Time and the Fairness Doctrine became less able to effect their well-intended results, namely a greater flow of news and political information to the average citizen, as the number of broadcasting channels expanded dramatically and as broadcasting became more of a fixture and less of a novelty in American culture. While the main purpose of the study is to explain the arguments of proponents and opponents of Equal Time and the Fairness Doctrine so that each will be more intelligible, the study also advocates that their timeliness is exhausted, and that both broadcast journalists and the public would be better served by robust public discourse.

Equal Time and the Fairness Doctrine can best be understood in terms of two competing positions on free speech and the first amendment, which I call the majoritarian and libertarian positions.

The majoritarian position is the dominant tradition in the American system of broadcasting. It has shaped Equal Time and the Fairness Doctrine. Presidents Herbert Hoover and Franklin D.Roosevelt, Supreme Court Justices Felix Frankfurter and Byron White, and virtually all Federal Communications Commissioners once advocated or still assert a majoritarian position in broadcast news and political programming. The majoritarian position holds that the widest possible flow of information to the public is the meaning of the first amendment. It views radio and television as instruments of mass communication to accomplish this dissemination, and sees Equal Time and Fairness Doctrine as useful policy instruments to assure that the public is informed. In doing so,the majoritarian position subordinates the free speech rights of broadcasters by exerting the sovereignty of listeners to the airwaves over those of broadcasters. I call this policy listener sovereignty.

As the legal expressions of the majoritarian position, Equal Time and the Fairness Doctrine place listener sovereignty above the free speech rights of broadcasters. Equal Time and the Fairness Doctrine constitute historic reversals of the first amendment. They turn the first amendment on its head by saying that the rights of people to receive information take priority over those of the speaker to speak his mind. This is a novel meaning of the first amendment, and it was expressed initially as federal law in 1927 due to the scarcity of radio frequencies.

Spectrum scarcity is the technological basis for listener sovereignty. Spectrum scarcity derives its name from the physical limitations of the electromagnetic spectrum for radio and television channels. In ruling after ruling, the Courts and the Federal Communications Commission uphold the Equal Time and the Fairness Doctrine on the grounds that broadcasters are using airwaves, which are a scarce resource, so they have responsibilities to share their channel with others in order that the public may be informed.

As policy instruments, Equal Time and the Fairness Doctrine regard the individual broadcaster as the unit by which the flow of a diversity of news, political and

public affairs programming to the public is to be measured. After all, from the majoritarian point of view it is the individual broadcaster who enjoys a monopoly over a scarce radio frequencies, therefore he should be responsible for its use. This implementation causes first amendment problems. It places disproportionate emphasis on the balance within an individual broadcaster's news, political,and public affairs programming, and minimizes the diversity of broadcast news, political and public affairs programming that is available in a mass media marketplace.

The libertarian position on free speech, a less dominant but no less saliant position on the first amendment, contends differently. Proponents of the libertarian position are found mostly in the broadcasting industry. Supreme Court Justices William O. Douglas and Hugo Black were also prominent proponents of unabridgeable free speech rights. The libertarian position argues strictly that the first amendment prohibits any law, which denies freedom of speech. By imposing obligations on broadcasters to provide access to political candidates and to citizens interested in controversial issues, advocates of the libertarian position assert that Equal Time and the Fairness Doctrine violate broadcasters' first amendment freedoms of speech.

In a libertarian scheme, sovereignty resides

unequivocally with the broadcaster, not the listener. Libertarians unambiguously advance the rights of the broadcaster to assert his views. According to the libertarian credo, the public is better served by unfettered freedom of expression for broadcasters. Regulations, which require broadcasters to provide a diversity of news, political and public affairs programming to the public, stifle the flow of news, political and public affairs programming to the public. Such policies as the Fairness Doctrine, according to the libertarian view, exert a perverse effect. The Fairness Doctrine in particular chills rather than promotes controversial news and public affairs programming due to its insistence that individual broadcasters balance their programming and provide access opportunities.

The libertarian position dismisses the spectrum scarcity rationale for Equal Time and the Fairness Doctrine. When Equal Time and the Fairness Doctrine were promulgated, advocates of the libertarian position argued both were wrong-headed by focussing on the individual broadcaster. Advocates of the libertarian position argued the number of channels in the media market place, not the individual broadcast station, was

the appropriate unit by which to measure the flow of a diversity of news and political programming to the public. More recently, with the emergence of cable television and increased uses of satellites expanding the number of channels, libertarians argue that spectrum scarcity is a problem of the past, and that the increased number of channels in a media marketplace make Equal Time and the Fairness Doctrine obsolete.

By situating Equal Time and the Fairness Doctrine within these competing first amendment traditions, this study attempts to make both regulations more intelligible. It strives to help to explain the contiuning role each plays in shaping the flow of news, political and public affairs programming to the American public today, and their resonance in the modern media market place despite giant leaps in broadcasting over the past sixty years. Such a perspective is especially important today due to the dramatic growth in television news, political and public affairs programming due to expanded news programming on broadcast channels and the emergence of cable and satellites.

The study explores the Equal Time and the Fairness Doctrine historically. An initial chapter explains the emergence of Equal Time. The Federal Communications Commission's articulation of the Fairness Doctrine is discused in the second chapter. A third chapter explains the first major changes in Equal Time and the Fairness Doctrine in 1959. A fourth chapter looks closely at waiving Equal Time for the Kennedy-Nixon presidential debates in 1960. A fifth chapter explains the expansion of the Fairness Doctrine in the 1960's. A sixth chapter analyzes Federal Communications Commission redefinition of Equal Time. A seventh chapter explores current issues in the Fairness Doctrine.

# CHAPTER ONE

# THE EMERGENCE OF EQUAL TIME

Fiorello LaGuardia stood up. Just 5 feet tall and representing New York's polyglot East Side, Congressman LaGuardia wanted to know that the bill before the House guaranteed free speech over radio. Representative Wallace H. White, architect of the Radio Bill, said it did. "The pending bill gives...no power of interferring with freedom of speech in any degree," White replied. LaGuardia pressed, "It is the belief of the gentleman and the intent of Congress not to exercise...any power whatever in that respect in considering a license or the revocation of a license." Again, White assured him, "no power at all."[1]

LaGuardia, like many others, had cause for concern. In 1926, the United States was struggling to develop a national policy for radio. Radio had come on the national scene with all the energy of the Charleston, the brio of movies, and the wide popular appeal of automobiles. By 1926, there were over twenty million radios in American homes, up from 50,000 in 1921. So popular was radio and growing so like topsy that radio stations routinely interfered with each other's signals or drowned out those with weaker power.[2]

Congress had little choice but to put some national radio policy in place. Radio was growing phenomenally and chaotically. The radio industry could not develop radio as a new technology of mass communications without ground rules, which the radio industry could not develop on its own. The Clayton and the Sherman Antitrust Acts prohibited the sort of cartelization that would have been necessary for radio companies to regulate the airwaves on their own. Federal regulation was necessary due to the massive interference, which resulted from unbridled competition in a chaotic new industry of mass communications. But unlike Britain and other European nations, which controlled radio through national broadcasting corporations or the national post office, the United States was relying on antiquated statutes to regulate an immensely popular mass communication. In America, statutes dated back to 1912, when radio primarily serviced shipping and ship-to-shore communication.[3]

Majoritarian and libertarian concepts of freedom of speech contended with one another as Congress struggled to create new law on news, political and public affairs programming to cope with the new technology of radio. Congress had to enact law, which would protect the rights of the majority of citizens to receive news, political and public affairs programming over their radios without unjustly discriminating against the free speech rights of broadcast stations.

This was the question that LaGuardia had posed to White: how was the federal government to accomplish both contradictory goals of a radio system. Based on a majoritarian position of the first amendment, the federal government should exert strong authority to assure a flow of news, political and public affairs programming to the public. Based on a libertarian position of the first amendment, the rights of broadcast station operators to express their views should receive first amendment protection, and the federal government should exert correspondingly less authority over radio news, political, and public affairs programming.

In the mid-twenties, Congress considered legislation on radio news, political and public affairs programming among three different kinds of radio systems: (1) a nationalized system, (2) a commerical system of common carriers, or (3) a commercial system of licensed broadcasters. Each would have had quite different effects on radio news, political and public affairs programming.

As a first alternative, Congress could have enacted statute, which would have made radio into a national broadcasting system, comparable, say, to the British Broadcasting Corporation. But, by 1926, Congress had excluded the possibility of a nationally owned and controlled radio system. The idea smacked too much of government control and censorship of radio news, political and public affairs programming. With the exceptions of the Navy, which held on to some frequencies from the First World War and wanted to extend its control over radio in peace time, and an errant, liberal commentator in The Century Magazine,[4] few advocated government control of radio. In addition, huge corporations in the United States had invested in radio,[5] and they resisted efforts to nationalize radio.

The commercial course for radio, and the one travelled, required Congress to choose between two mutually exclusive broadcasting systems. One was a system of common carriers. The other was that of licensed broadcasters.

Majoritarian requirements for the flow of news, political and public affairs programming to the public were stringent in the common carrier system. In theory, a common carrier system most closely resembled the American ideal of equal opportunity based on one's ability to pay. The common carrier system would enable anyone to purchase air time for news, political, public affairs or entertainment programming he wished to produce. Broadcasters would have had no discretion to accept or reject programming: they would be required to behave much as public utilities. But, in practice, politicians, radio commentators and radio producers complained that broadcasting companies censored them. Policy discussions about radio news and political programming within a common carrier system, therefore, focussed mostly on such barriers to access and to expression as price discrimination and censorship.[6]

Majoritarian concerns about the flow of news, political and public affair programming to the public were no less insistent in a licensed system, but the means of effecting majoritarian rules were entirely different. Unlike the common carrier system, where broadcasters would have had no discretion in programming, broadcaster discretion played a much more substantial role in a licensed system. The discretion of the broadcaster as a trustee of public airwaves was the crucial distinction, which distinguished a licensed from a common carrier system in matters of federal policy for radio news, political and public affairs programming.

A system of licensing raised perplexing questions about radio news, political and public affairs programming. Those with libertarian concerns like LaGuardia feared that by granting licenses the federal government would exert its authority to define public discourse in radio news, political and public affairs programming. Those with majoritarian concerns worried that broadcasters would monopolize the airwaves, and deny all others freedom of expression without specific federal law assuring the flow of news, political and public affairs information to the public.[7]

A system of licensing enjoyed greatest support. Both amateur and commerical radio broadcasters favored licensing. Republicans and Democrats were able to reach a consensus on licensing as long as Congress enacted legislation on radio news, political and public affairs programming that prohibited price discrimination and broadcasters' censorship.

In the odd workings of American politics, the common carrier system received support from opposite ends of the political spectrum. Democrats and reform-minded Republicans favored a common carrier system for radio due to their concerns about broadcaster censorship and price discrimination by "the radio monopoly," a code name for American Telephone and Telegraph. And, until 1926, American Telephone and Telegraph, the reformers' nemesis, supported a common carrier system but for reasons quite different from those of their political foes. Until 1926, ATT pushed for a common carrier system, and did so for business reasons that had nothing to do with radio news, political or public affairs programming. AT&T had pioneered radio in the United States. It had developed an extensive network of "toll" broadcasting. In the toll system, radio programmers and

producers paid AT&T a fee or toll for use of the radio waves in much the same way one would pay the telephone company as a common carrier for a long distance telephone call. But, as radio grew into a medium of mass communication rather than one-to-one communication, radio reaped greater profits by selling time to advertisers to reach potential markets and buyers, and in doing so fit less and less into AT&T telecommunications strategy. In 1926, therefore, AT&T management reversed AT&T's strategy to develop radio broadcasting, decided that the company's future lay in telecommunications, and took AT&T out of broadcasting. AT&T sold its eighteen (18) radio stations to the Radio Corporation of America in exchange for several million dollars and RCA's promise to use AT&T's wires for interconnecting RCA's radio network.[8]

The systemic issue was resolved in 1927 when Congress passed and President Coolidge signed the Radio Act. The Radio Act established a national system of licensees in which broadcasters were charged to use their discretion in radio news, political and public affairs programming by acting in the public interest. And to assure that the public received poilitical programming, Congress inserted language in the Radio Act which required broadcasters to provide Equal Time to candidates during elections. Due to this majoritarian

language requirying Equal Time for political programming, certain common carrier stipulations shaped the Equal Time section of the Radio Act. Radio news and public affairs programming received no comparable protection in the Radio Act.

It is appropriate, therefore,in analyzing the evolution of Equal Time to look more closely at congressional deliberations of the issues of free speech, monopoly, censorship and of common carrier or licensing systems to explain the emergence of Equal Time in radio political programming.

The federal statute for Equal Time is:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such a broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: Provided, that such licensee shall have no power of censorship over material broadcast under the provision of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.11

Equal Time remains in effect to this day, but with revisions in 1959, 1976, and 1983.

In 1927, Congress enacted Equal Time as Section 18 of the Radio Act for several reasons. Political programming over radio struck politicians directly. Their ability to mount electoral campaigns over radio, a new mass communications medium, were at stake. Long and fervently held American notions that an informed electorate reached political decisions by voting on the basis of the fullest information supported arguments that politicians enjoy access to radio during election campaigns. Ideological and sectional politics came into play. Western congressmen, suspicious of monopolies due to fights with railroads and utilities, and

southern congressmen, demanding consideration for sectional differences and equally as fearful as the westerners of an eastern-dominated radio industry, demanded minimal guarantees of Equal Time for the omnibus 1927 radio bill to pass.

Senator Clarence C. Dill (D-Washington) advanced the concept of Equal Time. Dill introduced Equal Time as "equal opportunities" for politicians to make use of radio during election campaigns. This concept of equal opportunities was at once sufficiently meaty to appease southern and western congressmen and sufficiently vague to mollify Republicans favoring only limited provisions for political programming. Dill skillfully manuevered Equal Time through the Senate and through Senate-House conference so that Equal Time for politicians to the airwaves during electoral campaigns became the first federal statute that guaranteed politicians' access to voters through a mass communications medium. Section 18 of The Radio Act of 1927 became Section 315 of The Communication Act of 1934. Both acts are the cornerstones of communications law in the United States as is Section 315 for political programming. So skillful, in fact, was Dill

that a journalist would later remark, "He did the one thing that in this day and age gives a man a stranglehold on his job. He became a specialist in a field so new, so complicated, and so interwoven with technicalities of speech and function that there were none to dispute him."[9]

## The Republicans and Equal Time

The Republican position on Equal Time was part and parcel of a larger vision of radio. The Republican position favored broadcaster discretion for political programming within a licensed system. The Republicans believed that broadcasters should behave as public trustees in return for receiving a license from the government. They touted a policy of listener sovereignty, but would have preferred to have left political programming decisions with broadcasters.

To grasp fully Republican arguments about Equal Time it is necesary before hand to place them in the context of Republican policy toward the radio industry as a whole. As proponents of licensing, Republicans favored a nationally regulated system of commercially financed radio stations and networks, which would be under the control of the Secretary of Commerce, along with a portion of radio channels set aside for government and non-profit uses. They advanced the policy of licensing and Commerce Department control due to their primary concerns about ordering a chaotic radio marketplace.

As Secretary of Commerce in the mid-twenties, Herbert Hoover played the key role as architect of a radio policy of licensing. Through his power at Commerce, Hoover rationalized a rapidly-changing, wildly-popular, technologically-complex growth industry to function in a market-driven economy with the minimal regulatory authority of the federal government. Radio policy was under the authority of the Secretary of Commerce until 1927 when the Radio Act established the Federal Radio Commission, a five member bipartisan commission, which was the precusor of the Federal Communications Commission.[10]

Policy issues turned more on how to control an advertiser-supported mass medium than on how to develop a system that depended on sources, other than advertisers, for revenues. To that end, Hoover began setting the agenda for legislation by convening four National Radio conferences from 1922 to 1925. At these conferences, Hoover was able to aggregate consent and shape consensus on policy goals for a system of licensing among amateur and commercial broadcasters and among the competing departments of the federal government and military.

Importantly for Equal Time, both at these conferences and through lobbying for the Radio Act, Hoover articulated principles of a licensed system of broadcasters, which would gird Republican senators and congressmen in dealing with Democratic proponents of a common carrier system. At the outset, for example, Hoover acknowledged a public interest in radio. At the first National Radio Conference in 1922, Hoover called for regulation so that "there may be no national regret that we have parted with a great national asset into uncontrolled hands."[11] At the fourth National Radio Conference in 1925, Hoover continued the same theme of listener sovereignty and a public interest in radio by calling radio "a public medium" to be used "for public benefit.... The dominant element in the radio field is, and always will be, the great body of the listening public."[12] Despite the domination of commercial broadcsters at the fourth National Radio Conference, Hoover said radio was "too important for service, news, entertainment, education and vital commercial purposes to be drowned in advertising chatter or for commercial purposes that can quite well be served by other means of communication."[13]

Hoover advanced a majoritarian concept of radio news, political and public affairs programming based on listener sovereignty and spectrum scarcity. Hoover argued that scarcity of channels supported the sovereignty of listener over speaker due to radio interference. Hoover said, "We do not get much freedom of speech if fifty people speak at the same time," and jumping quickly to listener sovereignty over speaker, Hoover continued, "nor is there any freedom in a right to come into my sitting room to make a speech whether I like it or not." Hoover pointed out, "... there are two parties to freedom of the air, and to freedom of speech....There is the speaker and the listener. Certainly in radio I believe in freedom for the listener. He has much less option upon what he can reject, for the other fellow is occupying his receiving set. The listener's only option is to abandon his right to use his receiver. Freedom cannot mean the license to every person or corporation who wishes to broadcast his name or wares, and thus monopolize the listener's set. No one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purposes."[14]

Despite the stridency of Hoover's rhetoric on listener sovereignty, in practice Hoover granted more licenses at more powerful frequencies to large commerical broadcasters in preference to smaller educational, religious, or labor broadcasters. For Hoover, such a policy made sense, because in his view commercial broadcasters were providing a greater diversity of programming to the public than broadcasters in one special area.

House and Senate Republicans advanced Hoover's principles of listener sovereignty in congressional deliberations of Equal Time within a licensed system with considerable broadcaster discretion. Like Secretary of Commerce Hoover, Representative Wallace H. White (R-Maine), the Republican floor leader on the Radio Bill, acknowledged that the public warranted consideration for granting licenses to privately-held corporations to exploit a natural resource like the airwaves. In congressional debate, therefore, Republicans advanced "the right of the public to [radio] service,"[15] in Representatives White's succint phrase, as "superior to the right of any individual to use radio." Such a position is significant not

only because it inverted first amendment privileges from speaker to listener, but also because it would provide Republicans with a rationale to come to agreement with Democrats and Progressives on Senator Dill's compromise position on Equal Time.

In congressional deliberations, Republicans supported minimal regulation, which guaranteed a licensed system in which broadcasters acted as public trustees. Representative White cautioned his fellow congressmen that "we are here dealing with a new means of communication."[16] He said, incorrectly, radio was competing for markets with telephones, telegraphs, and cable. He said the public interest required no new anti-monopoly statutes be enacted specifically for radio.The Clayton and Sherman Antitrust Acts were in force, and were sufficient. The public would benefit from competition among competing communications corporations, he contended. "A reasonable doubt [exists] whether we are justified in applying to this industry different and more drastic rules than the other forms of communication are subjected to."[17] White reassured the House that these anti-monopoly provisions in the pending legislation were sufficient to meet Democratic concerns about censorship and price discrimination. "Laws, narrow, restrictive,

destructive to a new industry serve no public good. We should avoid them," he said.[18] So that minimal legislation for the industry as a whole was also fit for radio news, political and public affairs programming. Common carrier stipulations that the flow of news and information to the public required supplemental regulation limiting the discretion of broadcasters did not carry sufficient weight with White. Instead, White held up the regulatory powers of two agencies, the Interstate Commerce Commission and the Federal Trade Commission -- neither of which had ever indicated its capacity to regulate political speech over radio.

Like Republican floor leader White, Representative Arthur M. Free (R-California) supported only minimal regulation of broadcasting. Free worried that burdensome regulation would retard an infant industry. The Federal Trade Commission with its focus on restraint of trade and monopolistic practices, and the Interstate Commerce Commission, with its focus on price fixing, were sufficient federal authority to police monopoly in radio and abuses in political programming by radio broadcasters, Free said. Further regulatory requirements would be burdensome. "The question you gentlemen have got to consider," as

Free put it to his colleagues, "is whether or not you are going to apply special rules to a new and baby industry that you do not apply to any other industry in the United States."[19] Only American Telephone and Telegraph's eighteen radio stations out of 536 radio stations in the country were cross-licensed according to Republican figures. Two to three hundred competing firms manufactured receivers, and over 3,000 manufactured radio parts and accessories. Free believed that these industry dynamics, coupled with the "public interest standards" that suffused the Radio Bill, were sufficient to assure the flow of news, political and public affairs programming to the public.[20]

In the Senate, Republicans argued that broadcasters themselves should retain maximum discretion on political programming. Senator Hiram Bingham (R-Connecticut) introduced a letter from W.G. Cowles, Vice President for Broadcasting for the Traveller's Insurance Company, owner of a Hartford radio station, supporting maximum broadcaster discretion. Cowles was a knowledgeable broadcaster: he had drafted a report on radio news and political programming for Hoover for the Fourth National Radio Conference. Cowles wrote that the radio industry supported regulation for technical issues like wavelengths and frequencies. When it came to radio political programming, however, Cowles maintained that decision-making appropriately resided with the

broadcasters. Cowles asserted that broadcasters would be willing to provide Equal Time for politicians as a matter of public service, but that they should not be required to do so by federal statute. "It is well to leave with the broadcaster the privilege of refusing, as we refuse, all controversial matter, whatever its nature, whether it be religious, political or anything which is in the nature of controversy..."Cowles wrote. "If we should extend to you the privilege of our broadcasting station on an occasion when some political discussion was existing, that is no reason why we should be forced as common carriers to accept the reply which anybody might make without any privilege to distinguish between a speaker worthy of making a reply and one who is totally unworthy, he wrote."[21]

Democrats and Equal Time

Democrats and reform-minded Republicans (excluding LaGuardia) insisted on common carrier stipulations for political programming over radio. They feared broadcaster censorship and price discrimination would limit the diversity of political viewpoints over radio. They did not share the blithe assurance of the Republican side of the aisle that the public trustee responsibilities of broadcasters were sufficient to assure a flow of news, political and public affairs programming to the public.

House debates of the Radio Bill capture these majoritarian concerns about using common carrier stipulations to assure of flow of news, political and public affairs programming to the public. "What greater monopoly," the Luther H. Johnson (D-Texas) asked his House colleagues, "could exist than where a radio company could give the free use of its line to one candidate for office, one contender of some economic theory, and then deny such...to those who are on the other side of the question?" "....If the strong arm of the law does not prevent monopoly ownership, and make [price] discrimination by such stations illegal," Johnson warned, "American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most

powerful weapon that can be wielded in a republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people."[22]

Remarking on rapid technolgical innovations in radio and its diffusion into American society, Johnson continued, "it will only be a few years before broadcasting stations will...reach half the American citizens...and bring messages to the fireside of nearly every home in America." Broadcasters would use this immense power to shape public opinion: "they can mold and crystalize sentiment as no agency in the past has been able to do."[23]

To remedy broadcaster discrimination, Johnson advanced an Equal Time amendment for both candidates and issues. He proposed that Congress require that "equal facilities and rates, without discrimination, shall be accorded to all political parties and candidates for office, and to both proponents and opponents of all political questions and issues."[24]

Representative Johnson's Equal Time amendment to the Radio Bill is significant because it articulated common carrier concept of news, political and public affairs programming over radio. In Johnson's amendment, broadcasters' rights of expression were subordinate to those of political candidates and issue-oriented individuals and organizations. "Equal facilities and rates, without discrimination" is in essence a common carrier stipulation to require broadcasters to grant access to politicians, organizations and individuals for discussion of electoral as well as public issues.

House Democrats supported Johnson by citing preferential radio rates for favored candidates and broadcasters censorship. Representative Emmanual Cellar (D-NY) put the matter bluntly. He told his colleagues that WEAF, an American Telephone and Telegraph owned and operated station in New York, charged him "$10.00 for every minute [he] desired to use the radio during the last election."[25] Although Cellar stopped short of saying his Republican opponent received free air time, he said, "I have no knowledge that candidates of the opposing party were asked to pay the same amount for the same use."[26]

On the censorship charge, Representative Ewin Davis (D-Tenn) took the floor. He cited testimony by a vice president of American Telephone and Telegraph to argue that big business censored radio news and political programming. In testimony before a congressional committee, ATT Vice President, Mr. W.E. Harkness, had said that ATT routinely rejected applications to use its broadcast facilities on grounds that ATT radio stations were like newspapers. "We take the same position that is taken by the editor of any publication. He has the right to accept or reject any material presented to him. You cannot walk into a newspaper office and get them to publish anything you care to present...We do not censor -- we edit. We feel if the matter is unfair or contains matter which the public would not care to hear, we may reject it..."[27] At the time, AT&T owned 18 stations and interconnected many more through its telephone lines, reaching nearly eighty percent of the public.

Davis decried this position of broadcaster freedom of speech. Like Representatives Cellar and Johnson, Congressman Davis called for stringent regulation, such as Equal Time for politicians and issues, to protect politicians and politically active citizens from price discrimination and censorship. Responding directly to LaGuardia's concern about government censorship, Davis

told his colleagues, to the applause of the House chamber, "I am even more opposed to private censorship over what American citizens may broadcast to other American citizens.....there is nothing in the present bill which even pretends to prevent it or to protect the public against it."[28]

Democratic and reform-minded politicians' insistence on common carrier stipulations to assure political candidates and issue-oriented individuals' access to the airwaves was not without foundation. In the protracted fight over radio legislation, dating from 1922, Congress had authorized a Federal Trade Commission investigation of monopolistic practices in radio. The FTC study had documented flagrant monopolistic practices. It showed that eight corporations -- the Radio Corporation of America, General Electric, American Telephone and Telegraph, Western Electric, Westinghouse, International Radio Telegraph Company, United Fruit Company, and the Wireless Specialty Apparatus Company -- restrained competition and created a monopoly in the domestic manufacture, purchase and sale of radio transmitters and receivers as well as in domestic and international radio communication and broadcasting. "There is not any question whatever," Representative Davis said but that "the radio monopoly...is one of the

most powerful, one of the most effective monopolies in the country...a monopoly, the capital stock whose members is quoted on the stock exchanges for $2.5 billion dollars."[29] An infant industry, indeed.

Due to their insistence on political candidates and issue-oriented citizens' access to the airwaves, House Democrats inserted language into Section 18 of the House bill that radio would be considered as a "common carrier in interstate commerce" for political and public affairs programming. In other words, House Democrats successfully legislated Equal Time for both candidates and issues out of the House and as far as the conference committee of Congress. By inserting language that radio was to be a common carrier on political and public issues, House Democrats were at the edge of creating law, which clearly defined politicians' and the public's access rights as prior to the free speech rights of broadcasters. If Section 18 survived conference, broadcasters would have no choice but to grant Equal Time for both politicians seeking election and citizens discussing controversial, public issues.

As a second instrument to assure Equal Time for both candidates and issues and to limit the power of "the radio monopoly," House Democrats proposed a bipartisan commission of five members, chosen from various sections of the country, as the federal licensing authority for radio. They contended that a bipartisan commission would be more responsive to Equal Time for candidates and issues than the Secretary of Commerce, and that through its bipartisan quality would limit the potential for government suppression of freedom of speech. Interestingly, neither Democrats nor progressives regarded licensing as a violation of the broadcasters' free speech. Rather, they regarded a bipartisan commission as a reasonable vehicle for balancing the rights of the speaker and of the listener. Senator Dill remarked, for example, that in placing licensing authority in a bipartisan commission, broadcasters need not be "under the fear which they must necessarily feel, regardless of which party may be in power, when the control is placed in the hands of an administrative branch of the Government."[30] This commission would become the Federal Radio Commission and, in 1934, the Federal Communications Commission.

In the Senate, Democrats and reform-minded politicians pushed Equal Time for political candidates and issue-oriented citizens through the Interstate Commerce Committee. Their accomplishment is significant because the bill for the Radio Act assigned common carrier status to radio both for politicians and for the discussion of public issues. Again, as in the House debates, censorship figured prominantly in the senate bill. The Interstate and Foreign Commerce committee bill was prompted at least in part by progressive senators Hiram Johnson's (R-California) and Robert LaFollette's (R/Progressive-Wisconsin) negative experiences with radio. One of Senator LaFollette's broadcasts in Des Moines and another in Detroit by Senator Johnson had been relegated to low power frequencies, so that they reached only a fraction of their potential radio audiences.[31] The bill also put Secretary of Commerce Hoover and the Senate Republicans on notice of strong support in the Senate for a bipartisan commission as the federal licensing authority.

Senator Clarence C. Dill (D-Washington) proposed Equal Time for political candidates as a compromise between Republicans, pushing for broadcaster discretion within a licensed system, and Democrats who advocated common carrier stipulations, which guaranteed access for political candidates and issue-oriented citizens. On July 1, 1926, Dill introduced an amendment to the Radio Bill, which provided for equal opportunities for legally qualified candidates, stipulated that broadcasters could not censor political comments, and relieved broadcasters of any liability for derogatory remarks which politicians might make over their frequency. Dill offered this amendment to replace an earlier draft of Equal Time, which had designated broadcasters as common carriers in political and public affairs programming (that is, for politicians and issue-oriented citizens) due to the problems that Senators LaFollette and Johnson had experienced with political speeches over radio.

Republicans criticized Dill's compromise amendment for Equal Time on interpretative grounds. Senator Simeon D. Fess (R-Ohio) feared Equal Time would trigger requests from politicians' opponents

anytime a politician got airtime even if he did not speak about current public issues. In expressing his concerns, Sentor Fess anticipated the problem of bona fide news events, which also would recur in FCC's rulings on Equal Time, culminating finally in an amendments to Equal Time in 1959, which exempted "bona fide" news events from Equal Time requirements. Dill told Fess that the Equal Time included a provision that "the commission shall make rules and regulations"[32] to deal with Equal Time. He implied that it was more efficacious to defer precise language on such a provocative issue. "It seemed to me to be better to allow the commission to make rules and regulation governing such questions as the Senator has raised rather than to attempt to go into the matter in the bill."[33]

One Democratic Senator worried that Equal Time was too expansive. Senator Earle Mayfield (D-Texas) challenged Dill that the amendment would enable too much public affairs programming over radio,particularly for dissenters. Mayfield worried that the wording of Equal Time was so vague that proponents of Bolshevism might qualify for access to radio. "If the Senator's amendment is adopted and

becomes law and a lecturer desired to deliver a lecture on Bolshevism or Communism, he would be entitled to do so."[34] As with the other senators, Dill pointed out that Equal Time applied solely to politicians campaigning for office, and specifically excluded discussion of controverisal public issues. Acknowledging that he had based his remarks on the Interstate Commerce Committee version of Equal Time for candidates and public affairs -- the version adopted following LaFollette's and Johnson's difficulties -- Mayfield withdrew his objection. "The original draft had in it language which prevented the operator from denying the use of the radio to anyone,"[35] Mayfield acknowledged. "That is true," Dill replied, "and that is the reason I have offered the new draft"[36] limiting Equal Time to political candidates."

Senate progressives criticized Equal Time for political candidates as restrictive, confusing, palliative, narrow, anemic. They advocated common carrier status for radio political programming in an effort to keep the provisions on Equal Time for the discussion of public affairs in the Radio Act.

Senator Albert B. Cummins (R-Iowa), a Republican with a career of progressive political reform against the railroad interests in Iowa, raised a question of clarification. He told Senator Dill that the Equal Time amendment would lead to confusion. The language was vague, Cummins told Dill. Cummins said that the effect of Dill's Equal Time amendment would be that while radio would not be designated as a common carrier in political programming, the language of equal opportunities would nonetheless require broadcasters to behave as though they were common carriers in political programming.

Dill responded that the Equal Time amendment only required "that if a radio station permits one candidate for a public office to address the listener it must allow all candidates for that public office to do so...." This, Dill said was far different from designating broadcasters as common carriers, which would require them to "take anybody who came in order of the person presenting himself and be compelled to broadcast for an hour's time speeches of any kind they wanted to broadcast."[37]

Dill explicitly stated that the Equal Time amendment provided broadcasters a significant amount of discretion concerning politicians' use of their stations. It allowed broadcasters to regulate political programming. Section 18 required only that broadcasters provide equal opportunities to all legally qualified candidates if they had granted air time to one candidate. Section 18, after all, reads that "if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates...."[38] This is a noteworthy distinction because it would recur in F.C.C. cases concerning Equal Time. "In other words," Dill told his fellow Senators, "a station may refuse to allow any candidate to broadcast; but if it allows one candidate for governor to broadcast, then all the candidates for governor must have an equal right; but it is not required to allow any candidate to broadcast. Or, as Senator Dill put it more succinctly, "a station can regulate, but it cannot discriminate."[39]

By distinguishing broadcaster regulation from broadcaster discrimination, Dill accomplished a tough balancing act. He succeeded in creating law that provided broadcasters some discretion in political programming and assured minimal guarantees of access to political candidates. Such a balancing act made sense to Senator Dill. Broadcasters entered the radio industry voluntarily. Listeners paid nothing for the radio service beyond the cost of their radio sets. The nature of the radio marketplace encouraged broadcasters to provide equal opportunities for politicians in order to build up their own reputations among their listeners. Due to these real world incentives and constraints, Dill felt common carrier status was both gratuitous and burdensome. "...It seemed unwise," he said, "to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and every thing that was offered to him as long as the price was paid."[40]

Senator Robert B. Howell (R-Nebraska), a long time progressive and advocate of public ownership of public utilities, raised principled objections to limiting Equal Time only to political candidates. Howell demanded that broadcasters be required to grant issue-oriented citizens access to the airwaves as was stipulated in the House and Senate Interstate Commerce Committee version of Equal Time.[41]

In legislating policy for political programming for radio, Howell reminded his fellow senators that voters had to know the issues if democracy was to work. Of all congressmen and senators, Howell articulated most clearly the majoritarian view that freedom of speech meant the flow of news, political and public affairs programming to the public. Laying his ground work carefully, Howell refuted radio industry agruments that radio broadcasters were like newspaper editors as well as Republican arguments that broadcasters should enjoy considerable discretion in political programming. Howell said that radio differed from newspapers due to the scarcity of radio channels. Broadcasters invested in radio for exclusively commercial purposes, Howell reminded his Senate

colleagues, noting the high prices demanded for sale of a broadcasting license. He countered the Republican argument in favor of discretion by holding up the goal of an educated citizenry, saying, in effect, that democracy required a constant flow of news and infromation to the public if democratic institutions were to flourish, and that it would be marred public policy to entrust so important a task to the discretion of radio broadcasters. "As far as principles and policies are concerned, they are major in political life; candidates are merely a subsidiary," he said. "We are not trying merely to place the privilege of broadcasting within the reach of all so far as cost is concerned," Howell said, "...we want to place it within the reach of all for the discussion of public questions when one side or the other is allowed to be presented."[42]

Expressing sympathy with Howell's position, Dill said Equal Time could not extend to public affairs programming, specifically to access rights for issue-oriented citizens. Industry opposition was too strong, Dill confessed. "The broadcasters were so opposed to having themselves designated as common carriers we thought it unwise at this state in the development

of the art to do it"....There is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time, and thus a radio station would be placed in the position...that [it] would have to give all [its] time to that kind of discussion, or no public question could be discussed."[43]

Dill told Howell that setting federal policy for public affairs programming and access rights for issue-oriented citizens should reasonably be taken up by the Federal Radio Commission once the Radio Act was enacted. Right now, getting the Radio Act on the books was what mattered, and he could not get the bill through Congress with a stipulation that broadcasters be required to act as common carriers for political or public affairs programming.[44]

Howell remained unimpressed. "Abuses have already become evident," Howell countered. "We do not need to wait to find out about these abuses...we ought to meet these abuses now, and not enact a bill which in the future it will be very difficult to change, when these great interests, more and more control the stations of this country; and that, apparently, is the future of broadcasting."[45]

Senator Edwin S. Broussard (D-Louisiana) came to Dill's aid. Broussard told Howell that common carrier status did not apply to radio because broadcasters did not make direct charges to listeners as railroads did to customers shipping freight. Secondly, Broussard said that broadcasters would have no incentive to go into the broadcasting business if broadcasting time was required to be used for discussions of public affairs.[46]

Howell responded to Broussard by acknowledging that while still in its infancy radio was nonetheless a powerful industry. The time for enacting policy was at hand. "...we are discussing a supervehicle of publicity," Howell said. "...Unless we now exercise foresight we will wake up some day to find that we have created a Frankenstein monster... The time to check abuses is at the beginning, in the infancy of development of this great vehicle of publicity."[47]

Howell offered methods of enabling broadcasters to carry discussions of controversial public issues, all of which had been rejected earlier in the Senate Interstate Commerce Committee on the grounds that they would be burdensome to broadcasters. Howell proposed

limiting Equal Time for discussion of public affairs to one affirmative or negative rejoinder. He said that if a number of people requested time, they could either agree upon a representative among themselves or, if no agreement could be reached, they could draw lots. Instead of accepting this proposal, the Senate agreed with Dill to place regulatory decision-making with a bipartisan commission.[48]

In the end, Howell had to settle for a clause in Section 18 that "it shall be the duty of the commission to adopt and promulgate rules and regulations"[49] on Equal Time for candidates.

As with Congressman Johnson's warnings on the House floor, Senator Howell feared that radio was an extraordinarly, powerful medium of mass communication, requirying stringent laws on news, political and public affairs programming. Howell's rhetoric about Frankenstein indicates just how powerful Howell thought radio to be. The potential dangers of broadcaster manipulation of public opinion assaulted the progressives' identification of good government with an informed electorate, which was capable of making indepedent political decisions after digesting news,

political and public affairs information. Therefore, Howell insisted on placing the rights or radio listeners to receive news, political and public affairs information ahead of those of radio broadcasters to express their opinions. Hence, his insistence along with that of Senators Hiram Johnson and Robert LaFollette, Jr. that radio broadcasters be designated as common carriers in radio news, political and public affairs programming, and his opposition to Equal Time for political candidates as anemic and palliative.

It is important to note as well that Howell's position of common carrier designation for radio news, political and public affairs programming is really quite different from that, say, of Congressman White or Secretary Hoover's position on listener sovereignty "in the public interest."

The difference turns on broadcaster discretion within a policy of licensing or of common carrier stipulations within a licensed system. Howell wanted common carrier stipulations, which would guarantee access to radio for the discussion of public issues. He supported common carrier stipulations within a licensed

system as a means to the goal of sustaining an informed electorate by effecting a flow of information to the public for its acceptance or rejection. Hoover and White, by contrast, trusted in broadcaster discretion within a licensed system. White and Hoover argued that the licensing power of the federal government was sufficient to prevent broadcasters from abusing their monopolies as public trustees of limited radio channels, and thus licensing was a resaonable protection of "the public interest." From their point of view, broadcasters' abuses could best be curbed after a broadcaster had violated "the public interest" in the quality of his radio service or in the partiality of his news and political programming. To impose common carrier responsibilities on broadcasters needlessly burdened broadcasters, White and Hoover maintained.

It is noteworthy, too, that for all the differences between Democrats and Republicans on a common carrier or a licensing system that both Howell's position in favor of common carrier stipulations on political and public affairs programming news and Hoover's in favor of broadcaster discretion in a commercially based system of licensees abrogated the free speech rights of radio broadcasters. LaGuardia had

tried impossibly to protect the free speech rights of the speaker to express his opinion. But neither Howell's nor Hoover's positions accommodated this libertarian construction of the First Amendment in shaping radio policy for political programming.

Dill emerged triumphant in Senate debate. Dill's amendment for Equal Time for politicians went into conference substantially unchanged, and emerged as Section 18 of the Radio Act. Equal Time extended to candidates but to issue-oriented citizesn to discuss public issues. Politicians could command Equal Time only if broadcasters had granted or sold airtime to legally qualified candidates for the same office. Broadcasters were not liable for derogatory remarks, which politicians might make during radio addresses, and which broadcasters would have no right to censor. Rather than deal with the ambiguities of equal opportunities in an effort to define more narrowly broadcasters' legal responsibilities, Congress empowered a bipartisan commission, the Federal Radio Commission, to make rules and regulations to implement Equal Time.

Several features stand out. First, Congress enacted statute only for legally qualified candidates for public office. Section 18 had no stipulations, guaranteeing issue-oriented citizens any access rights to the airwaves.

Second, broadcasters retained a considerable amount of discretion. They reserved the right to grant access to political candidates. Congress required only that a broadcaster provide Equal Time solely if he had allowed use of his facility. In other words, Dill's compromise that a broadcaster could "regulate, but...not discriminate"[50] became the law of the land. Broadcasters reserved significant power over political programming under Equal Time, and had the legal right to exercise considerable discretion in political programming. To be sure, it might be a negative power to deny access to all candidates. Or it might be sound business sense to allow access to any number of politicians to indicate evenhandedness about public issues to a listening audienece. In any case, if the broadcasters accepted the quid-pro-quo of allowing access to a candidate one of them opposed, they had nonetheless won the larger victory of significant self-regulation on political programming. Broadcasters were free to exploit radio's commercial potential with only modest intrusion of politicians.

Third, Congress established a bipartisan commission and invested it with considerable discretion in charting the regulatory course for Equal Time. This matter of regulatory discretion is as crucial to the evolution of Equal Time as broadcaster discretion. The Federal Radio Commission and its successor the Federal Communications Commission would cite this enabling legislation as evidence of congressional delegated authority to support subsequent interpretations of Equal Time. And the issue of FCC discretion to make rulings on Equal Time would become enmired in legal arguments and political fights as to whether the FCC was acting within its congressionally delegated authority or exceeding it. In the final negotiations for the bipartisan commission, Dill mollified White, who opposed a commission in favor of vesting authority in the Secretary of Commerce. Dill said that the commission would be temporary, functioning for only a year and then from year to year until its work was done. At that time, the Secretary of Commerce would assume regulatory authority for radio, Dill promised. But, Dill would remark later that he knew that a "temporary" commission was a ruse. "I knew if we ever got a commission, we would never get rid of it,"[51] Dill remarked.

These three outcomes, taken separately or together, assured confusion. Equal Time assured broadcaster discretion yet it provided minimal common-carrier-like guarantees for political candidates. A regulatory commission was to be empowered to cope with difficult interpretative tasks. Equal Time partisans would champion differing interpretations of congressional intent to manipulate the regulatory commission's decisions. Although Equal Time is precise in its provisions, its very name, "Equal Time," suggested to the public that broadcasters had common carrier obligations that far exceeded their precise responsibilities as licensees.

As President, Hoover blocked a law to extend Equal Time to public affairs when in 1932 he pocket vetoed H.R. 7716. Hoover used a pocket veto to stymie provisions for procedural changes and greater administrative authority for the FRC, which he wished to limit. The broadened Section 18 included Equal Time for people to speak for and against candidates for political office, for and against referendum issues, and for or against public issues.[52]

In 1933, Franklin Delano Roosevelt became Prsident of the United States, and so cowered broadcasters that issues of Equal Time paled quite literally when compared with broadcaster fears of nationalization. FDR's radio policy was unambiguously majoritarian, particularly when it came to informing the average citizen about the New Deal.

In his inaugural address, Roosevelt spoke of the Great Depression as a national emergency. He said that the federal government must exert extraordinary powers to cope with the emergency. Broadcasters immediately cooperated with Roosevelt to fend off any nationalization attempt. Some cut commentary that was hostile to the New Deal. William S. Paley, the young, dynamic president of the Columbia Broadcasting System, wired the President his willingness to lend CBS support in coping with the emergeny.[53] "President Roosevelt if he chose to do so might have comandeered the radio for the government as though the nation were at war," observed the radio trade journal Broadcasting, " but the immediate cooperation extended by radio obviated any suggestion that such a need would arise."[54]

There were as well powerful factions within the New Deal, including labor, farmers, welfare reformers and the universities, which favored nationalization. Such prominent New Dealers as Secretary of Interior Harold Ickes, Secretary of Labor Frances Perkins, and Agriculture Secretary all favored nationalization.

Roosevelt manipulated the broadcasters against proponents of nationalization within his administration to get the maximum radio coverage for his New Deal programs. With the help of White House insiders Louis Howe, Marvin McIntyre and Stephen Early, FDR muscled broadcasters to broadcast pro-New Deal programming, and to give him a clear national signal for his fireside chats by forcing the radio networks to interconnect his broadcasts with independent braodcasters, so that FDR reached a national audience, something neither Father Coughlin nor Huey Long could do even with their popular broadcasts.[55]

In 1934, Congress confronted Equal Time again. And again, progressives -- now Liberal Democrat Robert Wagner of New York and Henry D. Hatfield (R-West Virginia) -- pushed for Equal Time for public affairs as well as for political candidates. Their expanded Equal Time (Section 315) proposal resembled those originally proposed by Southern and Western progressives in the twenties: it called for

"equal opportunities" for access for issue-oriented citizens to discuss candidates, election issues, and referendum questions. The proposal also contended that "it shall be in the public interest" for broadcasters "to permit equal opportunity for...public questions."[56] The 1934 proposal for Equal Time omitted any reference to broadcasters as common carriers of news, political and public affairs programming although its wording of "equal opportunities" clearly intended that effect. The Wagner-Hatfield amendment also designated one-quarter of the radio channels for non-profit organizations in an effort to stimulate public affairs programming. A pragmatist like Dill opposed the measure so that the Section 315 on Equal Time in the Communications Act of 1934 emerged as identical to Section 18 of the Radio Act of 1927.

On their side, broadcasters wanted stiffer wording on libel. They wanted to be held harmless for any libelous or defamatory remarks uttered by politicians. Due the anti-censorship statutes of the Radio Act (Section 29) and the Communications Act (Section 326), broadcasters could not review political statements without triggering charges of censorship. In 1932, the Nebraska Supreme Court had ruled against a broadcaster in a case involving a political broadcast.[57] Referring to the anti-censorship provisions of the Radio Act, the Nebraska Court had ruled "the prohibition of censorship of material

broadcast...prevents the licensee from censoring the words as to their political and partisan trends..., and does not give a licensee any privilege to join and assist in publishing a libel, nor grant any immunity from the consequences of such action."[58] Such a ruling placed broadcasters in an impossible position: if they demanded to review politicians' remarks, they were open to charges of censorship, but if they did not review remarks, then they risked suit. To remedy this problem, broadcasters requested relief from liability for libel in the new version of Equal Time.[59]

In deliberation of the Wagner-Hatfield amendment to reserve a quarter of the spectrum for non-profits, Senators Dill and White (formerly Representative White) argued against reserving a quarter of the spectrum for non-commercial licensees. Their arguments were totally majoritarian. They feared that broadcasters with specific interests would discriminate against those who did not share their points of view. They also worried about government discrimination in assigning licenses to some educational, religious, labor and cooperative organizations but not to others. They predicted that programming costs for full time radio stations would force the non-profits to become like commercial broadcasters themselves. They noted that commercial broadcasters devoted significant programming to religious and educational programming.[60] In short,

Dill and White said the commercially dominant model of licensees produced greater quantities of "balanced" programming for "general public service" as well as news, political and public affairs programming. Since the commerical system of licensees provided an adequate flow of programming to the majority of the public, they argued that Senators Hatfield and Wagner would limit the flow by assigning licensees to more narrowly interested broadcasters.

The radio industry stated its opposition to the Wagner-Hatfield amendment by asserting that existing statutes were fine. "Almost every one recognizes that, despite minor defects, the Radio Act of 1927, and the court decisions under it, have established a solid, workable and sound basis for government regulation of radio,"[61] an industry spokesman told a Senate hearing. In comparable language, the National Association of Broadcasters representative argued against the Wagner-Hatfield amendment on the grounds that it advanced special interest programming. "The National Association of Broadcasters," he told the Senators, "fully agrees that the facilities of broadcasting should be made available in the fullest possible measure, as it maintains they are now, and either free of all

charge or at the lowest possible cost, in the service of education, religion, or other activities for human betterment, but it insists that these facilities should be those of stations serving the public as a whole."[62]

In the end, Wagner and Hatfield relented. They settled on a compromise, Section 307 of the Communications Act, which called upon the FCC to deliver a study on reserving a fixed percentage of the spectrum for non-profits by February 1, 1935. The FCC report, to no one's surprise, reaffirmed long-standing FRC policy that commercial stations served the public interest better than non-profits. While expressing Commission policy "to assist the non-profit organizations to obtain the fullest opportunities for expression," the FCC agreed with the Dill-White position. "It would appear that the interests of the non-profit organizations may be better served by the use of existing facilities, thus giving them access to costly and efficient equipment and to established audiences, than by the establishment of new stations for their peculiar needs. In order for non-profit organizations to gain the maximum service possible, cooperation in good faith by broadcasters is required."[63] In making this assertion the FCC arrogated to itself the policing function.

Summary/Conclusion

By 1934, the dominant dynamic for Equal Time was in place. Congress enacted a majoritarian policy for political programming over radio. Equal Time functioned within a commercially based radio system of private licensees, regulated by a bipartisan commission, to provide mass communications to the American public. To some extent, western progressives and Southern Democrats had won their point on Equal Time even if Equal Time applied only to legally qualified political candidates. Equal Time protected the majoritarian free speech rights to the extent that it imposed a common-carrier-like stipulation on broadcasters to that extent. Equal Time established listener sovereignty in radio political programming: Section 18 placed the rights of the listener to hear political information above those of the broadcaster to articulate his views.

At the same time, Hoover, with his vision of a national system of licensees regulated "in the public interest," also emerged as a partial victor. Radio took the commercial direction, providing mass entertainment, which Hoover and later the Federal Radio

and Federal Communications Commission supported with licensing policies that favored larger, commercial broadcasters. Radio broadcasters also retained considerable discretion in political programming because they had to meet only the FCC's "public interest" criteria rather than more stringent common carrier obligations. While hardly a libertarian policy, the FCC's "public interest" criteria were much less burdensome than some of the common carrier proposals articulated by Democrats and political reformers in congressional debate over radio policy.

Like many compromises, Equal Time produced its own controversies. The progressive insistence on Equal Time for public affairs and access rights for issue-oriented citizens was not the least among them.

# CHAPTER TWO

# THE ARTICULATION OF FAIRNESS

The Fairness Doctrine (1949) is to news and public affairs programming as Equal Time is to political programming. The Fairness Doctrine defines broadcast news and public affairs in the a way comparable to that in which Equal Time defines political programming over radio and television.

The Fairness Doctrine defines public discourse for broadcast news and public affair programming by imposing two obligations on broadcasters. First, the Fairness Doctrine requires broadcasters to provide controversial news and public affairs programming for their listeners and viewers. Second, the Fairness Doctrine requires that broadcasters extend access to issue-oriented citizens to discuss controversial public issues. Neither obligation was required of them before 1949. Until 1949, broadcasters had only to satisfy the general "public interest" standards of the Communications Act in matters of news and public affairs programming.

The Fairness Doctrine is a majoritarian policy instrument. Its intent is to assure a flow of news and public affairs programming to the majority of the citizens. As with Equal Time, spectrum scarcity is the

technological rationale for the Fairness Doctrine: because there are more people who wish to broadcast than available frequencies, those with broadcast licensees have "public trustee" obligations to those who do not.

Like so many regulations, the Fairness Doctrine hardly emerged de novo from bureaucracy's grey corridors. There were many precedents to impose news and public affairs programming obligations upon broadcasters, dating from failed efforts to extend Equal Time to public affairs programming in legislating the Radio Act and the Communications Act. Both the Federal Radio Commission and the Federal Communications Commission had made a number of rulings in which they asserted the rights of the public to the fullest possible news and public affairs programming. In the mid-forties, the Supreme Court upheld the Federal Communications Commission's licensing authority. Writing in expansive majoritarian language, Justice Frankfurter ruled that the FCC could properly exert its authority over content (referred to as "traffic" in the decision) as a legitimate function of its licensing authority. In the latter half of the forties, the FCC made a number of regulatory rulings, which specifically promoted controversial news programming. Then, in 1949, a thin FCC majority articulated the Fairness Doctrine.

Acting on its discretion, the FCC issued "A Report of the Commission In the Matter of Editorializing by Broadcast Licensees," which became known as the Fairness Doctrine.[1] Congress had not legislated the Fairness Doctrine. Neither the Radio Act nor the Communications Act addressed news and public affairs issues aside from general requirements that broadcasters behave "in the public interest." Here, then, is another aspect of discretion, which figures importantly into defining broadcast news and public affairs programming. Rather than broadcaster discretion, it is a matter of regulatory discretion. FCC discretion to "make appropriate rules and regulations"[2] to assure a flow of news and public affairs programming to the public enabled the FCC to issue the Fairness Doctrine.

From a libertarian point of view, the Fairness Doctrine was doubly abhorent. First, it clearly placed the rights of the majority to receive news and public affairs programming above the free speech rights of broadcasters. By imposing obligations on broadcasters to balance stories and provide access opportunities to

issue-oriented citizens to discuss controversial public issues, the Fairness Doctrine imposed duties on broadcasters far beyond those expected of newspapers, magazines and other printed forms of news and public affairs information. From the libertarian view, such obligations stiffled and chilled broadcast news and political programming. As libertarians saw it, the Fairness Doctrine would have a perverse effect. It would accomplish the opposite of what the FCC had hoped. By imposing obligations on broadcasters to balance news and to provide access opportunities, libertarians prophesized broadcast stations would avoid covering controversial issues rather than endure a host of access requests.

Second, from the libertarian view, it was improper that FCC enjoyed the authority to define the content of news and public affairs programming and to dispense broadcast licenses. They feared grave consequences for broadcasters' free speech rights, for here was the licensing authority defining program content standards against which broadcasters' licenses would be measured for renewal. There was a serious potential for FCC abuses due to its power as the national licensing authority.[3]

The Fairness Doctrine was originally a regulatory reform. The Fairness Doctrine abolished a total ban on broadcast editorials, which the FCC had put in place in 1941 in the "Mayflower Decision."[4] In articulating the Fairness Doctrine, the FCC intended to increase libertarian freedoms of expression for broadcasters and issue-oriented citizens alike, and to promote the majoritarian goal of assuring a flow of news and public affairs programming to the public.

The Fairness Doctrine's intended reform was narrow. The Fairness Doctrine enabled broadcast licensees to assert editorial views on controverial issues. It aimed at lifting the Mayflower Decision's black-out on editorials by broadcast licensees. The Fairness Doctrine dealt only with editorial comments by the broadcast licensee or a spokesman, who identified himself as representing a licensee's views. It did not formally cover broadcast commentators although as employees of broadcast licensee's it would seem unlikely serious differences characterized relations between individual licensees and the commentators they chose to hire.

In practice, however, the Fairness Doctrine redefined broadcast news and political programming. It imposed obligations on broadcasters, which they did not have before the Fairness Doctrine. These obligations, which are discussed in detail below, effected an expanded majoritarian policy in news and public affairs programming.

The FCC's total ban in 1941 on broadcast editorials in the Mayflower Decision grew out of a case in Boston in the late-thirties concerning a license renewal for the Yankee Network to operate WAAB, a radio station that had broadcast strongly opinionated editorials on public issues during its news casts. This case is known as the Mayflower case because a competing company, the Mayflower Broadcasting Company, challenged the Yankee Network's license for WAAB on the grounds that due to their partiality WAAB's editorials violated the station's "public interest" obligations. The specific editorial policy in question concerned personal attacks on political candidates.

In the Mayflower Decision, the Federal Communications Commission ruled that the Yankee Network could keep its license for WAAB as long as

Yankee Network management did not broadcast editorials on public issues and political candidates over WAAB. In its affidavits, Yankee Network management promised that since September 1938 "no attempt has ever been or will ever be made to color or editorialize the news." The Yankee Network's attorney told the FCC that "there are absolutely no reservations whatsoever, or mental reservations of any sort, character, or kind with reference to those affidavits. They mean exactly what they say in the fullest possible amplification that the Commission wants to give them." In issuing the the Yankee Network's license renewal, the FCC noted that " the station has no editorial policies."[5]

Beyond the specifics of a Boston radio station, the Mayflower Decision illustrated the stubborn resistance to resolving the tension between shaping a majoritarian broadcast policy, which effected a flow of news and public affairs programming to the public without trammeling broadcasters' freedom of expression. In an effort to assure a flow of news and public affairs information to the public, the FCC ended-up stiffling a broadcaster's right to editorialize.

Spectrum scarcity was the technological basis for the Mayflower Decision. Bandwidth on the spectrum was

too precious to allow broadcasters to use radio channels to express their editorial views, the FCC ruled. Due to "the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to support of [broadcasters'] own partisan ends." "The public interest -- not the private -- is paramount." "A truly free radio cannot be used to advocate the causes of the licensee," the FCC wrote. "It cannot be used to support the candidacies of his friends. It cannot be devoted to support the principles [the broadcaster] happens to regard most favorably. In brief, the broadcaster cannot be an advocate."[10]

Spectrum scarcity reasoning was hardly novel. The Mayflower Decision reiterated longstanding FCC policy and court precedents that a scarcity of channels placed the flow of information to the public above the free speech rights of broadcasters. The FCC had stated such a policy as early as 1929 in the Federal Radio Commission's decision in the Great Lakes Broadcasting Corporation and as recently as its 1940 Annual Report in noting that "stations are required to furnish well-rounded rather than one-sided discussions of public questions."[7]

The reach of the Mayflower Decision was novel. It preempted editorials entirely. It went beyond customary FCC practice of policing public affairs programming in considering license renewals, and of reviewing any abuses on a case by case basis after they had occurred. Instead, the Mayflower Decision denied editorials a priori.

Like the Fairness Doctrine, which was to follow it, the Mayflower Decision mixed together editorials and public affairs programming. Rights of editorial expression henceforth became attached to news and public affairs programming. "Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues,"[8] the FCC ruled. "Radio can serve as an instrument of democracy only when devoted to the communication of information freely and objectively communicated."[9] By broadcasting opinionated editorials on a candidate without providing such counterbalancing news as his rebuttal, the Yankee Network had neither fully nor objectively informed the public, and hence was derelict as a public trustee. By accepting a license, the FCC ruled, broadcasters "assumed the obligation for presenting all sides of important public issues, fairly, objectively and without bias."[10]

But, unlike the Fairness Doctrine which exerts a significant influence over policy for broadcast news and public affairs programming, the Mayflower Decision had a mostly formal impact. It forbade licensees such as the Yankee Network from editorializing but it did not strictly deny a radio commentators, employed by licensees, from editorializing on public issues. It applied to commentators only if they stated they were speaking for the licensee. Commentators continued to remark on the news, public affairs and politicians, doing so as individual commentators and not as advocates of the licensees.

A number of court decisions and FCC rulings created a basis for the FCC to modify the Mayflower Decision. The Supreme Court's decision in the Network case (1943), the FCCs Blue Book (1946), and three FCC rulings (1945,1946, 1946)each in its own way contributed to the articulation of "fairness" as a doctrine in 1949. All advanced the majoritarian position that the flow of news and information to the public had priority over the free speech rights of broadcasters. Each applied majoritarian rulings on freedom of expression to a number of facets of the radio industry. Cumulatively, these decisions affirmed FCC policy that its enabling legislation, its own body of regulatory precedents, and a Supreme Court ruling--upholding its licensing authority--all supported FCC rule making on editorial expression and public affairs programming.

In the Network case, Justice Felix Frankfurter affirmed the constitutionality of FCC licensing authority in expansive majoritarian language. Supreme Court imprimatur on FCC licensing authority helped to set the stage for a more active regulatory role by the

FCC in programming content. Frankfurter ruled that a national radio system was unworkable without licensing due to spectrum scarcity. Frankfurter called the scarcity of channels radio's "unique characteristic."[11] "Because [radio] cannot be used by all, some who wish to use it must be denied." The FCC had been established to effect maximum efficiency of the radio spectrum by granting licenses, Frankfurter wrote. He ruled, accordingly, that the FCC was correctly applying its licensing authority over the National Broadcasting Company as "a proper exercise of its power over commerce."[12]

Frankfurter's majoritarian language supported later FCC's policy statements, particularly the Fairness Doctrine, which forcefully reminded broadcasters that they were licensees. He rejected NBC arguments that breaking-up its networks constituted a violation of its First Amendment freedoms of expression. The FCC was not denying the free speech of NBC and/or its affiliates by denying a station or in this case an entire radio network licenses to broadcast. Rather, Frankfurter wrote that the FCC was exercising its authority to regulate the airwaves "in the public interest."[13]

Following the Second World War, the FCC put itself on record forcefully by asserting that public affairs programming constituted the public interest, and that it would consider "balance" in public affairs programming in issuing licenses. In 1946, the FCC published the Public Service Responsibility of Broadcast Licensees, a book of standards that became known in the trade as the Blue Book.[14] The FCC published the Blue Book in anticipation of more AM and FM radio stations and the commercial emergence of television. There is also a hint that the emergence of United States international leadership following the Second World War encouraged Blue Book writers that the flow of diverse, high quality news and public affairs programming to the American public constituted the public interest due to new international responsibilities.

In the Blue Book, the FCC championed its recommendation for public affairs programming under the banners of diversity and excellence. It deplored the preponderance of soap operas over news, public affairs and classical music. The Blue Book went on to document that network affiliates routinely rejected network-produced public affairs shows by substituting music and light entertainment for more serious news, public affiars and cultural programming.[15]

The writers of the Blue Book also saw a variant of "private" censorship, which had worried some members of Congress in the twenties. Blue Book writers worried that the broadcasters' dependencies on advertising, and the advertisers' insistence that radio programming offend no segment of any potential market combined so that radio did not serve the "public interest" as fully as its promise. Hence, their call for more public affairs programming and classical music.[16] They quoted Norman Rosten, a recognized writer, that "the sponsor and the advertising agency have taken over radio quietly in the matter of writing."[17]

Three FCC rulings on license renewals contributed to setting the agenda for the Fairness Doctrine. In the rulings, the FCC identified the flow of news and information to the public through controversial public affairs programming with broadcasters' public interest responsibilities as trustees of the airwaves. It asserted that broadcasters had affirmative obligations to provide controversial public affairs programming in order to keep their licenses. And, as in the Network case and the Blue Book, the FCC upheld its authority to force broadcasters meet these standards.[18]

The FCC announced its decision to reassess the Mayflower Decision in 1947. A petition from the Cornell University radio station, WHCU, requesting the right to editorialize, provided an occasion for the FCC to reconsider the Mayflower Decision.

In its call for hearings, the Federal Communications Commission requested comment on editorials "urging the election of various candidates for political office or supporting one side or another on various questions in public controversy."[19] The FCC requested testimony on difficult first amendment issues of freedom of speech. It called for testimony specifically on the relation between broadcasters' rights to express their views on issues and broadcasters' "affirmative obligation to be fair and to represent all sides of controversial issues"[20] in news and public affairs programming.

This construction on regulatory policy indicates the tight-rope that the FCC apparently

sensed it had to walk in its efforts to encourage the fullest flow of news and information to the public without triggering charges either of granting too much power to broadcasters or of censoring broadcasters inordinately.

In making the call for hearings, FCC Commissioner Denney observed that the radio industry was split over radio editorials. Some broadcasters favored the Mayflower Decision ban of editorials. They believed radio enjoyed higher public acceptance than newspapers because broadcasters avoided partisan issues. They wished to preserve radio's reputation and the revenues that flowed from its reputation for impartiality. Other broadcasters demanded the right to editorialize. FCC Commissioner Denney noted that many radio stations broadcast editorials through radio commentators. He also remarked that technological constraints on the number of radio channels had abated, noting that there were 1,200 radio stations after World War II up from the 600 odd in 1938 when WAAB had broadcast its editorials and the FCC did its fact finding for the Network case.[21]

The Mayflower hearings capture issues comparable to those discussed in 1926 when Congress had initially wrestled radio news and public affairs programming. In 1926, Congress was unable to reach a policy for radio news and public affairs programming. In order to pass the Radio Act, Congress had assigned the FRC, its initial licensing authority, the repsonsibility for devising rules and regulations for the discussion of public issues over radio. In the spring of 1948, as successor to the FRC, the FCC engaged this precise duty, and in doing so, provoked wholesale reconsideration of freedom of expression over radio.

The issues are not unfamiliar. The scarcity of channels, though less pressing than in 1926, constituted the technical basis for policy. Broadcasters championed unrestricted editorial rights due to first amendment rights of the press.[22] Farm and labor groups, heirs to the concerns of the progressives and Democrats about media monopoly, worried about media power.

The Mayflower hearings, held in March and April 1948, brought out over fifty witnesses. Roughly a dozen witnesses advocated an unqualified first amendment right for broadcast licensees to editorialize. Broadcasters, National Association of Broadcasters representatives, a radio preacher, and a professor of journalism comprised this group. The majority of witnesses, however, favored the Mayflower Decision's prohibition on broadcaster editorials. Trade unions, farm groups, radio writers and directors, and a former FCC commissioner at the time of the Mayflower Decision comprised this group. A smaller number of witnesses advocated editorializing with certain provisos such as extending editorial rights to licensees but not to networks or assuring a right to reply. Individual broadcsters and a college professor constituted this group.[23]

Broadcasters advanced first amendment claims for lifting the Mayflower ban and for granting them unqualified editorial rights. ABC President Woods asserted that broadcast editorials were "in the public interest," because they would increase the flow of information to the public. Woods rejected the attachment

of any provisios such as access opportunities for issue-oriented citizens to respond to editorials. Woods maintained broadcasters should feel free to reject access requests if other media in their communities devoted sufficient publicity to those views. In a word, Woods believed the mass media marketplace provided sufficient means to assure a flow of news and public affairs information to citizens. "Radio...is only one of many effective means...for the expression of ideas,"[24] he said.

CBS President Frank Stanton told the FCC that "radio should be as free as the press," but that in 1948, radio was "only half free." Stanton argued that spectrum scarcity was a problem of the past by pointing out that radio stations outnumbered newspapers by two to one (3,690 stations to 1,792 newspapers). He added that access opportunities were "constitutionally unsound."[25]

The National Association of Broadcasters cited first amendment rights and FCC enabling legislation, specifically the anti-censorship provisions (Section 326) of the Communications Act of 1934, to claim unqualified editorial rights for broadcasters. Justin Miller, Director of the NAB argued that the

first amendment forbade government censorship. Any FCC policy on radio editorializing constituted an improper extension of FCC authority, Miller asserted. Access opportunities to respond to broadcasters' editorials were an unconstitutional intrusion on free speech, Miller said. Any FCC policy on editorializing, comparable, say to, Equal Time would be similarly faulty in Miller's view.[26]

A.D. Willard, Executive Vice President for the NAB, argued that the Mayflower ban stifled the expression of a diversity of points of view on controversial public issues, and thus accomplished the opposite effect of what the FCC had intended. Willard testified that eitorializing was a responsibility that rested properly with broadcasters and should be placed there, not with the FCC. He claimed that under Mayflower, the broadcasters' microphone was accessible to everyone but the broadcasters.[27]

Fred Seibert, Professor of Journalism at the University of Illinois, argued that the Mayflower Decision violated the first amendment and the FCC's anti-censorship regulation. He would prefer occasional abuses with

controversial programming on the air than no discussion of controversial issues due to a regulatory prohibition on editorializing, Seibert told the FCC.[28]

Several proponents of editorials pointed out that the listening audience, as the broadcasters' markets, exerted a temporizing effect on editorial excesses. Frank C. Waldrop, a reporter for the Washington Times-Herald reminded the FCC that broadcasters could not afford to offend their listeners without endangering their revenues. He suggested that market-driven factors played an important role in predisposing broadcasters to balance news and public affairs programming. He added that broadcasters editorialized to a considerable degree in their news programming due to their selection, writing, and placing of news stories.[29] Professor Seibert pointed out that broadcasters had to live with interest groups and listeners in their communities, implying a sanction on editorial abuses within the marketplace.[30]

Mr. Louis F. Caldwell, former general counsel for the Federal Radio Commission, urged the FCC to lift Mayflower on first amendment and administrative grounds. He reminded the commissioners that "fair play" cases in news and political programming in the early days of the FRC had posed thorny first amendment issues. He said that as general counsel he had written FRC rulings for and against license renewals for different broadcastes on the basis of substantially similar evidence concering their news and public affairs programming.

Caldwell warned the commissioners that the FCC would be placing a priori restrictions on freedom of expression if it stipulated access opportunities as a condition for lifting the Mayflower ban. By creating such a policy, the FCC would not only violate the first amendment, Caldwell said that it would also create impossible administrative burdens for itself. Caldwell said he feared that the FCC would place itself in the untenable position of policing a general review standard, such as a proscriptive standard of "fairness," when it could only deal effectively with specific cases of abuse of the public trust after it had occurred.[30]

Proponents of the Mayflower ban on editorials asserted that broadcasters already had too much power. They testified that broadcasters' discretion in public affairs programming was not sufficient protection of "the public interest." Several testified that broadcasters had made partisan attacks in the past, and should not be trusted in the future. Granting editorial rights to broadcasters would endanger the free flow of ideas and opinions to the public, they contended. As a rule, Mayflower proponents believed that the first amendment entitled broadcasters to broadcast news and to hire commentators.

James Lawrence Fly, a FCC commissioner at the time of the Mayflower Decision, provided the strongest testimony against granting editorial rights to broadcasters. Fly said that the NAB's Justin Miller stood on "pathetic ground" in presenting his case for broadcasters' freedom of expression. Fly charged that Miller's argument in behalf of broadcast editorials amounted to private censorship. He warned any FCC regulatory policy which might be based on

Miller's brief "turn[ed] the right of exclusion over to the licensee..." He worried that such a ruling would chill free speech. "With a thousand tongues free to criticize the government, democracy is secure,"[31] Fly said.

Fly articulated the majoritarian view. He was willing to suppress the free speech rights of broadcasters due to his confiction that their rights to editorialize would hamper the flow of news and public affairs to the majority of American citizens. Fly's position is essentially that of the progressives, who had worried about broadcaster censorship in congressional debates over the Radio Act. Fly acknowledged that the technological grounds of a scarcity of channels were not as pressing as had been the case before the Second World War. However, Fly observed a great deal of duplication among the major radio networks. He said this duplication of programming provided further evidence that the FCC would be limiting rather than expanding the flow of news and information to the public if it were to grant editorial

rights to broadcasters. Fly concluded by asserting the the Mayflower ban on editorials served radio industry well, noting that the American public respected radio more than newspapers.[32]

Miller made a rejoinder to Fly. Miller replied that the Communications Act ruled out any FCC jurisdiction over editorial comments. His was the libertarian position: the first amendment protected broadcasters' right to broadcast editorials on public issues. Radio's power constituted no grounds to restrain it, Miller argued. "Does Mr. Fly mean to suggest that because of the powerful influence of radio broadcasting, does it not come, properly with the meaning of the first amendment?"[33] To Miller, concerns about media power or media monopoly were clearly secondary to a primary concern with the freedom of expression.

Proponents of the Mayflower ban, coming from organized labor, claimed that broadcasters did not deserve editorial privileges due partiality in the past and unwillingness to produce controversial public affairs programming. Henry C. Fleisher, representing the Congress of Industrial Organization, told the FCC that historically "radio treated controversy as a form of leprosy, at best to be avoided, at worst to be handled under carefully

prescribed conditions." He charged that broadcasters "place[d] controversy in carefully sterilized cells" so that "as few listeners as possible may be `contaminated' by the expression of ideas." As an example of broadcaster partiality, the National Farmers Union testified in favor of the Mayflower ban on the grounds that a radio commentator in the mid-west criticized farmers' cooperatives. Joseph A. Breine, president of the Communications Workers, argued that broadcasters' dependency on advertising revenues prevented "fair and reasonable" editorial policies.[34]

Eric Barnouw, President of the Radio Writers Guild, supported the Mayflower ban on editorials on grounds similar to those articulated by CWA President Briene about broadcasters' dependencies on advertising revenues. Barnouw feared that mass marketing to mass audiences would exert increasing influence over the broadcasting industry. He feared that independent editorial voices would be unable to assert themselves in the midst of huge entertainment corporations.[35]

Their testimony is instructive, because neither

supported the Mayflower ban on radio editorials on the basis that radio networks or broadcasters were adherents to a particular ideology such as liberalism or conservatism. Rather, each contended that the institutional constraints on news and public affairs programming within radio corporations frustrated editorial expression. Certainly, Briene also felt that broadcasters had an anti-labor ideology.

Other proponents of the Mayflower Decision urged the FCC to keep the ban in place because they feared that broadcasters were stifling liberal commentators. The Voice of Freedom Committee opposed news editorials on the grounds that more liberal than conservative commentators had left the air. Charles A. Siepmann, author of the Blue Book, "reluctantly" supported the Mayflower Decision because he felt the radio networks were not balancing liberal and conservative news commentators. Saul Carson, radio columnist of the New Republic, expressed concern that radio broadcasters would dominate public opinion if allowed to broadcast news editorials. He testified that Mayflower should be strengthened lest the broadcasters gain even more power over the flow of news and public affairs to the public.[36]

A number of religious, legal aid and military groups urged the FCC to prohibit broadcaster editorials. The American Jewish Congress urged the FCC to retain Mayflower because it worried about anti-semitism. The AJC expressed its concern that some broadcasters would provoke religious animosities and racial bigotry if freed to articulate their editorial views. The National Lawyers Guild testified that the Mayflower Decision was not censorship, and that broadcasters who did not comply with the Mayflower Decision should be penalized by having their licenses revoked. The American Veterans Committee added that Mayflower was a "logical and necessary extension of the constitutional guarantees of free speech."[59]

Access opportunities to reply to broadcaster editorials emerged as a middle ground between broadcasters' libertarian position that they be allowed to make news editorials without any quid pro quo and the Mayflower proponents' majoritarian position that the free flow of information and opinion to the public required FCC prohibition of radio news editorials. In much the same way that Senator Dill had championed Equal Time for political candidates as the pragmatic middle ground between the radio industry,

which wanted no restrictions on its news and political programming, and the Democrats and progressives, who had insisted on common carrier designation for radio for news and public affairs programming, so too, access opportunities emerged in 1949 as a middle ground on broadcast news and public affairs programming.

Several witnesses urged access opportunities to reply to broadcaster editorials as a pragmatic compromise and worthy ideal. Professor Robert E. Cushman of Cornell University, whose radio station's petition to the FCC had prompted reconsideration of Mayflower, came with proposals in hand. In addressing broadcasters' right to editorialize, Cushman ignored the technological issue of a limited number of radio channels. Cushman said that radio was like a newspaper, but due to the Mayflower Decision radio lacked an editorial page. Radio was "useful," he said, "but not as useful as [it] could be."[37] The public, Cushman continued, looked to newspapers for informed opinion and advice because the public assumed that newspapers had greater access to information than the average citizen. To make radio more useful, Cushman recommended access opportunities.

Some independent broadcasters supported the right of broadcasters to editorialize if access opportunities for reply were assured. Nathan Straus, owner of WMCA radio, advocated equal opportunities for the public to reply to broadcaster editorials. Straus supported editorial rights as long as stations programmed editorials for no more than fifteen minutes each day, labeled editorials at the beginning and end, granted rebuttal time, and read letters from the public following editorials. All licensees, save those stations controlled by absentee owners, should enjoy editorial rights, Straus testified. Morris Novick of WNYC favored editorial rights, as long as the FCC imposed and affirmative responsibility on broadcasters to seek out people critical of editorials and provide them reply time. Gordon P. Brown, owner and general manager of WSAY in Rochester, urged abolition of Mayflower for individual licensees, but told the FCC the ban on editorials should still apply to networks.[38]

In issuing the Fairness Doctrine, the Federal Communications Commission took a middle course from among the proposals, which were suggested at the Mayflower hearings. The FCC ruled in favor of editorial rights for broadcast licnesees and in favor of access opportunities for issue-oriented citizens to respond to broadcast editorials. This is the root meaning of "fairness." Fairness carries the meaning of freedom of expression through broadcast editorials combined with the two fold duty to seek controversial public issues as part of news programming and to provide access opportunities for a variety of views on controversial public issues.[39]

The Fairness Doctrine changed the rules on broadcast news and public affairs programming by attaching an affirmative duty or obligation to seek out and present controversial programming as a function of broadcasters' discretionary powers. This FCC construction of broadcaster discretion altered the construction Congress had originally placed on

discretion in 1926 and again in 1934. Broadcasters won the fight to classify themselves as licensees and not as common carriers precisely so they could decide what issues to cover and what news to present within, of course, the strictures of the FCC's "public interest" standard.

In ruling that broadcasters had an affirmative duty to provide controversial public affairs programming, the FCC replaced an a posteriori standard of public affairs programming with an a priori standard. It imposed the duty of presenting controversial public affairs programming on broadcasters as a prior condition for maintaining their licenses. Here, long after Senator Howell's remarks on the urgency of presenting "public questions" to radio listeners, stood a regulatory decision requiring broadcasters to behave as Howell had fruitlessly recommended to an unwilling Congress.

The FCC tried to diffuse some of the problems this shift to a priori from a posteriori review standards posed for broadcasters. The FCC ackowledged that there was no formula for measuring fairness. It noted that broadcasters should rely on their "good judgement,"[40] and that as a rule, good judgement would foster

programming on all shades of opinion. In the end, the FCC said decisions on licenses could turn not on any mechanical formula for achieving fairness, but on the reasonableness of broadcasters' actions to achieve the practice of providing access to "responsible"[41] individuals and organizations to address controversial public issues.

The FCC said it would implement the Fairness Doctrine in terms of overall news and public affairs programming, and not on a case by case basis. It warned broadcasters that they could not editorialize on specific issues and subsequently report to the FCC that opposing sides were covered during routine news programming.[42]

Implementation turned on "the reasonableness of [a] station's actions" and not on "any absolute standards of fairness," the FCC ruled. Broadcasters might well err in their editorial judgements, the FCC observed. The FCC held up reasonableness as a "flexible standard" well within the canon of Anglo-American law.[43] By way of example, the FCC reminded broadcasters that considerations of

reasonableness in terms of granting access opportunities did not set up the FCC as thought-police. Indeed, the FCC opined that the content of their editorials really had little to do with whether or not broadcasters opened their studios to people to respond to them. What mattered, the FCC wrote in reference to a hypothetical legislation, was "if the licensee had permitted only advocates of the bill's enactment to utilize its facilities to the exclusion of its opponents." "No independent appraisal of the bill's merits by the Commission would be required to reach a determination that the licensee had miscontrued its duties and obligations...to serve the public interest."[44] The FCC said it drew the line, however, at any broadcaster effort to "stack the cards"[45] by favoring one side over others in covering public controversy. It also asserted that no reason existed why broadcasters should not be able to afford "a fair opportunity for the presentation of contrary positions."[46] The FCC noted that if broadcasters felt that the FCC enforced standards of fairness in an arbitrary or capricious manner, they could use "procedural safeguards"[47] under the Communications Act and Administrative Procedure Act and in the end resort to the courts if they so opposed a FCC decision.

The FCC rejected the libertarian arguments of broadcasters, the NAB, and journalists and academics that imposing "a basic standard of fairness"[48] amounted to an a priori restraint on broadcasters' freedom of speech. The FCC cited the Associated Press case on diverse sources of information and the free flow of ideas. The AP case had found that the first amendment did not "afford non-governmental combinations" any rights to "impose restraints upon [the] constitutionally guaranteed freedom" of expression.[49] In language about print that was analagous to the limited number of channels, the AP case continued that "freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution but freedom to combine to keep others from publishing is not."[50] This standard of freedom of expression was virtually identical to the arguments, dating back to discussion at the National Radio Conferences and the original congressional debates in 1926 about freedom of speech over radio, in favor of listener sovereignty due to the technological constraints of a scarce radio spectrum. It was also Fly's argument about broadcaster censorship against

Miller in the Mayflower hearings. With such a precedent as its beacon, the FCC rejected the broadcasters' arguments that the Fairness Doctrine was a prior restraint on their freedom of speech. In language comparable to the Associated Press decision, the FCC rebutted Justin Miller, Frank Stanton et al., "the freedom of speech protected against government abridgement by the First Amendment does not extend any privilege to government licensees or means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilise their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the First Amendment."[51]

The FCC's language extending editorial rights to broadcasters was remarkably limp. The FCC ruled that broadcaster editorials were "not contrary to the public interest." The Commission noted that it was "not persuaded" that broadcasters' editorials "may not be actually helpful"[52] in promoting informed public opinion. Nowhere in the Fairness Doctrine did the FCC renounce the Mayflower Decision.

Finally, the FCC's articulation of "fairness" as a doctrine was hardly auspicious or firmly supported. Two commissioners supported the Fairness Doctrine unequivocably; two supported it with reservations; one opposed it; two abstained from voting. The FCC Commissioners' vote on "fairness" was four to one, but considering the two qualified opinions, the Fairness Doctrine was off to a shaky start at best.

The separate and additional opinions of FCC commissioners regarding the Fairness Doctrine are noteworthy because they point out the can of worms the FCC opened by requirying on broadcasters to be fair and to provide access opportunities. Commissioner E.M. Webster criticized the Fairness Doctrine as an "academic legal treatise" of little use to broadcasters in determining the day-to-day radio news and editorial management. He wrote that no individuals, except legally qualified candidates during elections, enjoyed access rights. In practice the Fairness Doctrine required only evidence of a reasonable effort toward providing equal opportunities for public affairs programming, Webster said.[53]

Commissioner Robert F. Jones wrote a blistering concurrence in his "separate views." He anticipated administrative problems, which would beset the FCC in implementing the Fairness Doctrine. He noted that the broadcasting industry had carried on editorials through commentators despite the Mayflower Decision, and

criticized the Fairness Doctrine for dealing exclusively with licnesees. Rather than impose an a priori obligation on broadcasters, Jones recommended that the FCC revoke licenses for broadcast abuses.[54]

Jones criticized the Fairness Doctrine for developing "prospective conditions" on broadcasters' editorial rights. He wrote that these conditions were as ambiguous as they were unenforceable.

Jones reprimanded the majority for its equivocal recision of the Mayflower Decisions. He advocated an unambiguous and unequivocal assertion of editorial rights and responsibilities. In making a tacit recision of the Mayflower Decision, Jones charged the majority with not having the courage to repudiate a past error on censorship and for temerity by perpetuating the negative effect of the Mayflower Decision.[55]

Jones contended that the Fairness Doctrine violated the first amendment, and complained that the FCC was setting its own standards of "reasonableness" as the litnus of broadcasters' freedom of expression. Such a policy, Jones wrote, was contrary to the anti-censorship provisions of Section 326 of the Communications Act.

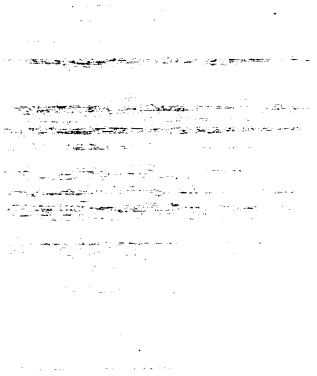
Jones complained the vagueness in defining fairness made the Fairness Doctrine unenforceable. It was one matter to enforce a specific decision, after the fact of an abuse than to hold up a standard of fairness, which would be difficult to apply to daily news operations.

Jones found the majority position on a flexible standard of reasonableness similarly untenable. He labelled it as another attempt at prior restraint, and argued that "problems with editorialization can only and should only be determined a posteriori in connection with specific situations."[56]

The FCC failed to follow correct administrative procedures in issuing the Fairness Doctrine as a regulatory memorandum, Jones charged. He wrote that Congress had charged agencies such as the FCC with the responsiblity of publishing policy statements, rules and regulations in codified form in the Federal Register. As a result, Jones feared the Fariness Doctrine's standing, if contested in courts of law, and the confusion it could create in broadcasters' minds due to its vague status as a regulatory memorandum.[57]

In addition to these shortcomings, Jones criticized the Fairness Doctrine for conflating "news" with "comment" with "editorialization." "Neither the general policy created not the qualifications on the right to editoralize are made clear in terms free from ambiguity," Jones blisterd. "Background, policy, example, qualification are commingled."[58]

There was one dissent. Commissioner Freida P. Hennock wrote that the Fairness Doctrine was beyond the enforcemnt powers of the FCC. She ruled to sustain the Mayflower ban.[59]



Broadcasting industry response to the Fairness Doctrine was cautious. After pushing for abolition of the Mayflower Decision, broadcasters now wondered if the Fairness Doctrine might become some sort of "Frankenstein" turning against them. Broadcasting worried that the Fairness Doctrine would foster more conformity in public affairs programming due to the vague requirement to be fair, which could inhibit braodcaster from taking partisan stands on controversial issues.[60]

In conclusion, one can observe that the Fairness Doctrine put a majoritarian policy in place for news and public affair programming. Spectrum scarcity was the technological rationale for the Fairness Doctrine. Although partisans on each side of the free speech debate acknowledged an increase in the number of radio channels and the emergence of television, the FCC ruled that access opportunities and controversial news programming were required of broadcasters. The FCC ruled that the individual broadcaster as a licensee was responsible to balance the flow of news and public affairs programming to his listeners. It dismissed contending arguments, which held that the media marketplace, if free from supplemental obligations, could and would assure a more diverse flow of news and public affairs programming. It ignored warnings of thorny problems of implementation. It denied the validity of arguments that the Fairness Doctrine would stifle rather than enhance controversial news and public affairs programming.

As was the case in the twenties and would be the case through the mid-eighties, advocates for broadcast regulation feared the power of the media to influence American political institutions and public opinion. Accordingly, federally imposed requirements to balance news and to provide access opportunities constituted policy mechanisms to sustain the rights of listeners over those of broadcasters. In the forties, regulatory advocates included such groups as labor and farm groups, religious organizations, and the American Civil Liberties Union among others.

Opponents of regulation argued different. They down-played the power of the media to influence American political institutions and public opinion. Instead, they advanced strict first amendment grounds for broadcasters free speech rights. Even if broadcasters might be influential, opponents of regulation argued unsuccessfully that they were entitled to the same first amendment rights as their print confreres. Supplemental regulations, requiring them to be fair or to provide access opportunities, were intrusive and counter-productive, they said. By and in large, broadcasters were members of this group.

By the late forties, then, movement was in the direction of increased regulatory oversight for news and public affairs programming. In issuing the Fairness Doctrine, the FCC had made that clear.

In the fifties, Congress would cut some of the Equal Time regulations because literal applications of Equal Time rules stifled rather than increased the flow of political programming to the public.

# CHAPTER THREE

# EQUAL TIME IN '59

Snow hit Mayor Daley's face. Together with other city officials and executives from International Harvester, Chicago Mayor Richard Daley had braved a snow storm to welcome Argentine President Frondizi to Chicago at the windy city's Midway Airport in February, 1959. Television cameras from Chicago television stations filmed the event for newscasts. The story was brief due to the storm: a few handshakes, President and Mrs. Frondizi waved to a crowd, Mayor Daley had only enough time to say "How do you do?,"dignitaries enterred limousines, the departing limousines went on their way to the Drake Hotel.[1]

Lar "America First" Daly, a perennial candidate for many political offices and an opponent of Mayor Richard Daley in Chicago's upcoming Democratic primary, did not like what he saw on television that night. Lar Daly felt Chicago television treated him poorly not just because they covered the Mayor performing official duties while denying Daly equal time, but also because they had failed to broadcast a news stories on Lar Daly's unprecedented filing as a mayoralty candidate in both the Democratic and Republican primaries. Television stations had broadcast stories of Mayor Daley filing his petitions for the Democratic primary and former Congressmen Timothy P. Sheehan filing his for the Republican.[2]

Lar Daly requested equal time from several of the Chicago television stations. WBBM, the CBS affiliate, and WNBQ refused. Daly petitioned the Federal Communications Commission to require the stations to grant him time equal to that the stations had provided Mayor Daley and former Congressman Sheehan in their newscasts. In making his request, Lar Daly cited other instances where television newscasts had covered his opponents in the Democratic and Republican primaries, but had ignored his candidacy. Among others, these instances included stories on each candidate recieving his party organization's nomination, interviews with Sheehan and the Democratic Cook County Chairman, and Mayor Daley's annual report on the city.[3] Interestingly, Lar Daly did not include news coverage of Mayor Daley's greeting of President Frondizi or of the Mayor's participation in a story on the March of Dimes in his complaint to the FCC. Daly was more upset with segments of the Mayor as a campaigning incumbent politician in tv newscasts than those depicting Mayor Daley in more strictly ceremonial activites. However, in ruling in "Lar Daly," the FCC addressed the issue of television news coverage of ceremonial as well more clearly political activities of campaigning incumbents.

The Federal Communications Commission ruled in Lar Daly's favor, and ordered WBBM and WNBQ each to provide Daly roughly ten minutes of air time. WNBQ complied; WBBM refused, and CBS asked the FCC to review its decision.[4]

The Federal Communications Commission's decision in "Lar Daly" came as a surprise. Just two years before, the FCC had ruled that television news coverage of politicians did not fall under Equal Time because such on-the-spot coverage was appropriately part of a broadcaster's judgement in covering newsworthy events and because the politician in question had not initiated the coverage.[5] In October,1958, the FCC had restated this position exempting newscast coverage of politicians performing ceremonial duties from Equal Time in an official handbook on political uses of television.[6] To be sure, the FCC had qualified this ruling by stating it would review television newscast coverage of politicians on a "case by case" basis, but precedent and practice seemed to exclude newscasts from Equal Time requirements.

In "Lar Daly," the Federal Communications Commission ruled that a politician's appearance on a newscast during an election constituted a political "use" of television, thereby falling under Equal Time. Interestingly, the FCC based its ruling on "use" on Congress's "unequivocal" language in Section 315. In its interpretative ruling, for example, the FCC did not pay attention to the compromises Congress struck in enacting Equal Time originally in 1927 as Section 18 of the Radio Act or in re-enacting Equal Time as Section 315 of the Communications Act in 1934. Rather, the FCC majority supported its interpretation of "use" on the basis of a incomplete and partial reading of congressional intent, significant court precedents, and its sense of the persuasive power of television. In the legislative history, the FCC found the basis for its ruling on use in the colloquy between Senators Dill and Fess in 1926 investing regulators with authority to make rules governing newscast coverage of politicians performing ceremonial duties. It also cited Senator Howell's remarks that broadcasters had public interest responsibilities to inform the public fully. Of the

court precedents, the FCC found standing for its ruling on "use" in the Supreme Court's ruling in the Associted Press case, supporting maximum flow of news and information to the public.[7] Finally, the persuasive powers of television warrented equal coverage of political candidates on newscasts no matter how remote any politician's electoral possibilities. "While not always indispensable to political success...television may enjoy a unique superiority in selling a candidate to the public in that it may create an impression of immediacy and intimate presence, it shows a candidate in action, and it affords a potential for reaching large audiences."[8] By witholding news coverage of some politicians, broadcast journalists put these candidates at a disadvantage due to television's "ability to reach widespread audiences and to create an illusion of initmate presence by placing the candidate, as it were, in the home of the viewer."[9]

John C. Doerfer, Chairman of the Federal Communications Commission, disagreed with his fellow commissioners ruling on "use"in Lar Daly. He voted against such a literal application of Equal Time to television newscasts. Doerfer wrote that his fellow

commissioners had subordinated the public's right to receive information to an idealized concept and impossible standard of fairness in television news coverage of polticians. Broadcaster discretion was the backbone of the licensing system, Doerfer contended. By construing "use" so literally, the FCC was denying broadcasters their rights to make judgements about the newsworthiness of public events. Such a literal interpretation of Equal Time was a giant step backwards, Doerfer argued, because it imposed common carrier requirements on broadcasters, a course rejected by Congress since 1927. "A broadcaster should be given some discretion other than a Hobson's choice. This is either a plethora of political programming ad nauseam or a complete blackout," Doerfer arugued.[10] The better course lay in repealing Eqaul Time all together and applying the FCC's public interest standard to license renewals, Doerfer recommended.[11]

In his minority position on "use," Doerfer was closer to the mark in reading congressional intent than the FCC majority. In 1927, Congress enacted Equal Time to cover political programming initiated by politicians. News programming fell under the Radio Act's public interest standards. Equal Time was a compromise between

a common carrier model on the one hand, where broadcasters would be at the mercy of anyone who wished to comment on public issues, and a licensing system on the other, where broadcasters would control the "use" of their channels for news and political programming subject to public interest standards set by the government. In 1927, Congress found a solution to these competing constructions of "use" for political programming by enacting Equal Time as a statute which required broadcasters to grant equal opportunities to air time if and only if broadcasters had exercised their judgement or discretion by allowing a legally qualified candidate the "use" of their broadcast facilities. This was the meaning of Senator Dill's assertion that broadcasters could regulate but not discriminate in providing air time for political programming.[12] Doerfer grasped this meaning while his fellow commissioners did not. In other words, Equal Time ruled that broadcasters had discretion over the use of their facilities for expressly political programming up to the point of selling or granting air time. But once they had granted or sold air time to a politician, broadcasters were

legally obliged to grant or sell time at the same rate to other legally qualified candidates for the same office. It did not cover news programming. Indeed, Senator Dill came out of retirment to clarify that Congress never intended "use" to apply to newscasts but only to occasions where politicians bought or were granted air time for political programming.[13]

Network executives warned that the "Lar Daly" decision would cause a black-out of television news coverage of the 1960 Republican and Democratic National Conventions and presidential election besides making impossible television news coverage of incumbent politicians performing their official duties. There was not enough time on newscasts to accommodate all the politicians, who were legally entitled under the ruling, they said.[14] By requiring broadcasters to provide time to all legally qualified candidates if they had shown any one in a news cast, industry spokesmen continued, "Lar Daly" accomplished the reverse of its purportedly ameliorative intent. Such a requirement created "unequal opportunities" by requiring equal time for all legally qualified candidates irrespective of their seriousness. Further, the networks contended, the

FCC had misconstrued the meaning of "use." Congress meant "use" to apply solely to occasions when politicians initiated radio or television coverage for political programming, and did not apply to routine newscasts. These were properly the broadcasters' metier. Indeed, RCA Chairman Robert Sarnoff told Congress that for all the politicians' complaints about the reporting of news and politics, politicians should really take some comfort in journalists' discretion in making judgements about the newsworthiness of public events. He warned the Senate Interstate and Foreign Commerce Committee that the public may well tire of major party politicians if television were to be required to provide time for all politicians.[15]

The FCC's "Lar Daly" ruling drew intense criticism. President Eisenhower called the ruling "rediculous."[16] The national press joined their television confreres and decried the ruling as a violation of the first amendment rights of television journalists. A raft of bills to amend Section 315 were quickly filed in the Senate and House.[17]

As a result of the "Lar Daly" decision, Congress authorized the first major change in Equal Time since its enactment in 1927. Congress redefined "use" to exclude "bona fide" news events, interviews, documentaries in which a candidates' appearance was incidental to the story, and on-the-spot coverage of news events, including conventions from Equal Time. Congress defined "bona fide" as either regularly scheduled or special news casts.[18] "Bona fide" assumed that broadcasters initiated coverage of the relevant news events, interviews, and documentaries as part of their news judgement. Significantly, the "bona fide" definition did not engage the issue of what would come to be called "media events" staged by politicians to gain broadcast coverage. Its meaning was much simpler, dealing only with whether a politician or a broadcaster initiated the "use" of air time during a newscast. If a politician initiated "use" by purchasing airtime or a broadcaster initiated a politician's "use" by granting airtime for expressly political programming, then the programming fell under Equal Time. If broadcast journalists initiated "use" in deciding to cover a news event, the "use" was then exempt from Equal Time. The issue of who manipulated whom, the politicians or the media, was a conundrum left unsolved by the 1959 amendments.

Television journalists had won a substantial first amendment victory. Congress recognized their discretion to determine the newsworthiness of the news and political information reaching more and more Americans. Although broadcasters had claimed all along that Equal Time was never intended to cover newscasts, they nonetheless came away from this fight with statutory recognition of their discretion and judgement in determining how they covered politics in their news programming.

But broadcast journalists also lost ground on Fairness Doctrine aspects of their news programming. In rewording Equal Time, Congress warned broadcasters they still had public interest responsibilities to provide "reasonable opportunities for conflicting issues of public importance." By inserting this language, which was initially proposed by Senator Proxmire as an amendement to Section 315, Congress gave statutory approval to the Fairness Doctrine. Until this new langauge in Section 315, which was inserted in Section 315, the Fairness Doctrine had the hazy status of a regulatory memorandum. Henceforth, this 1959 wording of Section 315 would be cited as elevating the Fairness

Doctrine to the status of U.S. Code, which meant that Congress rather than the FCC had the final say in keeping the Fairness Doctrine on the books or dumping it.[19] In retaining control over news casts, a control they claimed was rightly theirs all along and improperly wrenched from them by a literal and overzealous FCC, broadcasters had lost legal ground in fighting the Fairness Doctrine.

Perhaps major party politicians were the biggest winners in the 1959 amendments to Equal Time. Because broadcast journalists judged major party politicians to be newsworthy by virtue of the number of votes they got, major party politicians received the bulk of broadcast time during newscasts. It seemed a perfectly reasonable proposition: the votes indicated newsworthiness, newsworthiness legitimated coverage. And, in terms of self-interest the dynamic worked well: politicians, at least from the major parties, reached voters through television newscasts, and broadcast journalists reached their audiences, providing the audience with political fare well within the mainstream of American politics.

The newsmen gained a measure of autonomy through statutory recognition of their judgement; major party politicians won access to the airwaves for themselves without an appearance of heavy-handedness by placing the decision making to cover minor party politicians with broadcast journalists, who had little reason to find these fringe parties newsworthy in producing newscasts for mass audiences.

The public came out of the 1959 amendements to Equal Time neither as a big winner nor as a big loser. The public's relative position stayed about the same. Within the dynamics of an industry like broadcasting, which is sensitive to public pressure and dependent upon the good will of its audience for its revenues, caution dictated the kinds of news and political programming that would be produced. So it is unsurprising that in exercising discretion broadcasters did not alter their news coverage a great deal. And given the majority support for the Democratic and Republican parties it is not puzzling either that the activies of politicians from these parties were "bona fide" news events.

It might be pertinent to mention briefly some of the details of the bills before Congress to amend Equal Time in order to place this larger issue of the winners and loser of the 1959 amendments into context. Of the

bills before Congress, four proposed exempting newscasts and news commentaries from Equal Time. Five bills proposed exempting newscasts, interviews, documentaries, panel discussions, debates and "similar type" programming from Equal Time. Of these bills, the Hartke bill, S. 1585, also specified grounds for determining "substantial" candidates by setting a percentage on votes in previous elections or 200,000 or one-percent of voters' signatures for candidates. The Hartke bill also exempted broadcasters from any liability for libelous or defamatory remarks politicians might make in the course of campaigning--remarks broadcasters could not censor due to anti-censorship provisions (section 326) of the Communications Act.

In congressional hearings on these bills, various interest groups testified as to which bills better served the public interest. CBS supported the Hartke bill, giving most discretion to broadcsters, because CBS President Frank Stanton said, it provided a comprehensive solution to Equal Time problems. NBC's General Sarnoff and ABC's John Daly recommended going beyond reversing "Lar Daly," but indicated their networks could live with a law reversing it.[20] The Radio and Television News Directors Association urged total abolition of Equal Time. The American Civil

Liberties Union argued that newscasts, documentaries and commentaries should be excluded from Equal Time, but that debates and panel discussion should not. The Democratic and Republican Parties differed in how far each would go in urging amendments to Equal Time: the Democrats were more expansive urging exemption of newscasts, news documentaries, on-the-spot coverage of newsworhty events, panel discussions and political debates, while the Republicans urged exemption only for newscasts and special news events like political conventions. Among the minority and fringe parties, Norman Thomas recommended that Congress require broadcasters to make time available for discussion of election issues five to six weeks before elections. The Socialist Labor Party came out for keeping "Lar Daly." Speaking on behalf of New York's Liberal Party, Senator Kenneth Keating urged that debates and panel discussions remain under Equal Time requirements. Lar Daly testified that Congress should retain unchanged the FCC ruling bearing his name on the grounds that broadcasters' news judgement constituted a "subjective determination" of news, which Daly said placed tyrannical power with broadcast journalists. Amidst all this testimony, Senator Pastore of the Senate Interstate and Foreign Commerce Committee, the committee responsible for drafting legislation to cope with "Lar Daly," complained

to Senator Hartke that his bill was too expansive and opened a pandora's box of election law technicalities by imposing a federal statute on state law, which customarily determined how many votes or petition signatures constituted legally qualified or substantial candidates.[21]

In conclusion, the 1959 amendements to Equal Time defined the limites of broadcaster discretion covering candidates as part of their routine news gathering and reporting work. Without tampering fundamentally with majoritarian, regulatory policy, these amendments remedied literal applications of Equal Time, which had the perverse effect of limiting news programming. They enabled broadcast journalists only the freedom to do their jobs as news reporters. In 1959, Congress was still quite uneasy about the power of a mass communications technology like tv to influence American political institutions and to shape public opinion. An irony, of course, is that broadcast journalists paid the price of congressional codification of the Fairness Doctrine to win so modest a measure of journalistic discretion and freedom of speech. Despite congressional anxiety about the power of television news programming, broadcasters won a victory for televised presidential debates the following year.

# CHAPTER FOUR

# THE GREAT DEBATES

Senator John F. Kennedy looked great. Tanned, just back from Cape Cod after a campaign swing through Florida, Kennedy stepped on stage of Chicago's WBBM-TV for the first of four nationally broadcast presidential debates with Vice President Richard M. Nixon. The Vice President looked pallid. Nixon's phlebitis was acting up. When stepping out of his car to enter the tv studio, Nixon hit his knee, causing his face to contort with pain. Earlier in the day, Mr. Nixon had addressed an unenthusiastic audience at a convention of the United Brotherhood of Carpentars and Joiners. He had kept his own counsel on this first ever television debate between presidential candidates, and accepted only a phone call from his running mate Henry Cabot Lodge in which Lodge reportedly urged Nixon to erase his "assassin image." Nixon met with tv advisors only during the car ride to the studio.

Senator Kennedy had the first say. Kennedy told the television audience America could do better. "I'm not satisfied when the United States had last year the lowest rate of economic growth of any major industrialized society....I'm not satisfied when the Soviet Union is turning out twice as many scientists and engineers as we are. I'm not satisfied when many of our

teachers are inadequately paid. I'm not satisfied when I see men like Jimmy Hoffa ....still free... If a Negro baby is born...., he has about one-half as much chance to get through high school as a white baby. He has one-third as much chance to get through college, [and]....four times as much chance that he'll be out of work in his life as the white baby." Kennedy tied the idea of a bustling America and an America of equality to effective national government, saying that an active, effective federal government was America's and the world's best guarantee of freedom. He quoted from Roosevelt's 1933 inaugural that an earlier generation had a rendezvous with destiny, and said "our generation has the same rendezvous." "It's time America started moving again."[1]

Nixon agreed with his Democratic rival on America's potential, but told the audience of some 80 million that he and the Massachusetts senator differed on the means toward achieving national greatness. Nixon reminded Americans they prospered under Eisenhower. He told the tv audience their wages had gone up five times as much under Eisenhower than under Truman while the prices they

paid for goods had gone up five times more under Truman than under Eisenhower. The average person had more money in his pocket thanks to Eisenhower. "Now, that's not standing still,"[2] Nixon said. The Eisenhower Administration had also built more schools, hospitals, highways and hydroelectric power plants than any other, he said. Nixon called Kennedy's proposals "retreads" of Truman programs, said they cost too much, and, in a remark that brought a look of perplexity to Kennedy's face, warned they would stifle "creative energies." Nixon said he agreed with Kennedy on the need to promote equality and to provide medical care for the aged. The difference for America, Nixon said, was the means of reaching these goals. "I know Senator Kennedy feels as deeply about these problems as I do, but our disagreement is not about the goals for America but only about the means to reach those goals."[3] As a debater, Nixon had successfully rebutted Kennedy's assertions, and as a campaigner he had failed utterly to address a television audience.

And so, on September 26, 1960, in the first of four television debates, Kennedy and Nixon squared-off for the American vote. Kennedy would later say the television debates made all the difference in energizing his becalmed presidential campaign. Nixon acknowledged the debates' importance, but qualified his assessment about how crucial a role the debates played among other variables.[4]

These televised presidential debates, dubbed the "Great Debates,"provided Americans with an unprecedented opportunity to see the Democratic and Republican presidential candidates discuss campaign issues, and to measure their candidate. Political scientists would later argue over the effects. Sam Lubell's observation that religion was the most important variable in the 1960 presidential election seems the most telling. Lubell observed that Kennedy's sharper vision of America and his concise answers convinced enough voters to put aside momentarily their negative feelings about the suitability of a Roman Catholic to serve as president.

If the debates failed to meet a political scientist's hope of a dispassionate discussion of issues for the enlightment of voters, they did something else quite as valuable. They provided an opportunity for

voters to measure their candidates under stress, and, in Theodore White's words "let the voters decide, by instinct and emotion, which pattern of behavior under stress they preferred in their leader."[5] Significantly, they consolidated and accelerated a trend toward Kennedy in the 1960 presidential election. Kennedy's crowds had been growing in numbers and enthusiasm fully a week before the first television debate. They grew phenomonally and frantically afterward. And Kennedy's presentation in the first debate had been so forceful that ten Democratic governors from the South, at best indifferent and at worst hostile to Kennedy, wired him their congratulations and support from a regional conference they were attending.[6]

More importantly, the Great Debates changed the chemistry of electing an American president. Performance on television became a crucial variable. John F. Kennedy emerged from this first television debate as something of a movie star. Beyond the wildly enthusiastic crowds following his first debate with Nixon, Kennedy's example showed other candidates that speaking directly to voters in an adversarial situation with opponents guaranteed public attention. Henceforth, politicians' abilities to project on television became an all important considertion in presidential elections.

In 1964, 1968, and 1972, Lyndon Johnson and Richard Nixon refused to debate their opponents over television, because they believed they had more to lose than gain from doing so.[7] In 1976 and 1980,televised debates enabled challengers to appear as the equals of incumbents. In 1984, televised debates showed again that when a challenger spoke convincingly to the American people he could put a chink in a strong incumbent's armor. Following his defeat, Walter Mondale acknowledged that he felt he could not overtake President Reagan's commanding lead when he had failed to repeat in the second of two televised debates the same performance he had deliverd in the first.[8]

In 1960, presidential debates were hardly a given. The Equal Time law interferred. Congress authorized permission to waive Equal Time just a month before on August 23rd, and President Eisenhower had only signed the joint resolution into law on August 25th. Without this congressional waiver, there could have been no televised presidential debates. Under Equal Time, broadcasters were required to include all legally qualified candidates for an office in televised debates if they provided time to major party candidates. Congress waived Equal Time only for presidential and

vice presidential debates in the 1960 election. Following Election Day, 1960, the Equal Time law would go back on the books. Broadcasters would be required to to provide time to all legally qualified candidates, no matter how insignificant their following, if they provided time to major party candidates. In this moment of congressional reprieve, Kennedy and Nixon squarred off.[9] That November, more people voted than ever before.

Negotiations for the presidental debates had been intense. The television networks wanted to host debates between the Democratic and Republican presidential candidates in order to counter their sagging reputations due to scandals involving tv quiz shows.[10] The networks were willing to offer "free time" only if they retained editorial control over the proposed debates by scheduling them on expanded versions of such news shows as "Meet the Press."

Events happened quickly. In April, 1960, Robert Sarnoff, Chairman of the National Broadcasting Company, offered eight hours of an expanded Saturday night version of the popular public affairs show "Meet the Press" to the Democratic and Republican presidential candidates for questioning by reporters.[11] CBS and ABC quickly followed. CBS's Frank Stanton urged congressional repeal of Equal Time for the Republican

and Democratic presidential and vice presidential candidates for the 1960 election. He said CBS would be willing to provide an hour a week for eight weeks prior to the election for joint use by the major party candidates, but would not participate in simultaneous broadcasts with NBC and ABC. Under questioning from South Carolina's Strom Thurmond, the Dixiecrat candidate for president in 1948, Stanton said CBS would provide equitable time for substantial third party candidates, and cover their candidacies as part of evening newscasts. ABC's David C. Adams suggested that networks rotate an hour each week for the nine weeks preceding the election for debates between the Republican and Democratic presidential candidates, that way each network would produce three hours of time.[12]

In May, Adlai Stevenson went before the Senate Interstate and Foreign Commerce Committee to argue that the television networks should be compelled to provide airtime for the Democratic and Republican presidential nominees. Stevenson proposed that Congress require the major television networks to make an hour available free of charge during prime time evenings for the eight weeks preceding election day. He said each hour could be divided equally between the major party presidential candidates, and that the vice presidential candidates should be able to use two of the eight hours. He said

Sarnoff's proposal of an expanded "Meet the Press" format was wanting, because a panel would control the issues to be discussed. Debates were far better. Stevenson did acknowledge that the federal government might pay for the time, but added the networks' donation of the time in the public interest "would hardly be so expensive as to be beyond the[ir] endurance."[13] Stevenson said his proposal would reduce the influence of campaign contributions and enable voters to "make a direct comparison" of candidates.[14] One hundred-fifty people crowded into the committee room. They gave him a standing ovation.[15]

Television network executives disagreed with Governor Stevenson, and all offered time to the major party presidential nominees. NBC's Robert Sarnoff criticized Stevenson's proposal as "the wrong way to go about doing the right thing."[16] He stuck to his original offer of eight hour length shows of "Meet the Press." Sarnoff claimed that S.3171, the bill Stevenson supported, was withdrawn after his offer of 8 expanded hours of "Meet the Press."[17]

Republicans did not like Stevenson's idea. They had more money to spend on political commercials than the Democrats.[18] Vice President Nixon and former New York Governor Thomas Dewey called the proposal "expropriatory." Former President Hoover criticized the proposal for violating the first amendment rights of minority candidates like the Republicans, adding that candidates should buy television time.[18]

In July, all three networks offered time for debates to Nixon and Kennedy after they had been nominated by the Republican and Democratic parties. Kennedy accepted quickly so that the burden was placed on Nixon to accept the offer. Nixon accepted through a spokesman within a day.

Both the politicians and the broadcasters willingly put aside any reservations they might have had about the free speech rights of minor party candidates in order to enable televised presidential debates between the major party candidates to take place. The network executives, who were so insistentent on their own free speech rights, held up the prospect of such minor party candidates as as Lar Daly of the Tax Cut Party or Orval

E. Faubus of the National States Rights Party or Whitney Harp Slocomb of the Greenback Party or William Lloyd Smith of the American Beat Consensus debating with John Fitzgerald Kennedy and Richard Milhous Nixon as the basis for insisting on a waiver of Equal Time.

For all this, the Great Debates were a step toward greater freedom of expression for broadcasters besides being a benefit to the public. Where one could assert in the case of the 1959 amendments to Equal Time that the public came out just about where it was all along, here, with the Great Debates, the public won the opportunity to see and to measure the major party presidential candidates. Had Congress not waived Equal Time, there would have been no televised presidential debates. Equal Time would have had the perverse effect of denying a flow of political programming to the public.

The waiver constitutes another example of the stubborn resistance of majoritarian and libertarian standards of free speech for television. The free speech rights of minor party candidates were sacrificed so that broadcasters could exercise their free speech rights to put the major party candidates on tv. By winning their free speech rights, broadcasters had effect majoritarian goals of informing the public.

Finally, the limited scope of the waiver suggests another theme in this study, namely the effort of politicians to cope with a major means of mass communications like tv in making law and shaping policy. The waiver, after all, was only for the 1960 presidential election. After the fourth Kennedy-Nixon debate, Equal Time law returned to the status quo ante. The brevity of the waiver suggests that politicians were so anxious about the power of television to shape electoral outcomes by influencing public opinion that they were willing to grant only the most minimal discretion to broadcasters. During the sixties, and activitist FCC and Supreme Court would further limit broadcasters' free speech rights in news and public affairs programming.

# CHAPTER FIVE

# THE CRESTING TIDE OF THE FAIRNESS DOCTRINE

This chapter chronicles the cresting tide of the Fairness Doctrine. It runs roughly from the late fifties to the early seventies, the period in our culture known more popularly known as the sixties. During this time, the FCC extended and amplified the Fairness Doctrine and the Supreme Court recognized its constitutionality. Although radio and television were fixtures in the culture by the sixties, policy and law still regarded them as a technology, which required special regulation. Broadcasters won no free speech victories during this period. Indeed, the current is entirely that of a cresting majoritarian tide.

1

During the late fifties and early sixties, the initial salvo for high quality news and public affair programming came from within the broadcasting industry. In 1958, Edward R. Murrow, the distinguished news reporter, urged tv management to televise more news and public affairs due to a dual sense of enlightened self-interest and public service.

Murrow's argument was that of enlighten libertarianism. In his address to the Radio and Television News Directors Association in 1958, Murrow made an eloquent plea for high quality tv news and public affairs programming. Essentially, Murrow advocated self-regulation. He argued for no more than intelligent management. Murrow correctly foresaw that news and public affairs programming were essential ingredients in successfully managing huge entertainment corporations. He did not advocate increased government scrutiny. He made no mention of the Fairness Doctrine, only one reference to the Communications Act, two of the FCC. He spoke as a thoughtful, intelligent, influential insider, who was `going public' with recommendations that had fallen on deaf ears within television management.[1]

Murrow's long and distinguished carreer as a broadcast journalist, dating back to his wartime radio reports from London and including major news specials such as his "See It Now" broadcast on Senator Joseph McCarthy, added credibilty to his criticisms. Despite the quality of Murrow's work, CBS had discontinued his "See It Now" series in 1958. TV had grown so immensely profitable as a medium of mass entertainment that CBS management could sell the "See It Now" time slot far more profitably for entertainment programming than for news and public affairs. CBS management was also wary of offending potential viewers by televising controversial news programming of the sort Murrow produced.[2] It was at this point in Murrow's career that he addressed the Radio and Television New Director's Association in October, 1958.

Murrow's broadside was impelling. Murrow complained that broadcasting was an "incompatible" mix of show business, advertising, and journalism. He criticized broadcast management for timorousness in acquiescing to the government, particularly a "fiat" from Secretary of State Dulles banning American journalists from Communist China. He complained that corporate interest routinely

dominated the public interest, remarking critically about CBS's and NBC's delayed broadcasts of an address by President Eisenhower on "the probablity of war between this nation and the Soviet Union and Communist China" in order to avoid disrupting entertainment programming. He stated flatly that many broadcasters had "welshed on [their] promises" to televise news and public affairs programming due to greed.[3]

Murrow spoke as a man who believed in the capacity of broadcast journalism to inform the public about serious issues. Murrow noted that the United States in the late fifties was "wealthy, fat, comfortable and complacent. We have currently a built-in allergy to unpleasant or disturbing information. Our mass media reflect this. But unless we get off our fat surpluses and recongnize that television in the main is being used to distract, delude, amuse and insulate us, then television and those who finance it, those who look at it and those who work in it, may see a totally different picture too late,"[4] Murrow warned. To avoid such a fate,Murrow urged something be "done within the existing framework" that "redound[ed] to the credit of those who finance and produce" television programming.[5]

Murrow proposed that the major tv advertisers devote a share of their advertising money to quality news and public affairs programming, and that the networks absorb the production costs. By doing so, Murrow asserted, both advertisers and the networks would come out ahead in terms of the "corporate image" so important to them. Murrow offered a solution within the existing framework, which would not threaten the profitability of the corporations engaged in broadcasting either as advertisers or as producers. Eventually the television networks would follow Murrow's advice but only after scandals had rocked their industry. He also said the public would come out ahead. It would be better informed.[6]

In the early sixties, the federal government and the courts articulated a majoritarian view of news and political programming. During the sixties, this view was clearly dominant. To many people, stiff regulation seemed necessary. In the late fifties, broadcasing was mired in scandal surrounding the rigging of television quiz shows.[7] Two FCC Commissioners, including the Chairman, were forced to resign due to improper dealings with the broadcasters they were charged to regulate.[8] Murrow's argument fell on deaf ears. And, in 1960, the nation elected a vigorous, optimistic president,who espoused the positive role of government in directing the nation's future.

Three FCC programming statements in the early sixties pushed the cresting tide of the Fairness Doctrine. Two addressed tv programming generally: both upheld the flow of a diversity of news, public affairs, and entertainment programming to the public over the broadcasters' own programming preferences. Each tried to contend with the banality of most prime time television programming by asserting the regulatory authority of the FCC. The third dealt explicitly with the Fairness Doctrine.

In 1960, the FCC issued a policy statement in which it called for more diverse programming. The censorship restrictions of the Communications Act prohibited the FCC from involving itself directly in programming content so the policy statement did not have much bite. But the FCC did specify a number of programming formats, which, it contended, did serve the public interest. Among others, these formats included editorials, public affairs, educational, political and news programs. The statement also designated "service to minority group" along with these other program formats as consistent with broadcasters' public interest responsiblities.[9]

A second statement, FCC Commissioner Newton Minnow's "Vast Wasteland" address to the National Association of Broadcasters in 1961, had a more dramatic impact. Minnow spoke for the New Frontier. He told broadcasters to "help prepare a generation for great decisions...,[to] help a great nation fulfill its future." He urged broadcasters "to put the people's airwaves to the service of the people and the cause of freedom."[10] He warned broadcasters that license renewals would become rigorous, and that the FCC would view local programming and high quality news and public affairs programming as important parts of tv programming. He said that he intended to chair an activist FCC, one guided by serving the public interest.

Minnow's activist rhetoric was a clear signal to broadcasters that at the least the FCC had changed its tone along with the incoming administration. At a glance, Minnow's majoritarian position differs little from those dating back to Hoover's statements advocating listener sovereignty. But the freshness and insistence of Minnow's statement put broadcasters on notice. It was much more directed. It signaled the difference in tone between an acquiescent and ineffective FCC during the last quarter of the Eisenhower administration, and the insistence under Kennedy that broadcasters had to provide more variety and content in their programming. In the New Frontier, the FCC asserted unambiguously that news and public affairs programming would be crucial factors in determining their license renewals.

The third FCC statement of this period dealt explictly with the Fairness Doctrine. In 1964, the FCC published the Fairness Primer, and distributed it to broadcasters. The Primer compiled a number of `typical' cases, and provided broadcasters with information on FCC decision making on Fairness Doctrine complaints. It was further evidence of FCC seriousness in reminding broadcasters about the Fairness Doctrine and news and public affair programming.[11]

These FCC three statements from the early sixties set the basis for FCC administrative expansion of the Fairness Doctrine. All upheld the majoritarian view on news and public affairs programming. It is important to remember the dominance of the majoritarian position, because the FCC based the following decisions, expanding the Fairness Doctrine, on the validity of its authority to assure that broadcasters provide a flow of `balanced' news and political information to tv watchers.

FCC actions, expanding the Fairness Doctrine, carried forward the majoritarian position that the public's right to diverse information preceeded those of broadcasters to express themselves. In each of the following decisions, the FCC extended the Fairness Doctrine beyond its original bounds. It is important to note that the decisions do not violate the spirit of the original Fairness Doctrine. It's authors, after all, intended subsequent FCC's to modify it as "the public interest" required. What's telling is that the FCC's of this period expanded the Fairness Doctrine as an instrument of the public interest.

In 1963, in the Letter to the Honorable Oren Harris, the FCC changed fourteen years of Fairness Doctrine administration. The FCC announced that it would consider Fairness Doctrine complaints individually on a case by case basis. In the future, the FCC wrote, it would consider fairness complaints as they arose on specific issues and stories. It would no longer withold decisions on news and public affairs programming complaints until license renewals were issued nor would it evaluate the Fairness Doctrine obligations of broadcasters on the basis of his overall programming as it had done from 1949 to 1963.

The FCC contended such a policy was fairer to broadcaster and public alike. Broadcasters could seek legal relief in the courts if they wanted to contest a specific FCC Fairness Doctrine decision. Such a course, the FCC wrote, was better for broadcasters than potentially losing their licenses. The public would benefit of timely disposition of Fairness Doctrine cases, the FCC wrote.

The FCC's change in administrative policy came about in response to a query from Congressman Oren Harris. Harris wanted the FCC to clarify when it would reach Fairness Doctrine decisions on complaints. The FCC defended the policy change by writing Harris that case by case review would not be intrusive since FCC inquiries focussed only on the reasonableness of a broadcaster's discretion in providing contrasting views on controversial issues and not on the substance of the issues themselves.

Substantive problems arose directly for the FCC. Due to case-by-case review, the FCC found itself involved directly in the content of controversial news programming. While the the FCC had written Congressman

Harris that case-by-case review would require the FCC to deal only with the reasonableness of a broadcaster's efforts to assure a balance of conflicting views, in practice this policy created a myriad of bureaucratic problems. The FCC placed itself in the position of deciding what constituted a reasonable balance of conflicting views on individual topics. For example, the FCC had to determine the appropriate ratio of time for proponents and opponents of conflicting points of view. This this meant the FCC had to do its own documentation of time alloted to controversial issues as well as the balance of conflicting views within those presentations.

The FCC then had to reach a decision on the content of the programming: was it for, against or neutral on the issue? The use of stop watches became necessary to reach these determinations.

The timing and frequency of the scheduling of conflicting views on controversial issues had to be considered. For example, how much weight could and should the FCC place on a complainant's direct access to a relatively small audience by appearing on a Sunday morning talk show when an "unbalanced" program might well have reached a significantly larger audience during a prime time broadcast. And, should a broadcaster

subject to a complaint suddenly start televising more balanced programming duing FCC review, what then constituted the basis for an FCC decision?[12]

In practice, case-by-case review did not work so well for tv viewers. In making this rule, the FCC placed the procedural burden on complainants to show a broadcaster's unfairness, but it did not require broadcasters to release any programming information to complainants. Individuals or groups with Fairness Doctrine complaints then to go through time-consuming documentation in order to prove a broadcaster's unfairness. Despite these procedural problems, the FCC received more Fairness Doctrine complaints after making its case-by-case review decision.

In the Cullman corollary, the FCC extended the Fairness Doctrine to ballot issues. The FCC ruled that the Fairness Doctrine required broadcasters to provide reply time, free if necessary, to spokesmen on ballot issues.

The Cullman corollary comprised two significant elements of Fairness Doctrine policy. It was majoritarian in its first amendment logic that the right of the public to information clearly took precedence

over the rights of broadcasters to express their views. Secondly, it acknowledged that broadcasters retained considerable discretion in public affairs programming. The FCC specifically told Cullman that "if it is your good faith judgement that the public has had the opportunity fairly to hear contrasting views...then it would appear...that you obligation pursuant to the fairness doctine has been met."[13] The ruling contained a number of mollifiers for broadcasters. The FCC ruled broadcasters would be required to provide time to spokesmen only if they had previously aired programming that was clearly partial. The responsibility for providing time free-of-charge depended entirely on the broadcaster's judgement. The Cullman corollary impelled broadcasters to provide free time only if he were unable to find someone capable of paying, who was competent to articulate a view opposing that which already aired on his station. Broadcasters retained discretion under the Cullman decision about the format in which these parties or individuals would appear.[14]

The dangers of the Cullman corollary were those of subsidizing partisans and inhibiting broadcasters. Broadcasters worried that the Cullman decision opened

them up to manipulation by interest groups. They feared not incorrectly that interest groups would use the corollary to demand free tv time and then spend their funds for other purposes, such as newspaper ads, organizational help, etc. In fact, in 1985 when the FCC formally reconsidered the Fairness Doctrine, fully twenty-two years after the Cullman corollary was announced, public interest groups championed its first amendment virtues while broadcasters derided its chilling effect and the burdens of subsidizing referenda campaigns due to the regulation.

The Cullman corollary came about when the Cullman Broadcasting Company asked the FCC to clarify whether Fairness Doctrine obligations applied to local spokesmen of national issues. Cullman maintained the Fairness Doctrine applied only to local spokesmen for local issues. A citizen's group, the Citizens Committee for a Nuclear Test Ban Treaty, had approached Cullman management with a request for air time to respond to programming, which they felt was biased against passage of the treaty.

In the Zapple decision, the FCC extended the Fairness Doctrine to the spokesmen for political candidates during campaigns. One such spokesman, Nicholas Zapple, had asked for equal time for spokesmen for candidates under Equal Time (Section 315). It was Zapple's concern that broadcasters be required to provide equal time for one candidate's spokesmen if they had provided time for another's. Since Equal Time (Section 315) applies solely to candidates during political campaigns, and does not cover their spokesmen, Zapple asked the FCC to rule whether the Fairness Doctrine might enable candidate's spokesmen to equal time.

In the Zapple decision, the FCC ruled only on paid time. The FCC responded that broadcasters must sell time to one candidate's spokesmen if they already had sold it to another's. The FCC made a clear distinction between the Cullman corollary, which dealt with ballot issues and the Zapple decision. In the Zapple decision, the FCC expressly ruled out any requirement to provide free time to a candidate's spokesman. "Any such requirement would be an unwarranted and inappropriate intrusion of the

fairness doctrine into the the area of political campaign financing,"[15] the FCC reasoned. In Cullman, by contrast, the FCC felt the public's right to hear information on ballot issues overrided potential abuses of the corollary by partisans.

In 1967, the FCC extended the Fairness Doctrine to commercials, specifically cigarettes. The FCC required broadcasters to provide "a significant amount of time for the other viewpoint"[16] if they televised cigarette commercials. Controversey surrounding the health hazards of smoking warranted extension of the Fairness Doctrine to product advertising, the FCC argued. The Commission also noted that it would not apply the Fairness Doctrine to other products because, it said, cigarettes were a "unique" product.

A dizzying series of congressional acts, court decisions and FCC rulings then followed. Congress banned cigarette advertising over radio and television effective January 2, 1971. The Court of Appeals in Washington, D. C. upheld the rule and extended it to other products deemed to be hazardous or to cause pollution, in this latter case super-powered cars and the use of high-test gasoline. Then, in 1974, the FCC

backed off its initial 1967 decision, by ruling that commercials did not "inform the public on any side of a controversial issue of public importance" or make "a meaningful contribution to public debate."[17] Thereafter, the Fairness Doctrine became applicable only to commercial advertising in which sponsors explicitly raised controversial issues and no longer included ordinary commerical advertising.

The substantive problem confronting the FCC was the reach of the Fairness Doctrine. In keeping with the original status of the Fairness Doctrine as a regulatory memorandum subject to change, the FCC extended it to commercial advertising of a clearly controversial product. No more. It was as the original authors had wanted. In 1949, the rationale for articulating the Fairness Doctrine as a regulatory memorandum rested precisely on the notion that succeeding FCC's could apply it as the public interest required. And, in 1967, the FCC decided the pubic interest required a ban on cigarette advertising over radio and television. The aggrieved, in this case, broadcasters and cigarette companies took their complaints to the courts, again as the original Fairness Doctrine indicated was proper, and had an opportunity, which they lost, for the court to overrule the FCC.

Nevertheless, the policy proved unworkable for the FCC. The ruling and the subsequent backing-off proved only that the FCC found itself involved in creating policy it could not maintain. Although the Courts sustained the original policy, the FCC extension of the Fairness Doctrine to product commercials involved the FCC too directly in tv programming. And, by 1974, Congress had legislated a ban on cigarette advertising over radio and television.

Two court decisions, one enabling citizen participation in license renewals, and the other, upholding the constitutionality of the Fairness Doctrine, crested the Fairness Doctrine wave. Each decision is majoritarian in its First Amendment arguments.

In The United Church of Christ case, the Court of Appeals in Washington, D. C. upheld the right of ordinary citizens to participate in the FCC's licensing. The decision opened the door to greater public participation in licensing renewals. It sanctioned the public trustee role of broadcasters as the yardstick against which the FCC measured license renewals.

The United Church of Christ contended that WLBT in Jackson, Mississippi was broadcasting racist news and public affairs programming, and that the FCC had acted irresponsibly in renewing WLBT's license. The FCC had granted provisional license renewal to WLBT on condition that WLBT management change it ways. Specifically, the FCC required WLBT to "comply strictly with the...fairness doctrine,....to observe strictly its

representations to the Commission in this [fairness] area,....[to] have discussions with community leaders, including those active in the civil rights movement...as to whether its programming is fully meeting the needs and interests of its area, [and to ] cease discriminatory programming patterns."[18] The Court found this wanting, and instructed the FCC to consider new applicants for WLBT's frequency. The station was operated by a non-profit, integrated group of local residents during FCC comparative hearings for the license.

The United Church of Christ decision showed that the Fairness Doctrine rather than the other legal remedies, such as bringing suits for libel, slander, or defamation, was an effective tool for a public interest group to wrest a license from a broadcaster. It therefore put broadcasters on notice in no uncertain terms that their licenses could be challenged not merely by other businessmen competing for the same license, but by groups of entrepreneurs and public interest proponents as well.

The Red Lion decision was the high water mark in the cresting tide of the Fairness Doctrine. It constituted the big victory for proponents of the majoritarian position on free speech. The Court held that the FCC had broad policing powers to assure a flow of diverse news programming to listeners. The Court ruled that the FCC had not exceeded its congressionally delegated authority in making rules that required broadcasters provide direct access to the airwaves for individuals who had been attacked in broadcast commentary. It acknowledged congressional codification of the Fairness Doctrine in the 1959 amendments to Equal Time.

The Red Lion case dealt with personal attacks in broadcast commentaries. The personal attack rule required broadcasters to provide reply time to persons or individuals whose honesty, integrity or character they attacked in editorials on controversial public issues. The FCC required broadcasters to notify the person or group of the editorial within a week, provide him or it with a transcript, and offer a "reasonable opportunity" for response over the broadcaster's station. The personal attack rule extended to political editorials, which dealt with a broadcaster's editorial endorsement or opposition to political candidates. In such a case, the rule required broadcasters to notify

all candidates of their editorial opionion, provide each a tape or transcript, offer each or his spokesman "a reasonable opportunity" to respond over the broadcaster's station. It specifically exempted commentaries that were within newscasts, but it did apply to editorials a broadcaster might make on his own following a newscast.

For a number of reasons the Court held that the personal attack rule did not violate the first amendment rights of broadcasters. Listener sovereignty remained paramount. The Court held that the first amendment does not protect private censorship by broadcasters. The Court observed that the chilling effect of the personal attack rule on broadcasters was "at best speculative." It held that spectrum scarcity was still a problem, so that broadcasters could not legitimately assert that the number of channels in a market relieved individual broadcasters of their responsibilities to provide "a reasonable opportunity" for response. In the Court's opinion, broadcasters held licenses to scarce airwaves as public trustees, and as such, were obligated to provide reply time for expressing controversial editorial views. For all these reasons, the Court held that the personal attacks rule upheld the first amendment rather than undermined it.

The logic behind Red Lion was entirely that of the majoritarian view. Writing for a unanimous court, Justice Byron White ruled that "it is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas which is crucial here."[19] Like Frankfurter in the NBC case, White wrote "there is nothing in the first amendment which prevents the government from requiring a licensee to share his frequency with others an to conduct himself as a proxy of fiduciary with obligation to present thouse views and voices which are representative of his community and which would otherwiseby necessity, be barred from the airwaves."[20] And, like the AP ruling, White saw "no sanctuary in the first amendment for unlimited private censorship operating in a medium not open to all."[21] And, again, "as we have said, the first amendment confers no right on licensees to prevent others from broadcasting on `their' frequencies and no right to an unconditional monopoly of a scarce resource which the government has denied other the right to use."[22]

White cited FRC and FCC regulatory policies, which effected a majoritarian policy in broadcasting. In the Great Lakes case of 1929, the Federal Radio Commission ruled "the public interest requires ample play for the

free and fair competition of opposing views, and the commission belives that the principle applies ...to all discussions of issues of importance to the public."[23] The Court noted that in the thirties the FCC had denied license renewals or refused construction permits for broadcasters, which wanted to broadcast special interest programming, due to regulatory insistence that broadcasters carry programming for a diversity of people. Noting the Mayflower decision in passing, the Court jumped quickly to the Fairness Doctrine and its component parts -- a) adequate, fair coverage of public issues, and b) the presentation of conflicting views on pertinent, public issues. All these regulatory precedents indicated a consistency between the FCC's personal attacks rule and earlier rulings on news programming, according to the Court.

The court then trained it eye on statute and FCC rule making authority. It found broad authority for the FCC to make rules, such as the personal attack rule, in the original Communications Act. It found in the final version of Proxmire amendment[24] to the 1959 Equal Time amendments a link between the public interest standards

of the original Radio Act and the Fairness Doctrine. "The amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard," the Court wrote. And again, "thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusin that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations...."[25]

From there, it was a short leap to the personal attack rule itself. The Court noted that the FCC had promulgated the personal attack rule in 1967. The rule fell, therefore, within the FCC's congressional delegated authority to make rules. The FCC had made the rule on its own discretion. Congress had not passed a law nor instructed the FCC to implement precise aspects of the law. This distinction was crucial, because the FCC's own rule making capacities and the scope of FCC authority were being tested. And, again, the Court found no inconsistency between the personal attack rule and

earlier FCC regulations, specifically Equal Time[26] and the Fairness Doctrine. "Elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station,"[27] the Court quoted the Fairness Doctrine.

In an important aspect of the Red Lion decision, Justice White upheld the constitutionality of the Fairness Doctrine. He wrote that FCC rules requirying a broadcaster to provide reply time to an individual, who had been attacked over his radio station, were consistent with congressional intent in codifying the Fairness Doctrine as part of the 1959 amendments to Equal Time. Placing placed great weight on the final version of the Proxmire amendment, White noted that Senator Joseph Pastore, the majority manager on the 1959 amendments, and Senator Hugh Scott, minority manager of the 1959 amendments, asserted the paramount importance of assuring a flow of news to the public.[28] The importance both Pastore and Scott attached to Proxmire's amendment proved to White that Congress wanted to impose Fairness Doctrine responsiblities on broadcasters.

Red Lion was thus a double blow to broadcasters. First, the Court upheld the constitutionality of the Fairness Doctrine on the time-tried majoritarian view of the first amendment that a flow of news and information to the public took precedence over their first amendment freedoms of expression. Second, the Court recognized that Congress had given statutory authority to the Fairness Doctrine by inserting the watered-down version of the Proxmire amendment, requirying broadcasters to provide "a reasonable opportunity for the discussion of conflicting views on issues of public importance," to the 1959 amendments to Equal Time.[29]

Henry Geller, a prominent communications attorney and expert on the Fairness Doctrine, provided expert advice on managing an expanded Fairness Doctrine. Geller wrote a Rand Corporation report on the Fairness Doctrine. The Ford Foundation underwrote the project. The report was intended for use by the FCC as part of an inquiry into the Fairness Doctrine.[30] In order to be of most use to the FCC, Geller confined his recommendations to rules and regulations that the FCC could make on its own without having to go to Congress for further authorization. "The report's suggestions are pragmatic ones, which can be implemented by the FCC within existing law,"[31] Geller noted.

Geller's recommendations were straight-forward. He told the FCC to dump the case-by-case review method, which it had adopted in 1963. He advised the FCC to return to the original Fairness Doctrine standard of evaluating overall programming only at license renewals. Such a course, Geller wrote, would get the FCC out of evaluating single issues and daily news operations. At the same time, overall review a license renewal would assure sufficient scrutiny to determine whether

broadcasters fulfilled their public trustee responsibilities, Geller said. To make this policy work, Geller urged the FCC only to require broadcasters to "show in a general fashion" that they had afforded reasonable opportunities for contrasting views to be heard. He also suggested that broadcasters submit a list of ten issues, nationally and locally, which they covered most extensively the previous year. He thought "time percentage guidelines" might be a useful tool rather than the case-by-case, single issue method. He recommended a more efficient complaint procedure, one less burdensome to complainants.[32]

The sixties produced a remarkable expansion of the Fairness Doctrine, all within the majoritarian canon. The Supreme Court held that the Fairness Doctrine effected the first amendment rather than undermined it. The FCC successfully expanded its applications to partisans for ballot issues and spokesmen for candidates as well as to the FCC's own review of specific issues. Issue-oriented citizens won standing as participants in FCC licensing decisions due to complaints about a broadcaster's fairness.

An ebbing tide follows an incoming one. For proponents of a libertarian policy, the ebbing tide would slowly and minimally wash away some of the majoritarian policies of earlier FCC's and Courts. FCC policy reversals in areas of political programming signaled the shifting tides. By the mid-seventies, pressure for televised presidential debates prompted the FCC to amend Equal Time so that debates could occur again.

# CHAPTER SIX

## THE ASPEN DECISION AND THE FCC'S 1983 RULING ON CANDIDATES DEBATES

Although President Nixon had resigned in August, 1974, the after-effects of Watergate loomed over the Republic well into the following year. On May Day, 1975, North Vietnamese troops rolled into Saigon. To thoughtful people, the Watergate scandal and the victory of the North Vietnamese over the US-backed South Vietnamese signaled the disasterous shortcomings and ultimate conclusions of the Imperial Presidency. In the press, the Pentagon Papers and the Nixon tapes had revealed and exposed both the savage, imperial remoteness and veniality of the Presidency. And despite all the bad news, one could only thank the press for doing its job so well. Many believed the press had rescued the nation from calamity. True to the first amendment vision of the founders, a free press had reported, and public opinion had finally rid the nation of an irresponsible chief executive and commander-in-chief. But something more had to be done to return the Presidency to the people, to bring it back into contact with voters, to make it more responsive to public opinion.

The problem troubled Douglass Cater, Director of the Aspen Institute Program on Communications and Society. Cater was a former journalist, and in 1975, he directed the Aspen Institute, a think tank on

communications issues. Throughout 1975, Cater advocated televised debates between presidential candidates as an important way to enable voters to assess the president, who would be elected in 1976. In April 1975, at Cater's instigation the Brookings Institute had recommended that the FCC re-evaluate its Equal Time regulations on candidates' debates so that debates between the Democratic and Republican presidential nominess could appear on national television without triggering a host of Equal Time requests from fringe party candidates. Later in April, the Aspen Institute and CBS, Inc. presented petitions to the FCC to alter its Equal Time regulations on candidates' debates and news conferences. Aspen petitioned the FCC to lift its Equal Time requirement on presidential debates, and CBS petitioned the FCC to lift its Equal Time requirement on candidates' news conferences.

In the Watergate era, both petitions made sense. They opened up the presidency to scrutiny. They enabled the people to see the major candidates debate face to face and to hear how an incumbent president handled questions from journalists. They enabled the press to do its job, free of government regulation. Both were liberalizing proposals. And both ran squarely into the FCC's regulations on Equal Time, regulations which were themselves animated by a liberal vision to assure the

fullest flow of news and political programming to the American public.

In September, 1975, the FCC gave television a freer hand in covering candidates' debates and press conferences. In a significant Equal Time decision that became known as the Aspen decision, the FCC announced that both candidates' debates and news conferences were "bona fide news events" and, as such, exempt from FCC Equal Time requirements.[1] Gone were the old rules requirying broadcasters to provide Equal Time to any candidate if they broadcast a debate or news conference of any one or two candidates, rules originally put in place by the 86th Congress in 1959. In the Aspen decision, the FCC swept these rules away, and assumed the power to redefine the Equal Time rules Congress had set for political programming.

But the FCC gave broadcasters a freer hand only up to a point. Even at the moment in the mid-seventies when journalism enjoyed substantial public support, broadcasters wrested only a partial victory for themselves and found they still had one hand bound by new rules, particularly on candidates' debates. A pattern set in 1959 seemed to be emerging once again: a limited victory on one programming format, in this case, press conferences, accompanied by only a modest gain in another, candidates' debates.

The FCC majority ruled in Aspen that broadcasters could cover candidates' debates only if the broadcasters themselves neither initiated nor controlled them. In other words, broadcasters could not stage candidates' debates nor could they determine who would and would not be invited. Such control, the FCC felt, would give too much power to tv. The more expedient course lay in a third party, such as the League of Women Voters, hosting debates between candidates somewhere outside a television studio, and broadcasters then exercising their news judgement to cover the debates in their entirety as "bona fide" news events. Such a construction skirted troublesome control and use issues. The FCC simply included candidates' debates along with other kinds of "bona fide" news exempted from Equal Time in 1959.

Although the broadcasters' victory was limited, it was by no means hollow. In 1959 and 1960, television broadcasters were the big winners. They rescued their scandal-tainted industry from public disfavor and perhaps increased regulatory oversight by winning congressional approval for greater broadcaster control over news and political programming. Many regarded the FCC's literal interpretation of Equal Time in Lar Daly as extreme. Congress had provided broadcasters greater discretion in their news programming by holding that

candidates' appearances in a newscast, news interview, documentary and news events did not require Equal Time. In 1960, broadcasters had won the right to initiate and stage televised debates between Nixon and Kennedy thanks to a Joint Resolution of Congress. Then, in 1975, in the wake of the Pentagon papers, Watergate, and the Nixon tapes, broadcasters won again. But this time, they won a limited but nonetheless significant victory. In the Aspen decision, broadcasters attained total discretion on televising candidates' news conferences and limited discretion on televising candidates' debates.

Incumbent candidates were big winners in the Aspen decision. They had a better chance of pressing their cases directly to voters over television after Aspen than before it. Incumbent politicians could hold news conferences for whatever purposes they wished whenever they wished, particularly during elections, without fear opponents would receive Equal Time for press conferences of their own. Any petition to the FCC requesting Equal Time for rebutting press conferences were now moot: press conferences were news events and, as such, exempt from the Equal Time rule. Incumbents also got a boost from Aspen due to their newsworthiness as office holders. It was far more likely that broadcasters would exercise their newly gained discretion in the area of press conferences by making a news judgment to televise

or not to televise an incumbent but would provide opponents rebuttal time only as news stories in news casts.

The League of Women Voters gained considerably from the Aspen decision. The League won increased prestige and public esteem for the role it would play in hosting candidates' debates. The League assumed the role of host for the debates. The Aspen Decision did not assign host responsibilities to the League.

Among the losers were challengers for electoral office whether they were major party candidates or not. Shirley Chisholm, a prominent black Congresswoman who had mounted a presidential bid in the Democratic Party in 1972, carried the banner for challengers. Chisholm argued against exempting debates from Equal Time. The Democratic National Committee opposed exempting presidential news conferences from Equal Time, but later withdrew from appeals to Aspen on the press conference issue when it appeared a court ruling against Aspen would jeopardize the Ford-Carter presidential debates.[2] A closer look at the Aspen decision shows how the FCC majority expanded congressional intent on Equal Time rules. In Aspen, the FCC majority wrote that in 1959 the 86th Congress had originally intended debates to be included with news shows, news interviews,news documentaries as "bona fide" news events, and, as such, exempt from Equal Time.

After expanding congressional intent in the Aspen decision, the FCC majority admitted past interpretative errors in two FCC rulings on televised political debates. The FCC renounced two 1962 rulings, The Goodwill Stations, Inc. and National Broadcasting Company, which implemented the 1959 Equal Time law requirying Equal Time for candidates'debates. In Goodwill, the FCC had ruled that radio broadcast of a debate between then Governor of Michigan, John B. Swainson and his Republican challenger George Romney required the radio station to provide Equal Time to the Socialist Labor Party candidate for governor although the Socialist Labor Partry received only 1,500 votes out of 3.2 million in the 1960 elections. In National Broadcasting Company, the FCC ruled that television broadcast of a debate between then Governor Pat Brown of California and Richard Nixon, his Republican challenger, required Equal Time for the Prohibitionist candidate. In Goodwill, the FCC recognized that radio and tv coverage of the debates were "on the spot coverage of bona fide news events"[3] and, as such, seemingly exempt from Equal Time. However, the FCC ruled that the debate's "bona fide" status as a news event was not sufficient grounds to enable radio and tv to cover it live without providing Equal Time to other candidates. To do so would place too much control on the news judgement of radio and tv reporters and news directors. Congress intended

no such discretion when it came to political debates, the FCC had ruled in the sixties.

But in laying bare its sins of commission in these two Equal Time cases, the FCC also found in them the necessary precedents to acknowledge new-found virtue. In re-examining the legislative history of the 1959 law for its consideration of the Aspen petition, the FCC majority asserted it had found that the grounds for its 1962 rulings had been erroneous. The real issue, the FCC wrote in Aspen, turned on whether a candidate's appearance in a "bona fide" news event such as a political debate was or was not "incidental to" the event. This goes back to the 1959 law and 1962 rulings. In 1962, the FCC had based those rulings on the grounds that the candidates appearances were central to the debates, so Equal Time was required. Such rulings were hardly inconsistent with the 1959 law, because Congress had required that candidates' appearances could only be "incidental" to news events. Otherwise, tv coverage would trigger Equal Time. But in re-examining the legislative history, the FCC now found that Congress had meant all along that a candidate's appearance could be central to a news event, such as a debate, without triggering Equal Time. It supported this re-intepretation on the basis of arguments on the House floor about language in the conference report concerning news casts, news interviews, and news events, but not debates. To get around this, the FCC reasoned that the

debates, such as those between Nixon and Brown and Romney and Swainson were news events, hence Equal Time should not apply to debates.[4] The 1962 rulings, the FCC claimed in self-defense of its recision, had mistakenly cited a 1959 House Report of a version of an Equal Time bill that had never passed for the previous now erroneous interpretation.

On candidates' news conferences, the FCC majority reversed an earlier Equal Time decision, Columbia Broadcasting System (1964), requiring Equal Time following candidates' press conferences. In 1975, CBS urged the FCC to classify presidential news conferences as "bona fide news events and news interviews," and as such, exempt from Equal Time. The FCC agreed, but not on the grounds CBS had pressed. CBS wrote that control of press conferences rested with the journalists asking questions rather than the candidate responding. The FCC disagreed, and wrote that candidates controlled press conferences by deciding whether or not to hold them. CBS argued that candidates press conferences should be exempt from Equal Time, because they were really routine news. By routine, CBS meant "recurrent in the normal and usual course of events" like such "regularly scheduled" news interviews as "Meet the Press" and "Face the Nation." The FCC rejected this argument, writing that Congress meant "regularly scheduled" to mean just that, and had not contemplated including press

conferences with weekly news shows in the 1959 Equal Time exemptions. Another CBS argument, calling on the FCC to distinguish between press conferences "called by an incumbent candidate in his official capacity and those called in furtherance of his candidacy" opened a can of worms on content that the FCC wanted to keep shut. Then, the FCC ruled that its 1964 objection in CBS no longer held, and ruled that candidates' news conferences were "bona fide" news events exempt from Equal Time.

The FCC minority vehemently disagreed with the majority in the Aspen decision. The two dissenting commissioners worried the public would never see minority party candidates in televised political debates, and feared incumbent politicians, particularly presidents, would further exploit press conferences for their own partisan, political goals due to the relaxed regulations.

In meeting fresh constructions of Equal Time in the Aspen decision, the dissenting FCC commissioners argued vainly for the existing, unworkable, majoritarian 1962 position. Commissioner Benjamin Hooks warned that Equal Time was being struck "a severe and, perhaps, mortal blow." He chastised the majority for making a "tragic mistake." Hooks contended that political debates were not hard news, and should appropriately be covered as news stories on news telecasts. Hooks saw danger in granting broadcasters a fuller measure of discretion in

broadcasting debates and press conferences. Such discretion, he cautioned, put too much power in the hands of television journalists. He argued that candidates manipulated press conferences, and that it was mistaken to allow politicians any further latitude. In a word, Hooks argued the FCC majority had interpreted Equal Time into "oblivion."[5] "If newsworthiness is the operative test, then all the other carefully drafted 315a [Equal Time] exemptions and protections are useless and unnecessary."[6]. Even the ghost of Lar Daly appeared in Hooks's dissenting opinion as Hooks worried about the "subjective newsworthiness judgment"[7] of tv newsmen. Hooks finally complained that the FCC had not followed correct procedure in Aspen. The decision on debates and press conferences really was Congress's not the FCC's, and the FCC majority was wrong to assume it had the power on such a political issue. Commissioner Robert E. Lee echoed Hooks' positions in his dissent.

In ruling on candidates' debates and press conferences in Aspen, the FCC redefined political uses of tv. The policy question, dating back to initial legislation on radio in the twenties, centered on whether a candidate or a broadcaster initiated a political "use" of broadcast time when broadcasting political programming. In the twenties, use meant the purchase or gift of air time to campaign for election: Congress was more concerned about price discrimination

against candidates going on the radio at election time than with radio's minimal news programming, so in 1927 Congress enacted Section 18 of the Radio Act to assure that candidates purchasing or receiving radio time would be treated equally. By the late fifties,Congress took television news programming into account. Congress decided that news reports on incumbent politicians and candidate's activities in broadcaster-initiated newscasts, interviews, documentaries, and on-the-spot coverage of "bona fide" news events were not political uses of television. TV, after all, was presenting news and candidates appeared in the news along with other stories. Candidates did not initiate the coverage, such as Chicago tv's coverage of Mayor Daley greeting Argentine President Frondizi, so it was not sensible to require Equal Time for routine tv news programming. In 1975, the FCC changed the legal meaning of political use by ruling on its own discretion that candidate's debates and politician's news conferences were "bona fide" news events.

The important issue in all this, of course, is why Equal Time rules changed in 1975. Several factors warrant attention. Television was held in higher esteem in 1975 than in 1959. The Watergate hearings, televised by the major networks, had rid the government of a cloven hoofed president. Richard Wiley, Commissioner of the FCC, had pushed for deregulation of political programming in large radio markets, so the FCC was beginning its swing toward deregulation of news and political programming. Anti-Washington sentiment abounded, and in the spirit of returning government to the people, it doubtless seemed sensible to let television do its job informing people by lifting the '59 restrictions on candidates debates and press conferences.

Power plays and confusion marked initial implementation of the Aspen decision, particularly due to the new-found role of the League of Women Voters. The networks, jealous that the League of Women Voters would get all the credit for arranging debates between President Gerald Ford and Democratic presidential nominee Jimmy Carter while they were reduced to mere transmitters, complained about several aspects of the first televised presidential debates since the Great Debates between Kennedy and Nixon. Back in 1960, the networks had hosted those debates without any

intermediary, such as the League. And while tv memories may be short those of network television news executives, particularly those of Richard Salant at CBS News and Reuven Frank at NBC, proved to be long, so there was lots of wrangling about control of the Ford-Carter debates.

Control issues surfaced about details. First, the League and the presidential candidates excluded the networks from initial planning stages. Then, the League and the candidates worked-up a list of journalists, a list over which the candidates had veto power, who would pose questions to the candidates. The League and the candidates also reached agreement that television cameras would focus exclusively on the candidates: there were to be no reaction shots from the audience. Robbing the networks of the last bit of control, the League and the candidates agreed to a pool camera, thus denying networks cameras of their own.[8]

To Salant and Frank, it seemed as though tv was being reduced to a mere conduit, a lowly transmitter. After all, wasn't the tail waging the dog in this case? The Aspen Decision had enabled television coverage of presidential debates as long as they were hosted by a group other than broadcasters, and took place outside televison studios, and were broadcast in their entirety. The League had stepped in, and had taken control of the show. But what was the League compared to the great television networks? How could the League pretend to

host an event so significant as the first televised presidential debate in sixteen years anywhere nearly as competently as the networks with all their experience covering national politics? Could the League really "control" the debate? Its dealings with Ford and Carter certainly suggested otherwise. As if to corroborate the worst fears of the television executives, the League surrenderd the few prerogatives the networks had won in the 1960 presidential debates to the candidates, including the selection of journalists.

In the planning meetings where the networks finally did participate, Salant grew heated. He chastised the League for accommodating Ford and Carter so fully. The public was going to get cheated, he charged. Surrending control over the selection of journalists was the worst sin. That, Salant said, was tantamount to allowing the candidates to choose their own questioners. In agreeing on veto-rights over the journalists, the League had unwittingly granted the candidates control over the words that would reach the public. Then, in denying reaction shots of the audience, the League had given the candidates de facto control over the images that would reach the American public, too. How could television do

its job under such restrictive conditions? League representatives stuck to their guns, and Salant walked out of a Friday meeting, raising the spectre over the weekend preceeding the first Ford-Carter debate that CBS might boycott it entirely.[9]

But the networks did not boycott the first presidential debate in sixteen years. On Thursday evening, September 23rd, President Gerald Ford and Democratic presidential candidate Jimmy Carter met on the stage of the Chestnut Street Theatre in Philadelphia to debate before a tightly-packed theatre audience and a national television audience of 80 million people.[10] The consensus among pundits was that both candidates relied too heavily on economic statistics, neither proved able to articulate a convincing vision of where he wanted to lead the country, and both firmed-up support among their constituencies with 2 polls giving President Ford a slight edge for his performance.[11]

Then, well over an hour into the droning rhetoric, silence disturbing and unexpected, befell the two men seeking the presidency of the United States. As Jimmy Carter belabored "a breakdown in trust among our people," debate moderator Edwin Neuman interrupeted him,

and said, "Excuse me, Governor. I regret to have to tell you that we have no sound going out on the air." [12] And, both men stopped talking. Each stood at his podium. Neither said a word to each other nor continued to debate, because the sound was out for the theatre audience, too. After twenty-seven minutes, sound was restored, and the debate concluded.

A twenty-five cent electrolytic capacitor had broken in one of the twenty-four amplifiers ABC-TV News was using to transmit sound to seventeen sources fed by the pool cameras. The capicator, in itself, was not important. It's job was to cut the hum and buzz in a power supply for the pool cameras. Once sound was restored the buzz and hum were not audibly worse due to the one broken capacitor. And, because network news people are highly competent, it took ABC personnel only 27 minutes to arrange for the sound to be transmitted through a CBS-TV News sound line to the CBS broadcast center in New York, which then sent the sound through AT&T phone lines to the seventeen sources fed by the pool camera so the debate could resume and finally conclude. The technical people from the networks had solved the technical problem quickly and efficiently. [13]

But where the sound problem did matter and eventually did surface was in the FCC's Aspen Decision, defining candidates' debates as "bona fide news events." Minority candidates Eugene McCarthy, running as an independent, Lester Maddox, running on the American Independent Party, and Peter Camejo, the Socialist Workers candidate, complained that the debate was not a "bona fide news event." For had the debate been a truly "bona fide news event," the candidates would not have stopped talking due to a technical problem with sound. They demanded Equal Time on the grounds the debate was political programming, not news. John Armour, McCarthy's lawyer, contended that neither the Superbowl nor the Olympics nor a President delivering a State of the Union Address had ever stopped due to tv sound problems. Camejo's attorney pointed out that the debate was totally staged for television, so it could not be "bona fide." And, the American Independent Party filed papers asserting that the sound problem showed that the networks and the League were colluding, thus commingling roles of sponsor and broadcaster.

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The FCC responded to these complaints by citing the Aspen Decision. The FCC told the challengers that the debate was a "bona fide news event," exempt from Equal Time requirements, so they could not receive equal time for their minor party candidacies.

McCarthy and Maddox persisted. McCarthy next employed Fairness Doctrine arguments to win places in the second and third presidential debates. The FCC and the courts rejected his arguments. In declining to overturn a D.C. Appeals Court decision, Chief Justice Warren E. Burger ruled that both McCarthy and Maddox had "reasonable opportunities to have their views presented in contexts outside debates."[15]

On candidates press conferences, the sole case in the 1976 presidential election concerned television networks' decision not to broadcast an October 22nd press conference by President Ford. Television news covered the news conference as an important story in newscasts, but not so intrinsically important as to warrant uninterrupted air time of its own. Network executives cited Equal Time as well as news judgement as the basis for their decisions. William Small, then at CBS, pointed out that President Ford had held a news

conference only the week before on October 14th. Small also pointed out that since Ford's October 22nd press conference seemed staged for its political effect, networks would be put under pressure from other candidates for Equal Time.

As to the remaining debates in the 1976 election, the second debate figured prominently in Carter's success. Early on in the second debate, Carter articulated a winning theme. Carter immediately started off with a broadside against "inadequate presidential leadership."[16] Four years later this theme would come back to haunt him with a vengeance, but it sold in '76. Ford bumbled. In response to a foreign policy question, Ford replied stupidly, "there is no Soviet domination of Eastern Europe" Carter pounced on that. Ford did himself further harm by failing to correct himself immediately, which provided Carter further ammunition for his bumbling president theme.

Carter had enterred the second debate with concerns about no theme, loss of support among independents and moderates as he tried to pitch his campaign to traditional Democrats, and with persistent questions about his judgment for agreeing to an interview in Playboy and then making incautious remarks about his own sex drive, former president Lyndon Johnson and other topics. Ford enterred the second debate partially bouyed

by his somewhat better then expected appearance in the first debate, but beclouded by embarrased by racist remarks of his recently fired Secretary of Agriculture Earl Butts. In the end, Carter stemmed the tide of defections that had been eroding his considerable lead in the polls up to the second debate. The third debate was uneventful.

Both Ford and Carter spent approximately $8 million dollars each on television commercials.[17] Television news spent millions of its own on election night voter projections, projections made all the more difficult by the volatility of the electorate.

The expert opinion of the '76 election was that the public was gravely disappointed. Walter Dean Burnham observed that voters were better informed and thus more skeptical. He noted that in television's saturation presentation of the campaign tv news created expectations among voters no politician could meet. Marshall McLuhan pointed out that images had taken command. In a "simultaneous information environment," attractive images and promises win more votes than a clearly articulated statement of goals, McLuhan observed. Candidates' debates mattered only as elements in this news dimension of politics. Margaret Mead complained that tv presented so much information that the audience saw it all as advertising. The public was bored, she said, by the "continuous, relentless repetition of what should be fresh experiences for

different groups of voters." Roger Mudd called the campaign issueless. He blamed Carter for making trust and integrity into campaign issues and chided Ford for going along with Carter's agenda-setting.

In the 1980 presidential elections, the Aspen decision worked to the advantage of the incumbent, Jimmy Carter, during the primaries, and in the general election to the advantage of third party candidate, John Anderson, running on a National Unity ticket.

Equal Time cases during the 1980 presidential election focused on debates and press conferences, the very kinds of political programming exempted from Equal Time obligations by the Aspen decision.

The FCC and the Courts ruled against Senator Edward M. Kennedy's complaint about one of President Carter's news conferences. Kennedy was running an uphill campaign against Carter for the Democratic presidential nomination. Kennedy charged that Carter had used portions of a White House news conference on Febrary 13th, 1980 not to respond to reporters' questions but as a campaign forum to press his own candidacy for re-nomination safely away from a Kennedy response. Kennedy first went to the tv networks, which refused him on the grounds that news conferences were bona fide news events, and as newsmen, they had no obligation to provide him reply time. Kennedy next went to the FCC, which supported the networks, ruling that Kennedy had

"failed to offer evidence that the broadcasters were not exercising their bona fide news judgement in choosing to broadcast the press conference."[18]

Although Kennedy was playing for much higher stakes than a regulatory ruling on Equal Time for debates in June, 1980, the persistence with which Kennedy advocated a debate with President Carter at that time may have some connection to this FCC ruling. In June, 1980, Carter had enough votes to command the nomination, but Kennedy had enough to make Carter's renomination limited and partisan. In early June, Kennedy offered to release his delegates if Carter would debate him. Both he and Carter cited Carter's refusal to debate campaign issues as the biggest issue separating them, and at that time, there was considerable disagreement among the two on such issues as wage and price controls and health care.

The television networks turned down a request for Equal Time from the Reagan campaign following a September 18th Carter press conference, again broadcast from the White House. The Reagan campaign never made a complaint to the FCC. In the news conference, Carter opened with four to five minutes of remarks on Administration accomplishments in domestic and foreign policy before taking reporters' questions. William Casey, currently director of the CIA and at that time a high level advisor to Governor Reagan, demanded the networks provide the Republican presidential nominee atleast four to five minutes of Equal Time to respond to

what he called Carter's "political commercial." Casey chastised President Carter for "an obvious partisan announcement, not responsive to questions from the press,separate from the press conference....[Carter's opening remarks] "could not have been a more political commercial if he had paid for the time."[19] The television networks cited Aspen in rejecting the Reagan camp's request. "I don't think there's any legal basis under the equal time provision," remarked William Small at that time with NBC.[20]

Equal Time figured importantly on candidates' debates in the 1980 presidential election. Here, the effect of the Aspen decision was to provide discretion to a women's civic association, the League of Women Voters, on the selection of candidates to be invited to nationally televised political debates. The League did not act in a vacuum, of course. It had to contend with the incumbent president, Carter, and a highly organized if sometimes contentious campaign team surrounding Ronald Reagan. And it had to contend, too, with public opinion in offering invitations, for if the League showed too much partiality toward any of the candidates its own stature would be diminished.

The League had its hands full in 1980. John Anderson's independent candidacy threw a monkey wrench into the two-party process. Both Carter and Reagan wanted to manipulate the League invitations to Anderson in such ways that would benefit their own campaigns. For Reagan this meant a one-on-one confrontation between himself and Anderson and, eventually, between himself and Carter, but no three-way debate among all of them. For Carter, it meant a one-on-one with Reagan, no one-on-one with Anderson, and a begrudging acceptance of a three-way debate, which Reagan then ruled out.[21]

The League tried to use its discretion under the Aspen decision cautiously, but it was caught up in very powerful forces. First was the problem of handling the Democratic and Republican nominees. Then, there was Anderson. Faced with the Anderson candidacy, a candidacy enjoying measurably more public support than former Minnesota Senator Eugene McCarthy's independent bid four years before, the League turned to public opinion polls as the criterion for determining a candidate's eligibility for invitations. In early Ausgust, 1980 the League announced that candidates enjoying a national

popularity of 15% would be invited to League sponsored debates.[22] This figure was low enough to enable Anderson to qualify but too high for other independent candidates, such as Citizen's Party candidate Barry Commoner, to make the list of invited debaters.

The League's decision to set eligibility requirements by public opinions polls drew criticism. Andrew Kohut, head of Gallup, complained that the League was bringing public opinion poll results "into" the political process in using poll results as the basis for debate invitations.[23] Other public opinion experts worried about technical problems like the margin of error in sample findings and the likelihood that nonvoters would have been screened out of the polls on which the League was relying, thus skewing the sample to the politically active and informed and not providing an accurate reading of candidates' standings. Ruth Hinnerfeld, the person at the League most responsible for arranging the presidential debates, defended the League's decision. She said of the of the 15% cut-off figure, "we were looking for something that had the ability to be applied in a fairly objective way, was simple to understand, and was non partisan."[24] Among others, the League relied on the Harris/ABC poll, the Roper and Gallup polls, the NBC-AP poll, and the Los Angeles Times poll.

In the end, the decision on invitations to participate in televised presidential debates wrested with the League of Women Voters. The League determined that Anderson met the 15% criteria in September, in time for a one-on-one debate with Ronald Reagan, but did not meet the criterion in late October for a debate including President Carter. Everybody got mad at the League and accused it of bowing to Carter's insistence that he would not do a three-way debate with Anderson.[25] But the League only acted as it said it would. Indeed, earlier on in September, 1980, the League extended its deadline for meeting the 15% requirement from the end of August to September 10 precisely in an effort to help Anderson, whose popularity had waned a bit in the summer heat, to make the list of invitees.

Anderson had no one to blame but himself for failing to make more of his candidacy in the September 21st debate against Ronald Reagan. Carter was absent, but Anderson did not sufficiently clarify his message to keep any momentum running toward him. His wry line from a debate with Reagan for the Iowa caucuses that Reagan could only balance the budget and spend trillions on defense by using mirrors was now tired. Anderson did nothing to reinvigorate a campaign that had reached a

high point in Massachusetts a half year before. Indeed, Reagan was the more successful, winning points by deflecting concern among moderates and women, in particular, that he was too bellicose.[26]

By mid-October, some in the Reagan camp began to worry if the Governor might lose the election, and their concern caused Reagan to reverse his position on participating in a one-on-one debate with President Carter. At that time, Reagan's lead was stable, but not growing. Reagan's advisors wanted to keep momentum running in the Governor 's direction, and decided a debate with Carter would be less harmful than no debate. They feared Carter might engineer a release of the hostages shortly before election day, and thought a presidential debate would minimize the effect of such a release. Finally, Reagan's advisors wanted him to put to rest as best he could repeated public concern that he would get the U.S. into a war.[27] Given his advisors' concerns Reagan stepped back from his round-robin position of sequential one-on-one debates, skirted reporters' questions about his own criticism of the League as recently as September 19 for proposing a one-on-one debate between himself and Carter that excluded Anderson,[28] and agreed to debate Carter.[29]

President Carter won the formalities of the debate battle. He and Governor Reagan debated each other one-on-one over the major networks.

But Carter lost the debate. Until the debate, televised on October 28th, Reagan had a lead but not a commanding one. Carter enterred the debate as a incumbent underdog, and left a corpse. "Hemmorhaging" was the term Carter pollster Patrick Caddell would use as he reviewed poll results the weekend preceeding the election. When Reagan won all but five states and the District of Columbia a week after the presidential debate, the results were painfully in. Some Carter supporters, at least partially as a result of his debate performance, abandoned him for Reagan or Anderson.

As to the formalities of the debate, the League bowed to the wishes of the the major party candidates. Carter and Reagan both wanted a more debate-like format than the six question format of the Anderson-Reagan debate. Carter's aides, in particular, pushed for rebuttals between the two candidates. Reagan's side acceded, agreeing to a number of rebuttals in exchange for moving the debate as close to election day as possible. The League facilitated the contending camp's negotiations.[30]

In this phase of the general election, Anderson was the big loser. He was consigned to the Cable News Network, and to responding to debate comments between Carter and Reagan, whom he watched on a tv monitor. Anderson purchased a half-hour of tv time immediately following the Carter-Reagan debate to rebut the major party nominees. His standing in the polls was 8 to 9 percent, well below the 15 percent minimum requirement. Without a dramatic debate confrontation to highlight his differences from Carter and Reagan and with no other significant campaign gesture outside the debate, Anderson's attractiveness and credibility as a candidate waned.

Nevertheless, one should not over-hastily conclude that League discretion on participation in candidates' debates, due the Aspen Decision, meant that Anderson was treated shabbily, or that voters were disserved by his exclusion from the Carter-Reagan debate. Anderson carried his candidacy quite far in 1980, and he received ample coverage by broadcast journalists. The public had an opportunity to measure an independent against the major party candidates by following his campaign. And,

importantly, the public also had an opportunity to measure the major party candidates against each other precisely because the League had discretion over invitations as a result of the Aspen Decision.

In the 1980 presidential election, the Aspen Decision helped the major party candidates, and accommodated significant third party candidates with a following among the middle class. The Aspen decision worked the way its advocates and its detractors both said it would. It enabled the public to see televised political debates among the major party candidates and it cut fringe candidates out of televised candidates debates unless the candidates were substantial. Benjamin Hooks's concern that Aspen interpreted Equal Time "into oblivion" seems quite right if one wishes to sustain an egalitarian position on political discourse. But, such a position meant no debates.

In the hurly-burly of politics, the Aspen Decision put a lot of power in the hands of the League of Women Voters. The League then had to wrestle with incumbent presidents, major party presidential nominees, and public opinion.

Political advertisements or tv spots figured importantly in Equal Time rulings for the 1980 presidential election. The U. S. Court of Appeals in Washington rejected arguments from the Carter campaign that political commercials, sponsored by independent political groups supporting Reagan but separate from his campaign, violated Equal Time, the Fairness Doctrine, and the FCC's personal attacks law. The commercials featured pictures of Carter and used his voice. The FCC had ruled Carter was not eligible for Equal Time due to the commercials. The FCC cited a 1976 Supreme Court decision (Buckley v. Valeo), which held that as part of campaign contributions, independent groups buy all the commerical time they wanted to advance a candidate without triggering Equal Time.[31] The Appeals Court upheld the FCC ruling.

In July, 1980, Carter had tried unsuccessfully to surpress the commercials. The Carter campaign sent a letter to 700 television stations warning them about possible violations of the Equal Time law and Fairness Doctrine if they broadcast the ads. As in their briefs all the way up to the Appeals Court, the Carter Campaign wrote station managers that the independent group was really not independent of Reagan, so Carter should get Equal Time.

The D. C. Appeals' Court decision that political commercials fell outside Equal Time was the most significant of all the Equal Time decisions in the 1980 election. Reagan's supporters spent an estimated $60 million dollars in his behalf,and a considerable amount of it went to advertising. The Reagan camp was meticulous to keep independent groups independent of the actual campaign so as to comply with a 1976 Supreme Court decision enabling unlimited political contributions by individuals and organizations as long as there was no coordiation between the individuals and/or organization and the campaign receiving the money.[32] Had Equal Time attached to political commericals, the effect would have been to repressive: there would not have been as many.

The next major change in Equal Time occurred in 1983. At that time, the FCC responded to a petition to alter Equal Time, which had been submitted by Mr. Henry Geller, Esq., an expert on the FCC's public interest responsibilities, and by the National Association of Broadcasters and the Radio Televison News Directors Association. Geller petitioned the FCC to enable broadcasters to host candidates debates themselves without triggering Equal Time. Geller was associated with Duke University's Center for Public Policy in Washington, and had just completed a study, which showed that in many state elections broadcasters were the best parties to host candidates'debates. The NAB and RTNDA, long time advocates of increased broadcaster discretion in political programming, supported Geller's petition.

The FCC issued a Notice of Inquiry in response to the Geller's petition, which requested FCC approval for broadcaster-sponsored candidates' debates. The FCC received comments from interest groups on both sides of the Equal Time issue, including, among others, the three networks, the League of Women Voters, John Anderson and the United Church of Christ.

The formal fight in this FCC decision to allow broadcaster-sponsored candidates' debates rested on differing conceptions of FCC authority. Did Congress or the FCC have the authority to change the Equal Time law on so important a political programming issue as candidates debates? Geller, the NAB RTNDA, and the television industry argued that Congress had charged the FCC as a regulatory body with discretionary authority to make specific alterations in Equal Time, such as the petitioners' request for broadcaster-sponsored candidates' debates. Opponents of the 1983 decision, including John Anderson and the United Church of Christ, contended otherwise, asserting that Congress had to pass a new Equal Time law to enable broadcasters to sponsor candidates' debates. They said the Equal Time law specifically excluded broadcaster-sponsored debates due to concern about political favoritism. They maintained the FCC had no authority to exempt broadcaster-sponsored debates from Equal Time.

This legerdemain by the part of Geller and the proponets of broadcaster-sponsored debates is worthy of successful politics. While it is certainly true that Congress had always intended that the FCC and the FRC before it to have considerable latitude in enforcing communications law, it is equally as true that Congress did not intend to exempt candidates' debates from Equal Time. On the precise issue of candidates' debates, the

League, Anderson and the United Church of Christ were right, technically. But, metaphorically and politicaly, Geller et. al. won the day with expansive arguments on FCC authority and congressional risk-taking in 1959.

There can be no doubt the petitioners' argruments were expansive. In response to the FCC's Notice of Inquiry, proponents of broadcaster-sponsored debates repeatedly cited the Aspen Decision as grounds for FCC authority to rule in favor of broadcaster-sponsored debates. Aspen, it is true, was closer to the original 1929 version of Equal Time than the '59 exemptions. The Aspen Decision had made a hash of "use" in order to enable third-party debates like those sponsored by the League. The Aspen Decision had come under criticism by 1983 due to the artificiality of the League hosting candidates' debates, particularly presidential candidates where major party candidates in fact called the shots. Yet, the Aspen Decision carried the day.

By citing Aspen so expansively, the broadcast industry promoted the regulatory authority of the FCC in order to insulate itself from congressional scrutiny on the candidates' debate issue. As long as decision-making on candidates' debates took place inside the FCC and not in Congressional hearing rooms, the industry had a better chance of gaining control over the sponsorship of

candidates' debates without having to deal with congressional concerns about the impacts of television news and political programming on elections.[34]

The FCC agreed with Geller et. al. The FCC enlarged and extended broadcasters' discretion on candidates debates. The FCC ruled that broadcasters could sponsor debates themselves, because broadcaster-sponsored debates were "on the spot coverage of bona fide news events," and as such, exempt from Equal Time. No longer would broadcasters have to work with third party organizations, such as the League, to broadcast candidates debates. The FCC also lifted Equal Time requirements on rebroadcasts of candidates debates, reversing itself on two earlier rulings.

The FCC employed a number of arguments to support its legitimate authority to rule in favor of broadcaster-sponsored candidates' debates. First, the FCC asserted Congress had given the FCC power all along to make decisions like this one. Second, the FCC asserted that in 1959 Congress had decided to take a risk on broadcasters' news judgement by creating exemptions to Equal Time. Congress authorized the 1959 exemptions, the FCC wrote, on the conviction that broadcasters would use their newly gained discretion to produce more news and political programming even if the exemptions opened the door for broadcasters to favor certain candidates. Third, the FCC maintained Congress

had exempted candidates' debates from Equal Time in 1959 if the FCC chose to classify candidates' debates as either a "bona fide news interview" or as "on the spot coverage of bona fide news events." The FCC cited the legislative history of Equal Time to support these three positions. Fourth, the FCC cited court precedents, including rulings that rejected Shirley Chisholm's challenge to the Aspen Decision, which supported broadcasters' discretion in political programming and FCC latitude in rule-making on Equal Time.[36]

By 1983, broadcasters finally won some of the freedom presenting political information, which regulation had denied them. Ironically, broadcasters won a greater measure of their free speech liberties by promoting the regulatory authority of the agency charged with policing them.

Public interest advocates emerged as equally partisan though somewhat less manipulatively adept as Mr. Geller and the broadcasters. Anderson believed he had more of a chance of reaching voters with decision-making resting with the League. The League had a greater chance of extending its influence and promoting its own fundraising with candidates' debates in its metier

rather outside its domain. Mrs. Dorothy Ridings, head of the League in 1983, let everybody know her feelings about the decision. "The FCC has left the American voter even more vulnerable to the influence of the television networks on campaigns and elections. Putting the debates in the hands of the broadcasters allows profit-making corporations, which operate in extremely competitive enviornment,to make as well as cover news."[37] The D.C. Appeals Court upheld the FCC's ruling against challenges from the League in 1984.[38]

In conclusion, several themes emerge. First, the FCC boosted its own discretionary authority to alter Equal Time rules without consulting Congress. In both decisions, the FCC expanded on law, and the courts supported the FCC's interpretations. In the odd workings of regulation, broadcasters won a free speech victory through supporting FCC's discretionary authority.

Second, the FCC moved toward a libertarian policy on broadcast political programming and away from a majoritarian policy. These rulings signal the ebbing tide of majoritarian broadcast policy within the FCC. At the same time the FCC promoted greater freedom for broadcasters, it also began to claim more discretion, or "independence" for itself. While this independent course did not excessively irritate Congress in the seventies, this would not be the case in the eighties even with market-oriented Republicans seizing the White House and controlling the Senate.

Third, the FCC showed reticence as late as the mid-seventies to enable television journalists to do their jobs. By requirying a third party, such as the League, to host candidates' debates, the FCC exhibited the

abiding concern, which shaped regulatory policy since the twenties, that mass communications media like radio and tv would disproportionately influence election results and shape public opinion. It was only as recently as 1983 that the FCC granted broadcasters the same priveleges of hosting candidates' debates that newspapers enjoyed historically.

Fourth is the perverse effect of majoritarian regulation. The public benefitted from these deregulatory actions. By excluding candidates' debates and news conferences from Equal Time obligations, the FCC enabled more people to hear and to see more poltical programming.

Fifth is the difficult question of whether limitiations inherent in Equal Time make the law anachronisitic and unworkable in the modern media marketplace or whether major party politicians and the networks have chipped away at Equal Time so thoroughly that it has become eviscerated. Broadcast technology and the media marketplace have changed fantastically since Senator Dill first proposed equal opportunities for candidates in 1927. The spectrum scarcity rationale for Equal Time was much weaker by 1975 and 1983 than in 1927, 1933 and 1959. On these grounds, it would seem that limitations inherent in Equal Time suggest that the

law be retired.

But, it is also true that the 1959 congressional amendments and the `75 and `83 FCC rulings on Equal Time had their own perverse effect. While they increased the flow of political programming to the majority of Americans by granting broadcasters their first amendment rights, they also limited the free speech rights of minor party candidates. The minor party candidates lost standing for their free speech rights while major party politicians assured themselves tv exposure and broadcasters won public esteem for their political and public affairs programming.

In sum, in the seventies, majoritarian tide began to ebb on Equal Time. In the eighties, this ebbing tide would attempt to carry away the Fairness Doctrine as well.

# CHAPTER SEVEN

# THE EBBING TIDE OF FAIRNESS

A deregulatory tide pulled at the Fairness Doctrine by the mid-eighties. A libertarian position on broadcast news and public affairs programming won more credence as proponets of deregulation and competition in the mass media marketplace became the majority on the the Federal Communications Commission. By 1985, the FCC was launched on a wholesale inquiry into the Fairness Doctrine, a review initiated by Mark Fowler, Chairman of the Commission.

In February, 1985, Fowler looked out on a group assembled in the FCC's Hearing Room to testify on the Fairness Doctrine. For Fowler, the panels were something of an accomplishment. Through his efforts the burden of debate on broadcast news programming was shifting away from proponents of content regulation. Discussion of the Fairness Doctrine focussed more on why government should impose the Fairness Doctrine on broadcasters and less toward a government role in fostering access to the airwaves. To be sure, certain Fairness Doctrine proponents had circularized a memo criticizing Fowler for inviting a disproportionate number of their adversaries to the panels. They noted the majority of written comments supported the Fairness Doctrine, and

opposed the FCC's ongoing Inquiry into its fate. Phyllis Schlafly, a long time Reagan supporter and Fairness Doctrine proponent, would shortly tell Fowler two days of hearings were "a stacked deck designed for predetermined results."[1] But the momentum on the Fairness Doctrine was shifting, and it was moving in Fowler's direction. Things had begun a year before.

In 1984, riding a deregulatory wave, the FCC issued a Notice of Inquiry into the future of the Fairness Doctrine. The FCC's posture in the Notice was as cautious as it was provocative and predictable. First, on a note of caution, the FCC noted that it was merely inquirying into the possibility of altering the Fairness Doctrine. The FCC explicitly stated it would not repeal the Fairness Doctrine on the basis of responses to the Notice. Second, taking a provocative tack, the Notice itself clearly leaned toward repeal of the Fairness Doctrine by posing queries that indicated FCC willingness to consider favorably disposing with the controversial regulation. Third, in terms of predictability, the Notice participated fully in the FCC's current deregulatory policies dating back to the seventies.[2] It fit the general drift

The Notice is worthy in several particulars. It reflects the major issues facing regulators. The FCC requested comments on the role of the Fairness Doctrine in promoting or inhibiting the public's access to controversy and news. This is straight-forward enough. Here, the FCC was doing no more than querying whether the Fairness Doctrine serves its avowed and formal purpose or whether it does not work, as its critics recurrently allege, and actually represses the flow of news and information to the public.

The FCC inquired if technological innovations in tv news programming, specifically the impact of new channels on the diversity of news and information reaching the public, made the Fairness Doctrine obsolete. Did these new channels undermine the spectrum scarcity rationale for the Fairness Doctrine? It also queried whether the coming convergence of print and electronic media with videotext and teletext portended the possibility of Fairness Doctrine rulings on new forms of electronic print.

The FCC queried whether current first amendment jurisprudence supported the Fairness Doctrine. It wanted to hear whether first amendment law had changed

so significantly since the mid to late forties, when the Fairness Doctrine was originally promulgated, to make current enforcment a violation of first amendment rights of broadcasters.[3]

Lastly, the FCC inquired about its own authority to alter the Fairness Doctrine, or whether only Congress had the authority to do so. In many ways, the final query was most telling. It signaled conflict over whether the Fairness Doctrine was a law or a regulation. If the Fairness Doctrine were a regulation, then the FCC, as the responsible executive agency, could do with it as it pleased. Such agency discretion would mean almost certain repeal. But, if the Fairness Doctrine were instead a law, then only Congress could authorize any change in the controversial statute. In that case, almost certain retention was assured. The House Democrats were solidly behind the Fairness Doctrine, and as recently as 1984, the Republican Senate had rejected any substantive alteration in the Fairness Doctrine.

So, the issue was engaged. In a reprise of the Aspen Decision enabling broadcaster-sponsored candidates' debates, proponents of the Fairness Doctrine would argue that only congress could define the Fairness Doctrine, and that the FCC could only properly implement

congress' will. Proponents were as diverse and pluralistic as the culture as a whole. Proponents included public interest groups, labor and religious organizations, big business like Mobil and General Motors, some right wing advocates, the NAACP, and the American Civil Liberties Union. Opponents would say that the FCC had the authority. Opponents would include the major television networks, professional news organizations, and newspaper publishers. First Amendment lawyers and scholars argued both sides.

A closer look at the comments and written responses, generated by the Notice, shows the complexity of issues surrounding the Fairness Doctrine today.

Does the Fairness Doctrine accomplish its intended purpose?

The first query, whether or not the Fairness Doctrine actually provides the public with controversial news and reasonable opportunities to respond to news programming, prompted vehement disagreement. Contention turned on the "chilling effect" of the Fairness Doctrine; that is, whether the doctrine discouraged tv and radio newsmen from covering stories and developing editorial views as fully as print journalists.

Radio and tv journalists and news managers said the Fairness Doctrine limited controversial news coverage. They claimed the Fairness Doctrine has a pervasive chilling effect. In the case of large news organizations, news managers and reporters complained that too much management time was taken responding to Fairness complaints. Smaller radio broadcasters claimed that the Fairness Doctrine was economically burdensome. They contended that most radio operators were small businesses, and could not afford to cost of responding to Fairness Doctrine complaints. Due to the time or money involved handling complaints, news managers and reporters said the Fairness Doctrine discouraged coverage of controversial issues. Once burnt, twice shy was the message.

Former CBS news commentator Eric Sevareid called the Fairness Doctrine "a weapon on the backpocket of government." Referring to FCC regulators, the silver haired former network commentator warned that "people in officious disposition" were a greater danger to the public interest than the press. "The press doesn't draft you or imprison you or execute you," Sevareid said in a commanding, well modulated voice. Someday, Sevareid prophesized, the FCC would drop the Fairness Doctrine and a new generation of reporters would be free of "the little cancerous bit of awareness in the back of their heads" concerning government oversight.

Fairness Doctrine advocates denied the Fairness Doctrine chilled radio and television news. They advanced several arguments. The first was economic. Charles Ferris, the former FCC Commissioner and the attorney representing the Democratic National Committee at the panel discussions, asserted media economics were far more important in limiting the coverage of controversial issues. As an industry dependent on advertising revenues, Ferris said broadcasting presented material that is designed to be unoffensive to the largest possible audience. Broadcasters shunned

controversy to protect their revenues not due to the Fairness Doctrine, Ferris said. A first amendment legal scholar supplemented this argument. He said economic concentration in the media threatened the diversity of the news and information the public received.

Reed Irvine, a conservative critic of the media and head of Accuracy in Media, which had challenged an award-winning NBC documentary on Fairness Doctrine grounds, supported these views. Broadcasting media is such an "oligopoly," according to Irvine, that the public received only "liberal" news. Television stations would degenerate into "political tools" without the doctrine, Irvine said, echoing a position that Mobil had advanced in its written comments.

A second argument supporting the Fairness Doctrine was that the Fairness Doctrine was remedial, co-operative, only minimally intrusive. An attorney, who had represented advocates for beverage bottle desposits in a referendum campaign, asserted the Fairness Doctrine enabled bottle bill advocates to get media coverage they could not have acquired otherwise due to saturation advertising against the referendum by the beverage industry. Phyllis Schlafly a promiment opponent of the Equal Rights Amendment and the Supreme Court's decision on abortion, said the Fairness Doctrine enabled her to negotiate news coverage on these issues, which,

she asserted, the broadcasters routinely covered from a "liberal" point of view. "Of all the coverage on the ERA, over 95% of it on tv was pro-ERA and only 5% of it was against the ERA. If it weren't for the Fairness Doctrine, we couldn't have gotten even that measly five percent,"Shafley said. A B'Nai B'rith attorney called the Fairness Doctrine important in diminishing racism and anti-Semitism. He said the Fairness Doctrine was especially important in small towns with few radio and often no television stations. The Fairness Doctine also enabled B'Nai B'rith to speak with the major networks about news coverage of the Israeli-Lebanon war, he said.

Charles Ferris and others pointed out remedial, unintrusive aspects of the Fairness Doctrine. The former FCC Commissioners remarked that the Doctrine only required broadcasters to do stories over or to provide time to interest groups in their communities. Of the 11,000 broadcasters in the country, only 25 had received Fairness Doctrine complaints in the early eighties, according to the public interest advocates' figures. How could broadcasters possibly call the doctrine "chilling" with so few cases? And, on a final note, David Rubin, an ACLU attorney pointed out that journalists' own ethical standards demanded more of them than the Fairness Doctrine.

Fairness Doctrine opponents rebutted these arguments. They squarely denied that the Fairness Doctrine was minimally intrusive or co-operative. Floyd Abrams, NBC's attorney, blasted the public interest attorney, representing bottle bill advocates. Abrams complained that bottle bill advocates had used the Fairness Doctrine to respond to advertisements, not news coverage or broadcast editorials. He said it was wrong for the FCC to force broadcasters to provide time to bottle bill proponents when broadcasters were already covering the ballot issue in their news casts. Abrams reminded the commissioners that the doctrine was highly intrusive. He cited examples of efforts in the Kennedy and Nixon Administrations to manipulate the FCC to silence a right-wing radio broadcaster in the early-sixties and to intimidate the Washington Post during the Watergate scandal. He noted a failed effort by the CIA in 1984 and 1985 to use the Fairness Doctrine to challenge ABC news coverage of an alledged CIA plot to assassinate a former agent. According to Abrams, the Fairness Doctrine gave a license to interest groups to harass broadcast journalists. Doug Ginsburg, a Harvard

Law School professor on leave at the Office of Management and Budget, ripped into the B'Nai B'rith attorney for testifying that the Fairness Doctrine enabled B'Nai B'rith to make "private deals" with broadcasters on news coverage of the 1982 Isreali invasion of Lebanon. This, he asserted, showed how intrusive the doctrine was in practice.

Perhaps overplaying his hand, FCC Commissioner James H. Quello challenged Ferris on whether broadcast economics are the cause of non-controverial news and public affairs programming. Quello remarked that years before becoming a FCC Commissioner, he had worked as a radio news manager. Quello said he had granted an anti-fluoridation advocate an opportunity to rebut his station's editorials advocating floridation. Criticism and confusion were the short term results. First, Quello said he received a sheath of criticism from medical and dental experts for confusing the public. Then, Quello admitted he thought the station was misleading the public by carrying editorials on both sides of the issue. Finally, he said, the station dropped editorializing entirely to avoid controversey in the future. In a word, Quello said the Fairness Doctrine and not the broadcasting economics limited editorials.

Has technological innovation made the Fairness Doctrine obsolete?

Spectrum scarcity is the driving force and sustaining rationale for FCC licensing authority generally and for its Fairness Doctrine policy. At the 1985 Fairness Doctrine hearings and in written comments submitted in response to the Notice of Inquiry, partisans engaged the issue of the impact of technological innovation on spectrum scarcity along predictable lines. As a rule, broadcasters and Fairness Doctrine opponents asserted America is an "information rich society" due, in part, to the number of radio and television stations as well as to newer communications technologies. Among others, these news communications technologies include cable, satellite and microwave technologies. Due to the increased number of radio and television and all the new communications technologies, they asserted original spectrum scarcity rationale for the Fairness Doctrine was now anachronistic.[4]

On the other side of the issue, a wide variety of other interests, ranging from single issue interest groups to enthusiasts for distasteful right wing ideologies to such major corporations as Mobil Oil and

established liberal organizations as the American Civil Liberties Union disagreed. They asserted that technological innovations did not weaken the spectrum scarcity rationale for the Fairness Doctrine. Broadcasters have too much power, they said. The Fairness Doctrine is still needed to provide a flow of a diversity of points of view to the American public.

What is interesting about these positions, of course, is not so much the predictable assertions of these partisans, advocates, ideologues, and attorneys. That is all quite well rehearsed. What is more to the point is the way contending camps approach the spectrum scarcity issue of whether technology has made the Fairness Doctrine obsolete. Fairness Doctrine opponents look at the flow of news and information to the public from the point of view of the media marketplace. Fairness Doctrine proponents tend to look at the issue with a view to the monopoly individual broadcasters have over scarce licenses.

Fairness Doctrine opponents argued an abundance of broadcast radio and television channels made the Fairness Doctrine anachronistic. Quite aside from the newer alphabet soup of communications technologies (LPTV, MDS, SMATV, DBS, VCR, etc.), there are far more

radio and television stations than there were in 1949 when the Fairness Doctrine became FCC policy. In a competitive media marketplace, with these stations vying for listeners, Fairness Doctrine opponents claimed the public has innumerable opportunities to hear news, information and a diveristy of points of view.

Numbers alone show that the spectrum scarcity rationale for the Fairness Doctrine is outdated. There are nearly twelve times as many television stations and four times as many radio stations in 1983 than there were in 1950, the year after the Fairness Doctrine was adopted. By 1983, the average American could receive atleast five or more channels on his television set, and two-thirds of the country could receive nine or more.[5]

The following tables show the increase in the number of broadcast channels.

Table 1--Number or Radio Stations

| | 1950 | 1970 | 1983 |
|---|---|---|---|
| Total | 2,867 | 6,889 | 9,283 |
| Standard (AM) | 2,086 | 4,292 | 4,723 |
| AM Commercial | * | 4,276 | 4,679 |
| AM Educational | * | 25 | 44 |
| FM | 781 | 2,597 | 4,559 |
| FM Commercial | 733 | 2,184 | 3,458 |
| FM Educational | 48 | 413 | 1,101 |

Source: Notice of Inquiry, p. 20323

Table 2--Number of Television Station

| | 1950 | 1970 | 1983 |
|---|---|---|---|
| Total | 98 | 862 | 1,140 |
| Commercial VHF | 98 | 501 | 536 |
| Commerical UHF | | 176 | 321 |
| Educational VHF | | 80 | 112 |
| Educational UHF | | 105 | 171 |

Source: Notice of Inquiry, p. 20324

The new communications technologies undermine the spectrum scarcity rationale for the Fairness Doctrine. In addition to the 10,000 odd radio and television stations, in 1983 there were in the United States, 6,400 cable systems, serving 29 million homes. Subscription television (STV)was in place in seventeen markets. One hundred and five cities had microwave (MDS) service, serving a half million subscribers. Due to a 1983 FCC ruling permitting MDS operators to operate multi-channel systems (multichannel MDS), anywhere from eight to twenty-eight more channels are available to MDS users. Direct broadcast satellites (DBS) provide five channels,and could provide as many as 128. Satellite Master Antenna Systems (SMATV), primarily serving large apartment buildings and hotels, enjoyed nearly 300,000 subscribers in 1984. There were 12 million videocassette recorders in American homes by the mid-eighties.

If one adds print sources to broadcasting, cable and the new communications technologies, the amount of information is staggering. There are 1,701 daily and 6,784 weekly newspapers and 10,809 periodicals in the United States[6] In other words and quite aside from the new media, there are roughly six times as many radio and television stations as there are daily newspapers. Many of those newspapers depend on one dominant wire service, the Associated Press, and one financially-shaky wire service, United Press International. Neither of these wire services is under any Fairness Doctrine obligation.

Comparison of radio and television with newspapers in selected cities is instructive in approaching the spectrum scarcity issue. It is invariably the case, for example, that communities have more television and radio stations than newspapers. For example, Los Angeles, the second largest broadcast market in the country, supports 95 radio and television stations and 3 daily newspapers. Pittsburgh, the twelfth largest television market, sustains 82 radio and television stations and only two daily newspapers. Sixty-seven radio and television stations provide Hartford, the twenty-second tv market, with news as does one daily paper. Austin, Texas gets its news and information from 51 radio and television stations and from one daily newspaper. Austin is the eight-second television market in the United States.

News programming also increased with the explosion in the number of channels. Regularly scheduled network television news accounted for sixty and one-half hours of network tv programming per week in 1983. This is two and a half times as much news as the twenty-four hours of network news programmed in 1981 and nearly four times the sixteen hours programmed in the late sixties. For example, CBS, the dominant network, telecast nearly two thousand hours of regularly scheduled news in 1983, up from approximately 550 hours in 1980 and 400 hours in 1969. Local television stations boosted their news programming,but not as dramatically as the networks. By 1982, there were, on average, ten hours of locally produced news programming per week compared with eight in 1971. Independent television stations also came on line in the seventies and early eighties, providing more local news. By the early eighties, independents devoted 8 hours a week to local news, up from three hours in 1974.[7]

Ownership of broadcasting is another factor that requires attention in discussing spectrum scarcity. Even if more channels, more video recording paraphernalia, and the extensiveness of news programming have increased, it

does not necessarily follow that the sources of news and opinion have expanded correspondingly. However, there is sufficient diversity of ownership to enable the average citizen to to see or hear different viewpoints. For example, independently owned television stations have expanded considerably.[8] Of the eleven hundred VHF and UHF television stations, half are managed by individual licensees. It is true, of course, that the three major networks (ABC, CBS, NBC) still reach a dominant share of the television audience. ABC, CBS, and NBC each own five stations, all in major cities. Each has more than two hundred affiliates. Cable television is less concentrated than broadcasting.[9]

Proponents of the Fairness Doctrine argue that spectrum scarcity is still a problem, because there are more applicants for broadcast frequencies than there are available. Due to this limitation, which is sui generis to broadcasting, the Fairness Doctrine is still necessary, they say. Again, the unit of measurment is the individual licensee, not the media marketplace and the broadcast news available to the public.

When speaking of the media marketplace, Fairness Doctrine proponents say that the continuing domination of broadcasting, of the three major networks in particular, require sustaining Fairness Doctrine regulations. Andrew Schwartzman, representing the Media Access Project, remarked most cogently on this issue. Schwartzman pointed out that the continuing success of broadcasting in attracting investment capital indicated that broadcasting will continue to be the dominant source of television and radio programming to the American public for some time to come. Henry Geller, an expert on television news programming, supported this view in his written remarks. Geller pointed out that the high prices commanded for television stations indicated scarcity.

Cable television and the new technologies came under attack. The National Rifle Association tried to puncture the argument about a cable cornucopia. Like other conservative critics of the media, the NRA advocated retention of the Fairness Doctrine to assure its representatives and members could request reply time if broadcasters covered the NRA's issue, the right to bear arms, in their news programming and/or editorials. The NRA pointed out that broadcasters reach 98% of American homes while cable reaches at best just more than a third. To make matters worse, the NRA, noted that

broadcasting penetration was highest in the areas with the greatest population, because it is only recently that major cities are being wired for cable television. And, in the cases were cable does program news, specifically C-SPAN and Ted Turner's Cable News Network, the NRA complained that the programming focussed too much on national issues rather than local ones. Mobil pointed out that most of the newer cable channels programmed entertainment, not news and public affairs. Mobil wanted to show that the increased number of systems and channels hardly meant an increase in news and public affairs programming. As to the newer technologies, Fairness proponents argued their use and applications are untested, in the future, at best speculative.[10]

The wrinkle in the spectrum scarcity argument is that it is both technological and economic. On the economic grounds,the issues of oligopoly and barriers to entry and so forth, money determines the scarcity of broadcast stations. These concerns about oligopoly are what animate ideologues like Reed Irvine and Phyllis Schlafly to condemn the "liberal" media,or in Schlafly's phrase, "The Big Three TV Networks,"which "exercise monopoly control over news and information so vast they are a Fourth Branch of Government." And on a more thoughtful and articulate level, this is the concern that informs Schwartzman's and Geller's remarks that the high prices commanded by television stations in major

television markets indicate the scarcity of broadcast outlets. If more frequencies were available on the spectrum, presumably these television stations would not command such steep prices.[11]

This mix of economic and technological issues clearly illustrate the problems confronting the FCC in administrating the Fairness Doctrine. Due to the economics of broadcast television, the FCC is placed in an odd policy position. During the hearings, Daniel Brenner, Administrative Assistant to Chairman Fowler, articulated this problem. He pointed out that if the FCC enforces the Fairness Doctrine in smaller television markets, those are exaclty the markets where broadcast frequencies are available, but no one comes forth to apply for them because stations in those communities are not profitable. So, in technological terms of spectrum scarcity, those are the communities where an abundance of frequencies actually exist physically. On the other hand, in the larger television markets, there is a scarcity of channels due to the demand for lucrative licenses. However, the intense competition among the television stations in these larger communities guarantees plenty of opportunities for the public to see and hear controversial news. In cases of this sort, the FCC is reluctant to make a Fairness ruling because due to the highly competitive local television market.

Finally, on the convergence issue, broadcasters worried that the newer technologies of videotext and teletext might be construed as broadcasting and hence come under Fairness Doctrine obligations. If a daily newspaper editorial were to come into one's home over a televison screen, for example, would the newspaper or the carrier or both be required to provide response space? Fairness proponents said these worries were exaggerated.

3.) First Amendment Jurisprudence

In the thirty-seven odd years since the original Fairness Doctrine hearings, first amendment jurisprudence has taken more of a libertarian position. Several court decisions provide greater freedom for the speaker now than was the case when the FCC originally articulated the Fairness Doctrine in the late forties.

Increased freedom for the speaker goes to the heart of the Fairness Doctrine. Due to spectrum scarcity, the Fairness Doctrine is premised on the opposite principle of listener sovereignty. The Fairness Doctrine, after all, quotes approvingly and extensively from Frankfurter's passages in the Associated Press and the Network cases that the flow of news and information to the public takes priority over the rights of the speaker to articulate his thoughts due to the scarcity of broadcast frequencies. Frankfurter had referred to this technological problem as radio's "unique characteristic" and basis for licensing. At the Fairness hearings in response to the 1985 Notice of Inquiry, few quoted Justice Frankfurter, but his thinking on listener sovereignty dominated panel discussions and written comments.

First amendment attorneys, broadcasters, partisans reached back to a more recent precedent, the Supreme Court's Red Lion, decision in 1969. To no one's surprise, Fairness Doctrine proponents cited Red Lion approvingly and persistently to argue that first amendment jurisprudence required the FCC to continue implementation of the Fairness Doctrine and to drop the current inquiry.

In Red Lion, Justice White articulated the listener sovereignty rationale for a unanimaous court. White had written and his fellow justices had agreed that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." The Court also ruled that the First Amendment was not unabridgeable. The Court maintained that due the scarcity that government could impose content regulation in order to assure a diverse flow of news and information to the public. "There is nothing in the first amendment which prevents the government from requiring a licensee to share his frequency with other and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[12] Certainly, other, more recent cases were cited by Fairness Doctrine proponents, but Red Lion[13] comprised the backbone of these other rationales.

Fairness Doctrine opponents looked to fresher court rulings, to the Court's ruling on libel in the Sullivan Case (1964), and to the Miami Herald case in 1974. In Sullivan, they found a standard that print journalist had to willfully, intentionally misrepresent information about a public figure--what the Court called actual malice--in order for an individual to bring libel charges. How different, Fairness Doctrine opponents argued, was this standard compared with responsibilities imposed on broadcasters to provide time to reply to their editorial views or to be impelled to do a story over.

In the Miami Herald case, Fairness opponents had an unequivocal assertion that government cannot tamper in the editorial decisions of the press. This was the proper standard for broadcasting, they contended. Other, recent court rulings from the mid-seventies held that speakers' identity, wealth, persuasiveness, or distastefulness had nothing to do with his right to speak. The right to speak was unabridgeable.[14]

Best of all, however, was a historic Supreme Court decision in 1984 in which for the first time the Court threw out content requirments in broadcasting. Supreme Court Justice Brennan invited a test case of the Fairness Doctrine in FCC v. League of Women Voters.

Brennan noted that the Red Lion Court had left the door open to future reconsideration of the Fairness Doctrine when spectrum scarcity was less pressing. And, noting the changes in the number of channels, Brennan wrote that reconsideration of the Fairness Doctrine may now be appropriate.[15]

A historical view highlights the differences in first amendment jurisprudence between the late-forties and the mid-eighties. The Court initially sustained the FCC's regulatory authority over broadcast content in 1943 in the NBC case. It also reaffirmed in the AP case that a private monopoly cannot control the flow of news and information to the public. As commerical enterprises involved in the dissemination of news, information and entertatinment, the print and broadcast media were equally as subject to social and economic regulation as any other business, Frankfurter ruled, even if their businesses were those of ideas, opinions, information, and the popular arts. So sweeping was Frankfurter's language that both cases became precedents for the FCC's direct regulation of news and public affairs in the Fairness Doctrine. All of this was far beyond the public interest responsibilities imposed on the FCC in Section 315 of the Communications Act.

Justice Frankfurter's views followed existing precedent. From the beginning of federal regulation of broadcasting in the twenties, first amendment jurisprudence placed pubic order above the rights of speakers. In 1927, in Whitney v. California, the Court upheld a California statute forbidding communists from recruiting members. In 1925, in Gitlow v. New York, the Court ruled that the first amendment did not protect seditious speech. In 1919, in the Schenk decision, the Court articulated the "clear and present danger" standard on freedom of speech, and in Abrams v. US, it ruled that the first amendment did not enable publications during the course of World War I that were critical of U.S. participation in the war. In 1918, the Court ruled the first amendment did not protect newspapers from contempt convictions for publishing articles critical of the legal arguments during pending court cases. In 1907, the Court ruled that even if allegations of a public official's malfeseance were true, the speaker could still be penalized if the court deemed the assertions were detrimental to public welfare. And, as far back as 1877, the Court ruled that Congress could exclude publications, thought to be immoral, from the mails.[16]

Add to this the development early-on of radio as an entertainment medium and not as a news media and Frankfurter's opinion favoring reationale for content regulation is quite plausible. Judge Bazelon, an expert on communications law, remarked on the pervasiveness of first amendment standards, upholding public order over speaker's rights, during the early days of broadcasting. In his dissenting opinion in Brandywine-Main Line Radio, Inc. v. FCC, Bazelon noted "that radio came into the world as a magic box analogized to the telegraph...Broadcasters themselves were viewed as entertainers rather than responsible journalists: certainly they were not `newsmen.' The Commission felt justified in imposing upon these neophytes a series of obligations to insure they would act `responsibly' in the public interest."[17]

How different these decisions are from Sullivan or the Miami Herald. Cases involving political broadcasting, specifically CBS v. DNC, and FEC v. NCPAC/ FCM also supported increased discretion for broadcasters and greater freedom of speakers, eroding further the grounds for the Fairness Doctrine. Coupled with Justice Brennan's invitation to reconsider the Fairness Doctrine, first amendment grounds shifted dramatically to the advantage of the broadcaster since the mid forties.

4. Does the FCC have authority to repeal the Fairness Doctrine?

FCC authority to repeal the Fairness Doctrine is a judgement call. In this turf battle with a hostile Congress, FCC Chairman Mark Fowler, himself a proponent of deregulation, will only say, "I think there are very good arguments that it [the Fairness Doctrine] is codified, but there are other arguments that suggest it is not. I haven't had a chance to parse through all that to make a final determination in my own mind."[18]

As in the Aspen Decision, the argument turns on whether Congress or the FCC has authority to repeal or substantively alter the Fairness Doctrine. And, as in 1975, interest groups much divided along the same lines. The public interest groups, the big corporations like Mobil and General Motors, and the right wingers like Irvine and Schlafly assert that the Fairness Doctrine is codified, so only Congress can alter it. CBS, NBC and broadcasting trade groups assert that as the responsible regulatory authority the FCC does have authority to do as it pleases with the Fairness Doctrine. ABC offered a qualified opinion, asserting that the FCC should do as it pleases with the Fairness Doctrine, and seek congressional approval for its actions. First amendment

scholars took either side. Clearly the broadcast industry wants the FCC to claim authority to deal with the Fairness Doctrine, because broadcasters would get more freedom under the deregulation-minded FCC than from Congress.

The day before FCC panel discussions on the Notice of Inquiry, Representative John Dingell, Chairman of the House Commerce Committee, called a press conference along with other Fairness Doctrine proponents to challenge FCC regulatory authority. Dingell blasted the FCC as "radical" and "ideological." He dismissed the inquiry as a fool's errand. "This Commission should have recognized long ago that it is an independent regulatory agency accountable to the Congress, and, as such, it may find that what it thinks is a legal loophole can fast become its own noose."[19] Prospects for a repeal of the Fairness Doctrine hardly looked promising on the Hill.

And, just as clearly, big business, public interest groups, special interest groups, religious groups, the Democratic Party each wanted Congress to keep authority to make, break or alter the Fairness Doctrine. Many of these groups believed they could exert greater influence on the Hill and receive more protection from Congress than from the FCC. As recently as 1983, efforts to win "first amendment parity" for broadcasters had failed in Congress.

So, once again, the issue of FCC discretion was engaged only this time for news and public affair programming rather than for political programming. Partisans, advocates, ideologues and attorneys engaged the issue. Both sides argued fiercely that the legislative history and the law allowed only their view to prevail.

The precise issue of this regulatory fight was the 1959 amendments to Section 315 of the Communications Act and Justice White's language in Red Lion. The 1959 amendments exempted "bona fide" newscasts, news interviews, news documentaries (with incidential coverage of a candidate) and on-the-spot coverage of news events from Equal Time. But Congress further amended Section 315 with a watered-down version of an amendment origially offered by Wisconsin Senator William Proxmire that these exemptions did not relieve broadcasters from obligations to operate in the public interest. Congress inserted language from the Fairness Doctrine, "`to afford reasonable opportunity' for the discussion of conflicting views on issues of public importance" in the new Section 315.[20] Based on the legislative history of this sentence, Justice White had ruled in Red Lion that Congress had codified the

Fairness Doctrine as part of the amendments to Section 315a in 1959. In other words, Congress had codified the Fairness Doctrine in 1959, so only Congress could change it now.

A close look at the legislative history of the 1959 amendments to Equal Time devolves quickly into competing arguments about the intent, content, and fate of the Proxmire Amendment. In 1959, Senator Proxmire had offered an amendment to Equal Time, which would have codified the Fairness Doctrine as part of Equal Time. But, the amendment never passed. The Senate passed a version of it. The House did not. Senator Pastore, the Chairman of the Interstate and Foreign Commerice Committee, called the amendments "surplusage" at one occasion and hailed it as sustaining listener sovereignty at others.[21] And, Congress finally passed the above quoted sentence calling on broadcasters to obey long standing public interest responsibilities and to provide controversial news programming.

Both camps fell into line. Predictably, Fairness Doctrine proponents argued the sentence and the legislative history behind it proved that Congress had codified the Fairness Doctrine, so the FCC's Notice of Inquiry and panels were as gratuitous as they were overreaching. Fairness Doctrine opponents made counter arguments that Congress was far more concerned with candidates than with news programming and access issues

as it amended Section 315. The Lar Daly decision had thrown Congress into a tizzy just before the 1960 elections. Congressmen and senators wanted to make sure legally qualified candidates like themselves could get on the television news without triggering Equal Time. They pointed out correctly that the legislative history makes no specific reference to the Fairness Doctrine, and they concluded that the language of the sentence was generally about public interest responsibilities, not about the Fairness Doctrine.

And on the FCC's discretionary authority, that is, on the FCC's right to substantively alter or repeal the Fairness Doctrine vs. a more narrow regulatory scope of implementing Congress' laws, the sides again broke down predictably. The proponents argued, like Dingell, that the FCC is an instrument of Congress. The opponents noting the FCC's long history as a regulatory agency, charged with making policy for rapidly changing technologies, contend the FCC's leadership role on communications regulation enabled it to do as it pleased with the Fairness Doctrine. However, assertions by previous FCC commissions that Congress had codified the Fairness Doctrine, did little to strenghten their arguments.[22]

5. Tentative Solutions

Given contention about FCC authority to substantively alter the Fairness Doctrine, several courses of action were suggested.

Henry Geller, the prominent communications attorney, recommended that the FCC make the Fairness Doctrine applicable on overall programming (i.e. not case by case) at license renewals on under some sort of Sullivan rubric. Such a policy might well be within the FCC's powers without angering Congress too much. The proposal clearly gives prejudice to broadcasters, because under the Sullivan guidelines, broadcasters would have to have behaved egregiously for a claimant to wrest their license. Still, broadcasters do not support the Geller proposal, because the threat of a license challenge is more serious than the current case-by-case Fairness Doctrine sanctions of modifying their news and public affairs programming.

A second solution, advanced by Harry "Chip" Shooshan, a Washington communications attorney who had been cheif counsel of the House Telecommunications

subcommittee in the late seventies, and Doug Ginsburg, a Harvard Law profesor on leave with the Office of Management of Budget, suggests suspension of the Fairness Doctrine in big tv markets. This would seem to be consistent with Justice Brennan's invitation. However, if the FCC were to take this course of action, it would put a double standard of fairness in place, one for big tv markets and one for small. This course would pose serious implementation problems for the FCC and, no doubt, new rounds of litigation when a broadcaster or a complainant wished to challenge the rule. The virtue of the proposal is its litigenousness, because it would force judicial reconsideration of the Fairness Doctrine.

A third solution, advanced by ABC, calls for repeal of some Fairness Doctrine appendages. These include the personal attack rule, which enables direct access to a television station by an individual to rebut editorials that are critical of him or her. The Cullman decision, which enables interest groups to receive free time to articulate their position seemed dangerous to ABC because it placed broadcasters in the position of subsidizing interest groups. The Zapple ruling, requirying broadcasters to sell time to spokesmen for candidates on the same basis as they would for candidates also was more of a nuisance than a value from

ABC's point of view.

In conclusion, one might observe that the world of communications has changed considerably over the fifty-eight years since Congress passed the Radio Act of 1927. Technology has exploded, providing many more channels. The remarks of the journalists that the Fairness Doctrine can and is used to silence them have to be taken seriously.For whatever influence the major broadcast networks may have over that of other national news organizations, such as the New York Times or the Washington Post or the Gannett papers and television stations, there is little evidence to say the networks behaved irresponsibly. Arguments that television news, political and public affairs programming is chilled by its location in an advertiser-dependent, mass market entertainment industry are similarly wanting in discussing the Fairness Doctrine. Perhaps the Times and the Post may be "chilled" by their dependencies on advertising revenues, but neither has also to endure supplemental federal regulation, such as the Fairness Doctrine.

At this point, the wiser course lays in recognizing the limits of both Equal Time and the Fairness Doctrine to accomplish their avowed results. Rather than stimulating a flow of news, political and public affairs

programming to the public, both laws enervate it.

The historical focus of this study attempts to show that conditions change. It was entirely one matter to enact Equal Time when there were approximately six hundred radio stations in the country, and is quite another to apply it today. Television is very different in 1985 than it was in 1949, when the FCC articulated the Fairness Doctrine. A sea change is underway in communications. Broadcast journalists deserve the same first amendment rights as print journalists so that citizens can reach decisions on American political instituions through robust public discourse. Beneficently intended laws, framed for an earlier time, disserve the public now.

## ENDNOTES FOR INTRODUCTION

1. Olmstead v. US 277 US 279 (1928)

## ENDNOTES FOR CHAPTER ONE

1. 67 Congressional Record 5480

2. Edward F. Sarno, Jr., "The National Radio Conferences,"Journal of Broadcasting XIII (Spring 1969).

3. Ithiel deSola Pool, Technologies of Freedom (Cambridge, Massachusetts: Harvard University Press, 1983), chapter 6.

4. Writing in The Century Magazine, Bruce Bliven contended that "radio broadcasting should be declared a public utility under strict regulation by the Federal authorities; and it may be necessary to have the government condemn and buy the whole industry operating it either nationally or locally on the analogy of the post office and the public school system." "How Radio is Remaking Our World," The Century Magazine 108 (June 1924), 149.

5. E. Pendelton Herring, "Politics and Radio Regulation," Harvard Business Review XII (January 1935),167-178; John Brooks, Telephone: The First Hundred Years (New York: Harper and Row, 1975); Joseph McKerns, "Industy Skeptics and the Radio Act of 1927," Journalism

History 3 (1976-1977), 128-131; Pool, Technologies of Freedom, chapter 6.

6. See especially Representative Davis' comments in 67 Congressional Record 5480-5485.

7. Radio licensing as a system also raised additional thorny questions: for example, which of the many competing radio broadcasting corporations would receive licenses to broadcast, what criteria a federal regulatory official or agency would use in granting licenses, and what quid pro quo the federal government would exact in return for granting lucrative licenses to private corporations for use of a public good like the airwaves.

8. 67 Congressional Record-House 5478-5504 for comments by progressives on common carrier legislation for radio; Congressional Record-Senate, July 1, 1926, 12497-12505; Brooks and Pool are useful for information on AT&T and common carrier legislation.

9. United States News and World Report, May 21, 1943.

10. Hoover articulated an administrative solution for rationalizing radio. Hoover argued that the Secretary of Commerce, the position he held, was the best suited to be empowered to issue and revoke licenses in the public interest. Disagreements with the Secretary's decision making as federal licensing authority were to be adjudicable in the Washington, D.C., Federal Court, Hoover proposed. Hoover pressed such an administrative

component in his overall radio policy, because a series of court decisions and an advisory opinion from Acting Attorney General William J. Donovan had denied the Secretary of Commerce sufficient regulatory authority to effectively administer radio. Under the Radio Act of 1912, the Secretary of Commerce had been empowered to grant licenses to broadcast over radio to anyone who requested one. But, mass communications of the twenties differed from one-to-one communications that had characterized radio in the teens. In 1923, the courts decided in Hoover v. Intercity Radio, that the Secretary of Commerce could only assign wavelengths, and had no regulatory authority to issue or deny licenses. Then, in April 1926, in United States v. Zenith Radio Corporation, a federal district court ruled that Hoover was powerless to require a licensee to broadcast only at specified times and only on designated channels. In other words, the Court stripped Hoover of any power to regulate channels. Hoover asked Acting Attorney General Donovan for a clarification of the Secretary of Commerce's duties. Donovan agreed with the courts, maintaining that the Secretary of Commerce held administrative but no regulatory authority over radio: Hoover was obliged by law, Donovan wrote, to issue licenses upon request and denied by law to assert any control over wavelengths. In other words, once some one held a license, he was entitled to broadcast on whatever wavelength he wanted, and no matter how much

interference might be caused through these actions, the Secretary of Commerce, as the responsible federal authority, could do nothing. Chaos ensued.

11. Congressional Record-House, March 12, 1926, cited in Daniel E. Garvey, "Secretary Hoover and the Quest for Broadcast Regulation," Journalism History 3 (1976-1977), 128-131.

12. Proceesdings of the Fourth National Radio Conference, Government Printing Office, 1926. See also Hearings on S. 1 and S.1754, United States Senate, 69th Congress, 1st Session, where the proceedings of the conference are set out in full.

13. Ibid.

14. Ibid., 6-8. It is noteworthy that Hoover's assertion of listener priority or listener sovereignty is co-incidental with Supreme Court decisions on a "clear and present" danger in free speech. In both Hoover's recommendations for radio and the Court's decisions on political speech, Hoover and the Court assert that the First Amendment rights of the speaker may be justifiably regulated to achieve the public interest.

15. Congressional Record-House, March 12, 1926, 5479.

16. Ibid., 5480.

17. Ibid., 5488.

18. Ibid.

19. Ibid.

20. Ibid. It is noteworthy that atleast one Democrat, Representative Otis T. Wingo (D-Arkansas) shared some of the Republicans' concerns about burdensom regulation. Wingo agreed that the Secretary of Commerce shold have control over radio because he feared that a bipartisan commission, such as that proposed by his southern and western colleagues, would cause too much red tape. As a corrective to this potential problem, Wingo supported full licensing authority for the Secretary of Commerce. He also agreed that Washington's Second District Court was the best place of appeal. For Wingo's comments, see Congressional Record-House, March 13, 1926, 5568.

Not all of the above were small concerns, either, as they included Atwater-Kent, Crosley, and Bosch Magneto among others.

Representative Arthur M. Free (R-Calif.) carried White's position on broadcaster discretion one step further. Free pointed out that American domination in radio resulted from imposing no regulation, not even antitrust law, on large radio manufacturers. He reminded his colleagues that the federal government had made agreements with large electronics manufacturers not to prosecute them for pooling patents and cross-licensing as part of U.S. defense efforts in the First World War. In 1914, General Electric owned patent rights to a device, the Alexanderson alternator, which facilitated transoceanic radio transmissions. The British controlled Marconi Company had wanted to

purchase the Alexanderson alternator, but the United States government wanted an American based company to control the new technology. Admiral W.H.G. Bullard, Director of U.S. Naval Communications and Commander S.C. Hooper of the Bureau of Steam Engineering both approached General Electric, urging G.E. not to sell the patent for the Alexanderson alternator to the British-controlled company. Instead of selling to the British, General Electric worked with American Telegraph and Telephone, the American Marconi Company, the Federal Telegraph Company, and United Fruit to establish the Radio Corporation of America. General Electric did so after receiving assurance from the Wilson Administration that the Justice Department would not prosecute RCA and its parent corporations. Partriotism, Representitive Free asserted, had guided General Electric. As a result of the "limited" cross licenses that comprised the Radio Corporation of America, the United States dominated radio at the end of the First World War while Great Britain remained dominate in the older and slower technology of cable transmission.

Rather than monopolizing radio, Free asserted that RCA and its parent companies competed in different areas of communication. Free used this argument to mollify Representitive Davis and other Democrats and

progressives, who viewed RCA not incorrectly as an oligopoly. He pointed out that RCA dominated the market for making and selling transmitters and receivers. He noted that G.E. and Westinghouse sold capital equipment and assembly parts to RCA. He acknowledged that ATT reserved the rights to telephone patents. "Each one of them," said Free has "to get the use of those patents that pertained to their different lines of the industry." On the basis of these different product lines and specialities, Free asked Democrats to quell their concerns about monopoly and the attendant problems of censorship and price discrimination.

21. 67 Congressional Record-Senate, 12498-12500.

22. Ibid.

23. Ibid.

24. Ibid.

25. 67 Congressional Record-House, 5483.

26. Ibid.

27. Ibid., 5484.

28. Ibid.

29. Ibid. The FTC report showed that the major corporations (1) agreed to pool patents among themselves for both wired and wireless telephone and telegraph and for radio until 1945, (2) granted RCA exclusive rights to sell radio apparatus, and required RCA to purchase its supplies from other members of the cartel, (3)

restricted competition within certain fields so that each company was assured of no competition from another in its designated specialty, (4) controlled international communication between the U.S. and abroad, (5) and provided preferential contracts for transoceanic communication among members of the cartel.

30. Congressional Record-Senate, July 1, 1926, 12356. House Democrats also made a failed effort to limit broadcaster discretion over political programming by raising questions about libel, slander, and defamation. They worried that libelous, slanderous and defamatory campaign addresses over radio shortly before election day could skew election returns in favor of candidates using radio. Due to the instantaneous effect of such campaign broadcasts, House Democrats said that the libel, slander and defamation laws applying to newspapers had become antiquated, and more stringent law was required for radio. In addition, radio's ubiquity challenged existing law: in a word, radio crossed state lines.

Representative Thomas L. Blanton (D-Texas) raised the libel issue. He remarked on differing state law on libel and slander. He noted that Texas distinguished between printed and spoken derogatory remarks: print was subject to civil and criminal charges of libel while spoken remarks were classified as slander and then only when expressed about women. A

derogatory expression about a man broke no law in Texas, Blanton said. "The night before election some fellow, who might be favored by the Radio Corporation, could get up in a congressman's district, and with favored access to the radio, ruin any man running for Congress." Clearly, Blanton express greater interest in the political effects of slander than in the more pressing issue of where responsibility appropriately resides for uttering slanderous assertions: with the politician for uttering them or with the broadcaster for transmitting them. In the end, the Radio Act held politicians responsible under existing civil and criminal law on the grounds that Congress would be promoting censorship by holding the broadcasters responsible. Broadcasters had argued they would then have to censor or edit politicians' remarks for fear of being sued by besmirched candidates. The immediate response to Blanton's proposal to make derogatory language transmitted by radio criminal and civil offenses in the states where they were broadcast, however, was to vote it down. Representative White, the Republican floor leader, replied that common law was sufficient remedy for Blanton's worries, and LaGuardia remarked "civil rights are still in existence."

31. New York Times, May 7, 1926.

32. 67 Congressional Record-Senate, 12503.

33. Ibid.

34. Ibid., 12502.

35. Ibid.

36. Ibid.

37. Ibid.

38. Section 18, Radio Act of 1927.

39. Congressional Record- Senate, July 1, 1926, 12502.

40. Ibid.

41. Ibid., 12503-12504.

42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid.

46. Ibid.

47. Ibid., 12505.

48. Ibid.

49. Radio Act of 1927, Section 18.

50. Congressional Record-Senate, July 1, 1926, 12505.

51. Cited in Garvey

52. H.R. Report Number 2106, 72nd Congress, 2d sess., 4.

53. Charles Curtis, Jr., "Franklin D. Roosevelt and the Commonwealth of Broadcasting" (B.A. thesis, Harvard College, 1978).

54. Broadcasting, March 19, 1933, 3.

55. Charles Curtis, Jr., "Roosevelt and Broadcasting."

56. Hearings on S. 2910, Senate Interstate Commerce Committee, 73rd Congress, 2nd Session, 19.

57. Cited in Committee on Interstate Commerce, U.S. Senate, 73rd Congress, 2d sess., 1934, 66.

58. Ibid.

59. Ibid.

60. 78 Congressional Record 8843, S. 2910.

61. Interstate Commerce Committee, 73rd Congress, H.R. 8301.

62. Ibid., 117.

63. Report Of The Federal Communications Commission To Congress On Section 307(c) Of The Communications Act Of 1934, 5-6,9-10.

## ENDNOTES FOR CHAPTER TWO

1. 13 FCC Reports "In the Matter of Editorializing by Broadcast Licensees," 1246-1270. (Here and after referenced as The Fairness Doctrine.)
2. The Communication Act of 1934, Section 315.
3. See Pool, Technologies of Freedom.
4. 8 FCC Reports 333, Mayflower Broadcasting Company, January 16, 1941. (Here and after referenced as the Mayflower Decision.)
5. 8 FCC Reports 340.
6. Ibid.
7. 3 FRC 32 Great Lakes Broadcasting Company, Third Annual Report (1929).
8. 8 FCC 340 Mayflower Decision.
9. Ibid.
10. Ibid.
11. 319 US 190, National Broadcasting Company et. al. v. the United States, May 10, 1943.
12. Ibid.
13. Ibid.
14. 11 FCC Reports Public Service Responsibility of Broadcast Licencees, March 7, 1946.
15. Ibid.
16. Ibid.
17. Ibid.
18. 10 FCC 515 United Broadcasting. (WHKC), (1946); 11 FCC 197 Sam Morris, (1946); 11 FCC 372 Robert

Harold Scott (1946). The rulings are particularly noteworthy for the articulation of the Fairness Doctrine because the FCC indentified the flow of news and information to the public through controversial public affairs programming with broadcasters' public interest responsibilities as trustees of the airwaves. In these rulings, the FCC asserted that broadcasters had affirmative obligations to provide controversial public affairs programming in order to keep their licenses. And, as in the Network case and the Blue Book, the FCC upheld the sovereignty of listeners to receive news and information over the free speech rights of broadcasters to determine the content of the programs they broadcast.

In the United Broadcasting Case (June, 1945), the FCC ruled that overall program scheduling, including controversial public affairs programming, constituted a criterion for renewing a license. Radio station WHKC in Colubmus, Ohio had refused to sell time to Local 927 of the AFL-CIO to discuss labor, racial and political issues and to solicit memberships. WHKC also censored scripts, a routine practice in radio broadcasting in the forties. When Local 927 filed a complaint to revoke WHKC's license with the FCC, United Broadcasting management struck a compromise with the union

local. WHKC management agreed to review program requests individually and without discrimination. It agreed to devote some program time to controversial subjects to advance the broader purpose of "a well balanced program schedule." WHKC management agreed to allow non-profit organizations to solicit memberships on radio programs. It agreed to state in writing its grounds for refusing any controversial programming. Finally, United Broadcasting management pledged that controversial programming would be "considered on an over-all basis, maintain[ing] a fair balance among the various points of view " and among locally and network produced shows and between the commercial and sustaining shows provided by the network. The FCC ruled that since United Broadcasting management had agreed to balance its news and public affairs programming and had ceased censoring scripts that the station was operating in the public interest. The FCC ruled, therefore, that the United Broadcasting Company could retain its license for WHKC.

In the Sam Morris case (March, 1946), the FCC reasserted that overall programming, including controverial public affairs programming, was a criteria for license renewal. Mr. Sam Morris, a local temperance activist in Dallas, Texas asked the FCC to revoke Dallas radio station KRLD's

license. Morris claimed that radio advertising for alcoholic beverages was offensive, and he objected to KRLD management's refusal to sell time during peak listening hours to individuals and organizations promoting temperance. The FCC ruled against Mr. Morris, saying that it would not grant standing to his petition. A single issue, such as temperance, did not constitute sufficient grounds to warrant a special FCC action, the FCC ruled. Rather, the FCC would review KRLD's license on the basis of its overall programming as it routinely would.

The Sam Morris decision also expanded the scope of the FCC authority over public affairs programming due to the FCC's ruling that broadcasters consider the impact of their advertising on their public affairs programming. The FCC rejected as "handy nomenclature" a CBS brief filed in support of its KRLD affiliate. The CBS brief had drawn a distinction between advertising and propaganda. CBS argued that a review of KRLD advertising was beyond the scope of the FCC's regulatory authority concerning public affairs programming because Morris' complaint concerned advertising. The FCC differed. The FCC observed in Sam Morris that "advertising...is indeed a special kind of propaganda." It went on

to say that advertising for alcoholic beverages could "raise substantial issues of public importance." Given the controversy surrounding temperance, the FCC ruled that KRLD had to consider advertising promoting the consumption of alcohol as controversial, and make reasonable efforts in its public affairs programming schedule to address controversial public issues. It also recognized that KRLD provided time for the discussion of temperance issues during local option elections.

In Robert Harold Scott (July, 1946), the FCC ruled that the broadcasters had an affirmative obligation to present controversial public affairs programming. Again, the FCC asserted that it considered controversial public affairs programming an important part of a station's program schedule. It made these assertions about public affairs programming on the majoritarian grounds that flow of public affairs news and information to the public served the public interest. "The free flow of ideas and information is essential to the effective functioning of democratic forms of government and ways of life," the FCC ruled. "Immunity from criticism" was dangerous to the public interest because "unsound institutions could flourish without criticism." The FCC reasoned, therefore, that while broadcasters were not required to grant time to all who requested it,

they nonetheless had to grant time for the discussion of ideas "with a high degree of unpopularity." "The public interest criterion precludes removing radio wholly as a medium from the expression of a view protected by constitutional free speech guarantees," the FCC ruled. As United Broadcasting and Sam Morris, broadcasters retained discretion in particular cases of access while the FCC asserted increased authority over public affairs programming including controversial public affairs programming within its review criteria for license renewal.

The specifics of Robert Harold Scott were as follows. The FCC rejected a petition by Mr. Robert Harold Scott to deny license renewals to radio station KPO and KFPC in San Franciso. At the same time, the FCC lectured KPO and KFPO to provide more air time for programs on controversial public issues. Scott had claimed that management at both stations has stifled controversial public affairs programming by denying him time to speak about atheism, and by doing so had breached its public interest responsibilities as trustees of the airwaves. In a word, the FCC denied Robert Harold Scott's individual petition for programming advocating atheism, and upheld standards that

contoversial public affairs programming properly belong within a station's news programming.

19. Broadcasting, September 5, 1947.

20. Ibid.

21. Ibid. Commissioner Denney favored both the extension of editoral rights to broadcasters and an opportunity for the public to reply to broadcasters' editorials. If broadcasters advocated certain issues, however, Commissioner Denney expressed reticence at the FCC coming up with standards which would evaluate editorial positions as part of FCC licensing renewals. He did not want to put the FCC into a position of ruling directly on editorial content. "I don't know that's a good thing," he said.

22. The National Association of Broadcasters, the trade group for the broadcasting industry, staunchly advocated licensee editorials. Throughout the late forties, Justin Miller, Director of the National Association of Broadcasters, had placed revocation of the Mayflower Decision among his top priorities. Miller called the Mayflower Decision "one of the most serious abridgements of free speech... ... a philosophy contradictory to the Constitution" Broadcasting magazine, the unofficial trade journal of the radio industry, echoed Miller's view. It advocated the right and privilege of broadcasters to editorialize, but also asserted a broadcaster's

right to sidestep controversial issues should he wish to.

23. Ibid.

24. Ibid.

25. Ibid. April 26, 1948.

26. Ibid. April 26, 1948. Dan Petty, general counsel for the National Association of Broadcasters, supported Miller's argument by contending that radio editorials were free speech, and as free speech fell outside the FCC's statutory authority to regulate radio in the public interest. Any policy limiting broadcasters' freedom to advocate issues violated the anti-censorship provision (Section 326) of the Communications Act, Petty continued.

27. Ibid.

28. Ibid.

29. Ibid.

30. Ibid., March 8, 1948.

31. Ibid., April 26, 1945.

32. Ibid.

33. Ibid.

34. Ibid.

35. Ibid. To support his contention, Barnouw testified that writers enjoyed greater freedom of expression on sustaining shows than on commerical ones. On sustaining shows, writers were not under pressure

to write materials which applealed to mass audiences as was the case with commerical shows. As a rule, networks sponsored sustaining shows, and they dealt with news and public affairs.

36. Ibid.
37. Ibid., March 8, 1948.
38. Ibid.
39. Ibid., The Fairness Doctrine.
40. Ibid., p.1251.
41. Ibid., p.1251.
42. Ibid., p.1253-54.
43. Ibid., p.1256.
44. Ibid.
45. Ibid., p.1253.
46. Ibid., p.1253.
47. Ibid.
48. Ibid.
49. Ibid.
50. Ibid., p.1257, 326 US Reports 20 Associated Press v. United States.
51. Ibid. p.1257.
52. Ibid., p.1253.
53. Ibid., p.1258-9.
54. Ibid., p.1259-70.
55. Ibid., p. 1264-5.
56. Ibid.
57. Ibid., p.1266.
58. Ibid., p.1267

59. Ibid., p.1270.

60. Broadcasting, January 6,1949.

## ENDNOTES FOR CHAPTER THREE

1. In The Matter Of Petitions Of The Columbia Broadcasting System, Inc., And National Broadcasting Co. For Reconsideration And Motions For Declaratory Rulings Or Orders Relating To The Applicability Of Section 315 Of The Communications Act Of 1934, As Amended, To Newscasts By Broadcast Licensees, Interpretive Opinion adopted June 15, 1959, 26 FCC 715 (1959). (Here and after this cite will be referred to as "Interpretive Opinion.")
2. Ibid.
3. Ibid.
4. Ibid.
5. Letter To Allen H. Blondy, 14 Revenue Ruling 1199, Feb. 6, 1957.
6. Use Of Broadcast Facilities By Candidates For Public Office, FCC 58-936--Public Notice 63585, Oct. 1, 1958, question number 12. Cited in House Report 802, Aug. 6, 1959.
7. Interpretive Opinion, 728-740.
8. Ibid., 726.
9. Hearings before the Interstate and Foreign Commerce Committee, 86th Congress, 1st sess., 1959, 67.

10. Communications Subcommittee of the Committee on Interstate and Foreign Commerce, 86th Congress, 1st sess., 1959, S. Repts. 1585, 1604, 1858, and 1929, Political Broadcasting, 80. (Hereafter referred to as "Hearings on Political Broadcasting").
11. Ibid.
12. Congressional Record-Senate, 12502, 1926.
13. Hearings on Political Broadcasting, 111.
14. Ibid.
15. Ibid., comments by NBC (722), CBS (719-21), and Westinghouse (723) before the Communications Subcommittee; Robert W. Sarnoff, "An NBC View," in The Great Debates, ed. Sidney Kraus (Bloomington, Indiana: Indiana University Press, 1962),56-63.
16. Cited in Hearings on Political Broadcasting.
17. Hearings on Political Broadcasting.
18. Ibid.
19. Public Law 677, 86th Congress, Title 47, Sec. 315, US Code 1959-61, p. 11675.
20. Hearings on Political Broadcasting.
21. Ibid.

## ENDNOTES FOR CHAPTER FOUR

1. Sen. John F. Kennedy (D., Mass.), first presidential candidate debate with President Nixon, Sept. 26, 1960, in The Great Debates, ed. Sidney Kraus (Bloomington, Indiana: Indiana University Press, 1962), 349-350.
2. Ibid., President Richard Nixon's opening statement, 352.
3. Ibid., 352-353.
4. Cited in Kraus, The Great Debates.
5. Theodore H. White, The Making of the President 1960 (London: Jonathan Cape, 1962), 293.
6. Ibid., 291.
7. Austin Ranney, Channels of Power: The Impact of Television on American Politics (New York: Basic Books, Inc., 1983).
8. New York Times, Nov. 9, 1984.
9. In 1960, there were fourteen other presidential candidates besides Kennedy and Nixon. See White, The Making of the President 1960, 281, for this list.
10. White, The Making of the President 1960, 281, and Godfrey Hodgson, America in Our Time (Garden City, New York: Doubleday and Company, Inc., 1976), Chapter 7.
11. Kraus, ed., The Great Debates,, 56-64.
12. New York Times, May 18, 1960, and Aug. 1, 1960.
13. Ibid., May 17, 1960.
14. Ibid.

15. To support his testimony, Stevenson cautioned After one of his commercials in the 1956 campaign had interrupted five minutes of a popular television show, an irate viewer had telegrammed: "I like Ike and I love Lucy. Drop dead." Communications Subcommittee of the Committee on Interstate and Foreign Commerce, Presidential Campaign Broadcasting Act, 86th Congress, 2nd sess., 1960, S. Rept. 3171.
16. Ibid.
17. Robert W. Sarnoff, "An NBC View," in The Great Debates, ed. Kraus, 59.
18. New York Times, May 18, 1960.
19. Ibid.

## ENDNOTES FOR CHAPTER FIVE

1. Alexander Kendrick, Prime Time: The Life of Edward R. Murrow (Boston: Little, Brown, & Company, 1969); Frank J. Kahn, Documents of American Broadcasting, 3rd ed. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1978), 251-261.
2. Michael Dennis Murray, "See It Now vs. McCarthyism: Dimensions of Documentary Persuasion" (Ph.D. diss., University of Missouri, 1974); Kendrick, Prime Time, 387; Kahn, Documents of American Broadcasting, 252.
3. Edward R. Murrow, "Wires and Lights in the Box," (Address to the Radio Television News Directors Association, Chicago, Illinois, Oct. 15, 1958), cited in Kahn, Documents in American Broadcasting, 251-261.
4. Ibid.
5. Ibid.
6. Ibid.
7. David Halberstram, Powers That Be (New York: Alfred A. Knopf, 1979). For quiz show scandals, see New York Times, Oct. 11, 17, 18, 23, 29, 1959, and Nov. 3, 5, 1959.
8. Kahn, Documents of American Broadcasting, 281.
9. "Report and Statement of Policy re: Commission en banc Programming Inquiry," 25 Federal Register 7291; 44 FCC 2303, cited in Kahn, Documents of American Broadcasting, 262-278.

10. Newton N. Minow, "The `Vast Wasteland'" (Address to the National Association of Broadcasters, Washington, D.C., May 9, 1961), cited in Kahn, Documents of American Broadcasting, 281-291.
11. Fairness Doctrine Primer, 29 Federal Register 10415, 1964.
12. Henry Geller, "The Fairness Doctrine In Broadcasting: Problems and Suggested Courses of Action," R-1412-FF, 1973; Letter To The Honorable Oren Harris In Reference To The "Fairness Doctrine" Implementation, FCC 63-851, 40 FCC 582 (1963).
13. Letter To The Cullman Broadcasting Co., Inc., And To The Walker County Broadcasting Co., Inc., In Re Responsibility Under The Fairness Doctrine, FCC 63-849, 40 FCC 576 (1973). (Here and after this will be cited as "Cullman.")
14. The FCC noted that only persons or groups subject to personal attacks by broadcasters had a "right" to direct access to a station's viewers.
15. Letter To Mr. Nicholas Zapple In Re Request By Nicholas Zapple, Communications Counsel, Committee On Commerce, For Interpretive Ruling Concerning Section 315 Fairness Doctrine, FCC 70-598, 23 FCC 2d 707 (1970). (Here and after this will be referred to as "Zapple.")

16. Letter From Federal Communications Commission To Television Station WCBS-TV, 8 FCC 2d 381 (1967).
17. 48 FCC 2d 261 (1974).
18. Office of Communications of the United Church of Christ v. Federal Communications Commission, 395 F.2d 994 (D.C. Circuit Court of Appeals 1966).
19. Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission et al., 396 US 390 (1969). (Here and after referred to as "Red Lion.")
20. Ibid., 389.
21. Ibid., 392.
22. Ibid., 391.
23. Ibid., 377.
24. See supra, Chapter 3.
25. Red Lion, 382.
26. Ibid., 391.
27. Ibid., 366.
28. White quotes Pastore: "We insisted that the provision [referring to Proxmire's amendment] remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the

broadcasters alike, that we were not abandoning the philosophy that gave birth to Section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." In addition, Senator Hugh Scott (R-Penn.) said the provision was "intended to encompass all legitimate areas of public importance which are controversial."

29. There is a twist in all this. A sleeper. The Court glossed over the hard question of whether Congress really did codify the Fairness Doctrine. Red lion is open to interpretation on this precise point, as well as on the spectrum scarcity rationale. The Court noted that Senator Proxmire's original amendment had imposed statutory Fairness Doctrine obligations on broadcasters, but that a conference committee altered the amendment to "the present merely approving language." (395 US 384) And later, the Court described the Fairness Doctrine and the personal attack rule as "complementary" to statutorily imposed responsibilities like Equal Time.

These assertions are inconsistent with expressions elsewhere in Red Lion that the watered down Proxmire amendment "vindicated the FCC's general view

that the Fairness Doctrine inhered in the public interest standard." (395 US 380) Fairness Doctrine opponents latched onto these inconsistencies. They argued in the mid eighties that the Fairness Doctrine had never been codified and that the Court's approval was limited to solely the personal attacks and political editorial rules.

30. FCC Docket No. 19260.

31. Geller, "The Fairness Doctrine in Broadcasting," iii.

32. Geller also told the FCC to revise its personal attacks and political editorial rules, and to continue making timely decisions on a case-by-case basis for personal attacks and political editorials, that is, those cases where Cullman, Zapple, or Red Lion were pertinent until it had made newer rules.

## ENDNOTES FOR CHAPTER SIX

1. Petitions Of The Aspen Institute Program On Communications And Society And CBS, Inc., For Revision Or Clarification Of Commission Rulings Under Section 315 (a)(2) And 315(a)(4), FCC 75-1090, 55 FCC 2d 697(1975).
2. Ibid., and Chisholm v. FCC, 838 F.2d 349 (D.C. Circuit Court of Appeals, 1976).
3. Ibid., 700.
4. Ibid., 704.
5. Ibid., 713.
6. Ibid., 716.
7. Ibid., 715.
8. New York Times, Sept. 20, 21, 22, 1976, and Oct. 3,1976.
9. Ibid.
10. Ibid., Sept. 24, 28, 1976.
11. Ibid., Sept. 26, 28, 1976.
12. Ibid., Sept. 24, 1976.
13. Ibid., Sept. 25, 1976.
14. Ibid., Sept. 28, 1976.
15. Ibid., Oct. 23, 1976.
16. Ibid., Oct. 8, 1976.
17. Ibid., Oct. 15, 1976.
18. Ibid., Feb. 16, 1980.

19. Ibid., Sept. 19, 1980.

20. Ibid.

21. Ibid., Sept. 20, 23, 24, 25, 27, 29, 1980, and Oct. 16, 18, 1980.

22. Ibid., Aug. 10, 1980.

23. Ibid., Sept. 23, 1980.

24. Ibid., Sept. 14, 1980.

25. Dorothy Ridings, Remarks at a Conferece held at the Institute of Politics, John F. Kennedy School of Goverment, Cambridge, Massachusetts, January 29-31, 1982, cited in Television andd the Presidential Election: Self Interest and the Public Interest, edited by Martin Linsky, Lexington, Massachusetts: Lexington Books, 1983.

26. Anderson did suffer from financial problems, which probably had an impact on his performance. The Federal Election Commission issued a ruling that Anderson could legally seek bank loans against his election subsidy, but that banks could not use the FEC ruling to support the legality of such loans if anybody challenged the legality of the loans in court.

27. New York Times, Oct. 18, 1980.

28. Ibid., Sept. 20, 1980.

29. Ibid., Oct. 18, 1980.

30. Ibid., Oct. 22, 1980.

31. Ibid., Oct. 4, 1980.

32. Ibid., Nov. 30, 1980.

33. For full list of respondents, see BC Docket Number 82-564, Report and Order, adopted Nov. 8, 1983 and released Nov. 16, 1983.

34. Broadcasting, Feb. 1, 1985.

35. The FCC also declined the petitioners' request to exempt documentaries from Equal Time; it preferred instead to decide political complaints about documentaries on a case-by-case basis. See FCC News, Report Number 17750 concerning Docket Number 82-564, Nov. 9, 1983.

36. In part, the D.C. Appeals Court had ruled "in creating a broad exemption to the equal time requirements in order to facilitate broadcast coverage of political news, Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broadcaster coverage and increased broadcaster discretion. Rather than enumerate specific exempt and non-exempt `uses,' Congress opted in favor of legislative generality, preferring to assign the task to the Commission. See Chisolm v. FCC, 538 F.2d 366, (D. C. Circuit 1976).

37. Wall Street Journal, Nov. 9, 1983.

38. Broadcasting, Feb. 27, 1984.

## ENDNOTES FOR CHAPTER SEVEN

1. Statement of Phyllis Schlafly, In the Matter of Inquiry Into Section 72.1910 Of The Commission's Rules And Regulations Concerning The General Fairness Doctrine Obligations Of Broadcast Licensees, Docket No. 84-282, before the Federal Communications Commission, Washington, D.C., Feb. 7, 1984. (Here and after this will be referred to as "Schafly Comments.")
2. Federal Register, vol. 49, no. 94, "General Docket No. 84-282; FCC 84-140," May 14, 1984, 20317-20344. (Here and after cited as "Notice of Inquiry".)
3. Among other cases, the FCC cited Court decisions which held that the first amendment granted robust freedom of speech, irrespective of the identity of the speaker, or the persuasiveness of social undesirability of his speech (First National Bank v. Belotti, 435 US 735(1978), Linmark Associates, Inc. v. Township of Willingboro, 431 US 85(1977)). The FCC also noted that a recent Court ruling held that the first amendment was fundamental, absolute, unabridgeable, and that, importantly for the Fairness Doctrine, forbade limiting any individuals' freedom of expression in order to enhance another's (Buckley v. Valeo, 424 US 1(1976)). In a word, the Court currently ruled that the first amendment is absolute, not distributive. It also noted apparent first amendment incompatibility of two Supreme

Court decisions, one (Miami Herald Publishing Co., Division of Knight Newspapers, Inc., v. Tornillo, 418 US 241(1973)) denying ordinary citizens access rights to newspapers on the first amendment grounds of freedom of the press and another (Red Lion Broadcasting Co., et al. v. FCC et al., 395 US 367(1968)), citing freedom of speech, that imposed citizens' access rights on broadcasters (Notice of Inquiry).

For purposes of simplicity, the following comments of Eric Sevaried, Charles Ferris, Esq., Reed Irvine, David Rubin, Floyd Abrams, Doug Ginsby, and James H. Quello are here cited as comments In the Matter of Inquiry Into Section 73.910 Of The Commission's Rules And Regulations Concerning The General Fairness Doctrine Obligations Of Broadcast Licensees, Docket No. 84-282, before the Federal Communications Commission, Washington, D.C., Feb. 7-8, 1984. (Here and after these comments will be referred to as "Sevaried Comments," "Ferris Comments," "Irvine Comments," etc., respectively.)

4. These newer communications technologies include cable distribution, low power television (LPTV), multipoint distribution service (MDS), Satellite Master Antenna System (SMATV), direct broadcast satellites (DBS), videocassette recorders (VCR), and videotext and teletext.

5. Comments of Columbia Broadcasting Service, Inc., and reply comments of Columbia Broadcasting Service, Inc., In the Matter of Inquiry Into Section 73.910 Of The Commission's Rules And Regulations Concerning The Fairness Doctrine Obligations Of Broadcast Licensees, Docket No. 84-282, submitted to the Federal Communications Commission, Washington, D.C., Sept. 6, 1984 and Nov. 8, 1984, respectively. (Here and after these will be referred to as "CBS Comments" and "CBS Reply Comments," respectively.)
6. Comments of the National Association of Broadcasters, In the Matter of Inquiry Into Section 73.910 Of The Commission's Rules And Regulations Concerning The General Fairness Doctrine Obligations Of Broadcast Licensees, Docket No. 84-282, submitted to the Federal Communications Committee, Washington, D.C., Sept. 6, 1984, 11 (Here and after this will be referred to as "NAB comments"); CBS Comments, 48-50; Notice of Inquiry, 20324.
7. CBS Reply Comments, 27.
8. Two hundred twenty-seven independently owned television stations existed in 1983, up from 77 in 1970, and 30 in 1960.
9. Broadcasting/Cablecasting Yearbook, F-31-49, 1984, cited in CBS Comments.

10. Comments of the National Rifle Association, In the Matter of Inquiry Into Section 73.1910 Of The Commission's Rules And Regulations Concerning The General Fairness Doctrine Obligations Of The Broadcast Licensees, Docket No. 84-282, submitted to the Federal Communications Commission, Washington, D.C., Sept. 6, 1984. (Here and after this will be referred to as "NRA comments."), (The INQUIRY here and after will be referred to as The Fairness Doctrine Notice of Inquiry). Comments of Henry Geller and Donna Lampert, The Fairness Doctrine Notice of Inquiry (here and after these will be referenced as "Geller Comments"), Comments of the Media Access Project, The Fairness Doctrine Notice of Inquiry (here and after referred to as "MAP Comments"), Schlafly Comments.
11. Schlafly Comments, Geller Comments, Irvine Comments, Media Access Project Comments.
12. Cited in Statement of Erwin Griswold, press conference, February 2, 1985. For Red Lion, see Red Lion Broadcasting Company, Inc. v. Federal Communications Commission, 395 US 367.

13. Justice Douglas did not participate in this decision, because he had not heard the arguments. In subsequent decisions on political programming, Douglas argued passionately against government content regulation, e.g., Columbia Broadcasting System v. Democratic National Committee, 412 US 94 (1973). Justice Fortas did not participate in the decision.
14. First National Bank v. Bellotti, 435 US 735 (1978), Linmark Associates, Inc. v. Township of Willingboro, 431 US 85 (1977), Buckley v. Valeo, 424 US 1 (1976), CBS Comments, NRA Comments.
15. Federal Communications Commission v. League of Women Voters of California, Supreme Court of the United States, No 82-912, July 2, 1984.
16. Gitlow v. New York, 268 US 652 (1925), Toledo Newspaper Company v. United States, 247 US 402 (1918), Paterson v. Colorado, 205 US 454 (1907), Ex Parte Jackson, 96 US 727 (1877), Schenk v. United States, 249 US 47 (1919), Whitney v. California, 274 US 357 (1927), Abrams v. United States, 250 US 616 (1919).
17. Brandywine Main Line v. Federal Communications Commission, 473 F. 2nd 17, 71-72, (D. C. Circuit, 1972).
18. Broadcasting, February 18, 1985, p. 41.
19. Statement of the Honorable John D. Dingell, press conference, February 6, 1985.

20. Section 315 of the Communications Act of 1934, as amended September 14, 1959, Public Law 86-274.
21. Cited in Geller Comments, MAP Comments, CBS Comments, NAB Comments.
22. Letter To The Honorable Oren Harris In Reference To The "Fairness Doctrine" Implementation, FCC 63-849, 40 FCC 576 (1973).

# BIBLIOGRAPHY

## BOOKS


Brinkley, Alan. Voices of Protests. New York: Alfred A. Knopf, 1982.

Brooks, John. Telephone: The First Hundred Years. New York: Harper and Row, 1975.

Commager, Henry Steele. Majority Rule and Minority Rights. New York: Oxford University Press, 1943.

Compaine, Benjamin M. et. al. Who Owns the Media? White Plains, New York: Knowledge Industry Publications, Inc.

Diamond, Edwin and Bates, Steven. The Spot: The Rise of Political Advertising on Television. Cambridge, MA: MIT Press, 1984.

Geller, Henry. The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action. R-1412-FF, Santa Monica, CA: Rand Corporation, 1973.

Halberstram, David. Powers That Be. New York: Alfred A. Knopf, 1979.

Hodgson, Godfrey. America in Our Times. Garden City, New York: Doubleday and Company, Inc., 1976.

Kahn, Robert J., ed. Documents of American Broadcasting. Englewood Cliffs, NJ: Prentice Hall, Inc., 1978.

Kendrick, Alexander. Prime Time: The Life of Edward R. Murrow. Boston: Little Brown and Company, 1969.

Kraus, Sidney, ed. The Great Debates Background, Perspective, Effects. Indiana: Indiana University Press, 1962.

Martin, John Bartlow. Adlai Stevenson of Illinois. Garden City, New York: Doubleday and Company, 1976.

_____. Adlai Stevenson and the World. Garden City, New York: Doubleday and Company, 1976.

Paley, William S. As It Happened: A Memoir. Garden City, New York: Doubleday and Company, 1979.

Pool, Ithiel deSola. Technologies of Freedom. Cambridge, MA: Harvard University Press, 1983.

Ranney, Austin. Channels of Power: The Impact of Television on American Politics. New York: Basic Books, Inc., 1975.

Simmons, Steven. The Fairness Doctrine and the Media. Berkeley, CA: University of California Press, 1978.

COURT CASES

Abrams v. United States, 250 US 616 (1919).

Associated Press v. United States, 326 US 1.

Brandywine Main Line v. Federal Communications Commission, 473 F. 2nd 17 (D.C. Circuit Court of Appeals, 1972.

Buckley v. Valeo, 424 US 1 (1976).

Chisholm v FCC, 838 F. 2d 349 (D.C. Circuit Court of Appeals, (1976).

Columbia Broadcasting System v. Democratic National Committee, 412 US 94 (1973).

Ex Parte Jackson, 96 US 727 (1877).

Federal Communications Commission v. League of Women Voters of California, Supreme Court of the United States, No. 82-912, July 2, 1984.

First National Bank v. Bellotti, 435 US 735 (1978)

Gitlow v. New York, 268 US 652 (1925).

Linmark Associates, Inc. v. Township of Willingboro, 431 US 85 (1977).

Miami Herald Publishing Company v. Tornillo, 418 US 47 (1974).

Office of Communications of the United Church of Christ v. Federal Communications Commission, 395 F. 2d 994 (D.C. Circuit Court of Appeals 1966).

National Broadcasting Company, Inc. v. US 319 US 190 (1943)

Olmstead v. US, 277 US 438 (1928).

Paterson v. Colorado, 205 US 454 (1904).

Schenk v. United States, 249 US 47 (1919).

Whitney V California, 274 US 357 (1927).

GOVERNMENT DOCUMENTS

67 Congressional Record-House, 5483.

67 Congressional Record-Senate, 12497-12505.

FCC News, Report No. 17750 concerning Docket No. 82-564, Nov. 1983.

FCC Report and Order, see BC Docket No. 82-564, adopted Nov. 8, 1983 and released Nov. 16, 1983.

8 FCC Reports 333. The Mayflower Broadcasting Company, 1941.

8 FCC Reports 2d 381. Letter from Federal Communications Commission to Television Station WCBS-TV, 1967.

10 FCC Reports 515. United Broadcasting Co. (WHKC), Docket 6631. June 26, 1945.

11 FCC Reports 372. In Petition of Robert Harold Scott for Revocation of Licenses of Radio Stations KQW, KPO, KFRC, July 19, 1946.

11 FCC Reports 197. In Petition of Sam Morris for Denial of Application of KRLD Radio Corp. (KRLD) for Renewal of License. Memorandium Opinion and Order, 1946.

13 FCC Reports 1246. In the Matter of Editorializing by Broadcast Licensees. 1949.

16 FCC Reports 715. "Interpretative opinion In the Matter of Petition of CBS and NBC for Reconsideration and Motions for Declaratory Rulings or Order Relating to the Applicability of Section 315 of the Communications Act of 1934, as Amended, to Newscast by Broadcast Licensees. 1959.

23 FCC Reports 2d 707. Letter to Mr. Nicholas Zapple in Re Request by Nicholas Zapple, Communications Counsel, Committee on Commerce, For Interpretive Ruling Concerning Section 315 Fairness Doctrine, 1970.

26 FCC Reports 715. In the Matter of Petitions of the Columbia Broadcasting System, Inc. and National Broadcasting Co. for Reconsideration and Motions for Declaratory Rulings or Orders Relating to the Applicability of Section 315 of the Communications Act of 1934, as Amended, to Newcasts by Broadcast Licensees, Interpretive Opinion adopted June 15, 1959.

30 FCC Reports 576. Letter to the Honorable Oren Harris in Reference to the Fairness Doctrine.

40 FCC Reports 576. Letter to The Cullman Broadcast Co., Inc. and to The Walker County Broadcasting Co., Inc., in Re Responsibility Under the Fairness Doctrine, 1973.

44 FCC Reports 2303. Report and Statement of Policy re: Commission en banc Programming Inquiry.

48 FCC Reports 2d 261, 1974.

55 FCC Reports 2d 297, Petitions of the Aspen Institute Program on Communications and Society and CBS, Inc., For Revision or Clarification of Commission Rulings Under Section 315 (a) (2) and 315 (a) (4), 1975.

29 Federal Register 10415. Fairness Doctrine Primer, 1964.

14 Revenue Ruling 1199. Letter to Allen H. Blondy, Feb. 6, 1957.

U.S. House of Representatives. Hearings before the Select Committee to Investigate the Federal Communication Commission pursuant to HR 691, Aug. 5, 6, 31, Sept. 1, 1948.

U.S. House of Representatives. Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, 86th Cong., 1st sess., June 29, 30, July, 1959. HR's 5389, 5675, 6326, 7122, 7180, 7206, 7602, 7985.

U.S. House of Representatives House Report 802. Use of Broadcast Facilities by Candidates for Public Office, FCC 58-936--Public Notice 63585, Oct. 1, 1958, question no. 12, August 6, 1959.

U.S. Statutes. Sixty-Second Congress, Second Session. The Radio Act of 1912. ch. 287, August 13, 1912.

_____. Sixty-Ninth Congress, Second Session, The Radio Act of 1927, ch. 168.

_____. Seventy-Third Congress, Second Session, The Communications Act of 1934, ch. 642.

_____. Eighty-Sixth Congress, First Session, Section 315 of The Communications Act of 1935 as Amended Sept. 14, 1959, Public Law 86-774.

U.S. Senate. Proceedings of the Fourth National Radio Conference, Government Printing Office, 1926. See also Hearings on S. 1 and S. 1754, 69th Congress, 1st sess.

U.S. Senate. Hearings before the Communications Subcommittee of the Committee on Interstate and Foreign Commerce. 86th Cong., 1st sess., June 18, 19, 23, 24, 25, 1959.

U.S. Senate. Hearings before the Communications Subcommittee of the Committee on Interstate and Foreign Commerce. 86th Cong., 1st sess., 1959, S. Reports 1585, 1604, 1858, and 1929, Political Broadcasting, Co.

U.S. Senate. Hearings before the Communications Subcommittee of the Committee on Interstate and Foreign Commerce, Presidential Campaign Broadcasting Act, 86th Cong., 2nd sess., 1960.

## COMMENTS ON GOVERNMENT DOCUMENTS

In the Matter of Inquiry into Section 72.1910 Of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Docket No. 84-282, before the Federal Communications Commission, Washington, DC. Comments were submitted to the FCC by the following organizations:

Comments of Columbia Broadcasting System, Inc.
Reply Comments of Columbia Broadcasting System, Inc.
Comments of National Broadcasting Company, Inc.
Reply Comments of National Broadcasting Company, Inc.
Comments of American Broadcasting Companies, Inc.
Comments of Mobil Oil Inc.
Comments of National Bar Association and the National Association for the Advancement of Colored People
Comments of the Democratic National Committee, Democratic Congressional Campaign Committee and the Democratic Senatorial Campaign Committee.
Comments of Media Access Project and Telecommunications Research and Action Center
Reply Comments of Media Access Project and Telecommunications Research and Action Center
Comments of the National Rifle Association
Comments of the National League of Cities
Comments of the National Telecommunications and Information Administration
Commemts of Henry Geller and Donna Lampert
Comments of Group W
Reply Comments of Group W
Comments of General Motors Corporation, International Paper Company and Campbell-Ewald Company
Reply Comments of the US Public Interest Group

Comments before the FCC were made by the following people on February 7 and 8, 1985:

> Floyd Abrams, Jerome Barron, Jeff Baumann, Lee Bollinger, Michael Botein, Bev E. Brown, Andrew Buchsbaum, Terry Dolan, Wallace Dunlap, Timothy Dyk, Bruce Fein, Charles Ferris, Charles Firestone, Doug Ginsburg, Ralph Goldberg, Reed Irvine, Bob Johnson, Sis Kaplan, Tom Krattenmaker, John Martin, Bill Monroe, Scott Powe, Peter Prichard, David Raim, David Rubin, Phyllis Schlafly, Mike Schooler, Andrew Schwartzman, Chip Shooshan, Eric Sevareid, Steve Simmons, Sam Simon, Craig Smith, J. Clay Smith, Jr., John Spain, Joe Waz.

## JOURNALS AND MAGAZINE ARTICLES


Bazelon, David L. "The first Amendment and the 'New Media'--New Directions in Regulating Telecommunications," 33 Federal Communications Law Journal 2.

Bliven, Bruce. "How Radio is Remaking Our World." The Century Magazine 108 (June 1924): 149.

Bollinger, Lee C., Jr. "Freedom of the Press and Public Access: Toward A Theory of Partial Regulation of the Mass Media," 75 Michigan Law Review 1 (1976).

Broadcasting, Mar. 21, 1934; Sept. 5, 1947; Mar 8, 1948; Apr. 6, 1948; Jan. 6, 1949; Feb. 27, 1984; Feb. 1, 1985; Feb. 18, 1985.

Broadcasting/Cablecasting Yearbook, F-31-49, 1984.

Fowler, Mark S. and Daniel L. Brenner. "A Marketplace Approach to Broadcast Regulation," 60 Texas Law Review 1 (1960).

Garvey, Daniel E. "Secretary Hoover and the Quest for Broadcast Regulation." Journalism History 3, (1976-77): 128-131.

Godfrey, Donald. "The 1927 Radio Act: People and Politics." Journalism History 4, (1977): 75-78.

Herring, E. Pendelton. "Politics and Radio Regulation." Harvard Business Review XII (January 1935): 167-178.

Hoover, Herbert. "Policing the Ether." Scientific American (Aug. 1922).

Kalvern, Harry. "Broadcasting, Public Policy and the First Amendment." Journal of Law and Economics 10 (1967): 15-89.

MacMillan, John E. "New Voices in a Democracy." Television Quarterly 3 (Summer, 1964).

McKerns, Joseph. "Industry Skeptics and the Radio Act of 1927." Journalism History 3, (1976-77): 128-131.

Morse, Arthur B. "Four Days at Bellagio." European Broadcast Union Review (September 1969).

Mullahy, Donald P. "The Fairness Doctrine: Benefits and Costs." Public Opinion Quarterly vol. 33, no. 4 (Winter 1969-1970).

Sarno, Edward F., Jr. "The National Radio Conferences," Journal of Broadcasting XIII, (Spring 1969).

United States News and World Report, May 21, 1943.

NEWSPAPERS

New York Times, May 7, 1926; Oct. 11, 17, 18, 23, 29, 1959; Nov. 3, 5, 1959; May 17, 18, 1960; Aug. 1, 10, 1960; Sept. 20, 21, 22, 23, 24, 25, 26, 28, 1976; Oct. 3, 5, 8, 16, 18, 23, 1976; Feb. 16, 1980; Sept. 19, 20, 1980; Oct. 18, 1980; Nov. 9, 1984.

Wall Street Journal Nov. 9, 1983.

SPEECHES AND ADDRESSES

Statement of the Honorable John D. Dingelll, Press Conference, Feb. 6, 1985.

Durham, Congdon B. "Broadcast News and the Fairness Doctrine." Address to the Practicing Law Institute, February 27, 1971.

Goodman, Julian. "The Fairness Doctrine vs. Press Freedom." Address to 22nd Annual Convention of American Women in Radio and TV, May 18, 1973.

Statement of Erwin Griswold, Press Conference, Feb. 6, 1985.

Minow, Newton N. "The Vast Wasteland," Address to the National Association of Broadcasters, Washington, DC, May 9, 1961, cited in Kahn, Documents of American Broadcasting, 28-291.

Murrow, Edward R. "Wires and Lights in the Box," Address to the Radio Television News Directors Associatin, Chicago, IL, Oct. 15, 1958, cited in Kahn, Documents of American Broadcasting.

Ridings, Dorothy. Remarks at a Conference held at the Institute of Politics, John F. Kennedy School of Goverment, Cambridge, MA, Jan. 29-31, 1982, cited in Television and the Presidential Election: Self Interest and the Public Interest edited by Martin Linksy, Lexington, MA: Lexington Books, 1983.

Sarnoff, Robert W. "An NBC View" in The Great Debates, ed. Kraus, 59.

THESES

Curtis, Charles Grant, Jr., "Franklin D. Roosevelt and the Commonwealth of Broadcasting," B.A. Thesis, Harvard College, 1978.

Murray, Michael Dennis "See It Now vs. McCarthyism: Dimensions of Documentary Persuasion," Ph.D. Diss., University of Missouri, 1974.