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The Positive- and Negative-Right Conceptions of Freedom of Speech and the Specter of Reimposing the Broadcast Fairness Doctrine ... or Something Like It

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The Positive- and Negative-Right Conceptions of Freedom of Speech and the Specter of
Reimposing the Broadcast Fairness Doctrine ... or Something Like It.

by

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A thesis submitted in partial fulfillment
of the requirements for the degree of
Master of Arts
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DEDICATION

I would like to dedicate this thesis to my parents, Gary and Judy Fowler. Their love, patience and support over the years, especially during my many years in undergraduate and graduate school, has been greatly appreciated and cherished. Without them, none of this would have been possible. Thank you.

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TABLE OF CONTENTS

ABSTRACT iii

CHAPTER I: INTRODUCTION1

 Introduction/Background1

 Overview4

CHAPTER II: CONCEPTUALIZING FREEDOM6

 The Conceptual Debate6

 Essentially Contested Concepts7

 The Essential Contestability of Freedom9

 Positive and Negative Liberty: An Example of Freedom’s Essential
 Contestability12

 Positive and Negative Conceptions of Free Speech in the Fairness
 Doctrine Debate21

CHAPTER III: THE HISTORY OF THE FAIRNESS DOCTRINE25

 Introduction25

 Early Years of Radio Regulation25

 Early Years of the FCC28

 Fairness Doctrine Spelled Out30

 Doctrine Codified?32

 Kennedy and Johnson Use Fairness and Cullman Doctrines.....33

 The *Red Lion* Case36

 Post-*Red Lion* Developments40

Miami Herald v. Tornillo Contradicts Fairness Doctrine Rationale47

 The Questioning of the Justifications for the Fairness Doctrine50

 The Death of the Doctrine57

CHAPTER IV: POST-DOCTRINE59

 The Specter of Reimposition?59

 The Immediate Reaction to the Repeal60

 The Clinton Years63

 Ownership, Diversity, Localism and Other Issues in the Bush Years68

 Fairness, Localism and Diversity in the Age of Obama82

 Continuing Debate90

CHAPTER V: PROBLEMS WITH THE POSITIVE CONCEPTION91

 A Positive or Negative Conception?91

Positive-Right Paternalism	92
The Development of a More Negative Right to Free Speech	103
Practical Problems with the Positive Conception	120
Negative Consequences for Negative-Right Speech?	129
CHAPTER VI: CONCLUSION	131
Review	131
Other Areas of Study	132
Concluding Remarks	135
REFERENCES FROM THE TEXT AND FOOTNOTES	137
ABOUT THE AUTHOR	END PAGE

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ABSTRACT

A key theoretical debate underlying the now defunct Federal Communications Commission (FCC) regulation known as the Fairness Doctrine is conflict over what constitutes the right to freedom of speech: a positive or negative conception. Similarly, since repeal of the Doctrine, other FCC measures to uphold the “public-interest” standard in broadcasting have relied on a positive conception of speech. This thesis demonstrates the history of this debate through court cases, news reports, scholarly articles and historical documents. It then is argued that the positive-right nature of these regulations is problematic philosophically, constitutionally and practically. The positive-right conception lends itself to an uncomfortable level of paternalism on the part of government regulators, a constitutional abridgement of negative-right speech and a tedious involvement of government in regulation that can lead to a chilling effect on speech. The conclusion then suggests further areas of research related to the topics covered in the thesis.

CHAPTER I

INTRODUCTION

Introduction/Background

One of the most notable and highly debated regulations of broadcast radio and television in the United States was a policy adopted in 1949 by the Federal Communications Commission (FCC) known as “The Fairness Doctrine.” The Doctrine held licensees to a “public-interest” standard which called for them to present reasonable opportunity for the airing of contesting points of view when covering issues of public importance to their community (FCC, 1949). Proponents, in light of the scarcity of broadcast outlets (frequencies and channels), viewed it as serving the public-interest necessity to foster a robust public dialogue that represented all voices from the public and not skewed to the side of the station owners’ opinions; whereas opponents viewed it as a restriction on free speech, creating a “chilling effect” which led stations to stray away from covering any controversial public issues due to the requirement to present differing perspectives (Corry, 1987; Hershey, 1987).

The FCC did away with enforcement of the regulation in 1987 after it determined that such a chilling effect did exist and it was determined in court that the regulatory agency was not required by statute to enforce it (FCC, 1987; *Meredith Corp. v. FCC*, 1987). Since then, periodic attempts, calls and suggestions have been made to reinstate the Fairness Doctrine or regulations similar to it over the past 20-plus years, with several

prominent Democrats voicing the most recent suggestions since their party has regained power in both Congress and the White House (Calderone, 2009b, 2009d, 2009e; Cusack, 2008; Eggerton, 2007a). All attempts at reinstating the Doctrine have been unsuccessful, yet opponents still display worry over its potential return and proponents continue to voice their support for it periodically (“Despite Signs,” 2009). Conservative and Republican critics, lawmakers and talk radio hosts have gone further to argue that other seemingly innocuous calls for stricter media ownership rules, focus on public-interest obligations and regulations requiring more local input in programming (called “localism”) can be viewed as stealth attempts at achieving the goals of the Fairness Doctrine proponents without actually reinstating the Doctrine (Eberle, 2009; Eggerton, 2008b, 2009a; Limbaugh, 2009; Thompson, 2008). They view this as a way to stifle what has become a predominately conservative talk radio format.

One particularly important theoretical debate which the controversy over the Fairness Doctrine touches on is that over the distinction between what Isaiah Berlin (2002) dubbed “negative” and “positive” liberty. In a sense, the entire debate over the Fairness Doctrine and content regulation of the media can be related to this theory of a positive/negative-freedom dichotomy. Berlin believed that there were two strains or conceptions of freedom that had grown up along side each other and never really came into conflict with each other until around the time of his writing. He argued that this conflict could be exemplified in the Cold War and the differences in ideology of the capitalist, Western societies and the Communist societies. Both appealed to their own conceptions of freedom, however contrasting they may have been (Berlin, 2002).

Berlin’s negative vision of freedom implies the absence of restrictions, force or

coercion on the part of others, particularly government. This conception holds that as long as an individual is not hindered from doing what he is capable of doing (not what he wishes to do, but what he is physically capable of) by outside forces, particularly government, he is said to be free. This conception is essentially one of non-interference (Berlin, 2002).

The positive conception of freedom involves the individual's desire to control himself. This vision holds that not only can an individual's freedom be hindered by other individuals or government but also by other factors such as the individual's emotions, impulses or socio-economic status. This conception often requires action or intervention on the part of others in order for the individual to realize his freedom, not just inaction or non-interference on the part of others like the negative conception (Berlin, 2002).

In the area of free speech, the tension between positive and negative freedom can be exemplified in a rather simple manner. At the heart of the tension is the question, "Is government responsible for actively fostering and ensuring a diverse and robust environment in which all opinions are heard, or is its responsibility to refrain from any action, allowing individuals to speak freely without government interference?" A positive conception of freedom is what is implied in the former notion. In its positive form, freedom of speech implies that government should be actively involved in ensuring all speech is presented to the public. The latter notion implies a negative conception of freedom. In its negative form, freedom of speech implies that government stay out of the way in terms of individuals exercising speech.

The differences in conceptions of freedom are indicative of the fact that disagreement abounds over the nature of freedom of speech and expression, which helps explain much of the debate over the Fairness Doctrine and other similar media regulations.

W.B. Gallie brought this issue of conceptual disagreement to the forefront in a 1956 essay titled “Essentially Contested Concepts.” Gallie argued that there are a range of concepts which people share in common that enable them to come to a certain degree of agreement in certain circumstances and disagreement in others. There may be a base understanding and agreement on the definition of such a concept but a large disagreement on the specifics of it. This disagreement stems from the normative, qualitative and abstract nature of the particular concepts (Gallie, 1956).

Overview

This thesis will highlight areas in which the debate over the Fairness Doctrine relates to a more theoretical debate over what is the appropriate conception of freedom of speech: positive or negative? Case law, news articles, opinion pieces, previous scholarly work and official FCC and other government documents will be used to demonstrate the presence of this underlying theoretical contest over a positive versus negative conception of freedom of speech.

The next chapter will detail the positive- and negative-liberty dichotomy first explicitly expressed by Berlin. This dichotomy will be given as an example of what Gallie would call an “essentially contested concept.”

A large purpose of the third and fourth chapters is to demonstrate how the positive-right/negative-right dichotomy has underlain the history of the debate over the Fairness Doctrine and similar public-interest regulation. The third chapter will be a history and background of the Fairness Doctrine and its use, including some background on early broadcast regulation leading up to the Doctrine as well as the removal of the Doctrine

(detailing the lead up to the FCC's decision and relevant court opinions). The fourth chapter will cover the attempts, calls and suggestions to revive the Fairness Doctrine, including the immediate reaction to removal in the late 1980s and periodic calls, murmurings and actions attempting to restore it in the last 20-plus years. It will also cover related public-interest regulations like localism and media ownership which seek the same result: diversity of viewpoint and a more informed democratic decision-making process.

The fifth and perhaps most important chapter will argue against the positive-right conception of free speech exemplified in the Fairness Doctrine and similar broadcast regulation aiming for "fairness," "diversity" and the "public interest." These arguments will fall under three main areas of critique: a philosophical argument, a constitutional/legal argument and a practical argument. The paternalistic nature in which a positive-right conception of speech can take, the negative-rights nature of free speech that has developed in constitutional case law and the impracticality of government enforcing values like "fairness" and the more general public interest through other regulations like localism and ownership rules, as well as the "chilling effect" on speech that can result from positive action on the part of the government to regulate it, will all be used as evidence to support the general argument against the positive conception.

The sixth and final chapter will act as a conclusion. It will summarize the thesis and the arguments made as well as suggest further areas of inquiry that could be made in future studies relating to the issues touched on in the thesis.

CHAPTER II

CONCEPTUALIZING FREEDOM

The Conceptual Debate

The Fairness Doctrine brought, and continues to bring, heated disagreement by those on all sides of the debate. Proponents and opponents alike often argue their side based on appeals to supposed common values and traditions in society they believe should be maintained, enhanced or returned. Chief among those values they portend to hold up as justifying their point of view has been free speech, and the broader First Amendment in general. Opponents argue that the Fairness Doctrine acts in a way to stifle the freedoms of speech, press and (in cases of religious broadcasts) religion due to a perceived encroachment of the regulatory arm of the government over broadcast content (Eggerton, 2009a; Hentoff, 2007; LaRue, 2009). Proponents argue that the Doctrine upholds the broader First Amendment values of ensuring balanced, robust and informed discussion of controversial issues, free of station self-censorship. In their minds, the listener's right to receive information outweighs the speaker's right. (Kennedy, 2005; Lee, 1987).

What we find is that both those for and against the Doctrine appeal to the same concept: freedom. But how is it that this basic concept of freedom, more specifically freedom of speech, can be appealed to by both those for and against the Doctrine? What enables opposing sides to appeal to the same concept to justify their positions? Is one side simply ignorant of the meaning of the concept they are appealing to, or is there something

more complicated involved in the debate? One answer may be that the core concept itself, although nominally uniform, is one that is in actuality contested. It may be that the concept of freedom, on the surface, seems fairly conceptually clear but in actuality can be used by the opposing sides in different ways.

Essentially Contested Concepts

W.B. Gallie (1956) brought this very issue to the forefront in his essay on “Essentially Contested Concepts.” Gallie argued that certain social concepts carry with them a degree of internal complexity and normative weight which can complicate their use. Members of society, even the most well-educated, may believe they hold the same understanding of these concepts but, in fact, may not. The source of this conceptual disagreement is largely the value-laden nature of the concepts in question. In other words, members of a society may be able to come to a certain degree of agreement on such social, and often political, terms in one instance, but they may strongly disagree on their use in other contexts based on the weight they put on certain aspects of the concept and the normative priorities they hold (Gallie, 1956).

The examples which Gallie gave to demonstrate this conceptual confusion were concepts like “democracy,” “art” and “the Christian tradition” (Gallie, 1956). For example, what characteristics of a society make it a democracy: its methods of voting, its degree of political freedom? What degree of each is necessary to meet the definition of democracy? While individuals may hold a general notion of what it means for a society to be dubbed a democracy, they may differ when it comes to the specifics. Another concept that may be of particular import to this thesis and can help elucidate the issue further would be “fairness.”

For example, what makes a decision fair? What elements are needed either in the decision or the process to make the final outcome fair? Members of a society may often not necessarily agree on what is a fair outcome or presentation of sides. While we may hold a general agreement on what is meant by concepts like fairness, we may find disagreement on the specifics.

This disagreement can stem from the normative weight we put on certain elements of a concept's definition. While certain concepts used in social and political life could be argued to be value-neutral and descriptive, perhaps terms like "voting" or "education level," there are others that cannot be strictly referred to as value-neutral or merely descriptive. The aforementioned concepts are examples of such, and there are many others.

As might be evident from the above examples, this idea of essentially contested concepts is of particular import to political terminology. In noting essentially contested concepts in the political realm, William Connolly (1993) demonstrated that, to a degree, the term "politics" itself can be viewed to be essentially contested. The range of instances that can be termed "political" are varying and often contextual, perhaps leading users of the concept to agree on its application to an occurrence in one instance and disagree in another (Connolly, 1993).

In linking Gallie's contested concepts to the area of politics, Connolly went further to note that, "When groups range themselves around essentially contested concepts, politics is the mode in which the contest is normally expressed" (1993, p. 40). He argued that the contests over the conceptualization of such concepts relate to our "deepest commitments" and affect our society's politics in an important way (p. 40). He explained that:

In convincing me to adopt your version of ‘democracy’, ‘politics’, or ‘legitimacy’, you convince me to classify and appraise actions and practices in new ways; you encourage me to guide my own conduct by new considerations. And if I decide to repudiate your use, I am likely to range myself with others opposing the interpretations, strategies, and policies that express the judgments you would have us accept. (pp. 39 & 40)

Politics, in this view, could be said to be an act in which opposing sides try to convince each other that their conceptualizations of issues and behaviors in a society are correct.

Robert Grafstein (1988), in arguing for a realist approach to the study of contested concepts, perhaps noted it best when he said that such an approach would say: “. . . essential contestability does not characterize political concepts by accident. These concepts are essentially contestable because they are political.” (p. 26).

To the extent that social and political concepts are socially constructed within a society, their use can always be seen to be a matter of a certain degree of perspective. Objective, observable behaviors and actions by individuals take on new meaning when they are viewed in light of a particular set of conceptual meanings. It may be inappropriate to view such concepts as natural phenomena that can be observed objectively. Members of a society can use such terms in order for them to make better sense of their political life but may never come to a precise, agreeable definition of them.

The Essential Contestability of Freedom

A concept that raises similar types of defining questions and is of specific import to this paper is the general concept of freedom, or more specifically “rights.” It should be noted here that the terms rights, freedom and liberty will often be used interchangeably in this thesis, while occasionally referring to rights as a more specific enumeration of what

constitutes the terms freedom and liberty¹. Concepts of rights have a long and rich history in Western society. One could go as far back as the Old Testament to see protections for individuals as well as private property as indications of an acknowledgment of rights. Though this was not related to a notion of formal rights, it did represent an early precursor to such an idea (Pagels, 1979). The formulation of a formal concept of rights came later through the works of Hobbes, Locke, Rousseau and many succeeding political philosophers. As such, the scope of this thesis could not do this history justice, nor could it include the work of every philosopher who had an impact on the concept of rights. Rather, the main focus of this thesis will turn to the dichotomy of positive and negative liberty, first explicitly theorized by Isaiah Berlin in the late 1950s, to explain much of the debate over the Fairness Doctrine and related broadcast regulation (Berlin, 2002).

In recent times, one important formulation of what constitutes the components of the concept of rights came with the United Nations Universal Declaration of Human Rights. This fairly extensive list of rights was supposed to be geared toward creating a “common understanding of these rights and freedoms” (United Nations). In fact, some have called it authoritative in its catalog of rights (Henkin, 1989). However, a simple listing of the rights included in this document can quickly point out the problems with the notion that there is some common understanding of what constitutes the concept of rights or that it is the end-all/be-all authoritative catalog that all the world’s people should adopt, as some have suggested. Rather, some would argue that it may be practically seen as a

¹ The term “rights” is virtually identical to the terms “freedom” and “liberty” in the U.S. Constitution. The Bill of Rights is put forth as a protection and guarantee of the freedom and liberty believed to belong to the people. It is in essence a type of operational definition of “freedom” or “liberty.” The connection between “right” and “liberty” or “freedom” becomes more problematic when referring to other charters of rights which include such welfare-oriented rights such as rights to a free education and a minimum wage. The difference between such charters and the Constitution will be noted in more detail later in this chapter.

general agreement on the idea of human rights, without adherence to the specified rights enumerated in the document – more of a pluralist approach (Messer, 1997).

Most Western countries that espouse a respect for human rights would no doubt agree with the rights to “life, liberty and security of person” noted in the document, and most would agree with the rights to “freedom of thought, conscience and religion.” But, what about the rights to “reasonable limitation of working hours” and “periodic holidays with pay”? Or, what about the right to a free “education”? (United Nations) To the degree that certain supposed rights are held up by the Declaration but not agreed to by all societies who espouse their support for the general notion of human rights, there could be said to be a conceptual disagreement over the term rights.

And to what degree can the conceptualization of a particular right, like that of free speech, be said to be uniform? In the example of free speech (of particular importance to this thesis), does the concept refer to government taking a hands-off approach or actively involving itself in fostering speech? Specifically dealing with freedom of speech or expression, the Universal Declaration states that such a right exists – leaving both a “hands-off” and a “fostering” interpretation possible, unlike the U.S. Constitution which implies, at least in its wording, a strictly “hands-off” interpretation on the part of government.

Clearly not every Western state secures all of these rights or a particular conceptualization of these rights as fundamental to their society – not to mention non-Western countries (to the extent that even the term “Western” is a completely clear concept). The concept of rights is one with obvious political implications. As such, it is prone to essential contestability just as any other political concept may be. Peter Jones

(1989) noted this constant dilemma with respect to the concepts of rights when he stated it this way:

It is an unfortunate legacy of the natural rights tradition that people are sometimes still inclined to view argument over rights as though it must be argument over the existence of a single indisputable catalogue of rights. Many contemporary pronouncements on human rights also imply that that notion must incorporate a single uniform set of rights. But the concept of a right is one that can be accommodated in many different moral points of view and those who share the more specific idea of human rights may still have reason to disagree over what rights humans have and why. Consequently, to look for an end to argument over rights may be as absurd as to look for an end to moral and political argument itself. (p. 96)

This demonstration of the disagreement that can occur over what specifically constitutes the value-laden and politically-charged concept of rights is related to the dichotomy first formally laid out by Berlin (2002).

Positive and Negative Liberty: An Example of Freedom's Essential Contestability

Berlin's 1958 essay, based on a lecture he delivered that year, spoke of two conceptions of liberty or freedom. He saw these conceptions as a key ideological difference that might explain the conflict between the West and communist countries (Berlin, 2002).

The first conception is that of non-interference. This conception says that a person is free so long as he is not prevented to act by others. It emphasizes actual coercion or interference from another person. In that sense, Berlin related it to Hobbes' notion that a man is free provided that he, "in those things, which by his strength and wit he is able to do, is not hindered to do (sic) what he has a will to" (Hobbes, 1985, p. 262). This conception is not related to what the person may have the desire to do but rather what he can actually, physically do barring any constraints from others (Berlin, 2002).

Berlin called this first conception the “negative” view of liberty; it pertains to negative action from others or what they cannot do without violating an individual’s freedom. In that sense, Berlin related this negative conception to the writings of Locke, Mill, Constant and Tocqueville, who all considered there to be certain areas of freedom for the individual in which no one (particularly government) could interfere without negating the individual’s ability to use his freedom to reach ends which are considered to be “good or right or sacred” (Berlin, 2002, p. 171).

Berlin was also careful in his essay to delineate between this concept of freedom and other human goals such as equality and justice. He noted that we should not confuse the presence of liberty with the presence of equality; just because a person is in poor economic conditions, this does not mean that he is not free. “Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience,” he wrote (Berlin, 2002, p. 172), adding:

If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral. But if I curtail or lose my freedom in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs. (p. 172)

Berlin argued that this loss of liberty may have resulted in an increase in his happiness or peace, but still his freedom has been damaged (Berlin, 2002).

The last important component of this conception of liberty noted by Berlin is that it concerns the area or scope of the control over individuals, not who yields the control. That is what mainly distinguishes this first conception from the second (Berlin, 2002).

The second conception is what Berlin dubbed the “positive” conception of liberty. This conception involves the individual’s desire to control himself, or be “his own master”

(Berlin, 2002, p. 178). This relates to the wish of individuals to be the sole and final determinant of their decisions and life. An individual's desire to direct his own course through life and determine his own way without any constraints or hindrances is what is captured by this conception of positive liberty. In this conception, the individual himself yields reasoned control over his life, not others. This conception is not concerned with the area of control but who is in control. Berlin related this second conception with the notion that there is a true self within individuals that acts with reason to attain its will. This idea poses that an individual's true will can be not only hindered by other individuals but by other factors such as his irrational emotions or misguided impulses (Berlin, 2002).

It is this last point concerning positive freedom, the idea that an individual may not even be aware of his own true self or will, that Berlin was most critical of in his essay. Berlin saw this notion as a tipping point into paternalism – allowing others to abridge a person's negative rights in order to help them realize their true, reasoned self. In fact, he referenced Immanuel Kant when he wrote, "Nobody may compel me to be happy in his own way" and "paternalism is 'the greatest despotism imaginable'" (Berlin, 2002, p. 183).

This paternalism is not unique to Berlin or Kant alone; many in the "liberal" tradition have warned against such paternalism – of note was Hayek just a decade or so earlier when he warned that such paternalism was leading us down a "road to serfdom" (Hayek, 1944). This paternalism resulting from the positive conception can in instances have the effect of treating others as if they were objects and not individuals with their own desires and wills. In fact, Berlin noted in his essay that this "positive" conception of self-mastery or self-direction could be easily translated into collective self-mastery or self-direction – essentially a movement that treats individuals as members of groups

aiming for collective governance (Berlin, 2002).

Charles Taylor (1985) referred to the positive conception as one in which “freedom resides at least in part in collective control over the common life” (p. 211), or “collective self-government” (p. 213). But Berlin repeatedly emphasized in his essay the notion that the ends of individuals are different and any attempt to claim a unified purpose or end, in a sense a unified standard of public interest², is misguided and can lead to a type of despotism that tramples individual negative rights in the name of promoting a perceived common goal. Berlin, although acknowledging that the negative view could be construed to allow despotism provided that the despot does not interfere with the people’s actions, places more emphasis on the positive view as potentially leading to such despotism in the form of paternalism (Berlin, 2002).

No doubt the pertinent example of such paternalism in the name of the freedom of man’s “true self” at the time the essay was written could be seen in the growth of communism. At that time, the seeming contrast between communitarianism and individualism seen in the contrast between communism and capitalism played an important role in the political discourse and would continue to attract much attention by scholars even toward the end of the Cold War (Avineri & de-Shalit, 1992). In fact, Berlin pointed out that Marx was a proponent of the idea that there is a reasoned and true path for individuals that can be realized through proper understanding: “liberation by reason” (Berlin, 2002, p. 190). Such a liberation in practice calls upon positive action by others, which is often in the form of government action, to enable individuals to reach such a state of self-realization or

² The wording of “public interest” used here is no mere coincidence. It will be shown in later chapters that a large part of arguments for the Fairness Doctrine, and much of the broadcast regulation in the United States that has developed since the advent of the medium, relies on appeals to the “public interest.”

fulfillment³. As such, the type of “rights” stemming from the growth of socialism and communism that placed emphasis on economic and social conditions rather than individual property rights, because they involved positive action on the part of government rather than a hands-off, “negative” approach, have been dubbed “positive” rights⁴.

Berlin was careful to note that the negative and positive conceptions developed along side of each other, never really coming into clear conflict until more recent times (the divide between the West and communism being the example). As such, he noted that many philosophers, including Kant who warned against paternalism, had an element of each conception in their writings. He pointed out that a common assumption of many of the notable political philosophers, including from Locke to Rousseau to Marx, was the idea that “the rational ends of our ‘true’ natures must coincide, or be made to coincide, however violently our poor, ignorant, desire-ridden, passionate, empirical selves may cry out against this process” (Berlin, 2002, p. 194). This conception, he held, meant that freedom to do what is “irrational” is not freedom and to “force empirical selves into the right pattern is no tyranny, but liberation” (Berlin, 2002, p. 194). He related this idea particularly to Rousseau and Kant, who held the notion that the willful surrender of our selves to the society (Rousseau) or to the law (Kant) does not mean we lose freedom but rather that we secure it.

³ This wording of “realization” or “fulfillment” of rights is often used when referring specifically to welfare-oriented, positive rights (United Nations; United Nations Office).

⁴ The negative conception of liberty and its non-interference principle have generally been used to describe rights which involve a hands-off approach on the part of government and others – essentially leaving individuals alone. Other types of “rights” are left to be placed under the positive conception of liberty. However, it should be noted here that Berlin’s original essay on the distinction between negative and positive liberty did not specifically outline what specific types of “rights” would fall under each concept of liberty. He did, however, allude to the fact that the contestation between the two concepts could be exemplified in the struggle between the Western, capitalist countries and their Communist counterparts. At times it is argued that certain provisions are required from a society in order for individuals to fully realize their positive liberty; such provisions have been termed “positive rights.”

Berlin viewed these ideas as part of the rationalist approach to social science: the idea that the social sciences could be ordered in a way similar to the natural sciences, the notion that reason could create a uniform set of laws that would represent man's true self. As such, individuals, according to this view, should be educated to obey the laws which will make them rational. In essence, such a framework requires action on the part of the government to foster an environment which it believes is in accordance with promoting an informed and rational citizenry. Relating this back to despotism, Berlin showed how this attitude – the one that sees educating and leading individuals to follow reason – can easily be used by, and has often been used by, dictators to justify their actions. This conception leads those who believe they are acting with complete rationality to treat others who they believe are not acting rationally like children in need of correcting – thus justifying interference with them in the name of “liberty” (Berlin, 2002).

Berlin concluded his essay by noting that a degree of plurality is needed. He believed that the negative conception of liberty could better attain this, since it did not suppose one true goal of men or one set of laws that would reflect what all reasoned individuals would do, unfettered by emotions or conditions they find themselves in. In demonstrating this belief, he pointed in a footnote to Jeremy Bentham who wrote that “Individual interests are the only real interests” (Berlin, 2002, p. 217). He believed that the negative conception at least acknowledged, as did he, that “human goals are many, not all of them commensurable, and in perpetual rivalry with one another” (Berlin, 2002, p. 216).

Berlin's dichotomy shows just that, a dichotomy – two similar but eventually divergent (historically speaking) conceptions. That dichotomy will be shown in this thesis to be of particular importance to the Fairness Doctrine debate. But Berlin would point out

that these two conceptions are by no means the only way of studying rights or human liberty. They are, however, one useful way.

In fact, the varied criticisms of Berlin's essay, displayed in writings by those who believed that his two conceptions of liberty are not contrasting but complementary (Reed, 1980), or that his analysis is at times confused (Kaufman, 1962) or too skeptical (Kocis, 1980), or that he, despite his warnings not to, confuses liberty with justice (Cohen, 1960), or that there is a way of conceptualizing positive liberty without yielding it to the influence of tyranny (Christman, 1991), show that his dichotomous conception is by no means the definitive way to look at liberty, nor is the idea of a dichotomy itself necessarily appropriate (MacCallum, 1967). This is not to mention the separate distinction that has been made between rights contained in the strict legal sense and those which are innate to human beings (Marshall, 1992). And then there are the criticisms, in recent decades, that previous conceptualizations of rights have perhaps placed too much emphasis on, and have been largely based on, the male perspective and neglected to encompass rights more related to women, as well as other minority groups (Pitanguy, 1997).

To write on all of the conceptualizations of freedom would no doubt go beyond the scope of this thesis – particularly if one were not only to discuss the Western concepts of rights but also to delve into the varying non-Western approaches to respect for human dignity as examples of conceptualizations of rights (Donnelly, 1982). Berlin's dichotomy should be sufficient enough, however, to show how the conceptualization of such a fundamental notion to the study of politics as rights, or in the broader sense "freedom" or "liberty," has been rife with controversy to the point that, although many would appeal to the notion that humans have rights, and might even agree on several fundamental specific

rights, they would greatly differ on what their total list of rights would entail or what the definition of those commonly-accepted rights would entail. Words, in the end, can mean different things to different people, particularly in the realm of rights talk and conceptualization (Marshall, 1992). The particular conceptualization they hold of liberty or freedom will determine the operationalization of that concept into specific listings of rights and/or how those rights are defined and practiced.

That brings the discussion back to the United Nations Universal Declaration of Human Rights. In this document, one can see elements of both negative and positive conceptions of human rights. One could argue that perhaps if it were written many years before, the rights commonly construed to be outgrowths of the positive notion of liberty, such as the aforementioned rights to education and paid holidays, might not have been included. Of note is the timing of the document. It came out at the end of World War II and the United States' newly found domination on the world scene. The culture in the United States at the time was one in which a focus on welfare, or as many would characterize positive, rights was made. An example of this trend's effect on the global scene can be seen not only in the U.N. Declaration but also in the new Japanese Constitution that was influenced by the American occupation – it has been interpreted by some to be an updated version of the U.S. Constitution to include more positive-right elements (Mixon & Wilkinson, 2000).

But to say that the adoption of the Declaration meant that everyone in the world agreed upon the list of rights would be totally uncalled for. To even say that just because it was a trend in the U.S. to adopt the more positive conception of rights would necessarily mean that everyone in this country agreed on that conceptualization would be a far stretch

from reality. So, we are left with a seemingly definitive operationalization of the concept of human rights that is far from definitive in the minds of individuals, let alone social scientists, at the time.

This seeming attempt to get at the truly definitive definition of what the concept of freedom or liberty is through enumerated lists of rights is not new; it can be seen in the first amendments to the U.S. Constitution. The founders held in another declaration, the Declaration of Independence, that it was a matter of self-evident truth that all men were endowed with certain unalienable rights. Such statements about a clear, unadulterated concept of rights can be seen throughout the history of the development of the concept, with social scientists in recent times still continuing to attempt to formulate a way to make them universal to all and partial to no particular culture (O'Manique, 1990). Yet, there can be found no clear understanding of what the concept of freedom, liberty or rights would specifically entail.

Jack P. Geise viewed talk of what constitutes freedom as “polemical,” adding: “... the subject, by its very nature, demands political judgments and precludes the value-neutral disposition. The concept of freedom, like that of democracy, has too much rhetorical and political force to be treated with a fictive neutrality” (Geise, 1985, p. 47). Geise quoted Gerald C. MacCallum in his article, who noted that the predilection to claim such a clear understanding of the concept can be seen as opposing sides attempting “to capture for their own side the favorable attitudes attaching to the notion of freedom”(Geise, 1985, p. 47; MacCallum, 1967, p. 313). Part of Geise’s argument was that it becomes evident in many cases that the particular researcher or philosopher’s own values can be seen to be supported

by their claims to truth concerning the concept of freedom (Geise, 1985)⁵.

Positive and Negative Conceptions of Free Speech in the Fairness Doctrine Debate

Of particular import to this thesis is the conceptualization of freedom of speech or expression. In the area of free speech the tension between positive and negative freedom can be exemplified in a rather simple manner. At the heart of the tension is the question, “Is government responsible for actively fostering and ensuring a diverse and robust environment in which all opinions are heard, or is its responsibility to refrain from any action, allowing individuals to speak freely without government interference?”

A positive conception of freedom is what is implied in the former notion. In its positive form, freedom of speech implies that government should be actively involved in ensuring all speech is presented to the public. The latter notion implies a negative conception of freedom. In its negative form, freedom of speech implies that government stay out of the way in terms of individuals exercising speech. This negative vision is exemplified in the First Amendment wording: “Congress shall make no law...” Notably, it does not say, “Congress shall ensure” or “Congress shall foster.” This exemplifies that the bulk of the United States Constitution could be said to be negative in respect to its vision of what the concept “freedom” entails. The text of the Bill of Rights in most cases puts limits on what the government can do, rather than empowering it to act positively on behalf of supposed common goals or ends.

The negative-rights wording in the Constitution can be viewed in somewhat of a

⁵ In sum, the last several centuries have demonstrated the popularity of the concepts of “freedom,” “liberty” and “rights.” As such, the argument is that many individuals and groups have noticed the popular appeal of such concepts and have tried to link, however rightly or wrongly, their particular partisan ideas to these concepts in order to gain greater support for them.

contrast to the more positive-rights language used in the Universal Declaration of Human Rights (United Nations). That Declaration, as noted earlier, contains what could be construed as both negative and positive rights. The impositions placed by the Constitution are negative ones which state the Congress or government cannot do certain things. The Declaration contains several more general statements which proclaim that rights exist, several of which would require positive action on behalf of government or others which would abridge certain negative rights. Specifically dealing with freedom of speech or expression, the Universal Declaration states that such a right exists – leaving a positive-right interpretation possible, unlike in the U.S. where the Constitution has been interpreted in case law to convey a more negative-right interpretation (United Nations).

The differences in conceptions of freedom that are exemplified in the U.S. Constitution and the U.N. Declaration of Human Rights are indicative of the fact that disagreement abounds over the nature of freedom generally and, pertinent to this thesis, freedom of speech and expression specifically. This implies that such freedom represents a contested concept, which helps explain much of the debate over the Fairness Doctrine and other similar media regulations.

Reviewing the history of arguments for and against media regulations such as the Fairness Doctrine, which will be done in detail in later chapters, helps to show how such regulation relies on appeals to a positive conception of the right to free speech – one which implies government fostering an environment where all viewpoints are given a reasonably equal level of prominence in the public dialogue. This positive-right conception of speech focuses on the supposed collective right of listeners to be afforded with a robust, fair and balanced presentation of political opinion.

A contrasting appeal comes from a negative-right conception of speech – one in which government refrains from regulating individual speech in order to leave the public “free” in terms of political and social debates. The negative conception would argue that placing government in a regulatory capacity over political and social speech necessarily acts in a way as a filter or censor on speech, creating what some have dubbed the “chilling effect” – something to be detailed later in the history sections.

The history will show that both sides of the argument – those for and against the Fairness Doctrine and/or similar regulations which have the same aim of a diverse presentation of views – appeal to the concept of rights, specifically the rights enshrined in the First Amendment to the U.S. Constitution. But how they conceptualize the First Amendment differs in a way that displays Berlin’s dichotomy. One side appeals in rhetoric to the strict, literal interpretation of the First Amendment, “Congress shall make no law,” in arguing for a completely hands-off approach on the part of government in terms of regulating individual speech⁶. The other side rhetorically appeals to what they view as the underlying “values” of the First Amendment, which they construe as placing emphasis on the right of the public as a whole to be fully informed on matters of public discourse and importance (Kennedy, 2005; Lee, 1987). This contrast in interpretations of the First Amendment cannot be taken lightly. It has marked the debate and controversy over the Fairness Doctrine and the reasoning behind other regulation of the broadcast media throughout the history of radio and television.

⁶ See Justice Douglas’ concurring opinion in *Columbia Broadcasting System v. Democratic National Committee* (1973) for an example of the negative-right argument against the Fairness Doctrine. In that opinion, Douglas wrote: “But the prospect of putting Government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take Government off the backs of people” (p. 162).

This is why, although Berlin's dichotomy of two concepts of liberty is certainly not the only framework in which to view debates over rights, it is of particular relevance to the debate over broadcast regulation in the name of the "public interest." This positive/negative dichotomy will be the guiding theory behind the discussion of such regulation that will follow in this thesis. While the theory itself may have its critics and shortcomings, the history of appeals made by both sides to the notions of freedom, liberty and rights demonstrate the particular importance of Berlin's dichotomy to understanding the debate over the Fairness Doctrine and other related public-interest regulation. The opposing sides, themselves, have demonstrated the importance of understanding how rights can be conceptualized either as positive or negative. This debate has been a prime example of the type of contestation that Connolly would argue results from the politics of Galie's essentially contested concepts in practice.

CHAPTER III

THE HISTORY OF THE FAIRNESS DOCTRINE

Introduction

The history of the rise and fall of the Fairness Doctrine is characterized, among other things, by appeals to the First Amendment from all sides of the debate. The theoretical issues discussed in the previous chapter explain the reasons for this. Throughout its roughly 40-year history, the Doctrine touched on sensitive issues involving the freedoms of speech and the press.

This chapter will highlight major events in the birth, life and death of the Fairness Doctrine and note throughout how they depict a conflict of visions over what constitutes “freedom” in terms of the aforementioned areas of First Amendment concern. A large part of the history of the debate centers on the question of whether that freedom is negative or positive. The following historical overview will also highlight some of the trials and pitfalls resulting from enforcement of the Doctrine.

Early Years of Radio Regulation

To understand the history of the Fairness Doctrine, and similar broadcast regulation that evolved later, requires first a broad understanding of the fundamentals of the early years of broadcast regulation in the United States. Early regulation of the broadcast airwaves resulted from the problem of scarcity in radio frequencies. Because there were

only so many frequencies to broadcast on and many more people who wanted to use the airwaves, broadcast radio transmissions often conflicted with each other, leading to overlapping signals and confusion.

In an effort to correct this problem, the federal government sought to regulate the airwaves. So-called “radio conferences” were initiated by Republican President Warren G. Harding and then Secretary of Commerce Herbert Hoover. A key component of this framework developed at the conferences was the idea that the broadcast airwaves belonged to the people as a whole – public property not to be abused by private interests. At one of the conferences, Republican President Calvin Coolidge warned the attendees that either private or government control over the airwaves would be dangerous. Further emphasizing the perceived danger of private control of the airwaves⁷, Secretary Hoover, in the fourth conference, placed emphasis not just on ending the chaos of radio broadcast interference but also on the notion that the public as a whole should own the airwaves – noting specifically the freedom of the listener, not just of the speaker (Simmons, 1978).

Emerging from the push to regulate the airwaves would be the Radio Act of 1927, which enabled official licensing and allocation of signals to radio-station owners. It also set up the idea that the airwaves were owned by the public and not to be used exclusively for private gain. While it did not specifically mention a need for balanced presentation of controversial issues, there was debate on that subject in the legislative history of the 1927 Act that was closely tied to a public-interest standard⁸. The 1927 Act created the forerunner

⁷ Hoover also testified to Congress that he thought government should never censor material (*CBS v. DNC*, 1973).

⁸ See Simmons (1978) for details on the legislative history of the Radio Acts and the links made in the legislative debates between the “public-interest” standard and a fair and balanced presentation of issues. Also see Arbuckle (2006) for more on this subject.

to the Federal Communications Commission (FCC), the Federal Radio Commission (FRC). The FRC regulated the industry in the name of “the interest, convenience, or necessity of the public” (FRC, 1927, p. 6). In a FRC report from 1927, a commissioner noted the FRC’s “appalling” responsibility under the Act, given the scarcity of radio frequencies. He argued that such regulation would involve the FRC in determining that one broadcaster is “rendering a service of great value in the interest, convenience, or necessity of the public,” while finding another’s “service of less value to the public,” which could mean denying a license to the latter (FRC, 1927, p. 6).

In the early 1930s, the FRC denied a license renewal for KGEF in California, and it succeeded in court. The FRC argued that the station, including the opinions of the Reverend Bob Shuler, had repeatedly made unfounded and personal attacks on local public officials. In its opinion, the FRC argued that broadcast speech was not the same as printed speech in terms of First Amendment protection and that the type of oversight it provided in determining whether broadcast content was in the public’s interest was not a kin to censorship (Powe, 1987).

The FRC noted in a later case that loyalty to its community and nation could justify granting a license to a given station. Despite the fact that the 1927 Radio Act specifically banned censorship of free speech in section 29, the FRC’s logic at the time was that such actions against radio speech were not equivalent to censoring the type of speech covered under the First Amendment. Radio was viewed more as entertainment and not deserving of the same protection (Powe, 1987).

In its third annual report to Congress, the FRC specifically linked the public-interest standard to treatment of opposing sides’ views in questions of public

importance. Part of the report stated the following:

In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussion of issues of importance to the public. (FRC, 1929, p. 33)

This can be seen as a precursor to the more explicit pronouncement of the Fairness Doctrine that would come later under the FCC. In introducing this point, the FRC noted once again that the rights of the listening public (in part to hear opposing views on issues of importance) were paramount to the rights of any speaker (FRC, 1929).

Early Years of the FCC

The newly-created FCC soon evolved from the FRC. In an effort to consolidate all communications regulation under one agency, Democratic President Franklin D. Roosevelt (FDR) called upon Congress to act in 1934 (Roosevelt, 1934; Sterling, n.d.), resulting in the Communications Act of 1934, which created the FCC, similar in structure to the FRC in that it consisted of a small number of appointed commissioners. One note that is of particular import to broadcast regulation was that there was specific legislation in the run up to the completion of the Act that would have included wording noting the necessity for hearing both sides on public questions, but it was later omitted in favor of language similar to the radio regulation noted in the 1927 Radio Act (Simmons, 1978). One particularly notable carry-over from the Radio Act was the provision that the FCC not be involved in censorship or interference with free speech in radio (“Communications Act,” 1996).

In cases and statements that followed, the FCC further exemplified the push for fair

and balanced coverage. One of the more explicit pronouncements made by the Commission came in its 1940 annual report to Congress. Referring specifically to the requirement for stations to operate in the public interest, convenience and necessity, the report stated that, “In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussions of public questions” (FCC, 1940, p. 55).

In what could be viewed as a diversion from robust debate, the FCC set in place a new doctrine in 1941 that many broadcasters and observers interpreted as a ban on editorializing by licensees. The so-called “Mayflower Doctrine” originated from an FCC decision concerning station WAAB in Boston which was charged by a competitor, the Mayflower Broadcasting Company, of not adhering to fairness by airing one-sided opinions. Though renewing WAAB’s license, the FCC noted in its decision that radio should not be used toward partisan ends (Friendly, 1976). In its report to Congress in 1941, the Commission noted the Mayflower standard concerning radio station editorializing:

... the public interest can never be served by a dedication of any broadcast facility to the support of ... partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented.” (FCC, 1941, p. 28)

It also noted its positive view of free speech when it wrote that radio free speech must encompass the presentation of “all sides of public issues” (p. 28). The result of this decision had the effect of shunning licensees for presenting their particular partisan opinions on public matters (Powe, 1987).

Occurring around this same time was FDR’s attempt to gain support from all areas of society, including the media, for his New Deal legislation. FDR regarded many in the media as sympathetic to the interests of big business and opposed to his social welfare

programs – essentially more supportive of Republicans. FDR had already received criticism from newspapers, and he believed that since radio was under tougher regulatory scrutiny, he could use proposed rules concerning cross-ownership as a means to end what he viewed as a near monopoly of media opinion. Although the FCC made statements regarding the trouble with broadcast ownership being concentrated in a few hands, FDR's attempt at cross-ownership regulations was initially unsuccessful (Powe, 1987).

A more successful attempt by a political party in using the FCC to control who owned broadcast stations came later with Republican President Dwight D. Eisenhower. When television broadcasts began to emerge, the FCC was there to award licenses. Though not making a clear link between Eisenhower and the decisions by the FCC at the time, Powe (1987, pp. 83 & 84) recounts how those owners initially denied television licenses were predominately Democrats or critical of Republicans, and those that were granted licenses were more supportive of Republicans.

Fairness Doctrine Spelled Out

In 1949, the FCC laid out what has come to be known as the origin of the explicit Fairness Doctrine in its report on *Editorializing by Broadcast Licensees* (FCC, 1949). The purpose of the report was to clear up what the Commission viewed to be “confusion” among licensees and the public over its previous statements (FCC, 1949, p. 1246). Part of the report was meant to disavow the belief that the *Mayflower* decision was intended to end all editorializing by licensees; it did so by laying out broadcasters' fairness obligations (FCC, 1949).

The Commission noted that its prime consideration was that the broadcast system

in the United States was one in which private license holders were responsible for programming that would meet the overall principle of the public interest, in that each licensee was considered to be “a trustee for the public at large” (FCC, 1949, p. 1247). The report continued that vital to a democracy was the presence of informed public opinion. The Commission reasoned that such informed opinion could be achieved through the public presentation of news and ideas. But the presentation of such ideas would need to be carried out in a fair and balanced manner, hence the Fairness Doctrine (FCC, 1949).

The tenets of the Fairness Doctrine consisted of two components. The first component was that licensees should “devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to consideration and discussion of public issues of interest in the community served by the particular station” (FCC, 1949, p. 1249). The second component required that when covering such public issues, “the public has a reasonable opportunity to hear different opposing positions on the public issue of interest and importance in the community.” (FCC, 1949, p. 1258).

In addressing arguments that this doctrine would abridge the First Amendment, the Commission wrote:

It is the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting. (FCC, 1949, p. 1249)

The report continued:

... a requirement that broadcast licensees utilize 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. (FCC, 1949, p. 1256)

Further downplaying the right of the broadcaster to speak in relation to the public to hear,

the Commission stated that the licensee's editorialization was only part of the picture.

Only insofar as it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest. (FCC, 1949, p. 1258)

These statements linked the reasoning behind the Fairness Doctrine with a positive-rights view of the First Amendment. The FCC essentially stated here that the public had a positive right to be informed and that broadcasters had a duty to inform them⁹. The Commission believed that censorship could not only originate from government but also through private station owners serving their own personal interests – as opposed to the general public's interest. To ensure that such private censorship was to be avoided, it was the job of the FCC, a small government board of appointed commissioners, to determine which opinions were “balanced” and whether such presentations included “all responsible” views (FCC, 1949, p. 1258).

Doctrine Codified?

When the FCC spelled out the Fairness Doctrine in 1949, it was then an administrative rule and not a specific law. Although the Commission viewed the Doctrine as a reasonable application of the public-interest standard set forth in the Communications Act, it was not so far specifically required by the Act. This would allow the FCC to end fairness requirements.

Some, however, have argued that this changed in 1959 with the newly amended

⁹ Recall here that a positive right requires action on the part of government or others (in this case the broadcasters would essentially act as trustees of the government) in order for it to be realized. In order for the public to be informed, someone had to inform them. This job, according to the FCC, would be left to private broadcasters. These licensees would be required to use their time, money and resources to provide to the public its positive right to be informed.

Communications Act of that year (Simmons, 1978). The 1959 amendment inserted a statement referencing the Fairness Doctrine into section 315 of the Act (Powe, 1987). Section 315 concerns requirements that broadcasters provide equal time to political candidates. In amending this provision, Congress intended to exempt the equal-time requirement for news casts, news interviews, news documentaries and on-the-spot coverage of news events. In doing so, they added that:

Nothing in the foregoing sentence shall be construed as relieving broadcasters ... from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. (“Communications Act,” 1996, p. 167)

This amendment would become the most overt acknowledgment in law of the Doctrine. Whether or not this amendment represented specific legal codification of the Fairness Doctrine or mere Congressional acknowledgment of the existence of the FCC-created regulation would later become important to the debate in the 1980s when the FCC would seek to end enforcement of the Doctrine.

Kennedy and Johnson Use Fairness and Cullman Doctrines

During enforcement of the Fairness Doctrine that proceeded in the 1960s, the Democratic administrations of John F. Kennedy and Lyndon B. Johnson showed interest in using the FCC regulation to their advantage. Friendly (1976), in his detailed account of the history of the Fairness Doctrine, recounted how members of President Kennedy’s administration were concerned that the prevalence of certain conservative broadcasts may adversely affect their policy goals. Friendly recounted a discussion among two high-ranking executive branch officials on how they could use the Fairness Doctrine “to provide support for the President’s programs” (p. 33). Friendly also noted that one of those

officials actually spent time in the basement of his home listening to and recording radio broadcasts, some of which he dubbed “irrationally hostile to the President and his programs” (p. 35). He then recounted one telling quote from another Kennedy administration official that summed up the aforementioned actions: “Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue” (p. 39).

Also noted were several other quotes from Democratic officials noting that their attempt to harass right-wing broadcasters, who were often radio preachers, were not appropriate and may, in fact, have created an inhibiting effect on stations, making them reticent to broadcast more partisan programming¹⁰. One operative predicted:

Were our efforts to be continued on a year-round basis, we would find that many of these stations would consider the broadcasts of these programs bothersome and burdensome (especially if they are ultimately required to give us free time) and would start dropping the programs from their broadcast schedule. (p. 42)

The reference to free time referred to a new policy adopted by the FCC called the “Cullman Doctrine,” which required that if those with views in opposition to a broadcast were unable to afford to pay for a response, then the radio station would be required to pay for that side to air their opposition (Powe, 1987). The broadcast stations were required to provide free time for those voicing opinions that were not represented on their normal programming. Powe (1987) noted that a committee created at Kennedy’s behest to combat anti-Nuclear Test Ban Treaty rhetoric used the Cullman Doctrine to gain response time many times when a broadcast personality proceeded with such commentary.

Related to free air time were two corollary rules to the Fairness Doctrine: the

¹⁰ For more detail on the manipulation of the Fairness Doctrine, consult Friendly (1976).

personal-attack and political-editorial rules. These rules, although their principles were practiced by the FCC beforehand, were not officially issued by the Commission until 1967. The personal-attack rule required that attacks on individuals or groups in the course of airing controversial issues of public importance be followed by notices from the licensee to those individuals who were attacked, with the offer of response time on the station(s) where the initial attack occurred. The political-editorial rule required the same type of action on the part of licensees when their station specifically endorsed or opposed a candidate for public office; the candidate would be notified of the aired endorsement or opposition and would be allowed response time (*Red Lion v. FCC*, 1969)¹¹.

Powe (1987) also recounted the use of radio broadcast monitoring by the Democratic National Committee (DNC) under the Johnson administration. These actions, coupled with enforcement of the Fairness Doctrine and its, at the time, not-yet officially spelled-out two corollaries, now on a case-by-case basis rather than at license renewal time, would eventually lead to Supreme Court action on the FCC rules (Powe, 1987).

One article, noted by Powe, that was published in *The Nation* magazine in 1964 at the behest of Democratic operatives admitted that DNC officials were monitoring the airwaves and called for the use of mandatory response time in situations where their policies were criticized. The same author of that article, Fred J. Cook, would go on to write a critical biography of Republican Senator Barry Goldwater (Arizona), titled *Goldwater: Extremist on the Right*, again at the behest of Democratic operatives (Powe, 1987). One reader of that book who happened to be a prominent preacher and radio commentator, the Reverend Billy James Hargis, used his broadcast time to attack Cook. Hargis had, himself,

¹¹ These corollary rules are often confused with the actual Fairness Doctrine in reporting on the subject in the media. Although both the corollary rules and the Doctrine focus on fair presentations of views, they are distinct in their origin and applicability.

been the subject of Cook's criticism in the earlier mentioned 1964 article, "Radio Right: Hate Clubs of the Air," published in *The Nation* (Friendly, 1976). The aired attack on Cook by Hargis would lead to perhaps the most prominent Fairness Doctrine case before the Supreme Court, *Red Lion v. FCC* (1969).

The *Red Lion* Case

In November of 1964, WGCB in Red Lion, Pennsylvania aired a taped program in which Reverend Hargis, a Goldwater supporter, opined on Cook's history, his affiliations and his critical biography of the senator (Friendly, 1976). He called Cook "a professional mudslinger" and referred to *The Nation* as "a scurrilous magazine which has championed many Communist causes" (Friendly, 1976, p. 5). But unlike Cook's criticism of Hargis, Goldwater and talk radio in print, Hargis' criticism of Cook came under the regulation of the FCC and its fairness requirements.

Cook wrote to WGCB and other stations that aired the Hargis broadcast stating that he expected them to give him equal time to respond, at the stations' expense (Friendly, 1976). Friendly (1976) recounted that Hargis viewed Cook's actions as instigated by liberals who "intended the Fairness Doctrine to be their sole possession – a mandate from the government to coerce those who differ with their opinions" (p. 11). The parent company of WGCB, Red Lion Broadcasting, did not allow Cook free air time, leading to court action (*Red Lion v. FCC*, 1969).

The FCC had argued in lower court that Red Lion did not live up to its obligations under the Fairness Doctrine, and the United States Court of Appeals for the District of Columbia upheld that argument (*Red Lion v. FCC*, 1969). Amidst the timing of this case

came the official pronouncement of the personal-attack and political-editorial rules from the FCC, which were actually held unconstitutional by the Court of Appeals in *RTNDA and NAB v. FCC* (1967) because they abridged the freedoms of speech and the press¹². The case made its way finally to the United States Supreme Court in *Red Lion* (1969).

The majority opinion of the Court in *Red Lion* was brought by Justice Byron White. In that opinion, the Court ruled that application of the Fairness Doctrine in the lower court's *Red Lion* case and the corollary regulations under question in the *RTNDA* case enhanced First Amendment rights rather than abridging them, declaring them to be both "valid and constitutional" (*Red Lion v. FCC*, 1969, p. 375). The opinion went on to detail the history of the FCC's regulations in this area and related them to the Congressional mandate in the Communications Act that licensees behave in a manner consistent with the public interest. It noted that the legislative history links the public-interest standard to the concept that contrasting views should be aired (*Red Lion v. FCC*, 1969).

The *Red Lion* Court relied to a large degree on the notion that the scarcity of available broadcast frequencies, something it viewed to be "not entirely a thing of the past," required the special type of regulation embodied in the Fairness Doctrine and the corollary rules (*Red Lion v. FCC*, 1969, p. 396). The opinion argued that:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. (*Red Lion v. FCC*, 1969, p. 388)

It further added:

No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech"... There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to

¹² This is cited in the details of the *Red Lion v. FCC* (1976) case.

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. (*Red Lion v. FCC*, 1969, p. 389)

After stating this, the Court went on to note that this did not forbid the FCC from considering an essentially positive notion of free speech in its regulation. Arguing that the scarcity of frequencies allowed the government to restrain licensees, the Court asserted that “the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment” (*Red Lion v. FCC*, 1969, p. 390). The Court wrote that, “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount” (*Red Lion v. FCC*, 1969, p. 390).

It linked this positive right to the idea of an “uninhibited marketplace of ideas in which truth will ultimately prevail,” noting that a monopolization of such a marketplace could come from both government and a private licensee (*Red Lion*, 1969, p. 390). In putting forth this marketplace idea, the Court referenced the ideas of Alexander Meiklejohn in terms of free speech. Meiklejohn believed that varying alternatives should be considered in public decision making and that, in a public forum, or “town-meeting,” “what is essential is not that everyone shall speak, but that everything worth saying shall be said” (Powe, 1987, p. 42). Further elaborating on this positive-right notion of free speech, the Court wrote that, “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here” (*Red Lion v. FCC*, 1969, p. 390).

The *Red Lion* Court placed emphasis on the idea that free speech could be censored by private broadcasters. It believed that such private censorship through the scarce, public

airwaves was not protected by the First Amendment. “There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all,” it wrote (*Red Lion v. FCC*, 1969, p. 392). Then it referenced an earlier case’s wording that, “Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests” (*Red Lion v. FCC*, 1969, p. 392). These “private interests” stood in contrast to the public interest in which the medium of broadcast radio was supposed to operate.

The Court also addressed the criticism that such active involvement by the government, through the FCC, in broadcast speech would lead to a potential chilling effect – leading broadcasters to stray away from covering controversial public issues under fear of FCC action. It first noted that critics charged if radio stations were required to provide free air time every time that a political editorial or personal attack was made, they would self-censor in a way that would inhibit the presentation of issues of public importance (*Red Lion v. FCC*, 1969). The Court concluded that such a situation would be “a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled” (*Red Lion v. FCC*, 1969, p. 393).

But the Court’s opinion was in line with the opinion of the FCC at the time: such a chilling or stifling effect was “at best speculative” (*Red Lion v. FCC*, 1969, p. 393). It did, however, leave open the possibility of reexamining the FCC rules should this chilling effect actually prove to be the case. “And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage,” the Court wrote, “there will be time enough to reconsider the constitutional implications” (*Red Lion v. FCC*, 1969, p. 393).

Footnotes and arguments from Red Lion's counsel in the *Red Lion* case displayed notable comments opposed to the Fairness Doctrine and its corollary rules which also relied on appeals to the First Amendment – but more of a negative conception of it. One footnote quoted the president of CBS, who stated that he would refuse to be “affected by official intimidation” (*Red Lion v. FCC*, 1969, p. 393). The counsel for Red Lion argued that: “... the commandment of the First Amendment is simply: Thou shalt not abridge. And it is not ‘you may abridge, but please try to keep it reasonable’” (Friendly, 1976, p. 62). He later noted that there could be a “chilling and deterrent effect” resulting from the threat of FCC action against a broadcaster (Friendly, 1976, p. 62). Red Lion believed that the personal-attack rule could act in way to deter broadcasters from airing either the attack or the response, given that the costs legally and financially would be deemed, essentially, not worth it (Friendly, 1976).

Post-Red Lion Developments

The Supreme Court's decision in *Red Lion* gave legal backing to the Fairness Doctrine and its corollary rules. This backing would bolster the FCC in its subsequent fairness and licensing decisions in the decade that followed to greater promote what it believed to be in the public interest. The actions by the Commission and attempts by officials in government to use the Doctrine and its corollary rules in the years following, however, further exemplified the criticisms made against it. These actions further demonstrated that the FCC rules could be used by presidential administrations and others to create both a chilling effect and a general climate in which government acted in a paternalistic manner toward the listening and viewing public in its efforts to oversee what

speech could be presented over the broadcast airwaves.

Although its Court of Appeals case occurred before the 1969 *Red Lion* decision, the *Banzhaf v. FCC* (1968) case did emerge amid the predominant FCC reasoning stemming from the *Red Lion* issue. Taking to the notion that it was the government's role to ensure that the public is exposed to contrasting opinions on issues of public importance through the medium of broadcasting, the D.C. Circuit Court of Appeals ruled in favor of an FCC decision which essentially stated that broadcasters who aired advertisements that represented one side of a controversial public issue – in this case, smoking – had to present the opposite side as a matter of fairness. The Court wrote:

Whatever else it may mean, however, we think the public interest indisputably includes the public health. ... The power to protect the public health lies at the heart of the states' police power. ... evoking the legitimate concern of government wherever its regulatory power otherwise extends. (*Banzhaf v. FCC*, 1968, pp. 1096 & 1097)

Of note is that Congress later acted to ban all cigarette advertisement on broadcast radio and television (Friendly, 1976).

The next year after the *Red Lion* decision, the FCC moved to deny the renewal of WXUR in Media, Pennsylvania. The Commission argued that the station's programming – exemplified by, as in the *Red Lion* case, a reverend, Carl McIntire – failed to live up to fairness obligations. Programs on the station had often voiced views critical of Communists, liberals, blacks and Jews. As such, it received much criticism in the community. Complaints against the station were upheld in the FCC's decision in *Brandywine-Main Line Radio v. FCC* (1972) (Friendly, 1976).

The complaints against McIntire noted in the text of the case were that he had made:

“intemperate” attacks on other religious denominations and leaders, various organizations, governmental agencies, political figures and international organizations; and that such expressions are irresponsible and a divisive force in the community and help create a climate of fear, prejudice and distrust of democratic institutions. (*Brandywine-Main Line Radio v. FCC*, 1972, p. 20)

Part of the court’s rationale for ruling in favor of the FCC was that it was assumed, given the amount of time devoted to radio and television by the American public, “that the public be given access to varied information so that they may remain an intelligent and viable group – free to choose from the options available to them – free to make a choice” (*Brandywine-Main Line Radio v. FCC*, 1972, p. 42). The Court apparently believed that fairness regulation via the FCC was an acceptable way to ensure this.

In the *Brandywine* case, one judge who had originally supported the FCC’s decision had chosen to hold his detailed statement until a later date (Friendly, 1976). In that statement, Chief Judge David L. Bazelon seemed to have had a change of heart. This change of heart is especially noteworthy given that Bazelon was the same judge who delivered the opinion in the *Banzhaf* case.

Bazelon wrote that the FCC’s decision against *Brandywine* was a “prima facie violation of the First Amendment” and that, “In silencing WXUR, the Commission has dealt a death blow to the licensee’s freedoms of speech and press” (*Brandywine-Main Line Radio v. FCC*, 1972, pp. 63 & 64). Bazelon went on to criticize what he viewed to be a “supreme penalty”: “ But if we are to go after gnats with a sledgehammer like the fairness doctrine, we ought at least to look at what else is smashed beneath our blow” (pp. 63 & 64). After acknowledging the difficulty in answering such a question given that broadcast regulation was characterized by “competing interests and uncertain results” (p. 64) coupled with a “shifting balance of First Amendment freedoms,” (p. 64) he also criticized the idea

that the courts should just “hang our hats on *Red Lion* and relax” (p. 70). Bazelon went further to suggest that the Commission should reconsider its fairness rules in light of technological developments and the belief that it had developed in such a way that it actually hindered its intended goals, creating a chilling effect. He implied that greater freedom given to the broadcaster might “enhance, rather than retard, the public’s right to a marketplace of ideas” (p. 80).

Friendly (1976) recounts in his book that McIntire viewed the action as a way for Republican President Richard Nixon to retaliate against their broadcasts in which they were critical of his policy to end American involvement in Vietnam. McIntire described the action as “just another one of those dirty tricks from that Watergate gang” (Friendly, 1976, p. 82). He also lamented that many stations which had before carried his program had feared FCC action against them and dropped his show (Friendly, 1976).

The years following the earlier *Banzhaf* case, involving the FCC applying the Fairness Doctrine to cigarette advertisements, saw what Simmons (1978) called a “crazy quilt” of decisions by the FCC (p. 106). These rulings involved the FCC in deciding to apply or not apply fairness obligations to anything from ads for the U.S. Marines to boycotted department stores. Recognizing the problems associated with applying fairness rules to an infinite number of product advertisements, one of which being the hit to the financial base of radio and television, the FCC later exempted such ads in 1974 (Simmons, 1978).

However, like presidential administrations before them, the Nixon administration also sought to use the FCC and its fairness rules to its advantage. One Democratic operative recounted how he believed that Nixon gave his vice-president, Spiro Agnew, the

job of insinuating potential FCC action against television news organizations that were critical of Nixon's administration (Friendly, 1976). Friendly (1976), Simmons (1978) and Powe (1987) all gave examples of where the Nixon administration used the threat of FCC action, among other tactics, to intimidate and coerce broadcasters – particularly the television networks – into avoiding critical coverage of Nixon and his policies¹³. One telling quote came from Agnew, who retorted in a 1976 speech that the “privileged men” who used their “monopoly sanctioned and licensed by government” represented a questionable concentration of power, and that “perhaps it is time that the networks were made more responsive to the views of the nation and more responsible to the people they serve....” (Powe, 1987, p. 124)¹⁴. Powe (1987) argued that this abuse of the FCC licensing system would always be the case given that the FCC was made up of commissioners appointed by those politicians in power.

The Democrats, at the same time, also tried to use the FCC to their advantage. In *CBS v. DNC* (1973), they argued that the network's refusal to sell air time went against the First Amendment and fairness obligations. In its opinion essentially upholding the CBS policy, the Supreme Court noted that the Commission had beforehand ruled that broadcasters who provided fair coverage of public issues were not required to accept such editorial ads (*CBS v. DNC*, 1973).

The Court's opinion seemed to be more guarded this time, as opposed to in *Red Lion*, in respect to the extent to which the FCC could involve itself in the editorial decisions

¹³ These sources provide much more detail on the abuse of the FCC by both Nixon and other administrations that, to include here, would go well beyond the constraints of this thesis.

¹⁴ Powe (1987) also quoted from a 1972 oval office conversation where Nixon and advisors contemplated using the fact that the *Washington Post* also owned a television station, which would come up for FCC license renewal, as leverage against them.

of licensees. Part of the opinion stated that, “Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the [Communications] Act” (*CBS v. DNC*, 1973, p. 110).

Despite this notable caution, the Court still maintained that the public’s positive right to be informed was of critical importance in broadcast regulation. It also again recounted as appropriate Meiklejohn’s town-hall concept of including all opinions deemed worth hearing. In doing so, it questioned the lower court’s – again the D.C. Circuit Court of Appeals – approval of the respondents’ argument for a constitutional right-of-access to the airwaves. The Court believed that such a regime would involve the government too much in the day-to-day operation of broadcast stations and would risk increasing the government’s authority in regulating discussion of public issues (*CBS v. DNC*, 1973).

Notably, the Court of Appeals had argued that the existing system was a kin to “a paternalistic structure in which licensees and bureaucrats decide what issues are ‘important,’ and how ‘fully’ to cover them, and the format, time and style of the coverage” (*CBS v. DNC*, 1973, p. 130). The Supreme Court rejected that notion and wrote that, although the Fairness Doctrine was not perfect, a solution would not be to decrease the responsibilities of the licensee (*CBS v. DNC*, 1973).

Justice William O. Douglas, concurring with the Court’s majority opinion¹⁵, called into question the government’s role in regulating broadcast journalists through fairness obligations. Invoking Benjamin Franklin and Thomas Jefferson’s views toward the printed press in their time, Douglas, who was around but did not participate in the oral arguments

¹⁵ Justice Potter Stewart, who voted in the majority in *Red Lion*, also wrote a concurring opinion, although somewhat less forceful than Douglas’, that was critical of the government’s role in regulation of broadcast content. Stewart opined that the positive-right notion that “the First Amendment requires the Government to impose controls upon private broadcasters - in order to preserve First Amendment ‘values,’” was a “frightening specter” (*CBS v. DNC*, 1973, p. 133).

in *Red Lion*, wrote:

Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the Government is the censor, administrative fiat, not freedom of choice, carries the day ... The same is true, I believe, of TV and radio. (*CBS v. DNC*, 1973, pp. 153 & 154)

He added that the government should not be involved in forcing its ideas of fairness on the press by noting the negative nature of the First Amendment:

The First Amendment is written in terms that are absolute. Its command is that “Congress shall make no law ... abridging the freedom of speech, or of the press” ... The ban of “no” law that abridges freedom of the press is in my view total and complete. (p. 156)¹⁶

And specifically addressing the need for regulation of licensees because of the scarcity of radio frequencies, Douglas opined that the FCC’s role should be confined to preventing monopolies and promoting innovations in technology that would expand the broadcast spectrum. “But censorship or editing or the screening by Government of what licensees may broadcast,” Douglas wrote, “goes against the grain of the First Amendment” (p. 158).

One other important point in Douglas’ opinion was that granting broadcast the same First Amendment protections as print would prevent politicians from using the apparatus of government to promote their version of the common good. “The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications,” he wrote (p. 148). “That fear was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people” (p. 148). This argument from Douglas touches on the notion that government regulation like the Fairness

¹⁶ See Barron (1967) for a contrary argument that contemporary newspapers should be required by the First Amendment to grant access to opposing views.

Doctrine can be used in a paternalistic manner in which those in control of government decide for the people – in this case, the listeners and viewers – what is in their common or best interest¹⁷.

***Miami Herald v. Tornillo* Contradicts Fairness Doctrine Rationale**

Further FCC actions in the 1970s saw more judicial, and other, criticisms of the Commission's involvement in the details of broadcast and journalistic decisions¹⁸. The controversy over the Fairness Doctrine resulted from the fact that it, as the D.C. Circuit Court of Appeals wrote in its *NBC v. FCC* (1974) opinion, represented an attempt “to harmonize the freedom of the broadcaster and the right of the public to be informed ... both the Commission and the courts have proceeded carefully, mindful of the need for harmonizing these often conflicting considerations” (Simmons, 1978, p. 216). This was not a balancing act that was required for the printed press as it was for the broadcast press.

This difference in regulatory regimes between broadcast and print and the implications for First Amendment considerations came to an interesting point in the Supreme Court's *Miami Herald v. Tornillo* (1974) case. This case involved a candidate for state office in Florida, Pat Tornillio, who was denied a reply to editorials in the *Miami Herald* which were critical of his candidacy. Under Florida's then “right-of-reply” law, it was a misdemeanor for a newspaper to not allow such replies. The Florida Supreme Court had reversed a lower court decision declaring the law unconstitutional, noting that the

¹⁷ Douglas made an even more forceful appeal to negative First Amendment rights for broadcasters in an opinion later that year in *Yale Broadcasting v. FCC* (1973). He also argued that the Fairness Doctrine enabled meddling on the part of presidential administrations in the affairs of broadcasters (*CBS v. DNC*, 1973).

¹⁸ See chapters 10 and 11 in Friendly (1976) for detailed examples that, to include here, would go beyond the scope of this thesis.

right-of-reply law enhanced free speech and the greater positive-right interest of the public to be informed. The *Herald* appealed to the U.S. Supreme Court (*Miami Herald v. Tornillo*, 1974).

The U.S. Supreme Court's opinion was that the Florida law was unconstitutional in that it violated the First Amendment in respect to freedom of the press. The Court's opinion argued that the government compelling newspapers to publish something which they reasonably disagreed should be published was a kin to forbidding a newspaper to print something, which is unconstitutional. The decision also noted that the Florida law created a penalty in terms of various printing, labor and materials cost that would need to be used for such a reply instead of printing what the newspaper wanted to print – potentially chilling coverage. But the Court argued that even ignoring the costs associated with such a law still left the government in the inappropriate role of crossing First Amendment lines by intruding into the editorial decisions of the newspapers (*Miami Herald v. Tornillo*, 1974).

In its opinion, the Supreme Court noted that *Tornillo* had argued the positive-right notion of the First Amendment that it was government's role to "ensure that a wide variety of views reach the public" (*Miami Herald v. Tornillo*, 1974, p. 248). It noted that proponents of the right to reply had also argued that, unlike the printed press at the time of the American founding, the contemporary press was controlled by large businesses that were increasingly less responsive to the public. These proponents, the Court wrote in its opinion, "reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take *affirmative action*" (p. 251, emphasis added). The Court noted that these proponents argued that the public interest in being informed was jeopardized by what they viewed as a monopolized market (*Miami*

Herald v. Tornillo, 1974).

The majority opinion went on to note several statements from the Court and others acknowledging that a newspaper could act as a monopoly, but it argued that a legal remedy to this, resulting from a right of access, might involve government coercion. Such government coercion, the justices argued, was in conflict with the wording of the First Amendment and interpretations of it that the courts had developed. Noting the checks on a monopolization of opinion, the Court quoted the *CBS v. DNC* case opinion that the ability of a privately owned newspaper to promote its own opinion was constrained by its ability to sustain readership (and consequently advertisers) and its journalistic integrity (*Miami Herald v. Tornillo*, 1974).

In touching on the positive-right tendency to seek government action to enforce press responsibility and its conflict with the First Amendment, the Court argued that while such responsibility was important, it was not constitutionally required and could not be enforced in the legal system (*Miami Herald v. Tornillo*, 1974). Such a positive action on the part of government in order to ensure a right of access, the Court argued, quoting from a previous case, “inescapably ‘dampens the vigor and limits the variety of public debate’” (*Miami Herald v. Tornillo*, 1974, p. 257). It also argued that such a positive-right regulatory scheme could not be implemented without contradicting the First Amendment’s free-press clause and the judicial interpretations of it (*Miami Herald v. Tornillo*, 1974).

The noticeable contrast between this decision in respect to the print media and the decision in respect to the broadcast media by the Court in *Red Lion* is an important development that would lead to further scrutiny of the Fairness Doctrine and content regulation of broadcasting. *Red Lion* had upheld an active, positive-right role for the

government in attempting to ensure that a fair and robust debate of public issues be presented in the broadcast media. The *Miami Herald* opinion refused the government the positive-right duty to regulate the print media in hopes of ensuring such a fair presentation of public issues, arguing rather for a negative-right application of the First Amendment. The critical element that distinguished the reasoning for these two contrasting opinions was argued to be the scarcity rationale, which itself was increasingly becoming more controversial given the increase in avenues of public opinion through the media. The years to follow would bring an about-face in terms of how such content regulation was viewed in light of a supposed scarcity rationale.

The Questioning of the Justifications for the Fairness Doctrine

As the years passed since both the formalization of the Fairness Doctrine in 1949 and the Supreme Court's affirmation of it in 1969, the broadcast medium continued to expand. The total number of radio stations (AM and FM) had increased from 2,564 in 1949 to 7,501 in 1974, the same year as the *Miami Herald* decision; the number of television stations had increased from 51 to 938 in the same period (FCC, 1985). However, this decrease in scarcity did not immediately deter the courts.

A series of cases questioned whether the FCC should deny radio stations the ability to change formats. In ruling that the Commission had the ability to do so, the D.C. Circuit Court of Appeals once noted in referring to a particular case involving a station seeking to move away from classical music that, "We do not doubt that, at our present level of civilization, a 16 % ratio between devotees of classical music and the rest of the population

is about right ...” (*Citizens Committee v. FCC*, 1970, p. 269)¹⁹.

Up until 1981, the courts were still upholding the positive-right concepts noted in *Red Lion*. The Supreme Court argued in its *CBS v. FCC* (1981) case that the right of access did not violate the First Amendment but rather balanced the First Amendment rights of all parties involved – broadcasters, political candidates and the public. The Court argued that, “Although the broadcasting industry is entitled under the First Amendment to exercise ‘the widest journalistic freedom consistent with its public [duties],’” the right of the listeners and viewers outweighed those of the speakers – again upholding a positive notion of the right to free speech (p. 395). The Court then argued that this contributed to the overall democratic process by ensuring access to candidates and information to the public (*CBS v. FCC*, 1981)²⁰.

However, there was a gradual shift in the FCC’s ability to justify its content regulation of media, partially based on the advent of new modes of communication like cable. One example came with *HBO v. FCC* (1977), where the D.C. Circuit Court of Appeals ruled that there was a difference to be made between physical scarcity and economic scarcity. *Red Lion* had shown that physical scarcity could justify content regulation, whereas the *Miami Herald* case had shown that mere economic scarcity could not justify the government imposing content requirements on a medium. The appeals court judges in *HBO* argued that this difference in types of scarcity meant that the FCC could not

¹⁹ The FCC rejected the Court's determination and argued that it violated the First Amendment (Powe, 1987).

²⁰ This insistence by the courts to uphold these positive-right concepts as consistent with First Amendment values occurred along side other contemporary and earlier developments which questioned the First Amendment validity of the FCC’s content regulation. For example, Jung (1996) notes how several academics, lawyers and journalists met in 1973 in what would become known as the Warren Conference. The report they developed from this two-day meeting called for broadcast journalists to receive the same First Amendment freedom as print journalists. Jung also notes that the FCC would later use much of the reasoning in this report to call for an end to the Fairness Doctrine (Jung, 1996).

regulate what amount of programming, in terms of certain categories, HBO could present because it violated the First Amendment (*HBO v. FCC*, 1977).

Technological developments like cable, which brought the scarcity rationale under greater scrutiny, emerged around the same time as the new climate of deregulation that was brought about by the administration of Republican President Ronald Reagan in the 1980s. This combination would speed up the undoing of the Commission's role in regulating fairness.

Reagan's economic philosophy centered on free-market capitalism, which bolstered efforts to deregulate the nation's economy. Broadcasting was not immune to this push. But the push to deregulate came even before Reagan. FCC Commissioner Charles Ferris, who arrived in 1978, sought to greater understand the effect of the Commission's decisions on the economy as well as reorient the FCC to focus more on ownership and structural issues rather than direct regulation of program content; as early as 1979, the FCC made it known that it intended to deregulate radio (Jung, 1996). The Commission issued a formal report in 1981, a result of an inquiry made a few years before, announcing what it considered to be an experiment in deregulation of commercial broadcast radio (FCC, 1981).

This turn toward economic considerations was greatly increased during the chairmanship of Mark Fowler, who was appointed by Reagan. Fowler made it known on several occasions that he wanted the Fairness Doctrine and its corollary rules removed²¹. In a 1982 interview, he argued for a deregulation of broadcasting which would relegate the FCC to simply enforcing technical regulations, making broadcast speech equal to print

²¹ See Jung (1996) for a detailed history of Fowler's push for deregulation as well as several quotes highlighting his belief in repeal of the Fairness Doctrine and the FCC's role in content regulation in general.

(Donlan, 1982). Fowler also suggested that broadcasters could obtain their free speech rights by paying user fees to the FCC, making a particular frequency their property (Donlan, 1982)²². In the article, Fowler also questioned the scarcity rationale: “When the founding fathers came up with the First Amendment, there were eight weekly newspapers in the entire country, and yet they said, ‘These eight shall be free.’ They didn’t do a scarcity analysis”²³. Fowler also co-authored a notable law review article in 1982 arguing for a marketplace approach to the regulation of broadcasting in which broadcasters would be more accountable to market forces instead of the government (Fowler & Brenner, 1982). One of Fowler’s frequent statements concerning his view that the marketplace approach was better for broadcasting was that the public-interest standard should be defined by “the public’s interest,” meaning that the listening and viewing public should determine what programming broadcasters presented – through ratings, not government decree (Boyer, 1987).

Fowler was not the only one pushing for a reassessment of the FCC’s role in regulating fairness. One new Democratic member of the Commission, James Quello, noted his fidelity to First Amendment rights for broadcasters in his confirmation hearing by stating that he proposed the removal of all First Amendment constraints on broadcasters in an effort to lift them to the same level of First Amendment protection as newspapers. He went even further to state that this meant eliminating the public-interest standard.

Specifically dealing with fairness obligations, Quello admitted that he believed it would better serve the public to get rid of the Fairness Doctrine and Section 315 of the

²² One such spectrum-use fee proposal, though not calling for the removal of the Fairness Doctrine, was part of a proposed revision of the Communications Act that is noted on page 17 of Jung (1996). Fowler eventually stepped away from emphasizing such a user fee (Jung, 1996).

²³ This is the quote from the Donlan (1982) article as presented on page 53 of Jung (1996).

Communications Act. He characterized the Fairness Doctrine as a regulation that governed the practice of journalism, something he believed was better handled by actual professional journalists and editors (Jung, 1996).

In Congress, senators like Republican Robert Packwood (Oregon) and Democrat William Proxmire (Wisconsin) had pushed for bills, and even at one point a constitutional amendment, that would have asserted the free speech rights of broadcasters and abolished the Fairness Doctrine and its corollary rules. Adding further momentum to the push to do away with the FCC's fairness rules was a Commission ruling on teletext regulation that claimed that Section 315 of the 1959 amendment to the Communications Act did not, in fact, make the Fairness Doctrine applicable to the new technology (Jung, 1996).

This background of persons and events foreshadowed further action by the FCC to abolish fairness obligations. In April of 1984, the Commission voted on a notice of inquiry into the Fairness Doctrine to see if it was still warranted given changes in the media in the last decade (Black, 1984).

Later that year, the Supreme Court weighed in on the issue in *FCC v. League of Women Voters of California* (1984). In that case, the Court was charged with determining if a ban on editorializing by those public broadcast stations awarded grant money from the government-created Corporation for Public Broadcasting was constitutional; the Court affirmed the lower court's ruling that it was not. The Court questioned whether such a ban was an unconstitutional "attempt 'to allow a government [to] control the search for political truth'" (*FCC v. League of Women Voters of California*, 1984, p. 384). In that decision, the Court still maintained that it was legitimate to deny a broadcaster's freedom to voice their own opinion without presenting opposition views, unlike in newspapers.

They argued that the rationale for this was that it upheld a “substantial government interest” in seeing that full and fair coverage of issues of public importance was presented over this scarce resource (*FCC v. League of Women Voters of California*, 1984, p. 380). It again appealed specifically to public’s right to be informed (*FCC v. League of Women Voters of California*, 1984).

However, the Court also made a couple of interesting points in the footnotes to its opinion that called into question the continued validity of the rationale for the Fairness Doctrine. In one footnote, the Court acknowledged recent criticism of the scarcity rationale, but wrote: “We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required” (*FCC v. League of Women Voters of California*, 1984, p. 376). In the next footnote, it acknowledged the FCC’s arguments that a chilling effect would warrant removal of the Doctrine, adding that:

... the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course. As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine “[has] the net effect of reducing rather than enhancing” speech, we would then be forced to reconsider the constitutional basis of our decision in that case. (*FCC v. League of Women Voters of California*, 1984, p. 380)

Those on the FCC who supported repeal of the Doctrine, specifically Chairman Fowler, considered these footnotes ammunition that would aid them in seeking such an end (Kidder, 1985).

In August of 1985, the FCC “signaled” to the judiciary by releasing a detailed and scathing report on the Fairness Doctrine (FCC, 1985). In it, the Commission argued that the scarcity rationale was no longer valid given the increase in media outlets; the report noted

that the total number of radio stations had gone from 2,564 in 1949 to 9,766 in 1985 and television stations had increased from 51 to 1,208 in the same period. It also gave several examples of where broadcasters perceived a chilling effect which inhibited them from presenting issues of public importance. More specifically, it argued that this inhibiting effect was particularly potent when it came to the airing of opinions that may not be in the mainstream. It also argued that the Doctrine enabled potential abuse and intimidation on the part of partisan politicians. Given this, the Commission believed that the Fairness Doctrine no longer served the public interest and was constitutionally suspect. It, however, deferred the issue to Congress or the courts given that, in its view, whether or not the Doctrine was codified by the 1959 amendments was unclear (FCC, 1985).

The D.C. Circuit Court of Appeals seemed to answer the Commission in *Telecommunications Research and Action Center v. FCC* (1986). There, in ruling on the application of fairness requirements to teletext, it opined that the 1959 wording did not impose the Fairness Doctrine as a statutory obligation but simply acknowledged it as an administrative rule allowed under the public-interest standard (*Telecommunications Research and Action Center v. FCC*, 1986).

Later, that same court, in *Meredith Corp. v. FCC* (1987), heard a case that involved a broadcaster challenging an FCC ruling that it had violated the Fairness Doctrine. Meredith Corp., the broadcaster, argued that the Commission's action not to rule on Meredith's constitutional challenge to the Fairness Doctrine was arbitrary and capricious. This was in light of the FCC's own report two years earlier calling the constitutionality of the Doctrine into question. The Commission and an intervener, Syracuse Peace Council, argued against Meredith's claim (*Meredith Corp. v. FCC*, 1987). The Court of Appeals

argued that, despite the FCC's contention that it was not in a place to judge the continued constitutionality of the Doctrine, it was "aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward" (*Meredith Corp. v. FCC*, 1987, p. 874). It went further to add that members of the Commission swore an oath to support and defend the Constitution and concluded that, "To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath" (*Meredith Corp. v. FCC*, 1987, p. 874).

With that statement, the Court of Appeals both acknowledged the Doctrine as a regulatory rule (rather than specifically a codified law) and compelled the FCC to take action in light of its 1985 report. The ruling remanded the issue to the Commission to consider the constitutional claims made by Meredith. It, however, also noted that should the Commission determine that the Doctrine no longer served the public interest, it could end enforcement of it without necessarily addressing the constitutional issues (*Meredith Corp. v. FCC*, 1987).

The Death of the Doctrine

While the judiciary had responded and remanded to the Commission, the legislative branch was busy attempting to make the Doctrine unequivocally a part of law (Jung, 1996). A bill working its way through Congress would have specifically codified the Fairness Doctrine into law, removing any ambiguity as to whether the FCC could act independently to stop enforcing it. The bill made it to the desk of President Reagan, who vetoed it in June of 1987 (Noble, 1987). Reagan, in effectively killing the congressional

attempt to save the Doctrine, called it “antagonistic to the freedom of expression” in the Constitution and asserted that, “In any other medium besides broadcasting, such Federal policing of the editorial judgment of journalists would be unthinkable” (Noble, 1987, p. 1).

Now that a clear signal had been sent from the judiciary to take action on the Fairness Doctrine and opposition from Congress was blocked by Reagan, the FCC wasted little time in ruling. It released an order on August 6, 1987 that ceased enforcement of the Doctrine (FCC, 1987). In doing so, the Commission once again argued that the scarcity rationale was no longer applicable and that the Doctrine chilled speech. It concluded in the order that the Doctrine went against the First Amendment and further enforcement of it did not serve the public interest (FCC, 1987). But although enforcement of the Fairness Doctrine would end here, debate over it would not.

CHAPTER IV

POST-DOCTRINE

The Specter of Reimposition?

The FCC's decision in August, 1987 to end enforcement of the Fairness Doctrine was neither the end of debate over the Doctrine nor content regulation of broadcasting in the name of the public interest. The controversy over such regulation would continue for at least the next 20-plus years. And the arguments for and against would still center to a degree around what constitutes freedom of speech: a positive or negative conception? But the debate also broadened beyond the specific Fairness Doctrine to other regulatory measures that sought to enforce "diversity" or "localism," both thought to be in the public interest.

The specter of reimposing the Doctrine or something similar to it under the auspices of diversity or localism would continue to animate public debate, particularly as changes in parties in power would occur. Since the 1987 decision, periodic calls have been made by some to reimpose the fairness rule, while others have proposed other regulations which critics argue would have the same effect as reimposing the Doctrine. This chapter will highlight some of the pertinent events since the repeal of the Fairness Doctrine, emphasizing their relation to the right to freedom of speech mostly in the context of the positive/negative dichotomy. Whether or not each individual or group noted in the following section genuinely believed their rhetoric, particularly their rhetoric around

election seasons, is not something explored here. It is sufficient for the purposes of this thesis that their arguments, rhetorical or not, often exemplified a debate over what constitutes free speech: a negative or positive conception. With these events, the rhetoric on both sides, genuine or not, continued to warn of danger to First-Amendment rights.

The Immediate Reaction to the Repeal

After the FCC ended enforcement of the Fairness Doctrine, several people almost immediately voiced either their support or opposition. Consumer advocate Ralph Nader argued that the Doctrine allowed minority viewpoints and issues to be raised and called the repealed rule “constitutionally required” (Hershey, 1987). Democratic Senator Ernest Hollings (South Carolina), then head of the Senate Commerce Committee, hinted at the positive-right access that the Fairness Doctrine enabled by claiming that it represented “the only means for many in the public to be heard” (Shaw, 1987). Democratic Representative Edward Markey (Massachusetts) said the decision exemplified the Commission deciding it knew more about the Constitution than the Congress or courts did; he suggested Congress would seek to write the Doctrine into law (Shaw, 1987). In contrast, the Chairman of the FCC at that time, Dennis Patrick, claimed that the decision would “introduce the First Amendment into the 20th century,” and FCC General Counsel Diane Killory argued that, “No matter how good the intention, there is no way for government to restrict freedom of speech and the press and foster a robust and unfettered exchange of ideas” (Shaw, 1987).

Within a few days, the Syracuse Peace Council, represented by Media Access Project (MAP), petitioned the U.S. Court of Appeals in New York to block the decision – though MAP’s executive director, Andrew J. Schwartzman, predicted that Congress would

make the petition unnecessary by codifying the Fairness Doctrine (Mesce, 1987a).

Democratic Representative Al Swift (Washington) warned in a National Association of Broadcasters (NAB) luncheon that the Commission was “daring Congress to legislate” and that other broadcast legislation could be held back until the rule was made into law (Mesce, 1987b). NAB and other broadcaster and journalist groups joined together shortly thereafter and wrote a letter to members of Congress voicing their opposition to codifying the Doctrine (“Media Groups,” 1987).

The Senate Commerce Committee soon voted to bring back the Fairness Doctrine as part of a deficit-reduction bill. The bill also imposed a fee on broadcasters selling their stations, specifically adding an extra fee if they had violated the Doctrine. Some of the money derived from the fee would have gone to public broadcasting systems. Republican lawmakers voiced their opposition to the reinstatement of the Doctrine in the bill (Fram, 1987). Senator Robert Packwood warned that a reinstatement of the Doctrine in law could be interpreted to impose the fairness requirements on newspapers which used broadcast signals to transmit their publications to other areas to be printed and sold, adding that, “Either they’ve got to go one of two ways, either treat all media as broadcasters ... or merge all communications together and protect them with the First Amendment” (“Packwood Fears,” 1987).

By the end of 1987, more than one attempt by Congress to reimpose the Doctrine had failed (Molotsky, 1987). But that did not deter proponents of the Doctrine like Nader and Senator Hollings. Nader claimed that the failed attempts at reinstating it “[stripped] the people of all their rights to their airwaves” (Molotsky, 1987). Hollings insisted that he and fellow Democrats would pursue the issue in later sessions (Molotsky, 1987).

In February, 1989, in *Syracuse Peace Council v. FCC*, the D.C. Circuit Court of Appeals upheld the FCC's decision to no longer enforce the Fairness Doctrine on the basis that it no longer served the public interest, leaving aside judgment on the constitutional issue. Syracuse Peace Council had challenged the ruling by the Commission to not apply the Doctrine in its previous decision on the Meredith Corporation (*Syracuse Peace Council v. FCC*, 1989). The FCC praised the court's decision, stating that, "The court has vindicated the public's right to receive broadcast press coverage free from government interference." (Johnston, 1989).

Not deterred by the court's decision, proponents of the Fairness Doctrine continued their efforts. A research group founded by Nader released a study in April, 1989 calling into question the supposed rationale for removing enforcement of the Doctrine in order to create an uninhibited environment for free speech. The study argued that less broadcast time had been devoted to public affairs since repeal of the rule (Shales, 1989).

Meanwhile, members of Congress were still attempting to put the defunct Doctrine into law. A subcommittee led by Representative Markey was seeking to mark up legislation that would restore the rule (Shales, 1989). Markey had argued that a return to the Doctrine would ensure that broadcast licensees would not be able to pose a threat to the First Amendment rights of those without licenses (Arnold, 1989). The Senate Commerce Committee approved legislation to codify the Doctrine later that month ("Fairness Doctrine Bill," 1989). Neither of these moves was in the end successful, attributed to Republican President George H.W. Bush's threat to veto later legislation containing the fairness revival (Cronauer, 1994, footnote 66; Dewar & Kenworthy, 1989).

In court, the Syracuse Peace Council continued to plea for reinstatement of the

Doctrine; the U.S. Supreme Court, however, refused in January, 1990 to restore the Doctrine. That refusal seemed to embolden certain members of Congress like Senator Hollings to pursue legislating the Fairness Doctrine (Salant, 1990). However, attempts to reinstate the Doctrine still did not gain enough support to pass, and President Bush sided with the earlier Reagan administration's position against the rule (Zelnick, 2009).

The Clinton Years

Renewed attempts at legislating fairness came in the mid 1990s with the belief that the administration of Democratic President Bill Clinton would be more receptive to such a move (Wharton, 1993a). Aside from moves to reinstate the Fairness Doctrine, issues concerning ownership rules, coverage of local issues and the still-existing corollary rules also became more prominent.

Senator Hollings again introduced a bill in February, 1993 to reinstate the Doctrine (Wharton, 1993a). In response to the renewed efforts, Christian broadcasters became more concerned. The National Religious Broadcasters (NRB), meeting in February, 1993, voiced fears that a revived Fairness Doctrine would force them to air views contrary to their beliefs ("Christians to oppose," 1993). The next month, the federal court of appeals in St. Louis agreed to rehear a case raising the question of whether Congress intended to codify the Fairness Doctrine, only later to rule that the Doctrine was not codified in the 1959 amendment (Wharton, 1993b, 1993e). In June, the U.S. Senate successfully attached a provision reinstating the Doctrine in a campaign reform bill (Wharton, 1993c). And a House panel began meeting in July to discuss returning to the fairness rule (Boliak, 1993).

Some linked the renewed efforts to the fact that one of talk radio's most popular

hosts, Rush Limbaugh, was a strong critic of President Clinton (Halonen, 1993; Moss, 1993)²⁴. Calls to members of Congress spurred by radio talk-show hosts were reported to have put a snag in the efforts in 1993 to reinstate the Doctrine (Wharton, 1993d). Groups like NAB and the Radio-Television News Directors Association (RTNDA) continued to push against the move. One NAB spokesman stated that reinstating the fairness rule was “not about fairness, but about political control” (Diamond, 1993), and the president of RTNDA questioned the government’s ability to decide what is “fair” (Diamond, 1993). With failed legislative efforts in 1993, reports emerged the next year claiming that members of Congress were pressuring the FCC to reinstate the Doctrine (Wharton, 1994a). However, the Commission showed no signs of leaning in that direction (Wharton, 1994b).

Meanwhile, the ascendancy and influence of talk radio to shape the public political debate was being recognized by the print media (Dreher, 1994; St. George, 1994). In 1995, that influence was viewed by some in a negative context. After the bombing of a federal office building in Oklahoma City, critics charged that the rhetoric used in talk radio fanned the flames of terrorism that led to that incident. Some conservatives argued that placing the blame on talk radio was an attempt by President Clinton and liberals to justify a return to the Fairness Doctrine (Fleeson, 1995). This justification was exemplified with Democratic Representative Jim Clyburn (South Carolina), who voiced his concern after the bombing that conservative talkers were promoting violence and pledged to restore the Doctrine (Piacente, 1995).

²⁴ But not all proponents of restoring the Fairness Doctrine were liberal Democrats and not all opponents of it were conservative Republicans. Democratic Governor of New York Mario Cuomo, in an opinion piece in *The New York Times* that year, wrote against the disparity in First-Amendment treatment between the print and broadcast press and in favor of a negative-right conception of free speech, specifically quoting the negative-rights wording in the First Amendment (Cuomo, 1993). In contrast, several conservatives had also voiced their support of the Doctrine in the past (Moss, 1993).

In addition, efforts to further deregulate media ownership were gaining momentum in Congress – eventually leading to the Telecommunications Act of 1996 (“Telecommunications Act,” 1996). Deregulation was argued by proponents as a way of freeing up the marketplace of ideas (Fields, 1995). Linking the ownership debate to fairness, President Clinton warned that:

... it would be an error to set up a situation in the United States where one person could own half the television stations in the country, or half of the media outlets, and we don't have a Fairness Doctrine anymore, and we don't have ... any kind of maintenance of a competitive environment. (Wharton, 1995)

However, early the next year, George Stephanopoulos, a senior advisor to President Clinton, told a group of talk-radio hosts that though they had in the past wished the Doctrine was still in place, they did not plan to bring it back (Duin, 1996).

Further moving along the road to deregulation, in March, 1996, RTNDA urged Congress to make the FCC repeal the two corollary rules on political editorials and personal attacks (Wharton, 1996). After the FCC found itself divided on the issue, late in 1997, RTNDA and NAB asked the D.C. Circuit Court of Appeals to end the corollary rules (Littleton, 1997). The appeals court agreed to hear oral arguments (Boliek, 1997). While these old rules were on their way to being shelved, the Clinton administration had proposed looking at new public-interest rules for the digital age – something broadcasters were skeptical of (Boliek, 1998).

Broadcasters pushed further for looser regulation when they called in 1999 for ending the restrictions on how many stations they could own in a local market (Boliek, 1999a). The Clinton administration opposed further loosening of the rules, arguing that the current rules “preserve the core principles of viewpoint diversity embodied in the First Amendment as well as the fundamental values of localism and competition” (Boliek,

1999b). But that did not stop the FCC. Later that year, the Commission loosened ownership rules to allow, under certain circumstances, a broadcaster to own two stations in one city, provided that eight other full-power stations remained in the market and one of the two owned stations was not ranked in the top four in the market (FCC, 1999b; Schwartz, 1999). The FCC argued that this was done in light of the growth in media outlets and in order to allow the broadcasters to be more efficient (FCC, 1999b). This seemed to anger some in Congress, like Democrats Senator Byron Dorgan (North Dakota) and Representative Markey, who viewed it as harmful to the values of localism and diversity (Markey, 1999; Schwartz, 1999).

Concepts like “localism” and “diversity” were seemingly beginning to gain prominence in the appeals from those opposed to further deregulation, even as the FCC moved to further deregulate by proposing to ease the ban on owning a newspaper and a broadcast station in the same city. In proposing this change, the FCC’s then Chairman William Kennard noted the changing environment in information sources through newer avenues like the internet and satellite (“FCC aims,” 2000). MAP’s Schwartzman argued against the relaxation by pointing to the reliance of many voters on broadcasting and newspapers for local information and arguing that fewer owners of these mediums “cannot help democracy” (“FCC aims,” 2000).

However, the Commission at the same time voted to retain the national station owner cap (Schneider, 2000). Chairman Kennard justified the decision by arguing: “... it is vitally important that we encourage the widest possible dissemination of this information from diverse and antagonistic sources ... Our structural ownership restrictions seek to promote this First Amendment principle” (Schneider, 2000).

Amid greater focus on ownership rules, RTNDA and NAB were still urging court action against the corollary rules (Boliek, 2000a). In a petition to the judiciary to act, the two groups wrote:

In less time than it has taken the FCC to address the petition giving rise to this case, the American Revolution was fought and won, the Articles of Confederation adopted and rejected, and the Constitution drafted, ratified and amended by the Bill of Rights – including the [First] Amendment – which these rules flatly violate. (Boliek, 2000a)

MAP's Schwartzman disagreed and argued that individuals need an opportunity to respond (Boliek, 2000a).

In October, 2000, after the issue was remanded to the Commission, the FCC voted for a temporary lifting of the corollary rules in order to study the effect it would have (FCC, 2000). Critics were frustrated that the FCC did not just permanently put an end to the rules (Boliek, 2000b; McClintock & Bernstein, 2000). NAB and RTNDA soon filed an emergency request to the D.C. Circuit Court of Appeals to permanently end the rules (McClintock, 2000a). In its decision in *RTNDA and NAB v. FCC* (2000), the appeals court finally struck down the corollary rules. NAB and RTNDA naturally hailed the decision as a victory for the First Amendment (McClintock, 2000b; Stern, 2000).

Some FCC commissioners were not as thrilled. Earlier, in defending the FCC's role to protect the public interest over broadcasters' financial interests, Chairman Kennard criticized the "disarray and disinterest of our mass media towards fulfilling its crucial democratic commitments" (Labaton, 2000). Lamenting the court's decision, FCC Commissioner Gloria Tristani argued in a statement, "The purpose of the rules has always been to ensure the American public is an informed citizenry, a goal fundamental to our democracy" (Tristani, 2000). She added that, "Whether the rules properly balance the

competing constitutional rights at issue is a question left open by today's ruling" (Tristani, 2000).

Ownership, Diversity, Localism and Other Issues in the Bush Years

With both the Fairness Doctrine and the corollary rules repealed, much of the debate in the early years under the administration of Republican President George W. Bush revolved around issues of media consolidation, diversity and localism. Deregulation opponents saw regulation as a safeguard against concentration of ownership in a few hands and a mechanism for ensuring diverse opinion. Supporters of deregulation often viewed stricter regulation as a means for the government and politicians to control speech. Congressional opponents of deregulation warned against the media-merger trend and called for more diversity (Boliek, 2001a; Hollings & Dorgan, 2001; Lieberman, 2001), while some proponents of looser standards argued that the goal of localism was not necessarily served by having local control over stations but rather by the business interests of broadcasters to cater to local listeners (Boliek, 2001b).

In February, 2002, the D.C. Circuit Court of Appeals made a decision to end the broadcast-cable cross ownership rule and remanded the national-television station ownership rule back to the FCC based on the judicial panel's belief that the decision by the FCC to keep the rules was "arbitrary and capricious and contrary to law" (*Fox Television Stations, Inc. v. FCC*, 2002, p. 3). Again protesting judicial action loosening the FCC's regulatory power, MAP's Schwartzman claimed, "The (D.C. Circuit) Court of Appeals continues its Sherman's march through the FCC rulebook, squashing congressional powers and the public's First Amendment access rights along the way" (Boliek, 2002a).

In June of that year, the FCC decided to consolidate several of its media-ownership reviews into one larger review (Boliek, 2002b; Gatlin, 2002). Michael Copps, then the only Democratic member of the Commission stated that, “At stake are old and honored values of localism, diversity, competition and the multiplicity of voices and choices that undergirds our American democracy” (Gatlin, 2002). In similar sentiments appealing to democracy and the “free flow of information” later that year, the director of broadcast for the American Federation of Television and Radio Artists lamented that deregulation and the resulting consolidation harmed localism and diversity of perspective (McNary, 2002).

In early 2003, the FCC found itself internally divided over whether to further loosen ownership rules (Violanti, 2003), and lawmakers from both major parties were urging the Commission to proceed with its review cautiously (Boliek, 2003a). Chairman Michael Powell had linked the public interest to the goals of “diversity, localism and competition,” but just how those ends could be achieved was at the heart of the debate – through greater or lesser regulation (Hinckley, 2003). The FCC took to the road to garner opinions and more information to help it solve the debate amid a requirement by the 1996 telecommunications law to review ownership rules every two years and pressure from the judiciary to justify its current rules (Boliek, 2003b; Labaton, 2003a). The Commission soon began developing a diversity index as a way to measure media diversity in local markets (Crabtree, 2003; Szalai, 2003).

The link was increasingly being made between ownership rules and overall fairness in coverage. Lamenting what she viewed as the unfairness in the balance of political talk radio, Chellie Pingree, president of the group Common Cause appealed to positive-right language when noting, “I think the public believes it is their right to have fair coverage, and

they don't even realize what's been lost over the last two decades" (Cox, 2003).

Liberal-leaning groups argued that the stations owned by large media corporations were not being fair to their side ("Critics say," 2003). Amid this also came a push from a group of wealthy Democrats to start up a liberal alternative to what they viewed as a now conservative-dominated talk-radio format ("Democrats rush," 2003).

In May of 2003, a plan was developed by FCC staff that would have further deregulated the media-ownership market, partially by allowing networks to own more local stations (Labaton, 2003b). The two Democrats on the Commission urged caution over concerns that the plan was too drastic (Gatlin, 2003a; Labaton, 2003b). Chairman Powell, however, rejected a plea from the two to delay a vote in order to give time for more public comment and review (Boliek, 2003c).

The vote took place on June 2 and was down party lines, 3-2, in favor of further relaxing the rules – allowing networks to own more local stations and companies, in certain cases, to own a newspaper and television station in the same city ("FCC loosens," 2003). Powell – arguing that these changes would advance the goals of localism and diversity ("FCC loosens," 2003) – and the other two Republican commissioners deemed the decision appropriate (Martin, 2003), while their Democratic counterparts on the Commission, Jonathan Adelstein and Copps, argued that they would "damage the media landscape" (Adelstein in "FCC loosens," 2003) and "empower America's new media elite with unacceptable levels of influence over the ideas and information upon which our society and our democracy so heavily depend" (Copps in Geewax, 2003).

Opposition to the plan in Congress was not strictly among party lines, with several Republicans voicing their concerns along with Democrats (Dinan, 2003; Geewax, 2003).

Moves were soon made in the Senate to reinstate the rules (Gatlin, 2003b). Such moves were threatened with a veto from President Bush, but they continued to have bipartisan support (Boliek, 2003d).

Later that year, the Third Circuit Court of Appeals in Philadelphia ordered the enactment of the rules to be stopped (Labaton, 2003c). In litigation, the FCC defended its position but eventually lost in June, 2004 when it was ordered to rewrite the rules (Boliek, 2003e; Free Press, 2004).

Seeming to acknowledge the concerns about the potential negative effects of this deregulation on values like diversity and localism (Ransby, 2003; Safire, 2003), Powell had begun to pursue ways to safeguard against the erosion of the coverage of local issues by promoting measures to ensure localism (Ahrens, 2003; FCC, 2003; Gatlin, 2003c). In doing so, he also linked localism with diversity issues focused around women and minorities (Mollison, 2003). The FCC established a localism task force and planned to hold six public hearings across the country to garner citizen and activist opinion on the issue (Harper, 2003). Critics, however, argued that the Commission should have studied the localism issue prior to loosening the ownership rules ("FCC media," 2003).

In October, 2004, an issue that gained national attention played into both the localism and fairness debates. Sinclair Broadcasting had produced and planned to air a documentary critical of Democratic presidential nominee Senator John Kerry, of Massachusetts (Routhier, 2004). Critics argued that the preemption of local programming to air the documentary went against the stations' obligations to cater to local interests and needs (Lazaroff, 2004). The Kerry campaign argued that it should receive equal time in response to the documentary, but that requirement no longer applied given the earlier

repeal of the Fairness Doctrine and the corollary rules (Dean, 2004; Furchtgott-Roth, 2004).

Referencing Sinclair and the Kerry documentary, critics began pointing out how they believed fairness rules should be brought back. “As public trustees, broadcasters ought to be insuring that they inform the public, not inflame them,” said MAP’s Schwartzman (Rendall, 2005). “That’s why we need a Fairness Doctrine” (Rendall, 2005).

After losing his 2004 bid for the presidency, Kerry stated the following:

There has been a profound and negative change in the relationship of America’s media with America’s people. This all began, incidentally, when the Fairness Doctrine ended. You would have had a dramatic change in the discussion in this country had we still had a Fairness Doctrine in the course of the last campaign. (Anderson, 2006)

In February, 2005 Democratic Representative Louise Slaughter (New York) introduced an eight-page House bill which would have, among other things, essentially restored the Fairness Doctrine by requiring broadcast stations to cover important local issues in a fair manner. It also would have mandated that stations hold meetings assessing the interests of their local community and shortened the license period (“Fairness and Accountability,” 2005). The bill raised concerns that since repeal of the Fairness Doctrine, networks and news outlets had become “highly partisan” and “unbalanced” (“Fairness and Accountability,” 2005, p. 2).

Such moves to restore regulation concerned broadcasters. Speaking in a February meeting of the NRB, Commissioner Kevin Martin – who would soon take over as FCC chairman – said he did not think a return to the Doctrine was appropriate given its chilling effect on free speech. Specifically referencing the interests of the religious broadcasters, he added that removal of the Doctrine enabled broadcasters to air more “niche” programming

(Gerstein, 2005).

Critics of deregulation had become increasingly concerned about such niche programming. One example of these critics was Cass Sunstein, from the University of Chicago Law School. Sunstein argued that such niche coverage of the issues in print, broadcast and especially the internet, by not presenting issues from a broad and balanced perspective, hindered the functioning of democracy (Coy, 2001). Seeming to agree with Sunstein's sentiments, Susan Douglas, a communications professor at the University of Michigan, wrote that, "Ongoing media consolidation, and the censorship and pro-right blather that go with it, are sustained by the silencing of oppositional voices Americans are no longer required to hear" (Douglas, 2005) – required to hear by a government fairness rule, insinuating a positive-right conception of free speech.

In March, 2005, a report from the FCC's Media Bureau staff added more fuel to the fire of deregulation by arguing that the scarcity rationale for regulating broadcast was "an idea whose time has passed" (Berresford, 2005, p. ii). However, the report concluded that although the scarcity rationale was no longer valid, the government still had an interest in making sure that news and information, particularly about local issues, was available to Americans. It suggested looking at new ways of ensuring this that were consistent with the current media landscape (Berresford, 2005). That same month, after becoming the new chairman, Commissioner Martin reiterated the FCC's role in ensuring ownership rules that would, in light of the current media landscape, preserve the values of diversity, localism and competition ("A North Carolinian," 2005).

Another piece of legislation reinstating fairness rules was proposed by a co-sponsor of Representative Slaughter's earlier bill in 2005. Democratic Representative Maurice

Hinchey (New York) introduced his “Media Ownership Reform Act,” seeking to reverse many of the FCC’s deregulatory decisions (“Media Ownership,” n.d.). The bill would have restored the Fairness Doctrine and returned to stricter ownership caps (“Breaking Up,” 2005). Hinchey argued that it was the job of Congress to “ensure that our citizens are provided access to diverse and educational programming from a variety of sources ...” (Hinchey, 2005).

In June, 2006, the FCC began taking up the issue of revisiting its ownership rules made in 2003, given the requirement by the appeals court in 2004 (FCC, 2006; Holland, 2006). Critics of further deregulation argued that diversity and broadcaster treatment both in coverage and employment of minorities and women were deterred by ownership deregulation (Garofoli, 2006; Triplett, 2006a). Several lawmakers urged the FCC to finish its localism study before considering new ownership rules (Triplett, 2006b). The push to avoid further deregulation was aided by the fact that, as a result of the 2006 mid-term elections, Congress was soon to be controlled by Democrats.

Early in 2007, several Democratic lawmakers began talk once again of restoring the Fairness Doctrine. Representatives Hinchey and Slaughter were joined by two others, Democratic Representative Dennis Kucinich (Ohio) and independent Senator Bernie Sanders (Vermont), in calling for legislation to restore the rule (Hinckley, 2007; “Policing Speech,” 2007). An annual meeting of notables, including Democratic lawmakers, in favor of a return to the Doctrine was held in January of 2007 in which Sanders and others voiced support for restoring the Doctrine as a way to ensure more liberal voices were heard (Accuracy In Media, 2007).

In February, the two Democratic commissioners on the FCC wrote an op-ed in

which they linked fair presentations of views and localism to media ownership. They argued that, “We deserve to be exposed to a variety of viewpoints and local programs, rather than being force-fed content provided by a few companies that dominate our media landscape” (Copps & Adelstein, 2007). They also appealed to the *Red Lion* decision’s support of a “right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences” (Copps & Adelstein, 2007).

Further reports of support in Congress for a return to the Doctrine continued throughout 2007. One report in May claimed that two unnamed members of the House Democratic Caucus said that Democratic representatives Nancy Pelosi (California) and Steny Hoyer (Maryland) were both “aggressively” pursuing a return to the Fairness Doctrine (Washington Prowler, 2007).

In June, others added their comments on the subject. Republican Senator James Inhofe (Oklahoma) claimed on a radio program that he overheard Democratic senators Hillary Clinton (New York) and Barbara Boxer (California) lamenting the influence on conservative talk radio and contemplating a “legislative fix” for it (“Claim,” 2007). However, spokespersons for both senators denied that the conversation ever took place (Rowland, 2007a). Senator Olympia Snowe (Maine) stated her concern around the same time over the quality of programming in her state in light of the lack of local media ownership; she linked ownership rules to localism and diversity of viewpoint (Kesich, 2007). Democratic Senator Dick Durbin (Illinois) voiced his support for a return to the Fairness Doctrine, appealing to what he viewed as the need for the airwaves to be used as a means to “strengthen our country and our democracy” (Pike, 2007). In addition, Senator John Kerry also voiced his support for a return to the Doctrine in a radio interview

(Eggerton, 2007a).

In a television appearance in that same month, Republican Senator Trent Lott (Mississippi) and Democratic Senator Dianne Feinstein (California) both lamented the influence talk radio had on the current immigration-reform debate in the country, with Lott suggesting that talk radio had not represented the proposed reform legislation accurately (Lott, 2007). Feinstein went further to accuse talk radio of tending to be one-sided, arguing that it “pushes people to, I think, extreme views without a lot of information” (Feinstein, 2007). She then said she was looking at reviving the Fairness Doctrine (Feinstein, 2007).

Amid this rhetoric, however, a House amendment to an appropriations bill, introduced by Republican Representative Mike Pence (Indiana), was passed that would prevent money from being spent by the FCC the following year to restore the Doctrine. Pence argued that while the current debate over the return of the Doctrine was important, it was the next administration he and his cosponsors were concerned about. Representative Kucinich also agreed that a future administration might be willing to reinstate it (Eggerton, 2007b). One commentator from *Congressional Quarterly* warned similarly that, “Unless broadcasters take steps to voluntarily balance their programming, they can expect a return of fairness rules if Democrats keep control of Congress and win the White House next year” (Kincaid, 2007).

Pence also soon proposed a separate bill, “the Broadcast Freedom Act” (Boliek, 2007a). In a letter to Pence, FCC Chairman Martin said the Commission still had no “compelling reason” to reconsider the repeal of the Doctrine based on its 1987 determination that it was not in the public interest, adding that the boom in information sources since 1987 had rendered the Doctrine even more unnecessary (Boliek, 2007b).

Similar legislation blocking the reinstatement of the Doctrine was also supported by several Republican lawmakers in the Senate (Diaz, 2007). A report released from the Senate Republican Policy Committee in July further attacked the Fairness Doctrine by calling it “Unfair, Outdated and Incoherent” (Senate Republican Policy Committee, 2007).

Aside from the overt calls to reinstate the Doctrine, supporters of more government regulation of the airwaves also continued to voice support for localism and stricter ownership regulations – all in the name of the public interest. A joint report from the liberal think-tank Center for American Progress and the liberal group Free Press, released earlier in the year, presented talk radio as severely unbalanced in its point of view – tilted to the conservative side (Center for American Progress & Free Press, 2007). The report, titled “The Structural Imbalance of Talk Radio,” (referred to hereafter as the CAP report) argued that “The disparities between conservative and progressive programming reflect the absence of localism in American radio markets” and called for three main moves to correct the imbalance: restore ownership caps on commercial radio, “ensure greater local accountability over radio licensing” and impose a fee supporting public broadcasting on those “commercial owners who fail to abide by enforceable public interest obligations” (Center for American Progress & Free Press, 2007, p. 2).

The CAP report, however, did not call for a return to enforcement of the Fairness Doctrine. The authors argued that the Doctrine alone was never sufficient, but rather that it “was most effective” when combined with shorter license terms, challenges to those licenses via “comparative hearings,” interviewing local leaders and public notice of license expiration dates (Center for American Progress & Free Press, 2007, p. 6).

One of the report’s authors, Mark Lloyd, wrote in a separate article that the

Doctrine was never enough alone to ensure diverse coverage of local issues. He added that it was not necessary to return to enforcing the Fairness Doctrine, instead emphasizing regulation supporting more local accountability and diversity in hopes of serving the public interest (Lloyd, 2007a).

The conservative think-tank Heritage Foundation criticized the CAP report. Heritage argued that the goals of the report were to reduce the number of conservative voices and increase funds to more liberal-leaning public broadcasting (Gattuso, 2007).

This did not deter calls to reinstate the Doctrine or efforts to prevent its return in Congress. In October, Republicans were calling on lawmakers to make sure that Congress would have a final say in any possible attempt to reinstate the Doctrine. One Democratic congressman, David Obey (Wisconsin), was in favor of blocking reinstatement of the fairness rule, arguing that it would play into the hands of conservatives. A report had also come out around that time that Democratic Representative Henry Waxman (California) had planned investigations into talk-radio hosts in hopes of reinstating the Doctrine; Waxman's office denied that report (Pfeiffer, 2007).

Toward the end of 2007, FCC Chairman Martin was pushing to further loosen ownership rules, particularly cross-ownership rules (McConnell, 2007). Several senators attempted to delay any move from the FCC to loosen regulations (Carter, 2007a, 2007b). Republican Senator Lott, Democratic senators Dorgan, Barack Obama (Illinois) and John Edwards (North Carolina), and Representative Hinchey, among others, all stated their opposition to the rule changes (McConnell, 2007; Orol, 2007). Obama wrote to Martin in opposition to greater consolidation in media ownership, noting that "the commission has failed to further the goals of diversity in the media and promote localism" (Boliek, 2007c).

Obama also later co-wrote a letter with Senator Kerry warning Martin that they would act to block funding to the FCC if it voted to loosen the rules. In that letter, he argued, “We must ensure that we have an open media market that represents all of the voices in our diverse nation and allows them to be heard” (Triplett, 2007).

Soon, the Commission also released its report on localism and notice of proposed rulemaking, which among other things suggested the creation of community advisory boards made up of local officials and “leaders” of segments in the community to guide licensees on their service to their local communities (FCC, 2008, p.14). Republican FCC Commissioner Robert McDowell warned that the FCC “[risked] treading on the First Amendment rights of broadcasters with unnecessary regulation,” but Commissioner Copps, arguing that there were fewer local programs and reports, claimed that, “Big consolidated media dampens local and regional creativity, and that begins to mess around pretty seriously with the genius of our nation” (Virgin, 2008).

The Commission issued its final order on the proposed ownership-rule changes in February, 2008; lawmakers from both parties decried it (Carter, 2008a, 2008b). By now, though, attention had been shifted to some degree to the newly proposed localism rules. In commenting on the proposed rules, NAB laid out several arguments against them that were similar to those often levied against the Fairness Doctrine. They viewed this potential regulation to be similar in effect to the Doctrine in that it went against the First Amendment and would inhibit the goals of diverse opinion in much the same way that the chilling effect did with the Fairness Doctrine. They also argued that the rules would place the FCC in the position of subjectively defining for communities what was truly “local” programming (Parshall, 2008).

Then in March of 2008, President Bush made comments to the NRB raising the specter of a return to the Fairness Doctrine. He called the Doctrine “Orwellian” and argued supporters of it “want to silence those they don’t agree with” (Eggerton, 2008a). Noting that the Democratic congressional leadership had blocked action on Republican-drafted legislation to ban the reimposition of the Doctrine, Bush vowed to veto any legislation seeking to reinstate the rule (Eggerton, 2008a).

Comments on the proposed localism rules were due April 28 (Skrzycki, 2008). NAB was joined by other broadcasters like Disney, which stated that, “Such inquiries clearly indicate that the FCC would ultimately state a preference for certain types of local programming over others ... and this raises serious constitutional issues” (Boliek, 2008). Members of Congress, particularly Republicans, also voiced their opposition to the localism rules (Spivey, 2008). Some began to argue, similar to NAB, that the localism rules were a type of backdoor method of achieving the goals of the Fairness Doctrine – which in conservatives’ minds meant silencing conservative opinion (Boulet, 2008a)²⁵. However, that backdoor attempt argument was something that FCC sources denied (Weyrich, 2008).

Amid the localism debate, there continued to be hints at returning to the Fairness Doctrine. A *Human Events* editor reported in June that Democratic Speaker of the House Nancy Pelosi told him and others in a breakfast meeting that the interest of her caucus was to see that the efforts by Representative Pence and others to block reimposition of the Doctrine did not come to the floor, and, when asked, she said she personally supported a revival of the Doctrine (Gizzi, 2008). Religious broadcasters were also worried about the return of the Doctrine and its potential effect on their First Amendment free-speech and

²⁵ Representative John Boehner (Ohio), the Republican leader in the House, called the rules a “stealth enactment of the Fairness Doctrine, a policy designated to squelch the free speech and free expression of specifically targeted audiences” (Weyrich, 2008).

religious-exercise rights, particularly with the change of parties in power (Butts, 2008; Nereim, 2008; Rao, 2008).

However, both leading presidential candidates voiced their opposition to a return to the Doctrine. A spokesman for Republican Senator John McCain (Arizona) said, “Sen. McCain believes the federal government should not be in the position of policing the airwaves,” and a spokesman for Senator Barack Obama wrote that Obama did not support reimposing the Doctrine, adding that, “He considers this debate to be a distraction from the conversation we should be having about opening up the airwaves and modern communications to as many diverse viewpoints as possible” (Nereim, 2008).

But those comments did not stop the rumblings. Commissioner McDowell went so far as to link a revival of the Fairness Doctrine to the debate over internet network neutrality. “So you know, this election, if it goes one way, we could see a re-imposition of the Fairness Doctrine,” he said (Poor, 2008). “There is a discussion of it in Congress. I think it won’t be called the Fairness Doctrine by folks who are promoting it. I think it will be called something else and I think it’ll be intertwined into the net neutrality debate” (Poor, 2008). Related to that, a spokesman for Senator Obama told *Broadcasting and Cable* that, while the senator did not support restoring the Fairness Doctrine, he did support “media-ownership caps, network neutrality, public broadcasting, as well as increasing minority ownership of broadcasting and print outlets” (Eggerton, 2008c).

Toward the end of 2008, reports continued of lawmakers voicing support for the Fairness Doctrine and tighter regulation of broadcast. In October, Democratic Senator Jeff Bingaman (New Mexico) told a radio station that under the Doctrine: “... the country was well-served. I think the public discussion was at a higher level and more intelligent in those

days than it has become since” (Kovacs, 2008). Then on election day, Democratic Senator Charles Schumer (New York) voiced his support for the goals behind the fairness rule after a Fox News anchor asked him if he supported telling radio stations what content they could present. Schumer responded by asking the anchor, “I think we should all try to be fair and balanced, don’t you?” (Schumer, 2008). He then went on to voice his support of the FCC’s ability to ban pornography from broadcasts, arguing: “But you can’t say, ‘Government, hands off in one area to a commercial enterprise, but you’re allowed to intervene in another.’ That’s not consistent.” (Schumer, 2008). Similarly, a *Forbes* article that month argued that the Bush-era FCC’s actions against offensive language gave more leeway to Democrats and Obama should they decide to regulate broadcast content in the form of a restored Fairness Doctrine or something similar to it (Bolick, 2008)²⁶.

Fairness, Localism and Diversity in the Age of Obama

While several lawmakers continued to voice their support for a restoration of the Fairness Doctrine, the issue had not gained any relevant traction. However, critics began to increasingly argue that under the auspices of localism, diversity or similar broadcast goals, liberal Democrats in charge of Congress, and potentially President-elect Obama, could move to achieve many of the same results of the Doctrine (Boulet, 2008b; Stotts, 2008; Thompson, 2008). Shortly after the election, President Bush’s top telecommunications advisor warned that she thought restoring the Fairness Doctrine was still on the agenda of some in Congress (Eggerton, 2008d). Fox News interviewed Representative Pelosi and

²⁶ But not all Democrats were voicing pro-regulation sentiments. On election night, Democratic representatives Chris Van Hollen and Ben Cardin, both of Maryland, voiced their concern over the difficulty in reimposing the Fairness Doctrine given what they viewed as the current proliferation of media outlets (“Two Top Democrats,” 2008).

Senator Bingaman in November and they again voiced their support for the Doctrine (Bingaman & Pelosi, 2008). However, MAP's Schwartzman said of accusations of a return to the Doctrine around that time: "We've got a lot of work to do, and this would be a sideshow. This is entirely a creation of a bunch of right-wing talk-show hosts trying to make a ruckus" (Helling, 2008). Also, press secretaries for both senators Feinstein and Durbin said in November that their bosses did not intend to call for or vote for a restoration of the Doctrine (Nathan, 2008).

That was not enough to diminish the specter of the Doctrine's return. Conservative groups continued to ramp up their rhetoric and actions to prevent it (Motley, 2008), and commentators and lawmakers continued rhetorically pointing out the possibility of its restoration (Kyl, 2008; Wicker, 2008). Writing in December, conservative columnist George Will argued, as might have been evidenced in the earlier writing of Cass Sunstein:

... some liberals now say: The problem is not maldistribution of opinion and information, but too much of both. Until recently, liberals fretted that the media were homogenizing America into blandness. Now they say speech management by government is needed because of a different scarcity – the public's attention, which supposedly is overloaded by today's information cornucopia. (Will, 2008)

Then came comments from Democratic Representative Anna Eshoo (California) saying that she would not only push to support restoring the Fairness Doctrine, but she would also want it to apply to cable and satellite programming (Gladnick, 2008); Representative Boehner quickly criticized those comments and appealed to President-elect Obama to voice his opposition to any such attempts (Eggerton, 2008e).

Early in 2009, with the Democrats still in charge of Congress and a new Democratic president soon to take office, Republicans in the House and Senate once again offered bills to block reimposition of the Fairness Doctrine (Teinowitz, 2009) and NAB

and conservative groups voiced their support for them (“Broadcaster Freedom Act,” 2009; “Christian Coalition,” 2009; “NAB Applauds,” 2009). But Democratic leaders were still insistent that they had no intention of bringing the rule back (Ryan, 2009a). A spokesman for Democratic Senate Majority Leader Harry Reid (Nevada) said, “We have enough real problems facing this country that we don’t need to invent ones that don’t exist,” adding, “This is not even close to being on our radar screen” (Rowland, 2009).

Republican lawmakers, however, were not deterred by such statements. In Eric Holder’s confirmation hearings for attorney general, senators questioned him on the Fairness Doctrine. Republican Senator Jeff Sessions (Alabama) pointed to a 2004 speech from Holder in which he lamented the influence of conservative media and its effect on the dissemination of liberal views and then asked him if he believed the government had the authority to impose balance on the airwaves. Holder characterized his views as those of a private citizen and said he was not intending to implicate the Fairness Doctrine (Holder, 2004; Picket, 2009).

Some conservative critics also pointed to a statement on the new White House’s official Web site page on technology, that read, “Encourage diversity in the ownership of broadcast media, promote the development of new media outlets for expression of diverse viewpoints, and clarify the public interest obligations of broadcasters who occupy the nation’s spectrum” (“Technology,” n.d.) as an indication that the administration was open to imposing stricter regulations on broadcasters in the areas of localism and diversity without overtly bringing back the explicit Fairness Doctrine (Unruh, 2009). More controversy ensued over the new administration with a report that Obama told Republican leaders in one of his first meetings with them that, “You can’t just listen to Rush Limbaugh

and get things done” (Shipman, 2009). Twice, one time in a press conference and another in a “Fox News Sunday” appearance, key members of the Obama administration seemed to not be certain of the president’s views on the Fairness Doctrine, despite his earlier statement during the campaign that he did not support reinstating it (Calderone, 2009f; “‘Fairness Doctrine’ question,” 2009). The White House later reiterated Obama’s campaign position against reinstating the Doctrine (Eggerton, 2009b).

The month before, Commissioner McDowell warned again in a speech to the Media Institute that the Fairness Doctrine could come back in a stealth form, suggesting it could be marketed under a new name, this time “intertwined into other communications policy initiatives that are more certain to move through the system, such as localism, diversity or net neutrality” (McDowell, 2009, p. 9). Conservative groups echoed McDowell’s contention (Groening, 2009).

Acting Chairman Copps soon noted that although he did not support returning to the Doctrine, he thought the FCC had a “tremendous opportunity ... to ensure that the public airwaves truly deliver the kind of news and information that we need to sustain our democratic dialogue and to reflect the great diversity of our country” (Cover, 2009a). He added that, “If markets cannot produce what society really cares about, like a media that reflects the true diversity and spirit of our country, then government has a legitimate role to play” (Cover, 2009a).

Worries also came when Democratic Senator Debbie Stabenow (Michigan) hinted that she would push for hearings and told radio host Bill Press: “I think it’s absolutely time to pass a standard. Now, whether it’s called the Fairness Standard, whether it’s called something else – I absolutely think it’s time to be bringing accountability to the airwaves”

(Calderone, 2009a). Although her press secretary shortly thereafter said she would not be calling for hearings (Calderone, 2009c), another Democrat, Senator Tom Harkin (Iowa), also weighed in on Press' radio show and kept the specter alive by recounting how he had read an op-ed by Press and thought to himself, "there you go, we gotta get the Fairness Doctrine back in law again" (Calderone, 2009b). Harkin, too, later stepped back from those remarks (Norman, 2009)²⁷.

Aside from overt statements in support of the Fairness Doctrine, the localism issue also continued to concern conservatives and several broadcasters. Representative Boehner commented that, "Localism is quickly becoming code for the efforts of liberals to limit free speech and dissent" (Hair, 2009). And soon thereafter, Rush Limbaugh wrote an open letter to President Obama asking if he intended to "censor talk radio through a variety of contrivances, such as 'local content,' 'diversity of ownership,' and 'public interest' rules" (Limbaugh, 2009).

Conservative lawmakers continued their push to oppose a return to the Doctrine or something resembling it (Meyers, 2009; Thune, 2009). The Senate voted for a Republican-initiated amendment in late February that would have banned reinstatement of the Fairness Doctrine, while also voting for a Democrat-initiated amendment calling for the FCC to ensure diversity in ownership and public-interest standards ("District of Columbia," 2009; Jones, S., 2009). Senator Durbin, who proposed the latter amendment, noted that he believed it pertained more to ethnic and gender diversity and that, "... we're convinced that if there is diversity, then that is going to give us the kind of diversity of

²⁷ Former presidents Clinton and Jimmy Carter even weighed in. Clinton said he had not supported repealing the Fairness Doctrine and thought that if it was not present, something else would be needed to ensure balance (Calderone, 2009e), while Carter stated that he had not supported the perpetuation of the Fairness Doctrine ("Carter: 'Not,'" 2009, February).

opinion that America wants to hear” (York, 2009). However, Republican lawmakers were concerned that it would lead to a back-door type of Fairness Doctrine (Inhofe, 2009).

Liberal groups like Free Press also shifted their focus away from the Doctrine and onto localism, diversity and ownership rules (Eggerton, 2009c). A Penn State professor and former Clinton administration official, seeming to confirm Commissioner McDowell’s marketing theory, was reported to have told a group at a think-tank forum in early 2009 that, “‘activities simulated by the repeal of the fairness doctrine’ contributed to the need for new regulation, but that they would need rebranding to avoid the ‘strong and stereotyped’ reactions to the term ‘fairness doctrine’” (Eggerton, 2009d). Senate Majority Leader Reid soon reiterated that no one had an interest in bringing back the Fairness Doctrine (Ryan, 2009b).

The FCC’s focus was also turned to issues of diversity, ownership and localism. In April, Chairman Copps announced the members of a new Advisory Committee on Diversity for Communications in the Digital Age (FCC, 2009a). Conservative critics argued that the makeup of the committee did not contain any conservative groups and that it may be another back-door way into achieving a new type of Fairness Doctrine (“Concerns Raised,” 2009; Motley, 2009; Roberts, 2009). In the committee’s first meeting, Copps denied those suggestions and called them “issue-mongering” (Copps, 2009a). Copps later referred to a “progressive promised land” in a speech to Free Press where he also touted localism and diversity and warned that “... we are skating perilously close to depriving our fellow citizens of the depth and breadth of information they need to make intelligent choices about their future” (Copps, 2009b).

Meanwhile, one of the larger broadcast companies, Clear Channel, had

preemptively ordered its local stations to set up local advisory boards (“Nation’s talkers,” 2009). Commissioner McDowell warned that “a mandatory community advisory board that could have legal sway over a broadcaster’s license renewal could start dictating content under such a rule”, adding, “There are comments in the record supporting that, so it is not just a law-school hypothetical horrible situation” (Eggerton, 2009e).

In Congress, Republican attempts to legislate a block to any future attempt to bring back the Fairness Doctrine were blocked in committee and on the House floor by Democrats (“House Committee Rejects,” 2009; KDRV Staff, 2009). In an op-ed lamenting their failed efforts, Republican representatives Pence and Greg Walden (Oregon) noted previous support of the Fairness Doctrine from Democratic lawmakers and argued that proposed localism regulations were also “just a Trojan Horse for unelected bureaucrats in Washington determining what you can or cannot listen to” (Walden & Pence, 2009).

Conservative critics also began in 2009 to focus on several so-called “czars” in the Obama administration (Cantor, 2009). Those appointees pertaining to broadcast regulation were not immune.

Among those was the earlier mentioned Cass Sunstein, appointed as the head of the Obama White House’s Office of Information and Regulatory Affairs. Sunstein came under increased scrutiny for his previous writings in favor of tighter regulation of broadcast and internet content as well as a new book reportedly calling for increased monitoring and regulation of “false rumors,” specifically recounting President Obama’s critics’ attempts to link him with former 60’s radical William Ayers, now a Chicago professor (Hill, 2009; Klein, 2009).

Also on the radar for conservative critics was the FCC’s newly-selected Chief

Diversity Officer, Mark Lloyd (FCC, 2009b). Lloyd, as aforementioned, had co-authored the 2007 CAP report. Critics, however, began to emphasize his other comments, like those proposing that commercial broadcast stations should pay license fees equal to their operating costs that could go toward funding public broadcasting stations (Cover, 2009b). He also wrote another article for CAP in light of the media ownership regulation debate in which he recounted FDR's battle with the media to present his New Deal legislation in a favorable light (Lloyd, 2007b). Lloyd concluded the following:

A pro-big business Supreme Court aligned with Murdoch, Limbaugh and Zell and ready to battle a progressive in the White House begins to sound a lot like the early years of the FDR administration. Will progressives sound like FDR and commit to creating media policy that actually serves democracy and promotes diverse and antagonistic sources of news? (Lloyd, 2007b)

He had also reportedly written in favor of the positive-right conception of free speech by arguing:

The American republic requires the active deliberation of a diverse citizenry, and this, I argue, can be ensured only by our government ... Put another way, providing for the equal capability of citizens to participate effectively in democratic deliberation is our collective responsibility. (Cover, 2009c)

He wrote that:

... blind references to freedom of speech or the press serve as a distraction from the critical examination of other communications policies. ... the purpose of free speech is warped to protect global corporations and block rules that would promote democratic governance. (Lloyd, 2006, pp. 20 & 21)

Republican Senator Charles Grassley (Iowa) wrote a letter to new FCC Chairman Julius Genachowski expressing his concerns over Lloyd's previous proposals in light of Genachowski's earlier statements disavowing support for the Fairness Doctrine (Grassley, 2009). Genachowski responded back stating, as he had done before, that he did not support reinstating the Doctrine or "any effort to censor or impose speech on the basis of political

views or opinions” (Brown, 2009). He, and other FCC members, later voiced their support for Lloyd’s appointment, with Commissioner McDowell noting some reservations about Lloyd’s previous writings (“Commissioners spar,” 2009)²⁸.

Continuing Debate

As of the writing of this chapter, the debate over broadcast regulation in the name of the public interest has continued. That debate, however, has made a notable shift from the overt reinstatement of the Fairness Doctrine to other regulatory matters that revolve around the issues of diversity, ownership and localism. All of those issues, however, relate to a positive-right conception of free speech – one in which government’s perceived role is to actively foster, through regulation, the positive-right goals of diverse speech and access to media outlets and information.

Those in favor of the positive conception of political speech contend government regulation is the appropriate vehicle to attain those goals they believe are inherent in the values behind free speech and democracy. Those in favor of a negative conception continue to point out their belief that government regulation necessarily chills free speech and goes against the explicit wording in the First Amendment. This debate over the right to free speech, particularly in the rhetoric used by either side, continues to be animated by contrasting views of what that right represents: positive or negative liberty. The next chapter will, in light of the aforementioned history of this debate, attempt to argue that the positive-right conception of free political speech runs into problems philosophically, constitutionally and practically.

²⁸ Groups like Free Press and the Minority Media & Telecommunications Council also defended Lloyd (Eggerton, 2009f; “Honig Defends,” 2009).

CHAPTER V

PROBLEMS WITH THE POSITIVE CONCEPTION

A Positive or Negative Conception?

The previous chapters have demonstrated that underlying the Fairness Doctrine and similar public-interest regulations relating to localism and diversity of ownership is a positive conception of the right to free speech. This positive-right conception places emphasis on the government as the guardian of diverse speech in broadcasting (and at times, other mediums). Supporters of the positive right to free speech seem to believe government should foster and maintain diversity and balance of opinion in order to promote the broader goals of an informed citizenry and better democratic decision-making. In contrast to this positive-right conception is the negative-right view of free speech. It sees no role for government in policing the political content of broadcast speech. In fact, government, it contends, by involving itself in such regulation, may inhibit the very diverse political speech it intends to foster.

The purpose of this chapter will be to argue that the negative-right conception of free speech is philosophically, constitutionally and practically more appropriate than the positive-right vision exemplified in the Fairness Doctrine and similar regulations relating to localism and ownership rules. It will do so by arguing three main points. First is that a positive-right conception tends to treat individuals in a paternalistic manner, viewing them as incapable of making decisions on their own without the guidance of government

regulation. Second, a positive-right conception of free speech is constitutionally suspect in relation to a negative-right interpretation of the First-Amendment. And the third point is that the positive-right conception of free speech is impractical to implement and can actually inhibit the stated goal of diversity of political opinion – creating a chilling effect.

Positive-Right Paternalism

Isaiah Berlin warned in his writing on the two conceptions of liberty that the positive conception of liberty would lend itself more to abuse than a negative conception. As was noted in this thesis' earlier exposition of Berlin's positive/negative liberty dichotomy, he placed particular emphasis on the threat of paternalism (Berlin, 2002). Essentially, at its heart, paternalism means treating an individual as if they were incapable of making decisions on their own. It requires an assumption on the part of the paternalist that they know better than the actual individual what that individual truly, in their core, desires. As such, it often negates the autonomous free will of the individual and replaces it with the goals of the paternalist.

Berlin referenced Kant when he noted that paternalism allows others to treat individuals as not fully free (Berlin, 2002). This treatment allows the paternalist – referred to by Berlin as the “social reformer” (p. 184) – to shape individuals into his mold or vision, without regard to the individuals' desires, goals or free will. The paternalist is using individuals to reach some social goal he believes is in their best interest, as well as the society's interest. He is “[doing] for men (or with them) what they cannot do for themselves, and [the paternalist] cannot ask their permission or consent, because they are in no condition to know what is best for them” (Berlin, 2002, p. 197). This, Berlin notes, is

viewed by the paternalist as “the only path to ‘true’ freedom” (p. 197).

In this emphasis on “‘true’ freedom,” (p. 197), there is, in Berlin’s view, a confusion of liberty and freedom with other values like equality and fraternity. At one point, as noted before, he expressly argues, “Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience” (p. 172). He argues that while these values may be as equally important to individuals or a society, they should not be conflated with liberty (Berlin, 2002). Here he seems to side with the negative conception of liberty as a more accurate depiction of what should be in the end defined as liberty. This negative liberty is essentially the liberty to be left alone to decide for one’s self what to say or how to act. In contrast, Berlin equated the values inherent in the positive conception to a more general desire for “collective self-direction” (p. 208). This was, in essence, democracy in the simplest form: deliberative decision-making, in the end by a majority vote or action; he used as an example the French Revolution (Berlin, 2002).

These other values – fairness, equality, democratic governance – are no doubt desirable aspects of our political culture; however, conflating them with freedom, individual rights and liberty can become evident in practice. It is these other values such as equality, deliberative democracy and, in particular, fairness that best exemplify the values behind appeals to a positive-right conception of free speech. Recall the many appeals to free speech from those in favor of the Fairness Doctrine and other regulations like localism and ownership diversity. Their vision of free speech placed particular emphasis on the ability of every voice to be heard. To achieve this, it required action on the part of government to either limit the speech of others or compel them to present views they did

not espouse. In its focus on ensuring equality, deliberative democracy and fairness on the airwaves, the positive-right conception seems to have no qualms with limiting the negative free-speech rights of certain individuals in order to serve the interests of the whole. Berlin noted that philosopher Benjamin Constant viewed this form of popular government, where the individual's rights could be denied in order to further the broader goals and interests of the voting majority, with disdain – going so far to the extreme as to call it “merely a spasmodic tyranny” (Berlin, 2002, p. 209).

That susceptibility to government paternalism is what best differentiates the positive-right conception of liberty from the negative-right conception, which can be exemplified in the area of broadcast regulation of speech. The first prong of the Fairness Doctrine required individual broadcasters to speak on issues deemed by a government regulatory agency to be of public interest and importance. The second prong compelled broadcasters to give more than just their own opinion on the issue (FCC, 1949). At a minimum, such regulation required them to cease from speaking at certain times on their privately-owned broadcasting equipment to allow other speech they are not necessarily in agreement with. While this no doubt represented an attempt to further goals such as fairness, equality, diversity, deliberative democracy and a well-informed citizenry, it also expressly restrained the individual negative speech rights of broadcasters to determine for themselves what to say – in essence to act as autonomous speakers free from government paternalism.

This demonstrates that the positive and negative conceptions of free speech are not necessarily congruent – protecting one conception can be a detriment to the other conception. The positive conception of speech that has been present in broadcast regulation

might in many instances best be more clearly redefined as equality, diversity or fairness rather than calling it freedom or liberty. However, appeals to the terms “rights,” “freedom” and “liberty,” as noted in the earlier chapter covering contested concepts, carry quite possibly an even greater moral weight in American political culture than terms like “fairness” and “diversity” do, something which the positive-conception proponents have utilized to bolster their case. They have attached their goals of diversity and fairness with the concepts of freedom, perhaps to gain more support – similar to what MacCallum referred to as “[capturing] for their own side the favorable attitudes attaching to the notion of freedom” (MacCallum, 1967, p. 313).

Beyond the problems with the terminology used, there is the treatment of individuals under the positive conception. The positive conception of free speech in many cases necessarily requires government regulators to – though appealing to the public interest when enforcing fairness, localism and ownership rules – in practice substitute their own particular vision of what is in the public’s interest with what may truly be in the public’s interest (to the extent that such a unified interest can be said to exist).

Recall Justice Douglas’ concurring opinion in *CBS v. DNC* (1973). There he wrote that the prohibition in the First Amendment of government oversight of speech was founded partly on a fear of “government under the control of a faction that desired to foist its views of the common good on the people” (p. 148). Also, recall the examples given earlier of presidential administrations, Democratic and Republican, using the FCC to further their own political goals. They may have in rhetoric appealed to a notion of the public interest but were in reality protecting and advancing their own political agenda. This possibility necessitates taking a critical approach to the public-interest standard which the

FCC, an arm of the federal government, is supposed to enforce. Such an approach can become paternalistic in that it can replace what is actually in the public's interest with what those in control of government view to be in the public's interest.

When regulators attempt to pass rules ensuring diversity of opinion and perspective, they often do so believing that the public desires to hear such diverse opinion in order to make an informed decision on public matters. In so doing, they also intend to allow as many individuals as possible to have their opinions at least represented on the airwaves for others to hear, with the ultimate goal being a more informed citizenry. This form is the type that emphasizes the positive rights of the listeners, not the negative rights of the speakers. In doing so, it limits the individual negative speech rights of broadcasters in favor of providing a diverse and balanced presentation to the listeners and/or viewers. It says to someone that they must stop speaking in order to allow for another viewpoint. In those terms, it may be constitutionally and legally suspect (as will be addressed in the next section), but it does not necessarily represent overt paternalism.

However, another form this can take is when regulators seek to enforce diversity and balance in the presentation of views in order to expose individuals to views other than their own. Those in favor of this form point to the increasing partisan, niche broadcasting that has developed over the last several years that seems to cater to individuals already holding certain political beliefs, and they desire regulations that would require more balance. They believe that requiring balance of perspective by exposing individuals to views contrary to their own aids the functioning of democratic decision-making, which is in the public interest.

Examples of this reasoning were noted earlier in the writings of professors Sunstein

and Douglas (Coy, 2001; Douglas, 2005). Both, particularly Sunstein, exemplify a strain of thought that sees individual choices as to what to watch or listen to as somehow not fully interested in hearing all sides of an issue. They tend to view this as a flaw in the marketplace that needs to be corrected by government regulation. It is not enough to rely on individuals, on their own, to make the conscious decision to seek out contrasting viewpoints in order to better their understanding of political issues; government, the paternalists argue, must ensure via regulation that individuals are exposed to other sources. In doing so, they devalue the decisions of individuals, their autonomy, to choose for themselves what to listen to or watch. They substitute the individual's judgment for their own – which is at the heart of the problem with paternalism.

This is akin to what Berlin was referring to when he appealed to Kant: “Nobody may compel me to be happy in his own way” (Berlin, 2002, p. 183). In this substitution, the regulators become the decision makers rather than individuals, done in the name of helping the individuals to become more rational. To that point, a *Washington Post* editorial noted shortly after removal of the Fairness Doctrine that not only would a reinstatement of the Fairness Doctrine be in opposition to the First Amendment, but it also represented a worrisome level of paternalism on the part of government. It bluntly stated, “The assumption that Americans today are air-heads who must have certain government-prescribed doses of ideas orally and visually disseminated by every station and channel is repugnant as well as dead wrong.” (“Fairness’,” 1987).

In addition, in so doing the regulators yield their actions to not only paternalism but also a condition in which individuals – with certain constitutionally-protected rights – are treated as a means to an end. That greater end is more rational and informed political

decision-making and what the regulators believe is exposure to a diversity of presented perspectives. This emphasis on free speech as a mere means to another end is what was captured in the Supreme Court's opinion in *Red Lion*, and it related to Meiklejohn's belief that in a town-hall setting, decision-making should be made remembering that "what is essential is not that everyone shall speak, but that everything worth saying shall be said" (Powe, 1987, p. 42).

The Fairness Doctrine and localism, to the degree that they coerce or outright force individual broadcasters into ceasing speech in order to present speech they may not agree with, necessarily limit the individual's rights to free speech to the goals deemed more important and in the greater public interest to the regulators – those views the regulators have decided are "worth saying" (Powe, 1987, p. 42). Government under this construction has now become the regulator of the search for political truth²⁹, deeming some views on politics to be more worthy of mention than others. Government, in effect, becomes the regulator of opinions about government – for what is politics but the contestation over how individuals and societies should be governed.

Moreover, a deeper analysis of the positive conception of free speech might call into question the very notion of the assumed capability of regulators to successfully define a unified "public interest." To what extent, if any, can it be said that there exist certain interests in terms of speech which individuals hold collectively that can then be captured accurately by regulatory decisions that are by their nature incapable of omniscience. As noted before, Berlin referenced such a difficulty when he mentioned in a footnote a quote

²⁹ Such as situation was argued to also go against the grain of the First Amendment in *Consolidated Edison Co. v. Public Service Commission of New York* (1980), because, according to the majority opinion, "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth" (p. 538).

from Jeremy Bentham: “Individual interests are the only real interests” (Berlin, 2002, p. 217). Berlin argued that “human goals are many, not all of them commensurable, and in perpetual rivalry with one another” (Berlin, 2002, p. 216). The proponents of upholding the public interest would argue that certain values such as deliberative democracy and fairness are in the public’s interest – in practice making them more important than the negative free-speech rights of individuals. Here, they invariably place themselves in a position where they are prone to substitute their own vision of interests for the actual interests of the individuals. Such supposed unified goals determined by regulators necessarily fall prey to the limitations of information available to regulators, while at the same time hindering individual political speech.

This contention between varying individual interests and supposed unified public interests highlights deeper philosophical differences between the value placed on individualism versus communitarianism. The negative conception emphasizes the individual’s rights to be free from government coercion or limitation to determine for themselves what is in their individual interests, whereas the positive conception emphasizes the role of government to collectively uphold what it deems to be in community’s interests (or the “public interest”).

FCC Chief Diversity Officer Mark Lloyd emphasized the latter conception when he, as noted in the previous chapter, wrote:

The American republic requires the active deliberation of a diverse citizenry, and this, I argue, can be *ensured* only by our government – by the only institution established to operate for the general welfare. Put another way, providing for the equal capability of citizens to participate effectively in democratic deliberation is our collective responsibility. (Lloyd, 2006, p. 18)

This conception of the role of government in speech seems to again view speech as a means

to a greater end – that being informed decision-making in the interest of the greater public – rather than an end in itself. It places emphasis on a more utilitarian goal of serving the perceived needs of the community as a whole and devalues the individual negative rights of broadcasters to freely speak as they see fit.

The way this type of paternalism played out with the Fairness Doctrine has been demonstrated. But, despite the several aforementioned calls to bring back the overt Fairness Doctrine, attempts thus far have not gained any significant traction. However, newer regulatory measures, particularly localism, have.

Though the FCC had some detailed localism rules that required, among other things, stations to ascertain the needs of their listening community and log how they were meeting those needs, they were to a large degree scrapped in the 1980s in favor of issues/programs lists and reliance on market forces. However, in 2007 the Commission created a form which required broadcasters to spell out how they were attempting to meet the specific needs of segments in their community, particularly those traditionally deemed underserved by broadcast programming. The FCC became increasingly concerned that licensees were not sufficiently catering to the interests and needs of their local communities. Among its proposals to implement stricter rules for ensuring localism, the Commission has suggested the creation of local advisory boards, made up individual leaders representing various segments in the community, to steer the programming decision-making process. The details of such boards, however, have neither been specifically spelled out nor implemented (FCC, 2008).

Conceivably, proposed localism regulations would also be susceptible to similar paternalistic behavior on the part of regulators. The local boards in the communities

responsible for monitoring broadcast stations would necessarily be small. Attempts to make them representative of the community at large or even of the actual listeners or viewers of a particular station, even with the best of intentions, would nonetheless fall short.

Take for example the earlier noted FCC Advisory Committee on Diversity for Communications in the Digital Age, which critics argued failed to accurately represent the public as a whole by not containing any conservative-leaning groups. Similar small panels would be set up to monitor local radio and television stations under a localism regime. It is conceivable that these smaller community advisory boards would essentially have more sway over programming decisions than the larger group of actual listeners would – given the importance placed on the boards by the FCC.

Though the reasoning behind such a board is to better serve the public interest, the possibility of achieving that goal is hindered by the fact that the board represents a smaller percentage of the public than the listeners do. In that sense, it would represent those on the board (who would tend to be the most politically active in a community) substituting their judgment for the judgment of the listeners. Added to this consideration should also be that these advisory boards would have the blessing and backing of the government. Put together, this combination essentially would represent government again (as it behaved under the Fairness Doctrine) behaving in a paternalistic manner toward individuals – substituting its judgment (or at least the judgment of its approved board) for the judgment of individuals when it comes to what they should listen to and watch.

The degree to which ownership regulations are susceptible to the same type of paternalism is not as readily evident. In one respect, ownership restrictions might be

classified as a content-neutral method of preventing monopolization of an industry. In other commercial endeavors, the argument would be left at that. However, the industry regulated in this example is an industry where the product is speech itself. This adds an extra layer of complexity to the analysis of ownership regulation in broadcast.

Specifically dealing with paternalism, it might be argued that regulations preventing a company from acquiring a broadcast license would usurp the listeners' opportunity to judge for themselves if they should listen to a particular broadcast. The government, in that respect, is deciding for the listener that too much speech from the same owner is not in the public interest. Here again, the paternalistic nature of broadcast regulation in the name of the public interest becomes more clear. Instead of taking a hands-off, negative-right approach of allowing listeners to choose whether to listen to an owner's broadcast or not, ownership regulation involves government taking positive action to restrict the number of stations on which any particular owner can broadcast – doing so in the name of ensuring both the public-interest need for diversity in ownership and voices heard.

In summary, the paternalism of the Fairness Doctrine, localism and ownership regulations should be seriously questioned as a potential threat to individual negative-right freedom in the name of upholding other values. In the name of positive-right “freedom,” this type of paternalism uses individuals to reach an often more utilitarian social goal the government regulator believes is in their best interest.

In contrast to this paternalistic positive vision is the value placed on the anti-paternalistic ideas of negative liberty, freedom and individual rights. Berlin (2002) noted that the paternalistic nature in which the conception of freedom had taken,

exemplified by him in more communal societies like that in the Soviet Union, was far from the conception of freedom that saw the individual and his self-responsibility, free will and autonomy as preeminent – something more prominent in the West. That focus on the individual was exemplified to some extent in the limited powers given to the federal government and the freedom of the individual and states acknowledged in the U.S. Constitution.

The Development of a More Negative Right to Free Speech

The wording of the U.S. Constitution, the “supreme law of the land,” enumerates certain specific powers given to the federal government and leaves all other powers and rights to, according to the Tenth Amendment, the people or the states. In doing so, the text limited the ability of the federal government to steer and direct the actions of individuals beyond that of what it explicitly enumerated. The Bill of Rights, the first ten amendments, lays out specific limits on the power of the federal government to infringe on the rights of individuals. Rights, under this construction, did not emanate from government but, according to the earlier penned Declaration of Independence, were endowed by a creator. The federal government was not to violate those rights but only to secure them.

The Constitution lays out its treatment of freedom of speech in the First Amendment. The wording of this amendment is on the surface negative in nature:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The wording implies that the right to free speech, and for the matter the press, is violated when Congress – the constitutionally-vested lawmaking authority according to Article 1,

Section 1 – makes laws abridging the freedom of speech. It does not call for Congress to foster or ensure diverse or balanced political speech from all speakers, nor does it require Congress to ensure that individuals are provided with diverse or balanced information from speakers. The wording simply suggests that Congress should be hands-off, abstaining from making laws that would abridge the freedom of speech. It says nothing of private censorship, only federal government laws that would abridge.

In debate over the amendments, it was sufficiently noted that these rights listed were rights of individuals to be left alone by the federal government. James Madison, often referred to as the “father of the Constitution” for his influence in drafting the document, noted in the debates that there were those at the time who, despite the powers of the federal government being limited by the original and unamended Constitution, feared that the government, as all governments, was still susceptible to the abuse of individual liberties (“Annals,” 1789). Madison viewed the amendments as a way to ensure that such abuses “of the powers of the General Government may be guarded against in a more secure manner than is now done...” (“Annals,” 1789, pp. 449 & 450). Particularly referencing the relationship of rights to restraint from government, Madison wrote that:

... the great mass of people who opposed [the unamended Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power. (“Annals,” 1789, p. 450)

Similarly, Thomas Jefferson, in an earlier letter to Madison, noted that a bill of rights represented “what the people are entitled to against every government on earth” (Jefferson, 1787). A large influence on the Bill of Rights was Virginia’s own Declaration of Rights. That charter’s specific reference to freedom of the press in its text noted that,

“That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments” (“Bill of Rights”, n.d.). The link was clearly made at the time that the rights to free speech and the press protected by the First Amendment were specifically protected from the federal government, not private individuals or groups.

Though the wording of the Constitution, read casually by the reader in contemporary times, seems to note a purely negative right to free speech (e.g.; a completely hands-off approach by government), that was not necessarily the consensus among those at the time of the founding. English common law had developed at that time to view freedom of speech as a freedom solely from prior restraint from government censorship, not subsequent penalties. As William Blackstone noted in his commentaries on the common law:

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. (Blackstone, 1769)

Blackstone then added that subsequent punishment could still be justified if it punished that which was “dangerous or offensive” and “of a pernicious tendency” (Blackstone, 1769). This could also include, “malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule” (Blackstone, 1769) and was typically referred to as “libel.”

Under the understanding at the time, unlike what has developed in constitutional case law since the 1900s, truth was not a defense in criminal matters involving such libel. “For the same reason it is immaterial with respect to the essence of a libel, whether the

matter of it be true or false,” wrote Blackstone, “since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate its guilt, and enhance its punishment” (Blackstone, 1769).

It was this common-law understanding of free speech and the press at the time that enabled the passage and enforcement of the infamous “Alien and Sedition Acts” in the United States after the Constitution and Bill of Rights had both already been adopted. The Sedition Act in particular allowed the federal government to fine and imprison individuals for writings that were critical of those in government – deeming it seditious libel. This type of penalty was a type of speech and press restriction generally thought to be viewed by the majority at that time to be within the scope of government authority. It is important to note that the constitutionality of the Sedition Act was never ruled on by the Supreme Court at the time; however, it was not without its critics – particularly those whose supporters were on the receiving end of government penalties for such speech (O’Brien, 2005).

Those most adamantly opposed to the Act included the likes of Thomas Jefferson and James Madison. In contrast to the perceived majority opinion at the time that abridgment of speech meant only that government could not impose any previous restraint on the press, James Madison, himself the chief author of the First Amendment, seemed to hold an opinion most closely aligned with a negative-right vision of free political speech. Referencing the traditional debate over liberty versus licentiousness in terms of what speech could be regulated by government, Madison, in an address to the people of Virginia, gave his support to the belief that despite the press’ perceived abuses of their liberty from government restriction, there could be seen no alternative remedy that would not lead to “enslaving the press” (Madison, 1906, p. 336).

Both Madison and Jefferson were instrumental in drafting two separate resolutions critical of the Alien and Sedition Acts. In the Virginia and Kentucky Resolutions, the constitutional legitimacy of the acts was called into question, particularly in light of the Constitution's wording in the Tenth Amendment leaving all non-enumerated powers to the states.

In espousing the importance of free political speech, the Madison-drafted Virginia Resolution asserted that the acts had been "levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right" (O'Brien, 2005, p. 44). Madison also explicitly argued against government sanctions post-speech, not just prior restraint, when reporting on the Virginia Resolutions. "The freedom of the press under the common law is, in the defences of the Sedition Act, made to consist in an exemption from all previous restraint on printed publications by persons authorized to inspect and prohibit them," wrote Madison. He added:

It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made. (Madison, 1800).

Madison's vision of a more negative-right approach to the First Amendment should be additionally qualified not only by the apparently pervasive opinion during his time that prior restraint was the only legitimate type of action safeguarded against in terms of speech but also by the fact that his opinion on the constitutionality of seditious libel was based to a large extent on his view that it was the federal government, specifically Congress (the lawmaking body), to which the First Amendment at that time pertained. The states were

free under the construction of the Bill of Rights, particularly by the Tenth Amendment, to legislate on and regulate speech as they deemed appropriate. Though states also enshrined protections of speech and the press in their constitutions, and Madison, himself, initially proposed additional wording as part of the Bill of Rights that would have prevented states from abridging the freedom of speech and the press, the end result of the Constitution was only to govern federal abridgment (“*Journal*,” 1789; O’Brien, 2005). It would not be until later that much of the Bill of Rights would be applied to the states by the courts under the provisions of the Fourteenth Amendment, known as “incorporation”³⁰.

Though the more Madisonian approach to the freedoms of speech and the press, which was more in line with the negative-rights view, did not reflect the majority of views in the Congress which passed the Alien and Sedition Acts, it did eventually rule the day in much of American constitutional case law governing political speech and freedom of the press. This was particularly the case in the 1900s when questions over the scope of the First Amendment and government action beyond mere prior restraint were more readily addressed in federal courts – the most notable exception, of course, being the rights of broadcasters under the *Red Lion* precedent.

As Justice William Brennan would write in the majority opinion in *New York Times v. Sullivan* (1964):

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. (p. 276)

He also noted in the opinion a report to the U.S. Senate in 1836 that “assumed that its invalidity was a matter ‘which no one now doubts’,” adding that, “Jefferson, as President,

³⁰ See chapter 4 in O’Brien (2005) for further details on this trend.

pardoned those who had been convicted and sentenced under the Act and remitted their fines” (p. 276). The majority’s opinion, more than a century and a half after the expiration of the Sedition Act, was thus that the Act was unconstitutional (*New York Times v. Sullivan*, 1964).

It really was not until the 1900s where constitutional case law in regard to free speech and the press was largely developed. As cases were brought before the Supreme Court then, the trend in interpretation was progressively becoming more in line with a negative-rights turn not only protecting political speech against prior restraints but also subsequent penalties.

Originally addressing a similar law to the Alien and Sedition Acts, the 1917 Espionage Act, the Court set up a standard that would through time become an eventual precedent where political speech could only be penalized if it was used in such a manner that would bring about a “clear and present danger” of the “substantive evils that Congress has a right to prevent” (*Schenck v. United States*, 1919, p. 52). By doing so, the Court eventually asserted that the First Amendment not only protected against prior restraint but also subsequent penalty in certain cases (O’Brien, 2005).

Several years later, the Court would specifically address the issue of libel. Though libel and “slander” (the spoken form) were still prosecutable offenses, the aforementioned *New York Times v. Sullivan* (1964) case restricted their scope by setting the precedent that cases of libel and slander against public figures had to represent not only false claims, but they also had to stem from “actual malice” or “reckless disregard” for the truth of the claim (p. 280).

Fifty years after *Schenck*, in *Brandenburg v. Ohio* (1969), notably the same year as

the *Red Lion* decision, the Court further limited the government's role in penalizing political speech by ruling that mere advocacy of violent means was not enough to warrant government penalty under the First and Fourteenth Amendments; actual "incitement to imminent lawless action" (p. 449) had to transpire for government penalty to be justified. This test of incitement to imminent lawless action is the more recent test used to determine the scope of constitutional protection in terms of political speech and represented quite possibly the furthest progression toward a more negative-rights view from the Court.

The legacy of these cases and a string of others in the 1900s related to the First Amendment could be argued to be more in line with the vision Madison had of free speech and the press. Again, the exceptions to acceptable political speech were now so very narrowly defined to the point that the speech had to, by its very nature, provoke "incitement to imminent lawless action" (*Brandenburg v. Ohio*, 1969, p. 449), or it had to be flatly false with malicious intent or disregard for the truth in order for subsequent punishment to proceed legally.

These developments, for all intents and purposes, have finally perhaps led American First Amendment jurisprudence closest to a negative-right view of freedom speech and the press. Though this turn does not necessarily represent a perfectly absolutist negative-right turn, it is significant progress toward that end, particularly when compared to the common-law, prior-restraint approach that enabled prosecution for "seditious libel" or the more positive-right conception supported by proponents of the Fairness Doctrine and similar public-interest regulations that still sees a role for government to actively foster diversity in speech³¹.

³¹ Several other cases highlighting this more negative-right turn in free speech and press protections could be mentioned here, but doing so would go beyond the purpose of this section and deviate from the main points.

Perhaps one of the best defenses of the more Madisonian approach to the First Amendment emanating from the increasingly negative-right turn to free-speech jurisprudence particularly in cases dealing with broadcast political speech came in opinions from Justice William O. Douglas. For example, in his dissent in the 1973 *Yale Broadcasting v. FCC* case, Douglas rejected the different treatment of broadcast and print in terms of government interference and First Amendment protection. He wrote that there was an “inevitable danger resulting from placing such powers in governmental hands – a danger appreciated by the Framers of the First Amendment” (*Yale Broadcasting v. FCC*, 1973, p. 916).

Douglas had earlier written in *CBS v. DNC* (1973) that:

The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV and radio in order to serve its sordid or its benevolent ends. (p. 154)

Noting the chilling effect, Douglas wrote in his *Yale* dissent, “The threat of governmental action alone would impose a prohibited restraint upon the press” (p. 917). And in citing a previous case, *Lamont v. Postmaster General* (1965), he wrote that such prior restraint or “inhibition” against First Amendment rights “is a power denied to the government” (*Yale Broadcasting v. FCC*, 1973, p. 917).

Seemingly attacking the notion that the public-interest standard upheld by the FCC licensing regime included, as the majority wrote in *Red Lion*, a right “to receive suitable access to social, political, esthetic, moral, and other ideas and experiences” (*Red Lion v. FCC*, 1969, p. 390), Douglas noted that, “The Commission imposes on the licensees a responsibility to analyze the meaning of each song’s lyrics and make a judgment as to the social value of the message” (*Yale Broadcasting v. FCC*, 1973, p. 917). He postulated that

such government scrutiny could lead to applying such oversight to even comedy programs (*Yale Broadcasting v. FCC*, 1973).

It was clear that Douglas detested the notion of the Fairness Doctrine and its corollary rules, rules which he believed hindered the passion and diversity in public debate which were intended goals of the Doctrine. He concluded that it was not constitutionally permissible under the First Amendment for the federal government to “decide what messages, spoken or in music, are of the proper ‘social value’ to reach the people” (*Yale Broadcasting v. FCC*, 1973, p. 918). For better or for worse, government was to be hands off in its approach to political speech – in print or broadcast; there was no distinction in his mind with regard to the First Amendment (*Yale Broadcasting v. FCC*, 1973).

Despite this more Madisonian, negative-rights turn in interpretation of the federal government’s relation to political speech, there remains a persistent counter argument that interprets a general right to free speech that is tempered by other government interests. Over the years of constitutional interpretation by the courts, the individual right to speak has been qualified or limited. Courts have managed to allow certain restrictions on individual speech in the broader goal of carrying out a greater government interest³². The argument here for a negative-right approach to broadcast political speech is not meant to necessarily be a blanket statement that no speech whatsoever can be regulated by the FCC. To argue specifically that point and detail case law in terms of regulating other types of speech which those at the time of the writing of the Bill of Rights might have viewed as licentious, like “obscenity,” would go well beyond the scope of this thesis – not to mention that it would also be harder to clearly peg with the meaning of “speech” by the framers – and would require much more elaboration which would digress from the main thrust of the

³² See chapter 5 in O’Brien (2005) for greater detail on the restrictions allowed by the courts.

argument.

The main argument of this section is that of all the types of speech safeguarded against government regulation by the development of First-Amendment case law in the United States, explicitly political speech – opinion on government and its actions – has been viewed to be the most overtly obvious and the one to be most ardently protected. It is the free critique and examination of government and government officials that is protected by not limiting such speech. The negative-rights approach to political speech, exemplified in Madison's views on the matter, represents an attempt to deny government, more specifically those with sordid political intentions in government, the power to silence or punish speech that may go against their particular inclinations or interest.

The abuse of such manipulation of speech and the press was amply noted in the history of regulating broadcast political speech under the Fairness Doctrine. To go into each exception made by the courts in terms of non-political speech and expression would go beyond the scope of this thesis. As such, the focus here will be on the government interests appealed to in respect to political speech in broadcast specifically. These exceptions relate to appeals to democracy and the general public interest, with a condition for regulation being the supposed scarcity of the broadcast spectrum.

Democracy, it is argued, is fostered by active deliberation and the hearing of all sides of an opinion. The positive-right proponent would argue that where there is a scarce resource, like the broadcast spectrum, enough access must be granted to ensure that all points of view are represented in order for the society as a whole to make informed democratic decisions. Under this logic, it then becomes necessary for government to ensure that fairness and access are granted. The type of focus on democratic

decision-making that leads to government regulating political speech over the airwaves necessarily acts to restrict certain individual broadcasters' speech by requiring them to withhold speaking their opinion to present another's perspective³³.

The more general "public interest" has been interpreted by the courts to include a range of other social goals. As has been noted in previously mentioned cases like *Red Lion* and *Citizens Committee*, the public interest has encompassed anything from ensuring the more general positive right of the public to receive social, political and moral ideas through broadcast to balancing the type of music played over the airwaves.

In 2007, reacting to calls to reinstate the Fairness Doctrine, former FCC Chairman Fowler asserted that those who justify the rule based on the public interest are "politicians trying to control part of the press" (Rowland, 2007b). He added: "To say the airwaves belong to the people - all these reasons they use to regulate are excuses. They're not reasons" (Rowland, 2007b). Recall Fowler's earlier argument against the scarcity rationale: "When the founding fathers came up with the First Amendment, there were eight weekly newspapers in the entire country, and yet they said, 'These eight shall be free.' They didn't do a scarcity analysis"³⁴.

Similarly, Justice John Marshall Harlan noted in the dissent in *Patterson v.*

Colorado (1907):

I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges (p. 465)

³³ It may be important to clarify here that the arguments in this thesis are not meant to disparage the notion that informed decision-making and exposure to varying points of view are important and critical to democracy. Rather, the argument is that government acting to enforce such exposure to balanced opinion is a dubious practice that can lead to unintended consequences.

³⁴ Again, this is the quote from the Donlan (1982) article as presented on page 53 of Jung (1996).

The public-interest standard, coupled with the scarcity rationale, enables a wide variety of excuses to justify the denial of individual political speech rights – something not in line with the development of the constitutional protection of political speech.

Despite the negative-right interpretation of the First Amendment’s protection of political speech, there remains the specter of the Supreme Court’s opinion in the *Red Lion* case. In that case, as was detailed in a previous chapter, the Court upheld the FCC’s authority to enforce diversity of political opinion content in broadcasting. The sum argument was that the scarcity of radio frequencies not only allowed for licensing by the FCC but also direction of content. A negative-right approach would not necessarily forbid the regulation of frequencies to prevent signal bleeding; such a step is merely a technological regulation. However, a negative-right approach would forbid the FCC from directing the content of the political speech over those signals. Notably asserting the distinction to be made between technological and content regulation, former FCC Chairman Fowler once compared television to “just another appliance – it’s a toaster with pictures” (Tucker, 1985). That statement crudely voiced the negative-right approach to the regulation of broadcast political speech.

The *Red Lion* court seemed to conflate the two issues in its majority opinion. It justified content regulation on the basis that technological regulation was necessary to ensure the practical use of the spectrum. At one point, the opinion asserted, “Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment” (*Red Lion v. FCC*, 1969, p. 387). If this argument were limited to the need to regulate the technology in order to avoid signal overlap, it would not raise constitutional

issues. However, the Court used it partly to justify the FCC's actions to compel individual broadcasters to present contrasting opinions from their own – a regulation of content.

In addition, another line of reasoning that the *Red Lion* (1969) opinion asserted was that:

... nothing in the First Amendment ... prevents the Government from requiring a licensee ... 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. (p. 389)

But such a requirement would necessarily involve the government coercing individual broadcasters into presenting, with their broadcast equipment, those political views to which they may not agree. But government-coerced or compelled speech has been ruled to be just as much anathema to the First Amendment as government restriction of voluntary speech. Courts have generally ruled starting in the 1900s that where the government overtly compels individuals to speak or express views that they disagree with, it violates their First-Amendment rights³⁵.

In a similar argument concerning government compelled funding of religion, Thomas Jefferson had once noted, “That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical” (“Virginia Act,” 1779). This type of compelled speech is perhaps the most questionable form of positive-right regulation given that it goes beyond the mere restriction of speech and onto a government mandate to utter opinion that may contradict one's own deeply-held views. It stands to reason that government specifically compelling broadcasters to use their time, resources and money to express views which they may disagree with would likewise fall prey to the same criticism.

³⁵ See the Supreme Court's ruling in *West Virginia State Board of Education v. Barnette* (1943) for one of the first examples of rulings against government-compelled speech.

Neither the deliberative-democracy nor the public-interest rationales for regulating broadcast political speech under the Fairness Doctrine and its corollary rules can be firmly squared with the more negative-rights interpretation that has developed in relation to non-broadcast political speech. The negative-rights vision sees the enemy of free speech as government, not more speech. The negative-right freedom of speech permits the free will of individuals to choose for themselves what to say, and consequently what to not say in matters of politics, free from government influence. Likewise, that freedom also means that certain viewpoints and topics will invariably be of more interest to individuals than other viewpoints and topics. That may mean certain viewpoints will not see as much coverage on the broadcast medium given that it is reliant upon ratings to determine what people want to hear. But under this construction, it is for the individuals to decide what to listen to, not government.

The threat of federal government manipulation of political speech was the chief fear addressed by Madison. That threat of government manipulation was evident in the history of implementing the Fairness Doctrine. However, the Doctrine is gone and does not immediately show signs of reimplementing. Other regulations more likely to be implemented do, however, raise similar constitutional questions.

Potential localism regulations would give local community advisory boards sway over speech heard over the airwaves. Under this potential localism regime, despite the FCC's attempt to delegate the decision-making to local boards of community activists as a means of legitimizing such regulation, the fact cannot be lost that neither the boards nor the FCC would have any legal power except for the fact that they are extensions of Congressional regulatory power. However, that regulatory power – the power to determine

the content of political speech – is expressly prohibited. If the boards were given any real, enforceable power over programming decisions, it would constitute an abridgement of the First Amendment under the negative-rights construction.

In addition, even if the board had no direct decision-making power, if the FCC decided to base licensing decisions on whether a station listened to its advisory board, this would still raise serious constitutional issues. Such a move would, in effect, represent the government coercing broadcasters into changing their content in favor of the government-backed board's content suggestions. In fact, the FCC had indicated in its 2008 localism review that it would consider adding specific guidelines to the license renewal process which would take into account the performance of licensees in terms of adhering to localism content (FCC, 2008).

Proposed localism regulations might place government-backed power to influence the content of radio and television broadcasts in the hands of community advisory boards. In that the boards would be backed with the regulatory power of the FCC, a creation of Congress, it would by extension represent Congress delegating its regulatory power to the boards. As such, these boards would conceivably have the power to determine what broadcast content serves the local community and what content does not. This determination, under the development of First-Amendment case law would be constitutionally suspect. However, a more exact determination of if these eventual localism requirements would abridge the First Amendment's protection of political speech or not will have to be made if and when formal rules are eventually implemented by the Commission.

Ownership rules are the other prevalent broadcast regulation that may have

constitutional implications. In the sense that new ownership regulations can involve government preventing an owner from owning a station and broadcasting certain political views with it when absent the specific government ownership regulation the owner would have been free to do so, they may implicate to a degree a restriction on the owner's negative free-speech rights. However, this connection between ownership regulations and free speech is probably the weakest, given that, unlike in localism where the owner's actual speech is regulated after obtaining a license, denying a license to a potential owner does not specifically abridge actual speech. The potential owner has not obtained the license to utilize the broadcast spectrum yet. Though government cannot abridge a person's actual political speech, it is not required to provide access to a limited vehicle for that speech.

The power to regulate ownership caps would fall under the commerce clause of the Constitution found in Article 1, Section 8, which permits regulation of interstate commerce. Broadcast signals of commercial stations, in that they can often cross state lines, would constitute in most definitions the type of interstate commerce that falls under the commerce clause. As such, one could view ownership regulations as merely anti-trust economic regulations preventing the monopolization of an industry. Such regulations have been viewed in case law to be generally consistent with the commerce clause³⁶.

It just so happens, though, that this particular industry often trades in political speech – something protected from government abridgement by the Constitution. It is in this form of regulation that the emphasis placed in case law on the regulation of content becomes of particular importance. However, preventing one owner from owning too many stations is not direct content regulation of speech. It denies surplus licenses to an individual

³⁶ See *U.S. v. Trans-Missouri Freight Association* (1897) for an early example of courts acknowledging the ability of the federal government to prevent monopoly activity.

owner, not their right to speak what they desire to speak over the airwaves for which they do have a license. As such, the relationship of broadcast ownership rules to the legal protection of speech under the First Amendment is rather weak when compared to the relationship of localism to speech abridgement and may not necessarily be grounds to reject ownership rules on the basis of constitutional considerations.

This negative-rights approach to the First Amendment that has been argued for here is something that still may be opposed by those advocating a positive-right conception of free speech. They may, despite arguments for the Madisonian view and the more negative-right interpretation developed in later years by the courts, continue to point to the *Red Lion* case as an example of the Supreme Court upholding the Fairness Doctrine as constitutionally permissible. However, it should be noted that, even assuming the positive-right vision of free speech was legitimate, the continued constitutionality of the Doctrine in the *Red Lion* opinion hinged on it not acting in a way to hinder free speech (the chilling effect). That chilling effect might demonstrate an abridgement of free speech that the courts would need to revisit. The chilling effect would not only represent a constitutional dilemma but also a practical problem.

Practical Problems with the Positive Conception

In addition to the philosophical and constitutional issues with a positive conception of free speech, there are also practical problems with enforcement and implementation of rules and regulations aimed at upholding this conception. The first problem is the actual implementation of a positive-right conception and the practicality of such a task. The second is that in many areas, enforcement of a positive-right conception of free speech may

actually inhibit speech through a chilling effect.

Implementing the Fairness Doctrine proved at times to be difficult and taxing. It often involved regulators in time-consuming and tedious monitoring of broadcast content that, in the end, was prone to subjectivity. One example of this was the monitoring of political advertisements under the Doctrine. According to Simmons (1978), “In 1975, there were five lawyers, one broadcast analyst, and two secretaries working in the Fairness/Political Branch, which also handles section 315 equal time complaints and inquiries” (p. 14). This small group of government employees was responsible for ascertaining if broadcasters were being fair in their coverage of issues of public importance and then passing the issues on to the appointed FCC commissioners.

In addition, Simmons (1978) also noted that often, in determining if licensees had met their obligations in terms of providing fair and balanced coverage:

... only major opinions need be presented. Nonestablishment, minority viewpoints – no matter what their worth – simply do not need airing. And even if there are a number of major “establishment” viewpoints on an issue, the licensee will probably be safe from reprimand if it presents only two. (pp. 191 & 192)

This demonstrated a further daunting challenge to the small staff and Commission: determining which viewpoints are the major, important viewpoints.

Further exemplifying the tediousness involved in such tasks, one former FCC staffer, recounting the process of determining a licensee’s devotion to fairness, noted:

I was there when we used to take a stop-watch upon a complaint and we would watch a program or listen to it and we would say, “7 minutes pro, 6 minutes con, X minutes neutral.” Now if that isn’t getting into the broadcasters’ knickers, I don’t know what is. (Simmons, 1978, p. 204)

He added, “Furthermore, we used to argue about whether it was 7 minutes or 8 minutes, depending upon what someone thought” (p. 204). Noting the controversy with such

detailed scrutiny of broadcasters by the Commission, Former FCC Chairman Dean Burch questioned if this process involved the Commission “too deeply in day-to-day journalistic practices” (Friendly, 1976, p. 151)³⁷.

Localism regulations, in that they would involve an ascertainment of a station’s commitment to coverage of local issues and concerns, may lead to a similar type of detailed, taxing and inherently subjective oversight noted in respect to the Fairness Doctrine. Local advisory boards would conceivably be involved in analyzing the details of broadcasts. Even if the boards themselves would not be conducting detailed reviews of broadcasts, the FCC would. The FCC would condition station license renewal in part on whether it was implementing suggestions from the local boards. To ascertain if it was meeting this requirement, the Commission staff could find itself involved in pouring over broadcast records, and once again, dubiously monitoring broadcast content – this time searching for content that it would deem to be either serving the local interests or not serving the local interests.

In implementing this, just as in any policy implementation, how the regulators determine what constitutes coverage of issues of interest to the local communities can greatly affect the results. That determination would fall prey to the difficulty inherent in a process where a select few government regulators decide for the local community what issues they care about and what topics interest them – a process that can be prone to bias and subjectivity, not to mention political influence.

Even factoring in the existence of the community advisory boards, the makeup of

³⁷ At one point, the Screen Actors Guild attempted to add even more to the FCC’s plate of tedious content monitoring by seeking to have the Commission limit the number of re-runs that could be aired on television (Powe, 1987). Friendly (1976) also noted the daunting steps which the FCC had to take in determining fairness violations on pages 188 and 189.

the board would still fail to capture an accurate representation of the public's aggregate interests, let alone the interests of those in the community who actually listen to or watch the broadcast station under review. As noted, these boards would most likely be made up local officials and "leaders" (FCC, 2008, p. 14) of various segments in the community, the definition of which would also fall prey to subjectivity.

Also, those most interested in participating in these boards might likely be the more politically active members of a community and those with various financial or political interests in influencing the direction of broadcast licensing in the community. The average citizen, especially the average listener or viewer (to the degree that even that term could be sufficiently defined), may not necessarily be well represented on the boards. Such a mal-representation would distort the validity of the board's opinions on if a station is serving the interests and needs of the local community.

Another implementation issue to be concerned with in localism is the emphasis placed on serving the community's interest, not necessarily the interests of those who actually listen to or watch a station. Some members of a community, despite access and exposure to local radio and television, may not be interested or may not prioritize listening to or watching a particular station. Particularly in today's technology-saturated environment, some may rely on the internet for their news and information. Others may prefer the local newspapers. Still others may listen to satellite radio. To what degree does the FCC's priority on the community's overall needs sacrifice the needs of those who would actually listen to or watch a local broadcast in the first place. It serves little purpose to cater a particular service to a larger public that may not necessarily ever intend to use it.

The practical implications of implementing stricter ownership regulations do not

seem to be as evident. Regulators could arbitrarily cap ownership, based at times of course on Congressional direction, at a certain number with relative ease. Given the FCC's previous experience in this area of regulation, the caps, though potentially arbitrary, would likely run into little implementation issues.

However, when the focus of diversity of ownership shifts from simply capping to taking positive action to actively pursue ownership from certain underserved communities, the practical risks to implementation become more possible. The rationale, in both ownership regulations and localism, in pursuing the participation of underserved communities (racial and ethnic minorities and women) is to give members of these groups a voice in the public dialogue that it was believed beforehand was not present. The push to foster the participation of these underserved groups can be seen as a way to better serve the interests of the local community as a whole and also to expose others to the issues and concerns of those in the minority.

How the FCC defines what constitutes an underserved group can be prone to political pressure from activists on all sides. The degree to which such a determination can be inherently subjective is an issue that could prove troublesome for implementation. Will transferring ownership of a license to a person who happens to be of a particular underserved group necessarily ensure that the perceived concerns and views of that group would be more readily discussed on the airwaves? And to what degree can individual members of any particular underserved group be said to hold similar perspectives and interests? The answers to these questions go beyond the scope of this thesis and will not be pursued in detail here. But this short mention of this controversy should be sufficient to demonstrate another potential pitfall with the practical implementation of particular

regulations seeking greater diversification and minority ownership of broadcast stations.

Beyond these practical issues in implementation, there is a concern with the practical effect of implementation on the overall stated goals of localism and ownership regulations. The chief aim of such moves has been to foster more diverse and free speech. But to what degree, as was the case with the Fairness Doctrine, can the implementation of localism and ownership regulations actually act in a way to inhibit free and diverse speech?

As was amply noted by the FCC in its 1985 report on the Fairness Doctrine (FCC, 1985), the fairness obligations appeared to have an overall chilling effect on broadcasters in respect to their willingness to present issues of importance to the public and to present different perspectives on those issues. The report listed numerous examples demonstrating that broadcasters were inhibited by the Fairness Doctrine and were reticent to even cover many issues for fear of being subject to a fairness violation. The report argued that enforcement of the Doctrine hindered the presentation of what the Commission called “unorthodox opinions” (p. 104) – those not in the mainstream – because of its focus on balancing opinion between “major” and “significant” viewpoints (p. 105). The report also argued that the Doctrine enabled officials in government to intimidate broadcasters³⁸. These factors triggered, in the FCC’s collective mind at the time, the Supreme Court’s *Red Lion* opinion caveat that, should the Fairness Doctrine in practice lead to a reduction in coverage, it would need to be reconsidered (FCC, 1985).

In addition, other evidence that the Fairness Doctrine inhibited speech was presented in a study by Hazlett and Sosa (1997). The authors looked at the prevalence of informational programming – the chief type of program regulated by the Doctrine – over

³⁸ Much greater detail and more examples are given in the report to demonstrate these points. Listing them all here would be impractical.

time on radio broadcasts. They found a correlation between an increase in the amount of informational programming and the removal of the Fairness Doctrine in 1987. Hazlett and Sosa argued that the burden of fairness regulations was a disincentive for broadcasters to cover important, but controversial, public issues. With that burden removed, the authors argued, the data show a noticeable increase in the amount of informational programming in comparison to other formats thanks to the lessening regulation (Hazlett & Sosa, 1997).

In an interesting twist touching on the ownership issue, Hazlett (1997) wrote another article later that year arguing that the scarcity rationale and the ensuing regulations tied to it over the years, like the Fairness Doctrine, were actually used as means for regulators and station owners to distribute monopoly rights over an important medium to the detriment of the unregulated, free-flow of information critical to the functioning of democracy and free speech. In this later article, Hazlett argued that the rules could be seen as an example of regulatory capture where the regulated entities (the broadcasters already possessing licenses) had an advantage over competitors not already in the policy loop, essentially using the regulation as a means of erecting barriers to entry for potential competitors. This would represent government regulation said to be in the public interest actually having the effect of diserving that supposed public interest by hindering broadcast content competition (Hazlett, 1997).

The potential chilling effect on broadcasters that might result from the oversight of community advisory boards and eventual FCC re-licensing decisions based in part on a station's adherence to the suggestions of the boards is similar to that demonstrated in the age of the Fairness Doctrine. Broadcasters, afraid of FCC action determining that they are not serving their local communities by heeding the input of the community advisory boards

will become inhibited in their presentation of views. They may often find themselves operating in fear of upsetting the government-backed advisory boards. Such a scenario would in effect act to squelch the freedom of speech of the broadcasters in a similar manner in which the Fairness Doctrine acted to inhibit speech.

By backing the community advisory boards, government would find itself in the dubious position of inhibiting broadcast speech not in line with the opinions of those on the boards. And who is to say that the opinions of those on the boards are aligned with the actual listeners and viewers of the stations in their communities? Recall that these boards might likely be made up of local activists and those determined to be community leaders. Those broadcasters choosing to appeal to their actual listeners and viewers may not necessarily side with the community advisory boards on issues of broadcast content. Not doing so, however, would potentially make them subject to fines or license revocation from the FCC. Such a predicament could not only chill the speech of the broadcasters but would also be a disservice to the listeners and viewers at the same time. Implementation of the localism regulations in this manner would no doubt defeat the intent of the regulations.

The chilling effect would not seem to be necessarily as great a concern when dealing with ownership rules, however. Perhaps the only conceivable way in which a chilling effect might display itself in the enforcement of ownership regulations would be if the regulations were implemented in such a way as to have the effect of discriminating against certain owners because of the content of their programming. A push for “diversity” in ownership, no matter the good intentions of the initial regulation, may still pose such a problem in the implementation phase.

Recall the examples, mentioned in the earlier chapter on the history of the Fairness

Doctrine, of how ownership rules and regulations could be implemented in such a way as to discriminate against certain owners based on their partisan leanings. As recounted by Powe (1987), the ownership issue was used both in the FDR and Eisenhower administrations to seemingly attempt to hinder ownership of broadcast licenses by those with whom the administrations disagreed. FDR attempted to implement strict cross-ownership regulation to prevent the newspaper owners, who he viewed to be against his New Deal policies, from owning radio licenses. Similarly, Republicans under the Eisenhower administration gained control of the FCC, which, despite guidelines and delineated factors meant to steer the licensing process, resulted in several questionable decisions on granting new television licenses (Powe, 1987). Powe (1987) argued that those decisions had the overall effect of favoring friends and those more supportive of the party's views and personalities.

If the implementation of future ownership regulations were to resemble the patterns set by the Democrats under FDR and the Republicans under Eisenhower, the legitimacy of such decisions and the potential chilling effect that might result would become areas of great concern. Ownership regulations could be used for partisan political purposes and not to foster the positive-right goals of democratic debate and diversity of speech.

The aforementioned examples demonstrate that the ownership-regulation process carries with it the potential for political bias and manipulation in its implementation. As can be the case in many policy areas, the careful structuring of any policy may still be susceptible to distortion and corruption when the time comes for the regulatory agency to actually implement it. Though the wording of a particular broadcast ownership policy may appear in writing to be clear of partisan influence and corruption, how it is carried out may

not be so sterile.

If the net effect of the implementation of any future ownership regulation in the name of diversity were to be to discourage views critical of any particular political party or official in power, the result would necessarily constitute a chilling effect on the very type of political speech protected by the First Amendment. Where official intimidation exists in the ability of broadcasters to present political views freely, the broadcasters will have an incentive to censor their own speech in fear of losing their ability to broadcast. The history of such regulation has shown that the power given to politicians through regulation to control who will be granted a license and who will not is unavoidably tainted with the potential for corruption. With this in mind, the implementation of any future ownership-related regulations should be paid particular attention to in order to avoid the unfortunate track record demonstrated in past regulatory decisions.

Negative Consequences for Negative-Right Speech?

In the end, a return to the explicit Fairness Doctrine does not seem probable at this point. However, new localism rules and stricter ownership regulations do seem probable. As such, it has been necessary to consider in this chapter how the implementation of these public-interest regulations might affect individual, negative-right speech.

Localism rules and the accompanying oversight would place government in the position of once again monitoring broadcast content in order to determine if it sufficiently upheld a commitment to local issues as determined by a government-backed board. As such, it yields itself to similar problems experienced under the Fairness Doctrine in terms of an uncomfortable level of paternalism, an abridgement of First-Amendment rights and

pitfalls in practical implementation – often resulting in a chilling effect on speech.

Ownership regulations aimed at the goal of diversity are not as clearly prone to the same problems. However, how “diversity” is defined in seeking to serve underserved communities does pose some possible practical issues. There also remains the possibility of such rules having an indirect negative effect on individual speech based on how they are implemented, particular given the history of such regulation, but that possibility is at this point mostly speculative without concrete examples from actual implementation. Any further ownership rules should be proceeded with caution by the FCC and Congress to ensure that they do not represent an uncomfortable level of paternalism, a constitutional abridgment of free speech or an overall chilling effect on speech.

The Fairness Doctrine, as carried out, represented just such an unsettling level of government paternalism, a constitutional abridgement of free speech and a tedious involvement of the government in speech content that resulted in a chilling effect. With the continued interest of the FCC to develop new localism rules and the apparent recent swing toward pursuing tighter ownership regulations, all in the name of the public interest, democratic decision-making and diversity, it is incumbent on politicians, regulators and citizens alike to ensure that this process of fostering a positive right to free speech does not follow the unfortunate track record of the now defunct Doctrine – this time under a different banner. If the FCC is to continue down this road, the past experience with the Fairness Doctrine and its demonstrated effect on individual, negative-right speech should at least serve as a warning to the Commission to proceed with caution – if not move them to consider abandoning the positive-right approach to broadcast political speech altogether.

CHAPTER VI

CONCLUSION

Review

This thesis started out by noting that there exists disagreement about the nature of the concepts of “rights,” “freedom” and “liberty,” making them akin to the type of essentially contested concepts that Gallie (1956) noted. One way in which this disagreement has been noted is in Berlin’s (2002) dichotomy of negative and positive liberty.

The thesis then demonstrated that underlying the arguments for and against various broadcast regulations aimed at fairness, diversity and the public interest has been a more theoretical conflict between those with a positive-right conception of free speech and those with a negative-right conception. It did so by detailing the history of the rise, reign and fall of the Fairness Doctrine as well as discussion of more recent calls for other public-interest measures like localism and stricter ownership regulations pursued in the name of diversity.

Although the Fairness Doctrine does not seem to be likely to return in the near future, new localism and stricter ownership regulations do seem probable. This thesis has argued that, for the most part, the positive-right nature of these regulations, as well as the defunct Fairness Doctrine, is problematic philosophically, constitutionally and practically. The positive-right conception lends itself to an uncomfortable level of paternalism on the part of government regulators, a constitutional abridgement of negative-right speech and a

tedious involvement of government in regulation that can lead to a chilling effect on speech.

Other Areas of Study

After making these points, there may also be noted several areas of further study and discussion that, though important, may go beyond the main thrust and focus of this thesis. As such, some of these topics will be briefly mentioned here as means of proposing them for further areas of research.

One topic touched on throughout this thesis has been the scarcity rationale that has been used to justify the FCC's regulation of the broadcast spectrum. At several points, it has been briefly noted that there has been much criticism of the scarcity rationale and the ensuing public-interest regulations stemming from it. The arguments in this chapter have mostly dealt with criticisms of political content regulation and not other FCC rules. There exist other potential points of criticism of other content regulation like rules governing obscenity, violence and children's programming in light of the boom in other mediums like the internet and satellite programming that dilute the influence of broadcasting. Does the prevalence of these new mediums, as well as the increased, more efficient use of the broadcast spectrum, negate the need for the FCC to regulate in these areas in the name of protecting a once supposed scarce resource? Further study into this subject in light of specific points made in this thesis might prove insightful.

Another area of further study might be to look at how airwave spectrum auctions finally giving ownership rights to a frequency for the purpose of broadcasting, like has been done in areas of wireless communication (FCC, 1999a), can alleviate the justification

used for the deep involvement of the government in regulating the airwaves. What has allowed the continued oversight of broadcast content and practices by the FCC has been the fact that the airwaves were believed owned by the public, with the broadcasters only given a temporary license to use them. Treating broadcasters in such a custodial role over the nation's supposed common property has partly justified in many minds the ability of politicians and regulators, the representatives of the public, to control and influence broadcasters in the name of upholding the greater public interest. It is this control and influence that has been many times criticized for involving government in a dubious position of regulating the presentation of political issues and viewpoints – something pointed to in several sections of this thesis as potentially corruptible.

Some, like Hazlett (1997), have noted that such an arrangement allows government to grant monopoly rights to certain privileged broadcasters to the detriment of a truly free marketplace of ideas. In an earlier article, Hazlett (1990) also argued that such an arrangement is exactly what the regulators had in mind when setting up the system of government oversight in the name of the public interest. It, he argues, was in their rational self interest to allocate spectrum usage in this manner. Essentially, it guaranteed their continued control over the medium to the benefit of their political interests (Hazlett, 1990).

The ownership rights given to a broadcaster under an auction system would potentially negate the FCC's ability to revoke licenses from a broadcaster on the basis of their adherence to certain public-interest obligations. The spectrum, as the property of the broadcaster, could no longer be used as a tool for politicians and regulators to promote the supposed public interest, which, as has been demonstrated through the previous chapters, is a process filled with potential abuse.

Further study into how the specific system in place, allowing review by the FCC over periods of years to determine whether or not a licensee can continue to use its allocated piece of spectrum, may actually inhibit competition and disserve the interests of the listening and viewing public to the benefit of regulators and their favored broadcasters might prove very useful. To what degree does the system in place lead to a government-sponsored monopolization of the airwaves? Is it the government's regulation of licensing that actually fosters monopoly-like activity in broadcasting – essentially representing an example of regulatory capture? It may help demonstrate a further problematic area in the FCC's regulatory power beyond that of its implications for free speech as noted in this thesis.

One other area of further research would be focused on the subject of positive and negative rights. This thesis dealt specifically with the positive-right and negative-right conceptions of free speech. It focused on how attempts to uphold a positive-right conception affected the negative-right conception. Such a comparison could also conceivably be applied to other rights protected under the Bill of Rights and other charters such as the Universal Declaration of Human Rights. In what way do these other rights have both positive and negative conceptions? Then, how does the positive conception affect the negative one? And, conversely, how does the negative conception affect the positive? Also, other than rights which can display both conceptions, what about rights which only seem to convey a positive conception, such as the aforementioned right to “periodic holidays” (United Nations) mentioned in the Universal Declaration of Human Rights? How do they affect other rights?

Looking at the affect of the positive conception on the negative conception in

respect to several rights may help clarify the confusion in terms noted by Berlin (2002). Noting the ways each conception may conflict with each other may help our understanding of what specific values are upheld by each conception, which may enable us to apply more clarity to the definition of what is meant by any given right. In areas in which such conflict exists, would it be better for clarity to define the “right” in question as something other than a right? Looking at several rights in this manner might help us better categorize what we mean by a “right” to this or that good or action so as to avoid the apparent conflict that arises when the positive and negative conceptions seem to limit each other – as was demonstrated to be the case with the positive and negative conceptions of the right to free speech.

Concluding Remarks

The subjects of rights, freedom and government regulation touched on this thesis are aspects of our political culture which can be looked at from many angles and varying detail. Though touching on these subjects, the concern of this thesis was focused on how the specific positive-right approach to free speech taken in much of broadcast regulation like the Fairness Doctrine has affected both the negative-right vision of free speech and the stated goals of the positive-right approach. The argument in this thesis has been that, in the limited area of concern focused on, enforcing the positive-right approach appears to have negative consequences for both the negative right to free speech and the intended results of the positive-right approach.

As noted in the previous chapter, the history of the Fairness Doctrine highlighted in this thesis should serve as a warning to regulators in their ongoing endeavors to enforce

such a positive-right vision through other public-interest measures like localism and stricter ownership rules. The pursuit of newer ways for government to enforce the positive-right vision of free speech may again lead to undesirable and unintended consequences.

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