Tuning Out Free Speech

Mandating broadcast balance makes a casualty of the First Amendment.

By Jesse Walker

IN THE NAME of liberating speech and promoting what he calls the "uninhibited marketplace of ideas," Congressman Dennis Kucinich may be ready to revive a rule with a long record of stifling speech and inhibiting the exchange of ideas. Speaking in Memphis this past January, the Ohio Democrat, who now chairs the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee, declared "the media has become the servant of a very narrow corporate agenda" and pledged to hold hearings on media reform. One of the topics on the table: whether to revive the Fairness Doctrine, a long-dead rule requiring broadcast licensees to "afford reasonable opportunity for discussion of conflicting views on matters of public importance."

Kucinich insists that he isn't necessarily endorsing a return to the Fairness Doctrine but merely wants to review the effects of repealing it 20 years ago. Taking him at his word, I'll let him know right now what a fair inquiry will reveal.

The wording of the Fairness Doctrine may sound mild and unobjectionable, but when it was in effect, it gave politicians and pressure groups a tool to harass any station that transmitted views they found disagreeable. Even when it wasn't being deliberately deployed to suppress speech, it made broadcasters less willing to present ideas that might be controversial. And the chief effect of removing it was a renaissance in opinionated broadcasting—not just by conservatives but by a host of populist voices that were once marginalized on the airwaves. If Kucinich thinks the media is a servant of a narrow corporate agenda today, rest assured that there will be even less variety on the air if the Fairness Doctrine is restored.

The doctrine became law in 1949, but its roots predate the creation of the Federal Communications Commission. When the FCC's predecessor, the Federal Radio Commission, was born in 1927, its first task was to decide which stations would be allowed to broadcast on an increasingly crowded radio spectrum (or, more accurately, on that small segment of the spectrum where the feds were allowing people to broadcast). It decided to favor "general public service" stations with no particular point of view over "propaganda" stations with a distinctive outlook, arguing that there simply wasn't space "in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether." In practice, this meant an inoffensive commercial station affiliated with a network would get precedence over a nonprofit outlet run by a church, union, or civic institution. That, in turn, meant a general shortage of lively, controversial speech.

Chicago's WCFL, for example, began as an experiment that would have warmed Kucinich's heart: a listener-supported station run by the Chicago Federation of Labor, mixing entertainment aimed at working-class listeners with left-wing news and commentary. The Federal Radio Commission judged it a "propaganda" outlet and regulated it accordingly, forcing it to change frequencies and, eventually, to stop broadcasting in the evening hours. With its audience shrinking, it got fewer contributions and found it harder to pay the bills. Finally, it gave up and became a standard commercial station. In that form, it was an enormous success. But the number of opinions available on the airwaves shrank.

It was in that same frame of mind that the regulators declared, in a 1928 warning to a station owned by the Socialist Party, that broadcasters must show "due regard for the opinions of others." That guideline was formalized as the Fairness Doctrine in 1949. It, too, was a handicap for broadcasters with a point of view.

Under the new rule, the first group to feel a sustained series of blows was the anticommunist Right. In December 1961, Walter and Victor Reuther of the United Auto Workers, together with the liberal lawyer Joseph Rauh, wrote a 24-page memorandum to Atty. Gen. Bobby Kennedy. The memo urged the administration to deploy the FBI, the IRS, and, yes, the FCC to win "the struggle against the radical right," which to the Reuthers included not just the John Birch Society and the Christian Crusade but Sen. Barry Goldwater and the libertarian Volker Fund. The FCC, the authors wrote, "might consider examining into the extent of the practice of giving free time to the radical right and could take measures to encourage stations to assign comparable time for an opposing point of view on a free basis."

When word of the memo reached the press, the attorney general would deny that he had even read it. But the Kennedy and Johnson administrations clearly understood the ways the Fairness Doctrine could be used not just to assure "comparable time for an opposing point of view" but to get dissenting views off the air altogether. In his 1976 book *The Good Guys, the Bad Guys, and the First Amendment*, former CBS president Fred Friendly quoted Bill Ruder, an assistant secretary of commerce under Kennedy and a PR consultant during Johnson's presidential campaign, on the advantages of the regulation. "Our massive strategy," Ruder said, "was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."

One party operative, Martin Firestone, reported to the Democratic National Committee that the "right-wingers operate on a strictly cash basis and it is for this reason that they are carried by so many small stations. 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." He would later tell Friendly, "Perhaps in the light of Watergate, our tactics were too aggressive, but we were up against ultra-right preachers who were saying vicious things about Kennedy and Johnson."

At the same time, some activists on the Right were finding their own uses for the law. In Seattle, a maverick broadcaster named Lorenzo Milam had started a noncommercial station called KRAB. Milam had previously worked for Berkeley-based Pacifica Radio and loved their diverse musical programming but was disenchanted with their political lineup, which he found increasingly monochromatic and "Stalinist." At KRAB, he went out of his way to program every conceivable political perspective; it is surely the only station where the Socialist Workers Party and the John Birch Society shared a timeslot, alternating commentaries from week to week. Nonetheless, some local conservatives threatened Milam with a Fairness Doctrine challenge, even though their views were welcome on the station. Presumably they were offended that KRAB would allow leftists to speak at all.

When a Republican administration took office in 1969, it, too, found the Fairness Doctrine a convenient tool. (Ruder, the Kennedy appointee who spoke so frankly about his efforts to inhibit conservative broadcasters, soon found himself on Richard Nixon's enemies list. Harassment is a two-edged sword.) Private activists directed by the Republican National Committee regularly filed Fairness Doctrine challenges against stations whose reporting angered the White House, and Nixon staffers found they could intimidate network officials merely by threatening to challenge their licenses if their coverage was deemed "unfair." Twenty-one times during the intense antiwar demonstrations of October 1969, Nixon told his underlings to take "specific action relating to what could be considered unfair network news coverage."

Even when a complaint was shot down, it could have an effect. In 1981, Milwaukee Mayor Henry Maier asked the FCC to intervene after WTMJ-TV ran 15 editorials criticizing his city government. The commission didn't find any violation of the Fairness Doctrine. When Mayor Maier asked the courts to force the regulators' hand, they also sided with the station. But in the meantime, the broadcasters had run up a legal bill of $17,000 defending themselves.

With such outcomes in the offing, the result was a general chilling effect. In a column earlier this year, civil libertarian Nat Hentoff remembered his days as a reporter at a Boston station in the '40s and '50s. "When official Fairness Doctrine letters came to the station's owner from the FCC, the front office panicked," he wrote. "Lawyers had to be summoned; tapes of the accused broadcasts had to be examined with extreme, apprehensive care; voluminous responses to the bureaucrats at the FCC had to be prepared and sent. After a number of these indictments from Washington arrived at WMEX, the boss summoned all of us and commanded that from then on, we ourselves would engage in no controversy at the station."

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The Fairness Doctrine's most famous victim was Red Lion Broadcasting, the company that operated WGCB—the initials stood for "Word of God, Christ, and the Bible"—in southeastern Pennsylvania. On Nov. 25, 1964, it aired a broadcast by the Tulsa-based evangelist Billy James Hargis, who would go on to produce a book called *Is the School House the Proper Place to Teach Raw Sex?* and, still later, to fall into disgrace after students at his American Christian College accused him of using his schoolhouse to teach them raw sex. At the time, though,

he was one of the leading voices of the Religious Right, and he used his time slot to attack the liberal reporter Fred Cook. When Cook demanded a right to reply, the station offered to sell him 15 minutes of airtime for $7.50, the same price Hargis had paid for his 15 minutes, but Cook wanted free access. The FCC told Red Lion that it had to give Cook what he wanted. Red Lion took the government to court, arguing that the order violated the station's First Amendment rights.

The case eventually reached the Supreme Court, which ruled in 1969's *Red Lion* v. *FCC* that the Fairness Doctrine is consistent with the First Amendment because the "First Amendment does not protect private censorship by broadcasters who are licensed by the Government to use a scarce resource which is denied to others." Writing for the majority, Justice Byron White announced that the "danger that licensees will eliminate coverage of controversial issues" was "at best speculative," and argued that the important rights in question belonged to "the viewing and listening public," not the people speaking on the air.

He also echoed the Federal Radio Commission's original rationale for preferring "general public service" stations to "propaganda" outlets. "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate," wrote White, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

Red Lion remained law until the Reagan era, when the FCC studied the effects of the doctrine and issued a blistering report in 1985. In practice, the agency found, the rule "actually inhibits the presentation of controversial issues of public importance." Two years later, the regulation was repealed.

The result was a renaissance of opinionated, controversial broadcasting, in the form of the talk-radio boom. Suddenly it was far less risky to put political programs on the air. It was even profitable. The new talk shows tended to tilt to the Right, and they played a key role in the Republican victories of 1994. But not everyone was a Red Team loyalist. In 1996, for example, nearly 70 hosts, some quite prominent, endorsed the Libertarian Party's presidential candidate.

Talk radio's very format encouraged audiences to stop their passive listening, pick up the phone, and join the conversation; while some hosts prefer to bully dissenting callers, others welcome the debate. And while the form certainly has its limits, it helped pave the way for the even more diverse and participatory world of the blogosphere.

A revived Fairness Doctrine wouldn't just rein in the Fox-style right-wing shows that irk people like Dennis Kucinich. It would deliver a harsh blow to the "progressive talk" format that has emerged in the last few years as an alternative to Rush Limbaugh and his imitators. It would be a harsh blow, in fact, to any station that programs from a particular point of view. As in the '20s, the likely result would not be an increase in the opinions heard on the air but a decrease in the number of stations willing to air controversial opinions at all.

When Fred Friendly interviewed Reverend Hargis, the evangelist described the Fairness Doctrine as a law the "left-inclined use to keep the right wing off the air, and which the right wing uses to silence the left. What good is that? It can be used to keep everybody off the air." If that's what Kucinich wants, the Fairness Doctrine is a perfect tool to make the media even more homogeneous. If it isn't, he should drop this idea as promptly as possible. ■

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Land of the Free

Private solutions propel the conservation boom.

By G. Tracy Mehan III

WILL ROGERS reportedly said, "Buy land. They ain't makin' any more of the stuff." This has long been sound advice for making money. Of late, it has also become a call for the conservation of nature and its supporting landscapes.

Throughout the nation, countless forests, prairies, farms, and ranches in the path of urbanization are being gobbled up in a real-estate boom that defies gravity. Intense development paves paradise at astonishing speed.

In the Chesapeake Bay watershed, encompassing parts of six states and the District of Columbia, population growth increased impervious surfaces—roads, sidewalks, parking lots, and roofs—from 611,017 to 860,004 acres between 1990 and 2000. At that rate, an additional 250,000 acres will become impervious by 2010 as exceptional economic growth and the quest for prime real estate usher in their usual attendants: traffic congestion, deforestation, polluted runoff, and