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# Political Campaign Advertising and the First Amendment: A Structural-Functional Analysis of Proposed Reform

Rebecca Arbogast

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Arbogast: Political Campaign Advertising  
**POLITICAL CAMPAIGN ADVERTISING  
AND THE FIRST AMENDMENT:  
A STRUCTURAL-FUNCTIONAL ANALYSIS  
OF PROPOSED REFORM**

by

REBECCA ARBOGAST\*

[M]en may come to believe . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>1</sup>

The metaphor of the political arena as a marketplace has become all too apt with candidates' increased reliance on 30- and 60-second spot television advertisements produced by consulting firms. This shift in the nature of political discourse as well as the accompanying scramble to raise the money necessary to fund this uniquely expensive form of campaign speech has generated much discontent with the electoral process among politicians and commentators. For instance, the Senate established a six-member commission to propose reforms regarding media coverage of political campaigns, and the Markle Foundation has funded a study on "the potential role of public television in enhancing the quality of discourse about candidates and issues in the 1992 Presidential election." The concern is that political advertisements are becoming more and more like commercial ads — not only in their lack of substance but in their extraordinary cost as well. Although there is growing sentiment in favor of campaign reform, opponents reliably raise the first amendment as a bar to reformist regulation. Resistance typically is cast in a libertarian reading of the first amendment as absolutely prohibiting governmental infringement of individual autonomy. Yet if we allow two shifts in our thinking, we would recognize that the goals of the first amendment may actually compel rather than prohibit a recalibration of some of the rules of political campaigning.

The first shift is to replace the absolutist, libertarian interpretation of the first amendment with a structural, functionalist theory. The liber-

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\* Judicial Clerk, Ninth Circuit Court of Appeals; J.D., Yale Law School (1989); M.A., University of Iowa (1985); B.A., University of Iowa (1980). Article accepted for publication 9/1/89.

<sup>1</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

tarian position, based on the principal of individual autonomy, is descriptively inaccurate and theoretically inadequate. Its attractiveness derives largely from the fact that it is simple to understand and easy to apply,<sup>2</sup> yet to adhere to it is to ignore the amendment's richness and power. Rather than focusing on only one of the values that the first amendment embodies, we should promote its multiple functions even if that requires a more complex analysis. A structural-functional theory is superior because it incorporates a commitment to individual liberty and yet advances other values as well.

Students of the first amendment can quickly locate several functions of free speech and press — promoting individual self-actualization, preventing violent opposition to government, guaranteeing the raw materials necessary for the emergence of truth, and providing for an institutional 'watch dog' on government activity—which in a given instance can exist in tension with one another. Rather than lamenting or ignoring the complexity, we should celebrate the fact that the first amendment can serve different functions in different contexts or structural locations in a democratic society. There is no reason to expect or even to wish for a unitary response to first amendment issues raised in such disparate contexts as high school newspapers, political action committees, and religious pamphleteers. The overarching ideal, however, is the creation and maintenance of a democratic system of self-governance, and the first amendment exists as a multifaceted means to further that end, rather than a unidimensional end in itself.

In the particular context of mainstream electoral politics conducted through the electronic media, the Supreme Court has repeatedly affirmed that the central purpose of the first amendment is to foster an informed public and robust debate on ideas and issues. In *Red Lion v. FCC*,<sup>3</sup> the Court upheld rules designed to ensure balanced coverage of political candidates on the ground that the public interest outweighed broadcasters' rights. The Court concluded that requiring broadcasters to allow candidates to respond to personal attacks and to give opponents of those endorsed by the station a chance to communicate with the public is not inconsistent with "the First Amendment goal of producing an informed public capable of conducting its own affairs."<sup>4</sup> In resolving the issues posed by the Federal Communication Commission's refusal to force broadcasters to grant a candidate's claim to an unlimited right of access to commercial broadcast time, the Court in *CBS v. Democratic National Committee* reaffirmed that when faced with a conflict among the interests of the public, the broadcasters, and the individual requesting access, "it must constantly be kept in mind that the interest of public is our foremost concern."<sup>5</sup> The Court in *Buckley v. Valeo* purported to protect political com-

<sup>2</sup> Additionally, because it limits governmental intervention, the libertarian reading appeals to conservatives, while its protection of individual rights simultaneously appeals to liberals.

<sup>3</sup> 395 U.S. 367 (1969). <http://libarts.akron.edu/akronlawreview/vol23/iss2/4>

<sup>4</sup> *Id.* at 392.

<sup>5</sup> *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973).

munication by preventing a reduction in the "number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>6</sup> Though other values may coexist or compete, this collective interest in rich public debate, rather than the individual autonomy, is the paramount one in this particular context or structural location.

Those who wish to identify those structural locations for which "rich public debate" should be the guiding principle must unravel that concept. If one weakness of the libertarian analysis is that it focuses too exclusively on the speaker, a shortcoming of those who advocate replacing the principle of autonomy with the principle of rich public debate is that they tend to consider solely the text. Rich public debate involves not only the quantity and nature of the information presented to the electorate, but an element of participation in the process as well. Participation, however, is itself multifaceted. It can appear in the traditional form of vigorous debates over dinner among political mavens or contributions of time and money to one's favorite candidate. Not everyone, however, has the luxury or the motivation to aggressively seek out political information. For many there is only a marginal amount of time, energy, and interest left over for politics after they have dealt with the demands of their daily lives. For these individuals, participation will at most involve processing information that is easily available, deciding which candidate is favored, and then voting. One challenge to the continued vitality of a democracy then is to facilitate their participation and enhance their sense of engagement in the process. Rather than adopting an idealized and elitist version of the dynamics of political discourse, we must begin to inspect how different audiences actually use the information that is available to them; to do this we must take the electorate on its own terms.

The second conceptual shift is to replace Holmes' marketplace metaphor with his lesser celebrated "experiment" metaphor. The experiment metaphor highlights features that are obscured by the marketplace trope. First, America is trying out a novel, risky, complicated scheme, and as with most large-scale, long-term endeavors, periodic reevaluation is necessary to make sure that one is still on the course one has set out, given that not all factors can be anticipated and that forces inevitably change over time. The success of our collective experiment of self-governance depends on a citizenry which is at least to some degree aware

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<sup>6</sup> *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Among the several ironies of *Buckley* was that it protected the accumulation of money that goes primarily to spot television advertisements, which are not fora for deep exploration of issues. See Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 3 (1977) for an excellent account of the judicial review of the 1974 Amendments to the Federal Election Campaign Act, 2 U.S.C. § 431-456 *et seq.* and the practical and theoretical effects of that review.

of contemporary issues and the options available.<sup>7</sup> This in turn depends on the availability and use of information. As the Court has written, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government,"<sup>8</sup> and "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation."<sup>9</sup>

The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." . . .

In the specific language of the Constitution, the governing activities of the people appear only in terms of casting a ballot. But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them.<sup>10</sup>

The second sense of experiment — a scientific model of analysis — suggests the identification of relevant variables, recognition of interactions among those variables, and the acceptability of intervention to recalibrate them. Thus we could view rational, democratic self-governance as the goal or dependent variable of the experiment, an informed public as an intervening variable, and political discourse as one of several independent or explanatory variables. If we combine this conceptualization with the view of the first amendment as one of the tools to accomplish the overarching goal, then the first amendment is not just a shield against government intrusion; it is an offensive tool that can be used to broaden the range of ideas discussed and the scope of participation in that discussion.

Though it is commonplace to cast the government as the sole threat to robust debate on public issues, and first amendment protection of individual autonomy as the savior, in fact it is no longer that simple. Communication and media scholars have begun to focus their attention on the economic censorship that shapes and constrains the broadcast industry; it is, for instance the profit driven focus on audience ratings for

<sup>7</sup> Our commitment to public education is another manifestation of the assumption that self-governance rests on an informed citizenry.

<sup>8</sup> *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

<sup>9</sup> *Buckley*, 424 U.S. 1, 15.

<sup>10</sup> *Hynes v. Mayor of Oradell*, 425 U.S. 610, 627 (Brennan, J., concurring in part) (quoting Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.)

those segments of the population that purchase the bulk of consumer goods and most individuals' lack of access to the multi-million dollar budgets necessary to purchase political commercials — rather than government edict — that prevent many people from speaking on television. They are also questioning the validity and utility of applying an individualistic analysis to areas of communication with no identifiable individual speaker. In a complementary vein, legal scholars are beginning to map the two global strains in first amendment doctrine; individual autonomy on the one hand and a collective right to information and public debate necessary for a functioning system of self-governance on the other. Given the nature of contemporary electoral campaigns, to privilege individual autonomy falsifies the reality of our political life and may in the end be destructive of the first amendment functions of promoting robust debate and an informed citizenry. Blind obedience to the principle of limited government interference may be counterproductive. As Fiss concludes, "[j]ust as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship . . . [I]n the modern world the state can enrich as much as it constricts public debate."<sup>11</sup> Justice Stevens recognized the dual potential of state intervention when he wrote in *Metromedia v. San Diego* that "just as the regulation of an economic market may either enhance or curtail the free exchange of goods and services, so may regulation of the communications market sometimes facilitate and sometimes inhibit the exchange of information, ideas, and impressions."<sup>12</sup>

Those who believe in an affirmative function of the first amendment, and yet simultaneously recognize the dangers inherent in government regulation of political speech, face a difficult challenge: to accurately identify those situations where, through judicious and disciplined regulation, the state may and should act to enrich public debate and informed voter participation. Far from denying the need for vigilance against governmental repression of unpopular speech, this position merely claims that not all speech contexts pose this threat, and that we must begin to discriminate between those that do and those that do not, rather than retreat to simple rules of limited rather than uniform and universal applicability. Unlike Fiss, I do not yet accept that the free speech "[t]radition is [so] flawed . . . that it [may] be necessary to begin again."<sup>13</sup> The doctrine is rich enough in tensions and contains enough slippage that it invites rather than forecloses the finetuning and redirection necessary to stay on course.<sup>14</sup>

<sup>11</sup> Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415 (1986).

<sup>12</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 548 (Stevens, J., dissenting in part).

<sup>13</sup> Fiss, *supra* note 11, at 1406.

<sup>14</sup> For a discussion of the Supreme Court's reinterpretation of first amendment doctrine, see Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986); Published by IdeaExchange@UAkron, 1990. for a general discussion of multiple interpretation of indeterminate texts, see U. Eco, *A THEORY OF SEMIOTICS* (1979).

## THE NATURE OF CONTEMPORARY POLITICAL CAMPAIGN SPEECH

Political scientists and lay commentators for years have expressed unease that the electorate is not sufficiently well informed to carry out the job of self-governance. Decline in voter turnout, volatility of voters, and reports of boredom, confusion, and alienation from the political process have made the concern more acute and the problem more complex. These trends have occurred at a time when it has become all the more important that the electorate be involved and informed; the political parties no longer play the central role in structuring the political process that they one did.

Though the viability of political parties is hotly debated, even those who maintain that the reports of their death have been greatly exaggerated acknowledge two areas of decline: the decrease of party allegiance among voters and the decrease in party organizations' control of nominations.<sup>15</sup> Voting behavior and political socialization are no longer dominated by the parties, a shrinking percentage of voters identify themselves as Democrats or Republicans, and even among them, more split their ticket. Candidates are no longer selected through back room meetings, and the support of the party or other prominent politicians is sometimes perceived as more of a liability than an asset. Candidates now largely bypass party intermediaries and instead use the media to speak 'directly' to the voters. Today professional consultants rather than professional politicians manage campaign. If candidates want to know what voters think, they do not consult with local politicians. They commission a poll.

It is unclear whether some commentators are correct in concluding that the rise in media technology has been one of the causes of the decline in political parties<sup>16</sup> or whether it merely has been an accompaniment, but the nature of the relationship really does not matter. It is a *fait accompli*. The media have replaced the parties as the primary conduit for information between the candidates and the public. Whether the shift in the structure and process of electoral politics away from party machinery and toward 'direct communication' between the candidates and the public is a healthy one depends on the quality and topics of the conversation.

The conversation is taking place largely through the forum of televi-

<sup>15</sup> See Adamany, *Political Finance and the American Political Parties*, 10 HASTINGS CONST. L.Q. 497 (1983).

<sup>16</sup> Other causes include changing demographic and social trends — such as women working outside the home and increasing population mobility — with the consequent "demise of the neighborhood as the center of [economic and social] activity" and the decline of door to door canvassing. Adamany, *supra* note 15, at 512 (citing Elliott, *Political Action Committee: Precincts of the 80's*, 22 ARIZ. L. REV. 539, 540 (1980)).

sion spot advertisements. Partly because paid advertising allows candidates to bypass the media intermediaries and partly because television is the central source of political information for many Americans, the use of television spot advertisements produced by consulting firms has increased dramatically in the past decade. Candidates now devote a large share of their campaign budgets to producing and airing these advertisements. In the 1985-86 campaign, House candidates spent 11% and Senate candidates spent 33% of their budgets on the purchase of television air time alone.<sup>17</sup> In the first three weeks of 1988, Republican presidential candidates spent \$1.6 million and Democratic candidates \$121,000 on television advertising for the New Hampshire primary.<sup>18</sup> The central place of television advertisements is indicated by their special statutory treatment. Congress has imposed a financial subsidy for candidates' broadcast advertising, Section 315(b) of the 1934 Communications Act, under which broadcasters must make air time available to candidates at the lowest unit rate.<sup>19</sup>

The nature of the advertisements combined with the conditions of exposure divert attention away from the candidates' analysis of issues. The political and media consultants strive to create a particular image for the candidate, using the same market research techniques that sell any other commodity, and the texts of the advertisements themselves emphasize personality features and positive associations over information on contemporary issues. These phenomena naturally have led to charges that politicians are being sold like bars of soap, and that a presidential campaign has to produce television commercials that can stand up against campaigns for Big Macs or Preparation H. Some media researchers set out to test or refute such charges by analyzing the content of the spot advertisements, and their research is frequently cited for the proposition that our intuitions are baseless — that in fact the advertisements contain a wealth of information on candidates' positions on contemporary issues. Unfortunately, the actual research supports no such reassurances. Of the three studies commonly cited for this proposition, one defined

<sup>17</sup> Aristotle Industries Study, commissioned by National Association of Broadcasters, reported in an NAB press release (Sept. 5, 1987). NAB commissioned the study to challenge congressional charges of inordinate expenditures on television advertising, but in fact, it remains the largest expense category, and is more meaningful and dramatic when compared to the size of other categories of expenditures. The second largest expense category for senators was "general consulting" at 10%. In contrast to the 33% budget share for purchase of television air time, senators spent 0.25% on speechwriting, 0.60% on purchase of radio time, and 0.04% for the press.

<sup>18</sup> Rosenthal, *Candidates Spend a Lot Promising They Won't*, N.Y. Times, Feb. 2, 1988, at A14, col. 1.

Published by the Free Exchange at UConn, 1990.  
 47 U.S.C. § 315(b) (1982). See *infra* text accompanying note 41.



"issue" to include presentation of candidate characteristics<sup>20</sup> and one assigned an "issue score", which presumably reflected the presentation of issue information, by simply counting the occurrence of an issue word.<sup>21</sup> The third study actually concluded that although the percentage of advertisements with issue *mentions* was substantial, those with statements of candidates' positions, particularly specific ones, was quite low (only 12-24% in the aggregate).<sup>22</sup>

A second ground of criticism is that the limited time inherent in the genre in and of itself necessarily restricts the development of issues. Thirty or sixty seconds is simply not enough time to present much more than a slogan, an association, or a simple statement, and it certainly precludes presentation of an issue beyond the most superficial level. Although some issues such as abortion have been so thoroughly explored and debated in the popular press that a simple position statement would suffice, for other less fully explored or more complex issues, more time is necessary.

#### RESEARCH ON EFFECTS OF POLITICAL ADVERTISING

The obvious question then is what effects this increased reliance on television spot advertisements is having on the political process. Fortunately, the movement in theory and research on political communication has been away from simple questions and general answers toward increasingly complex statements of conditional relationships.

The birth of broadcasting brought with it the same exaggerated fears and hopes as does the advent of most new technologies. Early research was based on the premise that mass media messages would have direct and uniform effects on the audiences to which they were directed. The classic voting studies by Berelson, Lazarsfeld, and Klapper in the 1940's and 1950's led, however, to a wholesale rejection of any such direct effects of political messages in favor of the equally broad conclusion that the media have at most a limited impact on voters.<sup>23</sup>

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<sup>20</sup> Hofstetter and Zukin, *TV Network News and Advertising in the Nixon and McGovern Campaigns*, 56 JOURNALISM Q. 106 (1979).

<sup>21</sup> Shyles, *Defining the Issues of a Presidential Election from Televised Political Spot Advertisements*, 27 J. BROADCASTING 333 (1983).

<sup>22</sup> Joslyn, *The Content of Political Spot Ads*, 57 JOURNALISM Q. 92, 94-95 (1980).

<sup>23</sup> See Atkin, *Political Campaigns: Mass Communication and Persuasion*, in PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH 285 (M.E. Roloff & G.R. Miller eds. 1980) and S. KRAUS & D. DAVIS, *THE EFFECTS OF MASS COMMUNICATIONS ON POLITICAL BEHAVIOR* (1976) for reviews of this progression.

In the 1970's and 1980's theorists began to consider that the "limited effects" conclusion had been premature. Not only had the political context changed (the early voting studies predated the decline in party allegiance and the introduction of television into most households), but also the available theories, methodologies, and questions had become more sophisticated. They took Berelson's 1948 conclusion that "some kinds of communication on some kinds of issues, brought to the attention of some kinds of people under some kinds of conditions, have some kinds of effects," and began untangling it by focusing on the process of political communication and specifying its contingent nature. The current popular debate over the effect of advertisements mirrors the extreme and simplistic phases of early communication research. Though more subtle questions are tougher to research,<sup>24</sup> and simple, straightforward answers are necessarily rare, the starting point must be a more realistic view of the complicated relationships among mass communication, public opinion, and participation. The advertisements undoubtedly are having effects, but they certainly are not uniform ones.

First of all, different people use different media. Because people use the media selectively and differentially, it would be a mistake to view the relevant market as the totality of political information that is available through the mass media, and thereby conclude that viewers of television advertisements necessarily supplement them with information supplied by other sources. Instead, a portion of citizens rely specifically on television as their source of political information. Although people who read political articles in newspapers supplement that information with television news, the converse is not true.<sup>25</sup>

There are differences between those who rely on television as compared to those who use a range of media. O'Keefe and Atwood report that "there is ample evidence that those more dependent on television than on newspapers for political information are more likely to be from the lesser educated, lower income, and least politically involved segments of the populace."<sup>26</sup> Faber further specified differential media use by developing a profile of those who use televised political advertising information. He found that the majority of respondents agreed that television ads helped in their voting decisions, and those who indicated that

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<sup>24</sup> Becker, *Visual Stimuli and the Construction of Meaning*, in *VISUAL LEARNING, THINKING AND COMMUNICATION* 39 (B. Randhawa & W. Coffman eds., 1978).

<sup>25</sup> Choi & Becker, *Media Use, Issue/Image Discriminations, and Voting*, 14 *COMMUN. RES.* 267 (1987).

<sup>26</sup> O'Keefe & Atwood, *Communication and Election Campaigns*, in *HANDBOOK OF POLITICAL COMMUNICATION* 329, 335 (D. Nimmo & K. Sanders eds. 1981).

their candidate preference was influenced by the advertisements could be distinguished from other voters. Less educated voters and persons indicating a greater concern about who won the election relied the most on political advertising.<sup>27</sup> This profile is similar to Patterson and McClure's 1973 study which found that among the voters most affected by advertising were people who were interested in the election, but unwilling to expend the energy to follow the campaign closely in the news media.<sup>28</sup> This research reinforces the so called knowledge gap which has been observed in discussions of public participation and the mass media. Between the two extremes of what Zukin labels the "attentives" (those political junkies who are more likely to use print media and a multiplicity of media sources and to engage in political discussions) and the "apathetic public" (those with no interest in politics and who are characterized by lower income and education levels) are a sizable group of people who lack the motivation to seek out political information, but who are mildly or moderately interested in voting and who obtain most of their information through television.<sup>29</sup>

Second, different media have particular effects. Television leads to less political understanding than newspapers.<sup>30</sup> Individuals who rely on television for their political information do not discriminate among candidates' issue positions as compared to those who rely on newspapers.<sup>31</sup> Clarke and Fredin focused on the role of the media in helping people develop reasons for favoring or rejecting political alternatives on the premise that being able to explain one's choice, to self as well as to others, lends order and provides a cognitive framework for processing additional information. Though they viewed this as a minimum condition for an informed citizenry, they avoided judgments about the completeness or sophistication of the reasons people gave for their views of candidates: "Possessing any reasons counts here — a blind acceptance that is justified by finding that the major point of variance is between persons who lack reasons altogether and persons with at least one criterion for choice between candidates."<sup>32</sup> Even controlling for level of formal education and interest in public affairs, their nationwide study revealed that those who

<sup>27</sup> Faber & Storey, *Advertising and Candidate Choice: A Profile of Voters Influenced by Political Commercials*, PROCEEDINGS OF THE 1985 CONFERENCE OF THE AMERICAN ACADEMY OF ADVERTISING R123 (1985).

<sup>28</sup> See T. PATTERSON & R. MCCLURE, *POLITICAL ADVERTISING: VOTER REACTION TO TELEVISED POLITICAL COMMERCIALS* (1973).

<sup>29</sup> Zukin, *Mass Communications and Public Opinion*, in *HANDBOOK OF POLITICAL COMMUNICATION* 359, 377 (D. Nimmo & K. Sanders eds. 1981).

<sup>30</sup> O'Keefe, *Political Malaise and Reliance on Media* 57 JOURNALISM Q. 122 (1980).

<sup>31</sup> Choi & Becker, *supra* note 25.

<sup>32</sup> Clarke & Fredin, *Newspapers, Television and Political Reasoning*, 42 PUB. OPINION Q. 143, 145 n.8 (1978).

relied on television were much less able than those who used newspapers to articulate any reason for their political choice.<sup>33</sup> The ability to vote without being able to articulate a reason for one's choice is in part explained by the psychological theories used in the advertising industry; in condition of low involvement it may be possible to evoke behavioral change without first eliciting attitude change.<sup>34</sup>

Finally, the effects of the different media interact with the characteristics of those using them; all effects are greatest among those with lower levels of involvement. The ability of the media in general and political advertising in particular to mold our perceptions of what issues and events are most important — "agenda-setting" — is greatest among those who are less politically active,<sup>35</sup> not highly exposed to other sources of political information, and uninformed about the candidates.<sup>36</sup> Psychological theories of cognitive processing explain that in conditions of low involvement, individuals process information relatively uncritically,<sup>37</sup> which results in a preferred rather than a negotiated or oppositional reading.<sup>38</sup> Moreover, the accumulation and consonance of the messages directs their interpretation.<sup>39</sup> The preferred "reading" is to focus on candidates' physical features and mannerisms, their image or character qualities, and their associations with unquestionably positive values or images, rather than on any explanation for their positions on particular issues.

What emerges is a picture of an identifiable group of people who rely on televised advertisements for political information and who are more strongly influenced by them, while the ads themselves contain little in the way of what we traditionally consider to be the raw material for participation in reasoned decision making. This argument is not a reformulation of the old rational/emotional dichotomy or a romanticizing of pre-television campaigns. We have strong emotional reactions to issues,

<sup>33</sup> In fact television exposure was *negatively* related, while newspaper use was *positively* correlated with having a reason for voting as one did.

<sup>34</sup> See Rothschild, *Political Advertising: A Neglected Policy Issue in Marketing*, 15, J. MARKETING RES. 58 (1978).

<sup>35</sup> O'Keefe & Atwood, *supra* note 26, at 341.

<sup>36</sup> Atkin & Heald, *Effects of Political Advertising*, 40 PUB. OPINION Q. 216, 223-25 (1976).

<sup>37</sup> See Petty & Cacioppo, *The Effects of Involvement on Responses to Argument Quantity and Quality: Central and Peripheral Routes to Persuasion*, 46 J. PERSONALITY & SOC. PSYCHOLOGY 69 (1984); Atkin, *Consumer and Social Effects of Advertising*, in 4 PROGRESS IN COMMUNICATION SCIENCES 205 (1984); Weinstein, Appel, & Weinstein, *Brain-Activity Responses to Magazine and Television Advertising* 20 J. ADVERTISING RES. 57 (1980).

<sup>38</sup> See generally D. MORLEY, *THE NATIONWIDE AUDIENCE: STRUCTURE AND DECODING* (1980); J. FISKE & J. HARTLEY, *READING TELEVISION* (1978); Hall, *Encoding/decoding*, in CULTURE, MEDIA, LANGUAGE 128 (1980) (various strategies of "reading" television).

<sup>39</sup> Noelle-Neumann, *Mass Media and Social Change in Developed Societies*, in MASS MEDIA AND SOCIAL CHANGE 137 (E. Katz & P. Szecsko eds., 1981).

and political oratory has always incorporated both rational and emotional appeals. Nor is it meant to deny the importance of what recently has been dubbed the "character issue." Personal qualities of integrity and stability are valid criteria for selecting our leaders. So, however, are a well-articulated philosophy, competent analysis, and coherent policies.

Neither does this thesis quarrel with individuals' right to base their vote on whatever they wish. Critics will argue that if most Americans are 'ignorant TV addicts' who do not care about the issues, so be it. This position is closely analogous to those in the television entertainment industry who, in response to criticism of the quality of prime time fare, claim to be giving the public what it wants. The flaw in this reasoning is that it ignores that what we "want" is shaped by what we get and by the range of choices presented. If rich public debate refers not only to the totality of information available, but also to people's participation, then we must devise ways to improve the opportunity for participation by those who are constrained to limited engagement in the process. It is hardly necessary for everyone in the republic to master the intricacies of every policy option, but neither should we accept the condition of mass ignorance and alienation from the political process as natural or inevitable. Instead, we should adopt what Blumler calls a "posture of realistic idealism" which requires restructuring the political communication system in such a way as to "enable and constrain politicians to address the public in an intelligible and illuminating terms as possible. . ." so as to enable people to make choices "in accord with the politics they wished to support, implying an availability of information on the basis of which they could grasp the policy goals and intentions that parties and leaders would pursue if given power."<sup>40</sup> The integrity of the political process as well as the dignity of the individual voters require that information be presented in a manner that is tailored to voters' needs, that takes their participation seriously and that is designed to foster the greatest possible sense of engagement and involvement in the process of reasoned decision making.

### RECALIBRATING THE LAW OF CAMPAIGN ADVERTISING

If critics are correct in identifying television as one of the sources of uninformed voters and declining political participation, television is at the same time a uniquely effective vehicle for constructive change. Some have argued that the spot ads should be abolished. Even if this were constitutionally feasible, it would be counterproductive. This "solution"

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<sup>40</sup> Blumler, *Political Communication: Democratic Theory and Broadcast Practice*, in 3 *MASS COMMUNICATION REVIEW YEARBOOK* 621, 633-34 (D. Whitney, E. Wartella, S. Windahl eds. 1982).

would deprive a segment of the public of a central source of their political information with no assurance that it would be replaced with another. Instead, we should improve the quality of the conversation by creating incentives for candidates to address the public in as "intelligible and illuminating terms as possible."<sup>41</sup>

Diamond counters the criticism that candidates spend too much money on television advertisements by pointing out that McDonalds spent more to advertise Big Macs in 1982 than was spent by all the candidates for 468 House and Senate seats in the same year. He encourages critics to regard election dollars as the tuition Americans are willing to pay for their education in politics.<sup>42</sup> If, however, political ads look like Big Mac commercials, not only is the tuition no bargain, but the long term effect will be a trivializing of electoral politics and a distancing between candidate and citizen.

Just as it is possible to produce thirty minutes of fluff, a candidate could convey specific substantive positions in thirty seconds, as when John Lindsay ran a spot ad in Florida that gave his position on, among other issues, "gun control (for), abortion (for), and school prayer (against)."<sup>43</sup> More typical, however, are the following 1988 New Hampshire ads: "Real financial security. Who's for it? Only Pete DuPont." "Washington insiders Bob Dole and George Bush want higher oil prices and you'll pay the bill. Only Jack Kemp opposes higher oil prices." Pat Robertson is for "good traditional values and strong conservative government." Even when a candidate states a specific position, low-involvement voters may lack the information framework needed for adequate evaluation. A simple position statement is helpful only to the extent that the viewer has already assembled and evaluated the arguments for and against, has decided where she stands on the issue, and is merely looking for candidates who match her position. While even low-involvement voters may have done this preliminary work for highly visible and charged issues such as school prayer or abortion, it is unlikely they will find a simple statement for financial security or against high oil prices very illuminating. The ads should provide not only the candidates' conclusions, but invite the viewer to share in their reasoning process as well.

This could be accomplished by amending the "lowest unit rate" provi-

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<sup>41</sup> *Id.* at 634.]

<sup>42</sup> E. DIAMOND & S. BATES, *THE SPOT: THE RISE OF POLITICAL ADVERTISING ON TELEVISION* 374-75 (1984).

<sup>43</sup> *Id.* at 381.

sion of the 1934 Communication Act<sup>44</sup> to make it available only to those candidates who air minute and a half spot advertisements (the maximum length of time available for commercials during program changes) in which they identify an issue, present their position on that issue, and explain why they hold that position. This provision would apply to presidential and federal and state congressional candidates.<sup>45</sup>

Federal candidates currently enjoy financial benefit for their paid political broadcasts. Under Section 315(b) of the 1934 Communication Act, when broadcasters sell time to candidates in the period preceding an election they must make it available at their lowest unit rate charged. This provision is one element of an interrelated set of political broadcast laws and regulations<sup>46</sup> that was enacted, not to further the libertarian goal of individual candidates' self-actualization, but to create a structure than encourages distribution of abundant and balanced political information to the electorate. The lowest unit rate provision was enacted on

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<sup>44</sup> 47 U.S.C. § 315(b) (1982).

The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election or election to such office shall not exceed

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charged made for comparable use of such station by other users thereof.

<sup>45</sup> Though television has been credited with providing more informational coverage of the 1988 presidential candidates through debates and interviews, this may be inadequate. NBC deserves credit for even attempting its two hour, twelve candidate presidential debate in December 1987. However, the result was a disappointment to many viewers and commentators. *New York Times* television critic John Corry alluded to the perhaps unavoidable limitations:

That was billed as a debate, although it had all the elements of a game show. There is a sense in which all politics on television has elements of a game show, but the NBC [debate] . . . set a house record. Candidates were restricted to one-minute bursts, while sitting in what looked like a jury box. A minute was marked by the mellifluous sound of a chime; then we heard from the next candidate-contestant. As a way to pick Presidents, this was better than a coup d'etat, but as a way to discuss issues it didn't amount to much.

Corry, *Of Candidates, Conversations and Chimes*, N.Y. Times, Dec. 13, 1987, at H43, col. 1.

The three major networks altered their approach to covering the 1988 presidential race by replacing the traditional assignment of correspondents and crews to travel with each candidate with what they call "zone coverage." Though news executives explained it would allow the networks to offer more in depth analytical coverage of the race, the shift in strategy is a response to budget cuts, and there is no guarantee that the "new, lean approach" will continue once the austerity reductions are relaxed, particularly given that broadcast journalists believe the new approach diminishes the quality of coverage by "removing reporters from the texture of the campaign," and campaign advisers charge that it works to the disadvantage of underdog candidates. Boyer, *Networks' Approach to the '88 Campaign Takes on Lean Look*, N.Y. Times, Dec. 13, 1987, at 1 col. 6; 50, col. 3.

<sup>46</sup> 47 U.S.C. § 312(a)(7) requires stations to allow reasonable access to legally qualified candidates for federal office; § 315(a) requires broadcasters to provide equal time to qualified candidates and sets forth categories of coverage that are exempt; the Zapple rule and Cullman doctrine further elaborate broadcasters' responsibilities. *In Re Request by Zapple*, 23 F.C.C. 2d 707 (1970).

the premise that the advertisements provide valuable political information. The benefit should be adjusted in a way that makes it more closely tailored to its purpose.

Critics will point to issues of enforcement. First is the definitional problem of what would count as information of a candidate's position on a contemporary issue. The dividing line between "issue" and "image" is not always immediately apparent. Nonetheless, at an intuitive level most of us find the distinction a meaningful one. That so many political commentators have picked up on it also suggests it rings true for many people. Additionally, researchers who are studying political communication are able to work reliably with the distinction and report that it does not pose a problem.<sup>47</sup>

Though it is easy to think of examples of common political rhetoric that are difficult to label as either image or issue, they are often short slogans, such as "I'm strong on America" or "The working folk make this country great." The problem of categorizing largely solves itself once the time period is extended and the candidate is required to present an explanation for her stated position. If a candidate spends 90 seconds on the "I'm strong on America" topic, the direction she takes will make it more identifiable as an image or an issue-based presentation. If she continues to repeat the slogan and shows pictures of herself chatting with the working folk or walking through amber waves of grain with her husband and dog, then we could reliably classify the advertisement as one that did not satisfy the criteria. If she instead elaborated what problems face the workers and how she intends to solve them or outlines some measures for making America strong, then there would be easy agreement that the advertisement presented information on an identified issue. Likewise, consider if Pat Robertson had devoted 90-seconds to his New Hampshire advertisement — in which he informed voters of his support for "good traditional values and strong conservative government" — by explicating *which* values he considered to be good and traditional, and what he meant by a government that is strong and good.

Second, since the proposed regulation would not prohibit image based advertisements nor require that a certain percentage of advertisements be issue oriented, it does not require that every piece of programming be classified; it merely requires that the candidate air a certain amount of programming in which she provides information about an issue of her choice. In other words, the concepts of "information" and "issue" become problematic not when we use them absolutely and in isolation, but only in opposition to "image."

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<sup>47</sup> Telephone interview with Professor Jack McLeod, University of Wisconsin (Oct. 22, 1987).



Third, erring in the direction of stringency rather than leniency would further reduce any feared definitional problems. If only those advertisements that clearly satisfy the criteria are counted toward the requirement, that would eliminate haggling over gray areas.

The timing of enforcement should be decided in line with the goals of increasing predictability for candidates (especially those who are operating with smaller coffers), eliminating risk of partisan bias, and avoiding differential impact on incumbents or challengers.<sup>48</sup> One option would be to rely on post hoc, private complaints, which is similar to the way in which other areas of broadcast regulation are managed.<sup>49</sup> Anyone could challenge that a candidate had not met the requirement for receipt of the lowest unit rate, and the challenged candidate could then provide a record of the programming she considered qualified her. If she were found unqualified, she would have the choice of refunding the subsidy or satisfying the requirement. The problem posed by this approach is that if the challenge came after the campaign had ended, the only option would be reimbursement, and this unpredictability may be more onerous for candidates with less funding. However, those candidates could insure themselves against this risk simply by being certain to produce programming that clearly was informational. The alternative would be to qualify in advance for the benefit, but this may be unfeasible since campaign strategies evolve over such a long season. It would be too restrictive to force candidates to identify their positions in advance, since in reality those positions shift in response to public opinion polls.

### THE CONSTITUTIONALITY OF THE RECALIBRATION; A STRUCTURAL-FUNCTIONAL ANALYSIS

Critics of proposals for affirmative governmental regulation of speech reliably object on the basis of what they perceive to be a nearly absolute first amendment prohibition of such regulation. Their position, however, misunderstands both theory and precedent. The evolution of absolute protection of speech grew up in response to governmental repression of dissident social and political movements and developed against a backdrop of first amendment doctrine that provided precious little protection. Now governmental regulation of speech is viewed as an aberration of assumed absolute protection. In fact, the protection is not absolute, and a structural-functional theory of the first amendment would dictate and explain that the standard of judicial scrutiny must vary with the context.

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<sup>48</sup> Prior restraint is not an issue because no aspect of the proposal involves obtaining advance approval.

<sup>49</sup> Stations maintain files documenting their activity, which they produce if their licenses are challenged by private parties. Likewise, the Federal Election Commission requires candidates to keep records of contributions and expenditures.

*The Structural Location*

The Supreme Court has recognized that the first amendment interacts with such variables as type of speaker, medium of speech, and type of speech. These factors signal different structural locations, which in turn call for emphasizing certain first amendment functions over others. So, for instance, the identify of the speaker has predictable implications because of the role certain speakers play in society. Newspapers are granted nearly absolute protection both because they are viewed as the quintessential check on government abuses of power and because their history is such that abundance of supply and ease of access is assumed.<sup>50</sup> Soapbox orators and lonely pamphleters have likewise received virtually absolute protection in the twentieth century, partly because they are archetypal figures in the American myth,<sup>51</sup> and partly because when organized into movements, they presented sufficient threat to the stability of the system that it was necessary to incorporate them into the structure.

Features of the context of speech that the present proposal addresses — televised candidate advertisements — signal that it is located in an area of the social/political structure in which the first amendment permits and even mandates affirmative governmental regulation. Blum, for instance, explains that the first amendment has a dichotomous structure. It grants absolute protection, based on a grant of behavioral entitlements deriving from a principle of equal liberty, to a core of speech activities that are accessible to both the rich and the poor, such as leafleting and assembly. Expensive activities, such as broadcasting and hiring canvassers, should and do receive only discretionary protection guided by a consideration of the collective good. As Blum observes “[w]here regulatory interests are substantial, complex, and at times unforeseeable, behavioral entitlements are a clumsy device for shaping first amendment protection . . . Discretionary protection makes it possible for courts to render decisions that are narrow, tentative, and readily amenable to future

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<sup>50</sup> The print press has developed an institutional culture that accords with its structural role as the watchdog on government, and its members are acculturated into its ethics and norms. “In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy . . . . The press was protected so that it could bare the secrets of government and inform the people.” *New York Times v. United States*, 403 U.S. 713, 717 (1971). The broadcast industry lacks such a clearly defined role, and individuals working in the nonentertainment sectors of the industry struggle to reconcile the conflicting norms presented to them. See generally J. ETTEMA & D.C. WHITNEY, *INDIVIDUALS IN MASS MEDIA ORGANIZATIONS: CREATIVITY AND CONSTRAINT* (1982); Bantz, McCorkle, Baade, *The News Factory*, 7 COMM. RES. 45 (1980).

Such tension is also exploited by the industry leaders (and the FCC), who can simultaneously claim special treatment by arguing that they are no different than newspapers and rebuff special treatment (e.g. stricter limits on concentration of ownership) by claiming that “television is just another appliance. It’s a toaster with pictures.” FCC Chair Mark Fowler, quoted in O’Connor, *The F.C.C. Designs a New Toaster*, N.Y. Times, Aug. 23, 1987, at H23, col. 1.

<sup>51</sup> This was especially true when their speech was religious, e.g., *Lovell v. City of Griffen*, 303 U.S. 444 (1938); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

limitation in the face of changed circumstances or new information."<sup>52</sup> In his mapping of the areas of absolute and discretionary protection, Blum locates issues involving use of broadcast media in the area of discretionary protection. Access to broadcasting involves use of scarce resources which are differentially available. Protection, therefore, should be granted according to an assessment of the collective good.<sup>53</sup>

In addition to Blum's scarce resources rationale, protection is discretionary because the peculiar nature of television signals a context in which the primary first amendment function is to further the public's interest in full information and debate. Though the early impulse to regulate electronic media differently than print media derived from forces that may no longer exist,<sup>54</sup> television remains unique not because of any one feature, but because of a distinctive assortment of characteristics.<sup>55</sup> The court in *CBS v. Democratic National Committee* recognized this complexity when it articulated and thereby solidified what it termed the "tightrope" aspects of our system of broadcast control.<sup>56</sup>

Campaign advertising also is an unusual combination of political speech, considered to be the core of first amendment protection, and commercial speech, which is at the periphery of the scope of the first amendment. Though *New York Times v. Sullivan* established that editorial advertisements deserve the fullest protection, the Court continues to sense

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<sup>52</sup> Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1302-03 (1983).

<sup>53</sup> A recent Supreme Court case, *Austin v. Michigan Chamber of Commerce*, 58 U.S.L.W. 4371 (1990), reflects this theory. The Court upheld Michigan's Campaign Finance Act, which prohibits corporations from using general treasury funds for independent expenditures in connection with state candidate elections. In doing so, the court significantly expanded its definition of corruption of the political system beyond the very literal sense of *quid pro corruption*; the *Buckley* Court had suggested that this was the only form of political corruption that the state legitimately could seek to reduce.

In *Austin*, the Court recognized that Michigan's requirements burdened corporations' exercise of political expression, but found such restrictions justified by the compelling state interest in reducing the unfair political advantage exercised by corporations — unfair because the accumulation of corporate funds used to fund speech is not an indication of the popular support for the corporation's political ideas, but rather a reflection of the economically motivated decisions of investors and customers. The Court held that Michigan was justified in seeking to control the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support of the corporation's political ideas." *Austin*, 58 U.S.L.W. at 4373.

<sup>54</sup> These forces include a typical wariness in the face of a new technology, industry pressure for regulation, and technological spectrum scarcity.

<sup>55</sup> The characteristics include direct determination of content by audience ratings, access that is uniquely expensive and limited, and distribution and use that are uniquely pervasive.

<sup>56</sup> *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 105.

a difference between traditional political speech and candidates' spot advertisements. In refusing to force the FCC to force broadcasters to sell unlimited time to candidates, the Court observed that "[t]he licensee's policy against editorial spot ads is expressly based on a journalistic judgment that 10- to 60-second spot announcements are ill-suited to intelligible and intelligent treatment of public issues; [and] the broadcaster has chosen to provide a balanced treatment . . . in a more comprehensive form."<sup>57</sup>

### *Functional Factors*

Second, and more important, this proposal does not involve suppression of speech in order to keep certain ideas out of public awareness. When the government seeks to inhibit "subversive" speech or invokes national security to enjoin publication, such regulation is presumptively at odds with the functions of the first amendment, and strict scrutiny is the appropriate analysis. Nor does this proposal involve suppression of speech in furtherance of a noncommunicative goal, such as to prevent littering or intrusion into neighborhoods, in which case the courts perform case by case analysis, balancing the extent to which communicative activity is in fact inhibited against the values, interests, or rights served by enforcing the inhibition. As Tribe notes, "[i]n such cases, the first amendment does not make the choice, but instead requires a 'thumb' on the scale to assure that the balance struck in any particular situation properly reflects the central position of free expression in the constitutional scheme."<sup>58</sup>

In contrast, in the present case, first amendment values appear on *both* sides of the scale. This dictates a balancing be done between the likely harm and the likely benefit that would accrue to first amendment functions. The thumb, however, should stay off the scale; there should be no presumption in either direction when the point of the regulation is to enhance a first amendment purpose, for in such situations the *absence* of regulation itself can diminish first amendment values. The task is for the state is to fashion a solution that maximally promotes the first amendment interests on both sides.

### *Judicial Review and Required Legislative Record*

The question of how much and what kind of evidence is necessary to establish the requisite factual record to withstand judicial review is problematic, particularly since the Supreme Court's standards are vari-

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<sup>57</sup> *Id.* at 118.

<sup>58</sup> L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 791 (1988) (Tribe borrows the phrase from Professor Kalven).

able, vague and at times unreasonably high.<sup>59</sup> Both the FCC and the courts are labile monitors of methodological rigor with erratic epistemological commitments, sometimes basing opinions on unexamined and undocumented assumptions or anecdotal evidence,<sup>60</sup> while at other times becoming methodological purists.<sup>61</sup> Given that social science is rarely authoritative independent of ordinary knowledge<sup>62</sup> and that policy making must nonetheless proceed, to insist on the rigorous factual showing required under a strict scrutiny analysis inevitably works to maintain the status quo. It is one thing to require conclusive empirical evidence when the government action at issue is at odds with the constitutional standard, as when, for instance, racial classifications are imposed to discriminate against minorities or the state attempts to suppress radical speech. When, however, the state seeks to further the constitutional directive, as in the case of affirmative action and desegregation or efforts to increase the diversity of speech, the inevitable lack of authoritative empirical evidence is invoked inappropriately, and the reliable effect is to solidify the current state of affairs. Also, when the risk of harm is slight, we can tolerate less certainty and can more safely afford to experiment. At the same time, one need only consider many of the half-baked reforms proposed in the area of media regulation to understand that the court should not simply defer to legislative judgment. An intermediate standard should be adopted. Fortunately, this proposal refers to relatively simple propositions of media effects for which ample supportive evidence exists, and the degree of infringement is so slight, that even modest benefits would outweigh it.

### *State Interest*

In a society that has chosen a system of democratic self-governance, the weightiness of the interest in as well informed and as fully participating a polity as possible is self-evident. The public's right to information is not an individual right of access either to send or to receive information, but rather is a collective interest that furthers a structural goal.<sup>63</sup>

<sup>59</sup> See Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985) for a discussion of the obstacles and ways around the Court's demand for empirical evidence.

<sup>60</sup> See e.g. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir., 1983) and *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir., 1983), cert. denied 467 U.S. 1255 (1984).

<sup>61</sup> See *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir., 1985); In the Matter of Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, Notice of Inquiry, 1 FCC REC. 1315 (1986).

<sup>62</sup> See C. LINDBLOM & D. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* 40 (1979) for a discussion of the "mistaken pursuit of authoritativeness" and the role of social science as an instrument of social problem solving.

<sup>63</sup> See O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1 (1980) (There is no individual "right to know."); Kushner, *Freedom to Hear: First Amendment, Commercial Speech and Access to Information*, 28 WAYNE L. REV. 137 (1981) (The expansion of commercial speech protection by the Burger Court was part of an effort to foster capitalist, industrial development as well as a desire to close the information gap

The Supreme Court has found this interest in an informed public sufficiently weighty to warrant striking restrictions on commercial speech,<sup>64</sup> to infringe on property owners' rights,<sup>65</sup> and to support affirmative regulation of the broadcast industry.<sup>66</sup> Justice Brennan's writings, in particular, emphasize protection of the process of information gathering and dissemination necessary for the deliberation that is central to a democracy. In the particular context of information conveyed through the broadcast media, the right of the viewers have specifically been found to be most weighty.

This proposal is aimed at a more narrow goal than providing full information to the general public. Instead, it seeks to enhance one element of public debate for one segment of the populace by providing them with information that is realistically geared to their needs and that will allow them to participate in the political process in a manner more in line both with their information rich neighbors and with the vision of the process of deliberation that democratic theory and first amendment doctrine assumes is fundamental.

The need for improvement is clear. As was previously discussed, perhaps the most dramatic recent phenomenon in electoral politics has been the media replacing political parties as the principal source of information and a structuring force in American politics. Though certain segments of society have benefited from the abundance of directly available information, the information gap remains wide, if not wider. More people are dropping out of even the most minimal form of involvement — voting — and among those who remain in the electorate, those who rely on the most common source of news — television — are unable even to form a reason for their choices. A Harris poll submitted into Senate hearings on campaign finance reform proposals indicates that the public as well as pundits are dissatisfied with the current system. "By 74-21 percent, a majority said it fears that [television] commercials make voters viewers of, instead of participants in, an election, and 79% believe that 'political campaigns now are dominated by expensive paid advertising, which make elections a test of how well a candidate can be packaged by

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that resulted from a shift in the social model from a small, cohesive, homogeneous society where word of mouth supplied all the commercial information one might need to the current complex, urban society); *Houchens v. KQED, Inc.*, 438 U.S. 1 (1978) (Press can claim no special right of access to information under government control. *But see* Stevens' dissent: press does not have special right of access, but public has a general right of access); *CBS v. Democratic Nat'l. Comm.*, 412 U.S. 94 (candidates have no claim to an unlimited right of access) *CBS v. FCC*, 453 U.S. 367 (1981) (but there is a limited right of access in order to further the electoral system).

<sup>64</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>65</sup> *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

<sup>66</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; *CBS v. FCC*, 453 U.S. 367 (1981).

professional media experts, not who is the best person.'"<sup>67</sup> In the same hearings, a media consultant testified that when his firm tests commercials or candidates in focus groups, individuals respond that they want more information about the candidates.<sup>68</sup>

### *The Promotion and Diminution of First Amendment Values*

The problem is not intractable, however. The need for improvement is clear, but so is the opportunity. Though the advertisements are criticized for their deteriorating effects, they hold promise for reengaging those individuals who are marginalized. Social science research demonstrates that if candidates present some analysis of their specific positions on issues, those individuals who use the advertisements will benefit.

Televised political advertisements have the greatest impact on individuals with lesser involvement and lower levels of knowledge of the candidates. That impact could just as easily be a positive one. Individuals do learn information from the commercials, and the highest information gain occurs among those with the greatest need; less interested voters with less exposure to other sources.<sup>69</sup> In an ingenious study conducted in New Jersey, one of the only two states in the country without an in-state commercial VHF station, Zukin found that "it was the information environment, rather than the motivation to acquire information, that proved to be the critical factor" in information acquisition.<sup>70</sup> Patterson and McClure focused specifically on less interested voters and found that television spot ads were a more useful source of information than newspapers (which they do not use) or television news (from which they learn relatively little). They concluded that political advertising reached the low-interest voter far better than any other form of mass media.<sup>71</sup> Additionally, because of the nature of the genre, TV spot ads are not subject to selective exposure as are newspaper articles and television programs. It has been estimated that while a half-hour speech would lose a third of the time slot's normal audience, and a five-minute speech would lose from 5 to 10 percent, a thirty- or sixty-second spot would lose nothing.<sup>72</sup>

Although it is well documented that interest and need increase information recall,<sup>73</sup> media exposure in turn stimulates political interest.<sup>74</sup> Further, Atkin and Heald found that minimally informed voters are most

<sup>67</sup> *Campaign Finance Reform Proposals of 1983: Hearings Before the Senate Comm. on Rules & Admin.*, 98th Cong., 1st Sess. 492-93 (1983) (presentation of the Harris Survey: *Public Fed Up with Political TV Ads*).

<sup>68</sup> *Id.* at 490 (statement of J. Brian Smith, Political Consultant, Smith & Haroff, Inc.)

<sup>69</sup> O'Keefe & Atwood, *supra* note 26, at 339-40.

<sup>70</sup> Zukin, *supra* note 29, at 376.

<sup>71</sup> Patterson & McClure, *Television and the Less-Interested Voter: The Costs of an Informed Electorate*, 425 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 88 (1976).

<sup>72</sup> Diamond, *supra* note 42, at 382.

<sup>73</sup> Garramone, *Audience Motivation Effects: More Evidence*, 11 COMM. RES. 79 (1984).

<sup>74</sup> Atkin & Heald, *supra* note 36, at 219 (citing Atkin, Galloway, & Nayman, *Reciprocal Causality Among Political Interest, Political Knowledge, and Mass Media Exposure*, paper presented to the International Communication Association, 1974).

strongly influenced by the "agenda" set in the candidates' advertisements.<sup>75</sup> If the advertisements supply more detailed position statements and analysis, less involved voters will begin to believe that this type of information is important. It would miss the point to characterize this as paternalism or brainwashing. The media will continue to direct our attention and perceptions of what is important. The question is what direction we want to take. Those less involved voters who perceive a need for more substantial information but who lack the time or motivation to seek it out would get what they want, while at the same time the attention of the rest would be directed toward consideration of not only the packaging of the candidates but the reasoning behind their positions as well.

To be weighed against this enhancement of rich public debate is the degree to which broadcasters' and candidates' autonomy would be infringed. The balance between the public's interest in full and diverse information and broadcasters' editorial autonomy has already been struck, and the proposed regulation is squarely in line with first amendment jurisprudence that has developed in relation to the broadcast industry. Private broadcasters still are supposed to operate in the public interest. Identification of that interest is achieved through the delicate balance among broadcasters' editorial discretion, congressional oversight, and judicial review.<sup>76</sup> As one commentator notes, "An important element of this public service is to aid in developing an informed electorate, which is at least partly achieved by assuring political candidates some opportunity to present themselves and their platforms to the electorate."<sup>77</sup>

The proposed amendment merely would be an extension of already existing provision in the Communications Act. It would lead to a better informed electorate without chilling broadcasters' speech or cutting further into licensees' additional discretion since the proposal requires neither unlimited access to broadcast time,<sup>78</sup> nor a forced response,<sup>79</sup> nor a conditioned response.<sup>80</sup>

Infringement of candidates' first amendment rights likewise is negligible. First of all, it does not restrict political speech, but instead encourages it. It would be a different matter entirely to address the problem by

<sup>75</sup> See *id.*

<sup>76</sup> *CBS v. DNC*, 412 U.S. 94.

<sup>77</sup> Koppel, *The Applicability of the Equal Time Doctrine and the Reasonable Access Rule to Elections in the New Media Era*, 20 HARV. J. ON LEGIS. 499, 511 (citing *Electronic Journalism and First Amendment Problems, Recommendations of Communications Law Committee Section and Technology, American Bar Association*, 29 FED. COM. B.J. 1 (1976)).

<sup>78</sup> Unlimited access was held unconstitutional in *CBS v. Democratic Nat'l. Comm.*, 412 U.S. 94 (1973).

<sup>79</sup> This was held unconstitutional in *Pacific Gas and Elec. Co. v. PUC of Cal.*, 475 U.S. 1 (1986).

<sup>80</sup> The FCC concluded that the system of conditional response exemplified by the Fairness Doctrine can have a chilling effect, 1985 *Fairness Doctrine Report*.



prohibiting the use of televised spot advertisements or by conditioning the presentation of image-oriented advertisements on the provision of issue-oriented programming. Measures such as the Fairness Doctrine, which make some speech conditioned on the occurrence of other speech, may indirectly and inadvertently operate in such a way that the net effect is *reduction* in the overall amount of speech. The present proposal presents no such risk.

Second, there is a fundamental difference between telling candidates that they must discuss a particular issue and telling them they must talk about any issue of their choice. A central and real fear that lies behind the first amendment is that government would attempt to "control the search for political truth"<sup>81</sup> by prohibiting or requiring expressions of certain points of view. Such viewpoint regulation obviously is the most pernicious. For instance, in the only two cases involving governmentally compelled speech, the provisions struck down required people to assert a particular perspective or belief.<sup>82</sup> The proposed regulation in no way directs candidates toward a particular perspective, for that would be antithetical to its purpose. The proposal does not suggest that government choose the topics by, for instance, selecting a priori a set of issues that the government has identified as especially important and then requiring candidates to select from this pool. The proposal thus falls short of even topic-based regulation. The Court does not and should not treat infringement as a dichotomous variable, but rather as a continuous one; the question is not whether there is or is not some infringement, but how severe, pervasive, and intrusive it is. This regulation attends to content in the most general, and, therefore, the mildest way.

Finally, this proposal does not impose mandatory directives. There is a critical distinction between requiring that candidates engage in a particular type of speech activity and structuring incentives which encourage that activity. Creating incentives is what much legislation is all about, and the Supreme Court recognizes a distinction between interference with the exercise of a constitutional right and state encouragement of alternative activity. Political candidates are not immune from legislative behavior modification so long as the incentives do not restrict their ability to expend their personal funds, do not affect challengers and

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<sup>81</sup> Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980).

<sup>82</sup> In *West Virginia Bd. of Educ. v. Barnett*, 319 U.S. 624 (1942), the school required students to recite an oath or pledge of allegiance. In *Wooley v. Maynard*, 430 U.S. 705 (1976), New Hampshire required its residents to sport license plates that asserted the philosophy of "live free or die."

incumbents differentially, and are not justified by an effort to equalize the political influence of more affluent voters and candidates.<sup>83</sup>

### CONCLUSION

The proposed amendment advocates content regulation of political candidates' speech, and, therefore, on first glance appears to be an example of the most onerous form of regulation. A deeper understanding of the functions of the first amendment reveals that the proposal actually furthers its underlying values. The absolutist, libertarian interpretation of the first amendment allowed for the protection of dissident political and social movements, which was necessary to remain faithful to the democratic purpose. The regulation advanced in this paper represents just such another necessary recharting or recalibration. It is not a form of government repression, nor does it need to lead us down the slippery slope toward repression. It is a refinement of measures previously undertaken to preserve the integrity of the political process. It merely creates additional incentives for candidates to do what presumably they want to do anyway—engage in substantive conversations with all the electorate.

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<sup>83</sup> See *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Republican Nat'l. Comm. v. Federal Election Comm.*, the court affirmed per curiam a lower court decision upholding the constitutionality of a federal statute which conditions eligibility of presidential candidates for federal subsidies upon certification that they will not incur expenses in excess of the aggregate to which the candidate is entitled from the fund and that no private contributions will be used except to the extent necessary to make up a deficiency in the fund. 445 U.S. 955 (1980). See Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 HASTINGS CONST. L.Q. 601 (1983); Sunstein, *"Is There an Unconstitutional Conditions Doctrine?"* 26 SAN DIEGO L. REV. 337 (1989).

