IS IT TIME TO REVISIT THE FAIRNESS DOCTRINE IN RESPONSE TO THE FEDERAL COMMUNICATIONS COMMISSION'S PROPOSED MEDIA OWNERSHIP RULES?

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I. INTRODUCTION

The Federal Communications Commission (hereinafter "FCC") created the fairness doctrine as a response to the scarcity doctrine, which resulted from a combination of the limited number of broadcast frequencies and the competition for broadcast time.[1] The phenomenon of frequency interference with licensed stations prevents those with the technological capability of using the electromagnetic spectrum from doing so.[2] In order to avoid a chaotic system, the government must limit the number of broadcast licensees and regulate their content to ensure that every American has a voice.[3] However, the scarcity doctrine does not apply to cable because a virtually unlimited number of stations can broadcast simultaneously.[4] Although the FCC repealed the fairness doctrine in 1987, the debate about the necessity for the restrictions it imposed still rages. The principles that embodied the fairness doctrine must be a part of our media system once again. Otherwise, the media conglomerates with the greatest financial resources will be able to control our thoughts, ideas, and elections in a manner never before imagined.

Specifically, Part II discusses the creation and the ratification of the fairness doctrine and in particular, the landmark case in fairness doctrine history, *Red Lion Broadcasting Co. v. FCC*.[5] Part III focuses on the demise of the fairness doctrine and the attacks that were successfully launched against the doctrine to eliminate it as part of the public interest requirement of broadcasters. Part IV reviews the relationship between the fairness doctrine and the equal time provision. Part V examines the FCC's proposed media ownership rules and the congressional response. Part VI discusses the deregulation of radio ownership and markets, and the problems associated with concentration of ownership. Part VII proposes reinstatement of the fairness doctrine. Part VIII concludes that the principles behind the original fairness doctrine need to be a part of our

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1. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375-76 (1969), where the Court noted:
Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity.

Id.

2. Tom A. Collins, *The Future of Cable Communications and the Fairness Doctrine*, 24 CATH. U. L. REV. 833 (1975).

3. *Id.*

4. *Id.*

5. *Red Lion Broad. Co.*, 395 U.S. 367.

media system.

II. THE CREATION AND RATIFICATION OF THE FAIRNESS DOCTRINE

In 1949, the FCC recognized the need for licensees to preserve a certain amount of their broadcast time for news and programs dedicated to discussing issues of public interest unique to each community.[6] Specifically, the FCC recognized the paramount right of the public in a free society to be informed and to be presented with different values and viewpoints concerning vital and often controversial issues.[7] Thus, the FCC established a two-part obligation on broadcasters: first, requiring that they allocate a reasonable amount of time to the discussion of important public interest issues; and, second, mandating that they provide a fair chance for opponents of the point espoused to respond.[8]

A. FCC's Authorization to Regulate Broadcast Stations

Congress granted the FCC broad rulemaking power to regulate broadcast stations by specifically stating that "the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, [not inconsistent with law,] as may be necessary to carry out the provisions of this [Act]."[9] In fact, the FCC is required to consider the public interest when granting, renewing, and modifying licenses.[10] Also, the FCC has broad authority to ensure that "broadcasters operate in the public interest."[11]

B. The Importance of Red Lion Broadcasting Co. v. FCC

In *Red Lion* the Supreme Court upheld the fairness doctrine promulgated by the FCC, which gave the doctrine the authority it needed to survive.[12] Red Lion Broadcasting Company was a licensed broadcaster in Pennsylvania. In 1964 its radio station, WGCB, aired a broadcast by Reverend Billy James Hargis.[13] Hargis made several comments about

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6. *Id.* at 377 (citing Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949)).
7. *See id.* at 385.
8. *See id.* at 377.
9. *Red Lion Broad. Co.*, 395 U.S. at 379 (quoting 47 U.S.C. § 303).
10. *Id.* at 379-80. "The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U.S.C. §§ 307 (a), 309 (a); renewing them, 47 U.S.C. § 307; and modifying them." *Id.*
11. *Id.* at 380.
12. *See id.* at 400-01.
13. *Red Lion Broad. Co.*, 395 U.S. at 371.

Fred J. Cook. When Cook learned about the broadcast, he claimed that Hargis personally attacked him, so he requested free air time to reply.[14] The radio station refused Cook's request and Cook complained to the FCC.[15] The FCC determined that Hargis's comments amounted to a personal attack against Cook. Therefore, the FCC required Red Lion to send Cook a copy of Hargis's comments and to allow Cook free broadcast time to respond.[16]

Shortly after the *Red Lion* case began, the FCC proposed and adopted amendments that made the personal attack prong of the fairness doctrine easier to enforce.[17] In addition to adding substance to the fairness doctrine, the amendment updated political editorial rules.[18] For example, the rules set out the procedure that broadcast stations must follow when a "controversial issue of public importance" involves an attack upon another person.[19] This requires documentation of the attack as well as time to respond from the broadcast licensee's station.[20] Additionally, the new regulations applied the fairness doctrine to news programs, which were beyond the reach of the equal time provision.[21] The *Red Lion* Court ultimately upheld the use of both the fairness doctrine and the new regulation as within the authority of Congress and the First Amendment because they enhanced, rather than restricted, free speech.[22]

C. A Congressional Amendment Bolsters the Fairness Doctrine

In 1959, Congress amended the Communications Act to allow broadcast stations to preempt the equal time provision for political candidates during certain news programs.[23] However, Congress added language to make clear that broadcast stations were not exempt "*from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*"[24] *Red Lion* focused on this language, which stated that the phrase "public interest" forced

14. *Id.* at 372.
15. *Id.*
16. *Id.* at 371.
17. *Red Lion Broad. Co.*, 395 U.S. at 373 (citing 32 Fed. Reg. 10303).
18. *Id.*
19. *Id.*
20. *Id.* at 371 (citing 32 Fed. Reg. 10303).
21. *Red Lion Broad. Co.*, 395 U.S. at 371.
22. *Id.* at 375.
23. 47 U.S.C. § 315 (2003).
24. *Red Lion Broad. Co.*, 395 U.S. at 380 (quoting Act of Sept. 14, 1959, § 1, 73 Stat. 557, amending 47 U.S.C. §315 (a)).

broadcasters to discuss both sides of public issues that were contentious.[25] Moreover, the Court determined that this amendment supported the FCC's contention that the fairness doctrine was inherent in the public interest standard.[26] Also, the Court noted that a congressional amendment of a statute should be afforded great deference, especially in this situation, where Congress proactively ratified the meaning established by the FCC.[27] Lastly, the Court concluded that the public interest was a valid reason for requiring licensees to broadcast controversial issues.[28] In order to ensure that broadcasters followed this requirement, the Court allowed the FCC to enforce the regulation using reasonable means that did not interfere with freedom of speech.[29]

D. Legislative History Supported the Ratification of the Fairness Doctrine

The Court consulted the amendment's legislative history to support its ratification of the fairness doctrine.[30] In particular, the Senate report recognized the scarcity of broadcast stations and considered them to be a public trust, which broadcasters must operate in the interest of the public.[31] Additionally, the report explained that broadcasters must discuss pressing public issues in a fair manner.[32] For example, Senator Pastore stated that "we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country."[33] Senator Scott noted that the amendment was not limited to politics but instead was "intended to encompass all legitimate areas of public importance which are controversial."[34]

E. The Scarcity Rationale and the Rejection of First Amendment Protection

In response to the contention that the fairness doctrine violates the

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25. *Id.* at 380.
26. *Id.*
27. *Id.* at 381-82.
28. *Red Lion Broad. Co.*, 395 U.S. at 382.
29. *Id.* The Court found that "the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgement of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act." *Id.*
30. *Id.* at 383. "The legislative history reinforces this view of the effect of the 1959 amendment." *Id.*
31. *Id.* at 383 (citing S. Rep. No. 86-562, 1st Sess., at 8-9 (1959)).
32. *Red Lion Broad. Co.*, 395 U.S. at 383.
33. 105 CONG. REC. 17830.
34. *Id.* at 17831.

First Amendment right of free speech, the Court relied on the scarcity of broadcast frequencies to justify the Government's regulation of this medium of communication.[35] Specifically, the Court found that the First Amendment right of the listeners superseded the rights of the broadcasters.[36] Regulation of fairness was justified because "of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without government assistance to gain access to those frequencies for expression of their views."[37] The First Amendment did not prohibit the Government from mandating either that a "licensee share his frequency with others," or that a licensee act as a fiduciary with a responsibility to present opinions representative of his community, which he might otherwise ban from the air.[38]

III. THE DEMISE OF THE FAIRNESS DOCTRINE

In 1974, the Court in *Miami Herald Publishing Co. v. Tornillo* declined to extend the fairness doctrine to the newspaper media.[39] While this decision did not directly damage the *Red Lion* holding, it gave those opposing the fairness doctrine new momentum.[40] Ironically, the Supreme Court, rather than the FCC, dealt the first damaging blow to the fairness doctrine in a case whose holding actually reaffirmed the doctrine.[41] Although the Court still recognized that broadcasters had a duty to the public because of the scarcity rationale, Justice Brennan explained that the doctrine had recently come under serious scrutiny.[42] However, the Court would not reconsider its approach to the scarcity doctrine unless Congress or the FCC demonstrated that innovations in technology had eliminated the need for certain broadcast regulations.[43]

The FCC issued its 1985 Fairness Report, in which it presupposed that only Congress had the ability to eliminate the doctrine.[44] Nevertheless, the

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35. *Red Lion Broad. Co.*, 395 U.S. at 390.

36. *Id.*

37. *Id.* at 400-01.

38. *Id.* at 389.

39. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258-59 (1974).

40. Jerome A. Barron, *What does the Fairness Doctrine Controversy Really Mean?*, 12 HASTINGS COMM. & ENT. L.J. 205, 210 (1989).

41. *Id.*

42. FCC v. League of Women Voters, 468 U.S. 364, 376 (1984).

43. *Id.*

44. In re General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 147-48 (1985).

> While we are firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest, the issue as to whether or not Congress has empowered us to eliminate

1985 Fairness Report undermined the "factual predicates upon which the Doctrine rested."[45] The Report achieved this goal by stating that the doctrine had a "chilling effect" on the freedom of expression and by noting that since the landscape of the broadcasting world was no longer "scarce," the document no longer had any ground to stand on.[46]

Additionally, the FCC implemented its new stance on the fairness doctrine in an administrative proceeding involving the Syracuse Peace Counsel and WTVH, a television station.[47] A complaint arose when the Syracuse Peace Counsel claimed that the Meredith Corporation, WTVH's licensor, violated the fairness doctrine.[48] At first, the FCC supported the complainant, agreeing that WTVH failed to meet its obligation under the fairness doctrine because it did not cover both sides of a public interest issue.[49] The Meredith Corporation asked the FCC to reconsider its position based on the proposition that the fairness doctrine was unconstitutional under the First Amendment.[50] However, the FCC refused to find the doctrine unconstitutional.[51]

Meredith then sought review of the FCC's decision to the United States Court of Appeals for the District of Columbia.[52] It was apparent that the court did not want to determine the constitutionality of the fairness doctrine, but rather preferred that the FCC make the ruling.[53] The court of appeals remanded the case to the FCC to allow it to determine the

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> the doctrine is not one which is easily resolved. The fairness doctrine evolved as an administrative policy promulgated by the Commission pursuant to congressionally delegated power. While we do not believe that the fairness doctrine is a necessary component of the general "public interest" standard contained in the Communications Act, the question of whether or not Congress in amending Section 315 in 1959 codified the doctrine, thereby requiring us to retain it, is more problematic. In any event, the fairness doctrine has been a longstanding administrative policy and central tenet of broadcast regulation that Congress has chosen not to eliminate. Moreover, there are proposals pending before Congress to repeal the doctrine. As a consequence, we believe that it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding.

Id.

45. Barron, *supra* note 40, at 211.

46. In re General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d at 157.

47. Barron, *supra* note 40, at 212.

48. *Id.*

49. *Id.*

50. *Id.*

51. Barron, *supra* note 40, at 212-13. "In declining to declare the Doctrine unconstitutional, the FCC relied on its refusal to rule on the first amendment issue in the 1985 Fairness Report. Again, the FCC said that the appropriate forum for such action was either Congress or the courts." *Id.*

52. Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

53. Barron, *supra* note 40, at 213.

constitutionality of the doctrine.[54] Judge Silberman's decision recognized a well-known administrative law principle that "regulatory agencies are not free to declare an act of Congress unconstitutional."[55] However, Judge Silberman determined that principle did not apply because an administrative agency had created the fairness doctrine, not Congress.[56] Therefore, since the FCC had interpreted the public interest standard when it created the fairness doctrine, it could use that same authority to abolish the doctrine.[57]

The FCC was apprehensive about resolving the dispute because it feared the response of Congress.[58] However, Judge Silberman countered the FCC's concern with its 1985 Fairness Report, noting that "the fair inference to be drawn from the Commission's report was that the Commission believed the doctrine was not specifically mandated; otherwise, it would have been irresponsible for the Commission gratuitously to cast constitutional doubt on a Congressional command."[59] Hence, the court would not allow the FCC to rely on its theory that it would overstep Congress if it found the statute unconstitutional.[60] Judge Silberman made clear that since the FCC intentionally "undermined the legitimacy of its own rule," it would be fair to make the FCC determine the constitutionality of the doctrine.[61] Accordingly, the only way the FCC could avoid determining the constitutionality of the doctrine under the First Amendment was to look at it in relation to the public interest standard.[62]

Interestingly, before the FCC ruled on the fairness doctrine, another court decision ruled that the FCC had created the doctrine, thus paving the way for the FCC to eliminate the doctrine.[63] The FCC finally repealed the fairness doctrine on August 4, 1987 by stating that "the Fairness Doctrine contravenes the First Amendment and thereby disserves the public interest."[64] The FCC based its decision on the following premises: the

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54. *Meredith Corp.*, 809 F.2d at 874 n.13.

55. *Id.* at 872 (citing Johnson v. Robinson, 415 U.S. 361, 368 (1974)).

56. *Id.*

57. Barron, *supra* note 40, at 214.

58. *Id.* at 214. If Congress thought the doctrine was codified in 47 U.S.C. § 315, it might impose sanctions on the FCC. *Id.*

59. *Meredith Corp.*, 809 F.2d at 872.

60. *Id.* at 872-73.

61. *Id.* at 873.

62. Barron, *supra* note 40, at 214-15.

63. *Id.* at 215. "Prior to the FCC's decision, the federal court of appeals . . . held that the Fairness Doctrine was not statutory law but merely an administrative creation. Therefore, the Fairness Doctrine could be repealed by the FCC." *Id.* (quoting Telecommunications Research and Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986)).

64. *Id.* at 216 (quoting In re Complaint of Syracuse Peace Council against Television Station

fairness doctrine chilled free speech; the doctrine needed to be narrowly tailored in order to "achieve a substantial governmental interest" and it was not so tailored; substantial changes in electronic media significantly reduced the need to regulate the electronic marketplace; and, First Amendment protections should be afforded to both print and electronic media equally.[65]

IV. THE RELATIONSHIP BETWEEN THE FAIRNESS DOCTRINE AND EQUAL TIME

The fairness doctrine required radio and television broadcast stations to cover public interest issues, and to provide equal coverage of opposing viewpoints.[66] Separate from the requirements of the fairness doctrine is the equal time provision of 47 U.S.C. § 315, which requires that equal time be made available for all political candidates.[67] Although these two doctrines are distinct, the *Red Lion* Court recognized that the fairness doctrine played a critical role in the enforcement of the equal time rule.[68]

The Court explained that if the 1959 amendment to § 315 did not ratify the fairness doctrine, broadcast stations could elude the equal time provision.[69] Specifically, broadcast stations can avoid the statute because it applies only to candidates, and not to anyone else, including family members or other supporters.[70] If the fairness doctrine were unenforceable, a broadcast station could prohibit all candidates from appearing on the airwaves while allowing one candidate's supporters exclusive access to the airwaves.[71] For example, a station could legally support one candidate over the other, and the equal time rule would not require it to give the other candidate an opportunity to rebut, unless the candidate it supported appeared on its station.[72] The Court noted that this lack of an opportunity to rebut a candidate's supporters would allow a broadcast station to have a greater effect on an election than an appearance by the favored candidate.[73] The fairness doctrine, not the equal time

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WTVH Syracuse, New York, 2 F.C.C.R. 5043, 5057 (1987)).

65. *Id.* (citing In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.R. at 5048-58).

66. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369 (1969).

67. *Id.* at 369-70.

68. *Id.* at 382.

69. *Id.* at 382-83.

70. *Red Lion Broad. Co.*, 395 U.S. at 382.

71. *Id.* at 382-83. "Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air . . . and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of others." *Id.*

72. *Id.*

73. *Id.* at 383. "In this way the broadcaster could have a far greater impact on the favored

provision, imposes an obligation upon the broadcaster to refrain from such conduct.[74]

Moreover, the fairness doctrine reinforces the equal time provision because it gives the statute "teeth," requiring equal time for each position, not simply each candidate. The demise of the fairness doctrine and the rise of media conglomerate ownership has virtually eliminated any power the equal time provision had to help disseminate opinions regarding election candidates. The FCC's proposed media ownership rules would further weaken the equal time provision because owners of broadcast television stations would be able to reach more viewers, thereby influencing more voters.

V. FCC'S PROPOSED MEDIA OWNERSHIP RULES AND CONGRESSIONAL RESPONSE

In July 2003, the FCC approved new media ownership rules in accordance with § 202(h) of the Telecommunications Act of 1996, which mandates that the FCC evaluate broadcast ownership rules every two years to ensure the rules remain "necessary in the public interest."[75] The FCC voted to allow one company to own both a newspaper and a broadcast station in any market with nine or more television stations, thereby permitting "cross-ownership."[76] While markets with fewer than four television stations would still not allow "cross-ownership," in-between markets, containing between four and eight stations, would permit cross-ownership but be subject to certain limitations.[77] Simultaneously, the FCC

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candidacy than he could by simply allowing a spot appearance by the candidate himself." *Id.*

74. *Red Lion Broad. Co.*, 395 U.S. at 383. "It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step." *Id.*

75. Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286 (Aug. 5, 2003) [hereinafter Broadcast Ownership Rules].

> The Commission conducts this biennial ownership review within the framework established by section 202(h) of the 1996 Act, which provides: "The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act, section 202(h).

Id. at 46,287.

76. David Ho, *FCC Votes to Ease Media Ownership Rules* (June 2, 2003), *at* http://www.commondreams.org/headlines03/0602-05.htm (last visited Oct. 13, 2003). "Cross-ownership" occurs when a company owns both "a newspaper and a broadcast station in the same city." *Id.*

77. Broadcast Ownership Rules, *supra* note 75, at 46, 355-56.

> (2) In DMAs [Designated Market Areas] to which at least four but not more than eight full-power commercial and noncommercial educational television stations are

relaxed local television ownership rules when it allowed one company to own two television stations in larger markets, and to own three stations in the largest markets like New York and Los Angeles.[78] However, the most far-reaching new regulation would allow one company to own television stations that can reach forty-five percent of all homes in the United States, an increase of ten percent from the prior regulations.[79]

Although these new regulations were scheduled to go into effect on September 4, 2003, the United States Court of Appeals for the Third Circuit stayed the implementation of the new rules.[80] The court determined that the rules would substantially change the current multiple media ownership rules for television, radio, newspapers, and local broadcasting stations.[81] Further, the court found that if it did not grant the stay the FCC's new regulations might irreparably harm the petitioner, while the granting of the stay would not significantly harm the FCC.[82] The court recognized the public interest in the matter, and determined that it was strong enough to warrant a stay until a court completed full judicial

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assigned, an entity that directly or indirectly owns, operates or controls a daily newspaper may have a cognizable interest in either:

(i) One, but not more than one, commercial television station in combination with radio stations up to 50% of the applicable local radio limit for the market; or,

(ii) Radio stations up to 100% of the applicable local radio limit if it does not have a cognizable interest in a television station in the market.

(3) The foregoing limits on newspaper/broadcast cross-ownership do not apply to any new daily newspaper inaugurated by a broadcaster.

(d) National television multiple ownership rule.

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding forty-five (45) percent.

(2) For purposes of this paragraph (d):

(i) *National audience reach* means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

Id.

78. *Id.*

79. *Id.*

80. Prometheus Radio Project v. FCC, 2003 U.S. App. LEXIS 18390 (2003).

81. *Id.* at *2.

82. *Id.*

review.[83]

Additionally, the court recognized the difficulty in predicting the likelihood of success.[84] Even though the court did not indicate the plaintiff's chance of success, it appears more and more likely the court will find for the plaintiff. In part, this is due to Congress's negative reaction to the proposed rules.

Support of the new regulations divides largely but not exclusively along political party lines, as the Republican Party tends to defend the new rules, while the Democratic Party tends to criticize them.[85] In fact, the FCC voted to implement the new rules by a margin of three to two, directly in line with the political party affiliation of its members.[86] Proponents of the new regulations claim that the new rules will allow broadcast media companies to better compete with cable and satellite providers.[87] Critics contend that the new rules will allow large media groups to exert too much control over the opinions viewers see and hear.[88]

Congress reacted swiftly to the new ownership rules, as the Senate passed a resolution rejecting the regulations on September 16, 2003.[89] However, the resolution has no formal legal effect because the House of Representatives has not approved it.[90] Furthermore, even if the House of Representatives does approve the resolution, it faces a possible Presidential veto.[91] Some of the congressional response seemed to center on the lack of public input regarding the new rules.[92] In fact, the FCC held

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83. *Id.* at *3.

84. *Prometheus Radio Project*, 2003 U.S. App. LEXIS 18390 at *3.

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Id.

85. Ho, *supra* note 76.

86. *Id.*

87. *Senate Approves Measure to Undo Media Ownership Regulations* (Sept. 16, 2003), http://www.abcactionnews.com/stories/2003/09/030916media.shtml (last visited Oct. 14, 2003).

88. *Id.*

89. Disapproving Federal Communications Commission Broadcast Media Ownership Rule, S.J. Res. 17, 108th Cong. (2003).

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That Congress disapproves the rule submitted by the Federal Communications Commission relating to broadcast media ownership (Report and Order FCC 03-127, received by Congress on July 10, 2003), and such rule shall have no force or effect.

Id. at S11519.

90. *Senate Approves Measure to Undo Media Ownership Regulations*, *supra* note 87.

91. *Id.*

92. S.J. Res. 17, at S11507. Senator Olympia Snowe recognized that although 700,000

only one official public hearing.[93] In contrast, the two members of the FCC who voted against the new rules traveled across the nation and held public hearings of their own.[94] Then-Senator Tom Daschle stressed the lack of hearings on the new rules,[95] noting that two million people who commented on the FCC's new rules, ninety-nine percent of people opposed them. [96] Senator Barbara Boxer also admonished the FCC's failure to respond to the public interest.[97]

Moreover, Senator John McCain and the other members of the Senate Committee on Commerce, Science & Transportation (hereinafter "Commerce Committee") urged Congress not to support the resolution because the Commerce Committee proposed a comparable bill on June 19, 2003. If passed, the Commerce Committee's bill would change the limits established by the FCC's new rules, and its effects would be similar to the Senate resolution.[98] Although the bill has not been voted on, it would achieve many of the requirements proposed under S.J. Res. 17.[99] The Commerce Committee undertook a very detailed study in support of its proposed bill.[100]

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individuals and groups filed comments opposing the new rules, the FCC held only one public hearing. *Id.*

93. *Id.* at S11506.

94. *Id.* at S11502. These two commissioners were so concerned with the lack of public input that they wanted to gather their own testimony. *Id.*

95. S.J. Res. 17, at S11506. He commented that the hearing was "held 90 miles from Washington, and . . . [the] invited testimony came from industry representatives, many of whom, in fact, live and work inside the Beltway." *Id.* Senator Daschle explained that a field hearing is intended to gather input from the nationwide public, in an attempt to avoid the bias that often infects policies that never leave Washington, D.C. *Id.*

96. *Id.* The negative response to the proposed rules was ignored, as "[o]nly three votes counted – the votes of three commissioners who decided that they knew better than 99 percent of the people who commented on the rules." *Id.*

97. *Id.* at S11512. "The FCC held only one public hearing on these rules. But commissioners and their staff met with just one firm lobbying on behalf of big media more than 30 times." *Id.*

98. Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003, S. 1046, 108th Cong. (2003). "To amend the Communications Act of 1934 to preserve localism, to foster and promote the diversity of television programming, to foster and promote competition, and to prevent excessive concentration of ownership of the Nation's television broadcast stations." *Id.*

99. *Id.*

> The Commission shall not permit any license for a commercial television broadcast station to be granted, transferred, or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, or members, officers, or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in television stations which have an aggregate national audience reach exceeding 35 percent.

Id.

100. John McCain, *Media Ownership* (Oct. 2, 2003), *at* http://commerce.senate.gov/hearings/witnesslist.cfm?id=950 (last visited Feb. 25, 2004).

The Senate's resolution recognizes that the FCC's proposed ownership rules are against the public interest because they allow media conglomerates unprecedented control over the information the public receives. Furthermore, it arguably has seen the adverse effects of the deregulation of the radio industry, and it wants to avoid a similar occurrence in the television industry.[101] However, the impact of the proposed media regulations would be much greater than the impact of radio deregulation because television reaches a wider audience.

VI. DEREGULATION OF RADIO OWNERSHIP AND MARKETS

In March 1996, the FCC changed its rules regarding multiple ownership of radio stations and ownership of local radio stations.[102] The FCC eliminated the rule that governed national ownership of multiple radio stations, in effect allowing a company to own as many stations as it can afford.[103] Before these changes, a company was limited to owning a maximum of twenty-three AM and FM stations nationwide.[104] Now, the local radio ownership regulation allows an increase in the number of commercial radio stations a company can own in a local market.[105] For example, in a market with forty-five or more commercial radio stations, a company can control up to eight stations, with a maximum of five in the same AM or FM service.[106]

In response to the deregulation of radio ownership, Clear Channel Communications, Inc. (hereinafter "Clear Channel") increased its ownership of radio stations from forty-three in 1995 to more than 1,223 in 2003.[107] In fact, Clear Channel claims that deregulation played a big role in rescuing the troubled radio industry.[108] For example, Mark Mays, president and chief operating officer of Clear Channel, claims that in 1993, close to sixty percent of radio stations were operating at a loss.[109] However, in 2001, the radio industry recorded $16 billion in revenues, and

101. *See* discussion *infra* Part VI.
102. FCC Broadcast Radio Ownership, 47 C.F.R. § 73.3555 (2005).
103. *Id.*
104. *Id.*
105. *Id.*
106. 47 C.F.R. § 73.3555.
107. Tim Jones, *Media Giant's Rally Sponsorship Raises Questions*, CHI. TRIB., Mar. 19, 2003, *available at* http://www.chicagotribune.com/news/showcase/chi-0303190157mar19.story (last visited Oct. 15, 2003).
108. *Clear Channel Exec Criticizes Latest New FCC Rules*, BUSINESS FIRST, June 2, 2003, *available at* http://louisville.bizjournals.com/louisville/stories/2003/06/02/daily11.html (last visited Oct. 15, 2003).
109. *Id.*

Clear Channel was responsible for twenty percent of this number.[110]

Although the radio industry appears to be moving in the right direction after deregulation, Mays appears to want more room to expand.[111] Recent FCC proposals failed to eliminate the local radio ownership regulation.[112] In fact, the FCC changed the rule to account for non-commercial stations in a market.[113] The FCC addressed concerns that the rule is unnecessary because the 1996 amendments made the market more efficient and benefited the public interest.[114]

The deregulation of the radio industry proves that the ownership of media by only a few large companies can eliminate opposing viewpoints on a subject. The elimination of the fairness doctrine exacerbates the limited effectiveness of the equal time provision. To illustrate, a media conglomerate like Clear Channel can advocate important public interest issues without broadcasting opposing viewpoints. The reality of having a limited number of voices supports the reinstatement of the fairness doctrine, because the concept of scarcity has returned in a different form. Now, scarcity exists because only a few have access to media that control the ideas that the many receive.

VII. THE FAIRNESS DOCTRINE SHOULD BE REINSTATED

A. Deregulation of Radio Stations Poses a Threat to the Public Interest

Clear Channel owns more than four times as many radio stations as its closest competitor, Cumulus Media.[115] Without the fairness doctrine to ensure that the public will hear opposing sides of an issue, nothing prevents Clear Channel or any other multi-media conglomerate from flexing its broadcasting muscle.[116] The following situation illustrates the detrimental effects of media ownership concentration.[117]

In the spring of 2003, the lead singer of the Dixie Chicks, Natalie

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110. Jones, *supra* note 107.

111. *Clear Channel Exec Criticizes Latest New FCC Rules*, *supra* note 109.

112. Broadcast Ownership Rules, *supra* note 76, at 46,352. The FCC has determined that limiting the amount of radio stations owned in a local market is "necessary in the public interest." *Id.*

113. *Id.* The FCC will now include non-commercial radio stations in the number of stations a company can own in a local market, but the FCC will allow those companies who will be in violation of the new rule to "grandfather" in. *Id.*

114. *Id.* The FCC agrees that consolidation does provide benefits to the radio industry; however, it strives to keep smaller radio owners viable. *Id.*

115. *Treatment of Dixie Chicks by Some Radio Stations Raises Troubling Issues*, ASHVILLE CITIZEN-TIMES, May 2, 2003, *available at* http://cgi.citizen-times.com/cgi-bin/story/editorial/34115 (last visited Oct. 15, 2003).

116. *Id.*

117. *Id.*

Maines, made some disparaging remarks about President George W. Bush concerning the conflict with Iraq.[118] In response to Maines's comments, Cumulus Media, owner of 262 radio stations, prohibited all forty-one of its country stations from playing the Dixie Chicks' music.[119] While Clear Channel did not direct its stations to follow suit, most did so anyway.[120] Although the FCC determined that scarcity no longer necessitated the need for the fairness doctrine, the increase in the number of radio stations does not mean that these stations do not broadcast all viewpoints.[121] In fact, the Dixie Chicks' incident illustrates the manner in which broadcast stations can eliminate viewpoints from the airwaves.[122] The actions of Cumulus Media are a good example of what can happen when the ownership of information outlets is concentrated in a few companies. Consequently, an organization with an agenda could do severe damage without repercussions.[123] Even though there are numerous sources of information available to the public, a resource such as radio should not become the voice of only a few.[124]

Even though the number of radio stations our system can handle without interference is higher today than when the FCC created the fairness doctrine, there are still a limited amount of frequencies available.[125] Since these frequencies are distributed by the FCC, and owned by the public, so they should be operated with the public's interest in mind.[126] Relaxing regulations to the point where a few powerful companies can own a majority of the stations, combined with the fact that the FCC no longer requires stations to broadcast opposing viewpoints, creates a dangerous situation.[127] Since the public owns the airwaves, it has a right to demand that broadcasters operate in the best interest of the public.[128]

B. Proposed Television Ownership Rules are Against the Public Interest

The FCC's proposed media ownership regulations would allow media giants to become more powerful and more financially successful because

118. *Id.*
119. *Treatment of Dixie Chicks by Some Radio Stations Raises Troubling Issues*, *supra* note 115.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Treatment of Dixie Chicks by Some Radio Stations Raises Troubling Issues*, *supra* note 115.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Treatment of Dixie Chicks by Some Radio Stations Raises Troubling Issues*, *supra* note 115.
128. *Id.*

they could purchase more television stations and newspapers.[129] These large companies would not have to promise to provide better news or neutral viewpoints in return for this new ability to control more of the American airwaves.[130] Actually, the new regulations would reduce diversity and competition, thereby allowing fewer people to control what Americans watch.[131] The public interest considerations that guided the FCC in the past have virtually disappeared.[132] For example, the new rules would allow a company to own an Ultra High Frequency (hereinafter "UHF") television station in 199 of the United States' 210 television markets.[133] This equates to owning a television station in every market in every state, excluding California.[134]

In political terms, one company would have a very powerful effect on elections.[135] For example, one corporation can now influence ninety-eight U.S. senatorial elections, 382 congressional elections, forty-nine gubernatorial races and state legislative elections, along with numerous local elections.[136] Similarly, the new regulations would affect the owners of Very High Frequency (hereinafter "VHF") stations, allowing a single company to own a station in every television market in thirty-eight states.[137] Practically, the proposed regulation means that a large media corporation could own the most circulated local newspaper, the number one rated television station, the cable company, and up to eight radio stations in a single market.[138] In contrast, previous regulations prohibited ownership of a television station and a newspaper in the same market.[139] The combination of a market's leading newspaper and television station could monopolize 200 markets that reach ninety-eight percent of Americans.[140] Congress established the FCC to hold the broadcast airwaves in the public interest.[141] However, the FCC no longer requires broadcasters applying for a license to demonstrate a concern for the public

129. Mortimer B. Zuckerman, *Media-merger Ruling Imperils Democracy*, THE DAILY NEWS, July 2, 2003, *available at* http://www.nydailynews.com/news/ideas_opinions/story/97261p-88087c.html (last visited Oct. 16, 2003).

130. *Id.*

131. *Id.*

132. *Id.*

133. Zuckerman, *supra* note 129.

134. *Id.*

135. *Id.*

136. *Id.*

137. Zuckerman, *supra* note 129.

138. *Id.*

139. *Id.*

140. *Id.*

141. Zuckerman, *supra* note 129.

interest through their programming.[142] The lack of controls and the implementation of these new media ownership regulations are not in the best interest of the public.[143]

C. *Media Conglomerates Fail to Follow Broadcast Station Ownership Rules*

A recent merger between General Electric (hereinafter "GE") and Vivendi will bolster GE's already powerful lineup of NBC, CNBC and MSNBC by adding the USA Network, the Trio channel, and the Sci-fi channel.[144] Although ownership of cable television channels is not regulated in the same manner as broadcast stations, the concentration of several stations in the hands of a few creates a potential for oppression of viewpoints.[145] The oligopolistic structure of large media giants creates an even bigger problem when these companies do not follow the FCC's established rules.[146]

Recently, the Center for Public Integrity found that one company owns one-third of the radio stations in forty-three different cities.[147] Although the maximum number of stations that a company is allowed to own is eight stations in one market, large media conglomerates regularly violate this rule.[148] In fact, in thirty-four of the forty-three markets studied, one company owns eight or more stations.[149] For instance, Clear Channel owns over half of the radio stations in Mansfield, Ohio and Corvallis, Oregon.[150] Cumulus Media, the second largest owner of radio stations, controls eight of fifteen broadcast radio stations in Albany, Georgia.[151]

Unfortunately for the public interest, television broadcast companies also violate the established FCC rules as well.[152] With the exception of the biggest markets, a company is only allowed to own one television station in each city.[153] However, in Wilmington, North Carolina, Raycom Media

142. William Safire, *The Great Media Gulp*, N.Y. TIMES, May 22, 2003. The FCC used to require regular reapplication; "now they mail the F.C.C. a postcard every eight years that nobody reads." *Id.*

143. Zuckerman, *supra* note 129.

144. Bill Moyers, *Big Media Gets Bigger* (Oct. 10, 2003), *available at* http://www.alternet.org/print.html?StoryID=16941 (last visited Oct. 17, 2003).

145. *Id.*

146. *Id.*

147. *Id.*

148. Moyers, *supra* note 144.

149. *Id.*

150. *Id.*

151. *Id.*

152. Moyers, *supra* note 144.

153. *Id.*

owns two of the three network stations.[154] Thirty-three other cities across the nation are situated similarly.[155] Companies have used mergers, acquisitions, and takeovers to hide the underlying transactions from the public and the FCC.[156] In fact, mergers between Viacom and CBS, and between News Corp and Chris-Craft, both led to violations of the rule that prohibits a single company's broadcast stations from reaching an audience of more than thirty-five percent of the country.[157] The FCC's response was to give both corporations a temporary exemption from the rule.[158] Therefore, the FCC proposed to raise the television broadcast limit to forty-five percent in 2003, a regulation that is currently under review.[159]

VIII. CONCLUSION

Americans are aware of what happens when the government allows a few large companies to control an entire industry. It is time for society to speak up in order to prevent the same thing from happening to the television industry.[160] Our society now has more channels to choose from, but less diverse viewpoints than in the past.[161] The exponential growth of timely information our society has experienced, along with the advent of cable and the Internet, does not eliminate the necessity for television broadcasters to act in the best interest of the public.[162]

In 2000, more than 100 million American homes had a television, and more than seventy-five million of those homes had more than one television.[163] Of the 100 million homes with a television, more than eighty percent subscribed to cable or another form of satellite broadcasting service.[164] In 2000, viewers had a choice of 281 nationally distributed non-broadcast stations and eighty regional non-broadcast stations.[165]

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154. *Id.*

155. *Id.*

156. Moyers, *supra* note 144.

157. *Id.*

158. *Id.*

159. *Id.*

160. Safire, *supra* note 142. The deregulation of the radio industry has created a system in which three companies own a majority of stations in our country. *Id.* These stations fail to provide adequate news coverage and drive music sales as they see fit. *Id.*

161. *Id.* By allowing the methods we use to communicate to be held in the hands of the few, individuals are experiencing a loss of the community identity and the local values they once knew. Safire, *supra* note 142.

162. *Id.* Many people know that the vast majority of news and entertainment is delivered through the broadcast airwaves and print media. *Id.* Allowing these mediums to be controlled by a few media moguls disserves the many. *Id.*

163. Broadcast Ownership Rules, *supra* note 75, at 46, 293.

164. *Id.*

165. *Id.*

But, just because Americans have a choice does not mean that television stations have the best interest of the public in mind when programming. In fact, the statistics regarding cable television ownership illustrate the reach a giant media corporation can extend over this nation. In order to protect the rights of our citizens, the FCC needs to reinstate the diversity of viewpoint requirement that the fairness doctrine ensured.

Moreover, the proposed broadcast media rules ignore the fact that every broadcast network is an integral part of a vertically incorporated media conglomerate.[166] Through the strategic use of their cable offerings, broadcast station owners have been able to regain between two-thirds and three-fourths of the large market share they once held.[167] For example, the six largest broadcast networks make up nearly seventy-five percent of the television audience, programming expenses, and production budgets, and possess eighty percent of prime time shows.[168]

Broadcast media giants have been gobbling up cable television channels because of their income-earning potential.[169] Additionally, these acquisitions also help big media flex their muscle over advertisers and pay television operators.[170] The result is a return to the "old programming oligopoly."[171] Media giants claim that decreases in viewing audience

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166. Testimony of Mark Cooper, *Media Ownership* (Oct. 2, 2003), *available at* http://commerce.senate.gov/hearings/witnesslist.cfm?id=950 (last visited Feb. 25, 2004).

> The recent acquisition of Vivendi's U.S. entertainment assets by NBC means that all five owners of broadcast networks (CBS, ABC, Fox and Time Warner (WB) in addition to NBC) all own film production, film libraries, TV production and cable networks in addition to their broadcast networks. Four of the five own publishing and theme parks as well.

Id.

167. *Id.*

> The synergies and economic power that result from internalizing production, initial distribution, syndication and repurposing are the hallmark of the television industry in today's multichannel environment. The integration of production and distribution has been reinforced by legal rights that allow the media giants to gain carriage on cable systems, which have enabled the parent corporations of the broadcasters to capture a large share of the non-broadcast video market.

Id.

168. Testimony of Mark Cooper, *supra* note 166. "More importantly, the five owners of the broadcast networks capture virtually 100 percent of the television news audience." *Id.*

169. Martin Peers, *How Media Giants are Reassembling the Old Oligopoly*, WALL ST. J., Sept. 15, 2003.

170. *Id.* Media giants are using this new power to get larger fees from operators carrying their channels and they influence operators into providing service for untested channels. *Id.* Additionally, these providers are discovering new ways to connect promotions and offerings across their various channels. *Id.*

171. Peers, *supra* note 169. "Of the top 25 cable channels, 20 are now owned by one of the big five media companies." *Id.*

necessitates relaxing restrictions.[172] Interestingly, some large cable systems support restrictions on media ownership.[173] However, the large media companies note the recent trend of cable operator mergers.[174] Thus, the two industries are entrenched for an almost inevitable price war.[175]

The economics drives the recent trend in purchasing cable channels.[176] Subscriptions and advertising support cable channels by providing a reliable source of profits.[177] Advertising profits have increased with viewership.[178] Also, cable channels have been able to produce brand-name products for a profit.[179] Cable company profits have had a significant effect on their parent companies' balance sheets.[180] Additionally, companies who own both cable and broadcast stations have an advantage at the bargaining table with cable operators.[181]

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172. *Id.* "The original three broadcast networks now capture only 33.7% of the prime-time television audience, down from 69.3% in 1985-86. Cable now boasts a 49.3% share, compared with 7.5% in the mid-'80s, according to a Cabletelevision Advertising Bureau analysis of data from Neilsen Media Research." *Id.*

173. Peers, *supra* note 169.

> Cox Enterprises, parent of the fourth-biggest cable operator, Cox Communications, has argued that the big broadcasters are abusing protections granted them under federal law. The broadcasters, Cox argues, are using those protections to charge cable systems more for their cable channels. Cox and others have complained to the FCC that media companies make them accept less-popular cable channels in exchange for carrying their broadcast networks.

Id.

174. *Id.* Comcast Corporation's recent merger with AT&T Corporation's cable division helped it gain access to nearly 30% of the houses with cable television. *Id.*

175. Peers, *supra* note 169. Comcast has given cable channels notice that it wants to pay less for programming. *Id.*

176. *Id.* Internet piracy is quickly eliminating the profit margins in the music business, a part of many of these media conglomerates holdings. *Id.* Additionally, reliance on the film industry is dangerous, as a big-budget failure can impact the bottom line of these large corporations. *Id.* "Broadcast television's audience is shrinking, and its business model is entirely dependent on advertising revenue, a cyclical business." *Id.*

177. Peers, *supra* note 169.

> The subscriptions don't come directly from customers, but through cable-TV services, which operate the vast array of wires and pipelines connected to homes, and through satellite-TV services that beam the signal. For the right to carry the programming on their systems, these cable-operating companies pay a range of monthly fees, from 26 cents a subscriber for VH-1 to more than $2 for ESPN. These fees, for the most part, increase every year, providing a steady rising annuity for the channel owners.

Id.

178. *Id.* "Since 1980, cable-channel ad revenue has risen from practically nothing to $10.8 billion in 2002, according to the Cabletelevision Advertising Bureau." *Id.*

179. Peers, *supra* note 169. For example, Nickelodeon is a "merchandising powerhouse, with products including Dora the Explorer backpacks and SpongeBob SquarePants videogames." *Id.*

180. *Id.* MTV expects to make more than $540 million this year, up 10 times from 1989. *Id.*

181. Peers, *supra* note 169.

> A 1992 law allows broadcasters to regularly renegotiate the price for carrying TV stations'

Importantly, the equal time provision neither applies to cable television nor to "a bona fide news interview, a bona fide news documentary or to on-the-spot coverage of bona fide news events."[182] Taken together with the cable television statistics, this presents a particularly daunting reality for political elections. For example, a media mogul's decision to support a political candidate could easily affect the results of an election by highlighting one candidate and making the others look unappealing. In fact, the cable station owner could give the candidate he supports unlimited use of the airwaves, and would not have to give the other candidates equal time because the station is not a broadcast station. This is similar to what happened during John Kennedy's congressional campaign, as a certain media company refused to run the other candidate's advertisements.[183]

Furthermore, this would not even require the type of behavior mentioned in *Red Lion*.[184] In that case, the Court posited that a radio station could support a candidate to the exclusion of other candidates as long as it did not allow an appearance by the candidate himself.[185] While this behavior would not have triggered the equal time provision, it would have been in violation of the fairness doctrine.[186] Today, in the absence of the fairness doctrine, a radio station could engage in such behavior and would not have to allow the other candidate or his supporters time to respond. Although the FCC justifies this by saying that scarcity is no longer an issue, one company often monopolizes the radio airwaves in several cities. This evidences that the revival of the fairness doctrine is in the best interest of the public.

Technology has made the scarcity of airwaves no longer an issue since the FCC can now assign more channels to broadcasters than it could in the past. However, political affiliation does not determine the distribution of

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signal on cable. While broadcasters could charge a cash fee, they usually offer the broadcast stations free in exchange for carrying a new cable channel they've launched. Few viewers would subscribe to cable if ABC, CBS or NBC weren't on the channel line-up, so the cable operators have little leverage.

Id.

182. 47 U.S.C. § 315 (2003).

183. *See How Joe Made His Son President, at* http://www.ytedk.com/jfk.htm (last visited Feb. 27, 2003).

For example, William Randolph Hearst, who owned the *Boston American* newspaper, had one of his reporters check in at Jack's headquarters every day. No other candidate got such special attention. Joe also got Hearst to ignore Jack's opponent Michael Neville, the mayor of Cambridge, and the paper would not accept his advertising.

Id.

184. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 382-83 (1969).

185. *Id.*

186. *Id.* at 383.

broadcast licenses and cable television stations. Therefore, those with the most financial resources will be in the best position to control what Americans view. It is extremely important that society preserve the protections granted under the First Amendment, but it is vital to the public interest that broadcast stations present all sides of controversial issues. Unfortunately, the current system does not guarantee this result.

It is vital that Americans recognize that media ownership rules are based on the right of free speech granted by the First Amendment.[187] However, the proposed media ownership rules' restricted approach strays from the First Amendment theme that has run throughout the history of broadcasting.[188] All ideas may not be equally important, but a democratic society thrives on the fact that citizens have an equal chance to present their ideas.[189] The independence of newspapers and television outlets is a way to guarantee the dissemination of opposing opinions throughout the country, and the FCC must maintain this autonomy.[190] It is not in the best interest of the public to allow television mergers in highly concentrated

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187. Testimony of Mark Cooper, *supra* note 166.

> For over sixty years the Supreme Court has expressed a bold aspiration for the First Amendment in the electronic age that rests on two fundamental principles. First, the Court has declared that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Second, broadcast licenses, which create powerful electronic voices, especially for television, are scarce . . . . Therefore, the Supreme Court has repeatedly concluded that there is no "unabridgeable right to hold a broadcast license where it would not satisfy the public interest."

Id.

188. *Id.*

> Instead of accepting the challenge of the Supreme Court's bold aspiration of the First Amendment to promote the "widest possible dissemination of information from diverse and antagonistic sources," the FCC has adopted the narrowest version possible. It has declared that it is concerned only with ensuring that ideas can leak out and avoiding "the likelihood that some particular viewpoint might be censored or foreclosed, i.e. blocked from transmission to the public." If the distribution of media ownership undermines a robust exchange of views, the FCC is unconcerned, declaring: "Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions . . . nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing."

Id.

189. Testimony of Mark Cooper, *supra* note 166.

> There is a grass roots rebellion growing against the media concentration that these rules would spawn because the narrow view of the First Amendment adopted by the Commission is offensive to the traditions of vibrant civic discourse that the American people have always embraced. The rules violate the basic tenets on which our democracy stands and on which it has thrived.

Id.

190. *Id.* "Preserving the institutional independence, competition and antagonism between newspapers and television in every city in America is one of the most critical ways to ensure a robust exchange of views." *Id.*

markets; the FCC cannot justify supporting a society where media giants own up to three stations in a single market.[191]

Hence, the FCC needs to revisit the fairness doctrine. It is possible that the doctrine will differ significantly from its original form, but society must ensure that broadcast stations allow the public to hear every side of an argument. The numerous information sources we have today do not ensure the presentation of all views on an issue. The FCC is under the impression that people will be able to access each viewpoint because of the almost unlimited sources of information in the country. While this is a practical theory, it is not realistic because if viewpoint begins to control a majority of the sources used, its philosophies would be more prevalent than the opinions of the opposing party. Thus, it is clear that regulation is needed and is required in the best interest of the public.

191. Testimony of Mark Cooper, *supra* note 166. "When hundreds of millions of Americans who would want a license cannot hold even one, it is difficult to justify allowing media conglomerates to own two, not to mention three in the same market." *Id.*