Seton Hall Journal of Sports and Entertainment Law

Volume 23 | Issue 2 Article 7

6-5-2013

Resolving the Debate on Public Funding for National Public Radio

Andrew Giarolo

Follow this and additional works at: http://erepository.law.shu.edu/sports_entertainment

Recommended Citation

Giarolo, Andrew (2013) "Resolving the Debate on Public Funding for National Public Radio," *Seton Hall Journal of Sports and Entertainment Law*: Vol. 23: Iss. 2, Article 7.
Available at: http://erepository.law.shu.edu/sports_entertainment/vol23/iss2/7

This Essay is brought to you for free and open access by Seton Hall Law eRepository. It has been accepted for inclusion in Seton Hall Journal of Sports and Entertainment Law by an authorized administrator of Seton Hall Law eRepository. For more information, please contact lawlibdigital@shu.edu.

Resolving the Debate on Public Funding for National Public Radio

*Andrew Giarolo**

INTRODUCTION 440
IN THE BEGINNING, ALL WAS DARKNESS 441
A. The Public Broadcasting Act of 1964 442
B. The Attacks Begin; NPR Takes Action 445
ALTERNATIVE SOLUTIONS 447
Alternative I: Revive the Fairness Doctrine 447
Alternative II: Implement the Fairness Doctrine Solely for All Federally-Funded Programs so that Allegations of Bias Can Be Minimized 452
Alternative III: Direct Broadcast License Fees Directly to an Independent, Regulatory Trustee that Directly Subsidizes Public Broadcasting 455
CONCLUSION 459

* J.D. Candidate 2013, Seton Hall University School of Law. The author wishes to thank Professor Ronald Riccio for valuable input and his loving wife, Laura, for her support and the temporary loan of her great intellect and common sense.

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . . 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.[1]

INTRODUCTION

Public funding for National Public Radio ("NPR") has come under fire, yet again. Conservatives have long decried NPR as a liberal mouthpiece[2] while liberals argued that maintaining NPR was essential because it was a "national treasure."[3] Neither side argued the actual merits of NPR, relying instead on sentimental pleas to their respective bases.[4] The purpose of this note is to rectify that shortcoming. The note begins with a legislative and factual history of NPR and a comparison with other public broadcast institutions in the world. Next, it looks at another controversial topic—funding for the arts— and the legislature's solution to that problem in the hopes of analogizing the debate to funds for NPR. Such a solution is not without its own controversies; so next, this comment will consider the constitutional constraints of

1. STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 42 (1978), citing *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949) (remarks of Sen. Howell).

2. Keach Heagey, *House debates bill to defund NPR*, POLITICO (Mar. 17, 2011, 11:39 AM), http://www.politico.com/blogs/onmedia/0311/House_debates_bill_to_defund_NPR.html?showall; *See also*, 157 CONG. REC. H1953-66 (daily ed. Mar. 17, 2011) (remarks of Reps. Blackburn, Lamborn) (Note, the Republicans are decidedly more moderate in their rhetoric in the Congressional Record than in the popular media, while the Democrats are more vitriolic in the House).

3. Pete Kasperowicz, *Democrats lash out at NPR defunding attempt*, THE HILL (Mar. 17, 2011, 9:07 AM), http://thehill.com/blogs/floor-action/house/150403-democrats-lash-out-at-npr-defunding-attempt; *See also*, 157 CONG. REC. E537 (daily ed. Mar. 29, 2011) (remarks of Rep. Moore) ("Republicans [are trying to] kill Big Bird.").

4. *See also*, Mark Memmott, *House Votes to cut NPR's Federal Funds*, NPR (Mar. 17, 2011, 3:28 PM), http://www.npr.org/blogs/thetwo-way/2011/03/17/134629713/house-votes-to-cut-nprs-federal-funds; Brian Montopoli, *Should NPR lose its federal funding?*, CBS NEWS (Mar. 9, 2011, 5:11 PM), http://www.cbsnews.com/8301-503544_162-20041326-503544.html.

congressional regulation of NPR's funding and the implications vis-à-vis the First Amendment. Finally, this comment will offer sustainable funding suggestions for NPR that will effectively regulate content in accordance with constitutional constraints and allay the fears of those who believe that it is too liberal or conservative.

IN THE BEGINNING, ALL WAS DARKNESS

The first radio broadcast was a musical "station" operated out of the home of a Westinghouse Electric Company engineer named Frank Conrad.[5] As other radio stations arose in those early days, they would eventually fall into several categories: commercial corporations operating popular music stations and using air time to pump advertisements for their products, newspapers seeking to extend their media empires, and, to a lesser extent, religious institutions trying to send the Word out over the airwaves.[6] At that time, sponsors controlled programming, and a Bob Hope gag from the 1940s had Sydney Greenstreet attempting to mesmerize Hope elucidates this: "Gaze into my eyes. You are in my power. You will do my biding. You will fulfill my slightest wish. You will obey my every whim." Hope quips back: "This guy's crazy—he thinks he's my sponsor."[7] Orson Welles, the famous actor, director, and producer,[8] enjoyed the idea of sponsorships because he thought they broadened the availability of programs.[9] On the other side of the debate was then-Commerce Secretary Herbert Hoover. He said that "the quickest way to kill broadcasting would be to use it for direct advertising. The reader of a newspaper has an option

5. LEONARD MALTIN, THE GREAT AMERICAN BROADCAST: A CELEBRATION OF RADIO'S GOLDEN AGE 3 (1997).

6. *Id*. at 4.

7. *Id*. at 147.

8. Welles and his Mercury Radio Theater Company were responsible for popular radio's most famous, perhaps infamous, moment when a broadcast of H.G. Wells' "War of the Worlds" was mistaken for an actual news broadcast and paralyzed the nation. For a humorous, but in-depth, account of the fateful day, *see Show 403: War of the Worlds*, RADIOLAB (Mar. 24, 2008), http://www.radiolab.org/2008/mar/24/.

9. MALTIN, *supra* note 5, at 151 ("There were all kinds of sponsors, nutty ones, rightists, leftists, idiots, very bright people—and as a result, you had a big variety of shows, because they were the expressions of different kinds of peopleFalse [a]nd now, whatever you can do on television is a reflection of the three people [the heads of ABC, NBC, and CBS] who control what television is.").

whether he will read an ad or not, but if a speech by the President is to be used as the meat in a sandwich of two patent medicine advertisements, there will be no radio left."[10]

Public radio, on the other hand, was funded by governmental entities, including universities and municipalities.[11] In the late 1960s, regional public radio groups, looking to create a national model, merged into a new entity, called National Educational Radio.[12] Originally, the Ford Foundation gave much of the funding to educational radio stations, but with the advent of television, Ford pulled the plug on radio to devote its energies to the new medium.[13] The combined networks then "looked to the only organization that had more money than the Ford Foundation, the federal government."[14] After all,their educational message was perfectly in tune with President Johnson's Great Society agenda.[15] The purpose of "[p]ublic broadcasting, like public-service broadcasting, was to educate, to socialize, to democratize, to culturally uplift an entire society."[16]

A. The Public Broadcasting Act of 1964

The original Public Broadcasting Act was designed solely to benefit public television programming and public television facilities.[17] Through aggressive lobbying, especially by Don Quayle who became NPR's first president, National Educational Radio got the phrase "or radio" inserted into the bill wherever "television" had appeared alone.[18] The final

10. *Id*. at 152.
11. MICHAEL P. MCCAULEY, NPR: THE TRIALS AND TRIUMPHS OF NATIONAL PUBLIC RADIO 13-15 (2005). The first "public" radio station was New York City's WNYC; the University of Wisconsin station 9XM, would become WHA, the cornerstone of the Wisconsin Public Radio network.
12. JACK W. MITCHELL, LISTENER SUPPORTED: THE CULTURE AND HISTORY OF PUBLIC RADIO 27-28, 67 (2005); MCCAULEY, *supra* note 11 at 7-8 (Wisconsin Public Radio, Minnesota Public Radio, and the Eastern Education radio network were the founding members).
13. *Id*. at 28.
14. *Id*. at 29.
15. See Lyndon B. Johnson, President of the United States of America, Remarks at the Univ. of Michigan (May 22, 1964) (available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640522.asp).
16. MITCHELL, *supra* note 12, at 30.
17. Act of May 1, 1962, Pub.L. No. 87-447, 76 Stat. 64 (1962).
18. MCCAULEY, *supra* note 11, at 20-22.

wording in the Public Broadcasting Act was:

To amend the Communications Act of 1934 . . . by authorizing assistance in the construction of noncommercial educational radio broadcasting facilities, by establishing a nonprofit corporation to assist in establishing innovative educational programs, to facilitate educational program availability and to aid the operation of educational broadcasting facilities and to authorize a comprehensive study of instructional television and radio, and for other purposes.[19]

The bill passed by a large margin.[20] Section 396 of the bill, as codified, set up the Corporation for Public Broadcasting ("CPB").[21] Congressional findings make clear that "it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes."[22] Even from the beginning, though, Congress set out to ensure that programming was educational and not politically charged. For example, Section 399 prohibits public broadcasters from supporting a political party or candidate.[23] No organization that received funds from the federal government could "advertise"[24] and restrictions were placed on how business sponsorships could be announced.[25]

Sections 391-393(a) set up and maintained the financing and grants for developing the infrastructure that would support the new public radio (and television) systems.[26] Section 398 prohibited the federal government from exercising any control, programming or otherwise, over any of the member stations, the CPB, or the telecommunications facilities.[27]Even the Federal Communications Commission ("FCC") was precluded from reviewing content on public broadcasts.[28] In sum, Congress created an independent,

19. Public Broadcasting Act of 1967, Pub.L. No. 90-129, 81 Stat. 365 (1967).
20. MITCHELL, *supra* note 14 at 40.
21. 47 U.S.C. § 396 (2012).
22. *Id.* § 396(a) (1).
23. *Id.* §§ 396(f)(3); §399, *invalidated by* Hill v. Kemp, 645 F. Supp. 2d 992 (N.D. Okla. 2009).
24. 47 U.S.C. § 399(b) *invalidated by* Minority Television Project, Inc. v. F.C.C., 676 F.3d 869 (9th Cir. 2012) .
25. 47 U.S.C. § 399(a) (2012).
26. *Id.* § 391-393(a) .
27. *Id.* § 398(a), (c).
28. *Id.*; *See also*, Network Project v. Corporation for Public Broadcasting, 561 F.2d

educational, and nationwide infrastructure of public radio and television stations and funded the entity that tied them all together, the CPB.

The CPB receives its funding directly from the federal government as well as from individuals, corporations, and non-profit organizations.[29] The CPB then provides operating capital to the Public Broadcast System ("PBS") and to individual public radio stations nationwide. It also provides competitive grants to NPR, as well as American Public Media ("APM")[30] and Public Radio International ("PRI") and other programming entities.[31] "CPB, PBS, and NPR are independent of each other and of the local public television and radio stations across the country. CPB neither owns, operates, nor controls broadcast stations, but distributes more than 70 percent of its federal funds directly to stations throughout the country."[32] The local stations present their own programming and then purchase national programs from one of the above entities. For example, WNYC produces *The Brian Lehrer Show* and *The Leonard Lopate Show*, two local news-talk-culture programs. However, WNYC purchases, for example, *Morning Edition* and *All Things Considered* from NPR, *A Prairie Home Companion* from APM, and *This American Life* from PRI.[33] WNYC also produces, in collaboration with PRI, *Studio 360*, a show highlighting new offerings in arts and culture, and *The Takeaway*, a morning news and analysis program.[34] WNYC and PRI can sell these programs to other stations.[35]

963 (D.C. Cir. 1977), *cert denied* 434 U.S. 1068 (1978) (FCC has no jurisdiction over CPB).

29. *About CPB*, CORPORATION FOR PUBLIC BROADCASTING, http://www.cpb.org/aboutcpb/ (last visited Oct. 23, 2011).

30. Although rarely mentioned in the same breath outside of public radio circles, APM and PRI both contribute programs to public radio stations nationwide and to the Armed Forces Network. *See*, *About us*, AMERICAN PUBLIC MEDIA, http://americanpublicmedia.publicradio.org/about/ (last visited Oct. 23, 2011); *About PRI*, PUBLIC RADIO INTERNATIONAL, http://www.pri.org/about-pri.html (last visited Oct. 23, 2011)[hereinafter "PRI"].

31. *See supra* note 43.

32. *Id*.

33. *See Shows*,WNYC, http://www.wnyc.org/shows/ (last accessed Oct. 23, 2011) (In the interest of full disclosure, this author and his wife are sustaining members of WNYC).

34. *Id*.

35. PRI *supra* note 44.; MITCHELL, *supra* note 12 at 112.

B. The Attacks Begin; NPR Takes Action

NPR was still in its infancy when the first attacks on federal funding for public broadcasting were launched. President Nixon vetoed funding for the CPB in 1972 and vowed to continue vetoing appropriation requests until federal funds were reduced to 25% of NPR's budget. [36] Nixon saw public broadcasting as an elitist, Eastern liberal institution that might provide programming hostile to his administration.[37] Alongside the President, his counsel for public broadcasting policy, Antonin Scalia, crafted a policy by which local stations would drive programming choices.[38] At the time, nothing came of Scalia's work, but in the 1980s, NPR independently adopted a similar strategy and the new funding system would be its saving grace.

NPR took fire again during the Reagan Administration. President Reagan's first decision regarding NPR entailed cutting funds by 20%.[39] NPR President Frank Mankiewicz took the funding crisis as an opportunity to develop a localized system through which local stations would buy programming, enabling NPR to derive additional revenue from donations and corporate "support."[40] This system continues today. NPR receives less than 7% of its funding directly from the federal government, and such funding is in the form of competitive grants from the CPB.[41]

The most recent controversies surrounding the national broadcaster have arisen from the firing of two hosts, one from each side of the political aisle, and a "sting" video made by a

36. Mitchell, *supra* note 12 at 162-63. Originally, NPR was solely funded through congressional appropriations. It was not until after this first round of attacks that NPR retooled its system to receive funding through the public radio stations throughout the nation.

37. McCauley, *supra* note 11, at 34.

38. *Id.*

39. *Id.* at 55. Two years later, NPR was again criticized when NPR executives decided to send a press delegation to Moscow in 1985. Reagan administration officials were concerned that the broadcasters would deliver "programs based on 'wonderful Soviet ideas on their own history or something.'" *Id.* at 35. NPR could not have chosen a worse time for going to the Soviet Union. The Cold War was at its climax and President Reagan was determined to end it and defeat the communists. Reagan delivered his famous "Tear down this wall" speech less than two years later. President Ronald Reagan, Address at the Brandenburg Gate (June 12, 1987).

40. McCauley, *supra* note 11, at 56.

41. *Public Radio Finances,* NPR, http://www.npr.org/about/aboutnpr/publicradiofinances.html (last visited Oct. 23, 2011).

conservative activist. The first host to be fired was Juan Williams,[42] who lost his job after making "racially insensitive" remarks concerning Muslims.[43] NPR also took criticism after a video appeared online showing NPR executive Ronald Schiller criticizing Republicans and the Tea Party, and saying that NPR did not require federal funding.[44] As this note was being written, another host came under fire for being the voice of Occupy Wall Street. Lisa Simeone, who hosts both *World of Opera* and *Soundprint*, was fired from the latter for political activism with the Wall Street protestors.[45] While she maintains her host position with *World of Opera*, NPR has dropped *World of Opera* from its roster.[46] Another station that was already producing the program took over distribution rights.[47]

Early in 2011, the House of Representatives passed H.R. 1076.[48] Among other provisions, H.R. 1076 would forbid any federal funds from being used to fund NPR or any other public radio interface.[49] It also includes provisions that would prohibit congressionally-funded organizations (like local public radio stations), from purchasing services from NPR or other national public radio groups.[50] Essentially, this would reduce the congressional grant to local radio stations for their own purposes, as long as they do not purchase content from the national syndicates. For example, a local station could not use federal funds to purchase *Car Talk*, an NPR program,

42. Williams now works for FOX News. His FOX News biography makes no mention of his time at NPR. *See On-Air Personalities*, FOX NEWS, http://www.foxnews.com/on-air/personalities/juan-williams/bio/#s=r-z (last visited Oct. 30, 2011).

43. *Juan Williams Calls Firing by NPR 'Chilling Assault on Free Speech,'* ABC NEWS, http://abcnews.go.com/Politics/juan-williams-thinking/story?id=11937951 (last visited Oct. 30, 2011).

44. Brian Stelter and Elizabeth Jensen, *Facing Lawmakers' Fire, NPR Sees New Setback*, N.Y. TIMES (Mar. 8, 2011), http://www.nytimes.com/2011/03/09/us/09npr.html?_r=1&scp=2&sq=juan%20williams%20muslims&st=cse. The video may be viewed at: https://www.theprojectveritas.com/civicrm/contribute/transact?reset=1&id=9

45. Neda Semmani, *HOH's One-Minute Recess: Radio Host Puzzled Over Firing*, ROLL CALL, (Oct. 20, 2011, 2:16 p.m.), http://www.rollcall.com/news/Lisa-Simeone-NPR-World-of-Opera-Fired-Occupy-DC-209655-1.html.

46. *See On the Media: (More) Controversy at NPR*, NPR (Oct. 30, 2011), http://www.onthemedia.org/2011/oct/28/more-controversy-npr/.

47. *Id.*

48. 157 Cong. Rec. H1905 (daily ed. Mar. 16, 2011).

49. H.R. 1067, 112th Con. §§ (a)(1), (c).

50. H.R. 1067, 112th Con. §§ (d) (A quick glance reveals that this would include such groups as APM, PRI, etc.).

or *A Prairie Home Companion*, an APM program, or *This American Life*, a PRI program. The bill has stalled in the Democrat-controlled Senate. Unfortunately, rather than solving the problem, Congress has merely postponed the debate until another day. The purpose of this note is to offer a solution; this note provides three alternatives. Each one provides a concrete solution to the problem so that this debate can finally be gaveled to a close.

ALTERNATIVE SOLUTIONS

Ultimately, NPR should structure its business without reliance on the inconsistency of federal funding. The government should reduce NPR's funding incrementally so that NPR has the opportunity to effect the proposed restructuring. However, as noted by Rep. Justin Amash,[51] this process must be done gradually. When President Reagan first cut funding in the 1980s, Wisconsin Public Radio had an emergency fund drive and was able to raise sufficient revenue to carry out operations and compensate for the difference.[52] At that time, NPR's sole source of funding was the CPB.[53] With advance notice and a reasonable time frame for the phasing out of funding, NPR could find a new, more reliable revenue stream to support its operations. However, this is not the only solution, and there are certain alternatives and temporary measures that could see the nation through the interim between our current state of affairs, vis-à-vis NPR, and ultimate resolution of the issue.

Alternative I: Revive the Fairness Doctrine

In 1920, there were three radio stations; five years later there were 578.[54] Radio stations sprouted wherever a willing broadcaster set a transmitter and at whichever frequency it chose to broadcast.[55] The FCC[56] was formed to regulate the

51. *See* Rep. Justin Amash, *Statement on H.R. 1076, To Prohibit Federal Funding of NPR and the Use of Federal Funds to Acquire Radio Content*, FACEBOOK, (Mar. 16, 2011, 11:39 PM), http://www.facebook.com/note.php?note_id=190835980955816. (Rep. Amash, a Republican, opposes federal funding for public radio, but feels there is a more amicable way to resolve this issue.)
52. Mitchell, *supra* note 12, at 166.
53. *See supra* note 12, at 68.
54. Simmons, *supra* note 1, at 17.
55. *Id.*

broadcast spectrum and thereby reduce the radio wave interference that was prevalent at the time.[57] Meanwhile, there was concern that the most powerful station owners would monopolize radio traffic.[58] President Coolidge and his Commerce Secretary, Herbert Hoover, were particularly concerned about a radio monopoly that would gain control of the airwaves.[59] As a result, there was an element of anti-trust policy surrounding the regulation of the broadcast spectrum. The Communications Act of 1934 formed the FCC to rectify these problems.[60] Amongst a host of other things, it would be the duty of the FCC to assign each broadcaster a station frequency and ensure that no two stations would interfere with each other.[61]

Yet, the same argument—that powerful broadcasters would control the broadcast spectrum—still lingered. Therefore, the FCC would also have to ensure that a variety of viewpoints would be aired on the limited frequencies offered to radio broadcasters. Unlike newspapers, where one can simply create and print another news source, or a reader can select a different paper to read), the radio spectrum is finite.[62] The FCC shouldered the burden of ensuring that all broadcasters would transmit programs that were in the public interest.[63] The problems of bias in the broadcast media would be dealt with by the Fairness Doctrine.[64]

One thrust of the Fairness Doctrine was that if a broadcaster chose to air a controversial issue, it had to provide equal time to each side of the issue. More

56. Actually, the FCC's predecessor, the Federal Radio Commission ("FRC") was the first government agency to regulate the broadcast spectrum. The FCC replaced the FRC upon passage of the Communications Act of 1934. The FRC was very short-lived; to avoid confusion, this comment deals only with the FCC.

57. Simmons, *supra* note 1, at 18.

58. The Bob Hope gag, alluded to earlier in this comment, played during this era.

59. Simmons, *supra* note 1, at 20-21. Interestingly, Hoover, as President of the United States, would pocket veto legislation that codified the FCC's Fairness Doctrine. *See* Simmons, *supra* note 1, at 27.

60. Communications Act of 1934, 73 P.L. 416 (1934).

61. *Id.*; DONALD J. JUNG, THE FEDERAL COMMUNICATIONS COMMISSION, THE BROADCAST INDUSTRY, AND THE FAIRNESS DOCTRINE 1981-87 7-11 (1996).

62. Simmons, *supra* note 1, at 19. Daniel Toohey, et al., Legal Problems in Broadcasting: Identification and Analysis of Selected Issues 27 (1974) (The broadcast spectrum is finite, so each licensee must operate in the public interest).

63. *Id.*

64. *See generally* Simmons, *supra* note 1, at 35 (tracing the history of the Fairness Doctrine).

importantly, however, the Fairness doctrine *required* that controversial issues were given airtime.[65] If a broadcaster failed to air controversial issues, or failed to give each side of the issue a reasonable amount of airtime *within* a reasonable amount of time, the broadcaster risked losing its license.[66] At its heart, the Fairness Doctrine required that any broadcaster who aired an attack on any person would give that person a fair amount of airtime to rebut those attacks.[67] In the event that the broadcaster aired political issues, each side would have equal airtime.[68]

With such a sweeping mandate, the FCC invariably received complaints. When a complaint arose regarding the Fairness Doctrine, it was first reviewed by an analyst within the Fairness/Political Branch, Complaints and Compliance Division, of the Broadcast Bureau.[69] The analyst would make an initial determination, and then forward the complaint to the legal division, which would request a response from the licensee (the broadcaster).[70] If a complaint was found to have merit, the legal division could either censure the broadcaster or notify the broadcaster and suggest that the broadcaster bring itself into compliance.[71] Either way, the letter became part of the permanent record for the broadcaster, and would be referenced when the broadcaster applied for renewal of its broadcast license.[72]

The Fairness Doctrine was brought before the Supreme Court on First Amendment grounds in the *Red Lion Broadcasting* case,[73] which would become the seminal case in Fairness Doctrine jurisprudence.[74] The case arose from a personal attack by a self-proclaimed "Christian Crusade[r]" against a left-wing author.[75] The author first requested, and

65. Toohey, *supra* note 62, at 28. The Fairness Doctrine has two prongs: (1) controversial issues must be presented, and (2) coverage of those issues is fair, i.e. balanced. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 377 (1969).
66. Toohey, *supra* note 62 at 29; 47 U.S.C. § 309(a).
67. Toohey, *supra* note 62 at 45.
68. *Id.* at 55.
69. Simmons, *supra* note 1, at 12.
70. *Id.*
71. *Id.*
72. *Id.*; 47 U.S.C. §309.
73. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).
74. *See id.* (perform a "Shepardize" or similar search on the case); Jung, *supra* note 61, at 13-15.
75. *Red Lion Broadcasting*, 395 U.S. at 378.

subsequently sued for the opportunity, to rebut the attacks as was required under the Fairness Doctrine.[76] The Court found that the radio spectrum was clogged with broadcasters.[77] "It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential."[78] More simply, the broadcast spectrum was a scarce resource and Congress could place the mantle of regulation on the FCC. A place on the spectrum was, in essence, a privilege; the product of the government's tacit allowance of the broadcaster to occupy a specific wavelength. Further, for those not granted the privilege of a dedicated wavelength, the opportunity to air their views or rebut an attack was virtually impossible.[79] The Fairness Doctrine had to be upheld. Reasoning that the government is permitted under the First Amendment to impose reasonable time, place, and manner restrictions on speech, the Court found that regulating the limited radio spectrum so that the airwaves would be used in the public interest was constitutionally permissible.[80] In his opinion for a unanimous Court, Justice White stated, "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[81] While *Red Lion Broadcasting* has been questioned in the wake of the repeal of the Fairness Doctrine,[82] the decision has

76. *Id.* at 379. There was also a secondary case involving specifically the Personal Attack rules being proposed by the FCC, the opinion and the Court's rationale applies to both cases.

77. *Id.* at 393 (The Court also noted that the VHF television spectrum was almost entirely full, but the (then) emerging UHF channels were not completely allocated.)

78. *Id.* at 399.

79. *Id.* at 400-01.

80. *Id.* at 387-88.

81. *Red Lion Broadcasting*, 395 U.S. at 389.

82. Joint Statement of Comm'rs Powell and Furchtgott-Roth, Fed.Election Comm'n, (June 22, 1998) (available at 1998 F.C.C. LEXIS 6725)(the commissioners questioned the decision's scarcity argument and also posited that the net effect of the decision was actually to "dampen debate" on the airwaves.)

not been overruled. Revival of the Fairness Doctrine today might cause uproar among private broadcasters, but a modicum of civility on the airwaves would be a welcome change. The Doctrine worked before, was deemed constitutional by the United States Supreme Court, and was in place during the rise in popularity of television and throughout what is arguably the golden era of television broadcasting.

The Fairness Doctrine proved difficult to enforce and resulted in extensive litigation. The regulations did not provide sufficient guidance as to what issues were genuinely disputed and therefore required an equal-air-time allocation, nor did they specify how broadcasters could meet their equal-air-time vis-à-vis issues that might have multiple points of view. Both of these shortcomings were revealed through litigation brought before the FCC and the federal district courts. These problems were evidenced in *Levitch v. Columbia Broadcasting System, Inc.*,[83] when independent documentary filmmakers brought suit against CBS, NBC, and ABC alleging that their practice of only airing "in-house" documentary productions was discriminatory. The tobacco industry sued, on Fairness Doctrine grounds, when the FCC refused them equal air time to rebut broadcasted reports that smoking was a health hazard.[84] The national committees of the two major American political parties each litigated against the national network television broadcasters.[85] The Democratic National Committee attempted to get free air time after ABC, NBC, and CBS aired an interview with President Nixon, while the Republican National Committee sued for the same after an interview with six Democratic presidential candidates.[86] The Reagan Administration would ultimately repeal the Fairness Doctrine, ostensibly as a free-market solution to a relatively insignificant problem.[87] The problem with the Fairness Doctrine was its lack of guidance. The only mandate was for both sides of a disputed issue to be given equal air time. However, experience and Fairness Doctrine case law should inform a new round of rulemaking.

83. 495 F. Supp. 649 (S.D.N.Y. 1980).
84. Larus & Bros. Co. v. F.C.C., 447 F.2d 876 (4th Cir. 1971) (The tobacco industry lost.).
85. Democratic Nat'l Comm. v. F.C.C., 460 F.2d 891 (D.C. Cir. 1972).
86. *See* Democratic Nat'l Comm. v. F.C.C., 460 F.2d at 894-98.
87. *See generally* Toohey, *supra* note 62, at 25-38.

If the Fairness Doctrine was implemented today, the FCC would be able to promulgate rules and regulations consistent with the Fairness Doctrine's mandate and prevent much of the litigation that resulted from its original enactment.

President Reagan's chairman of the FCC, Mark Fowler, proposed that "spectrum fees" could be used to subsidize public broadcasters.[88] Fowler's idea meant that commercial broadcasters would be charged a fee for the use of their piece of the broadcast spectrum. This fee would be used to fund "public radio and television, whose programming mission could supplement, rather than duplicate, the offerings of commercial broadcasters."[89] The idea had merit when offered, and this comment will now resurrect and expand upon it.

Alternative II: Implement the Fairness Doctrine Solely for All Federally-Funded Programs so that Allegations of Bias Can Be Minimized

Two decades have now passed since the repeal of the Fairness Doctrine, and it might be difficult to reinstate it for all broadcasters, so perhaps the solution might come from implementing the Fairness Doctrine only where federal funding is directly involved. For example, Congress could bar political programming from receiving funds. Alternatively, it could restrict federal funds from going to the overtly politically biased. Congress has been able to do this in the context of funding for the arts.

In the late 1980s, artists were pushing the boundaries of their medium and some were doing so using federally-funded grants from the National Endowment for the Arts ("NEA"). The controversy surrounding Robert Mapplethorpe's photography and the "Piss Christ" sculpture resulted in a public uproar,[90] echoed in the halls of Congress. As a result, Congress cut funding for the arts and required that obscene art not be funded.[91] The facts of the *Finley* case arose out of a

88. *Id.* at 49.

89. *Id.* at 49 (citing Mark Fowler, Address before the National Radio Broadcasters Assocation (Sept. 13, 1982), *in* "The Federal Communications Commmission 1981-87: What the chairman said" 10 HASTINGS COMM. & ENT. L.J. 409, 452 (1988)).

90. Joan Biskupic, *'Decency' Can Be Weighed In Arts Agency's Funding*, WASHINGTON POST, (June 26, 1998), *available at* http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/wp062698c.htm.

91. 20 U.S.C. § 954(d)(1) (2012). The statute specifically states that "the

controversy virtually identical to the public radio funding debate. The NEA awarded competitive grants to local arts institutions, which had in turn funded individual artists.[92] Two of these artists, Mapplethorpe and Andres Serrano, creator of the "Piss Christ," used that money to fund their artwork, which members of Congress deemed obscene.[93]

Congress cut funding to the NEA and enacted 20 U.S.C. § 954(d) which strongly curtailed the type of art that could receive funding from the federal coffers.[94] Artists whose funding was denied by the chair of the NEA challenged the new restrictions and the case went before the Supreme Court. The artists argued that the mandate from Congress was an example of unconstitutional viewpoint discrimination.[95] The Court, looking at the legislative history and the plain language of the bill, determined that Congress had adopted a bipartisan compromise balancing the need for continued funding of the arts with a "decency and respect" element that needed to be considered (though not necessarily given a quantified weight in those deliberations) when funds were dispersed. Further, Congress had provided constitutionally permissible considerations by which the NEA might measure the decency and respect factors—namely education, artistic heritage, and cultural diversity.[96]

The Court held that "Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'"[97] However, in dicta, the Court left open the

Chairperson shall ensure that, (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and (2) applications are consistent with the purpose of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this Act from the National Endowment for the Arts."

92. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 574 (1998).

93. *Id*.

94. *Id*. at 575.

95. *Id*. at 580.

96. *Id*. at 584-85. The statute states that both arts programs in schools and for the general public need to be encouraged. 20 U.S.C. § 951(9); 20 U.S.C. § 954(c)(5). It also asks that America's cultural artistic heritage and cultural diversity be honored. 20 U.S.C. § 954(c)(1), (4).

97. *Finley*, 524 U.S. at 588, citing Rust v. Sullivan, 500 U.S. 173, 193 (1991) (*Rust*

possibility that such selective funding might go too far. For instance, the Court suggested that if the funding were calculated to drive certain ideas from the marketplace or to suppress "dangerous ideas," the First Amendment might be implicated.[98]

Political speech is traditionally the most protected form of speech. "Regulation of speech that is motivated by nothing more than desire to curtail expression of particular point of view on controversial issues of general interest is the purest example of law abridging freedom of the speech or press, and regulation that denies group of persons the right to address selected audience on controversial issues of public policy is such regulation."[99] This is a hybrid solution, proffered as a compromise in the hopes of resolving the funding dilemma amicably. In the context of the arts funding debate, the Supreme Court looked favorably on legislation that "was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constrained its grant-making authority."[100] This should be feasible because there is ample room for NPR and the other public media outlets to produce arts, culture, and news programs, without becoming political.[101] This is merely another step in the direction NPR has already taken.[102] Congress should implement a funding structure like that of

involved a case where Congress chose to fund family planning services to encourage childbirth and child rearing over abortions).

98. *Finley*, 500 U.S. at 587-88.

99. F.C.C. v. League of Women Voters of California, 468 U.S. 364 (1984); William C. Canby, Jr., *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974).

100. *Finley*, 524 U.S. at 581.

101. Recently, NPR commentator Michele Norris voluntarily stepped down from her position as host of *All Things Considered* because her husband accepted a position with President Obama's reelection campaign. While she will continue to produce other segments for NPR, she has recused herself from any segment related to the election. Anna Christopher, *An Update for ATC Listeners*, NPR (Oct. 24, 2011 10:32 AM) http://www.npr.org/blogs/thisisnpr/2011/10/24/141650305/an-update-for-atc-listeners

102. Perhaps the greatest advantage to each of these proposals, if introduced before Congress, is that they would give notice to both NPR and PBS that their federal funds would be slowly drying up and allow them to take action to seek alternative funds or to determine cost-saving measures. Perhaps NPR could offer more nation-wide programs and fewer locally-based programs. By producing perhaps half as many shows, but increasing the quality and popular reach of those shows, perhaps they will attract more listeners, get more of those listeners to donate to their membership funds, and allow greater interchange of funds between stations so that a kind of public-radio free market could emerge.

the arts funding statute, which mandates respect for American cultural and political diversity, and furthers national educational prerogatives.

Alternative III: Direct Broadcast License Fees Directly to an Independent, Regulatory Trustee that Directly Subsidizes Public Broadcasting

European broadcasters are not directly funded by their constituent governments. Instead, they are funded by a television licensing fee, which is charged annually to any individual who owns a television. For instance, in the United Kingdom, the British Broadcasting Corporation, or BBC, is funded this way. The BBC handles both television and radio broadcasts for the United Kingdom, Channel Islands, and the Isle of Man. The money from license fees is collected by the BBC—rather than a governmental organization—and then utilized to fund its programming and operations. Currently, the annual fee for a color TV license is £145.50; for a black and white television, the fee is £49.[103] It is a crime to avoid paying the license fee, much like tax evasion.[104] Some concessions are offered to the blind, pensioners (the European equivalent of Social Security recipients), and hoteliers. It should be noted, however, that the BBC does not escape its own allegations of bias.[105] Further, the BBC's programs differ

103. *Inside the BBC – The license fee*, BBC, http://www.bbc.co.uk/aboutthebbc/insidethebbc/whoweare/licencefee/ (last visited Jan. 29, 2012) (At current exchange rates, this translates to $228.92 and $77.09, respectively. *See*, XE, http://www.xe.com/ucc, (in the "From:" field select "GBP – British Pound;" in the "To:" field, select "USD – US Dollar;" input the amounts listed above).

104. "Part 4 of the Communications Act of 2003 makes it an offence to install or use a television receiver to watch or record any television programmes as they're being shown on television without a valid TV License. . . . The Wireless Telegraphy Act 1967 (as amended) requires television dealers to notify TV Licensing of all their sales and rentals of television sets. . . . The Communications (Television Licensing) Regulations 2004 define what is a 'television set' and who is a 'television dealer'. The regulations also set out the various types of TV Licence, the criteria for obtaining them, the fees payable for them (including the frequency and amount of instalments) and the different concessions available, including concessions for people who are blind or severely sight impaired, people who are over 74 years of age, people who live in residential care and people who run hotels, guesthouses or campsites." *TV Licensing and the Law*, TV LICENSING, http://www.tvlicensing.co.uk/about/legislation-and-policy-AB9/#link1. *See also*, *BBC Trust Governance Framework*; BBC, http://www.bbc.co.uk/bbctrust/governance/governance_framework.html (last update Feb. 12, 2013).

105. UK: Medium-Term Political Outlook, THE MEDIA, (Jan. 30, 2011); *Television Licence Fee Trust Statement for the Year Ending 31 March 2011*, BBC (Available at

from NPR and PBS programs, as the BBC produces and/or airs popular programs (i.e. non-educational), like "The Office" and "Doctor Who;" sporting events, like the Beijing Olympics; and international favorites like AMC's "Mad Men."[106]

The BBC is governed by the BBC Trust, an independent board whose mission is to represent the needs of all license fee payers.[107] The Trust oversees the Executive Board of the BBC, holding them to the BBC's stated mission[108] by ensuring that the managers utilize the revenue from license fees to get the best value for money with programming choices; that the quality of programming is challenging, engaging, and innovative; and that the broadcast spectrum is efficiently apportioned.[109] The twelve Trustees are appointed much like the Commissioners on the FCC. The Queen appoints based on recommendations from ministers from the Department of Culture, Media, and Sport.[110] Trustees are typically selected from the upper echelons of the business community and come from diverse fields and backgrounds.[111]

---

http://www.tvlicensing.co.uk/resources/library/BBC/pdf/licence_fee_trust_statement_20120716.pdf)

106. *The BBC Story - A History of Innovation*, BBC, http://www.bbc.co.uk/historyofthebbc/ (last visited Feb. 22, 2013).

107. *Inside the BBC – BBC Structure*, BBC, http://www.bbc.co.uk/aboutthebbc/insidethebbc/managementstructure/bbcstructure/ (last visited Jan. 29, 2012).

108. The Trust's website lists the mission of the BBC, as defined by its Royal Charter: "1. Sustaining citizenship and civil society; 2. Promoting Education and Learning; 3. Stimulating creativity and cultural excellence; 4. Representing the UK, its nations, regions and communities; 5. Bringing the UK to the world and the world to the UK; and 6. In promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television." BBC Trust – About the Trust – Public Purposes, BBC, http://www.bbc.co.uk/aboutthebbc/insidethebbc/whoweare/publicpurposes/ (last visited Feb. 22, 2013) (The BBC Trust is literally a trust, with a mandate to serve the public interest, rather than a governmentally influence or regulated commission.)

109. DEPARTMENT FOR CULTURAL AFFAIRS, MEDIA, AND SPORT, BROADCASTING: AN AGREEMENT BETWEEN HER MAJESTY'S SECRETARY OF STATE FOR CULTURE, MEDIA AND SPORT AND THE BRITISH BROADCASTING CORPORATION, 2006, Cm. 6872, at i-ii (U.K.) *available at* http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf (Select "The Agreement").

110. BBC Trust – How Trustees are appointed, BBC, http://www.bbc.co.uk/bbctrust/who_we_are/trustees/appointment.html (last visited Feb. 22, 2013) (Note, the ministers of British departments are elected ministers of Parliament, akin to United States Senators and Representatives. Rather than have appointed cabinet officials, ministers of Parliament perform similar duties while their party or coalition is in power.)

111. *Id.*

The largest public broadcaster is the German Association of Public Broadcasting Corporations of the Federal Republic of Germany, or ARD, which, like the BBC, is funded through licensing fees. As of this writing, the ARD's annual fee is € 284.88 or approximately $376.61 American dollars. The money is collected by the German equivalent of our CPB and dispersed to the constituent organizations.[112] A review of other major public broadcasting institutions shows that most operate similar to the BBC and ARD.[113]

This system of fees and governance can easily translate to the broadcasting sphere in the United States. In the US, citizens already pay FCC taxes,[114] so it would be easy to modify that system to fund PBS and NPR. The taxes are collected by cable providers through the monthly fees paid by television watchers.[115] Essentially, the FCC could cut out the middleman, the CPB, and directly give the funds to PBS and NPR. The FCC can continue to regulate the broadcast spectrum, and can take on the mantle of ombudsman for broadcasting, much like the BBC Trust does in the UK, with the additional responsibility of ensuring that the public's money is well spent on the public broadcasters. The FCC already has the framework in place for members of the viewing and listening public to voice complaints over content, viz. the Janet Jackson Super Bowl incident, "fleeting expletives," and nudity on *NYPD Blue*.[116] Further, the FCC is

112. *Finanzen*, ARD, http:www.ard.de/intern/finanzen/ (last updated Dec. 12, 2012), *translated in* GOOGLE TRANSLATE, http://translate.google.com (enter source URL in text box and click "Translate").

113. *See, e.g.*, *La contribution a l'audiovisuel public*, FRANCE TÉLÉVISIONS, http://www.francetelevisions.fr/groupe/contribution-audiovisuel-public.php (last visited Jan. 29, 2012), *translated in* GOOGLE TRANSLATE, http://translate.google.com (enter source URL in text box and click "Translate"); *Israel Broadcasting Authority*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/1/Israel%20Broadcasting%20Authority (last visited Jan. 29, 2012).

114. *See* 47 U.S.C. § 159 (2012). The amount of the fee is calculated based the FCC's needs. 47 U.S.C. § 159(b) (2012).

115. *See generally* 47 U.S.C. § 159; 47 C.F.R. § 1.1151.

116. The Supreme Court, in a case challenging the FCC's regulations on those issues, ultimately ruled that the defendant broadcasters "lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies." F.C.C. v. Fox Television Stations, 132 S.Ct. 2307, 2320 (2012); *see also* Adam Liptak, *TV Decency is a Puzzler for Justices*, N.Y. TIMES, (Jan. 10, 2012), http://www.nytimes.com/2012/01/11/business/media/supreme-court-weighs-relevance-of-decades-old-broadcast-decency-rules.html?ref=federalcommunicationscommission. Had the Court reached the First Amendment issues presented in that case, the FCC arguably would have been relieved of the task of

already comprised of individuals with extensive background in the news and communications industries.[117]

The FCC has only five members—compared to the twelve trustees at the BBC—and, to broaden the viewpoints and backgrounds available to inform the FCC's decision-making function, this number should be increased. The commissioners are also nominally an independent agency of the federal government as they are funded entirely through regulatory fees.[118] In order to more perfectly separate the commission from the federal government, its structure should be redesignated as a trust: the Public Broadcasting Trust. The new trustees could conceivably be elected by the people, by a congressional majority, or, as is currently the case, appointed by the President. The only issue facing the new Public Broadcasting Trust that was not previously before the FCC would be the allocation of funds to the public broadcasting institutions. Cost savings can be generated by dissolving the Corporation for Public Broadcasting, whose functions would be absorbed by the Public Broadcasting Trust, and eliminating any redundancies among the two institutions. While one can foresee a struggle over the proportion that each receives, NPR has been quite happy with less than 25% in the past.[119] Recall that the Republican FCC Chair, Mark Fowler, who served during the Reagan

regulating obscenity, thus freeing up resources to assume the duties suggested in this article.

117. *See FCC Leadership*, FCC, http://www.fcc.gov/leadership (last visited Jan. 29, 2012) (selecting the commissioners' "Biography" links reveal that Chairman Julius Genachowski not only was a Supreme Court clerk for two justices, but also worked in the general counsel's office of the FCC and then founded a technology company, Commissioner Robert McDowell has sixteen years of communications industry experience, and Commissioner Mignon Clyburn was for fourteen years the publisher and general manager of a biweekly newspaper in South Carolina. Two positions on the commission are currently vacant.)

118. FCC, FISCAL YEAR 2012 BUDGET ESTIMATES SUBMITTED TO CONGRESS FEBRUARY 2011, at 4 (2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304636A1.pdf. (Note the budgetary request for direct funding from Congress is $0, from regulatory fees, $335.8 million).

119. *See*, Mitchell, *supra* note 12, at 21. ("Economists recognize that there are certain things they call merit goods, that a marketplace may not provide but that the society may want or need. Some examples are libraries, public museums, public schools, public parks. And, I happen to believe, public broadcasting is one of those merit goods. It seems to me that there is a place for it in our society and that it's not inconsistent with our reliance on the marketplace to recognize those exceptions. And I think this may be something that the people would say is worthwhile.")

administration, backed this proposal.[120] Finally, while this proposal is meant to be read independently of the previous alternative, which applied the Fairness Doctrine to funding for public radio, this by no means implies that Congress should ignore the possibility that if a new federal-level revenue stream might be found, such as broadcast fees, that the Fairness Doctrine might not be applied to the new source of funds as well.

CONCLUSION

As Frank Mitchell has stated, "Being noncommercial and not-for-profit translates as having integrity and being sincere to public radio listeners. In the intimate medium of radio, integrity and sincerity are hard to fake."[121] NPR is a valuable service that provides news, cultural programming, and local information to millions of Americans, yet it seems inevitable that one day NPR will lose its federal funding. Perhaps a national revenue stream can survive if the government can effect some form of change in funding and/or broadcast governance.

The Fairness Doctrine was a noble idea and, though its time has passed, the ideals the doctrine embodied could provide a solution to the current problem. If NPR is to be maintained in some way by federal public spending, a caveat should be attached to the funds. This would be much like restrictions that are placed on federal funds for artwork that is offensive or obscene. Essentially, NPR programming could be made to conform to the tenets of the Fairness Doctrine. Alternatively, the FCC could be reformulated into a public trust for the broadcast medium. The funds garnered from the regulatory fees can be partially used to subsidize public broadcast institutions.

Rather than continue the recurrent debate about funding, the pragmatic and respectful solution would be to phase the funding out over time to allow NPR to prepare for the transition. NPR has already managed a revolutionary transition from being 100% federally funded to relying on

120. Jung, *supra* note 61, at 53, citing Thomas G. Donlan, *No Failure to Communicate: FCC Chairman's Message is Loud and Clear*," BARRON'S 28, 35 (Nov. 15, 1982).

121. Mitchell, *supra* note 12, at 191.

government for a mere fraction of its budget. If NPR is given notice and time to implement a changeover, it will certainly be able to transition successfully to an independently funded entity.