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# Independent Political Action Groups: New Life for the Fairness Doctrine

Charles D. Ferris\* and L. Gregory Ballard\*\*

*During the past decade, independent political action committees (PACs) have grown dramatically as an alternative source of funding for political candidates. Congress and many commentators have expressed fear over the potential political power of these independent expenditure groups, which are not accountable to political parties. In their Article Messrs. Ferris and Ballard argue that the political broadcasting laws, particularly the Fairness Doctrine, serve as essential barriers to PACs' attempts to dominate the political process through unrestricted spending on political advertising. Although some critics have denounced the Fairness Doctrine, which requires broadcasters to provide balanced coverage of controversial issues, as outdated and unnecessary, Messrs. Ferris and Ballard argue that the doctrine may indeed provide an effective means for balancing the public's need for information, the broadcasters' editorial freedom, and the PACs' rights to free expression.*

## I. INTRODUCTION

The rise of independent political action committees (PACs)—groups that organize under the Federal Election Campaign Act of 1971<sup>1</sup> (FECA) to support or oppose political candidates or issues—and the viability of the Fairness Doc-

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1. 2 U.S.C. §§ 431-456 (1976 & Supp. V 1981). The Act defines "political committee" as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding \$1,000." *Id.* § 431(d). Business, labor, professional, agrarian, ideological, or issue groups form PACs to aggregate small contributions from their members, stockholders, or employees into larger, more meaningful amounts. The PACs then contribute these funds to selected candidates or political party committees. Alexander, *The Obey-Railsback Bill: Its Genesis and Early History*, 22 ARIZ. L. REV. 653, 653 (1980).

trine—broadcasters' statutory obligation to cover with reasonable balance controversial issues<sup>2</sup>—are seemingly independent topics that have generated considerable debate in recent years. While many observers have overlooked the close relationship between these topics, this Article illustrates that the often maligned Fairness Doctrine serves as an essential barrier to PACs' attempts to dominate the political process through unrestricted spending on political advertising.

The explosive growth of PACs during the past decade is primarily the result of changes in campaign finance laws, favorable rulings of the Federal Election Commission (FEC), and one United States Supreme Court decision.<sup>3</sup> Although FECA<sup>4</sup> imposed ceilings<sup>5</sup> on political contributions and expenditures,<sup>6</sup> it permitted corporations and labor unions<sup>7</sup> to establish their own PACs.<sup>8</sup> Subsequent amendments<sup>9</sup> and FEC rulings<sup>10</sup> encouraged many other

2. See 47 U.S.C. § 315(a) (1976).

3. See Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 355, 358-59 (1980); Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603, 605, 625 (1980). PACs were not unheard of prior to the 1970's. Professor Epstein noted:

Except for organized labor—which has utilized the PAC mechanism as its primary mechanism for all forms of union electoral activities since the mid-1930's—PACs prior to the 1970's were a minor factor in channeling business-related and other social interest contributions into federal electoral politics. The federal laws that governed campaign financing were sufficiently porous and the opportunity for individuals and groups to donate substantial sums of money to parties and candidates sufficiently great that PACs were not essential.

Epstein, *supra*, at 355-56.

4. 2 U.S.C. §§ 441a-441j (1976 & Supp. V 1981).

5. Under the Act individuals may contribute up to \$1000 to a candidate in each election, \$20,000 to a national party committee each year, and \$5000 to any other committee (including PACs) every calendar year. A party committee may give no more than \$1000 to a candidate for an election, or \$5000 if the committee is a multicandidate committee. National party committees may contribute \$17,500 to a senatorial candidate. PACs may give \$5000 to a candidate in each election, \$15,000 to a national party committee each calendar year, and \$5000 to any other committee. Epstein, *supra* note 3, at 360 (discussing 2 U.S.C. §§ 441a-441j (1976 & Supp. V 1981)).

6. The Supreme Court subsequently found unconstitutional these limitations on expenditures. See *infra* note 12 and accompanying text.

7. The Act also allows corporations and labor unions to use their own funds to communicate with their stockholders, officers, or members on any subject-including partisan politics—and to conduct nonpartisan registration and "get-out-the-vote" drives among these groups. 2 U.S.C. § 441b(b)(2) (1976 & Supp. V 1981). See Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 583-84 (1980).

8. Federal law prohibits direct expenditure of corporate or union funds to support federal candidates. 2 U.S.C. § 441b(a) (1976 & Supp. V 1981). See Adamany, *supra* note 7, at 583.

9. See, e.g., Federal Election Campaign Act Amendments of 1974, 2 U.S.C. §§ 431-455 (1976 & Supp. V 1981) (allowing government contractors to establish PACs).

groups to form PACs. The Supreme Court's invalidation of the FECA's spending limitations in *Buckley v. Valeo*<sup>11</sup> in 1976 further stimulated the growth of PACs. The Court held that the imposition of ceilings on expenditures impermissibly burdens free expression under the first amendment.<sup>12</sup> Even though candidates could spend freely after *Buckley*, FECA still restricted contributions that they could accept. PACs became an important alternative source of funds for political candidates because they enable candidates to receive money collected primarily from small contributors whom the candidates themselves could not solicit efficiently or conveniently.<sup>13</sup> The resulting proliferation of PACs is evident in FEC statistics: from 1981 to 1982 the number of registered PACs increased from 2,901 to 3,371.<sup>14</sup> Even more dramatic has been the growth of "independent expenditure" groups—PACs that are not linked directly to a particular party or candidate.<sup>15</sup> In 1982 alone more than two hundred of these groups were born, an increase of 38.4 percent from the previous year.<sup>16</sup>

Congress has debated at length the effect of PACs on the political process. Wary of unlimited political expenditures by groups not accountable to political parties, Congress has discussed possible means of controlling these groups. Although most of the debate understandably has focused on reform of campaign finance laws,<sup>17</sup> the Supreme Court's holding in *Buckley* that campaign spending restrictions are unconstitutional limits these reform efforts. *Buckley*, however, does not limit the separate body of communications

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10. See, e.g., FEC Advisory Opinion No. 1975-23 (December 3, 1975) (approving widespread use of corporate PACs).

11. 424 U.S. 1 (1976).

12. *Id.* at 44-45. In *Buckley* various federal officeholders, candidates, and political groups challenged the constitutionality of FECA provisions that limited both political contributions and expenditures, required political committees to report to the FEC the names of contributors of more than \$1000, and provided for public financing of presidential campaigns. A divided Court struck down the spending limits but upheld the other FECA requirements, including the contribution restrictions, against first and fifth amendment challenges. *Id.*

13. Epstein, *supra* note 3, at 360.

14. 10 Campaign Practices Reports, No. 1, at 1 (Jan. 31, 1983).

15. See 2 U.S.C. § 431(17) (1976 & Supp. V 1981); 11 C.F.R. § 109.1(a) (1981) for a definition of independent expenditure groups.

16. 10 Campaign Practices Reports, No. 1, at 1 (Jan. 31, 1983).

17. See, e.g., *Contribution Limitations and Independent Expenditures: Hearings Before the Task Force on Elections, Comm. on House Administration, 97th Cong., 2d Sess.* (1982); see also Adamany, *supra* note 7, at 597-602 (discussing stricter disclosure requirements and contribution limits); Wertheimer, *supra* note 3, at 621-25 (discussing aggregate limitations on PAC contributions).

laws that regulate political broadcasting. Although these laws precede by many years the recent growth of PACs,<sup>18</sup> they now temper PACs' otherwise harsh effects on the political process. The political broadcasting laws, particularly the Fairness Doctrine, provide an effective legal framework for balancing the public's need for information, broadcasters' rights to editorial discretion, and PACs' rights to freedom of expression. At a time when critics denounce the laws governing political broadcasting as outdated and unnecessary,<sup>19</sup> especially in light of new technology in the communications industry,<sup>20</sup> the communications laws find renewed justification in their most important role ever—meeting the challenges of PACs.

Part II of this Article reviews the provisions of political broadcasting laws that pertain to PACs. Part III discusses how the political broadcasting laws, particularly the Fairness Doctrine, until now have accommodated the challenges of PACs. Part IV considers whether broadcasting's new technology justifies the elimination of the Fairness Doctrine. Part V concludes that balanced public dialogue will disappear unless Congress preserves the political broadcasting laws that serve as checks on the political power of PACs.

## II. POLITICAL BROADCASTING LAWS

### A. *The Regulation of Broadcasting in General*

Government regulation of broadcasters includes not only licensing provisions,<sup>21</sup> but also some supervision over program content.<sup>22</sup> Although the first amendment protects broadcasting,<sup>23</sup> the

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18. Present broadcasting laws derive from the Communications Act of 1934, now codified at 47 U.S.C. §§ 301-330 (1976).

19. Broadcasters, individually and through their trade association, the National Association of Broadcasters, long have criticized the Fairness Doctrine and other political broadcasting rules. In recent years a number of public officials—including the current Chairman of the FCC, Mark Fowler, *see, e.g.*, Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 244-45 (1982), and the Chairman of the Senate Commerce Committee, Robert Packwood, *see, e.g.*, BROADCASTING, Apr. 12, 1982, at 30; CABLEVISION, Nov. 8, 1982, at 131—have joined in the criticism.

20. The regulation of political expenditures is a relatively recent phenomenon. Only when Congress passed the Federal Election Campaign Act (FECA) did such regulation at the federal level become pervasive. *See* 1 T. SCHWARZ & A. STRAWS, FEDERAL REGULATION OF CAMPAIGN FINANCE AND POLITICAL ACTIVITY § 1.03 (1982).

21. *See* 47 U.S.C. §§ 301-312 (1976).

22. *See, e.g., id.* § 303(b) (FCC may “[p]rescribe the nature of the service to be rendered” as “public convenience, interest, or necessity requires”); *id.* § 315(a) (Fairness Doctrine).

23. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (citing United States

Supreme Court has held that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them."<sup>24</sup> Because the airwaves are a limited resource,<sup>25</sup> broadcasting law has sought to strike a proper balance between public and private control.<sup>26</sup>

Broadcasters receive licenses from the Federal Communications Commission (FCC) to serve the public as custodians of the airwaves. Because insufficient frequencies exist to allow everyone to broadcast at once, society has entrusted broadcasters to make editorial judgments on its behalf.<sup>27</sup> The broadcaster violates this trust when it ignores some voices and lets others dominate the public dialogue. Ever since government has regulated broadcasting,<sup>28</sup> the broadcaster's duty has been to serve the public's interest in being informed.<sup>29</sup> While the broadcaster has wide latitude in satisfying this obligation,<sup>30</sup> the Supreme Court consistently has emphasized that the public's right to be informed is paramount.<sup>31</sup>

Broadcasters' public obligations arising from their control of the airwaves distinguish broadcasting from the print media.<sup>32</sup> Nonetheless, some critics argue that the broadcast industry is not essentially different from the newspaper industry and hence, the

v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948)).

24. 395 U.S. at 386-87 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

25. Prior to the Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927), unrestricted use of the limited airwaves caused 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 cacaphony of competing voices, none of which could be clearly and predictably heard." *Red Lion*, 395 U.S. at 376.

26. See *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 112 (1973).

27. See 395 U.S. at 387-91.

28. The Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927), began the era of regulation.

29. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion*, 395 U.S. at 390.

30. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 111.

31. See, e.g., *id.* at 113-14; *Red Lion*, 395 U.S. at 390.

32. As one court noted:

A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.

A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.

*Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

government should treat both industries the same way.<sup>33</sup> These critics point out that television stations often outnumber newspapers in a town. This analysis, however, confuses the relevant markets. The appropriate market to compare with the television industry is not the newspaper industry, but the entire print industry, which encompasses much more than newspapers alone. The print industry is highly competitive; over 9,000 newspapers (including dailies, weeklies, and semi-weeklies) and almost 11,000 periodicals are published in this country.<sup>34</sup> Local newspapers compete not only with national daily newspapers and local weeklies, but also with magazines, newsletters, trade journals, and books. National newspapers such as *The Washington Post* must compete with *The New York Times*, *The Wall Street Journal*, *The Los Angeles Times*, and other newspapers from other cities. Unlike television, the variety of information and viewpoints available from the print industry is inexhaustible. Until enough different electronic sources of information exist to ensure a well-informed public, a higher level of regulation for broadcasting is warranted.

### B. Reasonable Access

The first provision of political broadcasting laws pertinent to PACs is the "reasonable access" requirement of section 312(a)(7) of the Communications Act of 1934.<sup>35</sup> This measure requires broadcasters to provide candidates for federal office "reasonable access" to broadcasting facilities.<sup>36</sup> Recently upheld by the Supreme Court in *CBS, Inc. v. FCC*, section 312(a)(7) embodies a

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33. See, e.g., *F.C.C. Asks End To Fairness Equal Time Rules*, N.Y. Times, Sept. 18, 1981, at 13, col. 1 (quoting Mark S. Fowler, Chairman of the FCC: "The scarcity-of-media-access argument is a bankrupt one. It is about time that media got the same rights to select material as newspapers, book publishers and others.") See also Note, *The Fairness Doctrine: Fair to Whom?*, 30 CLEV. ST. L. REV. 485, 519-21 & n.196 (1981) (advocating repeal of the Fairness Doctrine). See generally Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982) (proposing deregulation of commercial broadcasting).

34. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES 1982-1983* at 561 (103d ed. 1982).

35. 47 U.S.C. § 312(a)(7) (1976).

36. 453 U.S. 367 (1981). In December 1979 the Carter/Mondale Campaign Committee had attempted to purchase 30 minutes of air time between 8:00 p.m. and 10:30 p.m. from each of the three major networks. After the networks refused, the Committee complained to the FCC that the networks had violated their duty to provide "reasonable access" to legally qualified federal candidates. The Commission agreed and issued an order mandating that the networks comply with their statutory obligation. *Id.* at 374. The Supreme Court held that the Commission's application of § 312(a)(7) did not unduly restrict the networks' editorial discretion under the first amendment. *Id.* at 396.

delicate balancing of three first amendment interests: the candidate's interest in reaching the electorate with his message, the editorial freedom of broadcasters, and the public's right to hear an uncensored and meaningful presentation of a candidate's views.<sup>37</sup> A broadcaster may not refuse perfunctorily to allow any candidate for federal office to use its facilities; qualified candidates thus have an affirmative, limited right to reasonable access to the airwaves.<sup>38</sup> The provision, however, does not give the same right of access to groups or individuals who are not seeking election to a federal office.<sup>39</sup>

### C. Equal Opportunities

The second broadcasting provision that affects PACs is the "equal opportunities" provision of section 315(a) of the 1934 Communications Act.<sup>40</sup> Although frequently referred to as the "equal time" provision, section 315 does not literally compel broadcasters to provide equal time. Rather, the provision requires that once a broadcaster has allowed any candidate to "use"<sup>41</sup> its facilities, it must provide opposing candidates an *opportunity* to use time that is equally desirable.<sup>42</sup> If a candidate chooses to forego this opportunity—for instance, if he cannot afford the time or chooses to spend limited funds elsewhere—the broadcaster has no further obligation under section 315(a).

In enacting the equal opportunity provision Congress sought to prevent a broadcaster from using its facilities to forward the candidacy of any one particular candidate.<sup>43</sup> A broadcaster's exercise of political favoritism certainly would violate the public re-

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37. *Id.* at 395-97.

38. *Id.* at 396.

39. National Conservative Political Action Comm. (NCPAC), 89 F.C.C.2d 626, 627-29, *petition for review dismissed*, No. 92-1579 (D.C. Cir. Sept. 14, 1982); Honorable Thomas F. Eagleton, 81 F.C.C.2d 423, 425 (1980). *See infra* notes 67-84 and accompanying text.

40. "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 . . ." 47 U.S.C. § 315(a) (1976).

41. Equal opportunity applies only when the broadcast is a "use"—an identifiable appearance by the candidate by voice or picture. Thus, it does not apply to broadcasts on the candidate's behalf in which he does not appear. *See, e.g.*, Public Notice, Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C.2d 832, 838 (1970); *See infra* text accompanying notes 60-61.

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

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



sponsibility that accompanies the broadcast license. The law, however, does not require a broadcaster to subsidize a candidate who cannot afford air time. A broadcaster need not provide free time to a candidate unless it already has given free time to an opposing candidate.<sup>44</sup>

#### D. Fairness Doctrine

The third broadcasting provision relevant to PACs is the Fairness Doctrine, which is also codified in section 315(a) of the Communications Act.<sup>45</sup> Unlike the reasonable access and equal opportunity provisions, which apply to candidates, the Fairness Doctrine applies to issues and ideas. The obligations that the doctrine imposes on broadcasters are simple: a broadcaster must cover controversial issues of public importance, and the coverage must provide a reasonable opportunity for the presentation of contrasting views.<sup>46</sup> The first part of this doctrine, the obligation to provide coverage of controversial issues, is rarely the source of dispute,<sup>47</sup> and broadcasters enjoy, within reason, almost unlimited discretion in determining what issues are controversial and thus within the doctrine's coverage.<sup>48</sup> On the other hand, the second part of the Fairness Doctrine, which imposes a duty to provide reasonable balance in presenting those controversial views that the broadcaster chooses to air, has spawned considerable and continuing debate. Some critics claim that this requirement of balance excessively restricts a broadcaster's editorial freedom.<sup>49</sup> Proponents of the rule maintain that protecting the public's access to a variety of views on critical issues justifies the balance requirement.<sup>50</sup> Both the doctrine's opponents and supporters rely on the first amendment right of free speech in defending their positions. The Fairness Doctrine

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44. *Id.* at 416. See *infra* notes 86-94 and accompanying text.

45. 47 U.S.C. § 315(a) (1976).

46. The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974); see Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Pub. Importance (Fairness Primer), 40 F.C.C. 598 (1964); Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

47. *But see* Complaint of Representative Patsy Mink, 59 F.C.C.2d 987 (1976) (West Virginia station must cover strip mining issue).

48. See, e.g., Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 112 (1973); American Sec. Counsel Educ. Found. v. FCC, 607 F.2d 438 (1979); The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974).

49. See *supra* note 19.

50. See 48 F.C.C.2d at 6, 11; Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249, 1256 (1949).

actually incorporates two first amendment interests by balancing the broadcaster's right to speak and the public's right to hear. Neither broadcasters' nor the public's right to the airwaves is exclusive.<sup>51</sup>

The FCC in 1963 articulated an important clarification to the Fairness Doctrine known as the *Cullman* Doctrine. In *Cullman Broadcasting Co.*<sup>52</sup> the Commission ruled that if a broadcaster airing one side of a controversial issue in a paid advertisement cannot find a paying sponsor to express contrasting views, the broadcaster must either air the contrasting views itself or provide free time for appropriate proponents of those views.<sup>53</sup> The broadcaster cannot leave the public uninformed simply because no one will pay to inform.<sup>54</sup>

A corollary of the Fairness Doctrine is the *Zapple* Doctrine, which was the product of a 1970 FCC ruling<sup>55</sup> that addressed a broadcaster's obligations after it sells time to a candidate's supporters during a political campaign. The FCC in *Nicholas Zapple* ruled that a broadcaster selling time to supporters of one candidate must offer equal opportunities to supporters of opposing candidates.<sup>56</sup> This aspect of *Zapple* led the Commission to characterize the doctrine as a "quasi-equal opportunities" corollary to the Fairness Doctrine.<sup>57</sup> The *Zapple* Doctrine operates as a bridge between the general Fairness Doctrine and the political equal opportunities provision of section 315(a).<sup>58</sup> Without *Zapple* a political candidate would have no right to equal opportunities unless his opponent's political advertisement constituted a "use" of broadcast facilities.<sup>59</sup> The FCC defines a "use" as an identifiable appearance of a candidate by voice or picture,<sup>60</sup> regardless whether the

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51. The Supreme Court, however, has concluded that "[i]t is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

52. See *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963).

53. *Id.* at 577.

54. *Id.*

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

56. *Id.* at 708.

57. See *The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Communications Act*, 36 F.C.C.2d 40, 41 (1972).

58. "*Zapple* was neither traditional fairness nor traditional equal opportunities. It was a particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in Section 315(a)." *Id.* at 49.

59. See *supra* note 41 and accompanying text.

60. See Public Notice, *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2240 (1978). Section 315 exempts four uses from the equal opportunities requirement: (1) bona fide newscasts; (2) bona fide news interviews; (3) bona fide news

candidate has sponsored the advertisement or the appearance pertains to the campaign.<sup>61</sup> Under a traditional interpretation of section 315(a), the airing of political advertisements in which the candidate does not appear is not a "use" by that candidate and, consequently, does not trigger his opponent's right to equal opportunities. The *Zapple* Doctrine prevents a candidate from rendering the section 315(a) equal opportunities provision inapplicable by deliberately failing to appear on ads that his supporters purchase; *Zapple* thus extends equal opportunities to political broadcasting in which no "use" occurs.

Although *Zapple* effectively expands the scope of a broadcaster's equal opportunities obligations, one aspect of the doctrine limits those duties. A broadcaster must provide only an equal opportunity for the opposing candidate's supporters to purchase comparable broadcast time; the broadcaster need not provide for a free response.<sup>62</sup> The FCC in *Zapple* specifically refused to extend the *Cullman* free time principle to paid advertisements by a candidate's supporters during an active political campaign.<sup>63</sup> The Commission stated clearly that the *Cullman* Doctrine should not apply in the "direct political arena"<sup>64</sup> and that the FCC should not intrude into political campaign financing by forcing a broadcaster to subsidize an opposing candidate's campaign.<sup>65</sup> At present, this exception to *Cullman* applies only during election periods.<sup>66</sup>

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documentaries; and (4) on the spot coverage of bona fide news events. 47 U.S.C. § 315(a) (1976).

61. See, e.g., Adrien Weiss, 58 F.C.C.2d 342, *petition to review denied*, 58 F.C.C.2d 1389 (1976) (broadcast of Ronald Reagan's movies constituted "use").

62. Nicholas Zapple, 23 F.C.C.2d at 708.

63. *Id.*

64. *Id.*

65. *Id.*

66. Of course, the issue of when an election period has begun raises further questions. For purposes of the equal opportunities provision, the relevant election period begins only when at least two people qualify as candidates and oppose each other. Before a primary, the equal opportunities rule applies only to the candidates competing against each other in the primary; Republicans and Democrats do not oppose each other until the nomination process has yielded its choices. See Richard B. Kay, 24 F.C.C.2d 426, 426, *aff'd sub. nom.* Kay v. FCC, 443 F.2d 638, 645 (D.C. Cir. 1970). The determination when the final interparty election has begun is an objective one based solely upon the existence of two or more competing candidates.

Access rights under § 312(a)(7) also begin at the commencement of the election period. In *Carter/Mondale Presidential Comm., Inc., v. ABC, CBS & NBC Television Networks*, 74 F.C.C.2d 657 (1979), which the Supreme Court affirmed in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), the Commission examined criteria such as the number of announced and campaigning candidates, the degree of media attention, and the proximity of caucuses and primaries to determine objectively whether the election period had begun. 74 F.C.C.2d at 643-50. In

### III. TREATMENT OF PACs UNDER THE POLITICAL BROADCASTING LAWS

#### A. Access Rights

The political broadcasting laws' effect upon PACs differs from the impact of the laws on candidates for political office, even through PACs often support political candidates. The chief practical difference between the legal treatment of candidates and independent groups concerns access to the broadcast medium. On request a federal candidate may obtain "reasonable access" to a broadcaster's facilities in order to air his views.<sup>67</sup> Further, to protect a candidate's message from alteration, section 315 of the Communications Act provides a candidate an enforceable right to present an uncensored statement to the public.<sup>68</sup> Of course, since the broadcaster cannot censor the candidate's message, the broadcaster is not liable for its content.<sup>69</sup> PACs, in contrast, have no independent rights of access to the airwaves. The groups do have some rights to freedom of expression, as the Supreme Court in *Buckley v. Valeo*<sup>70</sup> recognized when it invalidated spending limits on independent groups.<sup>71</sup> A PAC's rights, however, do not include an automatic right to expression on television or radio.<sup>72</sup> The first amendment does not prohibit broadcasters from refusing to open their facilities to PACs, other groups, or members of the general public.<sup>73</sup>

The Supreme Court's 1973 decision in *Columbia Broadcasting*

the *Carter-Mondale* case, CBS and the other networks insisted that a proposed Carter/Mondale commercial designed to air three months before the Iowa caucuses was too early because the election season had not begun. 74 F.C.C.2d at 632. Ironically, the same networks now are pleading to the FCC that "electioneering is a continuing process," that *Zapple* should apply at all times, and that the networks need only provide equal opportunities to purchase time in response to PAC advertisements. The networks have made these pleas in seeking reversal of the FCC's decision in National Conservative Political Action Comm. (NCPAC), 89 F.C.C.2d 626, *petition for review dismissed*, No. 92-1579 (D.C. Cir. Sept. 14, 1982). For a discussion of the NCPAC decision, see *infra* notes 80-83, 99-103 and accompanying text.

67. See *supra* notes 35-39 and accompanying text.

68. "[S]uch licensee shall have no power of censorship over the material broadcast under the provisions of this section." 47 U.S.C. § 315(a) (1976).

69. *Farmers' Educ. and Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959).

70. 424 U.S. 1 (1976).

71. See *supra* notes 11-12 and accompanying text.

72. National Conservative Political Action Comm. (NCPAC), 89 F.C.C.2d 626, 628, *petition for review dismissed*, No. 92-1579 (D.C. Cir. Sept. 14, 1982). See *infra* notes 80-83 and accompanying text.

73. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114-15 (1973). See *infra* notes 74-79 and accompanying text.

*System, Inc. v. Democratic National Committee*<sup>74</sup> has blocked recent efforts by independent PACs to gain mandatory access rights. Prior to the institution of this lawsuit, the Democratic Party and the Business Executives' Move for Vietnam Peace (BEM) each had attempted unsuccessfully to buy air time to present its views on controversial public issues.<sup>75</sup> The Supreme Court held that mandatory paid access to broadcasting facilities for groups wishing to address public issues is unnecessary to achieve the first amendment goal of diverse speech.<sup>76</sup> The Court feared that under a system of mandatory paid access discussions of trivial private disputes would replace dialogue on public issues.<sup>77</sup> Moreover, the Court perceived that a general right of paid access would allow the wealthy to dominate discussion of public issues.<sup>78</sup> The Court decided to preserve the present system in which the public relies upon broadcasters' editorial judgment to ensure a full and fair debate of public issues.<sup>79</sup>

In 1982 the FCC in *National Conservative Political Action Committee (NCPAC)*<sup>80</sup> reiterated the Court's denial in *Columbia Broadcasting System* of mandatory access for anyone other than federal candidates. NCPAC had attempted to air a series of paid political advertisements opposing several incumbent legislators. Although some stations accepted the ads, many broadcasters refused access to NCPAC. The group sought a ruling from the FCC that it had a "reasonable right of access" to the air waves<sup>81</sup>—a right that several stations had violated by refusing to broadcast the NCPAC ads. Relying on *Columbia Broadcasting System*, the FCC ruled that NCPAC has no right of access to the air waves.<sup>82</sup> The

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74. 412 U.S. 94 (1973).

75. The Democratic National Committee (DNC) had planned to purchase time from radio and television stations and from the national networks to present its views and to solicit funds. Anticipating difficulty, the DNC requested a declaratory ruling from the FCC that the Communications Act or the first amendment precludes a licensee from having a general policy of refusing to sell time to "responsible entities" wishing to present their views on public issues. *Id.* at 99. The Business Executives' Move for Vietnam Peace (BEM) filed a complaint with the FCC claiming that a radio station had violated the first amendment by refusing to sell BEM a series of one-minute spot announcements that would enable the organization to express its views on Vietnam. *Id.*

76. *Id.* at 121-22.

77. *Id.* at 125.

78. *Id.* at 124.

79. *Id.* at 126.

80. 89 F.C.C.2d 626, *petition for review dismissed*, No. 92-1579 (D.C. Cir. Sept. 14, 1982).

81. *Id.* at 627.

82. *Id.* at 628. NCPAC filed a Petition for Review of the Commission's decision, Na-

Commission noted that no statutory, judicial, or administrative authority supports the proposition that the "reasonable access" provision of the Communications Act compels broadcasters to accept the advertisements of any individual or group, other than a candidate for federal office.<sup>83</sup> Thus, a broadcaster is free to donate, sell, or refuse air time to PACs. Further, because PACs lack a candidate's right to an uncensored presentation, a broadcaster airing PAC ads may be liable for an ad's defamatory content.<sup>84</sup> This vulnerability to lawsuit provides a disincentive for broadcasters to accept PAC commercials that attack opposing candidates.

### B. Equal Opportunities

Unlike candidates, independent PACs generally have no right to equal opportunities to respond following a candidate's "use" of a broadcast facility; equal opportunities is a personal right of opposed candidates and their authorized committees.<sup>85</sup> The *Zapple Doctrine*, however, prompted the FCC in *Carter/Mondale Reelection Committee*<sup>86</sup> to qualify this general rule when an independent group sponsors a "use" by a candidate.<sup>87</sup> The Carter/Mondale Reelection Committee was seeking free time to respond to ads that promoted challenger Ronald Reagan and that supposedly "independent" Reagan supporters had purchased. The Committee argued that because campaign finance laws restricted the candidates' resources,<sup>88</sup> allowing "independent" Reagan supporters to pay for Reagan advertisements unfairly supplemented the Reagan cam-

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tional Conservative Political Action Comm. (NCPAC) v. FCC, No. 92-1579 (D.C. Cir. Sept. 14, 1982), but later filed for dismissal of the suit. The United States Court of Appeals for the District of Columbia Circuit dismissed the petition on September 14, 1982. NCPAC requested dismissal because the FCC simultaneously agreed to reopen one of the central issues of the NCPAC dispute—whether a broadcaster that accepts paid advertising from an independent expenditure group is obligated to provide free time for contrasting views—at the request of CBS and other broadcasting parties. These parties filed a Petition for Declaratory Ruling on July 30, 1982. For a discussion of this petition, see *infra* notes 101-03 and accompanying text.

83. 89 F.C.C.2d at 628.

84. *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

85. 47 U.S.C. § 315 (1976); see *Carter/Mondale Reelection Comm., Inc.*, 81 F.C.C.2d 409, 420 (1980).

86. 81 F.C.C.2d 409 (1980).

87. See *id.* at 420-21.

88. A presidential candidate who accepts a federal grant to finance his campaign must agree to forego private contributions. 2 U.S.C. § 441 (1976 & Supp. V 1981); 26 U.S.C. §§ 9003-9004 (1976).

paign's restricted funds.<sup>89</sup> According to the Committee, the resulting disparity in campaign funds violated the intent of the federal election laws and section 315 of the Communications Act. Only free broadcast time to reply to these ads could ensure truly "equal opportunities."<sup>90</sup>

The FCC denied the Carter/Mondale Reelection Committee's request, holding that broadcasters airing an independent political group's advertisements must offer the opposing candidate only equal opportunities to *purchase* comparable time.<sup>91</sup> The Commission noted that the purpose of section 315's equal opportunities provision is not to compel broadcasters to equalize financial disparities between opposing candidates by subsidizing one candidate's campaign, but rather to prevent broadcasters from discriminating against competing candidates.<sup>92</sup> The Commission, however, recognized that should the opposed candidate or his authorized committee choose not to purchase time to respond to the independent group's advertisements, a group of the opposed candidate's supporters might purchase time for the candidate.<sup>93</sup> The Court in *Zapple* had ensured "quasi-equal opportunities" for a candidate's supporters to purchase time to respond when the initial broadcast technically was not a "use" by the candidate's opponent. Under the same principles, the *Carter/Mondale* Court found that a candidate's supporters should enjoy a limited equal opportunities right when the initial broadcast is a "use."<sup>94</sup> An independent PAC that supports a candidate, therefore, may exercise the candidate's right to equal opportunities to rebut attacks by other independent groups.

### C. *Fairness Doctrine Obligations of Broadcasters Accepting PAC Advertisements*

While the reasonable access and equal opportunities provisions of the Communications Act more than peripherally affect the clout of PACs, the Fairness Doctrine unequivocally applies to PACs and constitutes a direct check on the groups' use of broadcast media. The "balancing" half of the Fairness Doctrine requires broadcasters to provide a reasonable opportunity for the presenta-

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89. 81 F.C.C.2d at 419-20.

90. *Id.* at 409-11.

91. *Id.* at 416.

92. *Id.* at 416-17.

93. *Id.* at 420-21.

94. *Id.* at 421.

tion of contrasting views on controversial issues of public importance.<sup>95</sup> PAC advertisements, almost by definition, address such issues. An advertisement that focuses on a candidate's qualifications or addresses any other issue central to the PAC's agenda generally contains controversial elements and triggers the Fairness Doctrine.

The Fairness Doctrine mitigates a one-sided presentation of a PAC's views. A broadcaster accepting a PAC's advertisement generally must provide free time under *Cullman* for the presentation of contrasting views if no one purchases time to oppose the advertisements.<sup>96</sup> During the actual election campaign, *Zapple* limits this obligation so that the broadcaster need not provide free time if the initial broadcasts were paid advertisements.<sup>97</sup> *Zapple*'s quasi-equal opportunity aspect, however, prevents a candidate's supporters from circumventing section 315 equal opportunities by forming PACs to attack the candidate's opponents.<sup>98</sup>

Recent challenges to the *NCPAC* decision threaten to undermine these restrictions on PACs. The FCC in *NCPAC*, in addition to ruling that *NCPAC* and similar independent groups have no rights of access to broadcasting facilities, held that the *NCPAC* ads imposed *Cullman*-like free time obligations on broadcasters that aired them, not *Zapple*-like obligations to offer only the opportunity to purchase time to the candidates whom *NCPAC* attacked.<sup>99</sup> The Commission did not apply *Zapple* to the *NCPAC* commercials because broadcasters aired the ads during a nonelection period; *Zapple*, like section 315, only applies during election periods.<sup>100</sup> The *NCPAC* ruling means that a broadcaster frequently must provide free air time for contrasting views on the issues that an independent group discusses in its commercials. Columbia Broadcasting Systems (CBS) and other broadcasters, in concert with *NCPAC*, recently have challenged the *NCPAC* ruling in a petition for rulemaking before the FCC.<sup>101</sup> These parties contend that *Zapple* should govern all purchases of time by independent groups, even during nonelection periods.<sup>102</sup> A broadcaster that airs a PAC's commercial, they argue, should be able to satisfy its obligations by

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95. See *supra* note 46 and accompanying text.

96. See *supra* notes 52-54 and accompanying text.

97. See *supra* notes 62-66 and accompanying text.

98. See *supra* notes 56-61 and accompanying text.

99. *NCPAC*, 89 F.C.C.2d at 629.

100. *Id.* & n.7.

101. See *supra* note 82.

102. *Id.*



affording groups with different views an opportunity merely to purchase time at similar times and prices. If no person or group will pay to express a contrasting view, the broadcaster should have no obligation—even in nonelection times—to balance the views expressed in the PAC advertisements.<sup>103</sup>

The broadcasters' argument clearly lacks credibility. If the FCC and the courts adopt it and accordingly exempt PAC-sponsored ads from the application of *Cullman*, anyone wishing to mold public opinion on a controversial issue may form a PAC to espouse his views without triggering a broadcaster's duty under the Fairness Doctrine to present contrary views. Consequently, the public will remain uninformed unless someone is willing to pay to inform them. The CBS-NCPAC proposal would emasculate the Fairness Doctrine and condemn to historical obscurity the principles that it has served. The Fairness Doctrine is the centerpiece of an artful and delicate balance of competing interests in a robust and informative electronic press. The doctrine reflects society's convictions that democracy can flourish only with constant and informed public scrutiny and that the public's right to be well-informed is essential. PAC's increasing participation in political broadcasting demonstrates the crucial role that the Fairness Doctrine plays in protecting balanced public dialogue.

#### IV. FAIRNESS DOCTRINE IN LIGHT OF NEW TECHNOLOGY IN THE COMMUNICATIONS INDUSTRY

Many critics of the Fairness Doctrine argue that new video distribution technologies now provide so many sources of information that the Fairness Doctrine is outdated and unnecessary.<sup>104</sup> These technological advances, however, have resulted only in a theoretical abundance of viewpoints and not in real diversity. The

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103. This view, however, by necessity would distinguish PAC-sponsored advertisement in favor of nuclear power during a nonelection period from an identical commercial that a pronuclear corporation sponsors. The Fairness Doctrine would require free time from the broadcaster of the second commercial; the broadcaster of the first advertisement merely would have to provide an opportunity to buy time to respond. Similarly, this view would distinguish a pro-oil deregulation spot that a PAC purchases from one that an individual oil company such as Mobil or Exxon sponsors.

104. See, e.g., *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 80 (D.C. Cir. 1972) (Bazelon, J., dissenting); Note, *supra* note 33, at 521. But see MAJORITY STAFF OF THE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION AND FINANCE OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 97th Cong., 1st Sess., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY. (Comm. Print 1981).

critics speak of new distribution systems such as subscription television (STV) or multipoint distribution service (MDS) as though these systems have added new information to the marketplace of ideas. Actually, these innovations have added only more movies and variety specials. Competition in the marketplace of ideas has not increased; rather, the quite different marketplace of video entertainment has been the beneficiary of the technological gains.

Similarly, opponents of the Fairness Doctrine point to the advent of direct broadcast to home satellite (DBS) service as having boosted the number of electronic sources and assured the presentation of diverse viewpoints. Although the entrepreneurial interest that DBS has generated is impressive,<sup>105</sup> the system's ultimate contributions to public discussion remain unknown. Considerable time will pass before DBS's actual share of the market is large enough to justify calling the service a viable competitor of broadcasting.

Cable television, of course, has become the critics' standard justification for relaxing political broadcasting rules.<sup>106</sup> Cable supposedly delivers so many channels that the public cannot remain uninformed, regardless of what material a single broadcaster decides to air. Cable television someday may deliver to the American public the wealth of diverse information that it promises, but today the medium still is struggling to develop. At present, just over thirty-five percent of the public receives cable television.<sup>107</sup> Further, most cable subscribers can choose from no more than twelve channels of programming.<sup>108</sup> Most of the fifty and one hundred channel urban cable systems of the future exist only in franchise proposals. More importantly, cable television today primarily is a new means of *delivering* programming. Cable has not yet become a new source of enough diverse, self-generated informational programming to wean the American public from its dependence for information on the three commercial networks. Instead, today's

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105. During the 45-day period that the FCC established for filing applications after the Commission accepted the application of Satellite Television Corporation for a direct broadcast satellite service, 13 applicants filed. See Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, 90 F.C.C.2d 676, 677-78 (1982).

106. See, e.g., Notice of Proposed Rulemaking in Docket 83-331, 48 Fed. Reg. 26,472 (1983) (to be codified at 47 C.F.R. § 76) (proposed Mar. 28, 1983) (proposing to examine or eliminate certain political broadcast obligations of cable systems).

107. A.C. Nielson Report in Cablevision, Jan. 10, 1983, at 97.

108. See Amendment of Part 76 of the Comm'n's Rules and Regulations (Sections 76.59-76.63) with Respect to "Saturated" Cable Television Systems, 66 F.C.C.2d 710, 711 (1977).

cable systems feed off the networks. Cable television systems in many communities carry as many as six network-affiliated stations,<sup>109</sup> whose programs necessarily overlap. While cable systems also may carry a similar number of distant independent stations, the only information that these stations add is the news of those distant communities.<sup>110</sup> One or two pay movie or sports channels usually occupy any unused capacity on these small systems.<sup>111</sup>

One particular cable offering that critics cite as having obviated the need for the Fairness Doctrine is Ted Turner's Cable News Network (CNN), the largest cable competitor of the news and informational programming of ABC, CBS, and NBC. Although CNN currently has viewers in nearly twelve million American homes,<sup>112</sup> the emergence of CNN, by itself, does not mean that the amount of information available from television suddenly has become abundant. The American public still relies primarily on the three major networks for information. The networks have a diminishing, but still dominant, share of the electronic information market. Although hundreds of local television stations serve homes throughout the country, each station draws its national news from the national network with which it is affiliated. Independent stations similarly contribute little to the national public dialogue; these stations typically rely upon services such as CNN or the Independent Network News for any dialogue on national issues. Until many more electronic video sources addressing national issues become available, the Fairness Doctrine will remain a critical link in the system of political broadcasting laws.

## V. CONCLUSION

Crucial first amendment values are at stake both in the *NCPAC* case and in the broader debate about the future of the Fairness Doctrine. If the CBS/*NCPAC* attempt to overturn the *NCPAC* ruling is successful, broadcasters at any time will be able to accept and air an advertisement expressing any viewpoint with no accompanying obligation to present contrasting views, unless someone is willing to pay.<sup>113</sup> A reversal of *NCPAC* would enable a corporation with vast sums of money to form a PAC to persuade the public that the company's view on public issues should prevail.

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109. *See id.* at 713.

110. *See id.* at 719.

111. *See id.*

112. *Cablevision*, Mar. 28, 1983, at 70.

113. *See supra* notes 99-103 and accompanying text.

The very real prospect of large, well-funded groups and corporations buying huge blocks of time to sell their ideologies demands that Congress and the FCC preserve the Fairness Doctrine. One of the purposes of the Fairness Doctrine has been to prevent wealthy interests from purchasing an exclusive electronic pulpit from which to pursue their own goals.<sup>114</sup>

Sadly, access to the broadcast marketplace of ideas never will be equal, nor the views presented balanced, if the criteria for determining access to the airwaves appear solely on a rate card. The first amendment justifiably protects the right of a PAC or a corporation to sponsor issue-oriented advertisements. Democracy, however, will suffer if an unbalanced and unfair discussion of national issues dominates the national public agenda. The Fairness Doctrine moderates this threat. It does not restrict speech, but requires more speech. It does not inhibit the first amendment freedom of broadcasting, but rather safeguards that freedom for the public. If broadcasters choose to surrender their editorial judgment to the highest bidder, they must ensure that the American public has an opportunity to hear other views on these issues. This responsibility is not a huge burden, but a small obligation that accompanies the privilege of speaking on the public's behalf.<sup>115</sup>

The existing political broadcasting laws can continue to meet the challenges to balanced public dialogue that PACs pose. The laws warrant support during this time of vehement criticism. They guarantee that opposing views will balance any discussion which independent groups bring to the broadcasting area. In sum, these laws, especially the Fairness Doctrine, represent the only legal barrier to independent PACs' total domination of the electronic video marketplace.

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114. See *Columbia Broadcasting Sys., Inc., v. Democratic Nat'l Comm.*, 412 U.S. 94, 105, 111 (1973). *But cf.* notes 91-92 and accompanying text (purpose of § 315 equal opportunities provision is not to equalize expenditures among candidates).

115. See *supra* notes 27-31 and accompanying text.

