Keeping Third Parties Minor: Political Party Access to Broadcasting

I. Introduction

Since 1864, politics in the United States has been dominated by a two-party system comprised of Republicans and Democrats. Third parties, however, have raised new issues many of which have been adopted later by the major parties and have become enshrined in law. With the increased use of expensive radio and television time in political campaigns in recent years, federal statutory law and court opinions about access to the airwaves have been crucial for minor third parties in their efforts to reach the electorate.[1]

The "equal time" provision of the Communications Act of 1934,[2] the Federal Election Campaign Act of 1971,[3] and the United States Supreme Court decision in *Buckley v. Valeo*[4] have all served to further entrench established political parties at the expense of third parties.

Practical solutions, which Congress might study, do exist to remedy the discriminatory effects of these communications and campaign laws. The recent reliance upon television advertising as the major method of political campaigning will continue to endanger the important role customarily played by third parties in American political history unless ameliorative action is soon taken.

II. Third Parties in United States History

From 1787 to 1856, various political parties arose and

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[1]These parties have been called "minority" or "minor" or "third" parties to distinguish them from the Democratic and Republican parties; these terms are used interchangeably.

[2]47 U.S.C. § 315(a) (1976). While § 315(a) is the provision specifically creating the "equal time" doctrine, all of § 315 regulates matters of political broadcasts. In particular, § 315(b) establishes guidelines for the rates which may be charged to candidates seeking to obtain air time or attempting to enforce their equal time privilege.

[3]Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C. (1976)), *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C. (1976)), and *as amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified in scattered sections of 2, 26 U.S.C. (1976)) [hereinafter cited as Federal Election Campaign Act of 1971 *as amended*]. Also included in the scheme of campaign financing and regulation is Subtitle H of the Internal Revenue Code. The Revenue Act of 1971, Pub. L. No. 92-178, §§ 801-802, 85 Stat. 497 (now I.R.C. §§ 9001-9013). This subtitle consists of two parts: Chapter 95 deals with funding national party conventions and general election campaigns for President, and Chapter 96 deals with matching funds for presidential primary campaigns.

[4]424 U.S. 1 (1976).

declined—the Federalist, National Republican (Whig), Anti-Mason, American (Know-Nothing), and Free Soil parties. The Democratic-Republican party endured this period and today is known as the Democratic party. The Republicans, whose party was founded in 1854, captured the presidency a mere six years later and have continued since then as a major party.

Although other political parties in the twentieth century have slated candidates for elective office and have presented ideas, some of which have become embodied in law, none of them have dislodged or even seriously contested the political control of the major parties for more than a brief time.[5]

Early in the twentieth century, the Socialist party increased its strength yearly, winning races for 1,200 offices throughout the United States in 1912.[6] The party's opposition to World War I, however, was a major factor in its subsequent decline. Its six percent share of the presidential vote in 1912 dropped in half in the following two elections and declined precipitously thereafter.[7]

Differences over policies and personalities created splits in the Republican party in 1912 and in 1924, producing significant third-party movements in those years' presidential contests. In 1912, former President Theodore Roosevelt led the Progressive (Bull Moose) ticket, out-polling the Republican nominee, incumbent President William Howard Taft. Progressives of both major parties, socialists, labor unionists, and isolationists joined together in 1924 to support the candidacy of Wisconsin Senator Robert A. La Follette. That campaign attracted nearly 5,000,000 votes,[8] which constituted almost seventeen percent of the total number cast.[9]

South Carolina Governor J. Strom Thurmond of the States' Rights (Dixiecrat) party and former Vice-President Henry A. Wallace of the Progressive party each received about 1,100,000 of the votes case for President in 1948.[10] More recently, Alabama Governor George C. Wallace received over 10,000,000 votes, or fourteen percent of the total vote, in 1968 when he was the presidential candidate of the American Independent party.[11]

Since the beginning of the twentieth century, numerous candidates have appeared on the ballot for the presidency. In the 1976

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[5]For a discussion of third parties in United States history and their significance, *see generally* W. HESSELTINE, THE RISE AND FALL OF THIRD PARTIES (1957); D. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS (1974).

[6]J. WEINSTEIN, THE DECLINE OF SOCIALISM IN AMERICA 1912-1925, at 27 (1967).

[7]W. HESSELTINE, *supra* note 5, at 38-39.

[8]*Id.* at 27, 33.

[9]D. MAZMANIAN, *supra* note 5, at 5.

[10]U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 2, at 1073 (1975).

[11]*Id.*

election, there were about a dozen minor party candidates. Of these candidates, Roger McBride of the Libertarian party and former Senator Eugene McCarthy, who ran as an independent, appeared on state ballots for President the most frequently. Neither McBride nor McCarthy was on the ballot in Indiana, but three other minor party candidates were, each of whom received insignificant numbers of votes.[12]

Third-party and independent candidates seek other offices. A former Governor of Maine, James B. Longley (1975-79), and one of Virginia's current Senators, Harry Flood Byrd, Jr., both ran as independents against candidates of the major parties and defeated them.

In addition to attempting to gain power, minor parties have served various functions in American politics, including encouraging various disaffected citizens to participate in the electoral process. A major function served by minor parties has been the elevation of new and controversial issues to prominent public debate.[13] Throughout United States history, third parties have championed views that later became embodied in the programs of major parties and then enacted into law. The Anti-Masonic party of the 1820's and 1830's opposed secrecy in government and secret societies such as the Masons and Phi Beta Kappa.[14] In 1832, the Anti-Masons held the first national convention to nominate a presidential candidate; the Whigs and the Democrats soon imitated this practice.[15] While there may have later developed various defects in the convention system,

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[12]The minor party candidates for President in 1976 in Indiana ran on the tickets of the U.S. Labor, Socialist Workers', and American parties.

[13]Chief Justice Warren described this value of minor parties in Sweezy v. New Hampshire, 354 U.S. 234 (1957):

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society.

Id. at 250-51. In *Sweezy*, petitioner had been found guilty of refusing to answer questions asked him by the New Hampshire Attorney General, pursuant to a legislative resolution directing the officer to determine if there were "subversive persons" in the state and to suggest legislation regarding the subject. Sweezy had refused to respond to inquiries about the content of a lecture he had given at the University of New Hampshire and to indicate the extent of his knowledge regarding the state's Progressive party and its members. The United States Supreme Court reversed the conviction for contempt because of violations of the due process clause of the fourteenth amendment. *Id.*

[14]W. HESSELTINE, *supra* note 5, at 11.

[15]*Id.*

conventions were significantly more democratic than the previously used caucus system of nomination.[16]

The Free Soil party forced candidates in the 1848 presidential election to debate the restriction of slavery, the demand for which became a key Republican issue a decade later.[17] Progressive income taxation, regulation of railroads, child labor laws, postal savings banks, and social insurance were ideas first raised politically by Socialists, Farmer-Laborites, Progressives, and Populists at the end of the nineteenth and the beginning of the twentieth centuries.[18] Other issues first raised politically by these minor parties included direct election of United States Senators, women's suffrage, primary elections, recall, and referendum—most of which were adopted nationally or in numerous states early in the twentieth century. By raising the issue of "busing" to a national level, the American Independent party of 1968 directly contributed to the adoption of busing policies by the two major parties.[19]

While these minor parties did not achieve significant political power, they did serve important functions in raising issues, some of which were enacted into law. One observer stated: "If those who are in favor of a new party are content to remain missionaries, they might find much comfort in the record of achievement of the nineteenth century's third parties."[20]

III. Minority Parties and Broadcasting: The Critical Problem

The critical problem concerning minority parties' access to broadcasting involves assuring the widest possible exposure to divergent political views without overburdening the airwaves. Wide exposure leads to an informed electorate, upon which the proper functioning of a democracy rests. In 1968 the United States Supreme Court stated in *Williams v. Rhodes*:[21] "There is, of course,

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[16] *Id.*

[17] D. Mazmanian, *supra* note 5, at 67.

[18] *Id.* at 81-82. Most of these reforms were proposed by more than one of the minor parties mentioned.

[19] *Id.* at 85-87.

[20] W. Hesseltine, *supra* note 5, at 18.

[21] 393 U.S. 23 (1968). *Williams* involved an attack by the candidates for United States President of the Ohio American Independent and Socialist Labor parties on the state of Ohio's requirements for minor parties to achieve ballot status. Pursuant to Ohio law, a party other than the Democratic or Republican parties had to obtain petitions with signatures of 15% of the number of voters in the last gubernatorial election and file the petitions nine months before the general election. In affirming the lower federal court's ruling that the law was unconstitutional, the United States Supreme Court held that the parties were entitled to have their candidates legally qualified for

no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[22]

Federal regulation of broadcasting is based on the concept that the airwaves belong to the public. As a result, stations must serve the "public interest, convenience, and necessity."[23] These factors distinguish broadcast media from print media, which cannot be required, by virtue of the first amendment, to inform the electorate by presenting the views of all candidates for office.[24]

A. Regulation of Political Broadcasts: Congressional Intent

Section 315 of the Communications Act of 1934 continued without significant change the provisions of section 18 of the Radio Act of 1927.[25] The legislative intent behind both sections of these acts is uncertain due to limited congressional discussion of their provisions, but it is clear that they were designed to prohibit the monopolization of the airwaves by one candidate. No direct reference to third parties appears in the congressional debates on either section. Section 315, however, was debated less than two years after a significant third-party presidential campaign by La Follette, during which several radio stations censored his speeches.

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the election without meeting requirements of the Ohio law. The lower court decision was modified to allow the American Independent party to be listed on the Ohio ballot. *Id.* at 35. The Socialist Labor party was not placed on the ballot because its request to the Court came after the ballots had been printed, while that of the American Independent party came before the printing and thus did not involve disruption to the election. For further discussion of *Williams*, see 21 U. FLA. L. REV. 701 (1969).

[22]393 U.S. at 32.

[23]This phrase appears several times in the Communications Act of 1934, codified in scattered sections of 47 U.S.C. (1976), and is central to the mission of the Federal Communications Commission.

[24]For opinions of the United States Supreme Court discussing the different applications of the first amendment to print and broadcast media, see Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In *Columbia Broadcasting*, the Court indicated:

> [T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

412 U.S. at 101 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. at 388).

[25]Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162.

The candidate charged that monopoly interests in broadcasting had conspired to restrict his access to the electorate.[26]

Section 315(a) of the Communications Act of 1934 provides: "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."[27]

In the Senate debate on the Radio Act, Senator Howell of Nebraska explained the rationale underlying this particular provision:

> We are all familiar with the results of propaganda, its dangers and its advantages; and the question which we are called upon to settle now is how the public may enjoy the advantages of broadcasting and avoid the dangers that may result therefrom.
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> . . . Are we to consent to the building up of a great publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?
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> Mr. President, if all candidates can not be heard, none should be heard. If both sides of a question can not be heard over a particular radio station, none should be heard. . . . Are we going to allow these great interests to utilize their stations to disseminate the kind of publicity only of which they approve and leave no opportunity for the other side of public questions to reach the same audience?[28]

Section 315 was introduced by Senator Dill of Washington, whose colloquy with Senator Cummins of Iowa implies that the section was not meant to be limited to the two major parties:

> Mr. Cummins: Of course, the Senator understands that the effect of the amendment now offered is to deny to all candidates the use of the broadcasting station.
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> Mr. Dill: Unless it permits one candidate to use it.
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> Mr. Cummins: But the Senator knows that if it permits one there will be enough others to insist upon the use of the service to take up all the time of the broadcasting stations.

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[26]E. CHESTER, RADIO, TELEVISION AND AMERICAN POLITICS 19 (1969). For a discussion of the legislative history of § 315, see Flory v. FCC, 528 F.2d 124, 128-29 (7th Cir. 1975); Paulsen v. FCC, 491 F.2d 887, 889 (9th Cir. 1974); Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951); Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 26 MD. L. REV. 221 (1967).

[27]47 U.S.C. § 315(a) (1976).

[28]67 CONG. REC. 12503-04 (1926).

> Mr. Dill: I will say to the Senator that at present they are not required to allow anybody to speak over the radio. Under the House bill they can allow one man to speak and forbid everybody else to speak. . . . If a station permitted a candidate for Congress to broadcast, then other candidates for Congress should have an equal right.[29]

There have been three changes in the application of section 315 since its enactment. The first was the 1959 amendment in response to the Federal Communications Commission (FCC) decision in the Lar Daly case,[30] which indicated that the requirement of "equal opportunities" applied regardless of the context in which the initial candidate appeared on the radio or television station.

Daly was a minor party candidate for mayor of Chicago. He demanded equal time on Chicago television stations when the stations' news programs covered the pre-election activities of the incumbent Mayor Richard J. Daley. The FCC held that Daly had a right to television coverage equal to that afforded to Daley.[31]

The FCC decision may have been inconsistent with the congressional intent in enacting section 315 and with broadcasting practice prior to 1959.[32] In the 1959 amendment, Congress exempted from the

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[29]*Id.* at 12502.

[30]Columbia Broadcasting Sys., Inc., 18 RAD. REG. (P & F) 238, *aff'd*, 26 F.C.C. 715, 18 RAD. REG. (P & F) 701 (1959).

[31]*Id.*

[32]In debate on the Radio Act, Senators Fess and Dill discussed whether the equal opportunities provision would apply to a candidate making a speech or other remarks not connected with his campaign for office. Although Fess thought that the provision would be applied, Dill believed that the intention of his amendment was to leave such matters to the rule-making powers of the Federal Radio Commission (predecessor agency to the FCC) and that it was not his intent to have the section apply under such circumstances. 67 CONG. REC. 12503 (1926). When the FCC 30 years later ruled that the section was applicable under such circumstances, in the Lar Daly case, the Congress quickly amended the section. Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557. Former Senator Dill appeared before the Senate committee considering passage of legislation to overturn the FCC decision and answered questions of Senator John Pastore of Rhode Island:

> Pastore: Mr. Dill, when you chose the word "use" that appears in section 315, . . . did you mean that the candidate was responsible for initiating the broadcast?
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> Dill: Yes. That was the thought.
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> Pastore: In other words the mere fact that a station would, on its own, decide to take a picture at a given time of an event which they considered to be newsworthy, was that in your judgment a use being made by the candidate?
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> Dill: Not at all. . . . And as a candidate myself in those days I was anxious to put out such publicity as would get into the news on the radio, but it was never considered to be use of the radio as intended by the law. . . . No; the term "use" was intended to be a use initiated by the candidate. No doubt about that. Nobody had any other thought.

"equal opportunities" requirement of section 315 appearances of candidates on any bona fide newscast, bona fide news interview, bona fide news documentary, or on-the-spot coverage of bona fide news events.[33]

In 1960, a law suspended the application of the section to the races for President and Vice-President.[34] The exemption allowed John F. Kennedy and Richard Nixon to meet in three radio and television debates without similar broadcast access being provided to candidates of minor parties.

Finally, a 1971 statute amending section 312(a)(7) of the Communications Act of 1934[35] required stations 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."[36] Thus, in effect, section 315 requires that time be made available only to candidates for federal office. There is no requirement that time be made available to candidates for state or local office; the broadcast stations are allowed to exercise their discretion in selling air time to them. Whether time is purchased by candidates for state and local office or by candidates for federal office, any appearance by a candidate entitles all other candidates for the same office to have an equal opportunity to use broadcast time on that station under terms and conditions similar to the initial use. The exception to this equal opportunities requirement arises when an appearance is classified as

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Political Broadcasting: Hearings on S. 1585, S. 1604, S. 1858, and S. 1929 Before the Subcomm. on Communications Of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 113 (1959) [hereinafter cited as *Political Broadcasting*]. Frank Stanton of the Columbia Broadcasting System (CBS) testified that his network had believed that § 315(a) did not apply to newscasts. *Id.* at 103-04. Two years before issuing the Lar Daly decision, the FCC had interpreted § 315(a) as not applying to routine newscasts. Allen H. Blondy, 40 F.C.C. 284, 285 (1957). When Allen Blondy objected that an opponent in a judicial election had appeared on a television news program showing a group of judges being sworn into office, the FCC found that the opponent's picture and the newscaster's accompanying comments describing the event did not constitute a "use" under § 315(a). The FCC held:

> WWJ-TV did not "permit . . . [a] legally qualified candidate for . . . public office to use a broadcasting station" by showing and referring to Mr. Davenport [the opponent] in its routine newscasts in the manner indicated. Therefore, it is under no obligation to ". . . afford equal opportunity to all other" candidates for the office for which Mr. Davenport has filed.

Id.

[33]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1976)).

[34]Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554.

[35]Federal Election Campaign Act of 1971, Pub. L. No. 92-255, § 103, 86 Stat. 3 (1972) (codified at 47 U.S.C. § 312(a)(7) (1976)).

[36]*Id.*

occurring on a bona fide news program. In addition, stations are required to charge their lowest unit rate for any broadcasting time purchased by a candidate within forty-five days before a primary election and sixty days before a general election.[37]

B. Barriers to Equal Opportunities

There remain several barriers preventing third parties from receiving exposure on the airwaves equal to that of the major parties. Most significant is the cost of advertising, particularly on television and in the larger broadcasting markets.[38] Second is the lack of any requirement that broadcasters donate "sustaining" (free) time to the views of candidates for political office. Third is the effect of the 1959 amendments to section 315. Fourth is the Federal Election Campaign Act of 1971, as amended in 1974 and 1976,[39] which was upheld by the United States Supreme Court in *Buckley v. Valeo*.[40]

1. Costs.—Minor parties face significant obstacles in their attempt to acquaint the public with their analyses and programs. Today, television is the major source of public information about most issues and candidates. Increased costs of political broadcasting hinder all candidates from reaching the public but especially burden minor parties because of their usual lack of financial resources.

The cost to all candidates for political broadcasting advertisements (television and radio) rose from less than $10,000,000 in 1956 to more than $24,000,000 in 1964 and to over $40,000,000 in 1968.[41] This increase in costs took place over a period of time during which the total cost of campaigns only doubled[42] while, at the same

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[37]47 U.S.C. § 315(b) (1976).

[38]In 1968, the cost of a one-minute spot for a political candidate on a network, in prime time, during the fall election was almost $50,000, not including the cost of producing the spot. Wick, *The Federal Election Campaign Act of 1971 and Political Broadcasting Reform*, 22 DEPAUL L. REV. 582, 584, n.10 (1973). The cost of such advertisements presumably has risen sharply since that time. One of the television network station affiliates in Indianapolis indicated its prices for political advertisements, which were sold only in half-minute spots: a political advertisement during the 1976 campaign cost from $20 to $70 during most of the day, $175 to $500 during a sports broadcast, and $800 to $1200 in prime time. These figures were claimed to be competitive with the other network affiliates in the city. Interview with Beth Sullivan of WTHR (Channel 13), in Indianapolis (July 15, 1977). For radio, advertising rates are much less expensive; for example, one of the most popular Indianapolis AM stations charged between $15 and $50 for a minute spot political advertisement during the 1976 election campaign. Interview with Ray Cooper of WIBC (1070), in Indianapolis (July 7, 1977).

[39]Federal Election Campaign Act of 1971 *as amended*, *supra* note 3.

[40]424 U.S. 1 (1976).

[41]Freeman & Edelstein, *Political Campaigning and the Airwaves*, 1 PEPPERDINE L. REV. 178, 187-88 (1974).

[42]*Id.*

time, the rate of inflation increased but twenty-eight percent.[43] The spending restrictions of the Federal Election Campaign Act Amendments of 1974 may end the continuing increase in broadcast costs, although the law applies only to federal offices.[44]

Campaign broadcast expenditures in recent years have consumed an increasing percentage of the funds spent by candidates seeking office, which attests to the politicians' belief that such advertising is effective. Although there are some exceptions, there is a strong correlation between the size of overall campaign expenditures and the success of candidates running for election in states with meaningful party contests.[45]

The requirement for equal treatment in broadcasting for all candidates does little to assure equality in fact because the real test of a candidate's ability to achieve significant exposure to the electorate is measured by the size of the candidate's campaign chest.[46] If one candidate for an office purchases $1,000 in advertising on a particular broadcast outlet, federal law requires only that opponents in the same election be allowed to purchase a similar amount of broadcast time under the same conditions.[47] If the opponents lack the funds to purchase the broadcast time, then the requirement of equal access has been of no benefit to them since the first candidate has been the only one to obtain exposure to the voters through the particular station. One major party candidate commonly has far more funds than the other major party candidate. The disparity in financial resources is usually much greater for the minor party candidates.

With a few exceptions, such as the Wallace campaign of 1968, minority parties generally have limited funding. Another problem for most minor parties is that the public is not aware of their goals and their candidates; without the ability to receive significant coverage by broadcasters, who refuse to provide any appreciable

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[43]U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 1, at 210 (1975). This percentage increased in the rate of inflation is based on an 81.4 consumer price index in 1956 compared to an index of 104.2 in 1968.

[44]Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263 (codified at 18 U.S.C. § 608 (1976)).

[45]*Id.*

[46]Inquiries at the major broadcast stations in Indianapolis revealed no time purchased by any minor party candidate in the 1976 election, although minor party candidates appeared on the ballot in Indiana in that election year for President, Governor, and United States Senator. Although no data were available about minor party purchase of advertisements in previous elections, no station representative with whom the author spoke remembered selling any time to minority party candidates in this decade.

[47]47 U.S.C. § 315 (1976).

amount of "sustaining" time and whose rates are often prohibitively high, minor party candidates continue to lack public understanding of their proposals. Although the Wallace campaign of 1968 had more money and received more votes than any other minor party effort in forty years, it was able to purchase far less time than the competing major party candidates.[48]

2. Sustaining Time for Candidates.—The broadcasting industry has made repeated requests to Congress to modify or entirely repeal section 315, as their testimony before Congress in 1971 demonstrates.[49] American Broadcasting Company (ABC) spokesperson Everett H. Erlick noted that the network had "previously suggested a trial suspension of section 315 for *all* candidates—at every level of government."[50] He supported the suspension of section 315 for the 1972 national races, which the committee was then considering, claiming that it would "contribute significantly to alleviating the increasingly heavy cost of running for the Presidency. Moreover, the greater freedom and flexibility afforded the broadcaster in campaign coverage would benefit the public directly."[51]

Julian Goodman of the National Broadcasting Company (NBC) supported the proposal to suspend section 315 for national races in 1972 but also favored complete repeal of section 315:

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[48]"[I]n January 1969, the FCC reported that the Republicans had outspent the Democrats for television time, 5 million dollars to 3, during the 1968 Presidential campaign. Other groups (referring mainly to the American Independent Party of George Wallace) spent $681,491 on television." E. Chester, *supra* note 26, at 280.

[49]*Federal Election Campaign Act of 1971, Hearings on S. 1, S. 382 and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 328-30 (1971) [hereinafter cited as *1971 Hearings*]. A major revision of the nation's communications law was proposed in the Communications Act of 1978 by Lionel Van Deerlin, chairperson of the House Communications Subcommittee of the Committee on Interstate and Foreign Commerce, and Lou Frey, that subcommittee's ranking minority member. H.R. 13015, 95th Cong., 2d Sess., 124 CONG. REC. 5128 (1978). Although that bill did not leave the Committee in the 95th Congress, it is expected to be seriously considered by Congress in the next few years. H.R. 13015 would greatly alter the current equal opportunities doctrine by limiting its application only to television broadcasts for offices other than those elected on national or statewide bases. *Id.* § 439. In addition, the proposal would remove the current requirement of 47 U.S.C. § 312(a)(7) (1976) that candidates for federal office have reasonable access to broadcasting outlets. The Van Deerlin proposal makes no mention of the rates which broadcasters should charge for political programs, as opposed to the current requirement that those programs be billed at the lowest applicable rates.

Broadcasting industry officials have applauded the relaxation of the equal opportunities doctrine in the Van Deerlin proposal and have urged that its requirements be relaxed further. *The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 45, 166-67 (1978).

[50]*1971 Hearings*, *supra* note 49, at 329.

[51]*Id.*

> [T]he most effective step which the Congress could take to increase broadcast appearances of candidates would be the repeal of the equal opportunity requirements of section 315 of the Communications Act. This would enable broadcasters to schedule appearances of significant candidates in a variety of programs and formats without the penalty of making equal time available to candidates of "splinter" parties; such a penalty tends to limit the ability of broadcasters to present candidates with whom the public is concerned and disserves the public interest in the political process.[52]

Frank Stanton of the Columbia Broadcasting System (CBS) also supported suspension of section 315 for the 1972 national races. Although he did not here advocate total repeal of the section, he had previously expressed such a preference on numerous occasions.[53]

The network executives have argued that section 315 prevents them from giving major party candidates all the free time the networks would like to provide.[54] They have opposed, however, any proposals that they be required to give free time to any candidates. While they have advocated a total repeal of the equal opportunities requirement, they have also supported permanent or temporary suspension of section 315 for all national, statewide, and congressional contests. In support of their position, the executives cited the 1960 Nixon-Kennedy debates,[55] which were aired free of charge to the candidates and which were held after section 315 was temporarily suspended.[56] They used the debates as an example of the public service the networks could render in the absence of the equal opportunities doctrine. The executives claimed that the debates contributed significantly towards informing the voters about the two main candidates for President but asserted that such a service

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[52]*Id.* at 330.

[53]*Id.* at 328. For an example of Stanton's advocacy of repeal of the section, see *Equal Time, Hearings on S. 251, S. 252, S. 1696, and H.J. Res. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 220-22 (1963) [hereinafter cited as *Equal Time*].

[54]*1971 Hearings, supra* note 49, at 328-30; *Equal Time, supra* note 53, at 220-22.

[55]In that year, the major party presidential candidates appeared together in a series of programs billed as debates that were broadcast over the major radio and television networks. Kennedy is generally credited with having made a better appearance than Nixon, although a more favorable opinion of Nixon's performance was held by those who heard the program on the radio. T.H. WHITE, THE MAKING OF THE PRESIDENT 1960, 288-91 (1961). Kennedy's appearance on the debates did make him better known to the voters which was important for an obscure Senator against the two-term incumbent Vice-President. Even though it is not possible to ascertain the extent that the debates altered voting patterns, these programs are often credited as having been a significant factor in Kennedy's narrow victory in the election. *Id.* at 293-94.

[56]*Equal Time, supra* note 53, at 100-01, 220, 248-49.

would not have been available had section 315 been in effect during the 1960 election campaign. Under section 315, the networks would have had to devote an equivalent number of program hours to minor party candidates or perhaps been forced to include those candidates in the debates with Kennedy and Nixon.[57]

The actions of the networks in providing free time to candidates in various races involving only the major parties[58] suggest that stations would not provide very much free political time if the requirements of section 315 were lifted.

Under the requirements of section 315, minor parties in 1956 collectively received as much free time as each of the major parties in which to present their candidates to the public.[59] Although this comparison represents the combined time of all the minor parties, they still had time for a brief presentation of their respective positions.[60]

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[57]*Id.*

[58]*See* notes 70-71 *infra* and accompanying text.

[59]Guback, *Political Broadcasting and Public Policy*, 12 J. BROADCASTING 191, 196 (1968). The following table shows the amount of sustaining time provided by the television networks to candidates and supporters in the presidential races of 1956, 1960, and 1964:

	REPUBLICANS	DEMOCRATS	OTHER	TOTAL
	(Time is in hours and minutes)			
1956 Time	10:43	8:25	10:30	29:38
% of total	36%	28%	35%	99%
1960 Time	18:21	19:26	1:35	39:22
% of total	47%	49%	4%	100%
% of change from 1956	+ 71%	+ 131%	- 85%	+ 33%
1964 Time	2:47	1:41	___	4:28
% of total	62%	38%	___	100%
% of change from 1960	- 85%	- 91%	___	- 89%

Id. The article also includes similar figures for the radio networks. *Id.* Data about commercial time made available to candidates omits time bought for spot announcements and therefore is of little value since spot announcements constitute the bulk of political time bought by candidates. *Id.* at 198-99.

[60]Nathan Karp of the Socialist Labor party has described the inequalities in the implementation of § 315 regarding minor party candidates. Referring to the 1956 election, Karp stated:

> Minority party candidates do not receive free time, comparable or otherwise, unless they specifically demand it. . . . It should also be noted that although the major networks covered Republican and Democratic National Conventions for several consecutive days in 1956, the only time that minority party

In 1960, by contrast, the networks provided more free time to the major parties, primarily for the "Great Debates" between Richard Nixon and John Kennedy, but cut the minor parties from their programming almost entirely.[61]

Political broadcasting has increasingly relied on paid advertisements rather than on free time provided by stations. In 1962, fewer than one-fourth of all television or radio stations devoted sustaining time to election campaigns, while ninety-five percent of them sold broadcast time to candidates.[62] The increase in sustaining time between 1962 and 1970 was modest, while the increase in the amount of paid political time and the number of stations broadcasting increased much more rapidly.[63] Thus, the importance of sustaining time had declined significantly in this period in relation to commercial time.

The experience of the Socialist Labor party in obtaining network time in 1960 is indicative of the plight of minor parties in that year.[64] The Mutual Broadcasting System did broadcast the acceptance speeches of the party's candidates for President and Vice-President, although many of its affiliated radio stations did not carry the broadcast. The company claimed that there was not "sufficient interest in the campaigns [of Socialist Labor candidates] to

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> candidates were allowed was an amount equal to the actual acceptance speeches by the candidates who were finally nominated by these conventions. And even in this latter respect the minority party candidates had to accept less— and often undesirable—time, or run the risk of spending all their time and energies in long drawn-out struggles to receive what under the law they were incontestably entitled to. . . . [Karp then discussed the inability of minor parties to monitor broadcasts to discover when major party candidates receive time or whether network broadcasts of the minority parties are being carried on most network affiliates.] Thus, while all candidates are equal under the law, some candidates are more equal than others, to use the Orwellian phrase.

Political Broadcasting, supra note 32, at 116.

[61]Guback, *supra* note 59, at 196-97.

[62]Of those giving sustaining time, 54% of television stations and 43% of AM radio stations gave 2 or more hours, while 1½% of television and under 1% of radio stations gave more than 10 hours. This represented about one-seventh of the time devoted to political broadcasting during the campaign. FCC, SURVEY OF POLITICAL BROADCASTING—PRIMARY AND GENERAL ELECTION CAMPAIGNS OF 1962 (1963), *reprinted in Equal Time, supra* note 53, at 2-14.

[63]The total of sustaining time for political candidates in 1962 was 50,000 minutes. *Id.* By 1970, the amount had increased to 70,000 minutes. *1971 Hearings, supra* note 49, Appendix A, at 687-1004.

[64]SENATE COMM. ON COMMERCE, FREEDOM OF COMMUNICATIONS, S. REP. NO. 994, 87th Cong., 1st Sess., pt.5, 295-385 (1961). This report on the effect of the suspension of § 315 for the 1960 national elections was prepared pursuant to S. Res. 305, 86th Cong., 2d Sess., 106 CONG. REC. 12522 (1960).

warrant our granting them time comparable to that which will be afforded to the candidates of the Democratic and Republican parties."[65]

ABC did grant fifteen prime time minutes on its television network to the presidential candidate of the Socialist Labor party, Eric Hass.[66] NBC television broadcast a half-hour program involving several minority party candidates.[67]

CBS confined its television coverage of minor parties in 1960 to a half-hour program. Appearing on "Other Hats in the Ring" were the candidates of the Prohibition party, American Vegetarian party, and the American Beat Consensus. Also on the program was veteran Socialist party campaigner Norman Thomas, who was not running in the 1960 election.[68]

In the next presidential election, minor party candidates continued to have limited access to the airwaves. One commentator analyzed the networks' performance in 1964:

> For the 1964 campaign, Congress refused to suspend the equal time requirement for presidential and vice presidential candidates, although the broadcasting industry strongly favored the suspension. Seemingly as a penalty for Congressional refusal, networks drastically cut sustaining time offered to candidates and supporters. Not only was the time offered less than in 1960, it was even less than in 1956. If parties wanted network time, they could buy it. Thus, in 1964, the major parties received only 4 hours and 28 minutes of free television network time, while all third parties received nothing. From radio, Republicans and Democrats received almost 21 hours during which to present their candidates and views, while all third parties received only 30 minutes. As far as sustaining time on radio and television networks was concerned, third parties suffered almost a complete blackout.[69]

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[65]*Id.* at 321 (letter from Joseph Keating of Mutual to Nathan Karp of the Socialist Labor party (Sept. 20, 1960)).

[66]*Id.* at 323 (letter from Mortimer Weinbach of ABC to Ben Waple of the FCC (Sept. 27, 1960)).

[67]*Id.* at 302 (letter from Kathryn Cole of NBC to Ben Noble, Jr., of the Constitution party (Oct. 28, 1960)). This letter does not mention which parties were invited to appear.

[68]*Id.* at 375 (CBS news release, Oct. 27, 1960). Hass had been invited but refused to appear because of objections to the appearance of the American Beat Consensus candidate. *Id.* at 374 (letter from Patrick Murphy Malin of the American Civil Liberties Union to Sig Mickelson of CBS (Nov. 1, 1960)).

[69]Guback, *supra* note 59, at 197. In 1968, the networks provided a total of three hours of free television time to national candidates. *1971 Hearings*, *supra* note 49, at

In many political races, the only candidates have been those from the two major parties; consequently, the broadcasting stations could have offered significant amounts of free time to all the candidates if they chose without having to offer any time to minority parties. In 1964, twenty of the thirty-four Senate races involved only two candidates. Only twenty-nine percent of the television stations in those states provided free time, the same percentage as in states with three or more senatorial candidates.[70] The record in 1968 was even more dramatic: only thirty-four percent of the stations with two-person Senate races offered any free time, while forty-five percent of stations with multi-candidate races offered free time.[71] Free time provided by networks is proportionately much greater than that provided by local stations.[72]

One solution for meeting the problem of adequate access for candidates to the broadcast media would be for Congress to require stations to allocate specified amounts of free time to candidates for certain major offices. Such proposals have been frequently made but have never been passed by Congress.[73] These proposals have advocated that broadcast stations be required to provide free time as one prerequisite for obtaining a license to operate or for renewing such a license. Alternatively, they have suggested that the stations be recompensed through government subsidies or tax credits.[74] These proposals, sometimes referred to as "Voters' Time," would require that political time be offered to all candidates for specified offices without charge. These proposals have differed widely in their treatment of minor party candidates.

When Congress amended section 315(a) in 1959, it deferred action on more far-reaching changes such as proposals for "Voters' Time."[75] It did consider such suggestions the following year in hear-

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188. It is generally agreed that there was no suspension in 1964 because President Lyndon Johnson did not wish to debate against his opponent Senator Barry Goldwater of Arizona, because the Democratic candidate was favored to win overwhelmingly. Similarly, in 1968 there was no suspension because the Republicans did not want George Wallace to participate in a debate or to be given free time equivalent to that given to Richard Nixon and Hubert Humphrey.

[70]Wick, *supra* note 38, at 612 n.130.

[71]*Id.*

[72]For example, only one of the major Indianapolis broadcast stations reported providing any sustaining time for appearances of candidates for statewide election in 1976; none of them provided any free time to presidential candidates in that year. While much of the emphasis on the effect of § 315 has been placed on the performance of the networks and the problems affecting presidential candidates, the problems of lack of access to broadcasting and an ill-informed electorate appear to be greater in regard to local stations and statewide or local election races.

[73]*See* notes 77-81 *infra* and accompanying text.

[74]*Id.*

[75]S. REP. NO. 1539, 86th Cong., 2d Sess. 2, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3252, 3253.

ings which resulted in passage of legislation to exempt the presidential and vice-presidential races from the coverage of section 315 in that year's election.[76] S. 3171, sponsored by twenty-two Senators in 1960, would have required stations and networks to provide free time to presidential candidates whose parties received at least four percent of the vote in the previous presidential contest. Each station would have had to provide one hour of prime time in each of the last eight weeks of the campaign in blocks of back-to-back hour spots for every candidate. Under this proposal, which did not emerge from committee, only the Democratic and Republican parties would have qualified for free air time in 1960.[77]

In the following years, similar proposals for free broadcast time for candidates were made by members of Congress and legal commentators. Senator Mike Mansfield of Montana proposed giving subsidies of $1,000,000 to major parties in order to enable them to pay for broadcasting.[78] Senator Hugh Scott of Pennsylvania advocated giving equal free time to parties gathering ten percent of the votes in the previous election. Any party not so qualifying but appearing on the ballot would receive a maximum of five percent of the time allotted to a major party.[79] FCC Chairman Dean Burch suggested that to receive free time, a party must have received at least two percent of the votes in the last election or obtain the signatures of one percent of the number voting in the previous election. For the national offices, he proposed an additional requirement that the party be on the ballot in at least thirty-four states.[80]

Observers proposed varying criteria regarding access of minority party candidates to free broadcast time, ranging from allowing minor parties one-thirtieth of the time allocated to major parties to proposals that they be granted at least half of the time given to major parties; some even suggested the repeal of section 315, which would have had the likely effect of denying minor parties any broadcast time at all in most races.[81]

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[76]*Id.* at 3255-57.

[77]S. 3171, 86th Cong., 2d Sess., 106 CONG. REC. 5146 (1960).

[78]Guback, *supra* note 59, at 206.

[79]Scott, *Candidate Broadcast Time: A Proposal for Section 315 of the Communications Act*, 56 GEO. L.J. 1037, 1047-48 (1968).

[80]*1971 Hearings*, *supra* note 49, at 186 (statement of Dean Burch); Wick, *supra* note 38, at 618-19.

[81]*See generally*, Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447 (1968); Freeman & Edelstein, *supra* note 41; Geller, *Political Broadcasts—A Few Short Steps Forward*, 20 CATH. U.L. REV. 449 (1971); McGranery, *Exemptions from the Section 315 Equal Time Standard: A Proposal for Presidential Elections*, 24 FED. COMS. B.J. 177 (1970-71); Singer, *supra* note 26; Wick, *supra* note 38; Note, *Equal Opportunity in Political Broadcasting: A Dying Ideal*, 8 SW. U.L. REV. 991 (1976); 22 CATH. U.L. REV. 177 (1972).

It is unreasonable to base free broadcast time or campaign subsidies upon the showing of the political party or the candidate in the previous presidential or other major election. Since these minor parties arose as vehicles for expressing positions of great concern at the time, they have not endured for long. In some instances, when the parties' issue disappeared or was adopted as the program of one of the major parties, these minor parties died. Thus, they would have failed to satisfy the aforementioned requirements that are based upon performance in prior elections.

For example, the Wallace campaign of 1968 would have received no subsidies based upon its strength in 1964 because it did not exist four years earlier. Similarly, it would not have been reasonable to grant funds to the American Independent party in 1972 as a result of Wallace's performance in 1968 since in 1972 the party had few adherents, and Wallace at the time was again a Democrat. Determination of subsidies to parties should be based on methods which assess present rather than past strength so that minor parties receive funds at the time of their greatest popularity.[82]

All five of the minor party efforts that obtained more than 1,000,000 votes for President in this century[83] were forces of significance for only one presidential election. While each expressed important issues or grievances that did not disappear after its respective campaign, each of the parties failed to endure. One reason for their rapid rise and fall is that each party centered around a prominent individual who led its ticket; when those individuals deserted the minor parties, those parties lost almost all of their previous appeal to the electorate.[84]

Although most legislative proposals distinguishing among candidates have focused on the party organization, these minor parties in fact have not been organizationally significant except as vehicles

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[82]A further problem applies to independent candidates running without benefit of a formal party's support. While this Note has focused on the problems faced by minority party candidates, the same, and perhaps greater, obstacles face independent candidates.

[83]Progressive parties of 1912, 1924, and 1948, State Rights party of 1948, and American Independent party of 1968 all polled over 1,000,000 votes for President. *See* text accompanying notes 8-11 *supra*.

[84]For specific election data, see U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 2, at 1073 (1975); U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 502 (1978). These sources provide a reference to the popular vote received by the Progressive party in the 1912, 1924, and 1948 presidential elections, by the State's Rights party in the 1948 election, and by the American Independent party in the 1968 election. Compare these results with the performance of the same parties in the following presidential election at which time their candidates for the prior election had either died or had deserted the party.

to present their presidential candidates. All but one of these five candidates repudiated the minor party that had nominated him by the time of the next election.[85]

Equal treatment of candidates on the ballot is one solution. For the presidential race, candidates on the ballot in enough states to win a victory in the electoral college would be eligible for free time or subsidies for broadcast time in those states in which they appeared on the ballot. No candidate would qualify for these benefits if he was legally ineligible to hold the office sought. For example, a candidate not meeting the minimum age requirement for the office or an alien seeking the position would not be entitled to the benefits, even if able to be placed on the ballot.

Limiting benefits to those presidential candidates who are on the ballot in enough states to win the office does have some drawbacks. This test does ignore the nature of the electoral college system, penalizing a third party that had a great deal of strength in several states or a region of the country while not appearing on the ballot elsewhere. If this argument were deemed sufficiently strong to permit candidates to receive free air time or subsidies whether or not the aforementioned test was satisfied, they should be limited to those stations serving states in which they are placed on the ballot.

Requiring that a candidate be on the ballot for the office sought appears to be a minimum proof of the seriousness of the candidacy, although there have been rare instances of serious races by write-in candidates.[86] Perhaps such a candidate could be allowed to meet an alternative requirement, such as obtaining the signatures of a specified percentage, perhaps one percent, of those who voted for the office in the previous election.[87]

This percentage test may be a substantial burden to write-in candidates and their supporters, who would be forced to devote significant time and resources to a requirement not imposed upon major parties. This test appears to have a clearer connection to seriousness of candidacy than does the requirement that a candidate

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[85]The sole exception was La Follette, who died the year following his race for the presidency.

[86]J. Strom Thurmond of South Carolina won election to the United States Senate in 1954 as a write-in candidate. U.S. CONGRESS, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1971, at 1817 (1971).

[87]In Williams v. Rhodes, 393 U.S. 23, 33 (1968), the Supreme Court struck down a requirement that 15% of the voters in a past election sign petitions to allow a non-major party access to the ballot but said that it would allow a 1% standard which it characterized as a "very low number of signatures." More recently, in Jenness v. Fortson, 403 U.S. 431 (1971), the Court upheld Georgia's election statute requiring candidates for office to obtain signatures of 5% of those eligible to vote in the last election for the office being sought. *Id.* at 442. The requirement applied to independent candidates and those nominated by any party whose candidate received under 20% of the vote at the most recent gubernatorial or presidential election.

for President appear on the ballots of a minimum number of states because the latter prerequisite penalizes serious regional candidates.

3. Effects of the 1959 Amendment.—The 1959 amendment to section 315[88] was drafted so broadly that candidates can receive extensive coverage that is not subject to the requirement of equal access to all candidates for the same office. Incumbents reap a significant advantage since they can receive media attention merely by carrying out the duties of office, including ceremonial duties. Much more effort is required for a non-incumbent to do something which will be considered newsworthy. Often, minor party candidates will be unpopular or will not be taken seriously by broadcasters. It is true that incumbents are often engaged in activities which are of significant newsworthiness. These activities are properly excepted from the coverage of section 315. Many times, however, incumbents engage in ceremonial activities, arguably for the primary purpose of receiving news coverage of their candidacy. These appearances should trigger the equal opportunities requirement of section 315.

Presidential campaigning in recent years has involved much travel by candidates so that they may appear on local news broadcasts in several different media markets each day of the campaign. Minor party candidates are seriously disadvantaged because they often cannot afford the travel and related costs of such campaigning. This disadvantage is compounded if the minor party candidate does make an appearance, but local media do not judge it newsworthy. In 1972, when Benjamin Spock of the Peace and Freedom party was actively campaigning for the presidency, he was denied news coverage on the television networks during the final three weeks of the campaign.[89]

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[88]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (1959) (codified at 47 U.S.C. § 315(a) (1976)).

[89]*FCC Tells Spock: No Time Due*, BROADCASTING, Nov. 13, 1972, at 20-21. Spock complained to the FCC and requested half an hour of free time on each of the three networks, under the fairness doctrine. The FCC ruled against Spock on Nov. 6, 1972, by a five to one vote. Since this decision was made so close to the election, Spock did not appeal it to the courts. The fairness doctrine under which Spock had objected to his lack of coverage is part of 47 U.S.C. § 315(a) (1976). The Supreme Court has described its reach:

> Formulated under the Commission's power to issue regulations consistent with the "public interest," the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. *See Red Lion*, 395 U.S. at 377. In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, . . . and must initiate programming on public issues if no one else seeks to do so.

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110-11 (1972).

In the 1976 presidential election, the joint appearances of Gerald Ford and Jimmy Carter qualified as bona fide news events and, therefore, did not trigger the equal opportunities doctrine. It is apparent that this series of events was *manufactured* for television broadcast and was not a bona fide news event as evidenced by the fact that the speakers remained mute for more than twenty minutes in the first meeting when the audio portion of the broadcast machinery ceased working. Thus, it is obvious that they were more interested in speaking to their national television audience than to their live audience.[90]

4. Federal Election Campaign Act of 1971.—The funding of minor party campaigns and reform of section 315 were included in the general issue of campaign finance reform that Congress has considered in recent years.[91] Among the bills considered by Congress in 1971 were proposals to provide substantial free time on broadcasting stations for major candidates and permanent suspension of section 315 for presidential and vice-presidential races.[92]

One of the major advocates of campaign reform was Newton Minow, a former FCC Commissioner, who had served as Chairman of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era; that private commission's proposal regarding political broadcasting was called "Voters' Time." Under this proposal, all "significant" candidates were to be granted time on all television and radio stations simultaneously during the five weeks prior to the general election. Major party candidates would receive six half-hour segments, no more than two of which could be in the

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[90]Treating candidates' debates or the press conferences of individual candidates as bona fide news events and thus exempt from the equal time requirement under 47 U.S.C. § 315(a)(4) (1976) resulted from an FCC order in 1975 whose validity has been upheld. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), *aff'g* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697, 35 RAD. REG. 2d (P & F) 49 (1975). The *Chisholm* court found appropriate the FCC interpretation of § 315:

> [H]enceforth, debates between qualified political candidates initiated by non-broadcast entities (non-studio debates) and candidates' press conferences will be exempt from the equal time requirements of Section 315, provided they are covered live, based upon the good faith determination of licensees that they are "bona fide news events" worthy of presentation, and provided further that there is no evidence of broadcaster favoritism.

538 F.2d at 351 (footnote omitted). Subsequently, the requirement of live coverage was dropped, replaced by a requirement for rebroadcast within 24 hours of the live event unless unusual circumstances warranted a longer delay. Delaware Broadcasting Co., 60 F.C.C.2d 1030, 38 RAD. REG. 2d (P & F) 831 (1976).

[91]Previous to the 1971 and 1974 reform acts, the major campaign regulation had been accomplished by the Federal Corrupt Practices Act of 1925, Pub. L. No. 68-506, § 30, 43 Stat. 1053 (repealed 1972), and the Hatch Political Activity Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified in scattered sections of 5, 18 U.S.C. (1976)).

[92]*1971 Hearings*, *supra* note 49, at 152. The former goal was proposed in S. 1, while the latter was the subject of both S. 382 and S. 956.

same week. Other parties would receive lesser amounts of time.[93] Minow claimed that United States' campaign practices were unusual as well as in need of reform:

> The United States is the only country in the world where political candidates purchase time to take their case to the electorate, and I think a very serious study of the system that is used in Great Britain and in Canada and in Germany and in Japan and in other countries is very much in order for this country, because I think there is a lot to be learned.[94]

The Revenue Act of 1971 first introduced into federal law a distinction among parties legally entitled to appear on ballots on the basis of whether they were "major," "minor," or "new."[95] These distinctions were made to determine which parties would be entitled to campaign funds from the public treasury and to establish the amount of each entitlement. A Senate report in 1974 indicated a clear intent to channel political development into the two-party system:

> [T]he Committee bill would not stimulate a proliferation of splinter parties or independent candidates. Such a proliferation would undermine the stability provided by a strong two-party system and could polarize voters on the basis of a single volatile issue.
>
> All but fringe candidates would have an incentive to seek a major party nomination, rather than run as a minor party candidate, so as to be eligible for the full level of public assistance in the general election. The bill would thereby have a cohesive effect, encouraging different factions to compete and work out coalitions within the framework of a basic two-party system.[96]

The Report claimed that the bill met the constitutional requirement of allowing minor parties to retain their opportunity to grow into major parties:

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[93] *1971 Hearings*, *supra* note 49, at 404-06 (statement of Newton Minow).

[94] *Id.* at 402.

[95] The Revenue Act of 1971, Pub. L. No. 92-178, § 801, 85 Stat. 497 (now I.R.C. § 9002). Major parties are defined in this act as those which received 25% of the vote in the previous election. Minor parties are those which received 5 to 25% of the vote in the previous election. New parties are those which received under 5% in the previous election or which did not exist at the time of the earlier election.

[96] SENATE COMM. ON RULES AND ADMINISTRATION, FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, S. REP. NO. 689, 93d Cong., 2d Sess. 8 (1974).

> [T]he legitimate interest in preserving the benefits of two major parties does not justify laws which would choke off competition by other parties . . . .
>
> The bill complies with this requirement. It does not prevent minor parties from placing candidates on the ballot or from organizing resources to support them. It does not freeze the political status quo.[97]

The campaign reform act[98] reviewed in *Buckley v. Valeo*[99] contained sections placing limits on contributions to and independent expenditures for candidates, imposing limits on expenditures by candidates and parties, requiring reporting and disclosure of contributors of funds over specified amounts to political candidates and parties, providing for public financing of primary and general elections for President, making available public financing of political conventions at which presidential candidates are selected, and creating a Federal Election Commission to administer and enforce these provisions.

In *Buckley*, the Supreme Court upheld the limits on contributions against attacks that they placed an unjustified burden on first amendment freedoms[100] and that the limits invidiously discriminated against minor party and non-incumbent candidates in violation of the fifth amendment.[101] However, the Court found that the limitations on total political expenditures by an individual in one calendar year[102] and by a candidate out of his own funds[103] violated the first amendment.

Also attacked in *Buckley* was the Act's requirement of disclosure to the Federal Elections Commission of all contributions over ten dollars and the disclosure to the public of all contributions over one hundred dollars. Plaintiffs maintained that these requirements were overbroad in their effect on minor party campaigns.[104] The Court rejected this argument, holding that the peti-

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[97] *Id.* at 9.

[98] Federal Election Campaign Act of 1971 *as amended, supra* note 3.

[99] 424 U.S. 1 (1976).

[100] *Id.* at 24-29.

[101] *Id.* at 30-35.

[102] *Id.* at 39-51.

[103] *Id.* at 51-54.

[104] The plaintiffs included Eugene McCarthy, an independent candidate for President in the 1976 election; James S. Buckley, a United States Senator from New York seeking re-election that year; The Committee for A Constitutional Presidency—McCarthy '76, an independent political organization; several state and national political parties, such as the Libertarian party, the Conservative party of New York, and the Mississippi Republican party; numerous interested organizations, including the New York Civil Liberties Union, Inc., the Conservative Victory Fund, and the American Conservative Union; and an unspecified potential political contributor.

tioners did not demonstrate sufficient injury to minor party candidates and minor parties to justify invalidating that section of the law.[105]

In addition, the Court found the composition of the Federal Elections Commission to be unconstitutional[106] because the provision for members to be appointed by the leaders of Congress was thought to violate the separation of powers clause of the United States Constitution.[107]

The part of the election law most significant for minority parties is that concerning the funding of political campaigns.[108] Funding of $2,000,000 is made available for each major party's convention, which is the limit set for expenses allowed at the convention.[109] Other parties are entitled to limited percentages of the major parties' entitlement based on the vote in the previous national election;[110] a party not choosing its candidates at a convention would not be entitled to any funds under this section. Had this law been in

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[105]424 U.S. at 68-74. The Court indicated that the plaintiffs in *Buckley* failed to show "specific evidence of past and present harassment of members (or contributors) . . . due to their associational ties" or that the disclosure requirements "will subject them to threats, harassment, or reprisals from either government officials or private parties." *Id.* at 74. This indicates that, while no blanket exemption from the Act's disclosure requirements was available to minor parties and their candidates, the Court might find that certain kinds of facts would justify waiving the disclosure requirements in order to protect first amendment rights.

A recent opinion made use of this exception to the disclosure requirements. Socialist Workers 1974 Nat'l Campaign Comm. v. Federal Election Comm'n, No. 74-1338 (D.D.C. Jan. 3, 1979). The court's judgment was that the *Buckley* exception to the disclosure requirements applied. *Id.*, slip op. at 3. The decision cited no facts to establish that the exemption applied. Both parties agreed that the actual facts justified suspension of enforcement of some of the disclosure requirements. *Id.*, Stipulation of Settlement at 2. Information about contributors and recipients of expenditures of the Socialist Workers party will not have to be disclosed as required by the campaign laws. *Id.*, slip op. at 4. The party may place on all its literature and campaign advertisements the following statement: "A federal court ruling allows us not to disclose the names of contributors in order to protect their First Amendment rights." *Id.* The exemption from disclosure requirements will last through 1984. *Id.* at 6.

[106]424 U.S. at 109-43.

[107]Art. II, § 2, cl. 2.

[108]Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C. (1976)). The author believes that the disclosure requirements also represented significant harm to minority parties.

[109]I.R.C. § 9008(b)(1). The figures provided under the Act are for 1976 and will increase with the level of inflation in future years. The figures are dependent upon having an adequate amount of money in the Presidential Election Campaign Fund to satisfy all entitlements in any election year. If the funds are not adequate, first funding goes to the conventions; next it goes to the general election, and only then does anything remaining go to primary campaigns. *Id.* §§ 9006(c), 9008(a), 9037(a).

[110]I.R.C. § 9008(b)(2).

effect in 1968, George Wallace's party would have received no public funds for its convention since the party had not been in existence four years earlier. In 1972, when the party was a far less significant electoral force, it would have received about $280,000 for its convention. The same formula applies to the general election, which means that the party would have received about $2,800,000 for its general election campaign in 1972.[111]

With respect to public notoriety in political campaigns, primaries present problems for minor parties because they usually do not hold them. Under the election law, major party candidates receive funds for their primary election contests.[112] These funds help make major party candidates known to the electorate, while minor party candidates are not eligible to receive similar assistance. Similarly, under section 315 of the Communications Act, a campaign appearance on broadcast media by a candidate in a primary would lead to equal opportunities for other candidates only if they participated in the same primary election. Thus, candidates in uncontested races and candidates belonging to minor parties without primaries do not get the opportunity to reach the electorate which is afforded to candidates with contested primaries.

In the general election, the major parties each receive $20,000,000.[113] Minor parties receive a proportion of that amount determined by their percentage of the vote four years earlier.[114] If a minor party gathers more votes in the current election than in the previous election, it would be entitled to additional federal funds for the purpose of paying campaign debts.[115] A further requirement for receiving funds to be used in the general election is that a party must be on the ballot in at least ten states.[116]

The public financing provisions were attacked on three grounds, which were all rejected by the Court in *Buckley*.[117] First was the claim that the granting of funds for political campaigns exceeded the bounds of congressional power under the "general welfare" clause of

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[111]These figures are based on calculations that since Wallace received 14% of the votes cast in 1968, his party would have been entitled to 14% of the sums given to each major party for its convention and general election expenses. *See* text accompanying note 11 *supra*.

[112]I.R.C. §§ 9031-9042.

[113]*Id.* § 9004(a)(1).

[114]*Id.* § 9004(a)(2)(A).

[115]*Id.* § 9004(a)(3). Similarly, a party in the "new" category, one not existing four years earlier or one having received under five percent of the votes in the previous election, gets no funding until after the campaign and receives funds then only if its vote total was over five percent of the votes cast for the office.

[116]I.R.C. § 9002(2)(B).

[117]424 U.S. at 90-97.

the United States Constitution.[118] Second was a claimed violation of the first amendment, using an argument that analogized the establishment clause, on the basis that the public financing of some but not all political parties established the parties that did receive funds in a preferred position. The third argument asserted that this statutory section discriminated against candidates of non-major parties and thus violated the fifth amendment due process clause.

In *Williams v. Rhodes*,[119] the Supreme Court in 1968 held that the first amendment guarantees of free speech and association were violated when a state acted to favor established parties over other parties, absent a compelling state interest.[120]

In *Buckley*, the Court did not find that the campaign law discriminated against the non-major parties: "[T]he inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions."[121] It pointed out further that minor or new parties had an advantage over major parties in that the former were not subject to the limitation on total expenditures which was imposed on the latter.[122] The Court did acknowledge the argument that this benefit would generally be only an academic one.[123]

There is no correlation between the appeal of a candidate and his ability to raise significant amounts of money, but there is a close connection between the raising of funds and the ability to run an effective political campaign. It is possible to conceive of a candidate with strong support from the poorest citizens but without other major support. Similarly, a party whose program is opposed to capitalism is unlikely to receive much financial backing but might receive much electoral support.

The Court in *Buckley* claimed that since the past achievements of minor parties "in furthering the development of American democracy" had occurred without public funding, their inability in

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[118]Art. I, § 8, cl. 1.

[119]393 U.S. 23 (1968).

[120]*Id.* at 31. The Court stated:

> [T]he Ohio laws before us give the two old established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. . . . In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."

Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[121]424 U.S. at 94-95.

[122]*Id.* at 9.

[123]*Id.* n.129.

the future to receive public funds should not disadvantage them.[124] The majority held that if a party appears to have a good prospect of receiving over five percent of the vote, it will be an acceptable loan risk. In light of the difficulties often faced by major party candidates in securing loans or gifts, it is perhaps unreasonable for the Court to assert that minor party candidates are likely to be acceptable loan risks.

Only two Justices in *Buckley* argued that the law discriminated improperly against minor parties and their candidates. Chief Justice Burger noted: "The fact that there have been few drastic realignments in our basic two-party structure in 200 years is no constitutional justification for freezing the status quo of the present major parties at the expense of such future political movements."[125]

Justice Rehnquist most cogently analyzed the harm done to minority parties by the Act. He agreed with the majority that the law may require, prior to the allotment of funds, "some preliminary showing of a significant modicum of support."[126] He argued, however, that the law had gone far beyond this permissible requirement by giving a permanent and unconstitutional preference to the current major parties.[127]

Minor parties are disadvantaged under the election statute not only in regard to the receipt of public funds, but also by the requirement that all contributors of over ten dollars be listed by the parties. There is a great potential for reprisals against people listed as contributing to the Socialist Labor party, the American Independent party, or other minor parties. The Court, however, held that such harassment had not been shown by the plaintiffs and was merely speculative.[128] The Court found *Buckley* distinguishable from

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[124]424 U.S. at 102.

[125]*Id.* at 251 (Burger, C.J., dissenting).

[126]*Id.* at 293 (Rehnquist, J., dissenting) (quoting Jenness v. Fortson, 403 U.S. 431, 442 (1971)).

[127]*Id.* at 293-94. Justice Rehnquist stated:

> It has enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor party and independent candidates to which the two major parties are not subject. . . . I find it impossible to subscribe to the Court's reasoning that because no third party has posed a credible threat to the two major parties in Presidential elections since 1860, Congress may by law attempt to assure that this pattern will endure forever.
>
> I would hold that, as to general election financing, Congress has not merely treated the two major parties differently from minor parties and independents, but has discriminated in favor of the former in such a way as to run afoul of the Fifth and First Amendments to the United States Constitution.

Id.

[128]*Id.* at 68-72.

NAACP v. Alabama,[129] which had struck down a state requirement that the National Association for the Advancement of Colored People list all of its members with the state of Alabama. There, the Court had found "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[130] Another distinction is that in *NAACP*, production of the membership lists was not justified as essential to the purpose of the state law under challenge,[131] while in *Buckley* listing and disclosure of political contributors was a central means of carrying out one of the Act's purposes, that of eliminating corruption and influence-buying in political campaigns.[132]

IV. Conclusions and Proposals

No proposal for political broadcast reform will accommodate the public's need to learn about diverse political viewpoints unless it provides for free time to candidates. The right to be heard should not be dependent upon the ability to raise money. The public's right to be informed over the airwaves could be required as a public service, or the government could recompense the stations and networks directly or through tax benefits.

This reform raises important questions as to its scope. There must be some minimal requirement that a candidate be serious, which may be measured by the number of states in which a presidential candidate appears on the ballot or by a requirement that a specific percentage of voters sign a petition. Free time based

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[129]357 U.S. 449 (1958). The NAACP is a nonprofit membership corporation organized under New York laws for the purpose of advancing the welfare of black citizens. It had chartered an affiliate in Alabama that was an unincorporated association. Alabama filed an equity claim to enjoin the NAACP from doing business in the state because of its failure to comply with the state law requiring filing as a foreign corporation. The state court ordered the NAACP to cease its activities in Alabama. On the state's motion, the court ordered the production of many of petitioner's records, including its membership lists. The NAACP supplied all the records sought except the lists and was adjudged in contempt of court for which it was fined $100,000. The United States Supreme Court held the Alabama court order to be invalid under the first amendment to the United States Constitution, since compelled disclosure of NAACP membership lists would be likely to constitute an effective restraint on its members' freedom of association. The state's interest in compelling disclosure of the membership lists was not shown to be sufficient to overcome the constitutional objections to the production order. *Id.* at 460-66.

[130]*Id.* at 462.

[131]*Id.*

[132]424 U.S. at 70.

upon performance in past elections does not measure present political strength and significantly hinders minor parties.

With the growth of cable television increasing massively the number of broadcast stations, providing free time to all candidates may prove to be a lesser burden to broadcasters in the long run than it would be now. An increase in the number of stations would mean that the amount of free time required of each would be reduced proportionately. In addition, since cable systems have so many channels, dozens of other programs would be available to viewers at any time while political broadcasts were being made by all candidates for major national and state offices. An electorate should have the right to be informed. At the same time, it should not be forced to watch political programs. Thus, there is no reason to have the politicians' statements broadcast simultaneously on all channels as proposed by the Twentieth Century Fund.[133] Although surely fewer people will watch political broadcasts when there are alternative commercial programs available, all the people would have the opportunity, at least, to view the candidates' presentations.

There are dangers of unfair treatment once government attempts to decide which of the various candidates entitled to appear on the ballot are "significant" or "major" ones. The test applied will usually allow the Democrats and Republicans to be so classified but will likely discriminate against other parties and candidates. If any restrictions are placed upon minor party access to broadcasting, these restrictions should be drawn as narrowly as possible. If minor parties are to receive less time than major parties, they should still receive a significant percentage of that allowed to the major parties, such as fifty percent; proposals that they receive three or five percent are not much better than ones barring them from the airwaves.

Another measure to increase minor party access to broadcasting would be to revise the section 315 news program exception or at least to construe it more narrowly. At a minimum, such bogus news programs as the Carter-Ford meetings in 1976 should not be allowed without comparable time being provided to other candidates.

If reliance is to be placed on the fairness doctrine[134] to assure balance in the presentation of political candidates on news programs, that doctrine needs to be applied more strictly so that the situation involving Benjamin Spock in 1972 will not be repeated. The basic section 315 requirement of equal opportunities must be retained to prevent a single candidate from monopolizing the airwaves and to protect minor party candidates. This requirement should not pre-

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[133]TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTION ERA, REPORT 23, 52 (1969).

[134]*See* note 89 *supra*.

vent debates among candidates. As long as free broadcast time is made available to all candidates to use as they wish, nothing should hinder two or more candidates from pooling their broadcast time to appear together on one program. A proper interpretation of section 315 in 1976 should have considered the Carter-Ford meetings as "uses" under section 315, thereby requiring the television networks to provide equal opportunities for other presidential candidates to reach the electorate over the airwaves.

Some proposals for equalizing the ability of candidates to reach the public would not accord with the mandate of the first amendment. Among these would be restricting the lengths of campaigns, prohibiting candidates from using political broadcast time other than that which is provided free of charge to all candidates, requiring that all expenditures supporting a candidate be included within that candidate's spending ceiling, and curbing the amount which wealthy persons could spend to further their own candidacies.[135]

In addition to requiring free broadcast time for all candidates for specified offices, similar across-the-board treatment could be given to candidates with respect to other kinds of campaign expenses in order to assure that all of them have at least a minimally equivalent access to the electorate. Perhaps the printing and mailing costs of one free brochure to all voters could be subsidized by the government on behalf of each candidate in those states where he appears on the ballot.

It should not be surprising that Congress and the Supreme Court have acted in a way that will enshrine the current two major parties in preferred positions from which it will be difficult for others to dislodge them. Minor parties in this century have been of fleeting importance politically and have often represented unpopular causes. The experience and orientation of those in Congress and on the Court have been toward a two-party system. Despite their protestations that they are not trying to restrict third parties, they tend to view a two-party system as proper and inevitable in American political life. Even if these perceptions are accurate as to the future course of our politics, there are two flaws in their reasoning. Even if the country continues with a two-party system, nothing should be done to assure that the current major parties be the ones to survive. Secondly, the Constitution, which does not mention parties at all, should not be read as allowing discriminatory treatment against third parties and independents.

The key, then, to allowing minor party access to the electorate is to require free broadcasting time for all candidates for certain offices. Fund-raising ability should not determine a party's ability to

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[135]424 U.S. at 17-23, 51-59.

reach the public, nor should public funds increase the disparity between major and minor parties. If distinctions are made among parties regarding access to broadcasting and to the public treasury, those distinctions should be narrowly drawn so as to avoid being unreasonably discriminatory. While the burden imposed by these proposals on television and radio stations is not as severe as their owners maintain, the size of the burden is likely to be lessened considerably by the extension of cable systems throughout the nation. Together, these proposals would increase the public's opportunity to be informed about all parties and candidates so that the people could then make their own, and hence the best, decisions.

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