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COMMENTARIES

FAIRNESS—THE BROADCASTER'S HIPPOCRATIC OATH

*Charles D. Ferris**
*and James A. Kirkland***

Sixteen years ago, the Supreme Court unanimously upheld the Fairness Doctrine¹ in *Red Lion Broadcasting Co. v. FCC*.² Over forty years ago, the Court held that public interest regulation of broadcasters is fully consistent with the first amendment.³ Both of these venerable holdings, though consistently reaffirmed by the Court,⁴ are now under concerted attack by broadcasters and those who have taken up their cause.⁵ The volume and vigor of these attacks, however, exceed their merit. The case for the Fairness Doctrine and the similar provisions affecting political broadcasting⁶ is stronger now than it was when the Supreme Court decided *Red Lion*.

The power of television broadcasters in providing the public with information on political, social, and cultural issues and current events is indisputa-

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1. For an explanation of the "Fairness Doctrine," see *infra* notes 8-19 and accompanying text.

2. 395 U.S. 367 (1969).

3. *NBC v. United States*, 319 U.S. 190, 226-27 (1943).

4. See *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3116 n.11, 3117 n.12 (1984); *CBS v. FCC*, 453 U.S. 367 (1981); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-03 (1973).

5. These include members of Congress, see, e.g., 131 CONG. REC. S108 (daily ed. Jan. 3, 1985) (introduction of S. 22, "First Amendment Clarification Act of 1985" by Senator Proxmire); *Hearings on Freedom of Expression Act of 1983, Senate Comm. on Commerce, Science and Transportation*, 98th Cong., 2d Sess. (1984), as well as the FCC itself, see *General Fairness Doctrine Obligations of Broadcasters*, Notice of Inquiry, 49 Fed. Reg. 20,317 (1984).

6. The Commission has also adopted rules that guarantee fairness in coverage of political campaigns. The most important rules require that broadcasters afford equal opportunities to political candidates, and that they provide reasonable access to candidates for federal office.

ble.⁷ Broadcasting now outdistances other media of communication by a wide margin. This growth in power parallels the recent growth of independent political groups, known as political action committees (PACs). PACs are presently willing and able to devote their immense resources to media campaigns to advocate their limited political agendas. As a result, the risk that broadcasters and wealthy interests could monopolize our national dialogue, recognized in *Red Lion*, looms larger than ever before.

Critics of the fairness rules often overlook the fact that broadcasters possess this power not by their own efforts, but because the government has granted them the privilege of using a portion of the spectrum as trustees for the public. Without government allocation of the spectrum, no one could broadcast effectively, as the chaotic experience in the infancy of radio demonstrated. Requiring broadcasters to air diverse views on important issues, and provide access opportunities for political candidates, is the quid pro quo our society expects for the broadcaster's use of the public airways. These requirements, however, are no greater than the requirements imposed by the canons of journalistic ethics. The fairness rules are thus, quite simply, the Hippocratic Oath of broadcasters. Just as doctors are expected responsibly to exercise their power over life and death, so too are broadcasters expected responsibly to exercise their power in our national dialogue. This article will defend the Fairness Doctrine as a sensible accommodation of the first amendment rights of broadcasters, and the right of the public both to present its various viewpoints and to receive an evenhanded presentation of important issues.

I. THE FAIRNESS DOCTRINE AND THE POLITICAL BROADCASTING RULES

A. *The Fairness Doctrine*

The Fairness Doctrine imposes two obligations upon broadcast licensees. First, a broadcaster must devote a "reasonable percentage" of his broadcast time to controversial issues of public importance.⁸ This obligation is rarely a

7. For example, one recent study showed that 65% of the population relies primarily upon television for news, up from 51% in 1959. ROPER ORGANIZATION, TRENDS IN ATTITUDES TOWARDS TELEVISION AND OTHER MEDIA: A TWENTY-FOUR YEAR REVIEW 10-11 (1984) [hereinafter cited as ROPER STUDY]. See *infra* discussion accompanying notes 38-49.

8. *In re The Handling of Public Issues Under the Fairness Doctrine and Public Interest Standards of the Communications Act*, Fairness Report, 48 F.C.C.2d 1 (1974) [hereinafter cited as *Fairness Report*]. This obligation has venerable roots. See *Great Lakes Broadcasting Co.*, 3 F.R.C. ANN. REP. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930); *Metropolitan Broadcasting Corp.*, 8 F.C.C. 557 (1941).

source of controversy⁹ and the Commission has largely deferred to the "reasonable good faith judgment" of licensees in applying this standard.¹⁰ The second part of the Fairness Doctrine requires broadcasters to provide a reasonably balanced picture of controversial issues, whether presented through paid advertising or through regular programming.¹¹ Although a broadcaster need not present all views within a single program, programming must be balanced overall.¹² Where a broadcaster airs one side of a controversial issue and cannot find a paying sponsor to express contrasting views, the Fairness Doctrine requires him either to air the contrasting views himself or to provide free air time for proponents of those views.¹³ The broadcaster is allowed wide discretion in determining how these various obligations are met, and will only be questioned where his efforts are not in good faith.¹⁴

In *Red Lion Broadcasting Co. v. FCC*, the Fairness Doctrine was upheld despite a vigorous statutory and constitutional challenge.¹⁵ After finding ample statutory basis for the Fairness Doctrine, a unanimous Court rejected the broadcasters' contention that the fairness rules violated their first amendment rights.¹⁶ The Court reasoned that, in the context of broadcasting, where "only a tiny fraction of those with resources and intelligence can hope to communicate . . . if intelligible communication is to be had . . . it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."¹⁷ Instead, the Court found the public's interest in a free marketplace of ideas to be more compelling than the first amendment rights of broadcasters:

[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.¹⁸

The Court's analysis in *Red Lion* has been consistently reaffirmed through-

9. In at least one case, however, the Commission has required a broadcaster to cover a particular issue. See *Complaint of Rep. Patsy Mink*, 59 F.C.C.2d 987 (1976).

10. *Fairness Report*, *supra* note 8, at 11.

11. *Id.* at 7.

12. See generally *id.* at 1-7.

13. *Cullman Broadcasting Co.*, 40 F.C.C. 576, 577 (1963).

14. *Handling of Public Issues Under the Fairness Doctrine and Public Interest Standard of the Communications Act*, 74 F.C.C.2d 163, 171 (1979); *Yellow Freight Sys.*, 73 F.C.C.2d 741, 749 (1979). See *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008-09 (D.C. Cir. 1976); see also *infra* text accompanying notes 60-66.

15. 395 U.S. 367 (1969).

16. *Id.* at 388.

17. *Id.*

18. *Id.* at 390.

out the years.¹⁹

B. *The Political Broadcasting Rules*

The political broadcasting rules consist of two basic provisions. The first provision requires that broadcasters provide legally qualified candidates for federal office with "reasonable access" to their broadcasting facilities.²⁰ The second rule, commonly referred to as the "equal time" rule, requires a broadcaster who has allowed a candidate to "use"²¹ his facilities, to provide an opposing candidate with an equal opportunity to broadcast his or her views.²² However, if a broadcaster sells time to a candidate, he need only offer to sell time to the candidate's opponent. Under the equal time rules, free time need not be offered.

The purpose of the equal opportunities rule is straight-forward: to prevent a broadcaster from using his facilities to promote the candidacy of any one particular person.²³ This goal is accomplished with negligible interference with a broadcaster's editorial judgment by exempting all traditional news coverage from the equal opportunities rule.²⁴ As with the Fairness Doctrine, the Commission shows great deference to the good faith judgments of a broadcaster in determining how to comply with these requirements.²⁵

In 1981, the Supreme Court upheld the requirement of "reasonable access" to broadcasting facilities by legally qualified federal candidates in *CBS*

19. *See supra* note 4.

20. 47 U.S.C. § 312(a)(7) (1982). The FCC has also determined that licensees must offer reasonable amounts of time to state and local candidates under the general public interest standard. Public Notice: Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2286-87 (1978).

21. Equal opportunity applies only when the broadcast is a "use"—an identifiable appearance by the candidate by voice or picture. Thus, this provision does not apply to broadcasts on the candidate's behalf where he does not appear. *See, e.g.*, Public Notice: Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C.2d 832, 838 (1970). In addition, news coverage is generally exempted. *See infra* note 24.

22. 47 U.S.C. § 315(a) (1982). *See, e.g.*, Public Notice: Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C.2d 832, 869 (1970); Major General Harry Johnson, 40 F.C.C. 323 (1961); E.A. Stephens, 11 F.C.C. 61 (1945).

23. Carter/Mondale Reelection Comm., Inc., 81 F.C.C.2d 409, 415 (1980).

24. A broadcaster is under no duty to provide equal opportunity if a candidate appears in a bona fide newscast, news interview, news documentary, or on-the-spot coverage of a news event. Public Notice: Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d at 2245-57.

25. *See, e.g.*, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1089 (1978) ("We continue to believe that the best method for achieving a balance between the desires of candidates for air time and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable, good faith discretion of individual licensees."); Summa Corp., 43 F.C.C.2d 602, 604 (1973).

v. *FCC*.²⁶ The Court held that section 312(a)(7) created a “special right of access” for federal candidates, not merely a general duty to air candidates’ views.²⁷ Echoing *Red Lion*, the Court stated that “it is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”²⁸ Further, the Court noted that the reasonable access provision “makes a significant contribution to freedom of expression by enhancing the ability of candidates to present . . . information necessary for the effective operation of the democratic process,”²⁹ and concluded that

[s]ection 312(a)(7) represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest. We hold that the statutory right of access, as defined by the Commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters.³⁰

This same analysis should apply equally to the other political broadcasting rules.

II. THE RIGHTS AND RESPONSIBILITIES OF BROADCASTERS

Both the *Red Lion* and *CBS* cases recognize that broadcasters have unique responsibilities to serve the public interest. Broadcasters are “‘public trustees’ charged with the duty of fairly and impartially informing the public audience.”³¹ The trustee concept, with its concomitant responsibilities, dates back to the origins of radio.³² The early experience with radio showed

26. 453 U.S. 367 (1981).

27. *Id.* at 379-82.

28. *Id.* at 395 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

29. *CBS*, 453 U.S. at 396.

30. *Id.* at 397.

31. *CBS v. Democratic Nat’l. Comm.*, 412 U.S. at 117.

32. The requirement that broadcasters be regulated in the “public interest, convenience and necessity” was included in the original statute affecting broadcasting, the Radio Act of 1927. See ch. 169, 44 Stat. 1162. Herbert Hoover, in 1924, argued that broadcasters should be public trustees:

Radio Communication is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and is to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our other public utilities.

Hearings on H.R. 7357 Before the House Comm. on Merchant Marine & Fisheries, 68th Cong., 1st Sess. 10 (1924). In 1930, the Federal Radio Commission stated that

[although] [t]he conscience and judgment of a station’s management are necessarily personal, . . . the station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in

that with unfettered competition for use of the airwaves, no one could effectively broadcast; all were drowned out.³³ As a result, the broadcasting industry unanimously demanded government allocation of the public airwaves.³⁴ In responding to the demands of the broadcasters, the Federal Communications Commission (FCC or Commission), and its predecessor, the Federal Radio Commission (FRC), allocated the spectrum to a limited number of applicants.³⁵ Congress wisely chose the "public interest" as the criterion for selection of those who would receive this valuable privilege. Significantly, the FRC, in one of the first actions under the public interest standard, required broadcasters to devote a reasonable amount of time to coverage of issues of public importance.³⁶

Requiring broadcast licensees to inform the public in return for the grant of a valuable privilege was, and still is, a fair bargain. Indeed, the dramatic increase in the power of broadcasters in modern times makes the case for the fairness rules all the more compelling. Secretary of Commerce Herbert Hoover recognized the risk of domination of the broadcast medium by a few voices even prior to the passage of the Radio Act of 1927. He testified that "we can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public."³⁷

Sixty years later, the domination of broadcasting by the three television networks is an economic fact of life. The networks have the resources to take advantage of the pronounced economies of scale in the development and distribution of programming,³⁸ which are particularly pronounced in

sight with this injunction: 'Manage this station in our interest.' . . . The standing of every station is determined by that conception.

In re Schaeffer Radio Co. (1930), reprinted in part in *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B.J. 5, 14 (1950).

33. The Navy reported to the Senate that

[c]alls of distress from vessels in peril on the sea go unheeded or are drowned out in the etheric bedlam produced by numerous stations all trying to compete at once. . . . It is not putting the case too strongly to state that the situation is intolerable, and is continually growing worse.

S. REP. NO. 659, 61st Cong., 2d Sess. 4 (1910). See also E. KRASNOW, L. LONGLEY, & O. TERRY, *THE POLITICS OF BROADCAST REGULATION* 10-16 (3d ed. 1982).

34. Herbert Hoover commented in 1924 that he thought broadcasting was "probably the only industry of the United States that is unanimously in favor of having itself regulated." quoted in G. HEAD, *BROADCASTING IN AMERICA: A SURVEY OF TELEVISION AND RADIO* 126 (3d ed. 1976).

35. See, e.g., *Red Lion*, 395 U.S. at 376.

36. See *supra* note 8; see also *CBS v. Democratic Nat'l. Comm.*, 412 U.S. at 117.

37. *Hearings on H.R. 2357 Before the House Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. (1924).

38. B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION*, 18 (1975); II NETWORK INQUIRY SPECIAL STAFF, *FEDERAL COMMUNICATIONS COMM'N, NEW TELEVISION NET-*

the area of news programming.³⁹ As a consequence, the networks supply the vast majority of the programming to their affiliates.⁴⁰

The advent of new technologies capable of transmitting video programming has not reduced the dominance of the networks. As one network executive recently observed, the development of these technologies merely "underscore[s] the singular role of network television—which remains our only true mass medium—as the only shared experience that crosses over all the differences that characterize this vast and varied nation."⁴¹ Cable television and the other new video outlets cited by critics of broadcast regulation are insignificant by comparison. The "video cornucopia" envisioned by these critics is, indeed, many years away.

Exotic technologies such as Multipoint Distribution Systems and Satellite Master Antenna Television together presently reach less than one percent of the population.⁴² Even cable television only reaches slightly more than one-third of all households⁴³ while a majority of the twenty largest United States cities remain unwired for cable.⁴⁴ More importantly, cable television today is primarily a new means of delivering programming. Cable has not yet become a sufficiently important source of original and diverse programming to reduce the American public's dependence on the three commercial networks for their news and information. Instead, today's cable systems are dependent upon the networks for their livelihood. Cable television systems in many communities carry as many as six network-affiliated stations,⁴⁵ whose programs necessarily overlap. Any other programming carried by cable and other systems is generally sports or movies, not informational programming. Even the emergence of a cable offering such as the Cable News Network does not, by itself, significantly affect the preeminent position of the networks.⁴⁶

WORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 219-20 (October 1980); R. NOLL, M. PECK, & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 59 (1973) [hereinafter cited as *ECONOMIC ASPECTS*].

39. *ECONOMIC ASPECTS*, *supra* note 38, at 69.

40. Approximately three quarters of evening prime time programming originates with the networks. See *ECONOMIC ASPECTS*, *supra* note 38, at 15.

41. Speech by John Severino, ABC, to Arizona Broadcasters Ass'n, Nov. 11, 1984, at 2 (copy on file with the authors).

42. Comments of Media Access Project, General Fairness Doctrine Obligations of Broadcasters, Docket No. 84-282, at 72-73 (filed Sept. 6, 1984).

43. See Notice of Inquiry, *supra* note 5, at 20,324.

44. CHANNELS 1984 FIELD GUIDE TO THE ELECTRONIC MEDIA 26 (1984).

45. See Amendment of Part 76 of the Comm'n's Rules and Regulations sections 76.59-76.63 with Respect to "Saturated" Cable Television Systems, 66 F.C.C.2d 710, 713 (1977).

46. It may of course be that certain of these new media, such as cable television, do not need the full panoply of fairness doctrine protections, given their lack of dominance and the required access channels they must offer under the Cable Communications and Policy Act of

The dominance of television in our national dialogue thus continues unabated. Recent studies of how the population receives its news show clearly the magnitude of this dominance. The vast majority of the population depends primarily upon traditional television for news,⁴⁷ while over forty percent of the population relies exclusively on television for news.⁴⁸ Studies also indicate that television is the main source of information on national political campaigns and issues.⁴⁹

The Fairness Doctrine simply requires that television, as the dominant means of mass communication, cover public issues and candidates, and cover them in a fair and balanced fashion. These requirements are all the more important in light of the recent rise of independent political groups, known as political action committees or PACs.⁵⁰ These organizations have at their disposal great financial resources for advocacy of their limited interests. The number of PACs has mushroomed,⁵¹ as have their total expenditures in the political arena.⁵²

The fairness and political broadcasting rules limit the risk that such wealthy special interest groups will drown out those groups with less financial resources. Under the Fairness Doctrine, sale of time to a PAC triggers a broadcaster's obligation to air contrasting views by including opposing viewpoints in a program, by selling advertising time to opposing groups, or by

1984. For a discussion of the peculiar concerns of cable under the Fairness Doctrine, see, e.g., FCC Notice of Proposed Rulemaking, 48 Fed. Reg. 26, 472 (1983). This, however, does not diminish the need for the doctrine in the dominant broadcast media.

47. One recent study showed that 65% of the population mentioned television as the source of most of their news, up from 51% in 1959. By contrast, only 44% mentioned newspapers. ROPER STUDY, *supra* note 7, at 10-11. See also G. GERBNER & W. SIGMORELLI, *The World of Television News* in TELEVISION NETWORK NEWS 189 (W. Adams, ed., 1978); A. REEL, *THE NETWORKS* 13-15 (1979).

48. ROPER STUDY, *supra* note 7, at 12.

49. One study found that 59% of the public believed that television provided the "clearest understanding of candidates and issues in national elections," R. BOWER, *TELEVISION AND THE PUBLIC* 100 (1973), while another found that a substantial percentage of the population follows national political issues only through television, M. ROBINSON, *American Political Legitimacy in the Era of Electronic Journalism*, in TELEVISION AS A SOCIAL FORCE (D. Carter, ed., 1975).

50. See generally Ferris & Ballard, *Independent Political Action Groups: New Life for the Fairness Doctrine*, 36 VAND. L. REV. 929, 929-31 (1983).

51. The number of PACs has increased from 2,901 in 1981 (see 10 Campaign Practices Reports, No. 1, at 1 (Jan. 31, 1983)) to 3,800 in 1984 (see 11 Campaign Practices Reports, No. 18, at 8 (Sept. 24, 1984)).

52. Estimated expenditures on contributions to congressional campaigns totalled \$120 million in the 1983-84 election cycle, up from \$83 million in the 1981-82 cycle. 11 Campaign Practices Reports, No. 31, at 1, 2 (Oct. 31, 1984).

offering free time to opposing groups.⁵³ In addition, the Commission has held that where broadcasters sell time to supporters of one candidate to air, for example, negative advertisements against an opposing candidate, the supporters of the opposing candidate must be afforded an equal opportunity to purchase time to air their views.⁵⁴ Independent political action committees actually supporting a particular candidate are thus prevented from circumventing the rules requiring broadcasters to afford equivalent opportunities to opposing political candidates. As previously stated, the FCC recently reaffirmed the validity of this doctrine, denying efforts by CBS and others to overturn it.⁵⁵

The Fairness Doctrine and political broadcasting rules thus temper the power of broadcasters by requiring them to exercise their power responsibly. The rules prevent a single-minded pursuit of profit that could lead broadcasters to ignore important and controversial issues or viewpoints⁵⁶ by providing airtime only to wealthy candidates or to the highest bidders for advertising time. These responsibilities, which critics of the fairness rules claim to be so onerous, are no greater than those required by journalistic ethics and sound journalistic practice. For instance, Group W, owner of several broadcast stations, made this point succinctly in comments to the FCC: "The Fairness Doctrine . . . has never caused Group W to treat issues in any manner other than it would have done based on reasons of good journalistic practice."⁵⁷ Similarly, the Code of Ethics, Standards and Practices of the National Broadcast Editorial Association provides that "it is the duty and the obligation of every radio and television station to present editorials on issues of public significance in order to serve the needs and interests of the community."⁵⁸ One can only wonder why broadcasters are so intent on repealing standards that simply require ethical conduct.

53. See Ferris & Ballard *supra* note 50, at 942-44. See also, e.g., Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

54. Nicholas Zapple, 23 F.C.C.2d 707 (1970).

55. See *In re* Request of CBS, 95 F.C.C.2d 1152 (1983) (Memorandum Opinion and Order); National Conservative Political Action Committee, 89 F.C.C.2d 626 (1982).

56. Powerful economic incentives lead broadcasters to avoid controversy. See *infra* note 71 and accompanying text.

57. Comments of Group W, General Fairness Doctrine Obligations of Broadcast Licenses, Docket No. 84-282, at 6 (Sept. 3, 1984).

58. NATIONAL BROADCAST EDITORIAL ASSOCIATION, CODE OF ETHICS, STANDARDS AND PRACTICES. Similarly, the CANADIAN DAILY NEWSPAPER PUBLISHERS ASSOCIATION STATEMENT OF PRINCIPLES (1977) provides that "fairness requires a balanced presentation of the relevant facts in a news report, and of all substantial opinions in a matter of controversy. It precludes distortion of meaning by over- or under-emphasis, or by placing facts or quotations out of context." Additionally, the AMERICAN SOCIETY OF NEWSPAPER PUBLISHERS CODE OF ETHICS states that "every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly."

The rules, however, do more than restate accepted journalistic ethics. They also insulate broadcast journalists from external pressures and allow them to act as their conscience dictates. When pressured by established powers or advertisers in a community to suppress coverage of a controversial political issue or to support their particular points of view, a broadcaster can simply point to the obligations imposed by the Fairness Doctrine.⁵⁹

The fairness rules provide for broadcaster responsibility by setting broad standards of conduct that leave broadcasters with great editorial freedom in day-to-day coverage of the news. As a matter of policy, the FCC has shown great deference to the good faith judgments of broadcasters in meeting their obligations under the Fairness Doctrine.⁶⁰ The latitude allowed broadcasters is so great that the FCC will question a broadcaster only when the "station's position is so 'off the wall' that no reasonable person could accept it."⁶¹ For example, in 1980, the FCC requested only twenty-eight broadcasters to respond to Fairness Doctrine and political broadcasting complaints, even though the Commission received an estimated 20,000 complaints in all.⁶² A grand total of six cases were decided against the station involved.⁶³ In cases such as these, where coverage is found inadequate, the remedy, however, is not "censorship." Rather, the broadcaster is simply advised to meet its fairness obligations through additional programming.⁶⁴

The Commission's deference to broadcasters in this area is no accident. The courts have carefully protected the rights of broadcasters, and have scrutinized the FCC's decisions more closely than those of other regulatory agencies.⁶⁵ In addition, the courts have held that the FCC's deferential poli-

59. As one witness with experience in broadcasting testified at recent Senate hearings:

More dangerous [than the Fairness Doctrine], in my opinion, is the chilling effect that social and economic pressures exert against our media. These are daily, constant, and sometimes very troublesome pressures. Against these pressures, a doctrine that requires that all sides be covered fairly is a welcome protection for a news director intent upon living up to the highest standards of his profession. That perhaps explains why the working journalist in the newsroom is so much more sanguine about the Fairness Doctrine than the executive in the front office.

Freedom of Expression Act of 1983: Hearings on S. 1917 Before the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 2d Sess. 90 (1984) (statement of Roy M. Fisher) [hereinafter cited as *Freedom of Expression Act Hearings*].

60. See *supra* notes 9-10, 12-14 and accompanying text.

61. F. ROWAN, *infra* note 91, at 65.

62. *Id.* at 51.

63. *Id.* Similar percentages were found in another study of an earlier period. See S. SIMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 210-11 (1978).

64. See *American Security Council Education Foundation v. FCC*, 607 F.2d 438, 447 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *In re Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964).

65. See, e.g., *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976);

cies are required in light of the first amendment interests of broadcasters.⁶⁶ Fears that FCC regulation could escalate to "censorship" are, therefore, clearly unfounded.

Given the Commission's deferential policies and the actual reality of enforcement, broadcasters' claims that the fairness rules "chill" or otherwise intrude upon editorial discretion do not ring true.⁶⁷ Indeed, broadcasters have produced no evidence of a chilling effect. In 1974, after two years of study consuming thousands of staff hours, the FCC concluded that there was "no credible evidence of a chilling effect."⁶⁸ Again, in 1984, the National Association of Broadcasters, presumably after an exhaustive search, could produce only a few instances of a supposed chilling effect.⁶⁹ Furthermore, the "chill" argument ignores the first part of the Fairness Doctrine, which requires broadcasters to devote a reasonable amount of time to important issues.⁷⁰ By saying they are "chilled," broadcasters, in effect, admit noncompliance with this part of the doctrine. It is also strange that critics of the fairness rules believe that a pattern of violations of one part of the rules is a good argument for repeal of all of the fairness rules. In any event, it is more probable that if any chilling effect is present, it results from economic incentives and not from the minimal standards of fairness imposed by the Fairness Doctrine. The simple fact is that coverage of controversial issues is not as profitable as airing "sitcoms" or blooper shows,⁷¹ and advertisers are reluctant to support controversial programming.⁷² If anything, the Fairness Doctrine and political broadcasting rules provide an antidote to this chilling effect.

Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223, 244.

66. See *Straus Communications*, 530 F.2d at 1011.

67. Cf. *Address by William J. Brennan*, 32 RUTGERS L. REV. 173 (1979) (criticizing press for overreaction to defeats in Burger Court).

68. *Fairness Report*, *supra* note 8, at 8. The Supreme Court reached a similar conclusion in *Red Lion*, 395 U.S. at 367.

69. The NAB claimed to have documented 45 examples of a "chilling effect." See Comments of National Association of Broadcasters, General Fairness Doctrine Obligations of Broadcast Licensees, Docket No. 84-282. Even if all of these examples were valid, considering that the examples covered a 16 year period, and that there are approximately 10,000 broadcast licensees, this record hardly would be compelling. Even these few examples, however, have been extensively criticized. See Reply Comments of the Media Access Project, Docket No. 84-282, at 27-37 (Nov. 8, 1984).

70. See *supra* notes 8-10 and accompanying text. Similarly, arguments that the political broadcast rules "chill" coverage of political races ignore the "reasonable access" provisions of the political broadcasting laws.

71. See, e.g., ECONOMIC ASPECTS, *supra* note 38, at 69.

72. See, e.g., Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 230 n.58.

The fairness rules thus provide our society with a sensible accommodation of conflicting rights and values. The rules vindicate the public interest in information on issues and candidates, and in a fair presentation of this information, by setting broad standards of acceptable conduct. Within these guidelines, editors have broad discretion in selecting material without fear of government reprisal or censorship. If a broadcaster is unsure of his responsibilities, he or she can simply provide for more air time on a particular issue.

The alternatives to these rules are far worse. Our democracy and Constitution are founded on the belief that those with great power must be held accountable for their actions. This attitude pervades our society, and broadcasters would be naive to think that it does not extend to them as well. The fairness rules are a minimally intrusive means of enforcing some level of broadcaster accountability. Repeal of these rules, on the other hand, would feed popular perceptions of the unchecked power of the press.⁷³ Repeal would also run counter to the high value the public places on fairness. Indeed, a recent survey of public opinion indicated that by a wide margin, people believe that freedom of expression means that all views on important issues should be available,⁷⁴ not freedom of the institutional press from regulation. The fairness rules ensure that these public expectations are met. Without the rules, broadcasters increasingly would be vulnerable to public suspicion of a hidden agenda or some secret bias.⁷⁵

Such public sentiment in support of fairness cannot be ignored. Distrust and suspicion of broadcasting will manifest itself one way or another, most likely in ways far more harmful to the media than the fairness rules. As

73. See, e.g., Bollinger, *The Press and the Public Interest: An Essay on the Relationship Between Social Behavior and the Language of First Amendment Theory*, 82 MICH. L. REV. 1447, 1454-55 (1984).

74. PUBLIC AGENDA FOUNDATION, *THE SPEAKER AND THE LISTENER: A PUBLIC PERSPECTIVE ON FREEDOM OF EXPRESSION* 23-30, 38 (1980) (funded by John & Mary Markle Foundation). A more recent study of public attitudes towards the press commissioned by the American Society of Newspaper Editors found that overwhelming majorities favored balanced coverage of candidates for public office. MORI RESEARCH, INC., *NEWSPAPER CREDIBILITY: BUILDING READER TRUST* 31 (April 1985) [hereinafter cited as ASNE Study] (91% of those surveyed believe television should give equal time to political candidates).

75. The public currently perceives television as the most reliable and objective news medium. See ROPER STUDY, *supra* note 7, at 6; R. BOWER, *TELEVISION AND THE PUBLIC* 100 (1973). Suspicions that the institutional media favor certain political beliefs, however, are common. The recent controversy over Senator Jesse Helms' plans to take over CBS provides but one example. See *CBS Suit Accuses Conservative Group of False Proxy Solicitations*, COMMUNICATIONS DAILY, Feb. 19, 1985, at 3-4. See generally B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 55-66 (1976). The ASNE Study found that "three-fourths of all adults have some problem with the credibility of the media," while one-fifth "deeply distrust their news media." ASNE Study, *supra* note 74, at 13.

Fred Friendly, former president of CBS, observed in the context of the Westmoreland libel case:

It is a basic law of physics and journalism that to create a pressure-cooker climate without the safety valve is to ensure a destructive force inexorably destined to explode. Freedom of the press is a protection, a safety valve, for all citizens, not just those lucky enough or rich enough to control the levers of communication power.⁷⁶

Juries already return most libel verdicts against the media,⁷⁷ often for millions of dollars. The burdens imposed by the Fairness Doctrine are miniscule compared to the staggering costs of defending libel suits.⁷⁸ Worse still, growing public dissatisfaction may eventually lead to imposition of far more burdensome governmental regulations, such as mandatory access requirements.⁷⁹

76. Friendly, *After the Westmoreland Case: How Can the People Talk Back?*, Wash. Post, Feb. 20, 1985, at A21, col. 3.

77. A study by the Libel Defense Resource Center found that juries return 80% of libel verdicts against the defendant. Kovner, *A Response to Remarks of Louis Nizer*, 6 COMMUNICATIONS AND THE LAW 59, 61 (1984).

78. The legal fees in the CBS-Westmoreland case have been estimated at between 7 million and 9 million dollars. Wash. Post, Feb. 20, 1985, at A20. The Washington Post recently editorialized that

[the Westmoreland libel] case is bound to leave many people wondering if there is not a reasonable alternative to the draining process of a libel proceeding. Broadly speaking, we think there are two. Public figures must come to an understanding not so much of their difficulty in winning a libel suit as of the public's interest in robust inquiry. News organizations have to find it in themselves to be fair and professional and, when reasonable questions arise, to provide aggrieved parties a reasonable response or a reasonable way to respond themselves.

Wash. Post, Feb. 20, 1985, at A20, col. 2.

79. One popular groundswell in favor of access has already come and gone. In the early 1970's, following the *Red Lion* decision, the access movement grew in strength, culminating in the D.C. Circuit's opinion in *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971). The circuit court held that the first amendment required a right of access to paid advertising time. Although the appellate court's decision was reversed by the Supreme Court in *CBS v. DNC*, renewed popular sentiment, fueled by growing resentment of the perceived unchecked power and bias of the media, could create pressure for statutory or constitutional access. See *supra* notes 73-75 and accompanying text. One commentator has argued that:

[T]he media represent an emerging new concentration of power akin to the railroads, trusts, and monopolies of the late-nineteenth century. . . . Bear in mind that, one hundred years ago, railroads, utilities, and trusts were also claiming the protection of the Bill of Rights. . . . If the Fourteenth Amendment could mean something different in 1938—in recognition of changing circumstances—from what it did in 1888, then perhaps the First Amendment may undergo a shifting interpretation of its own to reflect the new status of the communications industry. The media may be forced into the status of utilities regulated to provide access.

K. PHILLIPS, *MEDIACRACY: AMERICAN PARTIES AND POLITICS IN THE COMMUNICATIONS*

III. THE FIRST AMENDMENT AND THE FAIRNESS RULES

The Fairness Doctrine and political broadcasting rules embody a delicate balance of three competing first amendment values: the public's interest in the free flow of information, the interests of speakers other than media owners in presenting their views to the public, and the editorial freedom of broadcasters. Critics of the rules nonetheless argue that the rules violate the first amendment. These critics view the first amendment narrowly, focusing solely on the supposed right of the broadcaster to be free from governmental interference. In doing so, they not only ignore other first amendment values, but also ignore the threat to these values posed by concentration of media control in the hands of the few. This is a real threat in the context of broadcasting. Government intervention under the circumstances is not only permissible, but truly essential to meaningful freedom of expression. The Supreme Court recognized this need in no uncertain terms in *Associated Press v. United States*:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some.⁸⁰

The fairness rules protect, first and foremost, the public's right of access to

AGE 31 (1975). The ASNE Study of media credibility concluded that "diminished press credibility may be a threat to the special role of the press in American society . . . credibility ratings were found in the study to be related to people's opinions about press rights and privileges." ASNE Study, *supra* note 74, at 51.

80. *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See *Red Lion*, 395 U.S. at 389-90 (the first amendment is intended to create an uninhibited marketplace of ideas and not to permit a monopolization of that market whether by government or a licensee). Cf. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-88 (1980) (upholding state court interpretation of free speech provisions of state constitution as requiring owners of a shopping center to open facility to speech by others). The notion that government may act affirmatively to vindicate first amendment rights is neither new nor novel, and has gained increasing acceptance among commentators. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-19, at 676 (1978) ("the right to know . . . carries the implication that government, while it may not close the [marketplace of ideas] may move to correct its defects and regulate its incidental consequences"). See also, e.g., Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); Yackle, *Confessions of a Horizontalist: A Dialogue on the First Amend-*

diverse viewpoints.⁸¹ *Red Lion* provided one of the Court's strongest pronouncements of the public's right to "receive suitable access to social, political, esthetic, moral and other ideas and experiences."⁸² It was, however, by no means the first. As early as 1923, the Supreme Court recognized that access to knowledge must be protected.⁸³ Since then, the Court has vindicated the right of access to diverse ideas in a variety of contexts.⁸⁴ The value of this access cannot be doubted. Exposure to different and even disturbing viewpoints helps us to better refine our own views and understand those around us. As Justice Brennan said of students, "access [to ideas] prepares [them] for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."⁸⁵ The process of self-government also requires that citizens be fully informed of competing viewpoints.⁸⁶

The fairness rules also serve first amendment values in a way that is often overlooked. The rules have created substantial opportunities for expression by those "who wish to exercise their freedom of speech even though they are not members of the press."⁸⁷ The political broadcasting rules accomplish this goal directly by providing candidates with an enforceable right of reasonable access to the airwaves, as well as a right to equal opportunities.⁸⁸ Additionally, the Fairness Doctrine indirectly creates similar opportunities

ment, 27 U. KAN. L. REV. 541 (1979); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

81. See *supra* text accompanying notes 57-59.

82. *Red Lion*, 395 U.S. at 390.

83. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (reversing conviction under statute making it unlawful to teach foreign languages to young children, in part because the law interfered with the "opportunities of pupils to acquire knowledge").

84. See, e.g., *Board of Education v. Pico*, 457 U.S. 853 (1982) (limiting school board's discretion to remove "objectionable" books from school library based on students' right of voluntary access to new ideas); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-79 (1980) (right of public access to criminal trials); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial free speech permits pharmacist to advertise price of prescription drugs); *Stanley v. Georgia*, 394 U.S. 557 (1969) (state law prohibiting mere personal possession of pornography in one's home interferes with constitutional right to receive information and ideas); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (first amendment right to receive Communist literature by mail without government interference).

85. *Pico*, 457 U.S. at 868.

86. James Madison observed that

[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 WRITINGS OF JAMES MADISON 103 (G. Hert, ed., 1910).

87. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

88. See *supra* notes 20-22 and accompanying text.

for expression by nonmedia speakers. While the doctrine does not require that a broadcaster provide airtime to individuals or groups in order to meet its fairness obligations in any particular case,⁸⁹ the Commission has recognized that broadcasters should, as one means of complying with fairness obligations, allow speakers to present their own views directly to the public.⁹⁰

Aside from these general statements of policy, the Fairness Doctrine provides created significant opportunities by providing individuals and community groups with leverage in their informal requests to broadcasters for coverage of opposing views on critical issues.⁹¹ Through such discussions, groups and individuals have obtained free and paid advertising time, as well as opportunities to appear on news programs and talk shows.⁹² Without the Fairness Doctrine, it is doubtful that many broadcasters would even discuss reasonable requests from individuals or groups seeking to present their views. In recent congressional hearings, several groups testified that, if not for the Fairness Doctrine, they would not have been granted access to broadcasting facilities.⁹³ The Fairness Doctrine has thus served well to ensure that a broadcaster presents "those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."⁹⁴

The free speech of individuals outside the press is also central to the right

89. As was noted earlier, the Commission allows broadcasters substantial discretion in determining how to comply with the Fairness Doctrine. *See supra* note 25.

90. *See, e.g.,* Democratic Nat'l Comm., 25 F.C.C.2d 216, 222 (1970) (licensees "must present representative community views *and voices* on controversial issues," and a policy of "excluding partisan voices and always itself presenting views in a bland, inoffensive manner" is inconsistent with the public interest) (emphasis added). *See also Cullman*, 40 F.C.C.2d at 577 (where licensee permits use of its facilities for expression of one viewpoint on a controversial issue, reasonable opportunities must be afforded for "presentation of contrasting views by spokesmen for other responsible groups").

The Supreme Court has also recognized that fairness obligations should be met in part by allowing speakers to air their views directly. In *CBS v. DNC*, the Court, while reversing a lower court holding that the first amendment required broadcasters to sell advertising time to individuals and groups, nonetheless cited with approval Commission statements that broadcasters should provide such opportunities. 412 U.S. at 130-32. *See Red Lion*, 395 U.S. at 392 n.18 (emphasizing the need for expression of opposing views by persons who actually believe them).

91. *See generally* F. ROWAN, BROADCAST FAIRNESS: DOCTRINE PRACTICE PROSPECTS 71-88 (1984).

92. Andrew Schwartzman, executive director of the Medial Access Project, has stated that "most of the dealings with the Fairness Doctrine are informal, the more informal the better so that local groups get to establish an ongoing relationship with the news people of the local station." F. ROWAN, *supra* note 91, at 72.

93. *Freedom of Expression Act Hearings, supra* note 59, at 101-04, 131-42.

94. *Red Lion*, 395 U.S. at 389.

of freedom of expression under the first amendment. As Justice Brennan observed in *CBS v. Democratic National Committee*:

[T]he First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view. And, in a time of apparently growing anonymity of the individual in our society, it is imperative that we take special care to preserve the vital First Amendment interest in assuring 'self-fulfillment' [of expression] for each individual. For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.⁹⁵

Fostering individual speech by guaranteeing access to broadcast media not only lends dignity and provides fulfillment to the individual,⁹⁶ but also serves society by adding new, and potentially important, views to social discourse. Society derives an even more clear and direct benefit from affording opportunities to political candidates. As the Supreme Court stated in *CBS v. FCC*, "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."⁹⁷

The first amendment rights of the public and speakers outside the media justify the responsibilities of broadcasters as trustees for the public. Critics of the rules nonetheless argue that the broadcast industry is the same as the print industry, and hence, the government must, under the first amendment, treat both industries the same. Broadcast stations, they argue, often outnumber newspapers, which remain unregulated.⁹⁸ These critics, however, have improperly identified the relevant market for comparison as simply newspapers, rather than the print media as a whole. In any given locality, an individual has access to hundreds, if not thousands,⁹⁹ of newspapers,

95. *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 193 (Brennan, J., dissenting) (emphasis in original) (citations omitted).

96. See, e.g., *L. TRIBE*, *supra* note 80, § 12-1, at 578.

97. *CBS v. FCC*, 453 U.S. at 396 (quoting *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976)).

98. See, e.g., *FCC Asks End of Fairness Doctrine*, *N.Y. Times*, Sept. 18, 1981, at C36, col. 1 (quoting Mark S. Fowler, Chairman of the FCC: "The scarcity-of-media-access argument is a bankrupt one. It is about time that media got the same rights to select material as newspapers, book publishers and others."). See also Note, *The Fairness Doctrine: Fair to Whom?*, 30 *Cleve. St. L. Rev.* 485, 519-21 & n.196 (1981) (advocating repeal of the Fairness Doctrine). See generally Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *TEX. L. REV.* 207 (1982) (proposing deregulation of commercial broadcasting).

99. Over 9,000 newspapers, including dailies, weeklies and semiweeklies, and nearly

magazines, and newsletters, not to mention an unlimited number of books. By comparison, broadcast outlets remain relatively scarce.¹⁰⁰ New technologies have not alleviated this scarcity.¹⁰¹ Even if new technologies do reduce the scarcity of electronic outlets, the crucial importance of broadcasting in our national dialogue places the fairness rules beyond constitutional challenge.¹⁰²

Simple analogies to newspapers notwithstanding, the first amendment does not, and should not, absolutely protect broadcasters from intervention that vindicates the broader public interest. As Justice Jackson observed, "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound track, the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself."¹⁰³ The nationwide reach of network broadcasting magnifies the dangers of private monopolization of the marketplace of ideas. Since government must allocate broadcast frequen-

11,000 periodicals are published in the United States. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 564 (104th ed. 1983).

100. A recent House Report provided the following figures on television availability:

Number of Stations	Percent of TV Households
1 or 2	7.93%
3	29.17%
4	21.25%
5/more	40.51%

REPORT BY THE MAJORITY STAFF OF THE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE, OF THE HOUSE COMM. ON ENERGY AND COMMERCE, TELECOMMUNICATIONS IN TRANSITION 345 (1981) (1977 data).

101. See *supra* text accompanying notes 41-46.

102. See *supra* text accompanying notes 47-49. In *CBS v. FCC*, the court upheld the reasonable access provisions of the Communications Act without mentioning scarcity. Instead, in rejecting a first amendment challenge, the court noted that the airwaves were an "important resource" which Congress was attempting to insure would be used in the public interest. 453 U.S. at 397. The Court also emphasized that the provision enhanced freedom of expression by protecting the rights of the public to receive information, and the rights of candidates to speak. *Id.* at 396. Since similar rights are also protected by the Fairness Doctrine, see *supra* text accompanying notes 81-96, the opinion indicates that it, too, is constitutional regardless of scarcity.

103. *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (Jackson argued that merely because a particular form of control was appropriate for speech in one context, in this case a sound truck, it would not necessarily be valid if applied to speech in other forms and contexts.). See *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it"); *Red Lion*, 395 U.S. at 386 ("differences in the characteristics of news media justify differences in the First Amendment standards applied to them"). See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (regulation of billboards); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state "rights of reply" statute in context of a newspaper); *Freedman v. Maryland*, 380 U.S. 51 (1965) (prior screening of movies by state censor board); *Saia v. New York*, 334 U.S. 558 (1948) (regulation of loudspeakers).

cies,¹⁰⁴ broadcasting presents the government with a unique opportunity to minimize these risks, and affirmatively foster freedom of expression for individuals and the public at large. The FCC and Congress, through the fairness rules, have taken full advantage of this opportunity.

IV. CONCLUSION

The passage of time has not made the wisdom of the *Red Lion* decision obsolete. Regulation is still needed to ensure that the public has access to competing views on important issues. The electronic media will continue to be dominated by a few voices for the foreseeable future. The rise of political action committees presents a new and serious threat to balanced discussion. Creative use of the fairness rules by individuals and groups outside the media to gain access to broadcast facilities further strengthens the case for the rules.

The fairness rules remain our least intrusive means of guaranteeing accountability, responsibility, and diversity in our most important medium of mass communications. The Fairness Doctrine and political broadcasting rules are thus important symbols not only of our society's commitment to full and fair debate, but also of our commitment to freedom of expression for all individuals and groups. In a perfect world, a marketplace free of governmental involvement might provide opportunities for all to speak, and allow all important viewpoints to be heard. If new technologies or changed circumstances at some point bring this possibility closer to reality, governmental intervention in general and the fairness rules in particular may become anachronisms. For the present, and for the foreseeable future, however, these rules cannot be abandoned without leaving the "marketplace of ideas" in the hands of the few and the powerful.

104. *Red Lion*, 395 U.S. at 388.

