

Restoring Historical Understandings of the “Public Interest” Standard of American Broadcasting: An Exploration of the Fairness Doctrine

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The “public interest” standard is a phrase that American broadcast regulation has not clearly defined throughout its history. Media scholars have attempted to locate the “true” meaning of the public interest standard by historicizing its use through broad analyses of broadcast regulation, but this approach has provided inadequate frameworks for understanding how the public interest standard has informed broadcast policy. By centering its historical analysis on the Fairness Doctrine, this article uncovers four dominant definitions for the public interest standard: first, as an enforcer of structure and efficiency of the spectrum; second, as part of the trusteeship of licensed broadcasters; third, for social justice and reform; and fourth, for the tastes and preferences of the public.

The “public interest” is a phrase that, in the words of Richard Weaver (1953), possesses a “charismatic” quality. Political scientist Frank Sorauf (1957) described the concept as reflecting “the highest standard of governmental action, the measure of the greatest wisdom or morality in government” (p. 616). Some scholars believe that this idyllic phrase, an important rhetorical feature of American broadcast policy, possesses an indiscernible meaning that is susceptible to political will. Legal scholars Krattenmaker and Powe (1994) describe the standard as “either an empty concept or one that is infinitely manipulable” (p. 143). Zlotlow (2004) argues that the poorly defined standard “was *both* an empty concept and infinitely manipulable” (p. 891, note 18). Because it means all things to all people, it ultimately means nothing.

Other scholars have historicized definitions of the public interest standard into competing political camps. Willard Rowland (1997a) argues that the standard has “a rather widely understood practical meaning that had been emerging during the earlier stages of American industrial regulation” (p. 315). He explains that, by the early 1920s, the public interest standard had become closely identified with the needs of regulated transportation and communication industries. Rowland (1997b) further notes that

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subsequent legal and regulatory interpretations of the public interest in broadcast policy, therefore, reflected more the needs of the National Association of Broadcasters (NAB) than they did the "broader notions of quality in the social role of broadcasting" (p. 395).

McChesney (1993) also identifies an early cooption of the term by the political interests of the NAB, in opposition to "an organized popular opposition to commercial broadcasting" (p. 252). After Congress passed the Radio Act of 1927 as "emergency legislation," he argues, the political maneuverings of large broadcasters established the network-dominated, advertising-supported system even before the passage of the Communications Act of 1934. Since then, a "public interest" supporting private interests has become the "dominant paradigm" of American broadcast policy.

That the public interest standard has either (a) an indeterminate, politically malleable meaning, or (b) a historically rendered definition co-opted by powerful interests in opposition to popular will creates an inadequate framework in which to build our understanding of how definitions of the public interest standard have informed broadcast policy. Both approaches incorporate long traditions in poststructuralism and political economy, but both explanations serve as poles on either side of a wide continuum that beckons a more nuanced analysis.

This article establishes that four dominant definitions of the public interest standard have shaped American broadcast policy, reflecting instrumental, public service, social justice, and commercial desires. It will accomplish this by analyzing the regulatory, congressional, and legal discussions surrounding the Fairness Doctrine—a major regulatory policy adopted by the FCC in 1949 and later abandoned in 1987. The analysis will also incorporate interviews with a few key players who have participated in the legal disputes surrounding the Doctrine.

The Fairness Doctrine serves as an excellent tool for understanding major interpretations of the public interest standard over the lifetime of American broadcast regulation. Because of the Fairness Doctrine's longevity (1949–1987), one can identify its birth, life, and death during which it faced Congressional actions, court rulings, and political activism. Despite its abandonment 25 years ago, the Fairness Doctrine remains an important topic in recent studies of broadcast policy that have explored whether its reinstatement presents a constitutional challenge to the First Amendment (Fisher, 2011; Hazlett, 1989), whether it instituted a "chilling effect" on press activities (Hazlett & Sosa, 1997), or whether its resurrection would be effectual or treated hostilely by the media (Ammori, 2008; Hale & Phillips, 2011). Also, by focusing longitudinally on a single regulatory doctrine, this article will be able to compare historical changes in attitudes to the public interest standard to a consistent piece of regulation.

Enforcing the Structure and Efficiency of the Broadcast Spectrum (1927–1934)

Regulation of broadcasting grew out of technological necessity, but broadcasting's economies of scale made access to the airwaves expensive and exclusive, laying the groundwork for future content regulation. Because of this, broadcasting has had a precarious relationship with the First Amendment. Barbas (2011) describes the advent of broadcast regulation as the "first modern crisis of communication" in the United States (p. 1). Indeed, the American concept of free expression reflects John Stuart Mill's

metaphor of a “marketplace of ideas” in which government nonintervention permits a free exchange of ideas that facilitates the discovery of objective truth (Mill, 1996). Broadcasting is a direct challenge to this ideal. Due to restricted access, broadcasting could not function as a public forum in the same manner as did print media.

But efforts to improve broadcast access first focused on instrumental reasons. In January 1926, Commerce Secretary Herbert Hoover informed members of the Merchant Marine and Fisheries Committee that “radio legislation is absolutely and immediately essential if we wish to prevent chaos in radio communications, especially broadcasting” (Goodman & Gring, 2000, p. 118). Hoover’s positivist approach to solving social problems, an aspect of social progressivism, relied on the science of engineering to “bring order to chaos” in broadcast radio transmissions (ibid.). Borrowing language from the 1920 Railroad Transportation Act—an act that privatized railroads, but did so with heavy oversight for the sake of the “public interest”—Congress passed the Radio Act of 1927 and later the Communications Act of 1934,¹ stipulating that licensed broadcasters must operate in the “public interest, convenience, and necessity” (41 Stat. 456, 1920; Krasnow & Longley, 1973). As Rowland (1997a) notes, this language, coupled with language borrowed from state utility laws, formed the basis of regulating broadcast airwaves as a utility.

During this time, Section 18 of the 1927 Radio Act, which subsequently became 315(a) of the 1934 Communications Act, established specific rules for political coverage on broadcast stations. This section included the “equal opportunity” rule, which stipulated that if a station provides airtime to a legally qualified candidate, that station must offer an equal opportunity to all other candidates for the same office to use the broadcast station’s airtime to promote their respective candidacies (Carter et al., 1986; Donahue, 1989).

Before Congress passed the Federal Radio Act of 1927, government, commercial, and populist interests argued over who would control the gateway for American broadcasting. Craig (2000) explains that chain broadcasters and the NAB took control of the debate by taking advantage of two inherent cultural forces already in play within the American political psyche: first, that government-controlled broadcasting represented a dangerous extension of state power, including the opposition to any taxation that would fund such a system; and second, that a government-controlled system would decide which programming would best suit the public and would therefore produce “boring” programming suited for only high-brow tastes. Because of this, any support for a noncommercial system died before the fight even began.

Furthermore, the FRC defined the “public interest” clause of the 1927 Radio Act to mean that broadcasters should operate with the highest technical standards for the widest possible audience, for which they must demonstrate the financial capability to be able to operate a station. On August 23, 1928, the FRC published their “Statement Relative to Public Interest, Convenience, and Necessity,” which defined the public interest standard as one that is “not absolute,” but comparative in how “the commission

¹ The Wireless Ship Act of 1910 and the Radio Act of 1912 were the first to regulate the broadcast spectrum, primarily for shipping communications, but the Radio Act of 1927 was the first to establish an organization—the Federal Radio Commission (FRC)—to license broadcasters.

must determine from among the applicants before it which of them will, if licensed, best serve more or less service. Those who give the least . . . must be sacrificed for those who give the most" (FRC "Statement," 1928, as reprinted in Kahn, 1984, p. 62).

Because Congress would not play a role in funding radio communications, the stations relied primarily on advertising. As radio ownership grew exponentially, two legislative moments between 1927 and 1934 solidified the commercial broadcast system in the United States: the 1928 reallocation of bandwidth through General Order 40 and the failed Wagner-Hatfield Amendment preceding the passage of the Communications Act of 1934.

On August 30, 1928, the newly created FRC issued General Order 40 to redistribute station bandwidth to "clean up" the cluttered airwaves. It stated:

The commission has further determined after careful consideration that the allocation of frequencies, of time for operation and of station power, for use by broadcasting stations to the respective zones, as herein below specified in this order, (a) is necessary in order to comply in part with the requirements of section 9 of the radio act of 1927 . . . in so far as it requires that the licensing authority shall as nearly as possible make and maintain an equal allocation of bands of frequency or wave lengths . . . to each of the zones when and in so far as there are applications therefor [*sic*], and (b) *will promote public interest and convenience and will serve public necessity* . . . ("Radio," 1928, p. 9, emphasis mine)

While the FRC acknowledged that commercial broadcasters operated due to selfishness, they argued a year later, in a set of guidelines established in their Great Lakes Broadcasting Co. decision in support of General Order 40, that "advertising furnishes the economic support for the service and thus makes it possible"; therefore, "without advertising, broadcasting would not exist" (FRC, 1929, as reprinted in Kahn, 1984, pp. 64, 68). The FRC also stipulated that because every group could not have a mouthpiece, no group should have a mouthpiece. Hence, they termed those stations operated by public organizations "propaganda" stations and determined that they did not operate in the public interest. Nonprofit stations, including those that endeavored to promote education, social welfare, or citizenship faced either losing their station to commercial broadcast interests or a drastic reduction in its operating hours due to General Order 40.

The Failed Wagner-Hatfield Amendment: Broadcast reformers who sought to create space in the commercial system for specific public programming created new pressure for radio reform in the early 1930s (Craig, 2000). After entering office, Franklin D. Roosevelt looked for ways to streamline the departmentally divided FRC² under one commission and formed the Roper Committee to recommend the best method to oversee communications. Reformers argued that nonprofit and educational broadcasters

² The FRC depended on the Department of Commerce and the Interstate Commerce Commission (ICC) to operate fieldwork, inspections, and telegraphy.

should be awarded licenses (*ibid.*). The Roper Committee rejected their requests, including one to create a government-operated media model. In one last effort, during the Senate debate on the Communications Act of 1934, Senator Robert Wagner of New York and Senator Henry Hatfield of West Virginia proposed an amendment that would preserve 25% of broadcast bandwidth for nonprofit use. The following is a portion of the transcript of the Senate floor debate of the Wagner-Hatfield Amendment (Discussion of S. B. 3285, May 15, 1934, p. 8844, as reprinted in Paglin, 1985):

- Mr. Hatfield: The Senator is now proposing an amendment, is he not?
- Mr. Wagner: I am quite willing to add, so there may be no question about it, "education, religious, agricultural, labor, and cooperative associations which are not organized for profit and which do not directly or indirectly provide a source of profit for their members or employees or anyone else." That is as all-embracing as I can make it.
- Mr. Dill: But the Senator proposes to leave the right to sell time and make the station self-supporting.
- Mr. Wagner: That is quite a different thing from profit. Such patronage may come, and undoubtedly will come, from the very educational institutions which will ask for time on these stations.
- Mr. Dill: If the Senator is going to limit it to selling time to educational and religious organizations who will buy it, that is a different proposition. I do not know of more than one or two religious organizations which buy time. They are all given their time for free.
- Mr. Wagner: They have their own stations.
- Mr. Dill: A few of them have, but they have not the money with which to buy time. I feel that it would be absolutely impracticable, if we do not allot the time to commercial stations, to hope for them to raise any money.

The amendment died on the Senate floor. By stating his concern for how nonprofits would pay for operating a station, Senator Dill supported the FRC's argument for the necessity of advertising, as stated in General Order 40. Although the Communications Act of 1934 used instrumental language to solidify a commercial broadcast system in the United States, the FRC's earlier application of the public interest standard to both technology and content left networks vulnerable to subsequent, stricter content regulation through Congress and the federal court system.

Broadcasters as Trustees of the Public Interest (1934–1969)

Following the passage of the Communications Act of 1934, the FCC began widening its focus to include how broadcasters, as stewards of the spectrum, used their stations in service of the public interest. At around the same time, lawsuits against broadcast stations created a legal impetus for the FCC to codify standards, so that broadcasters would not favor a particular political perspective. In 1939, Mayflower Broadcasting Company petitioned the FCC for a radio broadcast construction permit, requesting to operate under the frequency 1410AM assigned to Boston station WAAB, which was owned by The Yankee Network, Inc. The FCC, then directed by the progressive Chairman James Lawrence Fly, was engaged in reviewing WAAB's license for renewal. In its investigation, the Commission discovered that the station periodically aired editorials endorsing political candidates, as well as views on controversial subjects. In its report titled "In the Matter of Mayflower Broadcasting Corporation and the Yankee Network, Inc.," the FCC found that "no pretense was made at objective, impartial reporting . . . the purpose of these editorials was to win public support for some person or view favored by those in control of the station" (FCC, 1941, as reprinted in Kahn, 1984, p. 122).

Although the FCC determined that Mayflower was "not shown to be financially qualified" to construct and operate the station—a reflection of its early regulatory concerns for broadcasting's financial solvency—the FCC agreed to renew the license granted to The Yankee Network, but only if the station stopped broadcasting editorials. The Commission concluded that a

truly free radio station cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably . . . the broadcaster cannot be an advocate. (ibid.)

The "Mayflower Doctrine," as the ruling became known, signaled an adjustment in the FCC's regulatory logic. The FCC hadn't abandoned its original principle of opposing "propaganda stations," yet it had created unprecedented content regulations in the ruling.

The Mayflower Doctrine's broad editorial ban reached beyond its standard case-by-case reviews during license renewal and instead "placed the flow of information to the public above the free speech rights of broadcasters" (Donahue, 1989, p. 35). CBS's William Paley accused the FCC of "terrorizing broadcasters." Before the Senate Interstate Commerce Committee in 1941, Paley argued:

Here, the Commission . . . has chosen to act as complaining witness, prosecutor, judge, jury, and hangman. . . . We are at a loss as to how to operate a network successfully under the new rules, either from our own selfish, economic view or from the standpoint of the public interest and good programming. ("Running Account," 1941, p. 34)

Over the 1940s, several more players, including journalists, historians, and academic experts, added their perspective to the ongoing legal and legislative debates surrounding Mayflower. Former FRC

general counsel Louis G. Caldwell urged the FCC to remove the Mayflower Doctrine, because it likely placed a prior restraint on forms of speech.

During this time, however, in *National Broadcasting Co. v. United States* (1943), the Supreme Court determined that the FCC's jurisdiction transcends the technical aspects of broadcast regulation to also include the fair and equitable distribution of licenses, as well as studying new uses for radio (Carter et al., 1986). The Court also rejected NBC's claim that the FCC, by forcing the network to relinquish one of its "chain broadcasting" systems,³ infringed on the network's First Amendment rights. In his majority opinion, Justice Felix Frankfurter explained that, if the denial of a broadcast license in the "public interest" constitutes a denial of free speech, "it would follow that every person whose application for a license . . . denied by the Commission is thereby denied his constitutional right of free speech" (*National Broadcasting*, 1943). The language of *NBC v. U.S.* legally acknowledged that broadcast speech is less protected under the First Amendment than is speech delivered via print media.

The NBC decision and its broadening of the FCC's jurisdiction to include broadcast content became even more impactful after professional news practices, already developing in the print world, were introduced in radio stations across the country. In the beginning, broadcasters did not have newsgathering arms; that responsibility still remained solely with print media. KDKA in Pittsburgh, considered to be the first commercial radio station in the United States, started covering news with Frank Conrad reading the newspaper on the air. Newswire organizations already in operation, such as the Associated Press (AP), cheaply sent news between cities, hence beginning the "rip and read" tradition of reciting wired news reports on the air (Richter, 2006). Independent reporting on radio didn't emerge until Lowell Thomas' 15-minute news simulcasts in 1930 on the CBS radio network. As the decade progressed, broadcast newsgathering became increasingly sophisticated. In 1937, CBS hired Edward R. Murrow as the first "on-the-spot" reporter from Europe.

Broadcasters only grew more agitated after the FCC, in 1946, published their report: *Public Service Responsibility of Broadcast Licensees*. Commonly referred to as the "Blue Book," the report defined the trusteeship model for broadcasting, based on its power to regulate broadcast content, and detailed the pragmatic steps that stations had to adopt to serve the public interest. Some statements directly challenged the "social responsibility" model supported by the NAB and codified by the Radio Act of 1927. While noting the important role of industry self-regulation in preserving the public interest, the FCC also explained its role thusly:

In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. These are 1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; 2) the carrying of local live programs; 3) *the carrying of programs devoted to the discussion of public*

³ At this time, NBC operated two networks: NBC Red and NBC Blue. After *NBC v. U.S.*, NBC sold NBC Blue, which eventually became ABC.

issues; and 4) the elimination of advertising excesses. (FCC, "Public Service Responsibility," 1946, p. 55, emphasis mine)

The Blue Book documented the networks' propensities to reject public affairs programming for entertainment, and that, in fact, advertisers' demands for a broad audience appeal led to bland programming on stations (ibid.). The Commission, therefore, made public affairs programming a license requirement, which the NAB and others immediately challenged.⁴ A couple of years later, a Cornell student radio station petitioned the FCC for the right to air editorials. Caldwell, NAB counsel Justin Miller, and James Lawrence Fly, who had since left the FCC to become an attorney for the ACLU, testified before the FCC. Miller sided with Caldwell's opinion that Mayflower constituted an infringement of broadcasters' free speech and urged the FCC to abandon the measure. Fly argued that Miller and the NAB stood "on pathetic ground." With their wide reach, he insisted, broadcasters already enjoyed a strong community influence and that enabling them to editorialize gave them too much power. For Fly, the public interest standard constituted the public's ability to hear a full and open debate on the air ("Mayflower Hearing," 1948).

In 1949, the Commission reconsidered the Mayflower language. In a 13-page report titled "In the Matter of Editorializing by Broadcasting Licensees," the FCC, while not fully rejecting the Mayflower decision, concluded that broadcasters should be able to editorialize. However, editorializing fell within a broader responsibility of "overall fairness." The report explained:

The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees. (FCC, 1949)

The FCC's report became known as the Fairness Doctrine, which created a "two-fold" duty for broadcasters:

1. Broadcasters must give adequate coverage to public issues; and
2. Coverage must be fair in that it accurately reflects the opposing views.

The Commission also described broadcasting's role in the public sphere by using Mill's logic of an inclusive dialogue in the "public interest":

If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that *broadcast licensees have an affirmative duty generally to encourage and*

⁴ Pickard's (2011) recent analysis of the Blue Book exposes the broadcast industry's heavy backlash against the FCC, using such tactics as "red baiting" to squash the proposed reforms. The Blue Book, therefore, never became "enforceable policy," and its "immediate and long-term impact was minor" (p. 186).

implement the broadcast of all sides of controversial public issues . . . (FCC 1949, emphasis mine)

Not only did the Fairness Doctrine emphasize broadcasters as trustees of the public interest, it also stipulated that broadcasters must construct news stations as public forums in which a clashing of ideas—a fundamental principle of American free expression—can occur. The Commission had taken control of broadcasters as gatekeepers of political dialogue and, by stepping on one clause of the First Amendment, (the freedom of the press), supported another clause (the freedom of speech). Barbas' (2011) analysis of broadcasting as a public forum⁵ notes that, during the 1940s, the FCC used the rationale of granting access to all points of view as the justification for a public interest standard that promoted diversity. However, the Commission based this rationale on FCC Chairman Larry Fly's differentiation between freedom of the press as an "unfettered editorial page" and "freedom of the radio" as the licensee's duty to promote freedom of speech by presenting all facts and points of view.

In 1959, Congress amended the language of Section 315 of the 1934 Communications Act to require that broadcasters provide political candidates and opposing views with equal opportunities for airtime. This effectively codified the Fairness Doctrine into law. The Commission, however, wanted to emphasize their continued support for the Fairness Doctrine, so it added language to the amendment emphasizing that broadcasters still had a duty to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Many media historians have taken this action as the FCC's codification of the Doctrine (Jung, 1996). The FCC also took steps to specify the fairness rules by: first, explaining how to fairly provide opportunities for addressing personal attacks, partisan statements, and racial viewpoints (FCC, 1963); and second, by drafting a "Fairness Primer" further explicating the rules (FCC, 1964).

The 1943 *NBC v. U.S.* decision, followed by the adoption of the Mayflower and fairness rules, challenged the NAB's complete authority over broadcast content. These rules pushed against the First Amendment arguments that first structured the commercial, self-regulatory system sought by the NAB. Therefore, station owners had to operate as trustees of public forums, providing unprecedented access to a range of political views. Just before the Fairness Doctrine's adoption, Alexander Meiklejohn (1948) described "political freedom" not as the right for everyone to speak, but that within the public sphere "everything worth saying shall be said" (p. 25). In effect, the Doctrine enforced the Millian approach to public free expression within the confines of a private system.

Broadcasting in the Public Interest for Social Justice and Reform (1969–1977)

The NAB and individual broadcasters continued challenging the Fairness Doctrine's constitutionality. As the 1960s conflagrated into social stress in the United States, the press for change ignited within many inner-city communities. The civil rights movement stressed equality for every American, and which views broadcasters chose to air became a growing concern; hence, a movement to

⁵ For more information about the public forum, see Harry Kalven Jr.'s "The Concept of the Public Forum: *Cox v. Louisiana*" in *The Supreme Court Review*, Vol. 1965, pp. 1–32 (1965).

reform broadcast media emerged. Former Telecommunications Research and Action Center (TRAC) Director Sam Simon, a veteran of the media reform movement, described the political scene:

There is a connection [of the media reform movement] to the civil rights movement. There were a couple of different things going on in the Sixties about the unrest. You had a civil rights movement where people marched and it even had a radical fringe—the Black Panthers and the like. There were a couple of people, and a number of lawyers, who looked at using the legal system to make a change. There was no question about the power of the media, so part of all of it was [the behavior] of the establishment media. (S. Simon, personal communication, March 13, 2010)

The media reform movement pressed broadcasters to shine a light on social injustice, such as inner-city poverty; however, broadcasting afforded little to no access to the media reform movement. Attorneys and social activists organized public advocacy groups to create access for a greater diversity of opinions. Although broadcasters continued to challenge the Fairness Doctrine on constitutional grounds, it became the tool through which the media reform movement pursued broadcast accountability.

Because the FCC did not license networks, public advocacy groups focused on challenging the licenses of individual stations. In 1964, the Office of Communications of the United Church of Christ (UCC) and local citizens petitioned the FCC to remove the license of the Jackson, Mississippi station WLBT. The petition stated that the station failed to serve African-American viewers, which, at the time, comprised 45% of Jackson's population. The FCC's refusal to accept the petition led to a couple of significant court rulings that benefitted the media reform movement.

First, in 1966, while reviewing the WLBT case, the U.S. Court of Appeals for the District of Columbia Circuit ordered the Commission to honor citizen challenges to license renewal hearings. Before this time, only stations could challenge other stations' licenses, based on signal interference or economic injury. This ruling became a significant step toward allowing citizens to hold broadcasters accountable (MacDonald, 1990).

Second, in 1969, in the landmark case *UCC v. FCC*, the Court of Appeals overturned the FCC's initial decision to renew WLBT's license. It was the first time that a broadcast station had lost its license for not reaching the FCC's standards for fairness. Media reform activists had achieved a collection of goals throughout the multiple court battles. As Broadcasting magazine explained:

The case did more than establish the right of the public to participate in a station's license-renewal hearing. It did even more to than encourage minority groups around the country to assert themselves in broadcast matters. *It provided practical lessons in how pressure could be brought, in how the broadcast establishment could be challenged.* ("The Pool," 1971, emphasis mine)

In 1969, the courts gave media reform groups another significant victory. *Red Lion v. FCC* ruled in favor of the Fairness Doctrine's constitutionality. On November 27, 1964, WGCB aired a commentary by

Reverend Bill James Hargis as a part of his weekly 15-minute "Christian Crusade" series. During the broadcast, Hargis claimed that writer Fred J. Cook had been fired from a newspaper for making false charges in Cook's recently published polemic *Goldwater: Extremist on the Right*. Hargis also accused Cook of writing the book with the intent to "smear and destroy Barry Goldwater" (Carter et al., 1986). Cook petitioned WGCB, owned by the Red Lion Broadcasting Company, for airtime to challenge Hargis' claims. Red Lion refused, so Cook challenged Red Lion through the FCC under the Fairness Doctrine. The FCC ruled in Cook's favor, concluding that Hargis' broadcast constituted a "personal attack" on Cook's reputation and that the station must provide airtime to Cook, whether or not Cook agreed to pay for the airtime. Red Lion challenged the FCC's ruling on First Amendment grounds, but the U.S. Supreme Court ruled in favor of the FCC's decision. Writing for the Court, Justice White discussed the Doctrine's importance to creating a public forum for the sake of the public interest:

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress acknowledged that the analogous provisions of Sec. 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. (*Red Lion*, 1969)

The Red Lion decision became tantamount to the public interest standard as one that protects the rights of the public against the decisions of the privileged few who hold broadcast licenses. Emboldened, media activists used the case as a means to continue their fight for public access and broadcast accountability. Sam Simon called the case a "transformative experience" for him. "It made a case that I think is unassailable," he said, "and continues to provide some intellectual capital to make media more responsive."

A particularly salient perspective on the public interest standard—in which broadcasters have an ethical obligation not only to air multiple perspectives but also to serve as advocates for social justice issues by permitting those views airtime—emerged from the 1960s. Public advocacy groups believed strongly that the press should serve as a watchdog over government corruption and as a liaison to "the people's interests"—a change in broadcast involvement, from serving as a disinterested medium for political discourse to one actively seeking to make the public sphere more equitable for all Americans.

The UCC and Red Lion rulings seemed to drum out the ongoing complaints by broadcasters that the FCC's stewardship over broadcast content amounted to prior restraint of speech. Citizen groups became even more active. When only two petitions to deny license renewal existed in 1967, by 1973, that number had risen to 50 petitions, affecting as many as 150 outlets (MacDonald, 1990). The NAB and the Radio and Television News Directors' Association (RTNDA) fought back, pressing against the scarcity standard as a reason to regulate broadcasting. The growth of alternate delivery services such as cable television (CATV) and large KU and C-Band satellite dishes gave broadcasters the technological impetus to claim that electronic communications in America were no longer scarce. By the late 1970s, this

development, along with fundamental shifts in the American economic policy, created challenges to the Fairness Doctrine.

Reflecting the Tastes and Preferences of the Public (1977–1987)

When Charles Ferris became Chairman of the FCC in October 1977, he proposed six goals for the Commission (Jung, 1996, pp. 15–16):

1. Establish an office of chief economist to let the Commission know the impact of its decisions on the economy;
2. Consider a rule to make radio and TV licenses divulge their profits;
3. Start a major study of the broadcast networks, which are not now licensed, to see how they affect local stations and society in general;
4. Find ways to speed up the agency's adjudicatory process;
5. Investigate whether broadcasters do an adequate job of self-policing children's programming; and
6. Expand the Commission's capacity to make long-range forecasts of new trends.

These goals indicate Ferris' primary concern during his chairmanship: How do the activities of broadcasters impact the economic interests of the public? Furthermore, Ferris began adjusting the Commission's focus away from behavior and more toward the structure of the American media system, including anti-trust policies, limits on cross-ownership, and cable retransmission of broadcast programming. Ferris firmly believed that focusing on the structure of broadcasting would be a workaround for "rectifying undesirable aspects of the market without government involvement in program control" (Bazelon, 1979, p. 29).

Ferris also said that "the public interest can most effectively be voiced by the public itself as it turns the dials of television sets across the country to choose among an abundance of program choices" (ibid.). One indication of Ferris' change in regulatory philosophy was his silence on the Fairness Doctrine and the limited public exposure granted to the Doctrine during his tenure. While his logic seems to depart from the social justice perspectives of the 1960s, Ferris still maintained that the FCC's primary goal was to support the "public trustee" model that has existed since *NBC v. US*.

Quickly vanishing, however, was much of the clout enjoyed by public advocacy groups in the courts. Court rulings extending free speech protection to corporations (*Buckley v. Valeo*, 1976; *First National Bank of Boston v. Belotti*, 1978) created legal difficulties for public access movements. In his concurring opinion in the Belotti case, Chief Justice Burger concluded that the First Amendment does not give the "institutional press" a special status. He also believed that the framers of the U.S. Constitution did not grant special privileges for the press, and that defining what constitutes the "institutional press" would be problematic (*First National*, 1978). Broadcast press, then, could not be held to a different standard than were the free speech standards of the average citizen; the government could not create special rules to protect the "integrity" of broadcast news as separate from other forms of speech. Media advocacy groups had less legal clout to challenge how corporate broadcasters handled news reporting.

Ferris' ultimate goal was to deregulate what he deemed a heavily bureaucratic system. At around the same time, Congress started to hold hearings on rewriting the Communications Act of 1934. Driving the changes in the Ferris commission, Congress and President Carter were cutting paperwork, assessing the necessity of longstanding rules, and making the petition process more efficient. In an address to the 1979 NAB convention, President Carter presented his goals for broadcast deregulation, including his goal of reducing "the enormous inventory of rules and regulations that have accumulated over the years even though they have long since outlived their usefulness." However, broadcasters balked when the President said that he wanted to "open up the rulemaking process to all Americans . . . not just the best-financed and best-organized interest groups" (Jung, 1996, p. 19).

Broadcasters did not have to wait long for change that supported their decades-long opposition to regulation. Deregulation took a marked turn to the political right after Reagan's election in 1980 and after his first FCC Chairman, Mark Fowler, took over the Commission. Fowler continued Ferris' economic approach to regulatory policy, but rather than concentrating on broadcasters' economic effects on society, he instead focused on how regulation affected the economic condition of broadcasters. In a speech before Congress in 1982, Fowler employed the Millian "marketplace" metaphor, but he likened it to an actual marketplace: "The marketplace of ideas is part of the general freedom that exists in society to buy or not buy, to consider or not consider" (Rowan, 1984, p. 170). For Fowler, broadcasting's service as a public forum no longer remained in the trusteeship model but in a marketplace model. In 1985, before an audience of radio and TV executives, he declared:

It was time to move away from thinking about broadcasters as trustees. It was time to treat them the way almost everyone else in society does—that is, as businesses . . . Television is just another appliance. It's a toaster with pictures. (Nossiter, 1985, p. 402)

Fowler's deregulatory actions gradually stripped broadcast regulatory policy of any of the progressive values that defined the media reform movement of the 1960s and 1970s. The Fowler commission increased ownership caps, increased the number of years between license renewals, and loosened the public affairs programming requirement.

One principle now guides the commission's efforts. It is the policy of "unregulation," and simply it means that we examine every regulation on the books and ask, "Is it really necessary?". . . The end result should be a commercial broadcasting system where the marketplace rather than the myths of a trusteeship approach determines what programming the American people receive on radio and television and who provides it. (Fowler, 1982, p. 30)

The FCC's relaxation of broadcast ownership rules departed from Justice Frankfurter's belief that to deny a license did not constitute a denial of free speech. "Free" became an important term for Fowler, who believed strongly—as did the Reagan administration—in *laissez faire* "free market" capitalism. The public interest standard became subject to what he liked to call "marketplace magic," where viewers vote

with their remote control (Auletta, 1992). "The public's interest," therefore, "defined the public interest" (Fowler & Brenner, 1982, p. 210).

In 1984, Fowler focused his sights on the Fairness Doctrine. That year, the Commission issued a Notice of Inquiry into the possibility of altering the Doctrine; however, the notice thinly veiled the FCC's intent of dropping the Doctrine altogether. A debate among public interest groups, media reform groups, and conservative free speech proponents ensued. The nonpartisan American Enterprise Institute (AEI) issued a 1985 legislative analysis of the arguments surrounding the Fairness Doctrine. According to the analysis, proponents of the repeal contend that the Doctrine interferes with broadcasters' editorial judgment, threatening their First Amendment rights (AEI, 1985). This reflects the long case history and legislative battles among the NAB, the RTNDA, broadcasters, media reform groups, and the FCC. Opponents of the Doctrine also viewed the scarcity argument as having considerably weakened with the dramatic growth of radio and television outlets, as well as of CATV in the 1970s and 1980s.

After the FCC's announced inquiry, media reform groups quickly mobilized, lobbying the Commission to keep the Doctrine. In a 1984 white paper for TRAC, Sam Simon called on the public to exercise the Doctrine or else lose it altogether: ". . . it is our hope that members of the public, citizens groups and civic associations concerned about important national or local issues . . . will be heartened to learn that they have the power to keep broadcasting fair," he writes. "The frightening alternative to our exercise of that right is to lose it altogether" (TRAC, 1984, p. ii). According to Jack Goodman, a regulatory and government affairs attorney who represented the NAB and the RTNDA in multiple cases, citizens and public interest groups were actively petitioning the FCC on broadcast fairness. Complaints involved not only news but entertainment programs as well. He recalls that in the 1980s "there were a few rather large Fairness Doctrine cases, mostly involving network documentaries of various sorts." He also recalls "a variety of silly ones," including a petition against the ABC sit-com "Welcome Back Kotter" in which the complainant alleged that the program unfairly portrayed Irish-Americans (J. Goodman, personal communication, April 21, 2010).

The FCC's final 111-page report on the Doctrine offered little surprises, concentrating primarily on the "chilling effect" created by the Doctrine, as well as the weakening of the scarcity argument due to the dramatic growth in information sources available to the public in the mid-1980s. It also considered the Red Lion ruling as antiquated; not only did the Doctrine inhibit the coverage of controversial issues because of the "chilling effect" on editorial decisions but it also relied on a media market that was much changed since 1969. The report concluded:

Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively deserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine . . . significantly impairs the journalistic freedom of broadcasters. ("FCC Offers Ammo," 1985, p. 38)

Seeing the FCC's motion to eliminate the Fairness Doctrine, concerned congressional Democrats moved to legally codify it through the Fairness in Broadcasting Act of 1987. On April 7, 1987, hearings

held before the House Subcommittee on Telecommunications and Finance exposed the philosophical rift between Fowler's mission and Democrats wary of Reagan's deregulatory zeal. The transcript of those hearings reveal the familiar themes of First Amendment protection for broadcasters, scarcity as a means of broadcast regulation, and the possible chilling effect of the Fairness Doctrine.

Former FCC Chairman Newton Minnow, famous for his 1961 "vast wasteland" speech before the NAB, testified for the Fairness Doctrine, arguing that the rights of the public to hear a full public debate bear more importance than do broadcasters' rights to free speech.

Minnow: I feel that the issue before you is whose rights are to be protected, whose rights? Is it only the rights of those who are in the broadcasting industry? Is that all we care about, or do we care about everyone's rights, including the rights, as the Supreme Court said, of the listeners and the viewers, whose rights the Supreme Court said are paramount. ("Hearing," 1987, p. 64)

Fowler also testified and in this exchange with Subcommittee Chairman Edward Markey of Massachusetts, he reiterates his original stance that the Fairness Doctrine equates to government restraint of speech, refuting Minnow's testimony:

Markey: For the life of me, I can't understand what this debate is over since all we are asking people is to be fair. If they are looking for the exclusive right to be able to present one point of view and not allow another point of view on their airways, then I don't understand what the possible credible basis for their argument is.

Fowler: Chairman Markey, there is absolutely nothing wrong with fairness. There is nothing wrong with making sure that candidates can be on television or radio. The problem is when the government intervenes and dictates what is put on the air; that is the problem. ("Hearing," 1987, p. 67)

The Fairness in Broadcasting Act passed both the House and Senate by large margins (302–102 and 59–31, respectively). However, Ronald Reagan vetoed the act, upholding the FCC's decision to abandon the Fairness Doctrine.

Public Interest Today

Twenty-five years after the abandonment of the Fairness Doctrine, broadcasters face the new challenges of the growth of Internet use and the synergistic world of digital media. The public interest standard today seems less focused on broadcast trusteeship, on social justice, or on the quality of news content, and more focused on the structure of the new digital media environment. Media advocacy organizations, such as the Media Advocacy Project, are spending much of their time pressing for net

neutrality rules that would prevent Internet service providers from controlling the speed of access to different forms of content. However, the new generation currently leading media reform still believes in the necessity of the public interest standard. Cheryl Leanza, a policy advisor and media consultant for UCC's Office of Communication, believes that the development of digital technologies in no way lessens the need for regulation to keep broadcasting companies in check. In an interview, she said,

Unfortunately, even if the Internet takes off, [*NBC v. U.S.*] will still be important. They're still going to have a lot of people driven over to whatever the next technology is, but I think that the policies that were created to govern broadcasting are sound. The goals were competition, diversity, and localism, and I think those goals continue to be critically important goals for our media environment, however that's disseminated—whether it's disseminated on the Internet or some other way. (C. Leanza, personal communication, April 27, 2010)

The focus on reinstating the Fairness Doctrine has lessened over the last decade. President Obama's current FCC Chairman, Julius Genachowski, has focused more of his attention on creating an efficient and modern communications structure than on regulating content. In August 2011, along with approximately 80 other regulatory cuts, he struck the Fairness Doctrine language permanently from the FCC regulatory books. "In my view, the Fairness Doctrine holds the potential to chill free speech and the free flow of ideas and, accordingly, was properly abandoned," he stated in response to a request from House Republicans (Nagesh, 2011). After the last days of the Doctrine, it appears that FCC stewardship has come full circle, focusing less on how to enforce broadcasting as a public forum and more on how to create additional points of access to new media.

Conclusions

This article reveals that the public interest standard has acquired multiple but salient definitions in American broadcast policy. Changes in its definition derive from whether, and to what extent, the federal court system, regulators, broadcasters, and public advocates view broadcasting as a public forum that facilitates discussion. It is important to note that, although new definitions of the public interest standard may have informed how the FCC interprets broadcast policy, this does not mean that previous definitions have disappeared altogether from public discourse.

The argument that the public interest standard has a nebulous, politically manipulable meaning does not hold up within the case of the Fairness Doctrine. The public interest standard's meaning has, in fact, evolved into four identifiable, dominant forms: first, as an enforcer of structure and efficiency of the spectrum; second, as part of the trusteeship of licensed broadcasters; third, for social justice and reform; and fourth, for the tastes and preferences of the public.

Also, that powerful forces co-opted the public interest language early in broadcast history to subjugate populist desires for the spectrum is a limited argument. Although the NAB and other lobbying forces that promoted the American commercial system used the FRC's early concerns with system efficiency to successfully establish an advertiser-based model, the public interest language left them

vulnerable to content regulation as decreed by the 1943 *NBC v. U.S.* decision—the landmark ruling that permitted the creation of the Fairness Doctrine. Their control over broadcast content became even more watered down after the 1969 Red Lion decision ruled for the Doctrine’s constitutionality.

The FCC also experienced limited control over broadcast regulatory decision making through the *UCC v. FCC* and Red Lion decisions, which not only granted public organizations the means to influence FCC decisions but also the impetus to do so. The Fairness Doctrine became an important tool that public organizations and media reform organizations used to press for more equitable broadcast content, which, in turn, created a strong force against the interests of both the FCC and commercial broadcasters.

Broadcasters did not truly capture the public interest language deliberately, if not cynically, until the late 1970s, as the FCC’s attention turned acutely to economic interests. It was during this time that the Fairness Doctrine, a product of the trusteeship model, began to unravel. Perhaps one of the greatest mistakes media advocates of all political stripes make today is historicizing the public interest standard so that historical values mirror current political arguments. But as this analysis indicates, the public interest standard can only be defined by the political culture of the historical moment in which that interpretation developed. As larger political and cultural changes impact how citizens, broadcasters, and regulators view broadcasting as a public forum, new identifiable definitions for the standard will continue to emerge.

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