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EQUALITY, FAIRNESS AND 315: THE FRUSTRATION OF DEMOCRATIC POLITICS

By HARRY R. BLAINE*

*"In the house of breathings lies that word, all fairness."***

INTRODUCTION

In August of 1960, section 315(a) of the Communications Act of 1934¹ was suspended for the then forthcoming Presidential and Vice Presidential campaigns.² The immediate results of this action were the so-called great debates

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** Joyce, *Finnegan's Wake*.

¹ If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any:

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315(a) (Supp. IV, 1963).

See generally, Friedenthal and Medalie, *The Impact of Federal Regulations on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445 (1959).

² Pub. L. No. 86-677, 74 Stat. 544 (August 24, 1960) provides that it be:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That that part of section 315(a) of the Communications Act of 1934, as amended, which requires any licensee of a broadcast station who permits any person who is a legally qualified candidate for any public office to use a broadcasting station to afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, is suspended for the period of the 1960 presidential and vice presidential campaigns with respect to nominees for the offices of President and Vice President of the United States. Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest."

between Presidential aspirants Kennedy and Nixon,³ and the virtual blackout of minority party candidates.⁴ Hailed by broadcasters and politicians alike,⁵ the suspension actually increased television network sustaining time in the 1960 campaign,⁶ and thus lent credence to a long time industry claim that section 315 had, in actuality, contributed to the frustration of democratic politics.⁷

Public Law No. 86-677, the suspension of equal time amendment, was the penultimate stage in a long series of attacks upon section 315.⁸ Unsuccessful only insofar as they failed to receive permanent and complete relief from section 315,⁹ broadcasters have self-admittedly "proved that they can handle the freedom they asked for,"¹⁰ and have

³ These debates, four in number, appeared on September 26, 1960, from 9:30-10:30 p.m. — NYT, Oct. 7, 1960, from 7:30-8:30 p.m. — NYT, Oct. 13, 1960, from 7:30-8:30 p.m. — NYT, and Oct. 21, 1960, from 10:00-11:00 p.m. — NYT, Broadcasting, Nov. 7, 1960, p. 29.

⁴ *Hearings Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess., ser. 24, 112, 113 (1961). [hereafter cited as 1961 *Hearings*].

⁵ Broadcasting, Oct. 10, 1960, p. 33.

⁶ Total sustaining time on three major television networks (ABC, CBS, NBC) increased from 29:38 to 39:22. 1961 *Hearings* 113.

⁷ See the statement of Mr. David Sarnoff of NBC in *Hearings Before the Communications Subcommittee of the Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 125-26 (1959). [hereafter cited as 1959 *Hearings*]:

"We believe that the basic principle underlying the equal time provision is to insure the people of a fair, balanced presentation of the political facts and arguments they need to know to govern themselves.

"Certainly, that principle cannot be served by discouraging such presentations altogether. Yet that has been the historic effect of Section 315.

"It has been a deterrent rather than a stimulant; it has clogged the political pump it was intended to prime. . . .

"It is patently in the public interest for broadcasters to offer appropriate [free] time for talks by the major party candidates for President and Vice President. But if they do, Section 315 requires them to give every other candidate for these offices equal time.

"In 1956 that would have meant equal time for those fifteen-odd candidates as well as their running mates.

"In 1956, the aggregate of all minor party candidates barely exceeded one per cent of the total popular vote. Yet if we were to observe Section 315, these candidates would occupy far more air time than the candidates of the two major parties.

"To require hour upon broadcast hour to be devoted to the quixotic antics of little-known candidates; to require this so that the public might listen for just one hour to the candidates in whom they are really interested, is, in my opinion, a miscarriage of common sense and a disservice to the public.

"Such an exercise in tedium might well destroy public interest in listening even to the major candidates."

⁸ See 1959 *Hearings*, *supra* note 7. See also Salant, *Political Campaigns and the Broadcaster*, in 8 Public Policy 336 (Friedrich and Harris ed., 1958), Broadcasting, Oct. 15, 1956, p. 88, March 23, 1959, p. 130, May 25, 1959, pp. 58, 62.

⁹ See Broadcasting, May 25, 1959, p. 58.

¹⁰ *Id.*, Oct. 10, 1960, p. 33.

pushed, more or less successfully, for suspension privileges in the 1964 Presidential and Vice Presidential campaigns.¹¹ The major argument against suspension, "that broadcasters cannot be counted on to deal fairly with candidates,"¹² was effectively argued against by the industry before the fact,¹³ and in retrospect seemed to be a groundless fear;¹⁴ apparently, only the minority parties suffered,¹⁵ and these, it would seem, are no longer considered relevant to democracy in America.¹⁶

EQUALITY AND FAIRNESS: 1927-1959

Section 315 of the Communications Act of 1934 was a holdover from the Radio Act of 1927.¹⁷ Although apparently designed more to insure a candidate's right to speak than the public's right to listen,¹⁸ section 315 and its counterpart in the area of public interest, the fairness doctrine,¹⁹ have become, in the hands of the Federal Communications Commission, the front line of defense of the public interest in the right to hear divergent points of view.²⁰ Originally separate, these concepts in political broadcasting were fused in the 1959 amendment to the original section 315.²¹ That amendment was the culmination of two long, and superficially distinct series of events, one series dealing with section 315 and the equality doctrine, the other

¹¹ *The Wall Street Journal*, Friday, May 8, 1964, p. 1, col. 3. See also Broadcasting, Nov. 25, 1963, p. 66.

¹² Broadcasting, May 25, 1949, p. 62.

¹³ See *Id.*, June 6, 1960, p. 82.

¹⁴ At least where the two major parties were concerned. See 1961 *Hearings* 113.

¹⁵ See the statement of Mr. Eric Haas: "When a democratic society curtails the right of minority candidates to be heard, and to be heard on equal terms with major party candidates, it ceases to be democratic." *Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce on S. 2814*, 87th Cong., 2nd Sess. 200 (1962). [hereafter cited at 1962 *Hearings*].

¹⁶ Thomas H. Eliot has argued that this is because Americans have reached a consensus so broad that there is no need for minority parties. ELIOT, *GOVERNING AMERICA* 277-79 (1964).

¹⁷ 1 Pike and Fischer Current Service 10:99.

¹⁸ See the speech of Senator Howell: "We furthermore provide in this bill that if one candidate was allowed to address his constituency his opponent should be allowed to make addresses also, and if all could not have this privilege, then no one should have the privilege." 67 Cong. Rec. 12504 (1926).

¹⁹ See generally Barron, *The Federal Communications Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1 (1961).

²⁰ Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 707 (1964). *Report of Editorializing by Licensees*, 1 R.R., pt. 3, 91:201, 204 (1949).

²¹ 73 Stat. 557 (1959), 47 U.S.C. § 315(a) (Supp. IV, 1963). See generally Note, *Radio and Television Appearances of Candidates for Office: Amended Section 315 of the Communications Act*, 69 YALE L.J. 805 (1960).

with the series of decisions and rulings that constitute the fairness doctrine.

The first attempt to invoke section 315 came in 1936 when station WCAE in Pittsburgh, Pennsylvania, refused to broadcast a radio address by Earl Browder, the Presidential nominee of the Communist Party.²² Since that time, the Commission has had opportunity to lay down a comprehensive body of law dealing with the broadcast of political speeches.

Prior to the 1959 *Lar Daly* decision,²³ there were only two exceptions to the concept of use²⁴ by a legally qualified candidate.²⁵ The first was the *Blondy* decision,²⁶ which exempted the appearance of candidates on regularly scheduled newscasts where the candidates had in no way initiated the filming or the presentation by the station. The second was the CBS decision of 1956,²⁷ which exempted a report to the people by the President of the United States. Section 315 applies at every electoral level²⁸ and to both primary and general elections,²⁹ forbids censoring of candidates' statements,³⁰ and confers immunity upon the broadcaster against libel suits based on section 315 speeches.³¹

²² N.Y. Times, Sept. 4, 1936, p. 24, col. 5. See generally: note, *Communication Act — §315 — Censorship — Equal Facilities for Political Candidates*, 7 AIR L. REV. 313 (1936).

²³ CBS, Inc., 18 R.R. 238 (1959).

²⁴ Apparently any appearance before camera or microphone is considered to be a use. See 69 YALE L.J. 805, 806 (1960).

²⁵ The Commission's rules define this term as:

"[A]ny person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state, or national, and who meets the qualifications presented by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who —

- (1) Has qualified for a place on the ballot or,
- (2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and
 - (i) Has been duly nominated by a political party which is commonly known and regarded as such, or
 - (ii) Makes a substantial showing that he is a bona fide candidate for nomination of office as the case may be."

Sections 3.190, 3.290, 3.590, 3.657, as listed in 11 R.R. 1507 (1954). For an account of state requirements, see Note, *Legal Obstacles to Minority Party Success*, 57 YALE L.J. 1276 (1948).

²⁶ Letter to Allan H. Blondy, 14 R.R. 1199 (1957).

²⁷ Letter to CBS, 14 R.R. 722 (1956).

²⁸ See note 5, *supra*.

²⁹ KWFY, Inc., 4 R.R. 885 (1948). However, the Commission has ruled that a station need not grant equal time to a minor party candidate even though time has been made available to major party candidates in a primary election. Arnold Peterson, 11 R.R. 1507 (1954).

³⁰ See note 1, *supra*.

³¹ *Farmers Educational and Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525, 531 (1959).

Early in 1959 the Commission virtually abandoned the position taken in the *Blondy* decision. In the *Lar Daly* case, the Commission held that the use of film clips showing Democratic and Republican candidates for the office of Mayor of Chicago, Illinois, was a use within the meaning of the statute and ordered that equal time be made available to Lar Daly, a perennially unsuccessful candidate in municipal, state and national elections.³²

The fairness doctrine originated in a 1941 decision of the Federal Communications Commission.³³ In this case, the Commission held that (1) a broadcaster cannot be an advocate and (2) when public issues are discussed, all shades of opinion must be presented equally.³⁴ The next step in the evolution of the fairness doctrine, the *Scott* case,³⁵ held broadcasters to a high degree of responsibility in controversial issues programming, setting the width and breadth of the First Amendment as the test of the public interest requirements of the statute.³⁶ Following the *Scott* decision, the Commission, in *Blue Book*,³⁷ regularized the requirement of fairness, stating that (1) the public interest requires that adequate amounts of time be set aside for discussion of public issues and (2) the Commission would appraise the amount of time devoted to the discussion of public issues in determining whether or not a licensee has served the public interest.³⁸

In 1949, the Commission issued the *Report on Editorializing by Licensees*,³⁹ reversing the trend of the *Mayflower Broadcasting Corp.* decision,⁴⁰ by stating that editorializing was permissible.⁴¹ The Commission retained the *Scott* and *Blue Book* doctrines, however, in demanding that broadcasters make time available for "expositions" of various positions taken by responsible groups.⁴²

The 1959 amendment to section 315, by its specific exemption of newscasts, bona fide interviews, documentaries and news events from the equal time requirements,⁴³ reversed the Commission application of the equality doctrine as embodied in the *Lar Daly* decision. The amendment

³² CBS, Inc., 18 R.R. 238 (1959).

³³ *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941).

³⁴ 8 FCC 333, 340 (1941).

³⁵ Robert H. Scott, 3 R.R. 259 (1946).

³⁶ *Id.*, at 261-63.

³⁷ FCC Public Notice 95462 (March 27, 1946).

³⁸ *Id.*, at 40.

³⁹ 1 R.R., pt. 3, 91:201 (1949).

⁴⁰ 8 FCC 333 (1941).

⁴¹ *Id.*, at 91:207.

⁴² *Id.*, at 91:206.

⁴³ See note 21, *supra*.

sustained and endorsed, however, the Commission's fairness doctrine as outlined in the *Report on Editorializing by Licensees*.⁴⁴ Finally, in 1963, at the behest of the Senate Subcommittee on Freedom of Communication,⁴⁵ the Commission issued a Public Notice,⁴⁶ which broadened the fairness doctrine by applying four specific decisions⁴⁷ to the broadcasting industry in general.

An explicit part of the fairness doctrine is the area dealing with sustaining time for political broadcasts. The fairness doctrine only comes under review at the time of an application for license renewal;⁴⁸ if a station has provided no sustaining time for political broadcasts, this will weigh against it when the Commission considers the application.⁴⁹

1960: THE SUSPENSION OF EQUAL TIME

Early in 1960, Congress considered legislation designed to provide free television network time to all presidential parties who had polled over four per cent in the previous general election.⁵⁰ A combination of factors made this bill

⁴⁴ See note 39, *supra*, and Note, *Radio and Television Appearances of Candidates for Office: Amended Section 315 of the Communication Act*, 69 YALE L.J. 805, 812 (1960).

⁴⁵ 108 Cong. Rec. 7006 (1962).

⁴⁶ FCC Public Notice 63-674, (July 26, 1963), provides that:

"A broadcast licensee has an affirmative obligation to afford reasonable opportunity for the presentation of contrasting viewpoints on any controversial issue which he chooses to cover. If a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, with a specific offer of his station's facilities for an adequate response. When a licensee permits the use of his facilities by a commentator or any person other than a candidate to take a partisan position on issues involved in a political campaign or to attack one candidate or to support another by direct or indirect identification, he must immediately send a transcript of the pertinent continuity in each such program to each candidate concerned and offer a comparable opportunity for an appropriate spokesman to answer his broadcast. When a licensee permits the use of his facilities for the presentation of views regarding an issue of current importance such as racial segregation, integration, or discrimination, he must offer spokesman for other responsible groups within the community similar opportunities for the expression of the contrasting viewpoints of their doctrine. For the purpose of the fairness doctrine it is immaterial under what particular label or form a point of view is expressed."

⁴⁷ Times-Mirror Broadcasting Co., 24 R.R. 404 (1963); Clayton W. Maypoles, 23 R.R. 586 (1962); Billings Broadcasting Co., 23 R.R. 951 (1962); WBNX Broadcasting Co., Inc., 4 R.R. 242 (1948).

⁴⁸ Robert M. McIntosh, 20 R.R. 55, 56-57 (1960).

⁴⁹ *Ibid.* See also *Farmers Coop. v. WDAY*, 360 U.S. 525, 534 (1959); *Homer P. Rainey*, 3 R.R. 737, 742-43 (1947). But see *Port Huron Broadcasting Co.*, 12 FCC 1069 (1948).

⁵⁰ S. 3171, 86th Cong., 2nd Sess. (1960). See generally, *Hearings on S. 3171 Before The Communications Subcommittee of the Senate Committee On Interstate and Foreign Commerce*, 86th Cong., 2nd Sess. (1960). [Hereinafter cited as 1960 *Hearings*.]

fail: the Republican desire to avoid legislative compulsion⁵¹ which balanced the Democratic party's need to gain free air time to bolster their depleted finances;⁵² industry pressure which was brought to bear against any statutory requirements of free time;⁵³ the ability of the industry to agree upon a series of programs to be carried on sustaining time prior to the election which tipped the scales in favor of a suspension of section 315 for the purposes of the Presidential and Vice Presidential campaigns.⁵⁴

Although students of mass communication differ as to the impact of mass media upon the individual voter,⁵⁵ the statistics dealing with the Kennedy-Nixon debates are impressive. As reported by *Broadcasting* magazine, the debates drew an average viewing audience of over sixty-seven million persons.⁵⁶ According to polls conducted by Sindlinger and Company of Philadelphia, Pennsylvania, as reported in *Broadcasting*, both votes and attitudes were changed by the debates.⁵⁷ And, although the sustaining time coverage of major party candidates on television networks doubled, as compared to the 1956 election,⁵⁸ the total charges for political broadcasts remained approximately the same,⁵⁹ thus insuring that, in terms of network coverage at least, the 1960 elections were more fully reported than those in 1956.⁶⁰

In addition, an "unusual increase in voter interest,"⁶¹ culminating in a record vote in 1960,⁶² was attributed by industry spokesman to the use of the great debate format which the suspension had made possible. Of great interest too was the report that the debates had a holding power⁶³

⁵¹ N.Y. Times, Aug. 12, 1960, p. 18, col. 3.

⁵² 1960 *Hearings* 179-82. See also *Broadcasting*, May 23, 1960, p. 76.

⁵³ See *Broadcasting*, March 21, 1960, pp. 48, 74.

⁵⁴ See *Id.*, May 23, 1960, p. 72.

⁵⁵ See KLAPPER, *THE EFFECTIVENESS OF MASS COMMUNICATION* 53-56 (1960).

⁵⁶ *Broadcasting*, Nov. 7, 1960, p. 29. Of course, the debates enjoyed a virtual blackout of competition, with an average of 470 network affiliated stations out of 491 carrying the debates. 1961 *Hearings* 116.

⁵⁷ According to these polls, 31.2 per cent of those who viewed the debates wanted Kennedy to win, prior to the first debate; 39.3 per cent wanted Nixon to win. After the fourth debate, the percentage favored Kennedy, 40.5 to 38.1. Additionally, although viewers favored Nixon 37.3 per cent to 23.4 per cent when asked who they thought would win, by the fourth debate, the percentages favored Kennedy, 33.0 to 29.1. *Broadcasting*, Nov. 7, 1960, pp. 28-9.

⁵⁸ The actual increase was from 18:68 to 37:47. 1961 *Hearings* 113.

⁵⁹ Actually, total network charges for 1960 decreased from \$2,930,514.00 to \$2,927,235.00. 1961 *Hearings* 113.

⁶⁰ H.R. Rep. No. 359, 88th Cong., 1st Sess. 2 (1963).

⁶¹ See *Hearings* 39.

⁶² *Ibid.*

⁶³ "Holding power" may be defined as that per cent of the original viewing audience that is still viewing a program at its completion.

of eighty-eight percent, as compared with hour long entertainment programs' average of seventy-seven percent, and *CBS Report's* sixty-seven percent.⁶⁴ Perhaps the most stirring testimonial for the debates was given by President Kennedy, who claimed that they had, in fact, won the election for him.⁶⁵

Of course, there were those who saw in the debates something less than the finest hour of our civilization. Minority political parties were naturally opposed to the virtual suppression of their candidates' point of view;⁶⁶ moreover, both scholars⁶⁷ and commentators⁶⁸ argued that the debates were less than desirable. Despite these criticisms, however, Congress pressed forward, with six proposals being offered in the Senate alone, all pointing toward complete elimination or partial restriction of section 315.⁶⁹ Barring unforeseen accident, it appears certain that there will be a suspension of section 315 for the Presidential and Vice Presidential campaigns of 1964.⁷⁰ The status of a debate format is as yet uncertain as President Johnson has not yet seen fit to commit himself to that type of television campaign.⁷¹ Both politicians and the broadcasting industry are agreed, however, that a suspension of equal time for the 1964 Presidential and Vice Presidential campaigns is desirable.⁷²

⁶⁴ 1961 *Hearings* 46.

⁶⁵ Broadcasting, Nov. 14, 1960, p. 29.

⁶⁶ As demonstrated by their testimony before various House and Senate Committees. See generally 1959 *Hearings*, 1961 *Hearings*, 1962 *Hearings*.

⁶⁷ Commager, *Washington Would Have Lost a TV Debate*, N.Y. Times, Oct. 30, 1960 (*Magazine*), p. 13.

⁶⁸ Shayon, *TV and Radio: Another Viewpoint*, 44 *Sat. Rev.* 33 (Jan. 7, 1961).

⁶⁹ *Hearings Before the Communications Subcommittee of the Senate Committee on Commerce*, 87th Cong., 2nd Sess. 5-7. These bills restricted or eliminated Section 315 as follows:

- S. 204: would exempt the President and Vice President from Section 315.
- S. 2035: would exempt the President and Vice President, United States Senator, Representative and Governor of any State from Section 315.
- S. 3434: would exempt all candidates for public office from Section 315.
- S.J. Res. 193: would exempt the President and Vice President from Section 315 for period of the 1964 election.
- S.J. Res. 196: would exempt Senators and Representatives from Section 315 for period of the 1962 election.
- S.J. Res. 209: would exempt Senators, Representatives, and Governors from Section 315 for the period of the 1962 election, and the President and Vice President for the period of the 1964 election.

⁷⁰ See note 11 *supra*, and accompanying text.

⁷¹ Broadcasting, Feb. 24, 1964, p. 78; Also, *The Coming Attack on Lyndon Johnson*, 273 *Sat. Even. Post* 15 (Mar. 28, 1964); Broadcasting, May 11, 1964, pp. 54-55.

⁷² Broadcasting, May 11, 1964, pp. 54-55.

THE FRUSTRATION OF DEMOCRATIC POLITICS

The broadcasting industry has advanced two major arguments against the continued operation of section 315: (1) that the industry cannot afford equal time on a sustaining basis for all candidates⁷³ and (2) that oversaturation of the public by political broadcasts will destroy interest in politics.⁷⁴ Both arguments have, it would seem, enough truth in them to lend support for industry demands of relief from section 315. An hour of prime evening time on television networks sold, for example, during the 1960 Presidential campaign, for a network average of \$123,550.00.⁷⁵ It has been estimated that, in 1952, it would have cost CBS alone a total of \$10,500,000.00 to have provided one-half hour of prime time for each of the Presidential and Vice Presidential candidates.⁷⁶ Even though the industry is making record profits,⁷⁷ this is a considerable burden for them to bear. In addition, television audiences, the great debate notwithstanding, are not enthusiastic viewers of political broadcasts.⁷⁸

These arguments are not, however, altogether convincing.⁷⁹ The first, for example, has been countered by Mr. Nathan Karp in testimony before a Congressional Committee: "It would seem a small enough inconvenience for them [broadcasters] to suffer in return for the privilege and opportunity they have been granted to exploit the public air waves for their private profit."⁸⁰ It would appear also that industry estimates of minority-candidate demands for free time have been grossly exaggerated.⁸¹ Finally, in light of the increase in television network sustaining time in 1960 as compared to the 1956 campaign,⁸² it is difficult

⁷³ Salant, *Political Campaigns and the Broadcaster*, 8 Public Policy 336, 340-41 (Friedrich and Harris Ed. 1958). That time must be free if it is to be equal is well illustrated by the experience of the 1960 Presidential campaign. There all parties excluding the Democratic and Republican, spent \$400,000.00 for political broadcasts, as compared to a total of \$14,250,000.00 spent by the two major parties. 1961 *Hearings* 112.

⁷⁴ See note 7, *supra*.

⁷⁵ Ranging from ABC-TV's low of \$110,770.00 per hour to CBS-TV's high of \$130,000.00. Broadcasting, March 21, 1960, p. 76.

⁷⁶ Salant, *op. cit. supra*, at 341-2.

⁷⁷ Broadcasting, Sept. 23, 1963, p. 35.

⁷⁸ It has been claimed, for example, that a political broadcast of even five minutes duration decreases the normal viewing audience of the following program by 15 per cent. Salant, *op. cit. supra*, at 340.

⁷⁹ See note 65, *supra* and accompanying text.

⁸⁰ 1959 *Hearings* 278-79.

⁸¹ For example, in 1960 while the Democratic and Republican candidates requested over 266 hours of television sustaining time (of which 17:32 was refused), minority party candidates requested only 30 hours (of which 10:47 was refused). FCC, *Survey of Political Broadcasting*, Table 15 (1961).

⁸² See note 6, *supra*.

to understand the industry's contention that they cannot afford section 315.

The second industry argument, public dissatisfaction with political broadcasts, is, on its face, more difficult to counter. Undoubtedly, political broadcasts, generally speaking, have an adverse effect upon a network's holding power.⁸³ Moreover, this is true of most controversial issue programming.⁸⁴ However, unless the industry argues that profits are the exclusive aim of the media,⁸⁵ it would appear to be a matter of judgment as to how much political programming an audience will accept: while the industry presumably has expertise in this area, considerations of the nature of a democratic society would appear to be more relevant.

The continued existence of democracy depends upon liberty of thought and discussion.⁸⁶ As Mill has stated, "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."⁸⁷ That this is the theory underlying American democracy is well illustrated by the dissenting opinion of Mr. Justice Holmes in *Abrams v. United States*.⁸⁸

The Federal Communications Commission has indicated that this theory lies at the heart of the fairness doctrine. In the *Report on Editorializing by Licensees*, the Commission stated that:

⁸³ See note 77, *supra*. But see, White:

"The broadcasters failure to adopt this [better] method leaves room for the suspicion that some of them may have hoped that the very dullest and clumsiness of the forum type of program would soon be eliminated. The technique has become alarmingly common in radio: one does the sort of thing he does not understand but feels compelled to do in order to mollify the F.C.C. (or his more literate critics); he does it as badly as possible and the Hooper ratings are low; so he turns to his critics with a triumphant 'You see, the people just don't want it.'"

WHITE, *THE AMERICAN RADIO* 215 (1947).

⁸⁴ KLAPPER, *op. cit. supra*, at 38-43.

⁸⁵ To my knowledge, no industry spokesman has gone to this extreme.

⁸⁶ MILL, *On Liberty*, in *THE ENGLISH PHILOSOPHERS FROM BAACON TO MILL*, 949, 960-91 (Burt, ed., 1939).

⁸⁷ *Id.* at 961.

⁸⁸ 250 U.S. 616, 630 (1919):

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution."

If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities over and beyond their obligation to make available on demand opportunities for the expression of opposing views.⁸⁹

All speech, however controversial, is not equally valuable for the preservation of democratic rights. Political speech⁹⁰ is "instrumentally crucial in the defense and expansion of the whole range of actual and potential human rights." Democracy postulates that political decisions are influenced by the pressure of differing opinions. So long as freedom of political speech exists, there is an opportunity for all political groups to be heard and to vindicate their demands. As long as free speech exists on political matters, freedom of expression on all other subjects exists as well.⁹¹

Freedom of speech on political matters, in the sense of freedom from governmental restraint, while still necessary, is no longer sufficient to preserve democratic freedom. In contemporary mass society,⁹² political propaganda can no longer depend upon the technique of face to face contact.⁹³ Propaganda is conducted by and through the mass communication media.⁹⁴ As Karl Lowenstein has argued:

In our pluralist society the Leviathan speaks with many voices. He who speaks loudest, longest, and at the most convenient hours of radio and television reception has for his message the ear of the greatest number of potential customers. He who fries the political bacon with the most appetizing smell carries it home. Or, to paraphrase the geopolitical law of Sir Harold MacKinder: he who controls the mass communications

⁸⁹ *Report on Editorializing by Licensees*, 1 R.R., pt. 3, 91:201, 206 (1949).

⁹⁰ Political speech may be defined as verbal expression dealing with or bearing on political phenomena. BAY, *THE STRUCTURE OF FREEDOM* 137 (1958).

⁹¹ *Id.* at 136-39.

⁹² See generally, KORNHAUSER, *THE POLITICS OF MASS SOCIETY* (1959).

⁹³ LEOWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* 338 (1957).

⁹⁴ *Ibid.*

media controls the electorate; he who controls the electorate controls the political process.⁹⁵

The political philosophy of the founding fathers dictated that liberty was attainable only through the absence of governmental restraint.⁹⁶ This view of liberty engenders two complementary but outmoded hypotheses: that individual liberty increases as governmental power decreases and that government is the sole enemy of liberty.⁹⁷ This point of view is persuasively argued against by Franz Neumann:

The theoretical falsity of the statement that liberty decreases with the increase of governmental intervention is obvious, since the term 'intervention' neither indicates its purpose nor the interests against which intervention is directed. The connection between the two situations is a political-historical one, requiring analysis of each concrete situation, for it is undeniable that a minimum of intervention — the maintenance of 'law and order' — is always indispensable to the preservation of individual rights, so that the very existence of the state is a precondition for their exercise.

This, in turn, is closely tied up with the second implication of the formula liberty versus government, namely that the state is the sole enemy of liberty. That this is fallacious reasoning should be obvious from the fact that private social power can be even more dangerous to liberty than public power. The intervention of the state with respect to private power positions may be vital to secure liberty.⁹⁸

Neumann further delineates three types of civil rights, which as restraints upon power are necessary for the preser-

⁹⁵ *Id.* at 340.

⁹⁶ *Board of Education v. Barnette*, 319 U.S. 624, 639-40 (1943).

⁹⁷ NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 177 (1957).

⁹⁸ *Id.* at 177-78. Arthur S. Miller, in an article on constitutional law, advanced much the same argument. Miller argues, basically, that power is diffused in the United States. The state, while probably the most powerful, is not necessarily the dominant member of large group of power holders, which includes corporate enterprise, labor and farm organizations, veterans legions, charitable foundations and others. Given this wide dispersion of power, the most pressing problem of constitutional law is the relationship of the state and the individual to other centers of power. Miller's basic proposition is, that governing power, wherever located, should be subject to the fundamental constitutional limitations of due process of law. The Constitution in his opinion, should be construed to apply to all arbitrary applications of power against individuals by centers of private government. Miller, *The Constitutional Law of the Security State*, 10 *STAN. L. REV.* 620, 625-26, 662-63 (1958). See also, MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* (1959).

vation of freedom in a democracy: personal, societal, and political. The first two rights are inherent in the nature of man, while the third is derived from the nature of the political system. Personal rights are those whose validity is bound solely to man as an isolated individual: they are not dependent upon changes in the economic, social, or political structure. Societal rights are those which are exercised in relation to other members of society: they are specifically rights of communication. Personal rights, while they are ends in themselves, are also ancillary to societal rights: without security of person, there can be no communication.⁹⁹

Since personal rights are independent of socio-economic change and political expediency, there is an indispensable minimum which is the right of every individual. This minimum, however, is decreasing because of the application of socio-economic sanctions to the individual. In addition, societal rights are jeopardized by the economic imbalance existing in modern society. Only intervention by the state can restore a balance of social forces necessary for the continued operation of civil rights.¹⁰⁰

These arguments are directly applicable to the problem of equal time for political candidates. Freedom of political speech is necessary for the continued existence of democracy. The free play of all ideas in the market place is (or should be) the primary concern of all those interested in the preservation of democracy. And, given the nature of modern society, only government can preserve this vital freedom. Given this view of democracy, it is the duty of the state to foster minority views in the face of both majority apathy and hostility,¹⁰¹ and against action by private power groups such as the broadcasting industry.¹⁰²

⁹⁹ NEUMANN, *op. cit. supra*, at 173-76.

¹⁰⁰ *Id.* at 188-89.

¹⁰¹ SPITZ, *DEMOCRACY AND THE CHALLENGE OF POWER* 19, 47 (1958).

¹⁰² Industry claims of violations of the First Amendment (see 1960 *Hearings* 220-23, 236-48, 252-70; *Broadcasting*, Aug. 5, 1963, p. 46) are, according to this theory, ill-considered. See the argument by Alexander Micklejohn:

"Just so far at any point, the citizens who are to decide on issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*"

MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).

That the First Amendment does not apply to the government when it seeks to enlarge freedom in the communications industry is a fact that broadcasters seem unable to accept. See *Associated Press v. United States*, 326 U.S. 1, 20 (1944), *NBC v. United States*, 319 U.S. 190, 226 (1942).

The Federal Communications Commission has consistently moved in this direction through the medium of the fairness doctrine. In 1946, the Commission held that, "Freedom of speech can be effectively denied by denying access to the public means of making expression effective. . . ." ¹⁰³ In 1949, the Commission stated that, "The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communication free from any government dictation as to what they can and cannot hear, and free from similar restraints by private licensees." ¹⁰⁴ In addition, the series of cases centering around the use of sustaining time by political candidates points to a liberal interpretation of the public interest in minority points of view as expressed by minority candidates. ¹⁰⁵

The problem is, of course, more far-reaching than the circumference of section 315. The attitude prevalent in America today is, seemingly, that minority parties are unnecessary appendages to the political process, ¹⁰⁶ as evidenced by state restrictions placed upon them in their attempt to gain access to the ballot. ¹⁰⁷

Only a reversal of this more basic attitude will, in the long run, preserve American democracy as we know it. In the short run, however, minority parties, caught between two power centers, are swiftly disappearing from the American scene. The reason for this reaction on the part of the broadcasting industry and Congress is clear: their immediate interest does not lie in the realm of equal time for minority parties.

The broadcasting industry, operating as it does in a free enterprise society, depends upon attracting and holding a vast and varied audience. ¹⁰⁸ Any programs which threaten this audience will be opposed by the industry. ¹⁰⁹ Added to this, of course, is the considerable potential saving ¹¹⁰ afforded by the blackout of minority party candidates. Finally, there is the threat of program content regulation by the Commission, as embodied in section 315. ¹¹¹

¹⁰³ *Robert H. Scott*, 3 R.R. 259, 262 (1946).

¹⁰⁴ *Report on Editorializing by Licensees*, 1 R.R., pt. 3, 91:201, 211 (1949).

¹⁰⁵ See note 48, *supra* and accompanying text.

¹⁰⁶ See note 16, *supra*.

¹⁰⁷ See generally Note, *Legal Obstacles to Minority Party Success*, 57 YALE L.J. 1276 (1948).

¹⁰⁸ *KLAPPEE*, *op. cit. supra*, at 38.

¹⁰⁹ *Ibid.*

¹¹⁰ See note 75, *supra*, and accompanying text.

¹¹¹ Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 707 (1964).

The major political parties which control the legislative and executive branches of the government have an obvious interest in denying media access to minority parties:

Television and radio have become integral parts of political campaigns. By suspending the equal opportunity requirement of section 315 for presidential and vice-presidential candidates, better television and radio coverage of the campaigns of major presidential and vice-presidential candidates is made possible. *In the absence of such suspension presidential and vice-presidential candidates representing minor and splinter parties would be entitled to broadcast opportunities equal to those granted to such candidates of the major political parties, thereby inhibiting to some extent adequate coverage of the major candidates in the campaign.*¹¹² (Italics added.)

This, coupled with the obvious advantages of free time and the debate format, are most persuasive reasons for denying equal access to minority party candidates.

CONCLUSION

It is unfortunate for democratic politics that minority party candidates have become enmeshed in a web that threatens to remove them from the current political scene. It is imperative that our democracy, based as it is upon the free play of ideas, foster and protect minority viewpoints. The Federal Communications Commission by an application of both the equality and fairness doctrines was moving in that direction when suspension of section 315 effectively destroyed the base upon which the Commission had built its policy.

The Commission, by its application of the fairness doctrine to sustaining time given to political candidates, has implicitly realized that, where the minority parties are concerned, only free time is equal time. That doctrine must prevail or the United States will experience a continued frustration of democratic politics.

¹¹² House Rep. 359, 88th Cong., 1st Sess. 2 (1963). But see the statement of Sens. Hartke, Javits & Keating. 105 *Cong. Rec.* 14457-58 (1959).