

Broadcasters' Rights: Whether to Air Independent Political Action Committee Advertisements

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Introduction

With obsolete Titan I missile silos in the background, Representative James Golder tells the television viewer that:

I'm standing in front of these missile silos to dramatize one of the effects of Senator Church's power in Washington. These silos aren't filled with missiles anymore. They are empty. Because of that, they won't be of much help in defense of your family or mine. You see, Senator Church has almost always opposed a strong national defense. He led the fight to give away our Panama Canal and he voted to slash national defense procurement; and now Senator Church is one of those who wants to push the SALT II treaty through the Senate, which I believe would seriously weaken America.¹

John T. "Terry" Dolan, Chairman of the National Conservative Political Action Committee, states, "a group like ours could lie through its teeth and the candidate it helps stays clean."² Should television and radio stations be required, or even permitted, to broadcast political advertisements which distort the truth? Only a few years ago the likelihood of a broadcaster being requested to air an attack on a candidate for federal elective office containing fabrications and misleading innuendos was highly unlikely.

The 1976 Supreme Court decision in *Buckley v. Valeo*³ signifi-

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1. National Conservative Political Action Comm. television advertisement broadcast in Idaho during the 1980 senatorial campaign.

2. McPherson, *The New Right Brigade: John Terry Dolan's NCPAC Targets Liberals and the Federal Election Commission*, Wash. Post, Aug. 10, 1980, at F1, col. 1.

3. 424 U.S. 1 (1976). See Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 Wis. L. REV. 323; Comment,

cantly changed the complexion of campaigns for federal elective office. In *Buckley*, the Court struck down the limitations on independent expenditures⁴ contained in the Federal Election Campaign Act (FECA) of 1971, as amended in 1974,⁵ as an impermissible burden on the freedoms of speech and association protected by the First Amendment to the United States Constitution.⁶ Since the ruling in *Buckley*, the activity of independent political committees⁷ and, to a lesser extent, individuals, has grown in geometric proportion. Millions of dollars are collected by independent political committees and spent in an effort to not only elect particular candidates, but also to attack the voting record, character, and reputation of opposing candidates in an effort to defeat them. As a result, the broadcast media are confronted with a

Buckley v. Valeo: The Supreme Court and Federal Campaign Reform, 76 COLUM. L. REV. 852 (1976).

4. When *Buckley* came before the Supreme Court, an "independent expenditure" was implicitly defined by the Federal Election Campaign Act (FECA) of 1971 as follows: "No person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000." 18 U.S.C. § 608 (e) (1) (Supp. IV 1974). The act has subsequently been amended to expressly define "independent expenditure." 2 U.S.C. § 431 (17) (1982). See *infra* note 17.

5. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

6. *Buckley v. Valeo*, 424 U.S. at 39-59.

7. A political committee is defined in terms of contributions received and expenditures made on an annual basis. 2 U.S.C. § 431 (4) (1982). Among the different types of political committees are "principal campaign committees" and "political action committees" also known as "PACs." A principal campaign committee is a political committee designated and authorized by a candidate to be his or her primary committee. See 2 U.S.C. §§ 431 (5), 432 (e) (1) (1982).

The term political action committee does not appear in the FECA. In fact, what is commonly referred to as a PAC may be one of two types of political committees recognized under the law. One type of PAC includes those established by corporations, trade associations, incorporated membership associations, cooperatives, and labor organizations. These are referred to as "separate segregated funds" under 2 U.S.C. § 441b (b) (2) (1982), to indicate that such PACs are sponsored by, or have a close relationship to, another organization, and must observe rules governing their relationship with their affiliated or sponsored organization.

PACs established by groups of individuals, unincorporated associations, or partnerships are often referred to in Federal Election Commission literature as "no connected organization" political committees. In reality, of course, there may be a sponsoring organization. But the law views such a political committee as a separate entity from the sponsoring organization. The structure of these PACs is legally the same whether they are formed by a small group of concerned citizens or a large unincorporated organization such as the California Medical Association. Probably the best known of the "no connected organization" PACs is the National Conservative Political Action Committee (NCPAC). The focus of this article is on one form of activity of "no connected organizations": independent expenditures. Individuals also make independent expenditures. This article refers to PACs and individuals spending money in this manner as "independent expenders."

complex new issue: Must television and radio stations sell air time to independent exponents for the broadcast of political advertisements?

While independent exponents have a constitutionally protected right to participate in the political process and speak out on the issues and candidates,⁸ it is the contention of this article that there is no basis for concluding that independent political committees and individuals may purchase broadcast advertising time wherever and whenever they desire. To the contrary, broadcast stations may develop and implement general policies for processing, responding to, and rejecting editorial advertisements proffered by independent exponents.

This article will briefly examine the underlying concepts which make up the body of law regulating access to the broadcast media by independent exponents. Most significant is the interplay of the First Amendment rights to freedom of speech and association, the fairness doctrine,⁹ the equal opportunities¹⁰ and reasonable access¹¹ requirements embodied in the Communications Act and applied by the Federal Communications Commission (FCC), and the Federal Election Commission's (FEC) interpretation and enforcement of the law and regulations respecting independent expenditures designed to affect political campaigns.¹² This examination is followed by an analysis of recent court decisions having a significant impact on political speech and a review of the growth in independent political expenditures since *Buckley*. Finally, the article discusses television and radio stations' obligations when confronted with a request from an independent exponent to sell time for the broadcast of advertisements.

I. General Theory: The Convergence of Three Legal Concepts

The Federal Election Campaign Act (FECA) of 1971, as amended, together with the equal opportunity, reasonable access, and fairness doctrines, operates in an area of fundamental First Amendment activities: discussion of the qualifications of candidates for public office and the right of association in order to advance political beliefs and ideas.¹³ Because the First Amendment confers such a high degree of protection against encroachment on the rights of speech and association, congressional enactments regulating federal campaign activity of independent

8. *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976).

9. *See infra* notes 27-29, and accompanying text.

10. *See infra* notes 18-21, and accompanying text.

11. *See infra* notes 22-26, and accompanying text.

12. *See infra* notes 13-17, and accompanying text.

13. *See* *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Mills v. Alabama*, 384 U.S. 214 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

political committees, although broad, may not unduly burden those rights.

A primary objective of the FECA is to prevent corruption and the appearance of corruption in political campaigns for federal office.¹⁴ The FECA restricts contributions by an individual to a candidate and his authorized political committee to \$1,000 per election, and to a maximum of \$5,000 per calendar year to any independent political committee.¹⁵ Although an independent political committee is prohibited from contributing more than \$5,000 per election to a candidate for federal office and his authorized political committee,¹⁶ there is no concomitant restriction on the amount which may be expended by a truly independent political committee on behalf of a particular candidate.¹⁷

While the FEC focuses on the broader issues of contributions to, and expenditures by, independent political committees, the FCC is concerned with the efforts of independent exponents to influence the electorate by purchasing advertising time from the broadcast media. In its dealings with individual exponents, the FCC is guided by three principles of communications law: the equal opportunities doctrine, the requirements affording candidates and their opponents reasonable access to the airwaves, and the fairness doctrine.

The equal opportunities doctrine, embodied in section 315 (a) of

14. See *Buckley v. Valeo*, 424 U.S. at 26. Other objectives of the FECA include making candidates and other exponents of money accountable to the public, equalizing the relative abilities of rich and poor individuals to participate in the electoral process, and limiting the amount of money spent in campaigns for federal elective office. It is beyond the scope of this article to address the relative merits of these objectives and whether they are in fact met by the statute.

15. 2 U.S.C. §§ 441a (a) (1) (A), (C) (1982).

16. 2 U.S.C. § 441a (a) (2) (A) (1982). The term "election" is defined as follows:

"(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President."

2 U.S.C. § 431 (1) (1982). For practical purposes, then, a candidate running for Congress who must win a primary and general election would be able to receive \$2,000 from an individual and \$10,000 from an independent political committee.

17. The term "independent expenditure" is defined to mean: "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431 (17) (1982). See also 11 C.F.R. § 109.1 (a) (1982).

the Communications Act,¹⁸ prevents favoritism by broadcasters toward particular candidates by requiring that candidates for the same office be given an equal opportunity to use the facilities of a broadcast station. Sometimes referred to as the “equal time” requirement, section 315 is more comprehensive than implied by that label. Under this doctrine, broadcasters are required to provide to legally qualified candidates for federal office¹⁹ the right to obtain time in a period likely to attract the same size audience as attracted by the previous use²⁰ of the broadcaster’s facilities by an opposing candidate. The request for access to the broadcast facilities must be made within seven days of the initial broadcast and the station is obligated to sell the time during specified periods immediately prior to an election and at the lowest unit charge for the category of time being sold.²¹

18. 47 U.S.C. § 315 (a) (1976) provides as follows:

“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 under this subsection 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 Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”

19. A “legally qualified federal candidate” is a person who has publicly announced that he is a candidate for elective office, meets the qualifications prescribed by the applicable law to hold the office for which he is a candidate, and who has qualified for a place on the ballot or has publicly committed himself to seek election via the write-in method. 47 C.F.R. § 73.1940 (a) (1982). *See also* 2 U.S.C. § 431 (2) (1982).

20. As a general rule, any broadcast of the voice or picture of a candidate constitutes a “use” of the television or radio station if the candidate can be identified by the audience. Under § 315 of the Communications Act, there are four categories of broadcasts which do not constitute a use. *See supra* note 18; *see also The Law of Political Broadcasting and Cablecasting (Political Primer)*, 69 F.C.C.2d 2209, 2286-90 (1978) [hereinafter cited as *New Primer*].

21. 47 U.S.C. § 315 (b) (1976). A broadcast station may charge a candidate only what it would charge a commercial advertiser, and in some circumstances is obligated to charge a candidate based on its volume discount rates even though a commercial advertiser is not entitled to similar treatment. 47 C.F.R. § 73.1940 (b) (1982). *See New Primer, supra* note 20, at 2286-90.

A second aspect of the law of political broadcasting impacting on First Amendment rights is the reasonable access provision of the Communications Act.²² This provision permits the FCC to "revoke any station license . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy."²³ The effect of the reasonable access provision is to negate any incentive broadcasters may have to refuse to sell air time to candidates for federal elective office created by the requirement that the time be sold at the lowest unit charge for comparable use.²⁴

The term "reasonable access" is subject to no hard and fast definition. What may be reasonable for a station located in a major metropolitan area such as New York City whose broadcast signal reaches three or more states may not be reasonable for a station located in a sparsely populated midwest farming community. Since the latter station will likely have fewer candidates to accommodate, it would be reasonable for that station to provide more time to each federal candidate than that allowed to candidates by a New York station.²⁵ The FCC will examine broadcast decisions to determine whether they are reasonable in light of all the surrounding circumstances.²⁶

Unlike the equal opportunities and reasonable access requirements embodied in the Communications Act, the fairness doctrine does not apply to individual candidates for federal elective office. Rather, the fairness doctrine imposes an obligation on broadcasters to adequately cover issues of public importance for that geographic location and requires that the station fairly reflect the differing viewpoints on that issue.²⁷ While television and radio stations must exercise their editorial judgment and journalistic discretion in determining who will gain access to the airwaves, the station need not provide an equal

22. 47 U.S.C. § 312 (a) (7) (1976).

23. *Id. as amended by* Pub. L. No. 92-225, § 103 (a) (2) (A), 86 Stat. 3, 4 (1982). While federal law does not require television and radio stations to grant reasonable access to candidates for state and local office, the broadcast media have an obligation under the fairness doctrine to devote air time to political campaigns for such offices in proportion to their significance to the community so as to reflect the differing viewpoints being expressed. *See infra* notes 27-28; *New Primer, supra* note 20, at 2286-90.

24. 47 U.S.C. § 315 (b) (1976).

25. *See New Primer, supra* note 20, at 2286-90.

26. *Id.* at 2287 (quoting *Public Notice, Use of Broadcasting and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 536 (1972)).

27. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969). The fairness doctrine was incorporated in § 315 (a) of the Communications Act, 47 U.S.C. § 315 (a), by the Act of Sept. 14, 1959, § 1, 73 Stat. 357 (1959).

amount of time for broadcast of opposing views or provide time for expression of those contrary views in the same program.²⁸ However, the licensee must make a good faith determination of the appropriate format and the amount of time to be devoted to the issue.²⁹

II. Recent History of Political Speech

A. The 1974 Amendments and *Buckley v. Valeo*

Following the 1972 elections, Congress undertook a re-evaluation of the federal campaign financing system and enacted the 1974 amendments to the FECA.³⁰ The key provisions of the 1974 amendments limited to \$1,000 the amount an individual could contribute,³¹ and to \$5,000 the amount a political committee could contribute³² to any candidate per election with an overall annual limitation of \$25,000 on an individual contributor,³³ placed limits on expenditures by individuals or groups relative to clearly identified candidates;³⁴ restricted the amount candidates for various federal offices could spend of their own funds on their campaigns;³⁵ and imposed overall expenditure limitations on candidates seeking federal office.³⁶

Shortly after enactment of the 1974 amendments, litigation was initiated challenging the constitutionality of their provisions. On January 30, 1976, the Supreme Court handed down its opinion in *Buckley v. Valeo*,³⁷ the seminal decision establishing limits on congressional authority in the area of campaign financing. In *Buckley*, the Court ruled

28. There are instances where a broadcaster is *required* to provide free air time for opposing viewpoints. In *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963), the FCC held that under the fairness doctrine a broadcast licensee that has aired one side of an issue under paid sponsorship is obligated to air the opposing views of an appropriate spokesperson free of charge if the broadcaster is unable to obtain paid sponsorship for presentation of the contrasting views.

29. See *In re Nicholas Zapple*, 23 F.C.C.2d 707 (1970).

30. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

31. 2 U.S.C. § 441a (a) (1) (A) (1982) (amending 18 U.S.C. § 608 (b) (1) (Supp. IV 1974)).

32. *Id.* at § 441a (a) (1) (C) (1982) (amending 18 U.S.C. § 608 (b) (2) (Supp. IV 1974)).

33. *Id.* at § 441a (a) (3) (1982) (amending 18 U.S.C. § 608 (b) (3) (Supp. IV 1974)).

34. 18 U.S.C. § 608 (e) (1) (repealed 1976).

35. *Id.* at § 608 (a) (1) (repealed 1976).

36. *Id.* at § 608 (c) (repealed 1976).

Other provisions of the 1974 amendments imposed detailed reporting requirements on political committees, 2 U.S.C. § 434 (a) (1982); established the eight member FEC of which two members were to be appointed by the President *pro tempore* of the Senate, two by the Speaker of the House, and two by the President, 2 U.S.C. § 437 (c) (1976); and established public financing of presidential nominating conventions, primary campaigns, and general elections, 26 U.S.C. §§ 9001-13 (1976).

37. 424 U.S. 1 (1976).

that the contribution limitations enacted as part of the 1974 amendments were not an unconstitutional infringement of First Amendment rights of speech and association.³⁸ The limitations imposed on independent expenditures, however, and the cap on candidate spending from personal funds on their own behalf could not be reconciled with the First Amendment and were struck down.³⁹

1. *Permissible Restrictions on First Amendment Rights—The Contribution Limitations*

Freedom of political expression is a fundamental right protected by the Constitution. As the Court stated in *Buckley*:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁴⁰

Furthermore, discussion of political campaigns and expression of political ideas in a campaign setting is associational activity protected by the First Amendment.⁴¹

These rights are not without limit. The authority of Congress under the Constitution to regulate federal elections is well-established.⁴² In order to survive judicial review, however, federal election laws which regulate political expression through restriction of contributions and expenditures⁴³ must serve a compelling governmental interest

38. *Id.* at 23-39.

39. *Id.* at 39-59. Discussion of the Court's analysis of the limits imposed on candidates' use of their own funds insofar as it differs from the rationale for striking down the limits on independent expenditures is beyond the scope of this article. Similarly, the Court's reasoning for sustaining the expenditure limitations imposed on presidential candidates who accept public financing will not be analyzed.

40. *Id.* at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

41. The First Amendment guarantees "'freedom to associate with others for the common advancement of political beliefs and ideas.'" This freedom encompasses "'[t]he right to associate with the political party of one's choice.'" *Buckley v. Valeo*, 424 U.S. at 15 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975)).

42. *See* *Buckley v. Valeo*, 424 U.S. at 13.

43. The Supreme Court in *Buckley* rejected the contention that the contribution and expenditure limitations should be viewed as regulating conduct, as in *United States v. O'Brien*, 391 U.S. 367 (1968), rather than speech. As the Court noted, even assuming that the communicative aspect of the draft card burning in *O'Brien* implicated First Amendment freedoms, the governmental interest in regulating the non-speech aspect of the conduct resulted in an incidental restriction of First Amendment rights and was not directed at the communicative aspect of the conduct. *Buckley v. Valeo*, 424 U.S. at 16. Unlike the situation presented by *O'Brien*, the congressional objective of limiting contributions and expenditures in political campaigns "arises in some measure because the communication allegedly inte-

which can satisfy the "strict scrutiny" standard.⁴⁴ Of the three governmental interests advanced in *Buckley* as justification for the limitations on large contributions to political campaigns, only the governmental interest in preventing corruption and the appearance of corruption resulting from the potential influence of the contributions on elected candidates⁴⁵ was held to be constitutionally sufficient.⁴⁶

The primary issue raised by the contribution limitations was the restriction on an aspect of First Amendment associational rights: making a contribution to a political party is one of the ways in which an individual affiliates with a particular candidate or ideology.⁴⁷ The Court pointed out that contribution limitations do not impede an individual's right to join a political party or work on behalf of a candidate.⁴⁸ The majority also stated that the contribution limitations neither affect the political dialogue of candidates⁴⁹ nor restrict the otherwise wide open and robust discussion by individuals of the candidates and issues.⁵⁰ The act of contributing serves as a communication of support for a candidate or particular issue.⁵¹ Restricting the size of the contribution may inhibit the intensity of one avenue an individual may take to express his support, but it neither restrains the political communication that arises out of the contribution nor prohibits other means of communicating support for a candidate or ideology.⁵² With nearly perfect foresight,⁵³ the Court concluded that the contribution limitations would not adversely affect candidates, but would merely

gral to the conduct is itself thought to be harmful." *Id.* (quoting *United States v. O'Brien*, 391 U.S. at 382).

44. *Buckley v. Valeo*, 424 U.S. at 25.

45. *Id.* at 26. The other governmental interests advanced for the restrictions on contributions were (1) muting the voices of the affluent to equalize the relative ability of all persons to affect the outcome of elections and (2) slowing down the rising cost of political campaigns so as to open the system to candidates without access to substantial amounts of money. *Id.* at 25-26. These justifications were rejected by the Court as insufficient bases for impeding First Amendment rights through the contributions. *Id.* at 48-49.

46. *Id.* at 26.

47. *Id.* at 22, 24.

48. *Id.* at 22.

49. *Id.* at 21. "The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 21-22.

50. *Id.* at 29.

51. *Id.* at 21.

52. *Id.*

53. *See infra* notes 96-122 and accompanying text.

foster the proliferation of independent spenders.⁵⁴

2. *Impermissible Restriction of First Amendment Rights—The Expenditure Limitations*

The Supreme Court found that both the expenditure and contribution limitations have an impact on First Amendment interests.⁵⁵ In sharp contrast to its view of the contribution limitations, the Court concluded that the expenditure limitations constituted “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”⁵⁶

The most significant of these restrictions on independent expenditures provided as follows:

No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c) (2) (B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000.⁵⁷

The Supreme Court avoided invalidating the provision on vagueness grounds by restricting its application to “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”⁵⁸ Nevertheless, the Court found this expenditure limitation to be an impermissible burden on First Amendment freedoms.⁵⁹ Unlike the burden on the rights of free speech and association resulting from the contribution limitations, the governmental interest⁶⁰ was held to be inadequate to justify the ceiling on independent expenditures.⁶¹ The primary rationale articulated by the Court for overturning the expenditure limitations was that the inability to coordinate the expenditures with the candidate undermines their value and diminishes the likelihood of corruption.⁶² The Court reasoned that uncoordinated expenditures (i.e., independent expenditures) may be counterproductive,⁶³ an observation borne out by the

54. *Buckley v. Valeo*, 424 U.S. at 28.

55. *Id.* at 19.

56. *Id.*

57. Pub. L. No. 93-443, § 101 (a), 88 Stat. 1263, 1265, 18 U.S.C. § 608 (e) (1) (1974) (repealed 1976).

58. *Buckley v. Valeo*, 424 U.S. at 44. *See also supra* note 17.

59. 424 U.S. at 47-48, 51.

60. *See supra* note 45 and accompanying text for the governmental interests advanced as justification for the restrictions on contributions.

61. *Buckley v. Valeo*, 424 U.S. at 45.

62. *Id.* at 46-47.

63. *Id.* at 47.

1982 Congressional elections.⁶⁴

The Court in *Buckley* rejected as constitutionally impermissible the proffered Congressional objective of protecting the contribution limitations by imposing restraints on expenditures in an effort to close the so-called "independent expenditure loophole."⁶⁵ The Supreme Court also refused to accept as sufficiently compelling the governmental interests in muting the voices of the affluent in order to equalize the ability of all individuals and organizations to affect the outcome of elections, and in slowing down the ever increasing cost of political campaigns.⁶⁶

Addressing the limitation on expenditures by candidates from personal or family resources,⁶⁷ the Court refused to recognize that the governmental interest in preventing corruption is advanced because the use of personal funds may decrease candidate reliance on outside contributions.⁶⁸ More significantly, the Court felt that the expenditure limitation restricted a candidate's freedom to speak out and vigorously advocate his own election.⁶⁹ The Court therefore held that these restrictions violated the First Amendment.⁷⁰

The limitations on overall campaign expenditures also could not be sustained on the basis of the proffered governmental interests in preventing corruption or equalizing candidate resources. The Court concluded that the contribution limitations adequately deal with the corruption concern,⁷¹ and that as a result of those limitations, the amount of money received by candidates should and "will normally vary with the size and intensity of the candidate's support."⁷² The governmental interest in retarding the skyrocketing cost of political campaigns was viewed by the Court as the primary objective for imposing overall expenditure ceilings; however, this objective also was rejected as a basis for infringing upon First Amendment rights.⁷³ The determi-

64. See *infra* notes 117-22 and accompanying text.

65. *Buckley v. Valeo*, 424 U.S. at 45.

66. *Id.* at 25-26.

67. As enacted in 1974, 18 U.S.C. § 608 (a) (1) (Supp. IV 1974), set limits on expenditures from personal or immediate family funds in connection with a campaign at \$50,000 for presidential and vice presidential candidates, \$35,000 for senatorial candidates and \$25,000 for candidates for the House of Representatives. Candidates for the House of Representatives from states only entitled to one representative were subject to the \$35,000 ceiling on expenditures.

68. *Buckley v. Valeo*, 424 U.S. at 53.

69. *Id.* at 52.

70. *Id.* at 54.

71. *Id.* at 55-56.

72. *Id.* at 56.

73. *Id.* at 57.

nation of how much will be spent in political campaigns is beyond the scope of governmental authority and is left to the control of the public.⁷⁴

B. *Republican National Committee v. FEC* and Public Funding of Presidential Campaigns

After *Buckley*, the question remained whether the expenditure and contribution limitations of the Presidential Election Campaign Fund Act ("Fund Act")⁷⁵ violated the First Amendment. The Fund Act conditions eligibility for public campaign financing upon compliance with expenditure limitations and agreement to forgo private contributions.⁷⁶ In *Republican National Committee v. FEC*,⁷⁷ a three-judge panel⁷⁸ held that the Fund Act limitations do not violate the First Amendment rights of presidential candidates or their supporters.⁷⁹

In dismissing the challenge to the Fund Act by the Republican National Committee, the court found that a presidential candidate is not obligated to accept public funding and the restrictions on spending attendant thereto in lieu of unlimited private financing and spending.⁸⁰ A presidential candidate's decision to accept financing under the Fund Act is a voluntary choice which will be based on the candidate's evaluation of his campaign priorities. The court reasoned that because candidates may choose between private and public funding, Congress has

74. *Id.*

75. Chapter 95 of Subtitle H of the Internal Revenue Code of 1954, I.R.C. §§ 9001-13 (1976).

76. I.R.C. § 9003 (b) (Supp. V 1981) provides:

"(b) Major parties. In order to be eligible to receive any payments under section 9006, the candidates of a major party in a presidential election shall certify to the Commission, under penalty of perjury, that —

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled under section 9004, and

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006 (d), and no contributions to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002 (11) have been or will be accepted by such candidates or any of their authorized committees.

"Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations."

77. 487 F. Supp. 280 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

78. Section 801 (b) of the Fund Act, 26 U.S.C. § 9011 (b) (2), expressly grants jurisdiction to a three-judge federal district court to "implement or contrue [sic]" any provision of the Fund Act.

79. *Republican Nat'l Comm. v. FEC*, 487 F. Supp. at 283, 286-87.

80. *Id.* at 283, 285-86.

authority under the General Welfare Clause to restrict expenditures of presidential candidates electing public financing,⁸¹ and that the conditions imposed for receipt of public financing do not abridge the First Amendment rights of presidential candidates.⁸²

The court also concluded that because the rights of a candidate and his supporters are separate and distinct, the candidate's agreement to forgo private contributions and unlimited expenditures does not abridge the supporters' First Amendment rights of speech and association. The court pointed out that a candidate's backers are left with numerous alternative means of expressing their support, including contributing their services and making expenditures uncoordinated with the official campaign.⁸³ It is the candidate who determines whether to accept or reject contributions from the general public; the complaint of contributors should be directed to the candidate, not the courts.⁸⁴

C. *Common Cause v. Schmitt*

In an attempt to stem the tide of ever increasing expenditures by independent committees, suits were filed in mid-1980 by Common Cause and the FEC.⁸⁵ The actions were filed against several independent spenders under section 9012 (f) of the Internal Revenue Code, a little recognized provision not challenged in *Buckley*, which prohibits independent committees from spending more than \$1,000 on behalf of a presidential candidate who had accepted federal funds for his campaign.⁸⁶ A three-judge panel ruled that the provision was an unconstitutional limitation on expenditures for political speech and association.⁸⁷ The court noted that the form of campaign activity en-

81. *Id.* at 284.

82. *Id.* at 285. The court stated that: "While Congress may not condition benefit on the sacrifice of protected rights . . . the fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish the protected right or, where there is such a diminution, the burden is justified by a compelling state interest." *Id.* at 284-85 (citations omitted).

83. *Id.* at 286.

84. *Id.*

85. *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C.), *aff'd per curiam* by an equally divided court, 455 U.S. 129 (1982).

86. 26 U.S.C. § 9012 (f) (1) (1976) provides in relevant part that: "[I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding \$1,000."

87. *Common Cause v. Schmitt*, 512 F. Supp. at 493-94.

gaged in by the defendants was speech on the highest constitutional plane and subject to the highest level of protection.⁸⁸ The court ruled that the governmental interest in preventing corruption and the appearance of corruption is insufficient to permit the limitation of expenditures.⁸⁹ The court thus held section 9012(f)(1) to be an unconstitutional restraint of political speech.⁹⁰

In reaching its decision, the court relied on that portion of the decision in *Republican National Committee v. FEC*⁹¹ which held that the Fund Act does not infringe the First Amendment rights of candidates' supporters. The court in *Common Cause* read *Republican National Committee* to mean that the restrictions associated with public funding of presidential campaigns are permissible only because the right of candidates' supporters to independently participate in the campaign process is not impeded. The court found especially significant that "uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley v. Valeo*"⁹² The court concluded that expenditure limitations are no more acceptable merely because they are incorporated in the Internal Revenue Code rather than the federal election laws.⁹³ The right to make independent expenditures is the constitutional backbone of the election laws because individuals speak through the money they contribute to independent committees.⁹⁴ The court therefore held that independent committees are entitled to the same First Amendment rights as those afforded individuals to make independent expenditures in an effort to influence the outcome of political campaigns.⁹⁵

III. Independent Expenditures: A post-*Buckley* Experiment

The growth of independent campaign activity since the ruling in *Buckley v. Valeo* has been staggering. In 1976 there were 608 non-party political committees,⁹⁶ more commonly known as political action

88. *Id.* at 493.

89. *Id.* (citing *Buckley v. Valeo*, 424 U.S. at 44-45).

90. *Id.* at 496-97.

91. 487 F. Supp. 280 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

92. *Common Cause v. Schmitt*, 512 F. Supp. at 495-96 (citing *Republican Nat'l Comm. v. FCC*, 487 F. Supp. at 286).

93. *Common Cause v. Schmitt*, 512 F. Supp. at 496.

94. *Id.*

95. *Id.* at 499-500.

96. 7 FEC Record 2 (1981).

committees, or "PACs". By the end of the 1977-78 election cycle,⁹⁷ the number of PACs which had registered with the FEC ballooned to 1,949.⁹⁸ This number increased further to 2,785 PACs during the 1979-80 cycle⁹⁹ and stood at 3,371 as of December 31, 1982.¹⁰⁰

The amount of money spent as independent expenditures has likewise increased. The FEC reports that during the 1975-76 election cycle, \$2,033,207 was spent independently for or against 144 candidates.¹⁰¹ During the 1977-78 election cycle this number fell to \$317,455.¹⁰² The decline in the dollar amount of independent expenditures from the 1976 level is a function of the presidential election of that year. Discounting the amount of independent expenditures attributable to the 1976 presidential election reveals that \$386,667 was spent for or against congressional candidates during the 1975-76 election cycle.¹⁰³ While this amount slightly exceeds that spent during the 1977-78 cycle, the number of candidates affected increased by nearly fifty percent.¹⁰⁴

The presidential election cycle of 1979-80 showed a marked increase in spending over the previous four years. The FEC reports that \$16,084,273 was independently expended for and against candidates for federal office during that two year period.¹⁰⁵ Of that amount, \$13,745,444 was spent in an attempt to influence the presidential race,

97. An election cycle runs from January 1 of the year preceeding the election through December 31 of the year in which the election is held. Thus, the 1977-78 election cycle ran from January 1, 1977 through December 31, 1978.

98. Fed. Election Comm'n, *FEC Releases Final Report on 1977-78 Financial Activity of Non-Party and Party Political Committees*, Press Release 1 (Apr. 24, 1980).

99. Fed. Election Comm'n, *FEC Releases Final PAC Report for 1979-80 Election Cycle*, Press Release 1 (Feb. 21, 1982). The number of PACs had decreased to 2,551 by the end of 1980 because some committees had completed their activity. *Id.*

100. Fed. Election Comm'n, *PAC's Increase in Number*, Press Release (Jan. 14, 1983).

101. Fed. Election Comm'n, *FEC Releases Final Information on Independent Expenditures*, Press Release 1 (Oct. 9, 1980). The FEC reported its figures as "approximated and unverified." A *Congressional Quarterly* review of FEC records concluded that \$792,953 had been spent as independent expenditures during the 1975-76 election cycle. Light, *Surge in Independent Campaign Spending*, 38 CONG. Q. WEEKLY REP. 1635 (1980). One commentator has concluded that the *Congressional Quarterly* data is more reliable than the FEC approximation because it was based on stricter application of independent expenditure criteria. See Cantor, *The Evolution and Issues Surrounding Independent Expenditures in Election Campaigns*, 82-87 GOV CONG. RESEARCH SERV. REP. 24 (1982).

102. Fed. Election Comm'n, *FEC Releases Final Information on Independent Expenditures*, *supra* note 101, at 1.

103. *Id.*

104. One hundred forty four candidates were affected by independent expenditures during the 1975-76 election cycle and 215 candidates were affected during the 1977-78 cycle. *Id.*

105. Fed. Election Comm'n, *FEC Study Shows Independent Expenditures Top \$16 Million*, Press Release 1, 4 (Nov. 29, 1981).

with the remaining \$2,338,829 expended on the congressional campaigns.¹⁰⁶ The number of candidates affected by independent expenditures nearly doubled to 425 from 215 affected during the previous cycle.¹⁰⁷

The increase in independent expenditures directed at congressional campaigns evidenced during the 1979-80 election continued into the 1981-82 cycle. As of December 18, 1982, \$4,534,382 in independent expenditures had been reported to the FEC.¹⁰⁸ This represents a nearly one hundred percent increase over the prior election cycle — and the figures are not yet final.

The 1978 election year marked the first time that independent expenditures directed in opposition to particular candidates gained national recognition. The zenith of negative independent campaigning occurred during the 1980 campaign when the National Conservative Political Action Committee ("NCPAC") launched Target '80, a campaign of negative advertisements directed primarily at six Democratic senators.¹⁰⁹ The attention focused by the press on this negative campaign and that of other groups was not in proportion with the actual dollar expenditures of the groups. While the \$2,191,084 funneled into negative campaign activity during the 1979-80 election cycle¹¹⁰ far outstrips the \$59,182 expended against candidates during the 1975-76 election cycle, and \$74,964 during the 1977-78 cycle,¹¹¹ it also represents a ten point decrease in the percentage of independent expenditures spent in an effort to defeat a clearly identified candidate from the twenty-four percent level reached during the 1977-78 cycle. According to FEC records, of the nearly \$2.2 million independently spent in negative

106. *Id.*

107. *Id.* at 4.

108. Fed. Election Comm'n, *1981-1982 Independent Expenditure Index by Committee/Person Expending*, Press Release (Dec. 18, 1982). The total reflected in the FEC report of \$4,628,011 has been reduced by \$93,629 in expenditures attributable to the 1979-80 campaigns of Presidents Reagan and Carter paid during the 1981-82 election cycle. The report of each PAC and individual has not been examined to determine whether costs incurred for congressional elections during the 1979-80 cycle were paid during the 1981-82 cycle. If the costs were paid in the later cycle, the reported figure should be reduced accordingly.

109. Light, *supra* note 101, at 1635. The six Senators were Birch Bayh of Indiana, Frank Church of Idaho, Alan Cranston of California, John Culver of Iowa, Thomas Eagleton of Missouri, and George McGovern of South Dakota. Only Senators Cranston and Eagleton were re-elected.

110. Fed. Election Comm'n, *FEC Study Shows Independent Expenditures Top \$16 Million*, *supra* note 105, at 4.

111. Fed. Election Comm'n, *FEC Releases Information on Independent Expenditures*, *supra* note 101, at 1.

campaign activity against sixty-five candidates,¹¹² more than one half was expended in an effort to unseat the six Democratic senators targeted by NCPAC,¹¹³ and approximately ninety percent of that amount came directly from NCPAC.¹¹⁴

Although the press went to great lengths during the 1980 campaign to focus attention on the negative expenditures of NCPAC and the effect of this type of campaign activity, it failed to bring clearly into focus the fact that there was no real proliferation of negative campaign activity. FEC reports indicate that during the 1979-80 election cycle nearly seventy percent of all independent campaign expenditures spent in an effort to defeat clearly identified candidates came from one source, NCPAC.¹¹⁵

The data for the 1981-82 election cycle reflects both a change of course in independent expenditures and a continuation of patterns established in prior years. One of the more significant changes is in the amount of independent expenditures. Prior to the 1981-82 election, the most that had been spent on congressional campaigns by independent exponents was \$2.3 million during the 1979-80 cycle.¹¹⁶ The amount reported as independent expenditures through mid-December, 1982 exceeded \$4.5 million.¹¹⁷ This figure is more than twice the amount spent during the 1979-80 election cycle and is a fourteen fold increase over the amount independently expended in the 1978 congressional elections.

Another significant change is in how the money was spent. Of the \$4.5 million in independent expenditures reported, \$3.9 million, or eighty-six percent, was used for negative campaign activity.¹¹⁸ This is in stark contrast to the 1979-80 election cycle wherein fourteen percent of the independent expenditures was spent to defeat clearly identified candidates¹¹⁹ and fifty-nine percent was spent on negative activity in

112. Fed. Election Comm'n, *FEC Study Shows Independent Expenditures Top \$16 Million*, *supra* note 105, at 4.

113. *Id.* at 3.

114. Fed. Election Comm'n, *1979-80 Independent Expenditure Index by Committees/Person Expending*, Press Release (Dec. 18, 1980).

115. Fed. Election Comm'n, *FEC Index of Independent Expenditures, 1979-80*, Press Release (Nov. 9, 1981).

116. Fed. Election Comm'n, *FEC Study Shows Independent Expenditures Top \$16 Million*, *supra* note 105, at 30.

117. Fed. Election Comm'n, *1981-82 Independent Expenditure Index by Committees/Person Expending*, *supra* note 108.

118. *Id.*

119. *See supra* note 112 and accompanying text.

congressional campaigns.¹²⁰ Consistent with the prior election cycle, NCPAC has been responsible for nearly seventy percent of all independent expenditures reported through mid-December, 1982.¹²¹

What occurred during the 1982 election cycle is what the public was led to believe occurred in 1980: the vast majority of independent expenditures was directed against rather than for particular candidates. It is too early to predict whether this trend will continue in future elections, as the leading negative expenders may be re-evaluating their tactics in light of the 1982 election results. Shortly after the 1980 election, NCPAC targeted numerous potential candidates for attack. Of the one dozen candidates against whom NCPAC spent the most money, only one was defeated.¹²²

120. Fed. Election Comm'n, *Independent Expenditures Approach \$2 Million*, Press Release 1 (June 23, 1982).

121. As of December 18, 1982, the top ten negative independent expenders were:

<u>Name</u>	<u>Amount</u>
NCPAC	\$2,788,180
Citizens Organized to Replace Kennedy	322,154
Life Amendment PAC, Inc.	206,018
Fund For A Conservative Majority	159,258
PRO PAC	125,413
Independent Action, Inc.	100,420
Citizens for Common Sense in National Defense	91,920
Californians for Better Leadership	52,559
Mid-American Conservative PAC	37,753
Nuclear Weapons Freeze Voting Power PAC	10,561

See Fed. Election Comm'n, *1981-1982 Independent Expenditure Index by Committee/Person Expending*, *supra* note 108.

122. Only Senator Howard Cannon of Colorado was defeated. It should be noted that certain legal proceedings relating to Senator Cannon were being conducted during the campaign period. The twelve individuals and the amount spent by NCPAC as of December 18, 1982, are as follows:

<u>Name</u>	<u>Amount</u>
Paul S. Sarbanes	\$624,435
Edward M. Kennedy	528,169
Robert Byrd	226,882
Jim Wright	217,115
John Melcher	189,328
Lowell P. Weiker	189,328
Lloyd Bentsen	167,849
Howard L. Cannon	161,980
James R. Jones	124,415
Daniel Patrick Moynihan	73,775
Dan Rostenkowski	57,507
Dennis Deconcini	26,571

Id.

IV. Broadcasters' Rights and Obligations

Independent committee expenditures cannot be constrained by statutorily imposed dollar limitations. However, independent exponents, despite their extensive financial resources, may not spend their funds wherever and whenever they desire. Television and radio stations are under no obligation to accept for broadcast the advertisements of independent exponents. Rather, broadcasters have broad discretion to refuse non-candidate advertisements. The First Amendment and relevant federal statutes neither give independent committees unchecked access to the airwaves nor require broadcasters to accept the political advertisements produced by independent exponents.

A. *CBS v. Democratic National Committee* — Independent Exponents Have No Constitutional Right of Access to the Broadcast Media

The claim that the First Amendment guarantees a right to purchase advertising time from the broadcast media was emphatically rejected by the Supreme Court in *CBS v. Democratic National Committee*.¹²³ At issue in *CBS* was whether broadcasters may, as a general policy, refuse to sell advertising time to organizations wishing to speak out on issues of public concern.¹²⁴ The court concluded that such a policy is not an infringement of the speaker's First Amendment right to engage in political activity.¹²⁵

In *CBS*, the Democratic National Committee and the Business Executives Move for Vietnam Peace (BEM) brought complaints before the FCC alleging that their attempts to purchase time to air their views were being thwarted by general policies against editorial advertising.¹²⁶ While BEM's attempt to purchase advertising time had been rejected by a Washington, D.C. radio station, the Democratic National Committee did not complain of a particular refusal to sell advertising time, but rather sought a declaratory ruling from the FCC that broadcasters may not implement general policies prohibiting the sale of advertising time to "responsible entities" for comment on issues of public concern.¹²⁷ The FCC ruled that broadcasters may follow a general policy

123. 412 U.S. 94 (1973).

124. *Id.* at 97. The Democratic National Committee also challenged this practice as a violation of the Communications Act, 47 U.S.C. §§ 35, 151-609 (1934) (amended 1952, 1960).

125. 412 U.S. at 126-27.

126. *Id.* at 98.

127. *Id.* at 98. See *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970); *Democratic National Committee*, 25 F.C.C.2d 216 (1970).

of rejecting editorial advertisements.¹²⁸ The Commission reasoned that while the fairness doctrine requires broadcasters to fully and fairly cover issues of public concern, the broadcast licensee is invested with broad discretion to determine how those issues will be presented.¹²⁹ The Commission concluded that First Amendment rights are protected by this system of controlling access to the media.¹³⁰ The Court of Appeals for the District of Columbia reversed the FCC and held that a flat ban on paid public announcements violates the First Amendment, at least when other types of paid announcements are accepted.¹³¹ The circuit court reasoned that this policy constitutes unconstitutional discrimination.¹³²

In reversing the court of appeals decision, the Supreme Court noted that the airwaves are a limited resource of extreme value; access cannot be granted to everyone who can afford air time and desires to convey their message by radio or television.¹³³ Because there is limited access to airwaves, "First Amendment standards are applied differently to broadcast media than to the individual who conveys his message by distributing leaflets or placing his soapbox on a busy street corner."¹³⁴

The Court stated that the purpose of the First Amendment is to open the market place of ideas to the free flow of information:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount 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. That right may not constitutionally be abridged either by Congress or by the FCC.¹³⁵

The fairness doctrine is the vehicle which had been developed over the years as the appropriate means of balancing the First Amendment interests which compete in the broadcast area. Broadcast stations do not determine what issues are of public concern and entitled to coverage fairly reflecting the differing viewpoints; rather, they are merely the gatekeepers, regulating and balancing the amount of time devoted to a

128. 412 U.S. at 99.

129. 450 F.2d at 648; *Business Executives Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970).

130. 412 U.S. at 99; 450 F.2d at 648.

131. 412 U.S. at 100; 450 F.2d at 646.

132. 412 U.S. at 100; 450 F.2d at 661.

133. 412 U.S. at 101.

134. *Id.* (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969)) (citations omitted).

135. *Id.* at 102 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390) (citations omitted).

given side of any particular issue.¹³⁶

In reaching its holding in *CBS*, the Supreme Court summarily rejected the proposition that private parties seeking access to the airwaves should be the arbiters of whether their material would be broadcast.¹³⁷ The Court also refused to sanction a system by which the federal government would determine which speakers gain access to the airwaves.¹³⁸ The majority reasoned that permitting a right of access would cause the FCC to become even more involved in overseeing day-to-day decisions of individual broadcasters on such issues as whether a particular group has been accorded sufficient air time to present its views.¹³⁹ Governmental supervision of this nature would raise substantial First Amendment problems.¹⁴⁰ The Court concluded that “[t]o sacrifice First Amendment protections for so speculative a gain is not warranted.”¹⁴¹

B. Independent Expenders Have No Statutory Basis for Compelling Broadcasters to Sell Them Time for Editorial Advertisements

1. Broadcasters Are Not Common Carriers

It has long been recognized that radio and television broadcast stations are not common carriers¹⁴² within the meaning of the Communications Act.¹⁴³ Section 3 (h) of the Communications Act specifically provides that a person engaged in radio broadcast shall not, insofar as

136. *Id.* at 110-11. Admittedly, the system is not perfect. However, failure on the part of broadcasters to flawlessly balance the presentation of competing viewpoints is not sufficient grounds for diluting licensee responsibility. *See id.*

137. *Id.* at 124-25.

138. *Id.* at 126-27.

139. *Id.* at 127.

140. In a portion of the opinion dealing with governmental action which was not adopted by a majority of the Court, Chief Justice Burger noted that: “[I]t would be anomalous for us to hold, in the name of promoting the Constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest.” *Id.* at 120-21.

141. *Id.* at 127.

142. The prerequisites for being deemed a communications common carrier are provision of services to customers on an indiscriminate basis and transmission of intelligence of the users’ own design and choosing. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1050-51 (8th Cir. 1978), *aff’d*, 440 U.S. 689 (1979).

143. 47 U.S.C. §§ 151-609 (1934) (amended 1960).

such person is so engaged, be deemed a common carrier.¹⁴⁴ The reference to radio broadcasting in section 3 (h) has been construed to include television broadcasting.¹⁴⁵

As part of its decision in *CBS v. Democratic National Committee*, the Court examined the legislative history of the Communications Act and its forerunner, the Radio Act of 1927.¹⁴⁶ On both occasions, Congress had proposals before it which would have required broadcasters to open their facilities to any person wishing to speak out on issues of public concern.¹⁴⁷ In both instances, Congress rejected the invitation to impose common carrier status on broadcasters. Instead, the legislature enacted what became section 3 (h) of the Communications Act, specifically exempting broadcast stations from common carrier status.¹⁴⁸

Although the Court in *CBS* concluded that the Communications Act does not mandate that broadcasters open their microphones to anyone wishing to convey a message, it left open the question whether the FCC may promulgate regulations requiring broadcasters to permit a limited range of public access.¹⁴⁹ In 1976, the FCC issued regulations imposing mandatory channel capacity and access requirements on cable television systems with 3,500 or more subscribers.¹⁵⁰ These cable systems were required to develop a minimum twenty channel capacity by 1986 and make certain of those channels available for public access.¹⁵¹ The FCC regulations divested cable television operators of any control over who may gain access to their public access channels and what may be broadcast on those channels.¹⁵² The rules were challenged by Midwest Video Corporation as beyond the jurisdiction of the

144. 47 U.S.C. § 153 (h) (1934). Section 3 (h) of the Communications Act provides that: " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

145. See *United States v. Radio Corp. of America*, 358 U.S. 334, 348-49 (1959) (citing *Allen B. Dumont Laboratories v. Carrol*, 184 F.2d 153 (3d Cir. 1950)).

146. 412 U.S. at 105-10.

147. *Id.* at 105, 107-08.

148. *Id.* at 108-09.

149. *Id.* at 131. See also *FCC v. Midwest Video Corp.*, 440 U.S. at 704.

150. F.C.C. Report and Order in Docket No. 20508, 59 F.C.C.2d 294 (1976), *reconsideration denied*, 62 F.C.C.2d 399 (1978).

151. The rules promulgated by the FCC also required the cable systems to possess the technical capability for two-way, non-voice communication; to the extent of their available activated channel capacity, provide four separate channels, one each for use by public, educational, local government, and leased-access users; and make equipment available for public-access channel users. See *FCC v. Midwest Video Corp.*, 440 U.S. at 693-94.

152. *Id.* at 693.

FCC and as an unwarranted invasion of the free speech guarantee of the First Amendment.¹⁵³ The Eighth Circuit agreed and held that the access rules were not “reasonably ancillary” to the FCC’s jurisdiction,¹⁵⁴ were an attempt to impose common carrier obligations on broadcasters,¹⁵⁵ and were an impermissible exercise of the Commission’s authority.¹⁵⁶

The Supreme Court affirmed. The Court noted that while the FCC has authority to regulate cable broadcasters, there is no basis for removing control from cable systems over the composition of their programming.¹⁵⁷ The Court stated that the access rules imposed common carrier obligations on the cable television systems, and held that these obligations violate the unequivocal prohibition of section 3(h) of the Communications Act.¹⁵⁸

The Court did not completely lay the issue of broadcaster common carrier obligations to rest. It left open the possibility that broadcast stations might be subject to “less intrusive access regulation [which] might fall within the Commission’s jurisdiction.”¹⁵⁹ While the FCC apparently retains some authority to require broadcasters to permit access to the airwaves, there is no longer any question that radio and television stations are immune from common carrier obligations and that they need not open their facilities to every independent expender that desires to broadcast its message.¹⁶⁰

2. *A Grant of Reasonable Access to Candidates for Federal Office Does Not Entitle Independent Committees to Similar Treatment*

In 1972, Congress amended the Communications Act to permit the FCC to “revoke any station license . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.”¹⁶¹ Nine years later, the Supreme Court interpreted this provision and further refined the right of the broadcast media to control public access to

153. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff’d*, 440 U.S. 689, 694-95 (1979).

154. 571 F.2d at 1040.

155. *Id.* at 1052.

156. *Id.* at 1051-52.

157. *FCC v. Midwest Video Corp.*, 440 U.S. at 700.

158. *Id.* at 702.

159. *Id.* at 705 n.14.

160. *See J. Curtis Herge (NCPAC)*, 88 F.C.C.2d 626, 627 (1981).

161. 47 U.S.C. § 312 (a) (7) (1972). This section was added by the Campaign Communication Reform Act, Pub. L. No. 92-225, Title I, § 103 (a) (2) (A), 86 Stat. 4 (1972).

their facilities.¹⁶² In *CBS v. FCC*, the Supreme Court held that section 312 (a) (7) of the Communications Act creates an enforceable right of reasonable access to the airwaves for candidates seeking federal elective office.¹⁶³ The Court recognized that the section does more than merely codify preexisting law under the public interest standard.¹⁶⁴ The Court then admonished broadcasters to consider each request on its individual merits and to consider such factors as the amount of time previously purchased by the candidate, the potential for response time requests by a candidate's opponent, and the potential disruption to regularly scheduled programming when responding to a request from a candidate.¹⁶⁵ It is inappropriate for a broadcaster to ignore these criteria and adopt uniform policies for responding to candidate requests in lieu of evaluating each request on its individual merits.¹⁶⁶

Significantly, the majority opinion notes that neither this decision nor any previous Supreme Court decision has approved a "general right of access to the media"¹⁶⁷ — a right which could be used by independent committees as a means of forcing broadcast licensees to air their political advertisements. The right of access recognized in *CBS v. FCC* is a "reasonable" right of access and is enforceable only by "legally qualified federal candidates."¹⁶⁸

As could be expected, in an effort to gain their own right of access, independent committees attempted to turn the Court's decision in *CBS v. FCC* to their advantage by using it as a basis for mounting a challenge to the general policies of broadcasters against airing political advertisements. The National Conservative Political Action Committee (NCPAC) sent a letter to Mark S. Fowler, Chairman of the FCC, on September 22, 1981, requesting that the Commission "re-examine" its

162. *CBS v. FCC*, 453 U.S. 367 (1981).

163. *Id.* at 377-79.

164. *Id.* at 377-78. Prior to the enactment of § 312 (a) (7), the public interest requirement imposed an obligation on broadcast stations to devote some time to political issues, but no candidate had a right of access to the airwaves unless his opponent used a station's facilities. Political broadcasting was one of the 14 criteria reviewed to determine whether a broadcaster meets its public interest obligations. Stations used their editorial judgment to determine the extent of coverage to be accorded a political race and whether free air time would be provided. *See id.* at 378-79 (citing *Farmers Educ. & Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525, 534 (1959); *Commission Policy in Enforcing Section 312 (a) (7) of the Communications Act*, 68 F.C.C.2d 1079, 1087-88 (1978)).

165. *CBS v. FCC*, 453 U.S. at 387-88.

166. *Id.* The Court stated that if broadcasters did not respond to the individual merits of each candidate's request, the Commission would not be required to sustain the station's denial of access. *Id.*

167. *Id.* at 396.

168. *Id.* *See supra* note 19 and accompanying text.

position that independent committees such as NCPAC do not have the right to purchase radio and television time to air their editorial advertisements.¹⁶⁹ The FCC's Broadcast Bureau¹⁷⁰ categorically rejected the NCPAC request.¹⁷¹ The Bureau's ruling reaffirmed that broadcast stations are not common carriers obligated to afford all individuals and groups a right of access, and concluded that independent political committees have no right to purchase advertising time.¹⁷² In reaching this result, the Bureau relied on its prior analysis of section 312 (a) (7)¹⁷³ and the Supreme Court's decision in *CBS v. Democratic National Committee*.¹⁷⁴

Unwilling to accept this ruling, NCPAC filed a second complaint with the Broadcast Bureau.¹⁷⁵ NCPAC raised the issues argued in the September 22, 1981, letter, including the claim that "NCPAC enjoys an affirmative right of reasonable access to the use of broadcast stations," and that radio and television licensees must "broadcast NCPAC sponsored political advertisements on a reasonable basis."¹⁷⁶ In addition to relying on *Red Lion Broadcasting Co. v. FCC*¹⁷⁷ and *CBS v. Democratic National Committee*,¹⁷⁸ NCPAC again asserted that *CBS v. FCC* supports its contention that the Commission has an affirmative obligation to grant independent committees a reasonable right of access to the broadcast media.¹⁷⁹

The Bureau noted that it could not "ascertain any distinction" between the complaint and the September request.¹⁸⁰ In dismissing NCPAC's position, the Bureau concluded that nothing in the Court's opinion in *CBS v. FCC* nor in the language or legislative history of section 312 (a) (7) could form a basis to afford any group or individual other than candidates for federal elective office a right of access to the

169. Letter from J. Curtis Herge to the Honorable Mark S. Fowler (Sept. 22, 1981).

170. The Broadcast Bureau is charged with ruling on complaints and requests to the FCC. See 47 C.F.R. § 0.71 (g) (1982).

171. J. Curtis Herge (NCPAC), 88 F.C.C.2d 626 (1981). An appeal of this decision to the full Commission was denied on May 6, 1982. J. Curtis Herge (NCPAC), 89 F.C.C.2d 626 (1982).

172. J. Curtis Herge (NCPAC), 88 F.C.C.2d 626, 627-28.

173. *Id.* at 628 & n.2 (citing *New Primer, supra* note 20, at 2221-22, 2249-51); Robert H. Hauslein, 39 F.C.C.2d 1064, 1065 (1973).

174. 412 U.S. 94 (1973). See *supra* notes 123-141 and accompanying text.

175. NCPAC Complaint, F.C.C. No. C12-195 (filed Dec. 8, 1981).

176. *Id.* at 14.

177. 395 U.S. 367 (1969).

178. 412 U.S. 94 (1973).

179. J. Curtis Herge, 88 F.C.C.2d 626, 626-28.

180. *Id.*

broadcast media.¹⁸¹

C. Additional Grounds for Refusing to Air Independent Committee Advertisements

In light of *CBS v. Democratic National Committee*, *CBS v. FCC*, and recent Broadcast Bureau determinations, it is apparent that independent exponents have neither a constitutional nor a statutory right of access to the broadcast media. As long as the requirements of the fairness doctrine are met, broadcasters should be allowed to develop general policies for handling requests from independent committees to run editorial advertisements. While it is physically impossible to accord access to everyone who has a message to convey, the fairness doctrine guarantees that the public interest will be served through the broadcast of the differing viewpoints on issues of public concern.¹⁸²

Another basis on which broadcasters may rely to refuse to sell air time to independent political committees for editorial advertising is the potential of being hauled into court to defend against a defamation action. The Supreme Court has held that broadcast stations which carry advertisements for qualified federal candidates are immune from liability for libelous remarks and representations made in those advertisements.¹⁸³ The Court reached this conclusion because the stations are statutorily prohibited from exercising their editorial judgment or censoring in any way the material submitted for broadcasting.¹⁸⁴ There is no obligation imposed on television and radio stations to air independent committee editorial advertisements. Accordingly, there is no precedent which grants broadcasters immunity from suit for defamatory statements made in independent committee advertisements which they air.¹⁸⁵

Broadcasters might also refuse to sell air time to an independent committee on the ground that the station may become obligated to pro-

181. *Id.*

182. The FCC recognizes that the selection of public officeholders is an issue of public concern subject to the constraints of the fairness doctrine. *See id.* at 629; *New Primer, supra* note 20, at 2301.

183. *Farmers Educ. & Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525, 531-35 (1958).

184. *Id.* at 527-30. The pertinent statute is 47 U.S.C. § 315 (a) (1976). That section of the Communications Act provides in relevant part that: "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."

185. *See J. Curtis Herge*, 88 F.C.C.2d 626, 628-29.

vide free response time to the opposing candidate or his supporters. A radio or television station which broadcasts editorial advertisements of a candidate or his supporters, including an independent committee, during an election period will incur an obligation to sell comparable time to the opposing candidate, his authorized spokesman, or an individual, a group or an independent committee supporting the candidate.¹⁸⁶ While broadcasting an independent committee advertisement in support of a particular candidate during an election period may not require the station to make *free* response time available to supporters of an opposing candidate,¹⁸⁷ the same cannot be said when such advertisements are run outside of election periods. Under *Cullman Broadcasting Co.*,¹⁸⁸ a television or radio station may not avoid its obligation under the fairness doctrine to broadcast differing viewpoints from those expressed in a sponsored program which for the first time addresses particular issues of public concern when a paying sponsor cannot be found to support a follow-up program.¹⁸⁹ Using *Cullman* as its reference point, the Broadcast Bureau has concluded that broadcast of an independent committee editorial advertisement outside of an election period could "obligate the station or network to afford free response time" to the opposing candidate or his supporters.¹⁹⁰

The above discussion focuses on the criteria underlying general policies for refusing to accept paid editorial advertisements of independent exponents. It should not be concluded that these are the only grounds which may be used to reject such advertisements. There is no reason why broadcast stations may not evaluate and refuse to run non-candidate advertisements on a case-by-case basis. Criteria for evaluating particular submissions, such as the libelous content of representations made in an advertisement, may parallel the bases of general policies for refusing to accept independent committee advertisements. When deciding whether to air a particular advertisement, the broadcast station should also be able to consider the tenor of the piece — whether it is a positive advertisement in support of a candidate, a negative distortion of an elected official's voting record, or an attack on the candidate's character.

The decision to sell advertising time is to be left to the independent editorial judgment of the broadcast licensee. In making this editorial

186. *See, e.g.*, Nicholas Zapple, 23 F.C.C.2d 707, 708-09 (1970).

187. *See* J. Curtis Herge, 88 F.C.C.2d at 628-29 (citing Hon. Thomas F. Eagleton, 81 F.C.C.2d 423, 427 (1980)).

188. 40 F.C.C. 576 (1963).

189. *Id.* at 577.

190. J. Curtis Herge, 88 F.C.C.2d at 629.

decision, nothing precludes the television or radio station from considering the solicited and unsolicited opinions of third parties regarding the proposed advertisement. In dismissing a challenge to this practice in *National Conservative Political Action Committee v. Kennedy*,¹⁹¹ the District Court for the District of Columbia found that NCPAC's constitutional rights had not been violated by the consultations between the broadcasters and candidates for office about whom NCPAC had proffered critical advertisements.¹⁹² Any attempt to prevent discourse between a broadcaster and an individual would infringe upon the First Amendment rights of the speaker and the broadcaster's right to hear another's point of view.¹⁹³ This is no less true when the communication is between a broadcaster and congressman or senator running for re-election.¹⁹⁴

Conclusion

Independent expenditures, particularly those made to defeat candidates for federal office, have increased to a significant level.¹⁹⁵ The \$4.5 million spent as independent expenditures during the 1981-82 election cycle and reported to the FEC through December 18, 1982¹⁹⁶ is indicative of the fact that this form of political activity will continue to grow and remain with us for the foreseeable future. Yet in comparison with other forms of campaign financing engaged in by PACs, independent expenditures play a small role. During the 1979-80 election cycle, there was slightly more than \$16 million in independent expenditures.¹⁹⁷ This represents a mere twelve percent of the \$133.2 million spent by PACs during that period.¹⁹⁸

191. 563 F. Supp. 622, 625-26 (D.D.C. 1983), *aff'd per curiam*, 729 F.2d 863 (D.C. Cir. 1984). The NCPAC complaint alleged that certain congressmen had persuaded the broadcasters not to carry NCPAC political advertisements. The NCPAC argued that the refusal by the broadcasters to air the proffered advertisement resulted in an infringement on NCPAC's First Amendment right of freedom of speech and expression and Fifth Amendment right of equal protection, as well as a conspiracy in violation of 42 U.S.C. § 1985 (3).

192. *Id.* at 624. Following consultations with the candidates, the broadcasters refused to air the NCPAC advertisements. *Id.*

193. *Id.* at 625-26.

194. *Id.* at 626.

195. *See supra* notes 101-22 and accompanying text.

196. Fed. Election Comm'n, *1981-1982 Independent Expenditure Index by Committee/Person Expending*, *supra* note 108.

197. Fed. Election Comm'n, *FEC Study Shows Independent Expenditures Top \$16 Million*, *supra* note 105, at 1, 4.

198. Fed. Election Comm'n, *FEC Issues Final Summary Data on PAC Giving*, Press Release 1 (Aug. 4, 1981).

For broadcast licensees faced with a request to run an independent committee political advertisement, the issue is not whether there will be a continued growth of independent expenditures and whether they impede or further the objectives of the federal election laws. Rather, the question is more concrete and immediate: Is the broadcaster obligated to provide air time for the advertisement? Decisions from the courts and federal regulatory agencies indicate that radio and television stations are under no obligation to provide independent expenders access to the airwaves for broadcast of political advertisements. Neither the constitutional guarantees of freedom of speech and association embodied in the First Amendment, nor the fairness doctrine, equal opportunities and reasonable access requirements of the Communications Act, nor the federal election laws require that independent expenders be granted a right of access to the airwaves comparable to that of candidates for federal elective office. Instead, the interpretation and application of these rules, reviewed in conjunction with First Amendment and federal election law requirements, result in the conclusion that television and radio stations may develop and implement general policies to evaluate political advertisements offered by independent expenders and are under no obligation to air such advertisements.

