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The Equal Opportunities and Fairness Doctrines in Broadcasting: Should They Be Retained?

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The Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce is holding hearings for the purpose of rewriting the Communications Act of 1934,1 and the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation is conducting hearings on important aspects of communications. An important question under consideration is whether the Equal Opportunities and Fairness Doctrines applicable to broadcasting should be retained.2 This article assesses the merit of these doctrines in our representative democracy today.

1. The Policy Basis for the Equal Opportunities and Fairness Doctrines

The Supreme Court has observed that, in licensing and regulating broadcasting, “Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.”3 This concern was first aroused by the advent of chain broadcasting, the forerunner of today’s nationwide networks. Herbert Hoover, at the Third Annual Radio Conference in 1924, warned:

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1. Options Papers prepared by the Staff for use by the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives, 95th Cong., 1st sess., Committee Print 95-13 (May 1977).


The greatest advance in radio since our last conference is the complete demonstration of the feasibility of interconnection [of a chain of radio stations]. It is our duty to consider the possibilities and potentialities of interconnection. . . . It would be unfortunate, indeed, if such an important function as the distribution of information should ever fall into the hands of Government. It would be still more unfortunate if its control should come under the arbitrary power of any person or group of persons. It is inconceivable that such a situation could be allowed to exist. . . .\textsuperscript{4}

The concern over the power of chain broadcasting to control public opinion and political elections was also expressed in the congressional debates which led to the Radio Act of 1927.\textsuperscript{5} Illustrative is the statement of Congressman Johnson:

The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. . . . \textsuperscript{1}It will only be a few years before these broadcasting stations, if operated by chain stations, will simultaneously . . . bring messages to the fireside of nearly every home in America. They can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.\textsuperscript{6}

To guard against control of public opinion and political elections by broadcasting networks and stations, Congress has enacted several safeguards. The broadcasting channels are a public domain, with ownership of them vested in the people of the United States.\textsuperscript{7} Broadcasters are licensed to use the channels for a limited term of three years, subject to renewal if the public interest has been served.\textsuperscript{8} And broadcasters are required to provide opposing political candidates with equal opportunities to use broadcasting facilities for political purposes.\textsuperscript{9}

\textsuperscript{4} Address by Herbert Hoover, Third Annual Radio Conference, 1924, quoted in FCC, OFFICE OF NETWORK STUDY, SECOND INTERIM REPORT, Docket No. 12782, at 114 (1965).
\textsuperscript{5} Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.
\textsuperscript{6} 67 CONG. REC. 5558 (1926).
\textsuperscript{7} Congress stated that the purpose of the Act is "to maintain control of the United States over all the channels . . . and to provide for the use of the channels, but not for the ownership thereof." 47 U.S.C. § 301 (1970). The Act requires licensees to waive expressly any right in the assigned frequency, which is normally for a three year term. Id., §§ 304, 307(d), 309 (1970 & Supp. 1974). The Supreme Court has recognized that the electromagnetic spectrum is a natural resource and public domain, the ownership of which is vested in the people of the United States. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 173-74 (1972).
\textsuperscript{9} This provision was enacted as section 18 of the Radio Act of 1927, ch. 169, 44
In 1929, two years after Congress enacted this doctrine, the Federal Radio Commission (the predecessor to the FCC) applied the underlying fairness principle to "all discussions of issues of importance to the public." Twenty years later, the significance of the Fairness Doctrine in broadcast of controversial issues of public importance was articulated in the FCC's 1949 Report on Editorializing by Broadcast Licensees as follows:

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. . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. 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.

It is to be noted that under the Fairness Doctrine, broadcasters have an affirmative duty to allocate reasonable time to the broadcast of controversial issues of public importance and to allocate reasonable time to both sides of such issues. In 1959, Congress, in amending section 315 of the Communications Act of 1934, ratified the Fairness Doctrine.

The policy on which regulation of broadcasting is based is the requirement that the licensees of the publicly owned channels serve the public interest. In the *Ashbacker* case, the Supreme Court held that the FCC must provide a comparative hearing in which the best


13. See *supra* note 8.

qualified of competing applicants is chosen to serve the public interest. The nature of the electromagnetic spectrum is such that channels are limited and the licensee is granted a monopoly use of the channel for a term. Having excluded the many who desire to broadcast, the few who are granted licenses to broadcast are required to serve the public interest. Since commercial broadcasting is a mass marketing instrument, networks select programming which fulfills the need of the mass advertisers. Low brow entertainment, rather than programs involving controversial issues, is the proven vehicle for carrying advertising having sales impact. Accordingly, the licensees are placed under an affirmative duty to make a reasonable effort to ascertain and to fulfill the program needs of the people reached by the signal. The FCC is granted the power to implement the public interest standard through adjudication, rule making, and policy statements.

The capstone of the public interest standard is the right of the people to be informed through broadcasting regarding political campaigns and controversial issues of public importance. The Equal Opportunities and Fairness Doctrines in broadcasting are designed to inform the electorate and, thus, to encourage our people to participate responsibly in representative democracy.

2. The Constitutional Basis for the Equal Opportunities and Fairness Doctrines

The electronic media are subject to regulation but the print media are not. The soundness of this double standard is being questioned. This section reviews the Supreme Court's reasoning in holding that governmental regulation is compatible with freedom of speech and press of broadcasters but contravenes freedom of press of publishers and editors.

In National Broadcasting Co. v. United States, the Supreme Court held that the FCC's Chain Broadcasting Rules do not contravene the free speech of the broadcasters. The rules prohibit the licensing of broadcasters whose network affiliation contracts include provisions — such as time optioning — which inhibit broadcasters in their choice of programming to fulfill the needs of the community served.

17. See supra note 2.
18. 319 U.S. 190 (1943).
At the three judge trial court level, Judge Learned Hand wrote on the free speech issue:

The Commission does, therefore, coerce their [the broadcasters] choice and their freedom and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the first amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the [Chain Broadcasting] regulations seek to protect are the very interests which the first amendment itself protects, i.e., the interests, first of the 'listeners', next of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks'. Whether or not the conflict between these interests and those of the 'networks' and their 'affiliates' has been properly composed, no question of free speech can arise.\(^\text{20}\)

In the quoted passage, Judge Hand taught us that, in applying the first amendment to broadcasting, regulation in aid of free speech does not contravene freedom of speech or press, and that, in the accommodation of first amendment interests in broadcasting, the interest of the listeners and viewers is more important than the interest of the broadcasters and networks.

In affirming the lower court in NBC, Justice Frankfurter, for the Supreme Court, wrote:

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license.\(^\text{21}\)

Justice Frankfurter’s reasoning is that, since the physical limitations of the radio spectrum restrict grant of licenses to only a small part of those who desire to broadcast, those who receive the privilege accept it with the obligation to serve the interest of the viewers and listeners. Thus, if the licensee fails in this obligation, the license may be revoked without contravening the broadcaster’s freedom of speech or press. While Justice Frankfurter does not state that the interest of the listeners and viewers is paramount in the accommodation of the


\(^{21}\) 319 U.S. 190, 226-27.
several first amendment interests in broadcasting, his opinion is compatible with Judge Hand’s view.

The definitive case by the Supreme Court on the constitutionality of the Fairness Doctrine, Red Lion Broadcasting Co. v. FCC,\(^2\) is based upon the paramount interest of viewers and listeners in the accommodation of first amendment interests in broadcasting as well as upon the limited number of broadcasting channels.

In the Red Lion case, the Supreme Court had before it two cases in which different federal courts of appeals had reached conflicting decisions on the constitutionality of the Fairness Doctrine as applied in the context of an adjudication arising out of a personal attack during the presentation of a controversial issue\(^2\) and judicial review of the FCC’s rules applying the Fairness Doctrine to personal attacks and political editorials.\(^2\) The Supreme Court upheld the constitutionality of the Fairness Doctrine against the contention that the Doctrine violates freedom of speech and press. Justice White, for the Court, wrote:

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\text{[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by Government itself or a private licensee.}
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\text{... [T]he resource is one ... for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.}
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\[
\text{In view of the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here ... constitutional.}\(^2\)
\]

In Columbia Broadcasting System, Inc. v. Democratic National Committee,\(^2\) the Supreme Court again emphasized that the first amendment interest of broadcasters, and hence networks, must be

\(^{23}\) Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1968).
\(^{24}\) Radio Television News Directors Ass’n v. United States, 400 F.2d 1002 (7th Cir. 1968). The personal attack and political editorial rules are found at 47 C.F.R. §§ 73.123, 300, .598, .679 (1976).
\(^{25}\) 395 U.S. 367, 390, 399-401 (citations omitted).
\(^{26}\) 412 U.S. 94 (1972).
accommodated to the paramount first amendment interest of the viewers and listeners. The issue before the Court was whether there is a constitutional right of access to broadcasting during paid advertising time for presentation of editorial opinion. Chief Justice Burger wrote:

Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. ... Although the broadcaster is not without protection under the First Amendment, '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount....'

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the regulatory scheme that has evolved over the course of the past half-century. For, during that time, Congress and its chosen regulatory agency established a delicately balanced system of regulation intended to serve the interests of all concerned.27

The first amendment interest of listeners and viewers is paramount regardless of whether the subject matter of the broadcast is journalism, entertainment or advertising. However, in balancing the first amendment interest of the listeners and viewers with the broadcasters' freedom of press, the protection accorded the licensees may vary in degree.

The Supreme Court long took the position that product advertising is not protected in the degree that communications having idea content are protected.28 In recent cases involving restrictions on advertising of prices for pharmaceuticals29 and lawyers' fees,30 the Supreme Court has recognized that advertising has substantial protection under the first amendment. However, it should be noted that, in these recent cases, the Court was protecting freedom to communicate information which the public had a need to know.31 Congress has validly prohib-

27. 412 U.S. 94, 101-02 (citations omitted). The Supreme Court held that persons desiring to present editorial advertisements via broadcasting do not have a right of access which is protected by freedom of speech, as Congress and the FCC have provided for broadcast of public issues through the Fairness Doctrine. However, the Court observed that, if the FCC could devise a practical system for granting access which also accommodates the several first amendment interests involved, such a system of required access would not violate the freedom of the press of the licensed broadcasters.


31. "[A] consumer's interest in the free flow of commercial information ... may be ... keener by far, than his interest in the day's most urgent political debate ... . When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience." See supra note 29 at 763-64.
ited broadcast of product advertising of cigarettes and small cigars.\textsuperscript{32}

In balancing the first amendment right of listeners and viewers and freedom of press of broadcasters relative to entertainment programming, the Supreme Court would recognize the validity of concerns as to the impact of excessive violence on the young and impressionable, while protecting the good faith artistic judgment and discretion of the licensed broadcasters in selecting programming to fulfill the needs of listeners and viewers.\textsuperscript{33} In \textit{CBS v. NBC},\textsuperscript{34} the Supreme Court emphasized that Congress had vested good faith journalistic judgment and discretion in the broadcast licensees, subject to fulfilling the right of the people to know under the Fairness Doctrine. In the balancing of the first amendment interests of listeners and viewers with the freedom of press of broadcasters, probably the highest degree of protection accorded licensed broadcasters is in this area of journalistic judgment and discretion. However, even in this area, the Supreme Court has made clear that the first amendment right of the listeners and viewers is paramount.\textsuperscript{35}

Of course, in any legislative or regulatory area which involves a balancing of first amendment interests, the means chosen by Congress and the regulatory agency will be examined to determine whether the means of achieving the policy is reasonable and does not unnecessarily impinge upon a first amendment interest. However, in \textit{CBS v. NBC}, the Supreme Court emphasized that, due to the sensitivity and complexity of balancing the several first amendment interests in broadcasting, the means chosen by the Congress and the FCC would be given great weight in resolving the first amendment issue.\textsuperscript{36} Thus, the Court reasoned that, as the FCC had not required broadcasters to accept paid editorial opinions for broadcast in advertising time, relying rather on the Fairness Doctrine to achieve diversity of viewpoints, broadcasters did not violate a first amendment right in denying access to paid editorial advertisements; but, if the FCC should devise a practicable plan for access for paid editorial advertisements, this would not violate the broadcaster's freedom of the press.

In contrast to broadcasting, the print media are not subject to governmental regulation of content. In \textit{Miami Herald Publishing Co.}
the United States Supreme Court held that Florida's statutory right of reply to any political candidate whose character was attacked during political campaigns violated freedom of the press. The Florida Supreme Court had reasoned that daily newspapers are scarce, that there is a need to accommodate the reader's first amendment interest with the freedom of press of the publishers and editors, that the public's need to know is critical during political campaigns, and that free speech is enhanced rather than abridged by the statute. On this reasoning, which closely parallels the reasoning of the Supreme Court of the United States in upholding governmental regulation of broadcasting, the Florida Supreme Court held that the statute did not violate the first amendment. The Supreme Court of the United States, in reversing the Florida Supreme Court, refused to equate scarcity resulting from economic forces with scarcity inherent in the limitations of the radio spectrum or to balance the need of the public to know with the editorial control and judgment of the editors. The Court considered only the effect of the right-to-reply statute on the right of the publishers and editors to determine what to print:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

There are more than 8,000 radio and television stations and less than 2,000 daily newspapers. Competition between daily newspapers in the same city is almost a phenomenon of the past. In light of the scarcity of daily newspapers, some observers question the soundness of the Supreme Court's holding that governmental regulation of broadcasting in the public interest does not infringe freedom of speech and press while governmental regulation of daily newspapers does violate freedom of the press. A possible answer is that, contrary to the Supreme Court's decision, a right-of-reply statute is compatible with the first amendment. Our constitutional fathers wrote the first amendment

38. 287 So. 2d 78, 80-85 (Fla. 1973).
39. 418 U.S. at 258.
guarantees of freedom of speech and press in the time of Tom Paine. Dick and Harry did not need access to Tom’s penny sheet because they could print and distribute their own sheet. Today is the time of Hearst, Scripps-Howard, Knight, and other newspaper chains. The Miami Herald case, coupled with the defamation law, leaves both the political candidate who is attacked and, more importantly, the electorate “at the complete mercy of the press.”

Those who question the double standard in applying the first amendment so as to prevent governmental regulation of the print media while permitting governmental regulation of broadcasting typically take the position that governmental regulation of broadcasting violates freedom of speech and press of broadcasters. However, there are sound distinctions between broadcasting and the print media for the purpose of the first amendment issue. The broadcasting channels are owned by the people while newspaper facilities are owned by the publishers. The broadcasting channels are inherently limited by the nature of the electromagnetic spectrum while print media are limited only by the economics of cost. The regulation of broadcasting in the public interest, notably through the Equal Opportunities and Fairness Doctrines, does not inhibit free speech, but enhances it.

Broadcasters are licensed to use the publicly owned channels for a limited term subject to renewal if the licensee serves the public interest. The licensee is a trustee of the channel and assumes a duty to use a reasonable effort to ascertain and to fulfill the needs of the people in the community reached by the signal. Freedom of speech and press in broadcasting involves interests of broadcasters, networks, those desiring access to the facilities, and the listeners and viewers; and in the balancing of these interests the first amendment interest of the listeners and viewers is paramount.

43. 418 U.S. at 263 (White, J., concurring).
44. See supra note 7.
45. See the quotations in text accompanying notes 20, 25 and 27 supra. In Associated Press v. United States, the Supreme Court upheld the application of the Sherman Act to press service, over first amendment objections, explaining: “Freedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests.” 326 U.S. 1, 20 (1945). In Weaver v. Jordan, the Supreme Court of California held that California’s Free Television Act, which prohibited home subscription television (pay television) was invalid as an abridgement of free speech and distinguished the NBC case on the ground that the FCC’s Chain Broadcasting Rules (see text accompanying notes 19-22 supra) facilitated rather than hindered free speech. 64 Cal. 2d 235, 411 P.2d 289, 99 Cal. Rptr. 537 (1966), cert. denied 385 U.S. 844 (1966).
46. See quotations in text accompanying notes 20, 25 and 27 supra.
many radio and television stations as there are daily newspapers, concentration of control of national and international news and public affairs programming is far greater in broadcasting than in daily newspapers. This results from the network-affiliate relationship in television. Frequent polls show that most Americans depend upon television for news and information about public affairs. Three commercial television networks, ABC, CBS, and NBC, supply news and public affairs programming to three nationwide networks of affiliated stations. The non-commercial educational broadcasting stations, using the older chain broadcasting concept, determine the news and public affairs programs which will be produced for them by the Public Broadcasting Service. Most broadcasters limit their news originations substantially to local affairs. While daily newspapers may receive the AP, UPI, and Reuters news services, the editors use such portions of this material as they choose. However, it is impractical for local broadcasters to exercise any journalistic control or judgment over the news and public affairs programs provided by networks. If used, the program is broadcast without editing. Hundreds of local newspaper publishers and editors determine the content of daily newspapers. Only three commercial networks determine what national and international news and public affairs programs the commercial television stations carry. It will be recalled that the reason why Congress decided to license and regulate broadcasters was a well-based fear that nationwide broadcasting networks could control public opinion and determine the outcome of political elections. The unique concentration in three commercial networks of control of national and international news, public affairs programs, and power to manipulate national elections, is the most dramatic distinction between broadcasting and daily newspapers. This factor alone justifies the Supreme Court's double standard in application of the first amendment to the electronic and print media.

Without contravening freedom of speech or press, Congress could have adopted a system of use of the publicly owned airwaves under which stations were common carriers and open mikes were made available to citizens on a first-come, first-served basis; or Congress could have divided the broadcasting time on each channel between hours for commercial broadcasting and hours for noncommercial broadcast of political campaigns and public issues; or Congress could

47. See text accompanying notes 3-16, section. 1.
48. For an analysis of the constitutional issue in the regulation of cable television, see Barrow, Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience, 61 VA. L. REV. 515 (1975).
have set apart those hours when children are the most numerous
viewers for broadcast of noncommercial, nonviolent programming de-
signed especially for children. In fact, the FCC, pursuant to authority
conferred by the Congress, allocates portions of the broadcast spectrum
to particular uses. Among these are commercial, noncommercial public
and educational, maritime and aeronautical, government and military,
mobile industrial, and citizen's band uses. Such classification pre-
determines the character of broadcasts and excludes from the assigned
frequencies all except the permitted class. However, as this is a reason-
able and necessary system for use of the broadcast spectrum, such
regulation does not contravene freedom of speech or press.

The electronic and print media are therefore essentially different,
and the first amendment takes into account the differing nature of the
media.

3. The Governmental Action Issue in the Event of
Repeal of the Equal Opportunities and
Fairness Doctrines

In Section 2 of this article, it was shown that there is a sound con-
stitutional basis for the Equal Opportunities and Fairness Doctrines.
If the Equal Opportunities and Fairness Doctrines were repealed, there
would be a substantial issue whether actions of broadcasters favoring
one candidate against opposing candidates and granting access to ex-
press only one side of the public issues violates the first amendment.

The Supreme Court has established that vesting in private parties
action within the scope of governmental power and responsibility does
not deprive such action of the character of governmental action, if
government is involved in it to a significant degree. In Marsh v. Ala-
abama, where a company town had assumed the governmental func-
tions normally exercised by a municipality, management's prevention
of the distribution of religious literature on the business block was
unconstitutional state action. In Terry v. Adams, where the state
permitted a private group to duplicate the state's primary election
process and the regular primary election merely ratified the pre-
primary result, the exclusion of Blacks from the pre-primary process
was state action which violated the fifteenth amendment. And in
Burton v. Wilmington Parking Authority, where the state provided

51. 345 U.S. 461 (1953).
a parking facility and leased space therein to a private party for a
restaurant, refusal of the private party to serve a Black because of
his race was held to be state action violating the fourteenth amend-
ment. Justice Clark, for the Court, wrote:

[I]n its lease with Eagle the Authority could have affirmatively re-
quired Eagle to discharge the responsibilities under the Fourteenth
Amendment imposed upon private enterprise as a consequence of
state participation. But no state may effectively abdicate its respon-
sibilities by either ignoring them or by merely failing to discharge
them whatever the motive may be. . . . By its inaction, the Au-
thority, and through it the State, has not only made itself a party
to the refusal of service, but has elected to place its power, property
and prestige behind the admitted discrimination.\textsuperscript{53}

As shown in section 2 of this article, the broadcasting channels
are a public domain owned by the people; the channels are limited
in number and are licensed for a short term, subject to renewal if the
public interest has been served; the licensees of the channels are
trustees and are under an affirmative duty to make a reasonable effort
to ascertain and to fulfill the program needs of the listeners and
viewers; the FCC has been granted power to regulate the licensees
in the public interest; and the first amendment interest of listeners
and viewers in broadcasting has been declared by the Supreme Court
to be paramount in the accommodation of first amendment interests
in broadcasting. Under the regulatory framework of broadcasting
evolved during the past half century, therefore, the federal govern-
ment is involved to a far greater degree than has been held in other
areas to constitute governmental action.

One of the issues in \textit{Columbia Broadcasting System, Inc. v. Demo-
ocratic National Committee},\textsuperscript{54} was whether a broadcaster's refusal to
sell advertising time to groups wishing to purchase advertising time
for the purpose of broadcasting editorial opinions constituted govern-
mental action. Three members of the Court were of the opinion that
the broadcaster's denial of access was not governmental action.\textsuperscript{55} They
reasoned that the regulatory framework of broadcasting leaves to the
licensees journalistic freedom in a degree rendering the denial private
action.\textsuperscript{56} Two members of the Court were of the contrary view that,
in view of "the public nature of the airwaves, the governmentally

\textsuperscript{53} Id. at 725.
\textsuperscript{54} 412 U.S. 94 (1972).
\textsuperscript{55} Id. at 114-21 (majority opinion by Burger, C. J., joined by Rehnquist, J.).
\textsuperscript{56} Id. at 117.
created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy, the licensee’s refusal to grant access was governmental action. The Supreme Court did not reach a decision on the governmental action issue.

Two recent federal district court cases support the view that actions of licensed broadcasters are, in contexts marinated with strong public interest, governmental action. In *Kuzko v. Western Connecticut Broadcasting Co.*, a broadcaster’s censorship of the political advertisements of two unsuccessful candidates for public office was held to be governmental action, even though the FCC condemned the censorship. In *Writers Guild of America, West, Inc. v. FCC*, it was held that adoption by the networks and National Association of Broadcasters of the “Family Hour” policy violated the first amendment rights of producers, writers and actors who wished to create more mature program fare for network television. The FCC had not participated formally in this decision, but merely suggested that, unless self-regulation by industry should ameliorate the problem of sex and violence in programming during family viewing hours, an administrative policy making proceeding might be initiated. This informal suggestion was held to render the adoption by the industry of the “Family Hour” policy governmental action.

Even should the Equal Opportunities and Fairness Doctrines be repealed, actions by broadcasters granting access to one political candidate while denying access to other political candidates and presenting only the licensees’ point of view on controversial issues of public importance would raise significant constitutional issues if held to constitute governmental action. In *Williams v. Rhodes*, the Supreme Court held that state legislation which gives the two major parties an advantage over minor parties in getting candidates on the ballot violates equal protection of the laws guaranteed by the fourteenth amendment and the right of association under the first amendment. In *Buckley v. Valeo*, the Supreme Court held that The Federal Election Campaign Act, which favors major parties over minor parties and inde-

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57. Id. at 180-81 (dissenting opinion by Brennan, J., with whom Marshall, J., concurs).
61. 393 U.S. 23 (1968).
pendent candidates, is not invidious discrimination which would violate the fifth amendment. However, the Court referred with approval to Congress' recognition that legislation which favored major parties in such degree that it inhibited the opportunity of minor parties naturally to become major parties would be unconstitutional. Similarly, governmental action through licensed broadcasters, which favors major parties over minor parties to a degree preventing the natural development of minor parties by granting access to some candidates while denying access to opposing candidates, would be unconstitutional. As the first amendment interest of listeners and viewers has been declared by the Supreme Court to be paramount to the first amendment interest of broadcasters and networks, governmental action through licensed broadcasters which grants access for expression of one point of view on controversial issues of public importance while denying access to express any other view raises a substantial issue of freedom of speech.

The outcome of constitutional issues under the governmental action approach is not predictable. The Supreme Court as presently constituted might hold that actions of licensed broadcasters in limiting access to favored candidates and viewpoints is not governmental action, but rather an exercise of journalistic discretion. However, the issue is substantial and the outcome is in great doubt.

4. The Differential Equality of Access Solution to the Existing Impracticability of the Equal Opportunities Doctrine

The Equal Opportunities Doctrine, in its present form, is impracticable. Equal opportunities in use of broadcasting facilities for political purposes involves equal time for opposing political candidates without regard to the substantiality of support by the electorate. Candidates of major parties and minor parties, independent candidates, and candidates in name only, are entitled under the Equal Opportu-

64. 424 U.S. at 96-97.
65. See the quotations in the text accompanying notes 20, 25 and 27 supra. In the Red Lion case, the Supreme Court emphasized that the first amendment is intended to "preserve an uninhibited marketplace of ideas" and not to allow "monopolization of that market, whether it be by the Government itself or a private licensee." 395 U.S. at 399 (emphasis added). This view of the first amendment lends support to the governmental action basis for holding licensees' presentation of one side of controversial issues a denial of freedom of speech of listeners and viewers.
nities Doctrine to equal treatment by broadcasters in all respects.18 Also, the FCC has interpreted “use” of broadcasting facilities for political purposes very broadly, the test being whether the candidate is identifiable in the broadcast.19 Even if a candidate appears in a broadcast for a purpose unrelated to the candidacy, opposing candidates are entitled to equal opportunities and may advance their candidacy.20

Prior to 1958, the FCC had held that appearances by political candidates in newscasts did not constitute a “use”.21 Then, in the Lar Daly case,22 the FCC held that an appearance in a newscast of the Mayor of Chicago, Richard Daley, greeting the President of Argentina at a local airport, was a “use” entitling perennial mayoral candidate Lar Daly to equal time. Congress responded to this broad interpretation by amending section 315 of the Communications Act of 1934 to exempt from the Equal Opportunities Doctrine any bona fide newscast, bona fide news interview, bona fide news documentary, or on-the-spot coverage of bona fide news events.23 These exemptions avoided difficulties which broadcasters otherwise would have encountered in applying the Equal Opportunities Doctrine.

In 1962, the FCC decided in two cases, Goodwill Station, Inc.24 and National Broadcasting Co. (Wyckoff),25 that broadcast of debates between the candidates of the two major parties of a state arranged by

68. The FCC’s rulings in applying the Equal Opportunities Doctrine are compiled from time to time in “primers.” Examples are Use of Broadcast Facilities by Candidates for Public Office, 23 Fed. Reg. 7817 (1958); 31 Fed. Reg. 6660 (1966); 24 F.C.C. 2d 832 (1970). Also, the FCC has promulgated regulations relating to the Equal Opportunities Doctrine. 47 C.F.R. § 73.120 (AM), § 73.290 (FM), § 73.590 (Non-commercial Broadcasting), and § 73.657 (Television) (1976). “Legally qualified candidate” includes anyone who qualifies under state law, which includes write-in candidates. “Equal opportunities” includes not only equal time but also any other matters affecting the political efficacy of an appearance. These matters include equal rates and services and a time period in which a comparable audience may be reached. Licensees are required to keep public records of the disposition of requests for access by political candidates. Unless a request for access is made within one week after use by the opposing candidate, the right lapses.

69. Use of Broadcast Facilities by Candidates for Public Office, 31 Fed. Reg. 6660 (1966); KGN, 40 F.C.C. 293 (1958); Pat Paulsen, 23 Radio Reg. 2d 861 (1972). If an employee of a station exposed to public view on the broadcast such as a disc jockey should become a political candidate, opposing candidates would be entitled to equal time.

70. Id.


75. 40 F.C.C. 370 (1962).
non-broadcast organizations and held outside the studio do not come within the "bona fide" news exemptions adopted by the Congress and, hence, opposing candidates were entitled to equal time. The Commission explained: "Where the appearance of a candidate is designed by him to serve his own political advantage . . . , such program cannot be considered to be on-the-spot coverage of a bona fide news event simply because the broadcaster deems that the candidate's appearance (or speech) will be of interest to the general public and therefore newsworthy." In 1964, in Columbia Broadcasting System, Inc., the FCC held that press conferences by candidates for President, regardless of whether the candidate was an incumbent, did not come within the "bona fide" news exemptions enacted by Congress. The Commission explained: "If we were to construe subsection (a)(4) as encompassing all coverage of a candidate deemed newsworthy by the licensee, it would mean that the equal opportunities requirement of Section 315, in effect, had been repealed — that the licensee, in the exercise of his good faith news judgment, could cover the speeches, press conferences, indeed any and all appearances of a candidate, without bringing into play the equal opportunities requirement." 

In a surprising reversal of its interpretations in the foregoing cases, the FCC, in 1975, in the Aspen Institute case, held that broadcasters may carry broadcasts of debates between political candidates, initiated by non-broadcast entities outside of broadcast studios, and press conferences, without incurring an obligation to provide equal opportunities for other candidates for the same office. A divided Court of Appeals affirmed sub nom. Chisholm v. FCC. The litigation in the Aspen Institute case was scheduled to reach decision in advance of the Presidential election of 1976, as the Aspen Institute put it, to "make the Bicentennial a model political broadcast year." The Presidential debates of 1976 soon followed. Broadcast of the Carter-Ford debates enabled the electorate to compare the candidates of the Democratic

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76. Id. at 372.
77. 40 F.C.C. 395 (1964).
78. Id. at 398.
81. See supra note 79.
82. 55 F.C.C. 2d at 697.
and Republican parties, but no opportunity was given the electorate to compare the candidates of the third and fourth parties. The Bicentennial political broadcast model which the Aspen Institute gave us was a giant step toward establishment of the Democratic and Republican Parties in a political system limited to two parties. Our Founding Fathers would have rejected the model.

The legislative history of the "bona fide" news exemptions from the Equal Opportunities Doctrine shows that the purpose of the amendment was to overrule the FCC's *Lar Daly* case and that the exemptions were not to be used to advance the cause of one or more candidates to the disadvantage of other candidates for the same office. During the conference of the two houses on the bill which led to the amendment, Senator Pastore, long-time Chairman of the Senate Subcommittee on Communications stated: "[A]ll of these programs must have bona fide news value, and must not be used to advance the cause of any particular candidate."

Also, the legislative history shows that Congress considered and rejected the inclusion of political debates in the exemptions to Section 315. The Communications Subcommittee of the Senate Commerce Committee considered whether to include debates and panel discussions in the exemptions. It rejected political debates but included panel discussions in the recommended exemptions, panel discussions being deemed a lesser inroad on Section 315. However, after debate in the Senate, even panel discussions were excluded from the exemptions. Similarly, the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce considered whether to include debates and panel discussions in the exemptions from Section 315 and refused to include either of them.

In 1960, Congress suspended Section 315 insofar as it applied to the Presidential election of 1960. This was done to permit broadcasting to carry the Kennedy-Nixon debates without having to give equal time to other Presidential candidates. Congress deemed the suspension

83. See *supra* note 72. For example, Senator Pastore explained, "Generally all we are doing is restoring the situation insofar as news is concerned to that which existed for 32 years before the *Lar Daly* decision." 105 CONG. REC. 14455 (1959).

84. 105 CONG. REC. 17828 (1959) (remarks of Senator Pastore).


86. 105 CONG. REC. 14453 (1959).

necessary because the "bona fide" news exemptions enacted in 1959 did not include political debates.88

The legislative history supports the FCC's original interpretation that the "bona fide" news exemptions in Section 315 do not include political debates and press conferences rather than its reversal of that interpretation in the Aspen Institute case.89 Nevertheless, the reviewing court, on a two to one vote, affirmed sub nom. Chisholm v. FCC.90 The court found the legislative history inconclusive91 and, emphasizing that its scope of judicial review of FCC action implementing Section 315 is narrower than for judicial review of the usual agency actions,92 concluded that it was bound by the FCC's interpretation.93 The dissent, after a thorough analysis of the legislative history of the 1959 amendments, concluded:

Proper deference to the Commission's expertise cannot insulate this exercise in administrative arrogation of power from judicial review. The Commission has not relied on its discretion, nor has it complied with the procedure designed by Congress to assure that discretion is wisely used. Instead the Commission has based its reversal of settled law on a highly selective reading of the legislative history (italics supplied), the same legislative history it used to establish the settled law.94

The result of this adjudicatory tour de force is a de facto amendment of Section 315 to include exemptions which Congress had rejected.

The FCC's exemption of political debates and press conferences from the Equal Opportunities Doctrine applies to all elections for public office—federal, state and local. In Presidential elections, and probably in elections for other political offices, the impact of these

89. See supra note 79.
90. Id.
91. 36 Radio Reg. 2d 1437 at 1447, 1456-57, 1460.
92. Id. at 1448.
93. Id. at 1448, 1457, 1460.
94. Id. at 1505. The statement in the quotation that the FCC did not comply with the procedure designed by Congress to assure that agency discretion is wisely used refers to the fact that the FCC reversed its interpretation of twelve years' standing, that political debates were not included in the "bona fide" news exemptions to Section 315, in an adjudication rather than in a rule making proceeding. An adjudication does not provide the opportunity for all interested parties to be heard; a rule making proceeding does. Using the adjudicatory proceeding in such an important matter deprived minor parties and the electorate of an adequate opportunity to be heard. The procedure smacks of a strategy to avoid letting the public know that their fair political process was at stake in a friendly adjudication.
exemptions may be great enough to establish permanently the Demo-
cratic and Republican Parties in a two-party political system and to
prevent the natural development of any competing third party.

The influence of network television in Presidential elections is
great. The outcome of primaries and general elections for President
is determined largely by network television coverage. Presidential de-
bates between candidates for the Democratic and Republican Parties
are readily carried by television networks. The familiar examples are
the Kennedy-Nixon and Carter-Ford debates. A Presidential debate
between candidates of the Democratic and Republican Parties attracts
a large audience, the prime requisite for network television. Debates
between candidates of minor parties do not attract a large audience.
While a debate between Presidential candidates of the first through
fourth parties in voter support would attract a substantial audience,
candidates of the Democratic and Republican Parties have nothing
to gain through such a debate and probably would not participate.
Also, the television networks prefer a debate between two candidates
because this form of combat between two knights is better entertain-
ment and captures the popular interest. Hence, the effect on the
Presidential election of the FCC's exemption of political debates is
that the Presidential candidates of the Democratic and Republican
Parties will have access to the electorate in free prime time via nation-
wide network television, and the candidates of lesser parties will not.

The FCC's exemption of press conferences from the Equal Oppor-
tunities Doctrine also will favor the Presidential candidates of the
Democratic and Republican Parties over candidates of lesser parties.
Indeed, broadcasters and networks would be able to favor the candi-
date of one of the two great parties without covering the press con-
fferences of the opposing great party's nominee. However, fear of
legislative restoration of press conferences to the coverage of the Equal
Opportunities Doctrine by the victorious party whose candidate was
disfavored probably will prompt evenhanded treatment of the Demo-
cratic and Republican Parties in the matter of coverage of press con-
fferences. But it is unlikely that nationwide networks will cover the
press conferences of Presidential candidates of other parties.

95. Hearings before the Special Subcomm. on Investigations, House Comm. on In-
terstate and Foreign Commerce, 90th Cong., 2d Sess. 21-27 (1968) (statement of Dr.
Frank Stanton, CBS).

96. Id. at 23.

97. For a more complete analysis of the impact on political elections of the FCC's
exemption of political debates and of press conferences from the Equal Opportunities
Doctrine, see supra note 80 at 132-38.
The advantage in Presidential elections given the Democratic and Republican Parties by the FCC's exemption of political debates and press conferences from the Equal Opportunities Doctrine is aggravated by the law relating to public financing of Presidential elections.\textsuperscript{98} Broadcasters, through coverage of political debates and press conferences, will be able to aid favored candidates to meet the threshold for matching payments and to increase the size of payments. Parties electing to accept public funding must observe statutory limitations on the amount which may be spent in the Presidential election. The FCC's exemption of political debates and press conferences from the Equal Opportunities Doctrine enables broadcasters to contribute valuable free coverage of debates and press conferences in excess of the statutory limitation on expenditures.

The FCC's exemption of political debates and press conferences from the Equal Opportunities Doctrine may give the Democratic and Republican Parties such a great advantage over other parties that the natural development of any competing third party is prevented. If so, applying the governmental action concept described in section 3 of this article, a substantial constitutional issue will arise when broadcasters favor candidates of the Democratic and Republican Parties over candidates of lesser parties through coverage of selected political debates and press conferences.

Congress should restore Section 315 to the coverage intended by the Congress when it enacted the "bona fide" news exemptions in 1959. This should be done by amending Section 315 expressly to provide that political debates and press conferences are within the coverage of the Equal Opportunities Doctrine.\textsuperscript{99}

In the current hearings on revision of the Communications Act of 1934, consideration is being given to repealing the Equal Opportunities Doctrine entirely.\textsuperscript{100} This is, in part, a reaction to actions during the Nixon Administration repressive of the media.\textsuperscript{101} The specter of thought

\textsuperscript{99} It is appropriate to except from the Equal Opportunities Doctrine, as the FCC has long held, press conferences called by a President who is a candidate for reelection for the purpose of reporting to the people on important matters within the President's official duties rather than to advance the President's candidacy. Columbia Broadcasting Sys., Inc., 40 F.C.C. 395 (1964); Republican Nat'l Comm., 40 F.C.C. 408 (1964), aff'd by an equally divided court sub nom. Goldwater v. FCC, No. 18,963 (D.C. Cir.), cert. denied, 379 U.S. 893 (1964).
\textsuperscript{100} See supra note 2.
\textsuperscript{101} Hearings on Overview of the Office of Telecommunications Policy, Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess., ser. 93-2, passim (1973).
control by government instills fear of King John and induces trust in the media barons. But President Nixon was forced to resign, President Ford did not engage in such actions, and there is no indication that President Carter will do so. Nevertheless, we may be on the verge of substituting unfettered private censorship for reasonable regulation of broadcasting to fulfill the need of the people to see and hear all significant political candidates.

Chief Justice Hughes emphasized the importance of maintaining "the opportunity for free political discussion, to the end that . . . changes, if desired, may be obtained by peaceful means." The long range view of our representative democracy must take into account that a Presidential election process which gives such great advantage to two established parties that there is no natural opportunity for any other party to compete will cause citizens who do not belong to either of the two established parties to seek change outside the normal political process. It should be noted that only about half of the eligible voters participate in national elections. In the 1976 Presidential election, favored by perfect weather, only fifty-three percent of the electorate voted. The percentage of the electorate which participates has been declining for years. This is a dangerous political condition. Our political process should encourage responsible participation by the electorate lest some popular demagogue attract the half of the electorate which usually does not vote. Such encouragement can only occur under a system which permits new parties to develop and to compete for major status. Television is the political forum today. Unless the Equal Opportunities Doctrine in broadcasting is retained in a viable form, the Democratic and Republican Parties will be established in a political system limited to two parties. The substantial group of Americans who under a fair political process would express their views through political parties would then be left no choice except to express their political ideas outside the political process.

As shown at the beginning of section 4 of this article, the Equal Opportunities Doctrine is impracticable because the number of candidates for some public offices, including the Presidency, is too great for


103. Justice White, in Red Lion Broadcasting Co. v. FCC 395 U.S. 367 (1969), emphasized that without the Equal Opportunities and Fairness Doctrines, broadcasters could exercise "unlimited private censorship" and "unfettered power . . . to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed." Id. at 392.

broadcasters to give or to sell equal time to all. Public broadcasting has even greater difficulty than commercial broadcasting in complying with the Equal Opportunities Doctrine because public broadcasting cannot sell time to political candidates, and granting free time to one candidate usually is followed by requests of all opposing candidates for free equal time. Commercial broadcasters may sell broadcast time to significant candidates without opposing splinter candidates being able to buy time. In political campaigns for offices for which numerous candidates are running, broadcasters and (in the case of the Presidential campaign) networks are reluctant to grant time on either a commercial or sustaining basis.

A fair solution to the impracticability of the Equal Opportunities Doctrine is for Congress to enact a principle of differential equality of access based upon the amount of voter support for the candidate. Candidates would be classified "major", "minor", and "new". The amount of voter support necessary to qualify as a "major" or "minor" party candidate should take into account the history of major and minor parties in the United States. In this century, only six third-party candidates have received three or more percent of the popular vote. Also, in this century, only twelve third-party candidates for President have received more than one percent and less than three percent of the popular vote.

The differential equality of access concept has been enacted by Congress for application to federal funding of Presidential elections. Under the Federal Election Campaign Act, for purposes of participating in the Presidential Election Campaign Fund, "major party" is defined as one whose candidate for President received twenty-five percent or more of the popular vote in the preceding election, "minor party" as five percent or more but less than twenty-five percent, and "new party" as one which does not qualify as a major or minor party.

105. The author of this article proposed such a plan in 1968. For a more comprehensive discussion of the plan and a proposed statute, see supra note 66 at 532-42.

106. Congressional Quarterly, Presidential Elections 81-99 (1975); Hearings on S. 3171, Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 15 (1960); R. Scammon, America at the Polls 22, 24 (1965). The six third party candidates receiving three or more percent of the popular vote in this century are: Theodore Roosevelt in 1912; Eugene Debs in 1912; Allen Benson in 1916; Eugene Debs in 1920; Robert LaFollette in 1924; and George Wallace in 1968.

107. Id. For the 1976 election data, in which Eugene McCarthy is shown to have received about one percent, see Newsweek, Nov. 15, 1976, at 29.


110. Id. at § 9002.
The financial support for candidates of such parties varies with the indicated voter support. Candidates for major parties receive equal financial contributions; candidates for minor parties receive contributions based on a ratio of the vote received by the minor party's candidate in the preceding election to the average of the votes received by major party candidates; and, if in the present election, a new candidate receives five percent or more of the popular vote, a post-election contribution is made on the formula applicable to minor party candidates.111 This system applied to the Presidential election of 1976. The system was held constitutional in Buckley v. Valeo.112

The percentiles for qualification as “major”, “minor” or “new” party under the legislation for public funding of Presidential elections, discussed in the preceding paragraph, are higher than should be applied to the Equal Opportunities Doctrine. Access to broadcasting for political purposes should be provided to the extent practicable. Artificial inducements to the formation of splinter parties may impair the efficacy of the political process. Substantial impediments to the development of new parties is certain to impair the viability of the political process. Indeed, such impediments would be unconstitutional.113 If a standard of five percent for “major” parties and three percent for “minor” parties should be adopted, in this century there would have been, exclusive of the Democratic and Republican Parties, only four major third-party candidates and only two minor third-party candidates. In view of this history, it would seem that, at most, the definition of “major” party should be ten percent and “minor” party five percent of the popular vote in the preceding election.

A practicable allocation of broadcast time between “major”, “minor” and “new” parties would be as follows:114 Upon grant of broadcast time to a major candidate, opposing major candidates would be entitled to equal time and opposing minor candidates to half time. Upon grant of broadcast time to a minor candidate, opposing minor candidates would be entitled to equal time and opposing major candidates to half time. The broadcaster could grant time to a new candidate without being required to grant time to any opposing candidates.

The differential equality of access plan accommodates the various

111. Id. at § 9004.
113. Id. at 96-97.
114. For suggested statutory language for such a differential equality of access allocation of broadcast time, see Barrow, supra note 66, at 535-41.
interests involved in a manner rendering the Equal Opportunities Doctrine practicable. The electorate needs to see and hear candidates of major parties for a longer time than other candidates because, barring a rare political atmosphere, the elected official will come from one of the major parties. Granting opposing candidates of major parties equal time satisfies this need. Also, the electorate needs some contact with candidates of minor parties in order to have an adequate basis to compare leaderships and platforms. This is particularly important as to segments of the electorate which deem the major parties too similar and which feel the need for a new party. Granting candidates of minor parties half the time which broadcasters grant to candidates of major parties satisfies this need. Under such a plan, typically broadcasters would grant time to candidates for major parties, giving minor candidates a right to half as much time. However, a popular minor party candidate might well be favored by a number of broadcasters over either major candidate. Hence, it appears sound to require broadcasters who grant time to candidates of minor parties to grant half as much time to candidates of major parties. Again, this fulfills the need of the electorate for in-depth contact with the major candidates as one of them probably will be elected. As matters stand, minor parties rarely have broadcast time. The half time assured minor candidates would give them an opportunity to develop into major parties, at which point they would be entitled to equal time. While broadcasters would not be required to grant time to candidates who do not qualify as major or minor, broadcasters could grant access to such new candidates without incurring any obligation to grant time to other candidates. Thus, such new candidates might be aided in achieving minor party status. Another balancing procedure in the case of candidates of new parties might well be access through panel appearances or spot announcements.

There is no danger that the proposed differential equality of access solution would create a multiplicity of parties. Our political system would continue to be essentially a two-party system with a necessary safety valve.

The differential equality of access solution, if based on reasonable percentiles of voter support in defining “major”, “minor” and “new”, would be constitutional. This is indicated by Buckley v. Valeo\textsuperscript{[1]} in which the concept was held constitutional applied to the public finan-

\textsuperscript{115.} See text accompanying notes 108-12 supra.
cing of Presidential campaigns. The solution is also supported by notable authorities.110

If the Equal Opportunities Doctrine were repealed, the Democratic and Republican Parties would be permanently established in a political system limited to only two competitive parties. Moreover, the three nationwide commercial networks would have the power to determine which candidate for the nomination of each party would be nominated and which of the two nominees would be elected President of the United States. Such concentration of control of the political process can be prevented by retaining the Equal Opportunities Doctrine and rendering the Doctrine practicable by enacting the differential equality of access principle.

5. Does the Fairness Doctrine Inhibit Broadcast Journalism?

The policy basis for the Fairness Doctrine was discussed in section 1 and the constitutionality of the Doctrine in section 2 of this article. In this section, the complaint by some broadcasting officials that the Fairness Doctrine inhibits broadcast journalism is analyzed.

The basic distinction between representative democracy and authoritarian government is that in a democracy the electorate participates in political and social decision making. Jefferson believed that the people, if informed, would make sound decisions.117 H. G. Wells observed that "[h]uman history becomes more and more a race between education and catastrophe."118 Since 1920, when Wells wrote, the race has been accelerated greatly by the nuclear age, space exploration, the population explosion, the energy crisis, and the fouling of the environment. Our problems grow more complex and time for decision diminishes. Many question the capacity of the people to contribute to decision making. But, if the people do not participate responsibly in decision making, representative democracy becomes authoritarian. Moreover, consensus is necessary to support decisions, and it is difficult to achieve consensus on decisions reached by elites.

Centralization of communications and denial of access to the media isolate the individual and discourage responsible participation in public affairs. The ordinary citizen's failure to participate in decision making

results substantially from lack of information on the issues. Broadcasting has great power to inform. Polls show that people rely primarily upon television for news and public affairs information. The acceleration of the race between education and catastrophe requires an acceleration in the flow of information to the people.

Judge Learned Hand observed that “right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritarian selection. To many this is, and always will be, folly; but we have staked upon it our all.”110 Justice Holmes wrote that “the ultimate good desired is better reached by free trade in ideas. . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .”120 But Justice Holmes’s concept of free trade in ideas presupposes a market to which ideas have access. Just as the builder of a better mousetrap cannot effectively cry his wares in the modern industrial market without advertising in the mass media, the individual with a new idea cannot provide it an opportunity to compete for acceptance unless it is aired in the mass media. The Supreme Court has stated that the purpose of freedom of speech and press is to assure “the widest possible dissemination of information from diverse and antagonistic sources.”121

Our representative democracy depends upon a multitude of tongues in the market of ideas to reach sound decisions on crucial issues. The need of the people to know must be fulfilled by the mass media if the public is to participate responsibly in decision making and our representative democracy is to retain its vitality as a free society.

The Fairness Doctrine has converted the people’s need to know into a right to know. In its 1949 Report on Editorializing by Broadcast Licensees, the FCC stated that licensees, under the Fairness Doctrine, have an affirmative obligation to devote a reasonable portion of broadcast time to the discussion of controversial issues of public importance and, in the presentation of such issues, must make the broadcasting facilities available for the expression of contrasting viewpoints.122 The report emphasized that “[i]t is the right of the public to be informed, rather than any right on the part of Government, any broadcast licensee or any individual member of the public to broadcast his own

120. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).
122. See supra note 11 and related quotation in the text.
particular views on any matter, which is the foundation stone of the American system of broadcasting."123

Officials of the broadcasting industry have long opposed the Fairness Doctrine on the ground that requiring broadcasters to present contrasting viewpoints inhibits broadcast journalism.124 However, a survey of broadcasters conducted by the Senate Subcommittee on Communications in 1968 does not support this contention. Of 5,245 broadcasters answering the questionnaire, 2,768 (53 percent) responded that the Fairness Doctrine is satisfactory in its present form; 1,183 (22.5 percent) thought the Doctrine would be more satisfactory if modified or clarified; and only 1,160 (22.3 percent) favored abandonment of the Doctrine.125 Only 488 (9 percent) of the 5,247 broadcasters answering the questionnaire stated that the Fairness Doctrine discourages broadcast of programs on controversial issues.126 In the survey, only 4.3 percent of noncommercial educational licensees wanted the Fairness Doctrine discarded.127 Also, at the 1968 hearings on the Fairness Doctrine, witnesses for noncommercial educational broadcasting testified that the Fairness Doctrine does not inhibit broadcast journalism.128

The contrast between the attitude of some commercial broadcasters and far fewer noncommercial educational broadcasters suggests that it is the advertising function of broadcasting, rather than the Fairness Doctrine, which puts "bleeps in the bellows"129 of the broadcasting lions. Network managers, on behalf of mass-circulation advertisers and advertising agencies, provide programming which fulfills the advertis-

123. Id.
124. Hearings on the Fairness Doctrine Before the Special Comm. on Investigations of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess., ser. 90-33, at 22-27 (Frank Stanton, CBS); at 39 (Elmer Lower, ABC); at 47-48 (Vincent T. Wasilewski, NAB); at 77-83 (Reuben Frank, NBC); at 110-15 (Wasilewski, NAB); at 145-51 (Jay Crouse, RTNDA) (1968). The objections to the Fairness Doctrine were renewed in the FCC's 1974 hearing on the Fairness Doctrine, FCC Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26,372, 26,374 (1974).
126. Id. at 82.
127. Id. at 83.
128. See supra note 124 at 102-03 (William G. Harley, NAEB), and at 107 (Lincoln M. Furber).
129. The colorful phrase was articulated by former Chief Justice of the California Supreme Court Roger J. Traynor, who favors the approach of an informal committee to investigate complaints against the media. Traynor, Speech Impediments and Hurricane Flo: The Implications of a Right-of-Reply to Newspapers, 43 U. Cin. L. Rev. 247, 263 (1974).
ing needs of mass consumer goods. Entertainment programs are the successful vehicles for attracting large audiences to see and hear the advertisements. Programs involving controversial issues do not create an atmosphere conducive to strong sales impact. Gresham's Law operates in broadcasting to drive out public affairs programming and to bring in entertainment programming.

In its 1974 report on the Fairness Doctrine, the FCC wrote relative to the alleged inhibition of broadcast journalism by the Fairness Doctrine:

A number of commentators have argued that, in spite of its worthy purposes, the actual effect of the fairness doctrine can only be to restrict and inhibit broadcast journalism. Far from inhibiting debate, however, we believe that the doctrine has done much to expand and enrich it.

There seems little question that, if the Fairness Doctrine were repealed, the advertising function of broadcasting would prompt broadcasters to carry fewer programs on controversial public issues.

The policy and procedure of the FCC in administering the Fairness Doctrine are well calculated to avoid inhibition of broadcast journalism. Broadcasters are not required to present more than one side of a public issue in the same broadcast. Other points of view may be presented in the broadcaster's overall program service. Although some controversial issues have more than two sides or shades of opinion, the FCC does not require broadcasters to present more than two contrasting viewpoints. Unlike the Equal Opportunities in political broadcasting Doctrine, the Fairness Doctrine does not require that equal time be given to contrasting viewpoints — only that reasonable time be given. Decisions as to the controversial issues to be presented, decisions as to the appropriate spokesmen for such viewpoints, and the format of the program are "left to the licensee's discretion subject only to a standard of reasonableness and good faith." The FCC does not

130. For the influence of the advertising function of broadcasting on programming, see Barrow, The Attainment of Balanced Program Service in Television, 52 Va. L. Rev. 633, 634-44 (1966).


132. The FCC's policies, procedures and adjudications have been fully described elsewhere and a detailed description is not repeated in this article. See H. GELLER, THE FAIRNESS DOCTRINE IN BROADCASTING (1973); Simmons, The "Unfairness Doctrine" — Balance and Response Over the Airwaves," 1 COMM/ENT 1 (1977); Barrow supra note 58, and The Fairness Doctrine: A Double Standard for Electronic and Print Media, 26 Hastings L.J. 659 (1975).

133. See supra note 131 at 26,374.
monitor broadcasts for possible violations. Only if a complaint is made and the complaining party makes a prima facie case does the FCC forward the complaint to the broadcaster for comment.\(^{134}\) In fiscal year 1973, the FCC received about 2,400 complaints of violations of the Fairness Doctrine, but it forwarded only 94 of these complaints to the broadcasters for comment.\(^{135}\) There are over 8,000 broadcasters and in the course of a year each of them makes many judgments under the Fairness Doctrine. Forwarding only 94 complaints may indicate weak enforcement of the Fairness Doctrine but this certainly could not have a chilling effect on broadcast journalism.\(^{136}\) In the rare case in which the FCC finds a violation of the Fairness Doctrine, the licensee need only provide reasonable time for the opposing point of view in order to be in compliance.\(^{137}\) The only context in which a broadcaster is involved in a formal hearing before the FCC on a Fairness Doctrine matter is where a complaining party has made a prima facie case that the Doctrine has been violated; the FCC, after giving the broadcaster an opportunity to comment, is convinced that a violation has occurred and has requested the broadcaster to broadcast a contrasting viewpoint; and the broadcaster has refused to air an opposing viewpoint.

In administering the Fairness Doctrine, the FCC has established guidelines, promulgated rules to a limited extent, but relied largely upon case-by-case adjudication.\(^{138}\) Among the judgments which broadcasters must make in complying with the Fairness Doctrine are (a) what specific issue has been raised; (b) whether such issue is a controversial issue of public importance; (c) whether in its overall programming the broadcaster has adequately presented this issue; and (d) whether the broadcaster has afforded a reasonable opportunity

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135. See supra note 131 at 26,375.
136. Professor Simmons has compiled statistics on Fairness Doctrine complaints for the years 1973 through 1976 as follows: "If the fiscal years 1973 through 1976 are combined, a total of 49,801 fairness complaints received by the Commission, resulted in 244 station inquiries (.406% of complaints), 54 adverse rulings (.108% of complaints), and 16 general fairness doctrine rulings (.0321% of complaints). In other terms, out of every 1,000 complaints received between FY's 1973 and 1976, approximately four resulted in station inquiries, one in adverse rulings, and '1/3 of 1' in a general fairness adverse ruling. The average complainant truly had only a 1 in a 1,000 chance." Simmons, supra note 132 at 41.
137. See supra note 131 at 26,378.
in its overall programming for contrasting viewpoints on such issue.\textsuperscript{139} The FCC has not developed criteria governing these determinations, preferring to leave such determinations to the journalistic discretion of the broadcaster, subject to administrative review upon complaint. Broadcasters serving large communities and having expert management have little difficulty applying the Fairness Doctrine. However, broadcasters in small communities and lacking substantial managerial staffs might well be aided in complying with the Fairness Doctrine by the FCC's establishing criteria for determinations under the Fairness Doctrine.\textsuperscript{140}

Professor Simmons in a substantial article in this first issue of COMM/ENT has described the judgments of broadcasters under the Fairness Doctrine as very complex and the enforcement of the Fairness Doctrine by the FCC weak. He has recommended that, in lieu of the Fairness Doctrine, the FCC adopt a quantitative standard for broadcasts of news and public affairs programs.\textsuperscript{141} The Simmons proposal has the virtue of simplicity. But a quantitative requirement alone may not achieve the purpose of the Fairness Doctrine, which is to inform the public regarding controversial issues of public importance.

Entrepreneurs engage in mass media enterprises not only to make money but also to shape public opinion and influence political elections. If broadcasters are subject only to a quantitative requirement, they may air those issues on which they desire a solution while repressing issues which are more crucial. In the \textit{Patsy Mink} case,\textsuperscript{142} a broadcaster did not carry any broadcasts relating to strip mining although the community served by the station was destined to be destroyed by the strip mining of the site on which the community was built. Ordering the station to comply with the Fairness Doctrine, the FCC wrote, "a total failure to cover an issue of such extreme importance to the particular community would raise serious questions concerning whether the licensee has acted reasonably in fulfilling its obligations under the fairness doctrine."\textsuperscript{143} Under a quantitative requirement, the broadcaster would have not been under a duty to carry the controversial issue.

\textsuperscript{139} See \textit{supra} note 131 at 26,376-78.
\textsuperscript{141} Simmons, \textit{supra} note 132.
\textsuperscript{142} Patsy Mink and O. D. Hagedorn v. Station WHAR, 59 F.C.C. 2d 987 (1976).
\textsuperscript{143} \textit{Id.} at 995.
Moreover, under a quantitative requirement the broadcaster would be permitted to limit broadcasts on controversial issues to the viewpoint of the owner of the station. Justice White, in the *Red Lion* case, warned that without the Fairness Doctrine broadcasters could exercise "unlimited private censorship", would have "unfettered power . . . to communicate their own views on public issues", and could exclude from the airwaves all except "those with whom they agreed."144 It is difficult for one having such great power to resist using it. Owners and managers of networks and broadcasting stations, like the publishers of print media, occupy the wealthy end of the economic spectrum. If the Fairness Doctrine were repealed, it is likely that the issues ventilated and points of view aired would represent the private interest of the broadcasters rather than the public interest. The development of nationwide networks, with private concentration of control of program content, which motivated Congress to regulate broadcasting, poses a strong threat of the control of public opinion unless the Fairness Doctrine is retained.

Broadcasting's capacity to keep a watchful eye on government is not diminished by requiring broadcasters to observe the Fairness Doctrine. The actions during the Nixon Administration deemed repressive of the media,145 which prompted some citizens to urge deregulation of broadcasting, were exposed by broadcasting as well as by the print media.

In our representative democracy, the need of the people to know should continue to be a right to know. Congress should retain the Fairness Doctrine.

6. Conclusion

In the current hearings on the Communications Act of 1934, consideration is being given to repeal of the Equal Opportunities and Fairness Doctrines in broadcasting. The Doctrines were adopted because of concern that nationwide networks of broadcasting stations would control public opinion and political elections and because it is essential to representative democracy that the public be informed concerning vital issues. The Doctrines encourage the public to participate responsibly in political elections and in decision making.

The Supreme Court has firmly established the constitutionality of the Doctrines. However, contrary to popular belief, constitutionality

144. 395 U.S. at 393.
145. See *supra* notes 101-02.
is not based on scarcity of broadcasting channels alone. An equally strong basis is that freedom of speech and press in broadcasting requires an accommodation of the first amendment interests of listeners and viewers, broadcasters, networks, and those desiring access to express views, and in this balancing of first amendment interests the interest of the listeners and viewers is paramount. Another important element in the constitutionality of the regulation of broadcasting service in the public interest is that the broadcasting channels are a public domain, the licensee of the publicly owned channels is granted a monopoly use of the channel for a limited term, and in exchange for the valuable free use of the channel the licensee assumes the role of a trustee of the channel to serve the public interest. A further factor is that the Equal Opportunities and Fairness Doctrines enhance speech in the most important area of the public interest. Broadcasting is uniquely concentrated through three nationwide television networks, ABC, CBS, and NBC, which provide most of the national and international news and public affairs programming to the nation. These three networks, absent the Equal Opportunities and Fairness Doctrines, could control public opinion on vital issues and determine the election of the President and other important officials. These several factors combined account for the constitutionality of the Equal Opportunities and Fairness Doctrines.

The Supreme Court has established that, if government is involved in an action to a significant degree, a choice by government officials to vest in private parties action within the scope of governmental power and responsibility does not deprive such action of the character of governmental action. Through the licensing and regulation of broadcasters in the public interest, the United States is heavily involved in the actions of broadcasters. This raises a substantial question whether — if the Equal Opportunities and Fairness Doctrines were repealed and broadcasters then granted access to favored political candidates while denying access to opposing candidates and broadcast only one point of view on crucial issues — this would constitute governmental action violating the first amendment. The decision on the issue is not predictable, but would be very significant.

The Equal Opportunities Doctrine as presently applied is impracticable. This is because all candidates for political office, regardless of the substantiality of voter support, are entitled to equal time. There is not enough broadcast time to grant significant equal time to all candidates. The Equal Opportunities Doctrine can be rendered practicable by enacting a principle of differential equality of access to broadcasting
based upon the amount of voter support in the past election or, in the case of new parties, voter support evidenced by petitions. Parties would be classified "major", "minor" and "new", as in the case of the public funding of campaigns by candidates for President. "Major" candidates would be entitled to equal time, "minor" candidates to half time, and "new" candidates would not be entitled to time but could be granted time without incurring any obligation to provide time to other candidates. The differential equality of access plan accommodates the need of the electorate for in-depth contact with candidates of "major" parties, from which the elected official probably will be chosen, the need of the electorate to be able to compare the leadership and platform of significant "minor" parties with those of the "major" parties, and the need for a forum within the political system for segments of the electorate which do not identify with the "major" parties. If the Equal Opportunities Doctrine were repealed and networks and broadcasters should grant access only to candidates of "major" parties, as would be likely, substantial segments of our people would seek change outside the traditional political system. If the definitions of "major", "minor" and "new" parties should be based on percentiles of voter support which so favor the Democratic and Republican Parties that there would be no opportunity for a third party to evolve naturally and compete for leadership of the country, the legislation would be unconstitutional. It is important that all political groups be encouraged to compete for leadership within the traditional political system. The differential equality of access modification to the Equal Opportunities Doctrine would encourage participation by all significant political groups.

In 1975, the FCC, reversing rulings of twelve years standing, held that the Equal Opportunities Doctrine does not apply to political debates initiated by non-broadcast organizations outside of broadcast studios or to press conferences. This reinterpretation is contrary to the intention of the Congress as evidenced by the legislative history of "bona fide" news exemptions to the Equal Opportunities Doctrine enacted by Congress in 1959. Particularly in Presidential elections, the reinterpretation gives the Democratic and Republican Parties a great advantage over opposing candidates because the national television networks desire to carry debates between the Democratic and Republican Presidential candidates but do not provide similar opportunities to Presidential candidates of the third and fourth parties. The advantage so accruing to the Democratic and Republican Parties is so great that the natural development of any competing third party may be prevented. Congress should amend Section 315 to provide that
political debates and press conferences are within the coverage of the Equal Opportunities Doctrine.

Spokesmen for organizations within the broadcasting industry continue to urge that the Fairness Doctrine be repealed on the ground that it inhibits broadcast journalism. In a poll of all of broadcasting conducted in 1968 by the Senate Subcommittee on Communications, however, only nine percent of broadcasters (488 out of 5,247 responding) stated that the Fairness Doctrine discourages broadcast of programs on controversial issues. Also, in the FCC’s 1974 report on the Fairness Doctrine, it was concluded that the Doctrine has expanded and enriched broadcast journalism. In fiscal year 1973, while the FCC received about 2,400 complaints of violation of the Fairness Doctrine, only 94 of these complaints were forwarded to broadcasters for comment. In order for a broadcaster to become involved in a formal hearing on a complaint of violation of the Fairness Doctrine, a complaining party must make a prima facie case that a violation has occurred, after receiving comments from the broadcaster the FCC must be convinced that a violation has occurred, and the broadcaster after request by the FCC to comply by broadcasting a contrasting viewpoint must have refused to do so. While enforcement of the Fairness Doctrine may be weak, the FCC’s procedure does not have any chilling effect on broadcast journalism.

Entrepreneurs engage in broadcasting not only to make money but also to shape public opinion and influence political elections. If the Fairness Doctrine were repealed, broadcasters could give undue attention to some issues while neglecting others. As to any issue broadcast, the broadcaster could limit the viewpoint to that of the broadcaster. Broadcasting could become a medium of unfettered private censorship. It is likely that the issues ventilated and viewpoints expressed would fulfill the private interest of broadcasters rather than the public interest.

The purpose of the Fairness Doctrine is to inform the people on vital issues so that they may participate responsibly in representative democracy. The need of the people to know should continue to be a right to know through the Fairness Doctrine.

Since the depression of the 1930’s, one of the two great political parties has been deemed more conservative and the other more liberal. In this century, the daily newspapers, in the great majority, have supported candidates of the more conservative party. The owners and managers of newspapers, broadcasting stations and networks share similar economic, political and social interests. If the Equal Opportunities and Fairness Doctrines should be repealed, so that licensed
broadcasters would have the power of unfettered private censorship enjoyed by newspapers, it may be anticipated that broadcasters and networks, in the great majority, also would support candidates of the more conservative party, and that a conservative point of view would be presented on public issues. Such a concentration of electronic and print media power could mold the political character of our country in the conservative form and shift the center of political power. This may be looked on as a favorable development by conservatives but may be viewed with alarm by liberals. It would be contrary to the American tradition which is to hear both sides of public issues and all significant candidates and then exercise freedom of choice.