

1996

# The FCC, Indecency, and Anti-Abortion Political Advertising

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## Recommended Citation

Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 *Vill. Sports & Ent. L.J.* 85 (1996).

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# THE FCC, INDECENCY, AND ANTI-ABORTION POLITICAL ADVERTISING

LILI LEVI\*

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## INTRODUCTION

Since the 1992 election season, pro-life candidates for federal elective office have aired graphic television advertisements depicting abortion or aborted fetuses. Indiana Republican congressional candidate Michael Bailey, a self-styled "Christian media specialist," inaugurated the graphic ads in 1992.<sup>1</sup> One of his spots showed tweezers picking through a petri dish containing the crushed head, arms, and legs of an aborted fetus as a woman's voice intoned, "[i]t's a woman's choice."<sup>2</sup> Bailey's advertisement was not an iso-

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1. Michael E. Bailey, *Censorship by Media Elites Will Ultimately Threaten the Republic*, 47 FED. COMM. L.J. 159, 160 (1994); William Booth, *Antiabortion TV Ads Catch On in Campaigns*, WASH. POST, July 20, 1992, at A1; David Jackson, *TV Ads on Abortion Raise Speech, Obscenity Issues; Senate Hopeful May Air Spots with Dead Fetuses*, DALLAS MORNING NEWS, Feb. 14, 1993, at A39; Christopher Stern, *Antiabortion Ads Resurface at FCC*, BROADCASTING & CABLE, Apr. 18, 1994, at 36 [hereinafter Stern, *Antiabortion Ads*].

On Bailey's activities as a Christian media specialist, see *Bailey Plans More Graphic Anti-Abortion Ads for TV*, COURIER J. (Louisville), July 2, 1993, at B7 [hereinafter *Bailey Plans*]; Jon Lafayette, *Candidate's Ads Raising TV Fears*, ELECTRONIC MEDIA, Apr. 27, 1992, at 1 [hereinafter Lafayette, *Candidate's Ads*] (noting that Bailey ran his own promotion company until he founded Christian Media Ministries in 1991).

2. Booth, *supra* note 1; David Kelly, *Challenging the Right to Air*, HOLLYWOOD REP., Aug. 11, 1992; Kate Maddox, *Graphic Ads Take Political Center Stage*, ELECTRONIC MEDIA, Aug. 17, 1992, at 1 [hereinafter Maddox, *Graphic Ads*].

lated phenomenon, in part because he lent some of his abortion footage to other pro-life candidates for similar political campaign ads elsewhere.<sup>3</sup> Some of the commercials even used the same narrative lines: "When something is so horrifying that we can't stand to look at it, then why are we tolerating it? Pro-choice is a lie. These babies would never have chosen to die."<sup>4</sup> In Georgia, Republican congressional candidates Daniel Becker, Jimmy Fisher, and Mark Myers each ran an advertisement showing "Choice A," a smiling baby, and "Choice B," a fully developed fetus assertedly aborted in the last weeks of pregnancy.<sup>5</sup> Some ads purported to show a

3. Booth, *supra* note 1; Maddox, *Graphic Ads*, *supra* note 2, at 1. See also Jackson, *supra* note 1, at A39 (stating that Bailey "supplied footage to like-minded candidates in 18 states, including California, New York and Illinois"); Jeff Kunerth, *Candidates Turn to Graphic TV Ads to Spread Anti-abortion Message*, ORLANDO SENTINEL TRIB., July 12, 1992, at A5 (reporting on "copycat candidates" and Bailey's provision of videotape to others); Lafayette, *Candidate's Ads*, *supra* note 1, at 1 (noting calls received from potential candidates in Texas and Montana).

On the use of graphic anti-abortion advertisements generally since 1992, see Hille von Rosenvinge Sheppard, Comment, *The Federal Communications Act and the Broadcast of Aborted Fetus Advertisements*, 1993 U. CHI. LEGAL F. 393, 393 (1993) (stating that such advertisements aired in 17 states); Michael deCourcy Hids, *Senator Who Wouldn't Run Has Won*, N.Y. TIMES, Dec. 6, 1992, § 1, at 26 (reporting that anti-abortion candidates in 14 Congressional and Senate races used aborted fetuses in ads in 1992); Jackson, *supra* note 1.

4. Booth, *supra* note 1 (advertisement for Georgia congressional candidate Jimmy Fisher); *Crier & Company*, (CNN television broadcast, July 24, 1992); *Crossfire*, (CNN television broadcast, July 24, 1992) (advertisement for Georgia Republican congressional candidate Daniel Becker); Colorado Christian Pro-Life Party Congressional Candidate Matt Noah Advertisement (on file with author). Some of the Becker and Bailey advertisements apparently include footage from "The Hard Truth," an anti-abortion documentary purportedly showing fetuses from third trimester abortions. Charles Walston, *4 GOP Candidates Support Graphic Anti-abortion Ad*, ATLANTA J. & CONST., July 1, 1992, at C5; Jackson, *supra* note 1. Becker claimed that the fetuses were taken from garbage dumpsters outside abortion clinics. Walston, *supra*.

5. Booth, *supra* note 1; Sheppard, *supra* note 3, at 393. Similarly, one of Daniel Becker's advertisements featured a shot of the candidate holding an infant and saying: "I'm Daniel Becker. I'd like you to meet five day old Lydia. Six days ago under current law, she could have been aborted." Gillett Communications of Atlanta, Inc. Petition for Declaratory Ruling, *In re Applicability of Section 312(a)(7) of the Communications Act of 1934, as amended, and Section 73.1944 of the Rules of the Commission to Certain Political Advertisements*, at 2 n.1 (filed July 28, 1992) (on file with author) [hereinafter *Gillett Petition for Declaratory Ruling*]. The rest of the advertisement was described as follows by the station that aired it:

Right before the word "aborted" the image cuts to the first of six shots of aborted fetuses, some held in a human hand. All are badly discolored in whole or in part, and some appear covered with a wet, dark, shiny substance. While these six clips are being shown, a female announcer recites statistics purporting to show the prevalence of third trimester abortions. The spot closes with the candidate claiming that he has placed before the viewer both life and death in requesting their vote.

*Id.*



gloved human hand holding fetal arms that had allegedly been ripped from the fetus.<sup>6</sup> Other graphic abortion imagery featured intercutting shots of concentration camp horrors, swastikas, American flags and aborted fetuses, characterizing abortion as the American Holocaust.<sup>7</sup> In Iowa, a minor party presidential candidate aired a number of similarly graphic ads that also provided names and addresses of two physicians associated with Planned Parenthood, so that viewers could "contact these baby killers and urge them to mend their ways."<sup>8</sup>

Some of these candidates were not satisfied with the traditional thirty or sixty second political spot. They also sought program-length time to air "infomercials" on the asserted horrors of abortion. Daniel Becker, for example, tried to air a thirty minute program containing footage of a third trimester abortion actually being performed. The lengthy advertisement featured spurting blood, pieces of fetal tissue being removed from a woman's vagina by forceps, and a clinical voiceover by a physician describing the technique of dilation and evacuation abortion, during which the fetus' head is crushed prior to removal.<sup>9</sup>

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6. Videotape of 1992 Stephen Hopkins anti-abortion commercial program (on file with author).

7. Lisa S. Mangan, *Aborting the Indecency Standard in Political Programming*, 1 COMM.LAW CONCEPTUS 73, 73 (1993); *Bailey Ads Will Target Gambling*, COURIER J. (Louisville), Sept. 10, 1993, at B1 [hereinafter *Bailey Ads*]; Booth, *supra* note 1, at A1; Ben MacIntyre, *USA: Evangelicals Rally to Beat the 'Sinful'*, THE TIMES, (London), Oct. 19, 1992, available in LEXIS, Nexis Library, Times File; Maddox, *Graphic Ads*, *supra* note 2; R.G. Ratcliffe, *GOP Candidate Files for Senate Election*, HOUS. CHRON., Jan. 26, 1993, at A24 (quoting Stephen Hopkins' claim that "[d]ivine providence has decreed that America look upon the images of her holocaust"). The appropriation of the Holocaust for anti-abortion arguments can be found throughout the literature of the graphic ads movement. See, e.g., Bailey, *supra* note 1, at 162.

8. Comments of Planned Parenthood at 3-5, MM Docket No. 92-254, filed in response to Request for Comments, *In re* Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 7 F.C.C.R. 7297 (1992) [hereinafter *Comments of Planned Parenthood*]; Marcia Cranberg & Louise Arnheim, *When "Reasonable Access" Is Used Unreasonably*, 11 COMM. LAW. 1, 20 (Fall 1993). See also *infra* note 322.

9. See *Gillett Communications, Inc. v. Becker*, 807 F. Supp. 757, 763 (N.D. Ga. 1992), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1993). A tape of the Becker advertisement was provided to the author by the FCC. The FCC tapes also included a Stephen Hopkins "infomercial," purporting to show a third trimester abortion, in connection with his 1992 candidacy for U.S. Senate from Texas. Jackson, *supra* note 1. See also Anne Rochell, *Elections '92 TV Stations Split on Airing Graphic Anti-Abortion Ad*, ATLANTA J. & CONST., Nov. 1, 1992, at C8 (discussing a graphic ad from Becker's 1992 campaign).

Subsequent elections gave witness to similar anti-abortion ads, with candidates claiming that the graphic ads continued to be critical to their campaign strategies. Stern, *Antiabortion Ads*, *supra* note 1; Mary Dieter, *Leising Old-Fashioned Campaign Beat Bailey's Offering Tactics*, COURIER J. (Louisville), May 5, 1994, at B4 (reporting Bailey's use of anti-abortion ads in 1994 elections). Michael Bailey also produced

These advertisements unsurprisingly generated controversy.<sup>10</sup> The candidates were hardly unaware that their images would horrify.<sup>11</sup> Viewer reaction to these commercials was indeed as outraged

spots for other anti-abortion candidates (such as Joe Slovenec, an independent candidate for U.S. Senate from Ohio). Steven W. Colford, *FCC Ruling Imminent on Anti-Abortion Ads*, ADVERTISING AGE, July 25, 1994, available in WESTLAW, ALLNEWS File [hereinafter Colford, *FCC Ruling*]. Michael Bailey's own 1994 campaign considered scheduling a December ad depicting a traditional Christmas scene with an aborted fetus substituting for the Christ child and an announcer asking: "What would have happened if Mary would have aborted Jesus Christ?" *Bailey Plans*, *supra* note 1, at B7.

10. See, e.g., Booth, *supra* note 1; *Crossfire*, *supra* note 4; Jackson, *supra* note 1. Indeed, the ads became the subject of many news stories and talk shows. See, e.g., Brian Cabell, *TBS Says Hands Are Tied on Abortion-Baseball Ads*, CNN News, Transcript No. 112-7, July 6, 1992; *Nightline: Graphic Political Anti-Abortion Ads*, (ABC News broadcast Aug. 31, 1992) [hereinafter *Nightline*] ("The commercials became a hot story. Within weeks, Bailey went from obscurity to celebrity . . .").

11. See, e.g., Booth, *supra* note 1; Stern, *Antiabortion Ads*, *supra* note 1, at 36. For example, Daniel Becker acknowledged that "[c]learly the nature of these ads is offensive to most," but called it "a necessary offense." Walston, *supra* note 4. Becker stated:

I would like to express my grief over the necessity of using such a graphic portrayal of the violence done to children through abortions. I have chosen to air these ads through sports, news and other related programming which reaches a predominantly male audience, with the express purpose of appealing to fathers to turn their hearts once again to their little ones. This ad was not designed to overcome our ignorance about abortion. It was designed to overcome our denial.

Kathy Scruggs, *Candidate Won't Pull Graphic Abortion Ads, Spots to Air During Today's Braves Game*, ATLANTA J. & CONST., July 5, 1992, at A1.

Michael Bailey "freely admits" that his commercials are meant to disturb viewers, including children: "I think kids should see them because we don't want them to think abortion is socially acceptable." Stern, *Antiabortion Ads*, *supra* note 1, at 36. In his view, the ads forced viewers "to walk through the 'death camps.' It is sick. It ought to horrify people." *Nightline*, *supra* note 10. Furthermore, he described the commercials as containing "ripped apart arms and legs and torsos, absolutely disgusting . . . . It's just sick, it's just sick. That's our point." Booth, *supra* note 1. Early on, Mr. Bailey stated his view that "[i]f people would see the dead babies that we're killing through abortion, they would think it was so horrifying they would stop . . . ." Lafayette, *Candidate's Ads*, *supra* note 1, at 1 (quoting Bailey in April 1992). Bailey also said: "I decided to air the graphic footage because I believe that the American people have the right and obligation to make an informed decision as to whether abortion is murder." John Harmon, *Anti-Abortion Ad Rattles TV Station*, ATLANTA J. & CONST., Oct. 29, 1992, at E4. According to Bailey, "[w]hat we've done is, we've cut through all the rhetoric and taken it directly to the people." *Nightline*, *supra* note 10. After having continued to use the graphic formats in his 1994 campaign, Bailey conceded that his "message and [his] methods are offensive . . . . Even people in the church aren't yet quite comfortable with this." Dieter, *supra* note 9. Yet Bailey also said: "I have no apologies for the ads and our overtly Christian stance . . . . We believe Christians need to invade politics and bring Christian principles back into the body politic." Bob Lewis, *Hamilton Coasts, Three Vie in Tight GOP Primary*, AP POL. SERVICE, May 3, 1994, available in WESTLAW, ALLNEWS File.

Republican Senate candidate John Knox stated that "[t]he ads are designed to show that it's a life or death issue . . . . If it takes this graphic depiction of what is going on, I think the American people deserve that . . . ." Walston, *supra* note 4.

as it was swift, at least judging from the outpouring of distressed phone calls to stations, complaints to the FCC and threats of litigation evoked by the advertisements. Many of the commercials aired in the early afternoon and prime time.<sup>12</sup> Letters of complaint and phone calls poured into the television stations running the ads.<sup>13</sup> One station received bomb threats after it aired graphic anti-abortion ads for Republican U.S. Senatorial candidate Stephen Hopkins in 1993.<sup>14</sup> A number of viewers sued the television stations that

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Knox's bottom line: "[i]t's gut-check time in America. People have to quit straddling the fence." *Id.*

David Shedlock, of the Des Moines office of Operation Rescue, purchased time to air Virginia independent presidential candidate Howard Phillips' graphic anti-abortion ads during an ABC "After School Special" in 1992. *Graphic Anti-Abortion Ads to Run During Children's Program*, UPI, Sept. 17, 1992, available in LEXIS, Nexis Library, UPI File [hereinafter *Graphic Ads During Children's Program*]. His rationale: "children need to know what can happen." *Id.*

In explaining his placement of ads during periods when children will be watching television, Pro-Life Senate candidate Donald Larson stated that "they will question their parents and make them uncomfortable enough to begin working against abortion." *North Dakota Senate: New Pro-Life Ads Target Conrad*, THE HOTLINE, Nov. 23, 1992, available in LEXIS, Nexis Library, Hotline File [hereinafter *North Dakota Senate*].

12. See, e.g., Milagros Rivera-Sanchez & Paul H. Gates, Jr., *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267, 268 (1994); Booth, *supra* note 1 (noting that Becker ads appeared during Atlanta Braves games and that Republican Jimmy Fisher ads ran frequently — up to 200 times per week — on cable channels); *Graphic Ads During Children's Program*, *supra* note 11 (noting that Howard Phillips' ads were scheduled to be aired during ABC's "After School Special"); Christopher Stern, *Viewers Protest Antiabortion Ads*, BROADCASTING & CABLE, Feb. 21, 1994, at 64 [hereinafter Stern, *Viewers Protest*] (noting that Hopkins' 1994 ads aired in early mornings and evenings, when children were likely to be in audience, and that he purchased spots during those times "to use his advertising dollars most efficiently"); Walston, *supra* note 4 (reporting that Becker ads were scheduled to appear during Atlanta Braves broadcasts). See also Bailey, *supra* note 1, at 160-61.

13. See, e.g., *Abortion 0, Braves 1*, THE HOTLINE, July 7, 1992, at TV Monitor, available in LEXIS, Nexis Library, Hotline File; Lafayette, *Candidate's Ads*, *supra* note 1; Jon Lafayette, *Chicago Station Airls Graphic Ad Against Abortion*, ELECTRONIC MEDIA, July 27, 1992, at 2 [hereinafter Lafayette, *Chicago Stations*]; *Limit Sought on Fetus Display*, ATLANTA REC., Sept. 7, 1992, at B6; *Nightline*, *supra* note 10; Philip P. Pan, *Abortion Ads Anger Braves Viewers*, ATLANTA J. & CONST., July 4, 1992, at A1; Rochell, *supra* note 9, at C8; Scruggs, *supra* note 11, at A1; Stern, *Viewers Protest*, *supra* note 12, at 64. See also Comments of Gillett Communications of Atlanta at 4, MM Docket No. 92-254, filed in response to Request of Comments, *In re* Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 7 F.C.C.R. 7297 (1992) [hereinafter *Comments of Gillett*]. Broadcasters found that irate viewers blamed the station managements for their decisions to air the ads, not understanding the statutory mandates pursuant to which the broadcasters felt compelled to air them. Affidavit of Jack Sander at 5, *Comments of Gillett*, *supra* at 5.

14. *Texas Senate 1993: Last Ditch Ads*, ABORTION REP., Apr. 27, 1993, available in LEXIS, Nexis Library. KTFX-TV, the NBC affiliate in Midland, Texas, received six bomb threats after airing Hopkins' ad. *Broadcast TV*, ELECTRONIC MEDIA, Mar. 22, 1993, available in LEXIS, Nexis Library. Hopkins ran in 1993 for the seat vacated when Lloyd Bentsen became Secretary of the Treasury.

aired the graphic ads, claiming intentional infliction of emotional distress.<sup>15</sup> Additionally, many viewers contacted the Federal Communications Commission (FCC or Commission): In 1992 alone, the FCC received over 1200 telephone calls and about 1000 letters about the anti-abortion ads, the majority of which complained of their graphic nature.<sup>16</sup>

Given this reaction, broadcasters might have been expected to reject such advertisements or schedule them in the midnight hours. Some broadcasters, however, felt compelled by law to air them.<sup>17</sup>

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15. See, e.g., *Bailey Ads*, *supra* note 7, at B1 (reporting woman's intention to sue WAVE-TV in Louisville "for traumatizing [her] child"); *Limit Sought on Fetus Display*, THE ATLANTA REC., Sept. 7, 1992, at B6 (noting lawsuits against Denver and Boulder stations); Joe Flint, *Graphic Political Spots Bedevil Stations*, FCC, BROADCASTING, Aug. 31, 1992, at 6 (reporting on suit seeking restraining order against Denver Station KUSA-TV's airing of graphic ads); David Goetz, *Jeffersonville Mom Sues to Stop Bailey's Anti-Abortion Ads*, COURIER J. (Indiana), Sept. 15, 1992, at B1 (reporting pro-life viewer's suit to enjoin Louisville stations from airing graphic anti-abortion ads on ground that "her two sons could suffer permanent 'psychological and emotional injuries' from graphic anti-abortion ads . . ."); Lewis, *supra* note 11 ("[t]he ads prompted lawsuits from viewers who found them offensive"); *Limits Sought on Fetus Display*, *supra* (stating that irate parents sued TV stations in Denver and Boulder for "intentional damage" inflicted on their children); MacIntyre, *supra* note 7 (reporting that ads comparing abortions to Holocaust "prompted a lawsuit by an Indiana housewife who opposed abortion but called tactics 'vile, disgusting and atrocious'"); Maddox, *Graphic Ads*, *supra* note 2, at 1 (discussing two Colorado families' lawsuits to block Christian Pro-Life anti-abortion ads); *New Albany*, USA TODAY, Oct. 16, 1992, at 7A (describing refiling of federal suit as state court nuisance claim in order to enjoin Bailey ads); *Nightline*, *supra* note 10 (discussing how certain children experienced trauma and became hysterical when graphic anti-abortion ads aired); *North Dakota Senate: New Pro-Life Ads Target Conrad*, THE HOTLINE, Nov. 23, 1992; Leslie Scanlon, *Woman Again Tries to Block Abortion Ads Candidate*, COURIER J. (Indiana), Apr. 25, 1992, at A9 (discussing *pro se* federal complaint and request for temporary restraining order to block Bailey ads). See also *infra* note 315 and accompanying text.

16. Memorandum Opinion and Order, *In re* Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. 7638, 7642 (1994) (stating that FCC "received approximately 1,000 letters concerning the airing of political advertisements containing graphic abortion imagery") [hereinafter *November Ruling*]; Mangan, *supra* note 7, at 73; Colford, *FCC Ruling*, *supra* note 9 (stating that FCC reported complaints concerning airing of graphic anti-abortion ads); Stern, *Viewers Protest*, *supra* note 12 (claiming that FCC logged more than 3000 complaints).

Indeed, outraged viewers were counseled, in print, to call the FCC and complain about Michael Bailey's 1994 campaign of graphic abortion imagery. Steve Hall, *TV Stations Should Reject Bailey's Ad*, INDIANAPOLIS STAR, Apr. 13, 1994, at B7. The then-current spots featured "images of dead fetuses" and children in a cemetery, singing a song about "how long we will allow abortion to continue." *Id.* Some stations apparently refused to air the spots in the news, leading Bailey to charge them with hypocrisy for covering stories with dead bodies while rejecting his ads. Bailey, *supra* note 1, at 161; Cary B. Willis, *Bailey Files Complaint Over Station Limiting Ad*, COURIER J. (Louisville), Apr. 7, 1994, at B1.

17. See, e.g., Booth, *supra* note 1 (reporting that TBS executives did not want to air the ads, but thought FCC regulation required them to do so); Steven W.

Section 312(a)(7) of the Federal Communications Act of 1934 (Communications Act) guarantees federal political candidates "reasonable access" to the broadcast airwaves for their political advertisements, and puts licensees at risk of license revocation for any willful or repeated violation of the access privilege.<sup>18</sup> Section 315 of the Communications Act requires broadcasters to provide equal opportunities to all legally qualified candidates for a political office if any one of them is allowed to "use" the station, and explicitly forbids any censorship of political advertisements aired pursuant to the equal opportunities rule.<sup>19</sup>

A number of stations sought to avoid this dilemma by appealing to the FCC in July 1992,<sup>20</sup> in marked contrast to the traditional broadcaster posture of resisting governmental intervention.<sup>21</sup>

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Colford, *Candidate's Antiabortion Spots Test Federal Limits*, ADVERTISING AGE, Apr. 27, 1992, at 3 [hereinafter Colford, *Candidate's Antiabortion Spots*] (reporting that FCC "told station attorneys they were required by law" to air ads); Jackson, *supra* note 1, at A39 (quoting general manager of Dallas' KDFW-TV as saying "[if] we had a choice, we probably would not have ran the spots"); Lafayette, *Candidate's Ads*, *supra* note 1.

18. 48 Stat. 1064 (1934), amended by 47 U.S.C. §§ 151-613 (1995). Section 312(a)(7) states:

The Commission may revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

47 U.S.C. § 312(a)(7) (1995).

19. Section 315 provides, in pertinent part, that:

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

47 U.S.C. § 315(a) (1995).

20. In July 1992, two Petitions for Declaratory Ruling were filed with the FCC — one by Gillett Communications of Atlanta, Inc., former licensee of Atlanta television station WAGA-TV (a CBS affiliate that had previously aired a Daniel Becker commercial) and the other by the law firm of Kaye, Scholer, Fierman, Hays & Handler apparently on behalf of more than 300 broadcast clients. See *November Ruling*, 9 F.C.C.R. at 7638 n.1. See also Kelly, *supra* note 2 (stating that the Kaye, Scholer firm represented more than 400 television stations). None of the firm's filings specify the number of clients on whose behalf the declaratory judgment petition was brought. *Id.*

21. Broadcaster attempts to establish editorial autonomy have ranged from opposition to the fairness doctrine to challenges to the enforcement of the FCC's indecency rules. See *Syracuse Peace Council v. FCC*, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F.2d 654, 656 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (repealing the fairness doctrine). The history (not to mention the lengthy party list) of the various *Action For Children's Television* cases challenging the constitutionality of the Commission's indecency rules is good evidence of strong broadcaster opposition to the Commission's decision in 1987 to embark on a stringent enforcement pro-

These broadcasters asked the FCC to allow the commercials to be channeled to hours of the broadcast day when children would be less likely to be in the audience, despite the constraints of the political advertising provisions of the Communications Act, because the advertisements were indecent or otherwise unsuitable for children.<sup>22</sup> The candidates claimed that the broadcasters' reluctance to broadcast these advertisements was politically motivated:

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gram against the broadcast of indecency broadly defined. *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1334-35 (D.C. Cir. 1988) [hereinafter *ACT I*]; Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) [hereinafter *ACT II*]; Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (en banc) [hereinafter *ACT III*], *cert. denied*, 1996 U.S. LEXIS 36 (Jan. 8, 1996).

It should be noted that not all broadcasters aligned themselves with the substantive arguments of the petitioning parties. In fact, the National Association of Broadcasters and the same coalition of broadcasters and public interest groups that joined in the *ACT* cases to challenge the post-1987 expansion of the FCC's enforcement of indecency standards took the position that the agency should not expand its definition of actionable indecency to include graphic anti-abortion ads. *See, e.g.,* Joint Comments of Action for Children's Television at 3, MM Docket No. 92-254, filed in response to Request for Comments, *In re* Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 7 F.C.C.R. 7297 (1992) [hereinafter *Joint Comments*]; Colford, *FCC Ruling*, *supra* note 9; Harry A. Jessell, *Broadcasters Oppose Widening Indecency Net to Include Political Anti-Abortion Advertisements*, BROADCASTING, Feb. 1, 1993 at 54. The coalition's position, however, was consistent with the position permitting broadcaster discretion to make reasonable good faith judgments about when to broadcast these ads. *Id.*

22. The petitions took the position that the graphic depictions of abortions and fetuses were indecent and, as such, subject to the Commission's requirement that they be channeled to late night hours. *See* Letter to Vincent A. Pepper, Esq., and Irving Gastfreund, Esq., 7 F.C.C.R. 5599 (1992) [hereinafter Letter to Pepper and Gastfreund]; *November Ruling*, 9 F.C.C.R. at 7639. The Gillett petition requested that the Commission issue a declaratory ruling that "political uses, which the licensee determines in good faith to be indecent or otherwise unsuitable for children, may be channeled to day parts in which children do not constitute a significant audience." *Gillett Petition for Declaratory Ruling*, *supra* note 5, at 10. Since channeling would be mandatory if the FCC were to find an advertisement indecent, the permissive wording of Gillett's petition suggests that Gillett was asking the FCC to declare that mandatory channeling should rest not on a Commission finding of indecency, but on a broadcaster's good faith belief. The result of such a standard would be minimal independent FCC review of the channeling decision. Similarly, the Kaye, Scholer petition requested a declaratory ruling that broadcasters could decline to broadcast "uses" during hours when there is a reasonable risk that children may be in the audience where such uses present graphic depictions of fetuses and where the licensee reasonably concludes, in good faith, that the graphic depictions are indecent under § 1464. Comments of Kaye, Scholer Fierman Hays & Handler at 2, MM Docket No. 92-254, filed in response to Request for Comments, *In re* Petition for Declaratory Ruling Concerning section 312(a)(7) of the Communications Act, 7 F.C.C.R. 7297 (1992) [hereinafter *Comments of Kaye, Scholer*] (describing Kaye, Scholer petition). *See also* Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (holding constitutional statute requiring broadcasters to channel indecent material and remanding to FCC for establishment of ten o'clock p.m. to six o'clock a.m. "safe harbor" for broadcast of indecency), *cert. denied*, 1996 U.S. LEXIS 36 (Jan. 8, 1996).

Michael Bailey consistently charged "blatant censorship by the left-liberal pro-abortion broadcast media that is arrogantly defying the law."<sup>23</sup>

Ultimately, in its 1994 "November Ruling," the FCC decided that political ads with graphic abortion imagery were not indecent, but could nevertheless be channeled to times of the day when children were less likely to be in the audience if broadcasters, in the good faith exercise of their discretion, believed that the commercials would be harmful to children.<sup>24</sup> Both Daniel Becker and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights (hereinafter WACCI-VCR) have appealed the FCC's decision to the United States Court of Appeals for the District of Columbia Circuit.<sup>25</sup>

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23. Stern, *Antiabortion Ads*, *supra* note 1. See also Maddox, *Graphic Ads*, *supra* note 2, at 1 (quoting Bailey's view that "[t]his is the liberal, leftist media trying to tell conservative, Christian congressional candidates what they can and cannot air").

24. *November Ruling*, 9 F.C.C.R. at 7645-49.

25. Petition for Review, Becker v. FCC, No. 95-1048 (D.C. Cir. filed Jan. 19, 1995); Petition for Review, Washington Area Citizens Coalition Interested in Viewer's Constitutional Rights (WACCI-VCR) v. FCC, No. 95-1056 (D.C. Cir. filed Jan. 23, 1995). The two cases have now been consolidated, with the Becker case as the lead docket. Becker v. FCC, Consolidation Order, No. 95-1048 (D.C. Cir. filed Feb. 2, 1995). WACCI-VCR is described in its court papers as a non-profit membership organization whose members are listeners and viewers of the electronic media who reside in the Washington, D.C. metropolitan area. Joint Provisional Certificate of Counsel at 2, Becker v. FCC, No. 95-1048 (D.C. Cir. filed Mar. 3, 1995). The organization "seeks, *inter alia*, to represent its members' interests in protecting their right to be informed on issues of importance, and to hear the views of all legally qualified candidates for public office. In the past, at least one member of WACCI-VCR was a candidate for political office." *Id.* The National Association of Broadcasters (NAB), the Louisiana Television Broadcasting Corporation, and WAGA License, Inc. have all intervened in the proceedings. WAGA License, Inc. Motion to Intervene, filed Feb. 22, 1995; Louisiana Television Broadcasting Corp. Motion for Leave to Intervene, filed Feb. 17, 1995; NAB Motion for Leave to Intervene, filed Feb. 15, 1995; *Order for leave to intervene* filed May 5, 1995. (WAGA License, Inc. is the successor in interest to Gillett Communications as the licensee of station WAGA-TV. See WAGA License, Inc. Motion for Leave to Intervene, *supra*, at 5.) Oral argument is scheduled for January 23, 1996.

*Daniel Becker's Statement of Issues to be Raised* reads as follows:

Becker will raise the following issues: (1) whether the Commission acted properly in allowing a broadcaster to channel political speech which, while not indecent, is deemed by the broadcaster otherwise harmful to children, to later hours; (2) whether the FCC's determination to allow broadcasters to exercise discretion in channeling political speech to later hours of the broadcast day transgresses the prohibition against censorship of political advertising in contravention of Section 315 of the Communications Act; (3) whether the Commission erred in failing to take action against WAGA-TV for its failure to air as requested political advertisements by Daniel Becker, a candidate for federal office; (4) whether the channeling authorized by the FCC is contrary to the "reasonable access" requirement of 47 U.S.C. Section 312(a)(7); (5) whether the

The FCC's decision in the abortion imagery area has far-reaching implications for establishing broadcaster freedom to move a broad range of political speech to "safe harbor" hours if a broadcaster, in good faith, finds it to be harmful to children. The principle, though first established with graphic abortion footage, could expand to encompass other examples of the political deployment of graphic imagery. This is particularly at a time when MTV, Hollywood and television product advertisements have shown us that short and powerful juxtapositions of graphic images in a rapid-edit montage style have become the video esthetic of choice. Other subjects that could easily lend themselves to shocking and graphic visual treatment include the death penalty, gun control, rape, euthanasia and animal rights.<sup>26</sup>

The Commission accomplished this significant affirmation of broadcaster control over shocking political advertisements in a fashion likely to pass both constitutional and statutory muster under traditional doctrinal analysis. Had the agency found the graphic imagery indecent, its prior rules would have required that commercials containing such imagery be channeled to late night hours: the FCC would have had to mandate channeling. This, in turn, would have triggered a stringent and potentially deadly First Amendment review. Instead, the agency limited its definition of indecency to the directly sexual and excretory, conclusorily opining that graphic anti-abortion imagery did not fit the definition.

Having done so, the Commission then adopted a rather narrow interpretation of the scope of access and equal opportunity rights granted by the Communications Act to politicians. Because it simply *permitted* the exercise of good faith broadcaster discretion in channeling graphic anti-abortion imagery deemed harmful to children, the FCC's decision probably successfully avoided triggering sufficient state action to justify constitutional review under the First Amendment in the current doctrinal landscape. It is unlikely that a court would find a First Amendment violation in the Commission's

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channeling authorized in the *MO & O* is arbitrary and capricious, violates the First Amendment of the United States Constitution, and/or violates the Communications Act.

Daniel Becker's Statement of Issues to Be Raised, *Becker v. FCC*, No. 95-1048 at 1-2 (D.C. Cir. filed Mar. 3, 1995). WACCI-VCR's Statement (authored by its counsel, Media Access Project) contends that "the Commission's conclusion is arbitrary and capricious and in excess of statutory authority in that it contradicts the plain language and legislative history of Section 312(a)(7) and Section 315 of the Communications Act, 47 U.S.C. Sections 312(a)(7) and 315." WACCI-VCR Statement of Issues at 2, *Becker v. FCC*, No. 95-1048 (D.C. Cir. filed Mar. 3, 1995).

26. Lafayette, *Candidate's Ads*, *supra* note 1, at 1.



decision to leave the channeling choice to the discretion of broadcasters accountable to the FCC.

The Commission's statutory interpretation of the Communications Act's political advertising provisions would also likely survive judicial review under administrative law principles. It would do so virtually automatically if (as is probable) a court were to apply the now-current deferential standard of review of agency interpretations of ambiguous enabling statutes. Even if a more searching standard of review were used, the Commission's policy judgment would receive respectful consideration. The combination of traditional tools of statutory construction and judicial assessments of policy could rationally support the November Ruling despite some equivocal signals in legislative and judicial precedent.

Graphic political advertisements raise more than simply doctrinal issues about the status of the November Ruling under current law, however. They also prompt an extended discussion of policy — one in which people from otherwise diametrically opposed ideological camps can make both institutional and substantive arguments about the asserted benefits of channeling such political advertisements. The policy arguments range from institutional paeans to government neutrality and broadcaster autonomy to substantive arguments about the need for a deliberative and measured political discourse and the desire to protect children from trauma.

Although the results of the Commission's abortion advertisement decision are likely to be acceptable under current law, and although I argue in this Article that the Commission's reliance on broadcaster discretion to displace certain types of political advertisements to late night hours is probably good policy, the agency's approach is admittedly dangerous on two levels. One level concerns the relationship between broadcasters and the democratic polity. At this level, the Commission's approach is dangerous because in light of the commercial incentives for broadcasters to minimize the airing of controversial material, radio and television stations may well find virtually all non-traditional and shocking political material to be harmful to children. This result would be disturbing, given both the powerful arguments that can be made in support of a serious commitment to untrammelled political speech over the airwaves, and the understandable concerns about the potential overinclusiveness of risk-averse broadcasters faced with unpopular political messages and the power to shunt them off to late night hours.

Yet the likelihood of harm to children from at least some of the political advertisements featuring graphic abortion imagery (as well as the institutional benefits of reducing the discrepancy between the autonomy of the print and broadcast press) makes it at least worth experimenting with a less absolutist approach to the broadcast of political advertisements than that insisted upon by the candidates themselves. Although the FCC's "reasonable good faith judgment"<sup>27</sup> standard is not self-defining, the Commission's approach promotes broadcaster editorial discretion with a mandate for a tailored assessment of the possibility of harm — one that depends on the advertisement, the community, and the viewing audience. With the broadcaster accountable to the FCC for any channeling decisions based on harm to children, and the material still available to the adult audience in the evenings, the FCC's approach appears best to provide some equilibrium among the various important interests implicated by this type of advertising. That is particularly so if the FCC keeps in mind the hidden dangers of broadcaster discretion when the agency is faced with concrete complaints. Admittedly, broadcaster accountability for editorial decisions is itself troubling, both because of concerns of press independence and because any standards for such accountability — including the reasonable expectation of harm standard proposed here — are necessarily indeterminate and manipulable. Their primary benefit, however, is to keep broadcaster decisions in the lime-light and foster democratic discourse about the underlying issues.

The Commission's approach can also be analyzed at a second level: the relationship between the Commission itself and the democratic polity. At this level, too, there is an institutional concern. The Commission's legal arguments in the November Ruling, when explored fully and in depth, turn out to be open-ended and partial. They conveniently allow the agency to hide behind bodies of precedent as it fashions contingent yet stable solutions to hard social problems. The particular solution the Commission chose here was one which largely insulated it from judicial challenge. By classic theories of democratic accountability, that can hardly be considered desirable. Yet even here, there are benefits to the result. A different FCC choice would have demonstrated institutional candor but carried costs of its own. The agency here extricated itself from making a substantive choice about a controversial political issue, allowing an institutional actor accountable not only to the FCC but also to its various other constituencies to exercise a tailored and

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27. *November Ruling*, 9 F.C.C.R. at 7647.

reviewable discretion. Yet just as the FCC must be vigilant against the dangers of abuse of its November Ruling by broadcasters, we too must be vigilant about the institutional consequences of pragmatic solutions grounded on strategic arguments.

Part I of this Article addresses the scope of the Commission's interpretation of indecency in light of the petitioning broadcasters' claim of a conflict between the statutory mandates of the political broadcasting rules and the prohibition in the federal criminal law against the broadcast of indecency. It challenges the FCC's articulated rationales for its indecency ruling, identifies the open texture of the FCC's definition of indecency, and points out the constitutional issues avoided by the Commission's approach.

Part II considers whether the FCC may allow broadcasters to channel graphic anti-abortion advertisements — and presumably other advertisements that a licensee might find harmful to children — to late night hours despite the political broadcasting safeguards in the Communications Act of 1934. Specifically, Part II addresses the text and legislative history of sections 312(a)(7) and 315 of the Communications Act, the level of deference to be accorded to this agency action, and the constitutional implications of the FCC's approach. I conclude, in Part II, that the Commission's statutory interpretation is reasonable and not likely to be found illegitimate under current doctrine even though the legislative history and prior judicial and administrative precedent regarding the political advertising rules, and particularly section 315, could be read to support a broad reading of the relevant provisions. Furthermore, I argue that neither the permissiveness of the FCC's ruling nor any broadcaster actions permitted by the agency's decision implicate state action clearly enough under current doctrine to be subject to scrutiny under the First Amendment. I conclude in Part II that the FCC's decision is not likely to be subject to successful constitutional attack.

Finally, Part III looks at the policy issues implicated by the graphic abortion advertisements and concludes that the FCC's approach of allowing broadcaster discretion in this sort of case, while dangerous, is for the moment the wisest balancing of interests in political speech and child welfare. In so concluding, Part III first addresses broadcaster discretion and government neutrality as institutional arguments in support of the November Ruling. It then deals with substantive arguments about deliberative politics and the protection of children. I argue that, although broadcaster autonomy and administrative neutrality are in principle desirable, broad-

caster economic incentives and FCC legal strategy must be recognized. I also argue that, although substantive arguments about politics are seductive, the most persuasive and least dangerous claim in support of the November Ruling is the protection of children. Recognizing the pitfalls of untrammelled broadcaster discretion, however, Part III also suggests some parameters for FCC review of broadcaster decisions pursuant to the November Ruling. It does so not as solutions to the foreseeable problems of broadcaster discretion, but as means of assuring public scrutiny of broadcaster decisions and continuing democratic debate about them against a backdrop of broadcaster autonomy.

### I. THE SCOPE OF INDECENCY

Section 1464 of the U.S. Criminal Code prohibits the broadcast of obscene, profane or indecent material.<sup>28</sup> The Communications Act authorizes the FCC to impose sanctions on broadcasters for violation of section 1464.<sup>29</sup> Since 1987, the FCC has strictly enforced the statutory prohibition on the broadcast of obscene, indecent, or profane language.<sup>30</sup> The Commission has defined "indecent" material as: "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."<sup>31</sup> The issue of graphic anti-abortion advertising by federal political candidates presented the FCC with an opportunity to articulate and even expand its initiative in regulating indecency.

#### A. The Broadcasters' Claimed Dilemma:

The crux of the petitioning broadcasters' argument in support of their requests for a Commission directive that they be permitted to channel graphic anti-abortion ads was that without Commission guidance, they were stuck on the horns of a dilemma, forced to

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28. 18 U.S.C. § 1464 (1994). Section 1464 states: "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." *Id.*

29. 47 U.S.C. § 503(b)(1)(D) (1995). Section 503(b)(1)(D) states: "[a]ny person who is determined by the Commission . . . to have violated any provision of section . . . 1464 of Title 18, shall be liable to the United States for forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Chapter . . . ." *Id.*

30. See *In re Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1464, 8 F.C.C.R. 704 (1993).

31. *Id.* at 705 n.10.

obey conflicting statutory mandates.<sup>32</sup> The Kaye, Scholer petition argued that it should be permissible for broadcasters to channel political advertising featuring "graphic depictions of dead or aborted and bloodied fetuses or fetal tissue" because airing such material would constitute a violation of section 1464.<sup>33</sup> Complying with that statute's prohibition of the broadcast of such material, however, would put the well-intentioned broadcaster in the position of violating sections 312(a)(7) and 315, the Communications Act's political broadcasting rules. The broadcasters contended that both concern about the welfare of children in the audience and concern about the effect on licensees of conflicting statutory and regulatory demands counseled FCC recognition of broadcaster discretion to air these ads only during the indecency safe harbor.<sup>34</sup>

The Commission staff denied the petitions in a letter ruling.<sup>35</sup> First, the Mass Media Bureau (Bureau) declined to provide a general ruling that "a class of program material — that is, any depiction of dead fetuses or fetal tissue — is indecent," opining that such a ruling would be inconsistent with the FCC's case-by-case, contextual interpretations of indecency.<sup>36</sup> Second, the Bureau refused to accept the petitioners' suggestion that they "be permitted to classify political use material as indecent so that they may restrict the time at which it airs even where it does not meet the Commission's indecency definition."<sup>37</sup> Third, the Bureau concluded that a specific advertisement supporting Daniel Becker — a Congressional candidate from Georgia — containing "six shots of aborted fetuses" covered with "a wet, dark, shiny substance" could not be

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32. Gillett Communications, licensee of WAGA-TV Atlanta, and the law firm of Kaye, Scholer, Fierman, Hays & Handler, representing "numerous" unnamed television and radio stations, appealed to the Commission for declaratory rulings that channeling "federal candidate anti-abortion political advertisements featuring dead fetuses and fetal tissue" would be consistent with the political advertising rules of the Communications Act. Letter to Pepper and Gastfreund, *supra* note 22.

33. *November Ruling*, 9 F.C.C.R. at 7638 n.2 (quoting Kaye, Scholer Application for Review).

34. Both petitioners offered several arguments: first, that the § 312(a)(7) reasonable access requirements were not absolute; second, on a nuisance rationale, that these images were outside community standards for television broadcast times accessible to children; third, that the use of the graphic aborted fetuses constituted indecent programming; and finally, despite previous interpretations, that channeling these images to times when the risk of children in the audience would be minimal was consistent with § 315. See *Gillett Petition for Declaratory Ruling*, *supra* note 5, at 4-10; Mangan, *supra* note 7, at 81-82; *Comments of Kaye, Scholer*, *supra* note 22, at 2-3, 9-15. The indecency safe harbor is currently ten o'clock p.m. to six o'clock a.m.

35. Letter to Pepper and Gastfreund, *supra* note 22.

36. *Id.*

37. *Id.*

deemed indecent as constituting a depiction of excretory activity.<sup>38</sup> The letter reasoned that "neither the expulsion of fetal tissue nor fetuses themselves constitutes 'excrement' as defined by Webster's."<sup>39</sup>

By contrast, when faced later in the campaign with Daniel Becker's attempt to compel an Atlanta television station to broadcast a thirty minute political program entitled "Abortion in America: The Real Story," the Bureau concluded that "it would not be unreasonable for the licensee to . . . conclude that section 312(a)(7) does not require it to air, outside the safe harbor, material that it reasonably and in good faith believes is indecent."<sup>40</sup>

In so deciding, the FCC staff relied in part on an informal statement in 1984 from then-FCC Chairman Mark Fowler to Congressman Thomas Luken ("Luken Letter").<sup>41</sup> The Luken Letter opined that the "no censorship" language of section 315 was not intended to override the statutory prohibition against obscene or indecent materials: "Because Section 315's purpose of fostering political debate is untainted by subjecting broadcasters to the prohibitions in Section 1464 against obscenity and indecency (which by definition lack serious political value), it is concluded that it would be unreasonable to exempt broadcasters from Section 1464's criminal prohibitions."<sup>42</sup>

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38. *Id.* at 5600. As a result of the Mass Media Bureau's ruling, the affected station — WAGA-TV in Atlanta — aired this advertisement in support of the candidacy of Daniel Becker.

39. Letter to Pepper and Gastfreund, *supra* note 22. By way of relief to broadcasters, the Commission proposed that stations precede the abortion ads with the viewer advisory that "[t]he following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised." *Id.*

40. Letter to Daniel Becker, 7 F.C.C.R. 7282 (1992) [hereinafter Letter to Daniel Becker]. The Mass Media Bureau declined to determine whether the specific program at issue was indecent in advance of broadcast, lest it impose a prior restraint on protected speech. *Id.* This ruling by the Mass Media Bureau resulted from Becker's filing of a complaint against WAGA-TV for violation of §§ 315 and 312(a)(7).

41. Letter from FCC Chairman Mark S. Fowler to Honorable Thomas A. Luken, dated Jan. 19, 1984, *cited in* Letter to Daniel Becker, 7 F.C.C.R. 7282 (1992) [hereinafter *Luken Letter*] (on file with author). The attachment to the *Luken Letter* is a January 6, 1984 memorandum prepared by the Commission staff in response to Congressman Luken's letter of October 28, 1983, and hereinafter referred to as *Luken Staff Memorandum*. The *Luken Letter* and *Luken Staff Memorandum* are also an exhibit to the Comments of Gillett Communications in the public comment proceeding subsequently initiated by the FCC. *Comments of Gillett*, *supra* note 13. See Request For Comments, *In re* Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 7 F.C.C.R. 7297 (1992).

42. *Luken Letter*, *supra* note 41. See also discussion *infra* notes 97-104 and accompanying text. The issue had arisen because Larry Flynt, the publisher of *Hustler* magazine, had announced his candidacy for the Republican nomination for

Both the petitioning broadcasters and Daniel Becker sought full Commission review of the Mass Media Bureau's decisions.<sup>43</sup> Recognizing the complex nature of the issue — not to mention the tension between the Staff's prior decisions — the full Commission did not simply rule on the petitioning broadcasters' appeal from the Mass Media Bureau's decision. Instead, in October 1992, the agency sought public comment on all issues concerning the rights of broadcasters to channel political advertisements that they reasonably and in good faith believe to be indecent.<sup>44</sup> It also sought comment on whether broadcasters have the right to channel political advertisements that, while not indecent, may still be deemed by the broadcaster in good faith to be harmful to children.<sup>45</sup>

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the presidency and intended to air campaign advertisements containing snippets of X-rated material. Sydney Shaw, *Flynt Plans Hard-Core Campaign Ads*, UPI, Nov. 5, 1983, available in LEXIS, Nexis Library, UPI File. Some of the material was arguably political. For example, one ad was to include footage of sex acts between government officials and the murdered mistress of department store owner Alfred Bloomingdale (who was a close adviser of President Reagan). *Id.* Flynt had insisted that his plan was not "just for the sake of shocking people," and that his platform included "absolute freedom of expression." *Id.* Flynt characterized himself as broadcasters' "worst nightmare come true — a fabulously wealthy pornographer willing to spend his last dime on free speech." *Id.*

Although the FCC was able to avoid formally addressing the issue at that time by deciding that Flynt was not in fact a legally qualified candidate, and because he subsequently dropped out of the presidential race, Flynt's planned antics did lead to the informal opinion which Fowler passed on to Congress in 1984. See *In re Complaint of Larry Flynt*, 1984 F.C.C. LEXIS 2675 (F.C.C. May 21, 1984); Angela J. Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-Line Computer Services*, 38 VILL. L. REV. 517, 546-47 (1993); Jerry Adler and Martin Kasindorf, *A Smut Peddler Who Cares?*, NEWSWEEK, Nov. 14, 1983, at 58; *Clearing the Air*, WASH. POST, Jan. 25, 1984, at A10; *Flynt Causes X-Rated Worry*, BROADCASTING, Nov. 21, 1983, at 59; Michael Isikoff, *The FCC*, WASH. POST, Jan. 3, 1984, at A15; Howard Kurtz, *A Fiery Flynt Grabs Attention for His Mix of Porn and Politics*, WASH. POST, Nov. 9, 1983, at A2; Martin Scram and James R. Dickenson, *Ad Nauseam*, WASH. POST, Dec. 2, 1983, at A3; Shaw, *supra*.

43. Kaye, Scholer had filed an Application for Review seeking full Commission review of the Bureau Ruling. Kaye, Scholer Application for Review at 1, filed Sept. 1, 1992, (citing Letter to Pepper and Gastfreund, 7 F.C.C.R. 5599 (1992)). Daniel Becker filed a separate Application for Review seeking Commission review of the Mass Media Bureau's decision in Letter to Daniel Becker, 7 F.C.C.R. 7282. Application for Review, filed Dec. 3, 1992 (on file with author).

44. Request for Comments, *In re* Petition for Declaratory Ruling Concerning Section 312(a) (7) of the Communications Act, 7 F.C.C.R. 7297 (1992) [hereinafter *Request for Comments*]. With this public notice, the Commission commenced MM Docket No. 92-254 to solicit public comment on the issues raised by the Letter to Pepper and Gastfreund, Kaye, Scholer's Application for Review, and the Bureau's Letter to Daniel Becker. *Id.* Gillett, although it had not filed an application for review of the Bureau Ruling, did file comments in the MM docket No. 92-254 public comment proceedings. *Comments of Gillett*, *supra* note 13.

45. *Request for Comments*, *supra* note 44, at 7297.

In the meantime, also in October 1992, the United States District Court for the Northern District of Georgia ruled, in *Gillett Communications, Inc. v. Becker*, that Daniel Becker's political advertisement program "Abortion in America: The Real Story" was indecent and therefore could properly be channeled to a safe harbor period between midnight and six o'clock a.m.<sup>46</sup>

After receiving numerous letters and comments in response to its request for public comment, the Commission issued a ruling in late November 1994 that the advertisements at issue in the proceeding (and presumably other graphic and shocking advertisements purporting to portray abortions) were not indecent in light of the definition of indecency used by the agency.<sup>47</sup> Specifically, the Commission decided that the images of abortions and fetuses were not depictions of "excrement," and, in any event, that the political context of the depictions would further support the conclusion that the material would not be deemed indecent.<sup>48</sup> Explicitly taking the view that the *Gillett* court erroneously applied the indecency standard,<sup>49</sup> the Commission's November Ruling affirmed a limited reading of indecency: "Material may be shocking or outrageous, but it is not indecent within our definition unless it depicts or describes 'sexual or excretory activity or organs.' However disturbing, aborted fetuses or fetal tissue, alone, cannot be considered 'excretory by-products' within the meaning of the indecency definition."<sup>50</sup>

Nevertheless, the Commission held that broadcasters may reschedule or channel political advertisements containing graphic abortion imagery to time periods when children are less likely to be in the audience if they decide that such ads would be harmful to children.<sup>51</sup> The opinion

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46. *Gillett Communications, Inc. v. Becker*, 807 F. Supp. 757, 764 (N.D. Ga. 1992). The *Gillett* court specifically granted WAGA-TV's request for declaratory relief and enjoined Daniel Becker from requiring WAGA-TV to air his anti-abortion videotape at any time other than the safe harbor hours. *Id.* at 765. See also Kate Maddox, *TV Stations Sorting Through Court's Ruling on Fetus Ads*, ELECTRONIC MEDIA, Nov. 9, 1992, at 10 [hereinafter Maddox, *TV Stations*] (noting Justice Anthony Kennedy's refusal to lift district court's order); Rebecca Perl, *On TV: High Court Lets TV Block Abortion Ad But Candidate Can Seek Late-Night Airtime*, ATLANTA J. & CONST., Nov. 2, 1992, at B2.

47. *November Ruling*, 9 F.C.C.R. 7638, 7642-45. For extended discussion of the indecency prong of the *November Ruling*, see *infra* notes 59-107 and accompanying text.

48. *Id.* at 7643-44.

49. *Id.* at 7644 n.12.

50. *Id.* at 7643.

51. *Id.* at 7645-47.



emphasize[d] that we [the FCC] do not require — nor do we encourage — licensees to channel political advertisements containing graphic abortion imagery. Rather, we leave that decision to the reasonable, good faith judgment of broadcasters. We conclude only that licensees may consider any such advertisement's impact on children in making access decisions under Section 312(a) (7).<sup>52</sup>

The claim by the petitioning broadcasters that they were placed in a dilemma in trying to satisfy the apparently inconsistent requirements of the political advertising rules and the indecency policy does not, upon close examination, provide a fully adequate explanation of the counter-intuitive position of the petitioning broadcasters. After all, one is stuck between Scylla and Charibdys only if one reasonably perceives substantial threats from both. The reality in the indecency context is that despite its stepped-up enforcement efforts after 1987, the FCC has not imposed forfeitures on news-related indecency undertaken in a serious vein.<sup>53</sup> Indeed, the Commission's primary target for indecency enforcement appears recently to have been Howard Stern-type "shock radio" material.<sup>54</sup> Moreover, although the agency has imposed high fines on

52. *November Ruling*, 9 F.C.C.R. at 7647. The agency cautioned that a licensee may not channel political ads of this kind out of disagreement with the candidate's political position. *Id.* Additionally, "a broadcaster's decision to channel an advertisement may not be included as [a] pretext [ ] for denying access." *Id.* (quoting *CBS v. FCC*, 453 U.S. 367, 387 (1981) (alteration in original)). The licensee's decision to channel must be made in good faith and must relate to "the nature of the graphic imagery in question and not to any political position the candidate espouses." *Id.* at 7647-48. According to the Commission, any licensee who chooses to "channel such political advertisements containing graphic abortion imagery" that it believes are "harmful to children" must air those advertisements in time periods that are otherwise consistent with the candidate's right of reasonable access. *Id.* at 7648. For further discussion of the meaning and effectiveness of these limitations on licensee discretion, see *infra* notes 380-89 and accompanying text.

53. In Letter to Peter Branton, 6 F.C.C.R. 610 (1991) [hereinafter Letter to Peter Branton], for example, the Commission staff and subsequently the full Commission held not indecent National Public Radio's broadcast of a tape of a telephone conversation involving John Gotti and consisting of numerous expletives clearly within the definition of indecency. *Id.*

54. See, e.g., Seth T. Goldsamt, "Crucified by the FCC?" *Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203, 236-50 (1995) (suggesting that FCC's focus on Stern has been tantamount to selective prosecution); Steven Nudelman, Comment, *A Chilly Wait in Radioland: The FCC Forces "Indecent" Radio Broadcasters to Censor Themselves or Face the Music*, 2 J.L. & POL'Y 115, 119 (1994) (noting that Stern show targeted by FCC and arguing for uniform and speedy enforcement of indecency rules in order to deter self-censorship). Pending Notices of Apparent Liability based on Howard Stern material (including Sagittarius Broadcasting Co., 8 F.C.C.R. 2688 (1992); Letter to Infinity Broadcasting Co., 9 F.C.C.R. 6442 (1994); Letter to Infinity Broadcasting Co., 9 F.C.C.R. 1746 (1994); Letter to Infinity Broadcasting Co., 8 F.C.C.R. 6740 (1993); Letter to Infin-

licensees who have aired indecent material by Howard Stern, it has nevertheless resisted the opportunity to cause license renewal problems even for those stations.<sup>55</sup> Further, the *Gillett* court's finding of indecency arose in the context of rejecting a candidate's motion to compel a broadcaster to air material during the day or early evening. Therefore, the likelihood that the Commission would impose severe sanctions even for the broadcast of indecent political advertisements for federal candidates was in fact slim.<sup>56</sup> Similarly, the likelihood of successful lawsuits on other grounds was low.<sup>57</sup> Perhaps it would be better to say that the threat, while there in principle, was more hypothetical than real.

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ity Broadcasting Co., 8 F.C.C.R. 2688 (1992)), have been terminated by a recent settlement agreement, pursuant to which the broadcaster paid the FCC \$1,715,000. Order, *In re Sagittarius Broadcasting Corp.*, 1995 FCC LEXIS 5924, 78 Rad. Reg. 2d 1512 (Sept. 5, 1995).

55. See, e.g., *Eagle Radio*, 9 F.C.C.R. 1294 (1994) (renewing license "without prejudice to whatever action, if any, may be appropriate with respect to the alleged indecent programming"). Indeed, the Commission even passed up opportunities to deny the parent company of the Howard Stern broadcasters its request to purchase another radio station. See *In re KLUV (FM)*, 10 F.C.C.R. 4517 (1995); *Mass Media Action*, FCC Grants Applications to Assign Three FM Stations from Cook Inlet Radio Partnership to Infinity Broadcasting, 1992 FCC LEXIS 6905 (1992); *In re Application of Cook Inlet Radio License Partnership*, 8 F.C.C.R. 2714 (1992). Cf. Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 252-256 (1996) (describing dearth of indecency-based refusals to renew broadcast licenses). Moreover, the agency has not yet imposed even a forfeiture on any television broadcasters. (It should be noted, however, that the agency is currently investigating, *intra alia*, the issuance of fines against KYW-TV for material on a Jane Wallace program on couch dancing. See, e.g., *FCC Investigating: Group W Says Indecency Finding Against KYW-TV Philadelphia Would Be Censorship*, COMMUNICATIONS DAILY, Apr. 26, 1993, at 3.)

56. Admittedly, there already has been a shift in FCC enforcement policy regarding indecency. Assuming a dynamic rather than static view of FCC responsiveness to citizen indecency complaints, there is no guarantee that the FCC would in the future limit its enforcement activity to Howard Stern. However, the FCC does not ordinarily undertake significant policy changes without notice and explanation. Even in the indecency context, the Commission imposed warnings rather than sanctions on the first stations affected by its change in enforcement strategy. Accordingly, the notion that broadcasters would be sandbagged by FCC sanctions in a situation of first impression like this one is not persuasive. Moreover, I do not claim that the broadcasters' articulated concerns are wholly unreal. Rather, I suggest that the fear of sanctions, on the FCC's enforcement record as of the time the petitions were filed, does not provide a complete explanation for the strong and unusual reaction on the part of the petitioning broadcasters.

57. Admittedly, lawsuits against broadcast material would involve litigation costs. However, because it is unlikely that such suits would ultimately be successful on the merits, the threat they pose to broadcasters airing even indecent political ads would appear to be minimal. All the pending lawsuits relating to anti-abortion ads have apparently failed. See Goetz, *supra* note 15, at B1; *Bailey Plans*, *supra* note 1; Maddox, *Graphic Ads*, *supra* note 2, at 1. See also discussion *supra* note 15, *infra* text accompanying note 316.

In any event, the broadcasters could have asked the FCC to declare that the material at issue was *not* indecent instead of seeking the discretion to channel the broadcasts to late night hours in order to avoid harm to children. This posture would not have raised the kinds of prior restraint concerns that the Mass Media Bureau articulated as its reasons for not ruling on whether broadcasters could properly channel the ads.<sup>58</sup> Since this could have resolved the conflict that the broadcasters perceived between their two duties under the law, we might conclude that the petitioning broadcasters simply did not wish to air the ads and wanted a ruling from the agency that said they would not be forced to do so. Although they ultimately succeeded in securing that ruling, it was not grounded in their claimed statutory conflict between indecency and the political advertising rules.

#### B. The Open Texture of the FCC's Indecency Definition:

In the first part of its November Ruling, the Commission took the position that "excretory functions" should be equated with scatological references.<sup>59</sup> In the agency's view, both language and context led to the conclusion that the current definition of indecency did not cover the graphic images of abortion in anti-choice political ads. The Commission also rejected any invitation to expand its definition of indecency.<sup>60</sup>

While I believe that the Commission's result is prudentially wise and properly respectful of First Amendment interests, the agency's articulated reasons for its position are not entirely persuasive. The agency has picked a particular interpretation of its indecency language out of a number of available options. Had the FCC wished to find these graphic anti-abortion advertisements indecent, it could have argued that they were so — whether under a different literal interpretation of the language of its current regulations, or under a contextual interpretation of the language, or pursuant to an expanded definition of indecency encompassing offensiveness in general. Neither the words of the indecency standard alone nor contextual interpretations of them have singular and self-defining meanings. Thus, the Commission's choice of meaning for the terms of its definition implicates a particular normative vision of the proper scope of regulation under the aegis of section 1464. Yet

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58. See *supra* note 40 and accompanying text.

59. *November Ruling*, 9 F.C.C.R. at 7644.

60. *Id.*

the FCC's articulated justifications in the November Ruling do not address the issue at that underlying level.

1. *The FCC's Options on a Literal Reading:*

The FCC's definition of indecency is not self-defining. A literal, textual reading of the FCC's definition is not nearly as constrained as the Commission contends. Of the available literal definitions of indecency, at least some could include fetal tissue and abortions within the ambit of excrement or sexuality. For example, as some petitioners had proposed, the Commission could have directed its attention not to a dictionary definition of "excrement," but to the definition of "excretory activities" which includes the discharge of material from the body.<sup>61</sup> Similarly, with regard to the component of the FCC's traditional definition of indecency that focuses on sexual organs or activities, the Commission could have argued that abortion is, in a sense, about sex — not only because it involves the consequences of sex, but also because many people's reactions to abortion implicate their views about sex and sexuality.

The Commission responded to claims like these essentially by invoking the slippery slope. The notion of discharge of material from the body is broad enough to encompass bleeding, sweating, and even spitting, suggested the Commission.<sup>62</sup> The Commission feared that extending the definition of excretory activity to include the secretion of any bodily fluid would "deprive the definition of any meaningful limit."<sup>63</sup> And with respect to the argument that "abortions and fetuses are related to sex and reproduction," the Commission dismissed it in a footnote with the response that "[t]his would suggest that any byproduct of sex — arguably all of life — is indecent."<sup>64</sup>

These Commission responses are not particularly persuasive. For example, with respect to the issue of bodily fluids, the definition certainly could be limited to bodily fluids emanating from the

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61. This is the position taken by the Kaye, Scholer comments in this proceeding. *Comments of Kaye, Scholer, supra* note 22, at 11-13. The availability of multiple dictionary definitions of the term suggests the flexibility even of a "literal" or "textual" reading of the FCC's definition of indecency. See *infra* note 121 for a discussion of the role of dictionary definitions in the interpretation of statutes.

62. Moreover, as was argued in the *Joint Comments*, "[a]bortion is a medical procedure, not a 'sexual or excretory activity.'" *Joint Comments, supra* note 21, at 5. Nor do depictions or descriptions of the abortion process "necessarily include sexual or excretory . . . organs." *Id.*

63. *November Ruling*, 9 F.C.C.R. at 7644.

64. *Id.* at 7644 n.13 (dismissing argument proposed in Mangan, *supra* note 7, at 83).

anal and genital areas. Even if this limitation were not deemed satisfactory, the Commission has consistently stated that indecency is determined in context and requires a showing of patent offensiveness. Those requirements should surely serve as a check on the slippery slope.

With regard to the argument regarding the relation between sexuality and abortion, the Commission addressed an underarticulated claim that abortion material should be included in the realm of indecency because abortions and fetuses are simply "related to" sex and reproduction. While it is easy to dismiss this kind of nexus as overdrawn — after all, many things can be said to be "related to" sex and reproduction and should not reasonably be swept into the ambit of indecency — there is something to be said for the argument in the context of the precise issue presented. The claim in this context could be that the immediate by-products of sex and reproduction are sufficiently closely related to the core concept of indecency that they could be considered in the potential ambit of the term.

The textual approach discussed here is not unfamiliar to the FCC. The Commission itself has radically shifted and expanded its application of the prohibition on indecency since *Pacifica*<sup>65</sup> without significantly changing the words of the definition. Although the broad definition of indecency the Commission has been enforcing since 1987 harkens back to language used by the FCC in *Pacifica*, that generic definition was in fact interpreted during the decade following the Supreme Court's decision in *FCC v. Pacifica* as only covering repetitive uses of the "seven dirty words" featured in the now-famous George Carlin monologue at issue in the case.<sup>66</sup> It is only since 1987 that the indecency standard has been transformed into a disciplinary regime potentially enveloping all broadcast references to sexuality that the Commission finds patently offensive. The shift in application under the same definition is evidence of the contingent character of the definition's meaning.<sup>67</sup> Thus, abortion imagery cannot simply be excluded from the ambit of regulation by unelaborated reference to the definition of indecency.

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65. *In re* (a Citizens Complaint Against) *Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, *aff'd sub nom.* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

66. *See In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254-55 (1978) (describing scope of enforcement).

67. Indeed, the kind of prurient and sexualized understanding of indecency that the Commission's *November Ruling* seems to suggest was not, on its facts, a part of the *Pacifica* case. After all, the Carlin monologue was neither prurient nor erotic; it was simply a litany of "dirty" words invoked to ridicule conventional conceptions of appropriate language.

Moreover, the FCC has attributed its expansion of the indecency interpretation to a desire for intellectual consistency — a decision to eliminate the arbitrary exclusion of whole categories of offensive speech by the post-*Pacifica* limitation of enforcement to the seven dirty words.<sup>68</sup> Yet the Commission's decision to stop its expansion of indecency at the sexual boundary is not dictated by that rationale.

## 2. *Context as the Determinant:*

A more contextual inquiry led the court in *Gillett Communications of Atlanta, Inc. v. Becker*<sup>69</sup> to arrive at a conclusion different from, and criticized by, the FCC's November Ruling. The *Gillett* court found that Daniel Becker's "Abortion in America: The Real Story" was indecent because the videotape purported to depict "the actual surgical procedure for an abortion[.]" and contained four minutes of "graphic depictions and descriptions of female genitalia, the uterus, excreted uterine fluid, dismembered fetal body parts, and aborted fetuses."<sup>70</sup> Taking into account the fact that the broadcast images were "readily understandable to children,"<sup>71</sup> and keeping in mind the Commission's position that "'[t]he linchpin of indecency enforcement is the protection of children from inappropriate broadcast material[.]"<sup>72</sup> the court held that the videotape depicted the abortion materials "in a manner which is patently offensive according to contemporary community standards."<sup>73</sup> The court also found significant to its indecency decision the expert testimony of two psychiatrists who opined on the negative impact of the advertisement on children.<sup>74</sup> The meaning of patently offen-

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68. See, e.g., *In re* Regents of the Univ. of Cal. (KCBS-FM), 2 F.C.C.R. 2703, 2703 (1987). For a description of the change in FCC indecency enforcement, see, e.g., Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992-93).

69. 807 F. Supp. 757 (N.D. Ga. 1992), *appeal dismissed mem.* 5 F.3d 1500 (11th Cir. 1993).

70. *Id.* at 763.

The Commission Staff had not rendered an indecency ruling about this advertisement because of its concern about prior restraints. Letter to Daniel Becker, *supra* note 40, at 7282. However, the Commission had taken the position that "it would not be unreasonable" for the licensee to conclude that it is not required to air "material that it reasonably and in good faith believes is indecent" outside of safe harbor hours. *Id.*

71. *Gillett Communications*, 807 F. Supp. at 762-63.

72. *Id.* at 762 (quoting *In re* Liability of Sagittarius Broadcasting Corp., 7 F.C.C.R. 6873 (1992)).

73. *Id.* at 763.

74. *Id.* The court concluded, after referring to the psychiatric evidence, "that upon viewing the evidence in its entirety, there is ample support for the conclusion

sive sexual and excretory material in the indecency definition was interpreted by reference to harm to children.

The FCC also has insisted since 1987 that its definition of indecency must be applied contextually.<sup>75</sup> The FCC's interpretation of context in excluding graphic abortion imagery from indecency is different from the court's in *Gillett Communications*, however. Just as the *Gillett* court focused on the context of the ads as including the interests of children, the only meaning of context articulated by the Commission was the fact that the images were part of a political campaign and concerned an issue of importance in American politics. The court and the agency simply focused on two different aspects of the context in defining whether graphic anti-abortion footage constituted actionable indecency.

### 3. *The Underlying Vision of Indecency:*

The FCC cannot automatically justify the exclusion of abortion imagery from indecency by mere reference to dictionary definitions or an assertedly neutral reliance on context. The meaning of the definition is determined by an underlying substantive, normative vision. The Commission's decision that the anti-abortion material is not indecent is just that: not a mechanical necessity, but a choice based on an underlying vision of the appropriate regulatory footprint. That underlying conception is not clearly articulated in the November Ruling, however.

The history of the FCC's treatment of indecency evidences the separation of sexuality from other elements of potential offensiveness. The Commission's finding in the November Ruling is wholly consistent with the pattern of the FCC's indecency enforcement since its stepped-up enforcement policy commenced in 1987.<sup>76</sup>

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that the videotape contains indecent materials, the broadcasting of which is proscribed by 18 U.S.C. § 1464." *Id.*

75. See, e.g., New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726, 2726 (1987) (FCC Public Notice); Infinity Broadcasting Corp. of Pa. (WYSP (FM)), 3 F.C.C.R. 930, 932 (1988) (Reconsideration Order).

76. A July 1995 Westlaw search of all references to indecency in FCC cases after January 1, 1987 turned up 127 cites. This figure represents only the published actions — which would include Commission letters of inquiry and notices of apparent liability — issued to station licensees. It would not include the investigations and dismissals undertaken without the issuance of such formal documents. A printout made by the FCC of post-1987 "non-routine" indecency actions provides a total of 432 references in the broadcast service. (FCC-provided list on file with author). In addition, there are a number of pending indecency actions which would not have been included in the Westlaw search. Naturally, the number of actual forfeitures assessed for violations of the indecency policy is much smaller than the number of investigations. Suffice it to say, however, that the total amount

While much can be said about the range of material covered by the agency's enforcement actions, the one clear theme is that it covers the spectrum from the explicitly sexual to the more coded forms of smutty *double entendre*.<sup>77</sup> Historically, the FCC has not found indecency outside the realm of pandering, vulgar, or titillating depictions — narrowly interpreted — of sexual or excretory activities or organs.<sup>78</sup>

On a number of occasions prior to the adoption of the generic indecency definition, the FCC has been confronted with — and rejected — claims that highly inflammatory and offensive language should be taken off the air as indecent. Even after the Supreme Court's decision in *Pacifica*, the Commission declined an invitation to extend section 1464 to explicitly racist and inflammatory statements during J. B. Stoner's gubernatorial bid in Georgia in the 1970s,<sup>79</sup> and permitted a station's license to be renewed despite anti-Semitic slurs in its "public affairs" programming in the 1960s.<sup>80</sup> Even when faced with claims that offensive speech on the air should be regulated under section 1464 because it might present the threat of imminent violence, the Commission has enforced a stringently narrow interpretation of the degree of danger of violence that should trigger governmental involvement.<sup>81</sup> The Commission

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in fines assessed — particularly in connection with Howard Stern programming — is in the six figures. See Tim Jones, *Stern Issue for FCC: How Much License?*, CHI. TRIB., Mar. 27, 1994, at C1 (noting \$1.6 million in fines against Infinity Broadcasting Corp. as of that date); *supra* note 54 (describing \$1,715,000 in settlement fee paid by Infinity Broadcasting to terminate pending Howard Stern proceedings).

77. See, e.g., *Pacifica Found., Inc. (KPFK-FM)*, 2 F.C.C.R. 2698 (1987) (regarding reading of explicit scenes from *Jerker*, a critically acclaimed play about post-AIDS gay phone sex); *New Indecency Standards to Be Applied to All Broadcast and Amateur Radio Licensees*, 2 F.C.C.R. 2726, 2727 (1987) (concerning actionability of *double entendre*).

78. The Commission has stated that the topic of sex is not off limits to broadcasters. Even instances of explicit language have passed Commission muster when they are presented in a serious news context. See, e.g., Letter to Peter Branton, *supra* note 53, at 610-11 (permitting expletives in news broadcast of John Gotti wiretap). See also Rivera-Sanchez & Gates, *supra* note 12, at 282.

79. Letter from Commissioner Robert E. Lee to Lonnie King, Atlanta NAACP, 36 F.C.C.2d 635 (1972) [hereinafter Letter to Lonnie King] (refusing to declare that Stoner's racist advertisements during his senatorial race could be rejected on the ground that they would foster violence). See also Letter from Wallace E. Johnson, Chief Broadcast Bureau, to Julian Bond, Atlanta NAACP, 69 F.C.C.2d 943 (1978) [hereinafter Letter to Julian Bond]; see discussion *infra* notes 99, 238 and accompanying text.

80. Complaint of Anti-Defamation League of B'nai B'rith, 4 F.C.C.2d 190 (1966) (renewing, on ground of public interest in free expression, license of broadcaster who aired anti-Semitic material), 6 F.C.C.2d 385 (1967), *aff'd*, 403 F.2d 169 (D.C. Cir.), *cert. denied*, 399 U.S. 930 (1969).

81. Letter to Lonnie King, *supra* note 79, at 637.



has never construed section 1464 as covering offensive speech of a non-sexual nature.

Yet the question of graphic anti-abortion advertisements brings two intellectual problems into sharp relief: first, the problem of articulating a basis for distinguishing between broadly sex-related expression and sexual speech more closely akin to the prurience and titillation of the obscene; and, second, the broader problem of confining the notion of indecency to sexuality only.

One option is suggested by *Pacifica*, referenced in the November Ruling.<sup>82</sup> Although the *Pacifica* Court made clear the "emphatically narrow" character of its holding,<sup>83</sup> the *Pacifica* opinion contains some expansive language and broad regulatory rationales. Justice Stevens characterizes indecency as "nonconformance with accepted standards of morality."<sup>84</sup> In keeping with that reading of *Pacifica*, an FCC that wished to promote the welfare of children could expand the notion of indecency to include patently offensive, disturbing, shocking and outrageous material even if it did not directly relate to sex or other bodily functions.<sup>85</sup> After all, section

82. FCC v. *Pacifica Found.*, 438 U.S. 726 (1978). In dismissing the argument that excretory conduct could include expulsion of all bodily matter, the Commission opined that "[s]uch an expanded definition arguably would encompass televised scenes of a character sweating, blowing his nose, or dressing a wound, and would be far afield from the Commission's or the Court's concerns in *Pacifica*." *November Ruling*, 9 F.C.C.R. 7638, 7644 (1994) (emphasis added).

83. *Pacifica* was a plurality opinion that emphasized the narrowness of its holding. 438 U.S. at 750. See also *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 127 (1989) (characterizing *Pacifica* holding as "emphatically narrow").

84. FCC v. *Pacifica Found.*, 438 U.S. 726, 740 (1978). Justice Stevens' plurality opinion contains potentially expansive rhetoric and seems to rest in part on the lower social value of the kind of speech at issue. Rejecting *Pacifica*'s argument that the definition of indecency should require an element of prurient appeal, the Stevens opinion quotes Webster's Dictionary for a definition of indecency as "nonconformance with accepted standards of morality." *Id.* at 740 n.14 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY (3d ed. 1966)). Stevens also takes the position that channeling "will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18. Stevens does not deem this problematic because of his view that non-obscene sexual expression is low in the hierarchy of First Amendment values, not being an essential part of any exposition of ideas. *Id.* at 746. (This last element could serve to distinguish a very broad definition of offensiveness, however). For a reading of *Pacifica* that minimizes the centrality to the opinion of the lesser value of indecent speech, see C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 VILL. SPORTS & ENT. L.J., 45, 50-52 (1996).

85. *November Ruling*, 9 F.C.C.R. 7638 (1994). These are the adjectives used by the Commission in distinguishing the anti-abortion ads from the core material the agency considers actionably indecent. *Id.*

1464 does not define the appropriate scope of indecency.<sup>86</sup> Such an approach would not entangle the FCC in a battle of dictionaries and would also give the agency more regulatory flexibility to address in the future different kinds of shocking political programming not so closely tied to sex and other bodily functions as is abortion.

Presumably attempting to keep within the existing boundaries of First Amendment doctrine and a narrow reading of the statutory mandate of section 1464, however, the FCC has exercised its regulatory power in this area of content in a limited way. Naturally, the Commission has been concerned about the danger of censorship if the notion of patent offensiveness is not clearly anchored, presumably in something analogous to obscenity boundaries. However, by refusing to address the question at this level, the Commission has passed up an opportunity to explore the potential viability of any such anchors.<sup>87</sup>

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86. Nor does the history of the provision provide any meaningful parameters. See Milagros Rivera-Sanchez, *The Origins of the Ban on "Obscene, Indecent, or Profane" Language of the Radio Act of 1927*, 149 JOURNALISM & MASS COMM. MONOGRAPHS 1 (Feb. 1995) (reviewing sparse history of ban). See also *Pacifica*, 438 U.S. at 740 (distinguishing statutory term "indecent" from term "obscene"). Although Professor Rivera-Sanchez ultimately concludes in her monograph that the *Pacifica* Court may have erred in distinguishing between obscenity and indecency in the statute, a number of the historical facts she describes suggest that the measure may have been passed to deal with vulgar and offensive language that could be considered "morally objectionable" — an expansive principle significantly broader than obscenity (and even, perhaps, than of sexuality). Rivera-Sanchez, *supra* at 23.

87. David Cole, among others, has persuasively argued that the interest in avoiding offense to others does not work well as a justification for separating sexual expression from other offensive expressive material. David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 154-56 (1994). Based on this ground, arguments have been made in support of broadly defining regulable indecency or offensiveness. For an argument in favor of channeling violence as an aspect of obscenity, on the ground that obscenity should not be deemed strictly limited to sexual or erotic material, see, e.g., Kevin Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994).

The desirability and constitutional status of any such extension of the indecency principle is beyond the scope of this paper, except to the extent discussed *infra* notes 88-95 and accompanying text. It should be noted, however, that arguments can be made to explain the "special" treatment of sexual as opposed to otherwise offensive expression. For example, the maintenance of a distinction between public and private may provide a better explanatory model for some of the Supreme Court's cases dealing with sexual expression than the broad notion of offensiveness. Cole, *supra*, at 114-16 (ultimately arguing, however, that such a distinction inverts First Amendment principles and that regulating sexual expression reinforces the pornographic character of American sexuality by fetishizing it).

### C. The Problems of Constitutional and Statutory Interpretation Avoided by the FCC's Approach:

The FCC's decision not to interpret indecency to include graphic anti-abortion ads has the consequence of avoiding new First Amendment and statutory muddles. Its choice can be recognized as particularly strategic when an overview of the November Ruling discloses a structure that minimizes the likelihood of a challenger's success on either constitutional or statutory grounds, while permitting nearly the same result on the merits as might have flowed from a finding of indecency.<sup>88</sup>

One might argue that expanding the definition of indecency to include graphic anti-abortion images would create an unconstitutionally vague and overbroad category.<sup>89</sup> Even without such expan-

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88. For discussions regarding the strategic character of the second prong of the *November Ruling*, see *infra* notes 293-305, 319-21 and accompanying text.

89. I do not suggest that, for constitutional purposes, the vagueness doctrine is a mechanical way of defining abstract degrees of linguistic clarity in any given statute. See Anthony Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (on vagueness doctrine's surrogacy for merits considerations). The vagueness rhetoric is used by courts to strike down statutory language for different reasons. In the traditional understanding, vague statutes are struck down because they do not define conduct "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). (With regard to citizen behavior, a statute that does not display that level of definiteness would lead, at the very least, to a predictable chill on the expression of fully protected speech. With regard to official behavior, a "vague" statute is one that potentially hides official arbitrariness and discrimination in application.) I have previously proposed a version of the vagueness argument in the indecency context that focuses on the necessarily contradictory and ambivalent character of sexual speech. Levi, *supra* note 68, at 170-74. For an interesting argument about the use of vagueness doctrine to resolve substantive issues of constitutional law, see Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491 (1994) (explaining that some statutes are struck down on vagueness grounds because they permit official judgments imposing community norms and middle class mores across the board, allowing official intrusions on individual liberty in the course of pursuing community goals). Were the indecency definition expanded beyond its current scope to include material that would be generally shocking to community mores, various versions of the vagueness challenge could be mounted.

The category "graphic anti-abortion ads" might be considered sufficiently precise, if added to the definition of indecency, to satisfy the traditional vagueness doctrine threshold, particularly if the FCC experimented with some obscenity-like anchors for its application of the indecency definition. On the other hand, graphic anti-abortion ads arguably could be used by analogy to justify additional expansion of the definition of indecency, to encompass other shocking and graphic images. Moreover, the addition of this material to the definition might cause the generic definition of indecency to be subjected to more searching scrutiny as to vagueness than has thus far been the case (as pointed out in text). Third, even though the category of graphic anti-abortion ads has received some content and parameters from the specific instances in which abortion imagery has been

sion, the FCC's definition of indecency thus far has not been subjected to searching vagueness and overbreadth analysis under the First Amendment. The D.C. Circuit grounded its rejection of the vagueness argument in the context of the indecency rules simply on the assumption that the Supreme Court's *Pacifica* decision had implicitly approved the definition.<sup>90</sup>

The First Amendment problem would be particularly acute if the Commission had expanded indecency effectively to include any images that would be shocking or harmful to children, without any further guidelines to constrain discretion. Particularly since what is objectionable about the anti-abortion ads is that they purport to depict real blood, pain and death rather than merely that they do so by depicting sexual or excretory organs, it is difficult to identify a justifiable distinction between them and the many other deeply disturbing graphic and bloody depictions that could also be swept into such a definition.<sup>91</sup> Much more pressing First Amendment vagueness and overbreadth problems are posed by a definition of indecency significantly broader than that specifically referring to sexual or excretory organs. While some of the rhetoric and rationale of *Pacifica* could serve to justify a capacious category of regulable offensive material, the case is more comfortably read narrowly, as the opinion itself instructs.<sup>92</sup>

In addition to the by-now classic arguments based on unconstitutionality vagueness and overbreadth, the expansion of indecency to include anti-abortion material could raise a *de facto* viewpoint discrimination argument. Even with regard to indecent speech, *R.A.V. v. City of St. Paul* makes clear that viewpoint discrimination is forbid-

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aired, it would still presumably be possible that the inclusion of this additional category would allow for discriminatory and arbitrary application of law by the FCC and other official actors. For further discussion of the argument regarding administrative discretion, see *infra* notes 297-98 and accompanying text.

90. *ACT I*, 852 F.2d 1332, 1340 n.11 (D.C. Cir. 1988). Most recently, the court again rejected the void for vagueness argument as applied to the definition of indecency in the Public Telecommunications Act of 1992. *ACT III*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 1996 U.S. LEXIS 36 (Jan. 8, 1996).

91. See *Joint Comments*, *supra* note 21, at 6 (noting increased uncertainty about what would be subject to indecency review, including possible inclusion of assassination footage, war film and videotape relating to medical issues).

92. *Pacifica Found. v. FCC*, 438 U.S. 726, 734-35, 742, 757 (1978) (Powell, J., concurring). See also Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 *FORDHAM L. REV.* 606, 627-30 (1983) (discussing narrowness of *Pacifica* decision); Levi, *supra* note 68, at 139 (same). Despite sweeping language that could be used to justify extensive regulation of broadcast speech inconsistent with reigning morality, the *Pacifica* decision clearly states that the Court was simply interpreting the FCC's definition as applied to the Carlin broadcast. Baker, *supra* note 84, at 46.

den by the First Amendment.<sup>93</sup> If it is still in fact the case, as I suspect, that only virulently anti-abortion candidates have employed graphic abortion footage in their advertisements thus far, then attempts to channel such material could be deemed, in practice, to run afoul of *R.A.V.*'s call for value neutrality. After all, these anti-abortion advertisements would be singled out as a result of their particular content. Moreover, while "time zoning"<sup>94</sup> may not always be constitutionally suspect, it is surely so when it effectively targets one category of speakers for their ideas.<sup>95</sup>

Although the constitutional arguments against the FCC would not necessarily have been successful if the agency had held that the advertisements at issue in the November Ruling could be considered indecent, it is important to note that by structuring its decision as it did, the Commission probably avoided litigation on that First Amendment question, while still in the end permitting channeling.

Apart from the constitutional issues, a finding of indecency in this proceeding would have led to a question of statutory interpretation as well. Even if the FCC had defined the speech here as indecent, there still would have remained the question of whether the images could properly be channeled due to conflicts with the political advertising rules: is there a section 1464 exemption to sections 312(a)(7) and 315, or a sections 312(a)(7) and 315 exception to section 1464?

Although there is little authority directly on point, and the arguments of the existing authority are not overly persuasive, their

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93. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

94. *Baker*, *supra* note 84, at 49 (coining the phrase in describing the channeling at issue in *Pacifica*).

95. Whether this sort of argument is ultimately persuasive is questionable. We can distinguish between viewpoint and manner of presentation for purposes of analyzing whether a governmental burden on speech is tantamount to viewpoint-based discrimination. However, as the Court pointed out in *Cohen v. California*, 403 U.S. 15 (1971), among other cases, the meaning of speech is often inextricably intertwined with its manner of presentation. *Id.* Compare *Franklyn S. Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 Nw. U. L. REV. 153, 188-90 (1972) with Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 243-44 (1983). In *Madsen*, the Supreme Court upheld against constitutional challenge a permanent injunction imposed by a state court to exclude anti-abortion demonstrators from a buffer zone around abortion clinics. *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516 (1994). Despite the protesters' argument that their viewpoint had been singled out for prohibition, the Court held that there was no evidence that the state would not have enjoined similar demonstrations by others with different content and viewpoints. *Id.* at 2523-24. Following *Madsen*, one could argue that broadcasters are just as likely to channel graphic and shocking pro-abortion images as anti-abortion ads, even though the current vehicle prompting examination of the rules happened to involve an anti-abortion campaign.

result is statutorily supportable.<sup>96</sup> As noted above, the January 19, 1984 transmittal letter from then-Chairman Mark Fowler to Congressman Thomas Luken, and the accompanying staff memorandum, suggest that there would be a section 1464 exemption from the "no censorship" dictates of section 315.<sup>97</sup> The federal court in *Gillett* relied on the Luken Letter and the Luken Staff Memorandum's references to traditional norms of statutory construction to conclude that the graphic anti-abortion ads, as indecent material, could be channeled to late night hours despite section 315's prohibitions on censorship.<sup>98</sup>

On the other hand, the FCC's Broadcast Bureau in *Julian Bond*, in the context of rejecting the NAACP's argument that the use of the word "nigger" in a political advertisement should be deemed indecent, stated that "even if the Commission were to find the word 'nigger' to be 'obscene' or 'indecent,' in light of Section 315 we may not prevent a candidate from utilizing that word during his 'use' of a licensee's broadcast facilities."<sup>99</sup>

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96. See *infra* section II. A.

97. *Luken Letter*, *supra* note 41. The *Luken Letter* and *Luken Staff Memorandum* are appendices to the *Comments of Gillett* in the Commission's MM 92-254 proceeding.

98. *Gillett Communications, Inc. v. Becker, Inc.*, 807 F. Supp. 757, 762 (N.D. Ga. 1992). With no further explanation, some scholars addressing the issue have opined that "[t]he Bureau's dictum suggesting that section 315 would prevent the censorship of obscene or indecent language is doubtful." Martin Kassman, *The Defamation You Can't Refuse: Section 315's Prohibition on Censoring Political Broadcasts*, 13 HASTINGS COMM. & ENT. L.J. 1, 11 (1990). See also Sheppard, *supra* note 3, at 398-402; Richard G. Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 27 MD. L. REV. 221, 238 n.87 (1967).

99. Letter to Julian Bond, *supra* note 79, at 944. For strict readings of § 315's "no censorship" provision in contexts outside indecency, see Ken Bauder, 38 R.R.2d 31, 33 (1976); Honorable William H. Lamb, 37 R.R.2d 115, 117 (1976). In *William H. Lamb*, the Commission suggested, in dictum, that "any state requirement which would have the effect of inhibiting the broadcast of such [political] 'uses' would frustrate the underlying purposes for which section 315 was enacted, or, at the very least, would impose unreasonable burdens on the parties governed by that section of the Communications Act." *Lamb*, 37 R.R.2d at 117. And in *Ken Bauder*, the FCC declared (in response to a station's inquiry whether the Smith Act prohibited the sale of political advertising time to the Communist Party's Presidential and Vice Presidential candidates), that

[a]s long as a station abides by the directives of Section 312(a)(7) and Section 315 of the Communications Act, we do not believe that it need concern itself with the provisions of the Smith Act with regard to the sale of political broadcast time to legally qualified candidates associated with the Communist Party.

*Bauder*, 38 R.R.2d at 33. Although the FCC sought to harmonize the political programming rules and the Smith Act by noting that the Act prohibited speech advocating the overthrow of the government rather than necessarily targeting all members of the Communist Party per se, its citations to the immunity holdings of *Port Huron Broadcasting Co.*, 12 F.C.C. 1069 (1949) and *Farmers Educ. & Coop.*

Moreover, the FCC Luken Letter Staff Memorandum has been argued to rest on shaky substantive ground.<sup>100</sup> The basic rationale of the Luken Staff Memorandum, as Chairman Fowler summarized it, is as follows:

Because Section 315's purpose of fostering political debate is untainted by subjecting broadcasters to the prohibitions in Section 1464 against obscenity and indecency (which by definition lack serious political value), it is concluded that it would be unreasonable to exempt broadcasters from Section 1464's criminal prohibitions.

Applying the canon of statutory construction under which a statute should not be interpreted to yield an unreasonable result, the Luken Staff Memorandum concluded that exempting political uses from section 1464 would be unreasonable. The bottom line of the staff's approach in the Luken Staff Memorandum was that it would be unreasonable to read section 315 as requiring the broadcast of low value political speech that would be considered illegal under section 1464.

In its comments in the Commission's proceeding on the anti-abortion ad issue, Media Access Project (MAP) argued that the Luken Staff Memorandum does not distinguish between obscene and indecent speech from a constitutional standpoint. Even apart from the abstract question of statutory conflict and the role of canons of construction, section 1464 cannot be read constitutionally to place a flat ban on broadcast indecency (as its language purports to do).<sup>101</sup> Since section 1464 requires a limiting construction to

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Union v. WDAY, Inc., 360 U.S. 525 (1959) clearly suggest the agency's assumption that § 315 foreclosed licensee censorship even of political speech violative of the Smith Act. See *Bauder*, 38 R.R.2d at 32.

100. Procedurally, neither the Fowler transmittal letter (referred to in note 41) nor the accompanying FCC staff memorandum are of any precedential value. *Reply Comments of Media Access Project* at 7, MM Docket No. 92-254, filed in response to Request for Comments, *In re* Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 7 F.C.C.R. 7297 (1992) [hereinafter *MAP Reply Comments*]; discussion *infra* notes 101-04 and accompanying text. Neither Chairman Fowler's transmittal letter nor the staff memo had the full Commission's explicit backing and support, as noted in the Fowler transmittal letter itself. *Luken Letter*, *supra* note 41. In addition, on the reduced level of deference that should be accorded to such informal expressions of administrative agency views about statutes they administer, see, e.g., Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 749-50 (1995) [hereinafter *Pierce, Hypertextualism*].

101. See, e.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989); *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991).

preserve its constitutionality, MAP argued that it is not, in principle, in conflict with sections 312(a)(7) and 315.<sup>102</sup> In addition, the Luken Staff Memorandum's assumption that indecency is not protected speech is "the fatal flaw in the staff's analysis."<sup>103</sup> More fundamentally, both the Luken Staff Memorandum and the *Gillett* opinion's uncritical reliance on canons of construction raise the debate on the meaning and determinacy of the canons.<sup>104</sup>

Although these criticisms of the analytic structure of the Luken Staff Memorandum may be well-founded, they do not resolve the question of whether the Commission had the statutory authority to channel political advertising it found to be indecent. First, just because section 1464 cannot constitutionally justify a complete ban does not mean that it cannot constitutionally justify a channeling regime. Second, that the canon of construction used in the Luken Staff Memorandum is manipulable means simply that it is not conclusive; it does not mean that the memo's conclusion is unsupportable as a matter of statutory interpretation. Third, the structure of the original Radio Act of 1927 supports the conclusion of the Luken Staff Memorandum, even if it does not support the memo's reasoning. Section 1464 was originally part of the Communications Act, and, indeed, was included in the very section that prohibited censorship by the Commission itself.<sup>105</sup> Thus, at the time of enact-

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102. See MAP Reply Comments, *supra* note 100, at 6.

103. *Id.* at 7.

104. See, e.g., Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30 (Wallace Mendelsohn ed., 1964); KARL LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1073 (1989) [hereinafter Eskridge, *Public Values*]; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950); Richard A. Posner, *Statutory Interpretation — In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800 (1983). It is, of course, true that the *Gillett* Communication court's reference to the canons is not atypical; judges habitually articulate their decisions on the ground of some canon of statutory construction, despite critiques of the canons from the academy. See generally Symposium, *A Re-evaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992). For an account more charitable to the canons of construction than Llewellyn's, see David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

105. Initially, § 1464's prohibition against indecent speech was enacted as part of § 29 of the Radio Act of 1927, 44 Stat. 1172-73 (1927). Section 29 was transferred verbatim as § 326 of the Communications Act of 1934. Section 326 read:

[n]othing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person



ment, it could be said that the original drafters did not see any fundamental conflict between simultaneously prohibiting both indecency and FCC censorship of any kind. This then might well lead to the conclusion that if the material were indecent, Congressional will would not be thwarted if the material were shunted off to broadcast times when children would be less likely to be in the audience.<sup>106</sup> Finally, if, as is argued below, the statutory scheme of sections 312(a)(7) and 315 do not preclude channeling for purposes of protecting children, *a fortiori* channeling would be applicable in the context of a finding of indecency.

In sum, the graphic anti-abortion advertisements provided the FCC with the opportunity to engage in a searching analysis of its proper role in regulating offensive expression. The Commission declined the invitation, presumably because it saw such an inquiry as entailing potentially high constitutional and statutory risks unnecessary to the resolution of the issue. Ironically, however, the indecency prong of the November Ruling is significant for its possible analytic effects in the traditional regulatory domain of sexual expression, even if its analysis is not significant in expanding the scope of that regulation. Simply put, the Commission's arguments in the November Ruling may signal the possibility of a salutary relaxation of enforcement standards in the ordinary indecency context.<sup>107</sup>

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within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Federal Communications Act of 1934, 47 U.S.C. § 326 (1934).

106. In *FCC v. Pacifica Found.*, 438 U.S. 726, 735, 737-38 (1978), Justice Stevens concluded that the prohibition on censorship by the FCC was not intended to limit the Commission's power to regulate obscene and indecent speech because

[a] single section of the 1927 Act is the source of both the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

*Id.* at 737-38.

107. As noted above, the Commission argued in its *November Ruling* that even if the graphic anti-abortion imagery could be considered to fit into the category of sexual or excretory expression subject to indecency review, it would still not be considered indecent because of its use in the context of a political campaign. *November Ruling*, 9 F.C.C.R. at 7644. Having reiterated the Commission's by-now traditional characterization of the indecency inquiry as being primarily contextual, and having clarified that the Commission's analysis of context "has always encompassed more than just the four corners of the material being reviewed[.]" the Commission focused only on the facts that the material aired was part of a political campaign and that "the issue of abortion is an important question in American politics." *Id.*

## II. THE SCOPE OF CANDIDATE POLITICAL ADVERTISING RIGHTS

Although the FCC's decision that the challenged material is not indecent eliminates the petitioning parties' argument of statutory conflict between section 1464 and the political advertising rules, its conclusion that harmful but not indecent material can permissibly be channeled raises questions both of statutory and of constitutional interpretation. First, did the FCC correctly interpret sections 312(a)(7) and 315 in allowing broadcaster decisions to channel graphic anti-abortion political ads? Second, does the November Ruling's recognition of discretion in broadcasters violate the rights of political advertisers under the First Amendment?

### A. The Statutory Dimension:

This Part concludes that, particularly in light of the policies articulated by the Commission in support of its statutory readings — namely, the constitutionally recognized interests in the protection of children, editorial autonomy, and consistency with prior administrative practice — deference by a reviewing court to FCC interpretation is likely. Whether a court applied the extremely deferential approach to review of agency statutory interpretations adopted by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*,<sup>108</sup> however, or only the “special” or “respectful”

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The Commission's post-1987 enforcement approach to indecency has been criticized elsewhere as inconsistent. Although prior enforcement actions have traditionally paid lip service to the value of merit as one of the factors to be addressed in the contextual indecency analysis, the decisions have not been consistent in defining the merit factor or addressing the weight to be accorded to merit. For example, some programming containing offensive material but otherwise satisfying the public interest has avoided indecency sanctions. *See, e.g.*, Letter to Peter Branton, *supra* note 53 (not finding indecent broadcast by National Public Radio of an expletive-laden tape of telephone conversation involving John Gotti). On the other hand, the Commission has imposed indecency forfeitures on broadcasters who have addressed important social issues in ways that have fallen into the indecency net. *See, e.g.*, Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Merrell Hansen, (KSD-FM), 6 F.C.C.R. 3689 (1990) (imposing forfeiture on radio station for reading of *Playboy* interview about Jessica Hahn's claim of rape against televangelist Jim Bakker).

In its attempt to distinguish the anti-abortion ads from indecent material, the FCC could be read to have articulated a commitment to a more restrictive interpretation of indecency and a broader sweep for merit than it had used in at least some post-1987 indecency cases. While that is not necessarily the case and the Commission could well distinguish its treatment of anti-abortion ads from the ordinary indecency enforcement context, the rationale of the decision here provides a new window of opportunity into the traditional indecency area.

108. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Even before *Chevron*, although there was no consistent statement of doctrine on the standard of review for agency interpretations of statutes, the Court in *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) expressed the

consideration accorded under traditional administrative law principles, the November Ruling would in all likelihood pass muster.

As noted above, section 312(a)(7) requires broadcast licensees to provide legally qualified federal political candidates reasonable access to the air, and section 315 assures that licensees have no power of censorship over political advertisements aired pursuant to the section's equal opportunities provisions.<sup>109</sup>

With regard to section 312(a)(7), the FCC was clearly delegated power by Congress to interpret the meaning of the statutory right of reasonable access, and nothing in the language or legislative history of the section suggests constraints on the FCC's interpretive power. The prior judicial and administrative interpretations of section 312(a)(7), however, are more equivocal. Nevertheless, even the existence of some prior administrative language emphasizing the needs of federal candidates in the application of section 312(a)(7) is counterbalanced by consistent administrative reference to broadcaster discretion in other cases.

With regard to the "no censorship" provision of section 315, the statute does not define the term "censorship." The legislative history is silent on the question whether channeling political advertising to late night hours would be considered censorship. It is even ambiguous on the question of whether the drafters of the 1927 Radio Act intended the "no censorship" provision to be truly absolute. Although prior administrative and judicial interpretations of section 315 contain some absolutist language, no precedent is dispositive. Under these circumstances, although a contrary result is supportable, it is likely that a court would find the November Ruling to be a reasonable accommodation of conflicting statutory policies in a context where Congress expressed no specific intent.<sup>110</sup>

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rhetoric of deference in the context of broadcasting: "The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Id.* at 381.

109. See *supra* notes 18-19 and accompanying text.

110. The relationship between § 312(a)(7) and § 315 is as follows: Federal candidates — and federal candidates only — have affirmative rights of access to the broadcast media under § 312(a)(7). Section 315 provides only a contingent right of access, and is triggered for any candidate only when a station has granted airtime to the requesting candidate's opponent. That section assures equal opportunities both to federal candidates and to state and local candidates whose opponents have been provided airtime by a station. Of the two, only § 315 contains an explicit proviso that broadcasters do not have the power of censorship over material aired pursuant to equal opportunities requests. However, the argument that § 312(a)(7) permits broadcaster censorship because it does not specifically

1. *Section 312(a)(7)<sup>111</sup> and the Meaning of Reasonable Access:*

In light of the fact that the affirmative right of access under section 312(a)(7) is statutorily limited to "reasonable" access, the fundamental question is whether FCC permission for broadcasters to channel these ads by federal candidates can properly be considered "reasonable."<sup>112</sup> There is support, both in the legislative history and in the subsequent judicial and administrative interpretations of the statutory right of access, for arguments that the FCC's decision in the anti-abortion ad context is not an unanticipated departure from prior interpretations of "reasonableness."

In its November Ruling, the Commission took the position that allowing broadcasters to channel images deemed by a broadcaster to be harmful to children would not violate section 312(a)(7). Because the Commission had never interpreted 312(a)(7) to "entitle a federal candidate 'to a particular placement of his or her political announcement on a station's broadcast schedule,'" <sup>113</sup> the agency did not see its decision in the abortion ad context as inconsistent with its prior treatment of the reasonable access provision.<sup>114</sup> The Commission rested its conclusion on three arguments. First, it read its precedents to have paved the way for its November Ruling: "We already have concluded that Section 312(a)(7) does not preclude licensees from considering the potential impact of political advertisements on their audience in making access decisions."<sup>115</sup> Second, the Commission took the view that nothing in section 312(a)(7) eliminated broadcasters' discretion to protect children.<sup>116</sup> Third, the Commission argued for its conclusion by emphasizing its limits: to cabin the expansiveness of its ruling, the

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prohibit it — particularly in light of the § 315 "no censorship" proviso — is unpersuasive.

111. Campaign Communications Reform Act, Title I of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 47 U.S.C. § 312(a)(7) (1994)).

112. Section 312(a)(7), as originally reported in the Senate, would have applied to any legally qualified candidate and not simply to federal office-seekers. The Conference Committee expressly limited the provision. S. CONF. REP. NO. 580, 92d Cong., 1st Sess. 22 (1971); *CBS v. FCC*, 453 U.S. 367, 380 (1981).

113. *November Ruling*, 9 F.C.C.R. at 7645 (*quoting* Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1091 (1978) (Report and Order)).

114. *Id.* The Commission staff had taken a dramatically contrary position on this issue, holding that even content-neutral channeling of federal candidates to late night hours in order to protect children would violate § 312(a)(7). Letter to Pepper and Gastfreund, 7 F.C.C.R. 5599 (1992).

115. *November Ruling*, 9 F.C.C.R. at 7645.

116. *Id.* at 7646.

FCC reminded licensees that they had to give individualized attention to access requests by anti-abortion candidates;<sup>117</sup> that those broadcasters who chose to channel any of this material must make available to the candidate "access to times with as broad an audience potential as is consistent with the federal candidate's right to reasonable access,"<sup>118</sup> and that licensees not channel this material "out of disagreement with the candidate's political position."<sup>119</sup>

a. The Text and Legislative History of Section 312(a)(7):

In addition to the "plain" language of the statute, traditional statutory construction calls for a look at legislative history, legislative purpose, and the structure of the statute.<sup>120</sup> The plain lan-

117. *Id.* at 7646-47.

118. *Id.* at 7647.

119. *Id.*

120. See, e.g., Mark Seidenfeld, *Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, TEX. L. REV. 83, 112 (1994). The rationale for this approach is grounded on a notion of legislative supremacy and a legitimating theory of politics that limits the judicial role in interpreting statutes to that of discovering an already-existing legislative design. See, e.g., Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594-99 (1995) (describing this traditional approach as form of "institutional essentialism" in the course of cataloguing an emergent new strand of "democratic legitimacy" in statutory interpretation).

The use of legislative history as a tool of statutory interpretation has been severely criticized recently, both by scholars and by courts (with Justice Scalia as one of the more outspoken textualist critics). Indeed, there has been an apparent change in the Supreme Court's approach to statutory construction, with the Court decreasing its reliance on intentionalist or purposive statutory analysis (grounded on legislative history and purpose) and increasing its textualist bent. For discussions and analyses of the change, see, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 207-29 (1994); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 656-66 (1990) [hereinafter Eskridge, *New Textualism*]; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-85 (1992) [hereinafter Merrill, *Executive Precedent*]; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355-63 (1994) [hereinafter Merrill, *The Chevron Doctrine*]; Pierce, *Hypertextualism*, *supra* note 100; Fred Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990) [hereinafter Wald, *Sizzling Sleeper*]; *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438-40 (1994) [hereinafter Note, *Looking It Up*].

It is by now an old saw to repeat Judge Harold Leventhal's description of legislative history-based statutory interpretation as "akin to looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) [hereinafter Wald, *Use of Legislative History*] (quoting Harold Leventhal); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1158 n.264 (1993); see also Pierce, *Hypertextualism*, *supra* note 100, at 751 (repeating turn of phrase and concluding, about intentionalist statutory interpretation in 1970s and 1980s, that "[j]udges frequently relied on carefully selected nonauthoritative statements in the

often voluminous and internally inconsistent legislative history of statutes to attribute to Congress the judges' preferred resolutions of policy disputes that Congress did not resolve." Legislative history has been criticized on the ground, *inter alia*, that the purposive or intentionalist statutory interpretation it aids is indeterminate and even incoherent. ESKRIDGE, *supra*, at 13-47. After all, an examination of the legislative history all too often leads to "a plethora of purposes, cross-cutting purposes, and purposes set at such a general level that they could support several different interpretations." William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1744-45 (1993) [hereinafter Eskridge, *Speluncean Explorers*]. For discussions of various criticisms of the use of legislative history in statutory interpretation, see, e.g., ESKRIDGE, *supra*, at 210-25; James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 41-60 (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1507 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*]; Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1255-58 (1989) [hereinafter Pierce, *Agency Theory of Government*]; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930), cited in Schacter, *supra*, at n.22; Seidenfeld, *supra*, at 114-19. Even more pointedly, critics have charged that the process of legislative enactment — involving, as it does, coalition building and compromise, not to mention deceit — necessarily fails to provide a single coherent and cohesive legislative intent that can pass for a public purpose. See Eskridge, *New Textualism*, *supra*, at 630-40. When strategic motives are factored in for particular congressional stances (including the purposive decision to enact vague statutes in certain political circumstances), the inquiry into legislative intent becomes murkier still, and perhaps, as some have thought, intractable. See Schacter, *supra*, at 604 & n.49.

Nevertheless, the acuity of these criticisms does not necessarily support dispensing with legislative history entirely. A look at the legislative history and purposes is useful, so long as it is not proposed as dispositive or unchallengeable. Simply put, legislative history provides a range of purposive possibilities within which to operate. See Seidenfeld, *supra*, at 130 (noting some benefits of legislative history); Brudney, *supra*, at 3. Thus, it narrows the field and provides the outside parameters for a purposive analysis. See also ESKRIDGE, *supra*, at 238 (illustrating factors in which pragmatic statutory interpreter should be interested). The antipathy of "new textualists" like Justice Scalia to legislative intent and history, while understandable given the limits of legislative history, effectively forecloses a useful avenue of inquiry in statutory interpretation. The criticisms of legislative history need not be insuperable if legislative history is looked at self-consciously, with an understanding of what it can do and no illusions as to its determinacy, objectivity or seamless character. Indeed, a look at the available legislative history and articulated purposes, as well as an understanding of the political context of the congressional enactment, can help guide the otherwise overly abstract reliance on dictionary definitions of the text of a statute. Textualism, while a useful reminder that purposive statutory analysis can go too far, is itself unsatisfying if it is not coupled with the more traditional approach to statutory construction (including a look at legislative history). For critiques of the Court's textualism, see, e.g., ESKRIDGE, *supra*, at 230-34; Pierce, *Hypertextualism*, *supra* note 100; Seidenfeld, *supra*, at 120-21; Wald, *Sizzling Sleeper*, *supra*, at 300-09. For a persuasive argument that the better interpretive approach begins with the language of the relevant statute, but also adds strong evidence from context, statutory goals, and legislative history, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). (Whether textualist or grounded in legislative intent, the traditional approaches to statutory interpretation are based on an assumption of legislative supremacy, with the judiciary simply serving as the amanuensis of the legislative will. See Wald, *Sizzling Sleeper*, *supra*, at 301-03. For an account that identifies and analyzes a different trend in statutory interpretation — one that meas-

guage of section 312 requires reasonable access but does not define "reasonableness." Dictionary definitions do not resolve the issue.<sup>121</sup> The legislative history, while instructive, is silent on the specific question of this kind of advertising.

Section 312(a)(7) was passed as part of the Campaign Communications Reform Act, Title I of the Federal Election Campaign Act of 1971.<sup>122</sup> One of the central purposes of this reform legislation was "to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."<sup>123</sup> In considering campaign reform in 1971, Congress addressed bills "intended to increase a candidate's accessibility to the media and to reduce the level of spending for its use."<sup>124</sup> The Federal Election Campaign Act was motivated primarily by congressional concern over the expense of modern political campaigning, particularly over television.<sup>125</sup> The legislative evidence suggests a congressional hope that a combination of the political potential of television with elec-

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ures democratic legitimacy not by the elimination of judicial discretion in the interpretation of statutes, but by the interpretive rules that shape that discretion to produce democratizing effects, see Schacter, *supra*.)

121. It is hardly revolutionary to assert that statutory meaning is usually anything but "plain," that courts can vary on the "plain" meaning of the very same statute, and that an over-reliance on dictionary definitions is both misleading and dangerous. On the prevalence of meaning skepticism, see Schacter, *supra* note 120, at 601-03. For cogent critiques of reliance on dictionary definitions as value neutral, or as the basis of wide consensus, or as avoiding inconsistency in results, see, e.g., Clark D. Cunningham, et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1563, 1614-16 (1994) (reviewing LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993)); Pierce, *Hypertextualism*, *supra* note 100, at 752, 765; A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1320-21 (1990); Note, *Looking It Up*, *supra* note 120.

122. Federal Election Campaign Act of 1971, 47 U.S.C. § 312(a)(7) (1994). Title I of the Federal Election Campaign Act of 1971 contained the reasonable access requirement now in § 312(a)(7), the lowest unit charge requirement now in § 315(b)(1), and a since-repealed spending limitation for federal candidates. *Kennedy for President Comm'n v. FCC*, 636 F.2d 432, 439 (D.C. Cir. 1980). See also *CBS v. FCC*, 453 U.S. 367, 377, 379-82 (1981) (describing legislative history of § 312(a)(7)).

123. S. REP. NO. 96, 92d Cong., 1st Sess. 20 (1971), reprinted in 1972 U.S.C.C.A.N. 1774; *CBS v. FCC*, 629 F.2d 1, 12 (D.C. Cir. 1980) (quoting S. REP. NO. 96), *aff'd*, 453 U.S. 367 (1981). See also S. REP. NO. 229, 92d Cong., 1st Sess. 56 (1971), reprinted in 1972 U.S.C.C.A.N. 1822; 117 CONG. REC. 28792 (1971) (statement of Sen. Pastore).

124. *CBS v. FCC*, 453 U.S. at 379, (quoting *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. 2 (1971) [hereinafter *Hearings on S. 1, S. 382 and S. 956*] (opening statement of Sen. Pastore)).

125. *Kennedy*, 636 F.2d at 439.

tion reform legislation reducing the cost of campaigning could lead to a more informed electorate and improved political discourse.<sup>126</sup>

The Report of the Senate Commerce Committee that considered the 1971 legislation provided neither an explicit interpretation of what came to be section 312(a)(7) nor a discussion of its impact.<sup>127</sup> The Report simply stated that broadcasters' duty to permit candidate access "is inherent in the requirement that licensees serve the needs and interests" of their communities of license.<sup>128</sup>

Section 312(a)(7) was derived from a Senate bill that included a provision designed "to insure that all licensees make available to legally qualified candidates for public office reasonable amounts of time for use of broadcasting stations . . . ."<sup>129</sup> The objective of the section which ultimately passed as 312(a)(7) was described on the House floor as "requir[ing] broadcasters to permit any legally qualified candidate to purchase a 'reasonable amount of time' for his campaign advertising."<sup>130</sup>

Other than opining that the legislation would improve federal candidates' access to the air, what did Congress intend by its dictate

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126. Senator Gravel, the sponsor of one of the reform bills in 1971, delivered an encomium to television as potentially the new public forum. 117 CONG. REC. 272 (1971) (remarks of Sen. Gravel). See also *Kennedy*, 636 F.2d at 439-40 (quoting Sen. Gravel). Yet the dangers posed for such a vision by spiraling electronic campaign costs were clear in the members' minds. *Id.* at 440.

Rather than attempting to limit the role of television in political campaigns, however, Congress' goal in 1971 was "to make the medium more responsive to civic needs, and to provide better and more complete information to the American public." *Id.* at 441. The *Kennedy* court concluded that the amendments of the Campaign Communications Reform Act were inspired by congressional concern that insufficient time (at excessive rates) was being made available to candidates by broadcast media. *Id.* at 442.

127. *CBS v. FCC*, 453 U.S. at 381.

128. S. REP. NO. 96, *supra* note 123, at 34, cited in *CBS v. FCC*, 453 U.S. at 379.

129. *Kennedy*, 636 F.2d at 444 (quoting *Hearings on S. 1, S. 382 and S. 956*, *supra* note 124, at 132-33). The congressional desire for reform in election communications led to a number of bills before Congress, the most significant of which were three Senate bills — S. 1, S. 382 and S. 956. Ultimately, the Federal Election Campaign Act of 1971 was derived largely from S. 382, but § 312(a)(7) owes its origin to an access provision in S. 956. *Id.* See also *CBS v. FCC*, 453 U.S. at 379 (explaining origin of § 312(a)(7)). The concept of reasonable access apparently stemmed from a campaign reform bill in 1970 — S. 3637 — which was vetoed for other reasons by President Nixon. Henry Geller & Jane H. Yurow, *The Reasonable Access Provision (312(a)(7)) of the Communications Act: Once More Down the Slippery Slope*, 34 FED. COMM. L.J. 389, 391 & n.5 (1982). The bill had repealed the equal opportunities requirement for presidential and vice-presidential contests; required stations to sell time to candidates at the lowest unit charge available to commercial advertisers on the station on a given day for the same length and class of time; and had been amended on the Senate floor to provide specifically for reasonable access for federal candidates during prime time. *Id.*

130. 118 CONG. REC. 326 (1972) (remarks of Rep. Keith), cited in *Kennedy*, 636 F.2d at 445 & n.112.



that federal candidates be afforded "reasonable" access? Section 312(a)(7) does not define the term. Broadcasters complained that the provision that reasonable amounts of time be made available to candidates was "sufficiently ambiguous to create difficulty and uncertainty" and asked for its elimination from the final legislation.<sup>131</sup> Nevertheless, the lack of definition is unsurprising. In introducing the bill whose access provision was the precursor of section 312(a)(7), for example, its proponent, Senator Scott, stated that "[t]he term 'reasonable,' of course, is open to interpretation; but it can, I believe, be given a quick test run through the FCC when a complaint is filed."<sup>132</sup> This suggests a congressional understanding of FCC discretion. Perhaps Congress believed that it should not concertize, in the abstract, the degree of access required to be "reasonable." Yet, perhaps to constrain FCC discretion, Senator Scott also asserted that "it is absolutely essential that candidates be allowed as much access to television and radio as they wish, and as they can afford. To impose ceilings [on broadcast expenditures] without offsetting them with guarantees [of broadcast time], ignores the real problem which is access to the media and access to the electorate."<sup>133</sup>

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131. *Hearings on S. 1, S. 382 and S. 956, supra* note 124, at 418 (testimony of Leonard Goldenson, President of American Broadcasting Co.). Even Dean Burch, the FCC Chairman, made it clear that the FCC was not enamored of this bit of legislation:

[I]t is better to consider the licensee's performance in this area as one part . . . of his entire programming service to the public. We believe the amount of time afforded and the campaigns to which time is devoted are matters best left to the licensee's reasonable, good faith judgment based on his knowledge of his community's particular needs . . . . I would personally hesitate to go this far [as to grant reasonable access to all legally qualified candidates] in the absence of some definite showing that the inability to buy broadcast time is of serious proportions.

*Id.* at 189-90 (testimony of FCC Chairman Dean Burch).

132. 117 CONG. REC. 3886 (1972). As noted above, two separate pieces of reform legislation were pending when Senator Scott and his allies introduced S. 956. S. 956, 92d Cong., 1st Sess. (1971). Section 302(c) of S. 956 was the precursor of the reasonable access requirement of § 312(a)(7) that was ultimately adopted in the Federal Election Campaign Act. *See supra* note 129.

133. *Hearings on S. 1, S. 382 and S. 956, supra* note 124, at 341 (comments of Senator Scott). *See also id.* at 347-49 (containing Senator Scott's and Senator Mathias' official statement in connection with S. 956).

Commentators suggest that the section 312(a)(7) access provision was a direct result of congressional adoption of the lowest unit rate requirement for political advertisers. One commentator stated: "Having driven the price of political advertising time to its lowest levels, Congress logically became concerned about the possibility that some broadcasters might decide not to sell any political advertising time at all." DONALD M. GILLMOR, et al., *MASS COMMUNICATIONS LAW, CASES AND COMMENT* 780 (5th ed. 1990); Geller & Yurow, *supra* note 129, at 392. Similarly, it should be noted that the central provisions of S. 382 were spending limits and the

Although the Supreme Court upheld the constitutionality of the reasonable access requirement under section 312(a)(7) in *CBS v. FCC*,<sup>134</sup> it did not speak directly to the legislative view of the specific definition of reasonableness. It read the legislative history of section 312(a)(7) as establishing a new, affirmative and personal right of access for each federal candidate, rather than simply reaffirming the FCC's prior practice of interpreting the public interest to require that licensees provide some air time for political candidates generally.

The bottom line with regard to the legislative history of section 312(a)(7) is that Congress chose not to define its notion of reasonable access. It delegated the task of elaborating that notion to the FCC.<sup>135</sup> Substantively, the 1971 Congress simply did not address the particular question involved here: it was not faced at the time with candidates who wished to air the kind of shocking and offensive advertising that characterizes the graphic anti-abortion material.<sup>136</sup>

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suspension of § 315 for Presidential and Vice Presidential races. The access right was added in committee. S. REP. NO. 96, *supra* note 123, at 34. This might suggest that the candidate access rule was inserted in the legislation to ensure that with § 315 eliminated for some races, broadcasters would not fail to provide access to candidates.

134. *CBS v. FCC*, 453 U.S. 367 (1981). In *CBS v. FCC*, the Carter-Mondale Committee had sought to buy 30 minutes of prime time in December 1979, in conjunction with President Carter's formal announcement of his candidacy for the next election. *Id.* at 371-72. All three networks rejected the request. *Id.*

135. The Commission's authority to interpret § 312(a)(7) derives from § 303(r) of the Communications Act, which provides that the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." 47 U.S.C. § 303(r) (1994), *cited in* Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1087 & n.8 (1978) (Report and Order).

136. Much of congressional commentary justifying the access right relies on the notion that candidates should be able to inform the voters to promote well informed and intelligent voting. See *Kennedy for President Comm'n v. FCC*, 636 F.2d 417, 439-40 (D.C. Cir. 1980) (quoting Sen. Gravel's statement that "we have in the technology of television the potential renaissance of the Athenian forum where the public gathers, political contenders debate the issues and enlightened citizen decisions are formed."). See also *Licensee Responsibility as to Political Broadcasts*, 15 F.C.C.2d 94, 94 (1968) (noting, with regard to § 315, that "presentation of political broadcasts . . . is an important facet [of service to the public], deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate — in turn so vital to the proper functioning of our Republic"); *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525, 534 (1959) (recognizing that "the thrust of section 315 is to facilitate political debate over radio and television").

Congressional opposition to spot advertising on the ground that it privileged the telegenic over the substantive suggests also that at least some reformists at the time had a rationalist political discourse in mind. See *Kennedy*, 636 F.2d at 440-41 &

b. Administrative and Judicial Interpretations of Section 312(a)(7):

Neither the Commission's rhetoric nor its practice gives a single and unambiguous response to the question whether channeling graphic anti-abortion ads should be considered a denial of reasonable access under section 312(a)(7).

The Commission has developed its interpretation of section 312(a)(7) largely on a case by case basis, although on a number of occasions, it has issued general statements as part of its provision of political broadcasting guidelines.<sup>137</sup> In 1972, the Commission issued a Public Notice describing the rules for political advertising in light of the passage of section 312(a)(7).<sup>138</sup> The Notice expressed the Commission's view that reasonable access did not require that all or most time at the end of a campaign be preempted for political broadcasts, but did not provide any further substantive guidelines of what the reasonable access requirement *would* entail.<sup>139</sup>

When it revisited the issue in 1978, the Commission again declined to adopt formal rules to implement section 312(a)(7) on the ground that no rules could address all possible election campaign circumstances.<sup>140</sup> Instead, it took the position that it would rely on

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n.67. For example, Senator Gravel — who had proposed S. 1, one of the three central bills considered by the 1971 Congress in connection with election reform — sought to legislate an ambitious "voter's time" plan pursuant to which each major presidential candidate would be given broadcast time. In arguing for this approach, Senator Gravel opined: "It is preposterous that ability to pay determines access to television, and that the political television fare of the American public is commercial-like campaign spots rather than rational and informative political discussion." 117 CONG. REC. 273 (1971) (statement of Sen. Gravel).

On the other hand, it would not be fair to read too much into the rhetoric of an informed electorate. The Congress, at the time of § 312(a)(7), was not explicitly distinguishing between informed and rational voters and voters swayed by sentiment and gut reaction. Instead, it was addressing the issue of whether an informed electorate would be prompted only by broadcaster political programming, or whether some governmental intervention to allow candidates to express their own positions would lead to a more democratic politics.

137. Geller & Yurow, *supra* note 129, at 399 (noting and criticizing FCC's case-by-case approach). For example, the Commission issued comprehensive guides for compliance with its political programming rules in 1978, 1984 and 1991. See Codification of the Commission's Political Programming Policies, 7 F.C.C.R. 678, 680-81 (1991) (Report and Order); Political Primer, 100 F.C.C.2d 1476 (1984); Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1089-90.

138. Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510 (1972).

139. *Id.* at 536.

140. *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1089. See also *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. at 680-81 (restating Commission's 1978 conclusion).

the reasonable, good faith judgments of its licensees to provide reasonable access.<sup>141</sup> Having announced the test of the new section as reasonableness, the FCC stated that it "will not substitute its judgment for that of the licensee, but, rather, . . . will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section."<sup>142</sup>

Nonetheless, the Commission provided guidelines "that would be applied to determine whether a particular licensee's judgment was reasonable[.]"<sup>143</sup> and to "ensure that the Congressional intent in enacting Section 312(a) is fully realized."<sup>144</sup> The Commission's guidelines require broadcasters to consider: the individual needs of the candidate as he or she expresses them; the amount of time previously provided to the candidate; potential disruption of broadcasters' regular programming; the number of other candidates likely to request equal opportunities under section 315 if the broadcaster grants a given candidate's section 312(a)(7) request; and the timing of the request.<sup>145</sup>

The application of this litany of factors by the FCC over the years has been ambiguous and, some have charged, inconsistent.<sup>146</sup> On the one hand, the Commission has always used the language of broadcaster discretion and minimal administrative second-guessing. As noted above, "so long as a station makes available to candidates a wide array of day parts and programs," candidates need not be af-

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141. *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1089.

142. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d at 536. Henry Geller has interpreted this policy statement as likening broadcasters' § 312(a)(7) obligations to those established under § 315 — pursuant to which the licensee, rather than the Commission, would determine how best to accommodate candidates. Geller & Yurow, *supra* note 129, at 404 ("In practice, the Commission has seesawed with respect to this fundamental declaration.").

143. *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. at 681.

144. *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1089.

145. *See CBS v. FCC*, 453 U.S. 367, 375 (1981).

146. *See, e.g., Geller & Yurow, supra* note 129, at 400-09; Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1516 (1986). Geller and Yurow have taken the position that the history of FCC interpretation of reasonable access is one of inconsistency, subjectivity and intrusiveness with respect, *inter alia*, to determinations regarding the start of campaigns, to limits on licensee discretion to provide spot and program time, and to claims of a multiplicity of candidates. Geller & Yurow, *supra* note 129, at 400.

forded access to specific programming of their choice<sup>147</sup> or "be given or sold any particular position on a station's schedule."<sup>148</sup> The subsequent review of the rules stated that, in negotiations with candidates, broadcasters are "permitted to consider such factors as the amount of time the candidate has already purchased and/or utilized, the total number of candidates in the race, and potential programming disruption."<sup>149</sup>

The Commission has also taken the position, since 1978, that "there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day."<sup>150</sup> In particular, in recently reaffirming its traditional approach that allows broadcasters to refuse to sell political advertising during the news, the Commission rejected arguments that limiting candidates' access to news programming impermissibly curtails their access to voters since television news programming reaches the highest concentration of those likely to vote.<sup>151</sup> Instead, the Commission explicitly balanced the candidates' rights to access and the public interest in broadcaster discretion:

We continue to believe that allowing the station discretion to refuse to run political advertising within its news programming does not unreasonably hamper the access of

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147. *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. at 682. The Commission expressed its views in 1978 as follows:

[A]lthough a candidate for federal office is entitled under Section 312(a)(7) to varied broadcast times, such candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule. We recognize that it would be very difficult for a licensee to afford "equal opportunities" to opposing candidates if one candidate has his or her spot placed adjacent to a highly rated program, which was broadcast only once or very rarely.

*Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1091. See also Geller & Yurow, *supra* note 129, at 404 & n.81 (identifying cases demonstrating broad view of licensee discretion, though arguing that agency has "seesawed" with respect to licensee discretion).

148. Public Notice, 43 Fed. Reg. 36,349 (1978).

149. *Codification of the Commission's Political Programming Policies*, 6 F.C.C.R. 5707, 5713-14 n.25 (1991) (Notice of Proposed Rulemaking). See also *CBS v. FCC*, 453 U.S. at 387 (listing factors broadcasters may consider).

150. *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1091. The 1991 Codification of the political programming rules quotes this language from the 1978 Report in connection with its finding that news programming could properly be exempted by broadcasters from reasonable access time. *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. at 682.

151. See *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. at 682 (describing arguments of media buyers against Commission policy of accepting broadcaster limitations of political time in news programming).

federal candidates to broadcast time, but does serve the public interest by preserving the journalistic integrity of the licensee in this vital area of programming.<sup>152</sup>

In the balance, the Commission seemed to weigh heavily what it took to be congressional recognition of the "special status of news programming in the context of licensees' political broadcasting obligations."<sup>153</sup> So long as federal candidates were given access to a wide array of dayparts other than news, the Commission took the position that "the public interest is served by preserving the journalistic discretion of the licensee in the vital area of news programming. Pursuant to this policy, licensees are permitted to refuse political advertising in all news programming or during some news programs or during any portion of a specific news program."<sup>154</sup>

Doctrinally, it can be argued that the Supreme Court, in upholding the federal candidate right of access, upheld nothing more than a limited right grounded on broadcaster discretion. This reading of *CBS v. FCC* would harmonize the case with the Supreme Court's prior precedent in *CBS v. Democratic National Committee*,<sup>155</sup> in which the Court held that the First Amendment does not require a general right of access to the media.<sup>156</sup>

On the other hand, a close look at decisions under section 312(a)(7) might suggest that, despite sweeping rhetoric about broadcaster discretion, the level of discretion allowed broadcasters under section 312(a)(7) is often quite limited in practice. A number of commentators suggest that this has been increasingly true since the Commission's *Carter-Mondale* decisions ultimately af-

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152. *Id.*

153. *Id.* at 682 n.26 (citing 47 U.S.C. § 315(a)(1)-(4)).

154. Codification of the Commission's Political Programming Policies, 7 F.C.C.R. 4611, 4611 (1992) (Mem. Op. & Order) (footnote omitted).

155. 412 U.S. 94 (1973) (hereinafter *CBS v. DNC*).

156. Moreover, it has been argued that, despite its rhetoric, the Court's decision in *CBS v. DNC* was driven less by faith in broadcast journalism than by the salutary effect of having political discourse under the control of governmentally accountable licensees and not private partisans who might manipulate the political process without accountability. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 127-28 (U. Chi. Press 1991); *CBS v. DNC*, 412 U.S. at 124-25. If so, it might be argued that these manipulative advertisements by the pro-life candidates have precisely the effect the Court sought to evade in *CBS v. DNC*. (On these advertisements as manipulative, see *infra* notes 322-39 and accompanying text). On this view, one might want to argue that *CBS v. FCC* should not be read to undermine the fundamental assumptions about public debate in *CBS v. DNC*. It must be kept in mind, however, that with regard to federal candidates, Congress expressed a preference for their own access to the air, as opposed to broadcaster coverage of their candidacies.

firmed in *CBS v. FCC*.<sup>157</sup> The FCC has imposed both procedural and substantive constraints on broadcaster discretion to reject access to federal candidates.

The Commission has stressed the importance of addressing the individual needs of the federal candidate requesting access. Opining that "[f]ederal candidates are the intended beneficiary of section 312(a)(7) [,]" the FCC announced in its first general statement on the subject that "a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access"<sup>158</sup> and, indeed, should be honored as much as possible under the 'reasonable' limits imposed by the licensee."<sup>159</sup> In keeping with this individualized approach, the Commission reasoned that it would be unreasonable for broadcasters to follow a policy of flatly banning access to any class or length of program or spot time offered to commercial advertisers.<sup>160</sup> The FCC also suggested that one way of trying to act reason-

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157. *Carter-Mondale Presidential Comm., Inc.*, 74 F.C.C.2d 631 (1979), *aff'd sub. nom. CBS v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981) [hereinafter *Carter-Mondale*]. Some characterize *Carter-Mondale* as a politically-motivated departure from prior Commission interpretation and practice, noting the party-line breakdown of the decisions. See *CBS v. FCC*, 453 U.S. at 418-19 (Stevens, J., dissenting) (observing that FCC had voted along party lines in case); Smith, *supra* note 146, at 1516. An account that suggests that the Commission's approach in *Carter-Mondale* was unprecedented is overly simplistic and ignores the multiplicity and complexity of Commission action in this area. A review of the Commission's pre-*Carter-Mondale* reasonable access cases suggests that both candidate-friendly and broadcaster-friendly interpretations of the reasonable access notion can be found. One article, for example, takes the view that the policies in the FCC's 1978 Order regarding the enforcement of § 312(a)(7) "look both ways" in terms of the balance between broadcasters and candidates. Geller & Yurow, *supra* note 129, at 405. See also Smith, *supra* note 146, at 1516 & n.182 (pointing to criticisms of Commission interpretations as inconsistent).

158. Commission Policy on Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1089 n.14 (1978) (Report and Order).

159. *Id.* at 1090.

160. *Id.* at 1090, 1094 (proscribing across-the-board bans). As one of the FCC's subsequent Notices of Proposed Rulemaking regarding political broadcasts described the post-1978 policy:

[S]tatements are obligated to negotiate the timing and placement of political advertising with candidates, without preexisting limitations or bans on the number or placement of spots. Stated differently, any time that is available to commercial advertisers must also be made available to federal candidates. Federal candidates have the right to formulate their own campaign media strategies, and the broadcaster must negotiate the sale of time on an ad hoc, individualized basis.

Codification of the Commission's Political Programming Policies, 6 F.C.C.R. 5707, 5713 (1991) (Notice of Proposed Rulemaking) (footnote omitted). The Commission "fe[lt] certain" that Congress wished candidates "to be at least on par with commercial advertisers . . ." *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1090. In the Commission's view, reasonable access "does not lend itself to a specific number of hours based on complex formu-

ably and in good faith would be for licensees to meet with candidates prior to a campaign "in an effort to work out the problem of reasonable access."<sup>161</sup>

In addition to requirements of individual consideration, the Commission's guidelines included the requirements that licensees provide access to prime time programming, absent unusual circumstances,<sup>162</sup> and that they always make prime time spot announcements available. The Commission's political broadcasting primers have consistently made clear that broadcasters cannot simply exempt certain dayparts from the periods they will make available for sale to federal political candidates. In addition, the Commission has consistently taken the position that stations "may not use a denial of reasonable access as a means to censor or otherwise exercise control over the content of political material, e.g., by rejecting it for nonconformance with any of the station's suggested guidelines."<sup>163</sup>

Therefore, the Commission's rhetoric of broadcaster discretion may stand in contrast to the extent to which rational broadcasters are likely to capitulate to candidate demands.<sup>164</sup> In *CBS v. FCC*

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las. Rather, what constitutes 'reasonable access' depends on the circumstances surrounding a particular candidate's request for time and the station's response to that request." *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. 678, 681 (1991) (Report and Order). The Commission revised its comprehensive 1978 guide to the political programming rules in 1984. *Political Primer 1984*, 100 F.C.C.2d 1476 (1984). The *Primer* reiterated the Commission's aversion to flat bans. *Id.* at 1524. The Commission's political broadcasting rules were subsequently codified again in 1991. In the new ruling, the FCC said it would continue to rely on the reasonable good faith judgments of licensees as to what constitutes reasonable access; that it would continue to rely on the guidelines set out in *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1089-95, and approved in *CBS v. FCC*, 453 U.S. 367 (1981); and that it would retain its policy of permitting stations to ban federal candidates from news programming on the ground that "section 312(a)(7) was never intended to provide candidate access to specific programming." *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. at 682.

161. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 536 (1972).

162. *Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. at 681. The meaning of this statement is unclear. It could mean that prime time could be precluded under certain substantive circumstances. It could also refer to the number of contenders who would have to be provided equal opportunities during prime time if any one candidate were provided prime time access.

163. *Codification of Commission's Political Programming Policies*, 7 F.C.C.R. at 681 (citing *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d at 1094).

164. After all, given the death penalty of license revocation that can attach to a single violation of § 312(a)(7), and given the broad language of the majority's opinion in *CBS v. FCC*, 453 U.S. 367 (1981), the rational broadcaster would be quite risk-averse. See, e.g., Kenneth M. Kwartler, Note, *Political Broadcasting by Independent Committees: A Proposal for Eliminating the Federal Communications Commis-*



itself,<sup>165</sup> for example, the candidate's needs prevailed, although the networks had shown that there would have been quite substantial interference with their scheduling function if they were required to accept the thirty minute spots when President Carter wanted them aired.<sup>166</sup> Despite the broadcasters' showing, the Court did not second-guess the FCC's interpretation of the breadth of the Congressional mandate for reasonable access. Instead, the majority found that the FCC's asserted position of accepting broadcaster judgments, so long as they took into account the relevant factors in good faith, assured that the intrusion on broadcaster discretion was not sufficient to create a First Amendment problem. And, having reviewed the Commission's criteria for determining reasonableness, the Court did not find the standards to be arbitrary or capricious.<sup>167</sup> Risk-averse broadcasters acquainted with *CBS v. FCC*<sup>168</sup> would naturally consider paramount the needs and purposes of the candidates.<sup>169</sup>

Most importantly, although broadcasters who can show individualized consideration of candidates' requests without adopting blanket rules are rarely, if ever, found to have declined to provide reasonable access,<sup>170</sup> any suggestion that decisions to decline access are content-based raise FCC concern. Indeed, FCC precedent seems to prohibit section 312(a)(7) refusals of access for content-related reasons.<sup>171</sup>

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sion's *PACcess Doctrine*, 64 B.U. L. REV. 625, 633 (1984) (predicting that *CBS v. FCC* decision would result in greater broadcaster caution).

165. 453 U.S. 367 (1981).

166. See, e.g., *CBS v. FCC*, 453 U.S. at 414-17 (White, J., dissenting); Note, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 221, 229 (1981) [hereinafter Harvard Note]; Smith, *supra* note 146, at 1513-16. Justice White (joined by Justices Rehnquist and Stevens) was particularly concerned about the Commission's ruling that specialized attention should be given to the individual candidate's needs, because under that kind of standard, by definition, "there will be very little deference paid to the judgment and discretion of the broadcaster" and "[t]he demands of the candidate will be paramount." *CBS v. FCC*, 453 U.S. at 413 (White, J., dissenting).

167. *CBS v. FCC*, 453 U.S. at 386-90. Some commentators have taken the position that the FCC's emphasis on the needs of the individual candidate in the *Carter-Mondale* case was in fact somewhat of a departure from the "traditional FCC practice of according considerable weight" to the broadcasters' judgments. See Harvard Note, *supra* note 166, at 229 & n.43; Smith, *supra* note 146, at 1513-16. See also *supra* notes 146-48 and accompanying text.

168. 453 U.S. 367 (1981).

169. See, e.g., *CBS v. DNC*, 412 U.S. 94, 111; *Carter-Mondale Presidential Comm., Inc.*, 74 F.C.C.2d 631, 644 (1979).

170. See, e.g., *Citizens for LaRouche, Inc.*, 47 Rad. Reg.2d (P & F) 1197 (1980) (declining to find that station violated § 312(a)(7) by refusing to provide candidate with 30 minute prime time program spot on particular day).

171. See, e.g., *Carter-Mondale*, 74 F.C.C.2d at 669, in which CBS argued that its interpretation of § 312(a)(7) as requiring an assessment of a candidate's purpose

Despite the Commission's asserted concerns about broadcaster denials of access for content-based reasons, however, it could still be argued that the November Ruling is not an arbitrary and unreasonable reading of the legislation. First, although concern about the impact of particular speech content on the public has never before served as an articulated justification for the exclusion of certain time slots from reasonable access, the Commission took the position in its November Ruling that its precedent in allowing broadcasters to close news programming to section 312(a)(7) access was a recognition that licensees could permissibly take the public impact of political spots into account in determining access under section 312(a)(7). The interest that the Commission purported to protect in its news exemption decision was the broadcaster's asserted journalistic interest in the integrity of its news programming.<sup>172</sup> The November Ruling, however, provides a plausible rereading of that decision. Rather than an abstract endorsement of broadcaster editorial discretion, the news exemption decision could be explained by broadcaster concerns about the possible effect on public perceptions — including assumptions of broadcaster endorsement — of political ads in the news. In any event, if the public has an interest in the journalistic integrity of the broadcast licensee in the area of news programming that can outweigh the candidate's interest in access to news programming that is most likely to target the candidate's desired audience, it could be argued that a parallel kind of balance exists as between the anti-abortion candidate's access right and the public's interest in the protection of children from harmful material.

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in seeking time would violate § 315's prohibition against censorship. The FCC stated: "nor did we state that content would be a relevant consideration in evaluating a request for reasonable access." *Id.*

This is consistent with the FCC's assumption that the "no censorship" provision of § 315 is applicable to the access provided under § 312(a)(7) as well. See *supra* note 110. In addition, it could be argued that reading § 312(a)(7) as permitting content-based decisions would nullify § 315, whose "no censorship" mandate could be argued to be absolute. This was one of the arguments made by the Media Access Project in its comments in Docket 92-254. Letter from Gigi B. Sohn & Andrew Jay Schwartzman, Counsel, Media Access Project and the Washington Area Citizens Coalition Interested In Viewers Constitutional Rights, to Donna Searcy, Secretary, Federal Communications Commission 1-2 (Jan. 22, 1993) (on file with author). See also *November Ruling*, 9 F.C.C.R. 7638, 7641 (1994) (discussing MAP's argument concerning "no censorship" provision of § 315). MAP will presumably reiterate this argument in its briefs in the appeal from the *November Ruling*. The discussion of § 315 can be found *infra* notes 178-271 and accompanying text. On the other hand, the flexibility of § 312(a)(7) might counsel reading § 315's prohibition on censorship more flexibly as well.

172. See, e.g., *CBS v. DNC*, 412 U.S. 94, 99-100 (1973).

Second, the broader structure of section 312 as a whole suggests that an FCC decision to permit broadcasters to establish a safe harbor for certain kinds of shocking speech is consistent with legislative intent. Section 312(a)(6) authorizes the FCC to revoke a station license for violations of section 1464's prohibition on the broadcast of obscene or indecent speech.<sup>173</sup> If this provision were read as a statutory limit on the reasonable access guaranteed by section 312(a)(7), the limitation permitted by the November Ruling is consistent with such a structure.<sup>174</sup>

The reasonable access provision of section 312(a)(7) was apparently designed to promote the public interest in rich political discourse through the privilege granted to federal political candidates.<sup>175</sup> Even the FCC, which has on numerous occasions stated that federal candidates are the beneficiaries of the reasonable access mandate, recognizes that those candidates are awarded access in a fiduciary capacity.<sup>176</sup>

This particular problem is doctrinally difficult because it pits several aspects of the public interest against one another: the interest in informed political discourse; the interest in journalistic freedom and editorial control; and the interest in the protection of children and parental supervision. There is a conflict, for example, between the public interest in untrammelled debate on issues of momentous social import, no matter how ugly or unruly, and the public interest in the welfare of children who might be harmed by graphic abortion material. Given this conflict — and in light of the constitutionally compelling interest in the protection of children affirmed in the *Ferber*<sup>177</sup> line of cases — a court would probably find

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173. See also *Luken Staff Memorandum*, *supra* note 41, at 7 n.17 (on file with author) (concluding that this provision "must be read to carve an exception to Section 312(a)(7)").

174. On the other hand, one could also conclude that the § 312(a)(6) provision presents not a floor, but a ceiling on the limitations statutorily envisioned for § 312(a)(7). This would mean that even though reasonable access might not have to be provided for material that violates § 1464, the exclusion of material that does not rise to that level of law violation (and that is only otherwise "harmful to children") could not take advantage of the structural § 312(a)(6) argument.

175. See discussion *supra* notes 123-26 and accompanying text.

176. See, e.g., *CBS v. DNC*, 412 U.S. 94, 102 (1973); *Carter-Mondale Presidential Comm., Inc.*, 74 F.C.C.2d 631, 644 (1979), *aff'd sub nom. CBS v. FCC*, 453 U.S. 367 (1981).

177. *New York v. Ferber*, 458 U.S. 747 (1982) (upholding conviction of child pornography seller and explicitly stating that state's interest in safeguarding physical and psychological well-being of minors is compelling). See also NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* 119-36 (1995) (on "child's First Amendment" and special constitutional role of the protection of children).

permissible a reading of the textually ambiguous section 312 that would permit the Commission's decision to allow broadcasters to consider the interests of children as well as candidates in determining reasonable access in particular instances.

## 2. *The Prohibition of Censorship Under Section 315:*

By contrast to section 312(a)(7), which requires reasonableness and thus provides for administrative interpretation, the censorship prohibition of section 315 is stated in absolute terms. Having established the principle of equal opportunities for the use of broadcast stations by legally qualified political candidates, the statutory language in section 315 cautions that "such licensee shall have no power of censorship over the material broadcast under the provisions of this section."<sup>178</sup> The FCC adopted an anti-discrimination regulation addressing political broadcasting as a gloss on section 315.<sup>179</sup> This naturally raises two questions: first, what is meant by censorship, and second, whether the channeling of political messages with harmful content should be considered censorship under the statute or discrimination under the regulation interpreting the statute.

While I conclude in this discussion that there are no clear answers to those questions in the legislative history, and while the weight of FCC and judicial precedent has interpreted section 315 strictly, there is sound basis for the interpretation of section 315 in the November Ruling. Given the deference traditionally accorded to agency interpretations of statutes, and in light of prior judicial approval of channeling as a means of resolving constitutional conflicts in the indecency area, it is likely that the FCC's interpretation of section 315 would survive judicial scrutiny.

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178. 47 U.S.C. § 315(a) (1995).

179. 47 C.F.R. § 73.1941(e) (1994). Pursuant to this non-discrimination regulation, broadcasters cannot permissibly discriminate between candidates in either charges or service. The question then raised is whether the channeling of graphic anti-abortion advertisements works as a discrimination against anti-choice candidates. This section is the renumbered (but otherwise unchanged) § 73.1940 of the Commission's rules. It provides, *inter alia*, that "[i]n making time available to candidates for public office, no licensee shall make any discrimination between candidates in . . . practices . . . or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage." *Id.* See also *infra* note 272 and accompanying text. Discussion of this provision is surprisingly absent from the parties' comments and the FCC decisions in the abortion ad matter.

a. Legislative History and the Meaning of Censorship in Section 315:

Section 315 was essentially adopted wholesale from its predecessor Section 18 of the Radio Act of 1927.<sup>180</sup> The section 315 prohibition on censorship was not addressed by the Congress that adopted the 1934 Communications Act.<sup>181</sup> Nor were there proffered definitions of censorship or clear discussions of the meaning of the prohibition on broadcaster censorship in the legislative history of the Radio Act of 1927.<sup>182</sup>

The Radio Act of 1927, which was the first comprehensive federal regulation of radio, was passed against a political background of complaints by candidates that they had been discriminatorily denied access to airtime by broadcasters.<sup>183</sup> The discussion in Con-

180. 44 Stat. 1170 (1927); *CBS v. DNC*, 412 U.S. 94, 105-07 (1973); HARRY P. WARNER, *RADIO AND TELEVISION LAW* 312 (1948); John W. Dean, III, *Political Broadcasting: The Communications Act of 1934 Reviewed*, 20 FED. COMM. B.J. 16, 20-21 (1966); Edward De Grazia, *Equal Political Defamation For All: Section 315 of the Federal Communications Act*, 20 GEO. WASH. L. REV. 706 (1951).

181. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 532 (1959). H.R. CONF. REP. NO. 1918, 73rd Cong., 2d Sess. 26, 49 (1934) ("Section 315 on facilities for candidates for public office is the same as section 18 of the Radio Act. The Senate provision, which would have modified and extended the present law, is not included in the substitute."); WARNER, *supra* note 180, at 318. *See also infra* notes 207-08.

182. For accounts of the legislative history of the Radio Act of 1927, *see, e.g.*, ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES, VOLUME I — TO 1933*, 197-202 (1966); HUGH CARTER DONAHUE, *THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT?* 1-18 (1989); JONATHAN W. EMORD, *FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT* 167-71 (1991); WARNER, *supra* note 180; J. Roger Wollenberg, *Title III: The FCC as Arbiter of "The Public Interest, Convenience and Necessity," in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934* 61, 73 & n.88 (Max Paglin ed., 1989). *See also* BERNARD SCHWARTZ, *THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 2075-372* (1973) (collecting legislative materials).

It should be noted that both § 29 of the Radio Act of 1927 and § 326 of the Communications Act of 1934 included provisions prohibiting censorship by the Federal Radio Commission and the Federal Communications Commission respectively. Radio Act of 1927, § 29, 44 Stat. 1162 (superseded 1934); Federal Communications Act of 1934, § 326, 48 Stat. 1064 (1934), *amended by* 47 U.S.C. §§ 151-613 (1995).

183. DONAHUE, *supra* note 182, at 9-11; David H. Ostroff, *Equal Time: Origins of Section 18 of the Radio Act of 1927*, 24 J. BROAD. 367, 367-72 (1980). *See also* Note, *Radio: Communications Act — Section 315 — Censorship — Equal Facilities for Political Candidates*, 7 AIR L. REV. 313, 314 (1936) ("The frequent comments in the public press would seem to indicate that discrimination and unwarranted political censorship are by no means foreign to the American broadcasting system."); Seymour N. Siegel, *Censorship in Radio*, 7 AIR L. REV. 1, 4-7 (1936) (discussing radio access during Roosevelt Administration's early days). *See also* *Hearings on H.R. 7357*, 68th Cong., 1st Sess. 83 (1924). Some commentators suggested examples of discriminatory practices by broadcasters even after passage of § 315 in 1934. *See, e.g.*, De

gress largely concerned the model of regulation to be adopted for the still-new medium of radio. One option was the common carrier model, promoted by progressive legislators as the system "promising the fullest access opportunities for candidates and discussion of public affairs."<sup>184</sup> Supporters of the common carrier approach argued for it largely on grounds of discrimination by broadcasters between candidates and between people of different views on political questions.<sup>185</sup> As is noted below, the common carrier model was ultimately rejected for broadcasting in the Radio Act of 1927 and the Communications Act of 1934.<sup>186</sup> Instead, the early legislation constituted a compromise between a common carrier and a traditional editorial model — providing no affirmative rights of access to the air to anyone, but assuring equal opportunities if access were granted to one political candidate.<sup>187</sup>

Congressman Wallace White's bill to reform broadcasting — one of the 1927 Act's parents — did not specifically deal with the issue of political broadcasts.<sup>188</sup> Nevertheless, the bill was specifically directed at curtailing what Congressman White saw as a dangerous monopoly in the infant industry.<sup>189</sup> Floor discussion of the bill made clear that freedom of speech was a value intended to underlie the legislation.<sup>190</sup> Moreover, House floor discussions raised specific

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Grazia, *supra* note 180, at 356-58. The first attempt to invoke § 315 itself apparently came in 1936 when a radio station flatly refused to broadcast a radio speech by the Communist Party nominee. Harry R. Blaine, *Equality, Fairness and 315: The Frustration of Democratic Politics*, 24 MD. L. REV. 166, 169 (1964).

184. DONAHUE, *supra* note 182, at 3; BENNO SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 141-44 (1976). See 67 CONG. REC. 5478-5504 (comments by Progressive legislators in support of a common carrier model).

185. See, e.g., DONAHUE, *supra* note 182, at 5, 9-12.

186. See *infra* notes 196-204, 209.

187. *Id.*

188. 67 CONG. REC. 5480 (1926) (statement of Rep. White); Dean, *supra* note 180, at 21; Ostroff, *supra* note 183, at 372.

189. EMORD, *supra* note 182, at 167.

190. See, e.g., 67 CONG. REC. 5480 (1926); DONAHUE, *supra* note 182, at 1 & n.1. Congressman LaGuardia sought assurance that there was a guaranty of free speech over the radio. 67 CONG. REC. 5480 (1926) (remarks of Rep. LaGuardia). Congressman White replied that his bill "[did] not touch that matter specifically. Personally, I felt that we could go no further than the Federal Constitution does in that respect. The pending bill gives the Secretary no power of interfering with freedom of speech in any degree." *Id.* (remarks of Rep. White). Congressman Blanton inquired into whether the bill dealt with slanderous political attacks of one party or individual upon another; and Congressman Woodruff asked whether Congress "[c]ould . . . take action in regulating what a person might say over the radio without abridging the right of free speech?" *Id.* (remarks of Rep. Woodruff). Congressman White responded to Congressman Woodruff: "You get very near censorship when you undertake to do that." *Id.* (remarks of Rep. White). See also Seymour N. Siegel, *Attitude of Congress on Censorship*, in RADIO CENSORSHIP 58-59

concerns about discrimination in political broadcasts. Congressman Davis complained about both discriminatory access and unequal rates granted to political candidates by broadcasters.<sup>191</sup> Texas Democrat Luther Johnson's eloquent attempt to amend the White bill to include an equal access provision was derailed only because of the Chair's procedural ruling that the amendment was out of order.<sup>192</sup>

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(H.B. Summers ed., 1939). It should be noted, of course, that the censorship issue underlying that day's Congressional colloquy appeared directly to concern censorship by the government (and particularly the Secretary of Commerce — then the powerful Herbert Hoover — to whom the White bill would have remitted full jurisdiction over radio). See, e.g., DONAHUE, *supra* note 182, at 6-9 (on Hoover's power and strategic maneuvering as Commerce Secretary).

191. Representative Davis complained of broadcaster censorship of news and politics, relying on congressional testimony by AT&T Vice President W.E. Harkness that the company routinely rejected requests to use its toll broadcast facilities. 67 CONG. REC. 5483 (1926). Taking the position that "[w]e do not censor — we edit[.]" Mr. Harkness had likened AT&T to any other publication with the right to reject material presented. *Id.* at 5484. Harkness stated the standard as follows: "We feel if the matter is unfair or contains matter which the public would not care to hear, we may reject it." *Id.* Congressman Davis reminded the House that broadcasters

can permit one candidate to be heard through their broadcasting stations and refuse to grant the same privilege to his opponent. They can permit the proponents of a measure to be heard and can refuse to grant the opposition a hearing. They can charge one man an exorbitant price and permit another man to broadcast free or at a nominal price. There is absolutely no restriction whatever upon the arbitrary methods that can be employed, and witnesses have appeared before our committee and already have given instances of arbitrary and tyrannical action in this respect, although the radio industry is now only in its infancy.

67 CONG. REC. 5483 (1926). See also H.R. REP. NO. 464, 69th Cong., 1st Sess. 18 (1926) (discussion between Rep. Davis and W.E. Harkness regarding AT&T's practice of rejecting some purchasers of airtime). Congressman Davis stated: "I am even more opposed to private censorship over what American citizens may broadcast to other American citizens . . . . There is nothing in the present bill [the White bill] which even pretends to prevent it or to protect the public against it." *Id.*

192. 67 CONG. REC. 5558-61 (1926). Congressman Johnson proposed "[t]hat the broadcasting stations shall be required by a mandatory provision of law to serve the public like other public-service concerns, and in so doing shall not be permitted to discriminate against anyone, either as to service or rates." *Id.* at 5558. Short of that, Congressman Johnson argued for an amendment that would provide equal facilities and rates, without discrimination, to all political parties, candidates for office, and proponents and opponents of all political questions. *Id.* at 5559-60. He made clear that fear of media power in the political arena was a central concern that animated his support for a common carrier regime. He asked:

What greater monopoly could exist than where a radio company could give the free use of its line to one candidate for office, one contender of some economic theory, and then deny such . . . to those who are on the other side of the question? . . . If the strong arm of the law does not prevent monopoly ownership, and make [price] discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most

On the Senate side, Senator Clarence Dill had proposed his version of a radio regulation bill, designed to grant full authority over the regulation of radio to an independent radio commission.<sup>193</sup> Senate discussions were even clearer than those in the House in articulating legislative concern about access to the air for political candidates and points of view on political issues. Some members of Congress strongly objected to broadcaster discretion to reject requests for airtime and to edit broadcast material, contending that such discretion was nothing more than "private censorship."<sup>194</sup> Senator Heflin characterized licensee pre-broadcast review of political speeches as "tyranny" and called for uncensored and non-discriminatory access to Republicans and Democrats alike.<sup>195</sup>

In keeping with those views, the bill reported to the Senate by the Interstate Commerce Committee prohibited discrimination in the use of broadcasting stations for the discussion of matters of public interest and required that broadcasters be deemed common carriers for the purpose of political broadcasts.<sup>196</sup> The then-

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powerful weapon that can be wielded in a republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people.

67 CONG. REC. 5558 (1926), *quoted in* DONAHUE, *supra* note 182, at 10-11. The Johnson amendment was nevertheless rejected by the Chair as not being germane to the matters then under discussion. 67 CONG. REC. at 5560-61. *See also* Ostroff, *supra* note 183, at 372-73.

193. *See* S. REP. NO. 772, 69th Cong., 1st Sess., 1-5 (1926); EMORD, *supra* note 182, at 168.

194. 67 CONG. REC. 5484 (1926) (remarks of Congressman Davis). *See also* CBS v. DNC, 412 U.S. 94, 105 (1973) and legislative history cited therein; H.R. REP. NO. 464, 69th Cong., 1st Sess. 15-18 (1926); Wollenberg, *supra* note 182, at 73 & n.88. During the hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, Senator Wheeler took the position that "this is in the nature of a public utility. I think something must be done to permit a man to get a permit. It must be done so that the people shall not be kept off the air." *Hearings Before Sen. Comm. on Interstate Commerce on S. 1 and S. 1754*, 69th Cong., 1st Sess. 133 (1926).

195. 67 CONG. REC. 12356 (1926) (remarks of Senator Heflin):  
What business is it of one to censor a speech and say whether or not it can be made, unless it is of such a character that it ought not to be made anywhere because of obscene language or something of that kind . . . . The conditions ought to be absolutely fair. If a Republican has a speech he wants to broadcast, let him do it and say what he pleases, and let a Democrat do likewise . . . .

*Id.*

196. 67 CONG. REC. 12503 (1926). The bill provided that  
[i]f any licensee shall permit a broadcasting station to be used . . . by a candidate or candidates for any public office, or for the discussion of any



established meaning of "common carrier" entailed the notion of uncensored and non-discriminatory carriage.

Ultimately, however, Senator Dill, the floor manager of the bill and Chair of the Senate Committee on Interstate Commerce, proposed an amendment that would eliminate the characterization of broadcasters as common carriers, prohibit censorship by broadcasters, and explicitly immunize broadcasters from civil and criminal

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question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier of interstate commerce.

*Id.* See also *CBS v. DNC*, 412 U.S. at 106; *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 531-32 (1959) (discussing legislative history of 1927 Radio Act); WARNER, *supra* note 180, at 313-14.

liability for defamation.<sup>197</sup> The Dill bill was passed.<sup>198</sup> Even though Senators disagreed about whether they should "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 [in the first instance,]"<sup>199</sup> there was wide agreement that licensees should be prevented from censoring political

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197. 67 CONG. REC. 12358, 12501-02 (1926). See also *CBS v. DNC*, 412 U.S. at 106; Dean, *supra* note 180, at 20-21; Ostroff, *supra* note 183, at 374; Wollenberg, *supra* note 182, at 73; Walter A. Goldhill, Note, *Censorship of Political Broadcasts*, 58 YALE L.J. 787, 789 (1949). Senator Dill also made clear in floor discussion that the non-discrimination provision relating to political speech by candidates should be extended to rates as well as terms of service. 67 CONG. REC. 12502 (1925). On Dill's role in the bill, see EMORD, *supra* note 182, at 168. See also *CBS v. DNC*, 412 U.S. at 106 (describing Senator Dill as principal architect of 1927 Radio Act).

The Dill amendment read as follows:

If any licensee shall permit a broadcasting station to be used by a candidate or candidates for any public office, he shall afford equal opportunities to all candidates for such public office in the use of such broadcasting station: *Provided*, That such licensee shall have no power to censor the material broadcast under the provisions of this paragraph and shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast.

67 CONG. REC. 12501.

The story of the Dill amendment appears to be a fascinating example of pragmatic politics at work. Senator Dill was the Chair of the Interstate Commerce Committee that referred the common carrier version of the political speech legislation to the full Senate. Yet, having gotten the bill to the Senate, Senator Dill reneged on his Committee's proposal and suggested a different amendment. He stated during floor discussion that the common carrier provision of the bill received the most discussion and the most objection in Committee deliberation. 67 CONG. REC. at 12358. He said that the Committee "finally agreed to it [the common carrier provision] in order . . . to get the bill out of the committee. After we got it out we realized that the 'common carrier' phrase was an unwise phrase, to say the least, at this time." *Id.* Arguing that broadcasting was voluntary and unpaid by the listener, Senator Dill believed that it would be "unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid." *Id.* at 12502. Senator Dill assured the membership that he had "consulted [on his amendment] with a number of the leading broadcasters," and that although "they do not like any limitation they do agree that this will not be objectionable." *Id.* at 12358. Presumably having gotten his bill through a split committee to the Senate by appearing to give in on a crucial point regarding free access, Senator Dill then managed to get the Senate to agree to a legislative compromise that he had cleared with the regulated industry. For an account of Dill as a supporter of broadcast interests despite his image as trust-buster in the 1920s, see ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935* 126-27 (1993).

198. 67 CONG. REC. 12505 (1926); *CBS v. DNC*, 412 U.S. at 107; DONAHUE, *supra* note 182, at 15; Ostroff, *supra* note 183, at 374.

199. 67 CONG. REC. 12503 (1926) (statement of Senator Howell). See also DONAHUE, *supra* note 182, at 12 ("Progressives criticized equal time for political candidates as restrictive, confusing, palliative, narrow, and anemic."). These legislators sought a general access right, not only for candidates, but also for other citizens for discussion of public issues on a common carrier basis.

speeches.<sup>200</sup>

The House-Senate Conference Committee charged with reconciling the White and Dill bills included the equal opportunities provision as Section 18 of the new legislation, but limited it to candidates,<sup>201</sup> eliminated the Senate version's express immunity from liability,<sup>202</sup> included the prohibition on censorship without any explanation,<sup>203</sup> and clarified that the anti-discrimination principle applied to rates as well as access to airtime.<sup>204</sup> Subsequent Congressional discussion of the conference legislation reiterated free speech concerns<sup>205</sup> and addressed the scope of the equal opportu-

200. 67 CONG. REC. 12356, 12502-05 (1926). See also Port Huron Broadcasting Co., 12 F.C.C. 1069, 1073 (1948). Similarly, in the context of discussing the prohibition of censorship by the government itself, both Senator Dill and Senator Heflin spoke vehemently in support of uncensored speech. 67 CONG. REC. 12615 (1926). Senator Heflin, for example, "took the position [throughout the discussion of the radio legislation] that people ought to be at liberty to discuss anything they want to over the radio, and that the special interests ought not to be able to suppress free speech." *Id.* One commentator summarized the history as follows: "Repeatedly, senators expressed their concern that the medium was in danger of being controlled by a select few who could deny coverage to certain political topics and, most particularly, could deny members of the Senate an opportunity to present their campaign messages." EMORD, *supra* note 182, at 168.

201. H.R. REP. NO. 1886, 69th Cong., 2d Sess. 10, 18 (1927).

202. See *id.* (excluding any provision for immunity from liability). Proposals to ban all political defamation from the air had been defeated. See 67 CONG. REC. 5572-73 (1926). So was legislation designed to immunize broadcasters from liability for defamation aired pursuant to the non-censorship provision. See H.R. 9971, 69th Cong., 1st Sess., as reported with Senate amendments (May 6, 1926), cited in De Grazia, *supra* note 180, at 707 & n.8. The elimination of the immunity provision by the Conferees was not explained in the Conference Report. Goldhill, *supra* note 197, at 789; Port Huron Broadcasting Co., 12 F.C.C. 1069, 1073 (1949); Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 532 (1959). In floor discussion concerning the compromise bill in the House, Senator Blanton asked Senator Scott why the proposal to ban political defamation from the air had been eliminated from the bill in conference. 68 CONG. REC. 2567 (1927). Senator Scott's response was that "there were a number of reasons . . . . When we reached conference the question presented itself as to the legality of such a provision . . . where the right of action would attach." *Id.*

203. H.R. REP. NO. 1886, 69th Cong., 2d Sess. 18 (1927). The Conference Report simply explained § 18 as follows:

Section 18 was not embodied in the House bill. It is a modification of one of the sections of the Senate amendment. It provides in substance that if any licensee shall permit a legally qualified candidate for public office to use a broadcasting station the licensee shall afford equal opportunities to all other candidates for the same office to use the station.

*Id.*

204. See, e.g., 68 CONG. REC. 3034 (1927) (comments of Senator Dill).

205. The House discussion of free speech and anti-censorship issues was explicit. For example, on being questioned on the non-discrimination principle in the bill, Senator Scott stated, "you are trespassing very closely on sacred ground when you attempt to control the right of free speech." 68 CONG. REC. 2567 (1927).

nities notion.<sup>206</sup>

Attempts to amend the Radio Act of 1927 followed shortly on the heels of its passage.<sup>207</sup> The ultimate legislative winner — the Communications Act of 1934 — borrowed its political rules from the 1927 Act virtually verbatim.<sup>208</sup> The 1934 Act followed its prede-

206. WARNER, *supra* note 180, at 315-18; *CBS v. DNC*, 412 U.S. at 110-11. One commentator has summarized the rationales for the passage of the equal time notion in 1927 as follows:

In 1927, Congress enacted equal time for several reasons. Politicians' ability to mount electoral campaigns over radio, a new mass communications medium, was at stake. Incumbents especially wanted to secure access to broadcasting. Progressive political ideals that an informed electorate reached political decisions by voting on the basis of the fullest information supported arguments that candidates enjoy access to radio during political campaigns. Ideological and sectional politics came into play. Several key Western Congressmen had made their political careers fighting railroad and utility interests and viewed broadcasters suspiciously as the monopolists' latest incarnation. Southern Congressmen protective of the legacy of their region's peculiar institution and anxious about encroaching urbanism, were equally suspicious of Eastern-dominated radio. Perennial Democratic standard-bearer William Jennings Bryan viewed "impartial treatment of candidates" over radio as an effective counterbalance to a Republican press in contested states. All demanded equal time for candidates before a national system of licensing was put in place.

DONAHUE, *supra* note 182, at 5-6.

207. The Radio Act of 1927, as a compromise measure, had vested primary licensing authority in the Federal Radio Commission for one year, with the idea that it would be returned to the Secretary of Commerce thereafter, although the Commission would play an appellate role. EMORD, *supra* note 182, at 171 (citing J. Rosenbloom, *Appendix I, Authority of the Federal Communications Commission in FREEDOM AND RESPONSIBILITY IN BROADCASTING* 96, 113 (John E. Coons ed., 1961)). Despite the statutory plan, however, Congress renewed the independent Federal Radio Commission's jurisdiction three times, ultimately renewing it "until otherwise provided by law." *Id.* Senator Dill supported the compromise between his desire for an independent committee and Congressman White's desire to settle control of communications in the executive, apparently because he foresaw that if a commission were ever created, "we would never get rid of it." LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 62 (1987) (quoting Senator Dill); BARNOUW, *supra* note 182, at 199; DONAHUE, *supra* note 182, at 201 n.40.

President Hoover pocket vetoed the first major attempt to rewrite broadcast regulation. See H.R. REP. NO. 2106, 72nd Cong., 2d Sess. 4, 6 (1933). See also 76 CONG. REC. 3767 (1933) (remarks of Senator Dill). Hearings on this legislation again reflected many Congressmen's distaste for broadcaster censorship of any kind. See, e.g., *Hearings on H.R. 7716 Before the Senate Comm. on Interstate Commerce*, 72nd Cong., 2d Sess. 10 (1932) (remarks of Senator Wheeler). The legislation — H.R. 7716 — would have included a provision broadening the equal opportunities requirement beyond political candidates to include presenters of views on public questions. The legislation passed both Houses of Congress in 1933. Wollenberg, *supra* note 182, at 68-69. See also De Grazia, *supra* note 180, at 708; WARNER, *supra* note 180, at 315.

208. H.R. REP. NO. 1918, 73d Cong., 2d Sess. 26, 47 (1934). See WARNER, *supra* note 180, at 318; Wollenberg, *supra* note 182, at 69-70, 75. Section 315 read:

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

cessor in explicitly exempting broadcasters from the obligations of common carriage.<sup>209</sup>

The legislative history suggests that many of the legislators feared censorship and used the rich rhetoric of absolute prohibition. However, what they meant by censorship was never defined. Most importantly, broadcaster discretion over time scheduling of advertisements was not addressed. The stories told in Congressional colloquy focused on access refusals, editing, and rate discrimination. Moreover, at least some powerful congressmen assumed that some of what we might today call censorship would not be completely prohibited.<sup>210</sup> Both members of Congress and persons testifying on the issue of broadcaster immunity over the years after

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such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

H.R. REP. NO. 1918, 73d Cong., 2d Sess. 26 (1934). In the words of Senator Dill, "[t]he radio law expressly prohibits any kind of censorship by the managers of radio stations . . . [and the proposed Dill-Rayburn bill] simply writes into law . . . the provisions of the radio law as they relate to radio regulation now being enforced by the Federal Radio Commission." 78 CONG. REC. 4138-39 (1934).

Although there was virtually no specific discussion of the non-censorship aspect of section 315 during the legislative discussion of the bill that ultimately became the 1934 Act, it should be noted that various encomia to free speech on the air were made in Congress. *See, e.g.*, 78 CONG. REC. 10991-92 (1934) (remarks of Congressman Willford). Senator McFadden warned against the then-current censorship of politics by broadcasters, including network censorship policies, and called for a legislative solution (particularly in light of the impending Congressional elections of 1934). 78 CONG. REC. 3543 (1934) (remarks of Senator McFadden regarding H.R. 7986). At one point, according to Senator Dill, claims were made that the call for a new radio bill was an attempt to bring about censorship. 78 CONG. REC. 4138 (1934). Senator Dill vociferously denied any attempt to regulate freedom of the press and cited as evidence the retention of the prohibition of censorship in the 1927 Act. *Id.*

209. 48 Stat. 1066 (1934), as amended, 47 U.S.C. § 153(h) (1994). *See also* *CBS v. DNC*, 412 U.S. at 108-09; Wollenberg, *supra* note 182, at 73.

The Supreme Court pointed out in *CBS v. DNC*, 412 U.S. at 108-09 & n.4, that several additional — and ultimately unsuccessful — attempts were made to add a limited obligation on the part of broadcasters to permit access to those wishing to address public questions. *See also* Wollenberg, *supra* note 182, at 73 & nn.91-92.

210. Similarly, the Federal Radio Commission's formulation of programming standards and its imposition of sanctions — including non-renewal of license — for programming reasons were not perceived as censorship at the time. *See, e.g.*, *KFBK Broadcasting Assoc. v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931) (holding that FRC's taking account of licensee's past conduct did not constitute prohibited censorship and affirming agency's decision to deny license renewal on grounds that station's programming did not serve public interest); *Trinity Methodist Church v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir.) (en banc), *cert. denied*, 284 U.S. 685 (1932) (affirming FRC's denial of license renewal application on grounds that licensee's broadcast of vituperative sermons was not in public interest).

the enactment of sections 18 and 315 apparently assumed that section 315 permitted broadcasters to delete obscene and indecent matter from political programming.<sup>211</sup> Accordingly, even some who seemed to adopt an absolutist view of the non-censorship mandate and who would not have permitted censorship of defamation in political broadcasts nevertheless appeared to accept the propriety of censoring obscenity and indecency. This suggests that even the so-called absolutists were not wedded to complete non-intervention into the candidate's chosen speech.<sup>212</sup>

211. See, e.g., 67 CONG. REC. 12356 (1926) (remarks of Senator Heflin); Note, *Defamation — Broadcaster's Liability — § 315 of Federal Communications Act Implies Complete Immunity*, 34 ST. JOHN'S L. REV. 140, 141 (1959).

212. In addition, one commentator noted that "the Commission ha[d] never suggested that § 315 prohibit[ed] broadcasters from deleting indecent language from election speeches." De Grazia, *supra* note 180, at 713 n.41(a). In this commentator's view, there was "presumably no doubt but that a broadcaster must delete indecent language to escape liability under § 1464." *Id.*

With respect to editing for defamation, I note below that the Supreme Court ultimately held that § 315 did not permit such broadcaster intervention. See *infra* notes 231-36 and accompanying text. Although in doing so the Court characterized the legislative history as indefinite, it should be noted that some legislators attempted to harmonize the deletion of defamatory political language with the prohibitions of § 315 by substantive parsing of the asserted difference between defamation and political speech. Much of the post-1934 legislative discussion with regard to whether broadcasters should be deemed to have immunity from libel suits addresses the question of what the earlier Congresses meant by the non-censorship provision. A number of legislators took the position that the prohibited censorship related only to the content of the candidate's political message and not to its defamatory character. See, for example, the comments of Congressman Charles H. Elston:

If section 315 is given the interpretation which I think the Congress intended and not what the Federal Communications Commission says Congress intended [in *Port Huron*], there would not be any difficulty. In the first place, the part of the section that refers to censorship simply means that the licensee could not censor a person's political view.

*Hearings Before the Select Comm. to Investigate the FCC*, 80th Cong., 2d Sess. 73 (1948). See also *Hearings on H.R. 7716 Before the Senate Comm. on Interstate Commerce*, 72nd Cong., 2d Sess. 9-10 (1932) (position taken by Henry Bellows, Chairman of Legislative Committee of National Association of Broadcasters). This view is consistent with the interpretation of the non-censorship proviso adopted by one of the first state courts to address the issue of broadcaster immunity from defamation liability. In *Sorenson v. Wood*, the Nebraska court stated that the § 18:

prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from censoring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action.

243 N.W. 82, 85 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Sorenson, 290 U.S. 599 (1933) (per curiam) (on ground that decision rested on adequate non-federal ground).

These courts and legislators attempted to distinguish political speech from defamation — which they did not consider proper political speech anyway — so that the latter and not the former would be subject to control by the broadcaster. Of course, the distinction between political partisanship and defamation is often

Moreover, Congress' elimination of the language of common carriage and immunity from liability suggests that Congress did not envision a complete lack of broadcaster discretion either to deny access to political candidates or, perhaps, even to censor their broadcasts in some ways.<sup>213</sup> Admittedly, however, it is unwise to read too much into the legislature's decision to drop the language of common carriage and immunity from liability. At least one plausible reading of the Senate's retreat from common carriage for broadcasters suggests that the legislative history is one of subtle compromise. The most significant difference between the common carrier approach and the "no censorship" provision appears to be that under the Dill amendment, broadcasters could refuse to air any candidate's political broadcast so long as the denial of access were even-handed.<sup>214</sup> As a common carrier, a radio station would not have been permitted to reject any such requests for carriage. Senator Dill, in removing the common carrier language without eliminating the "no censorship" notion, provided broadcasters with a two-pronged option. Broadcaster who did not wish to carry certain political programming would not be forced to do so; however, those who chose to carry such programming would be denied the luxury of censoring speech they did not like. This result could well have been the most politically tenable way of getting wide agreement in the Senate on the issue of equality of opportunity without including the more controversial affirmative political access rights that would have been guaranteed by a common carriage provision.

Finally, it could be argued that the legislature worried most, in the early radio broadcasting context, about viewpoint discrimination by broadcasters.<sup>215</sup> There is ample evidence that broadcasters

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ephemeral. Indeed, defamatory statements about opponents may be the method by which a candidate seeks to promote his candidacy.

While graphic anti-abortion advertisements are neither defamatory nor, under recent FCC precedent, obscene or indecent, the disparity in the legislative approach to censorship of defamation on the one hand, and indecency or obscenity on the other, suggests that there might be more interpretive room in the Congressional view of the coverage of the non-censorship provision than one might think.

213. See *supra* notes 184-86, 196-97 & 201-02 and accompanying text.

214. See 67 CONG. REC. 12502 (1926) (colloquy between Senators Cummins and Dill in which Senator Dill explains that licensee need not permit any candidate to broadcast, but must not discriminate if it does permit any candidates to do so).

215. See *supra* notes 183, 190-91, 199-200 & 205 and accompanying text. See also De Grazia, *supra* note 180, at 706 ("The provisions of the section [18] were inserted to insure equality of treatment by radio stations of political parties and candidates. An appreciation of the 'political and propaganda' potentialities of radio communications inspired Congress to a provision which would preclude sta-

had discriminated among candidates in making airtime available.<sup>216</sup> Many of the Democratic legislators were concerned that what they characterized as the conservative and increasingly monopolistic radio licensees would deal preferentially with Republican candidates.<sup>217</sup> If we focused on this as the primary motive behind the equal opportunities legislation, then we could interpret the non-censorship proviso as a way of ensuring equal opportunities.<sup>218</sup> In other words, allowing equal amounts of airtime to the Democratic and Republican Senatorial candidates would not comply with the dictates of section 315 if the Democratic candidate's message were censored and the Republican candidate's message not subject to the same review or treatment.<sup>219</sup> Attention to the Congressional concern to assure broadcaster viewpoint neutrality may permit an

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tion-owner partisanship and discrimination in political elections."); Ostroff, *supra* note 183.

216. See, e.g., DONAHUE, *supra* note 182, at 9-12 (recounting claims by Senate Progressives Robert LaFollette and Hiram Johnson that they had been relegated to low-power frequencies, and by House members who claimed price discrimination in radio use during election periods); De Grazia, *supra* note 180, at 719-20 & n.68; Ostroff, *supra* note 183, at 367-72. Legislators and commentators who discussed the issue argued that such discrimination by broadcasters was common. See *supra* notes 183 & 190-91 and sources cited therein; DONAHUE, *supra* note 182, at 6 (quoting William Jennings Bryan article in N.Y. TIMES, Sept. 3, 1922).

217. Ostroff, *supra* note 183, at 368 ("The major effort came from Democrats, such as Clarence Dill in the Senate, and Ewin Davis in the House. Outside of the South the Democrats were in the political minority; since the Civil War only two Democrats had been elected President. During the mid-1920s the Democrats could not foresee the economic cataclysm which would make them into the majority party. The threat radio would follow the press by heavily favoring the Republicans might well have led some Democrats to fear for the survival of their party."). See also DONAHUE, *supra* note 182, at 6, 11; *supra* note 205. Claims of broadcaster censorship against Republican candidates were also reported after Roosevelt's election. See *supra* note 183. On "private censorship" of non-mainstream views after 1927, see MCCHESENEY, *supra* note 197, at 82-84, 245.

The rhetoric of the Progressives who sought a right of access both for candidates and for the public in the discussion of political issues was grounded in concern that broadcasters could manipulate public opinion and undermine democracy. See DONAHUE, *supra* note 182, at 15 ("The potential dangers of broadcaster manipulation of public opinion assaulted the Progressives' identification of good government with an informed electorate capable of making independent political decisions after digesting news and public affairs . . .").

218. For example, one scholar took the position that the Commission adopted the view that § 315 did not permit deletion of defamation and that § 315 would be "desecrated were broadcasters permitted to delete defamation . . . [because the Commission likely] felt . . . broadcasters could obscure discrimination by defamation deletion practices." De Grazia, *supra* note 180, at 719-20. This type of criticism interprets the non-censorship mandate not as an affirmative decision to opt for unfettered political speech, but as a transaction cost-avoiding corollary to the principle of equal treatment.

219. See, e.g., 68 CONG. REC. 3034 (1927) (colloquy between Senators Dill, Pittman and Fletcher during the Senate floor discussion of the Dill-White Conference Committee bill). Senator Pittman and Senator Fletcher were concerned to make



interpretation of section 315's censorship prohibition that focuses on non-censorship as a guarantor of viewpoint neutrality. This focus on the "no censorship" provision not as a prohibition in itself, but as part of a regime designed to provide equality in the treatment of political candidates by broadcasters, might lead to the conclusion that good faith broadcaster decisions about the public's interest, when viewpoint neutral, would be acceptable under the statute's "no censorship" provision.

Senator Dill — the architect of the Radio Act of 1927 — did subsequently describe section 18 of that legislation as "a law requiring equal treatment of candidates with no censorship of what they say."<sup>220</sup> Admittedly, it would be awkward to read this as if "no censorship" simply restated "equal treatment."<sup>221</sup> Additionally, the FCC has in the past interpreted the clause as having an independent meaning.<sup>222</sup> Nevertheless, the structure and purposes of the statute do not necessarily support blanket prohibitions of a neutral rule of censorship across the board.<sup>223</sup>

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clear that the equal opportunities provision in the bill also required equality of conditions for use (including equality of rates). *Id.*

220. *Hearings on H.R. 7716 Before the Senate Comm. on Interstate Commerce*, 72nd Cong., 2d Sess. 9 (1932).

221. Dill also made clear his understanding that the legislation's "equal opportunities" language entailed equality of treatment in conditions of access, including rates, and suggested that the FRC regulations would so provide should the measure be adopted. 68 CONG. REC. 3304 (1927). One could conclude that it would have been unnecessary to assure the Senate that regulations assuring equality of treatment would be adopted under the equal opportunities clause if Senator Dill thought that the "no censorship" proviso had accomplished that result in the statute itself.

222. In *Western Conn. Broadcasting Co.*, 43 F.C.C.2d 730 (1973), for example, the FCC interpreted as violative of § 315's "no censorship" provision a broadcaster's editing of Democratic mayoral candidates' scripts to eliminate material not in "good taste" and that he thought would harm the image of the station. As the FCC put it: "[t]he basic purpose of the absolute prohibition against censorship in section 315(a) is to assure candidates of the opportunity to use broadcast facilities unfettered by licensee judgments as to the manner of use." *Id.* at 795. In the Initial Decision, 43 F.C.C.2d 752 (1972), the Hearing Examiner had discussed the censorship issue under § 315. He found that the "basic purpose of the absolute prohibition against censorship in Section 315(a) is to assure candidates of the opportunity to use broadcast facilities unfettered by licensee judgments as to the manner of use." *Initial Decision*, 43 F.C.C.2d at 795 (citing *Farmer's Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 527, 529 (1959)).

The FCC concluded that § 315 "requires equal treatment and prohibits censorship. Here the censorship, which itself was illegal, had the effect of favoring one candidate, which *also* was illegal." *Western Conn.*, 43 F.C.C.2d at 743 (emphasis supplied).

223. Admittedly, the Supreme Court's decision in *Farmer's Educ. & Coop. Union v. WDAY, Inc.*, if read broadly, does undermine this argument. *Farmer's Educ. & Coop. Union*, 360 U.S. at 525.

b. Judicial and Administrative Precedent:

The most widely debated issue involving the meaning and extent of the "no censorship" provision of sections 18 and 315 concerned the question whether broadcasters could delete defamatory statements by legally qualified political candidates in light of the broadcasters' possible exposure to liability for defamation under state law.<sup>224</sup> For the first twenty-odd years of the 1934 Act, courts were split on the issue<sup>225</sup> and many state legislatures avoided the pitfalls of judicial conflict by enacting immunity legislation.<sup>226</sup> Until the FCC's decision in *Port Huron Broadcasting*,<sup>227</sup> where no state legislative immunity existed, broadcasters typically reviewed and deleted defamatory material despite the "no censorship" language of the federal statute.<sup>228</sup> In *Port Huron*, the Commission stated that the prohibition on censorship in section 315 was absolute, that broadcasters could not excise defamatory matter from the statements of political candidates, and therefore that they would be relieved from all liability under state law for defamation.<sup>229</sup> Broadcasters were not comforted by this decision, fearing that the Commission did not have the singlehanded authority to suspend state law.<sup>230</sup> Although several attempts were made to establish express Congressional immunization of broadcasters for the airing of defamatory political speech, none prevailed.<sup>231</sup>

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224. *Id.* at 529.

225. *Id.* at 528 & nn.2, 3 and cases cited therein.

226. See, e.g., De Grazia, *supra* note 180, at 724 and n.81; Note, *Recent Cases: Broadcaster's Immunity from Liability for Defamation in "Equal Time" Political Speeches*, 44 MINN. L. REV. 787, 790-91 & n.26 (1960) [hereinafter Minnesota Note] (discussing enactment of immunity provisions).

227. *Port Huron Broadcasting Co.*, 12 F.C.C. 1069 (1948).

228. *Id.* See also 98 CONG. REC. 7401 (1952) (describing prior history regarding defamatory political broadcasts); De Grazia, *supra* note 180, at 711 (describing pre-*Port Huron* editing of defamation by broadcasters).

229. The FCC was "of the opinion that the prohibition of section 315 against any censorship by licensees of political speeches by candidates for office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages." *Port Huron*, 12 F.C.C. at 1074.

230. *Id.* Indeed, the Supreme Court later characterized the FCC's pre-*Port Huron* views on the matter as "not clearly articulated[.]" *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 528 (1959). See also *Hearings on H.R. 7716 Before the Senate Comm. on Interstate Commerce*, 72nd Cong., 2d Sess. 10 (1932) (testimony of Henry Bellows, Chairman of the Legislative Committee of the National Association of Broadcasters).

231. Attempts to achieve a Congressional resolution to the issue occurred both before and after *Port Huron*. See, e.g., *Port Huron*, 12 F.C.C. at 1073 & n.2 (listing relevant congressional hearings from 1932 to 1943); Investigation of Federal Communications Commission, *Hearings on H.R. 691 Before the Select Committee to Investigate the Federal Communications Commission*, 80th Cong., 2d

It was not until 1959, in *Farmers Educational & Cooperative Union v. WDAY, Inc.*,<sup>232</sup> that the Supreme Court affirmed the FCC's *Port Huron* approach. The Supreme Court there held that the "no censorship" provision of section 315 prevented broadcasters from removing libelous material from political uses of stations, and, as a corollary, that section 315 granted the stations a federal immunity from state law defamation suits for libelous material broadcast pursuant to that section.<sup>233</sup> The Court stated that the term "censor-

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Sess. (1948) [hereinafter Select Committee Hearings]; H.R. REP. NO. 7062, 82nd Cong., 2d Sess. (1952); S. REP. NO. 1333, 80th Cong., 1st Sess. § 14(d) (1947); WARNER, *supra* note 180, at 362; Goldhill, *supra* note 196, at 789 & nn.13, 14 and hearings cited therein.

There are indications that despite Congress' failure to pass immunity legislation, some legislators favored an exception to the censorship proviso of § 315 for defamation. See, e.g., *Hearings on H.R. 7716 Before the Senate Comm. on Interstate Commerce*, 72nd Cong., 2d Sess. 11 (1932) (comments of the Chairman and Senator Fess). Some legislators themselves expressed doubts about the constitutionality of such proposed enactments clarifying § 315. For example, Ohio Congressman Fess expressed doubt about Congress' power to enact an immunity from defamation liability for broadcasters. 67 CONG. REC. 12503 (1926). Commentators echoed the theme. See, e.g., De Grazia, *supra* note 180, at 723. See also Goldhill, *supra* note 196, at 789 & n.14 (suggesting that congressional inaction after the 1934 Act "may have been caused by doubt as to the power of the Federal Government to provide immunity against state defamation law[,] (citing *Hearings on S. 814 Before Senate Comm. on Interstate Commerce*, 78th Cong., 1st Sess. 63-64 (1943))). See also *Hearings on H.R. 7716 Before the Senate Comm. on Interstate Commerce*, 72nd Cong., 2d Sess. 10 (1932).

Later refusals to act have been attributed to different congressional motives. See, e.g., De Grazia, *supra* note 180, at 713-14 and accompanying notes. Initially after *Port Huron*, a House Select Committee to Investigate the Federal Communications Commission addressed the broadcasters' concerns about the dilemma in which they felt placed as a result of the decision. See Select Committee Hearings, *supra*. The hearings did not ultimately lead to Congressional action, perhaps then because of FCC Chairman Coy's assurances that "for the time being, at least until the matter is settled, the honest and conscientious broadcaster who uses ordinary common sense in trying to prevent obscene and slanderous statements from going out over the air, need not fear any capricious action." De Grazia, *supra* note 180, at 714 & n.44 (quoting First Interim Report Pursuant to H.R. 691, H.R. REP. NO. 2461, at 2 (1948) and concluding that "[t]here appears to be no question but that the House Select Committee recommended no legislation because it felt assured the Commission would not enforce the *Port Huron* decision."). Congress' failure to enact an immunity provision expressly has also been explained as resulting from "the inability of the legislators to agree on what the rule should be, rather than whether there should be immunity or not." Note, *Defamation — Broadcaster's Liability — Section 315 of Federal Communications Act Implies Complete Immunity*, 34 ST. JOHN'S L. REV. 140, 146 (1959). Still another explanation mentioned by commentators was that such amendments to § 315 were proposed in bills that were objectionable and rejected on other grounds. Goldhill, *supra* note 196, at 790 n.14.

232. 360 U.S. 525 (1959).

233. *Farmers Educ. & Coop. Union* involved a speech by a Senatorial candidate — aired as a matter of equal opportunities under § 315 — in which he accused his opponents and the Farmers Union of "conspiring to 'establish a Communist Farmers Union Soviet right here in North Dakota.'" *Id.* at 526-27. Two of the candidates in the race had made speeches over WDAY and the station felt compelled by

ship," as it is "commonly understood, connotes *any* examination of thought or expression in order to prevent publication of objectionable material."<sup>234</sup>

The Court found neither "clear expression of legislative intent, nor any other convincing reason" to suggest that Congress meant to give the term "censorship" in section 315 a narrower meaning than the one attributed by the Court to common understanding.<sup>235</sup> Rather, the Court said, the legislative history "shows a deep hostility to censorship either by the Commission or by a licensee."<sup>236</sup> Moreover, as a policy matter, the Court found that permitting broadcasters to censor allegedly libelous remarks "would undermine the basic purpose for which section 315 was passed — full and unrestricted discussion of political issues by legally qualified candidates."<sup>237</sup>

The FCC's prior cases deploy restrictive language about broadcaster discretion over political advertising. Although the FCC has implied that the "no censorship" provision of section 315 would not permit broadcasters to refuse to air material that presented clear

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§ 315 to make the station available to the third candidate. The Farmers Union then sued both the candidate and the station in state court for defamation.

The holding of the case, as suggested in text above, has two parts. Although four Justices dissented in *Farmers Educ. & Coop. Union*, disagreeing with the majority's assertion of broadcaster immunity from state defamation law, all the Justices agreed that allegedly libelous material could not be eliminated from political broadcasts under § 315. *Id.* at 535-36 (Frankfurter, J., dissenting) (concluding that both language and legislative history of § 315 "call for the conclusion reached in Part I of the Court's opinion, namely, that WDAY could not have lawfully deleted from A.C. Townley's broadcast his defamation of petitioner").

234. *Id.* at 527.

235. *Id.*

236. *Id.* at 528 & n.6.

237. *Id.* at 529. The Court characterized the 1927 Act's predecessor of § 315 as grounded on a congressional recognition of radio's "potential importance as a medium of communication of political ideas . . ." *Id.* This recognition led Congress to "foster [radio's] broadest possible utilization" by encouraging access to broadcasters' facilities by political candidates "without discrimination" and by insuring that such candidates "were not to be hampered by censorship of the issues they could discuss." *Id.* The Court saw it in line with the tradition of free expression for Congress to have forbidden both the Commission and individual licensees any power of censorship over political broadcasts. *Id.* at 529-30.

Given the difficulties involved in making judgments about whether any given statement is defamatory, and given the time limitations inherent in political campaigns, the Court feared that "all remarks even faintly objectionable would be excluded out of an excess of caution" by fearful broadcasters and censorship of assertedly defamatory matter "would almost inevitably force a candidate to avoid controversial issues . . . and hence restrict the coverage of considerations relevant to intelligent political decision." *Id.* at 530-31.

and imminent danger of lawless action,<sup>238</sup> the FCC historically has employed a rhetoric that heavily favors the interests of political advertisers.

The FCC has described section 315 as designed to "permit a candidate to present himself to the electorate in a manner wholly unfettered by licensee judgment as to the propriety or content of that presentation."<sup>239</sup> Even more bluntly, the FCC has attributed to Congress an intent to "allow a candidate complete control over the content and format of his or her media campaign."<sup>240</sup> The FCC has resisted any broadcaster incursion into the content of political advertising, even when claimed necessary to avert harm. For example, despite *dicta* that the danger of imminent lawless action would be sufficient to permit "censorship" of speech protected under section 315, the FCC's broad interpretation of the section 315 prohibition of censorship has been applied even against a credible factual claim that language in political advertising would incite people to violence.<sup>241</sup>

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238. See Letter to Lonnie King, 36 F.C.C.2d 635, 637 (1972) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). See also *supra* note 79 & 99, *infra* note 241; *Luken Staff Memorandum*, *supra* note 41, at 7. The agency staff has also informally opined that § 315 political uses would not be deemed exemptions to the prohibitions on the broadcast of indecent and obscene speech under § 1464 of the federal criminal code. *Luken Staff Memorandum*, *supra* note 41.

239. *Gray Communications System, Inc.*, 19 F.C.C.2d 532, 535 (1969). In *Gray*, the Commission held that the definition of "use" under § 315 was not limited to the political candidate's appearance alone, but would extend to his appearance in a lengthy variety show he planned. *Id.* at 533. The FCC also stated that where a candidate's personal appearance is the focus of a program, that program satisfies the requirements of being a "use" for purposes of § 315 and "the station is prohibited from censoring the candidate's choice of program material." *Id.* at 534. While it reiterated its commitment to a case-by-case review of § 315 use questions, the Commission in *Gray* did advise licensees to be aware that "the Commission views the noncensorship provision of § 315 as including all program material presented as part of a candidate's use of a broadcast facility, with no right of prior approval of format or content on the part of the licensee." *Id.* at 535. The Commission later said that if a candidate uses a broadcast station under § 315, "the station cannot edit his material in any way or limit what he talks about." *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2220 (1978).

240. *In re Lane Denton v. The LBJ Co.*, 61 F.C.C.2d 1163 (1976) (clarifying definition of "use" for purposes of § 315 and finding a violation of section's "no censorship" provision in station's initial refusal to sell airtime to candidate for an ad the station considered libelous, misleading and deceptive). The FCC admonished the station that "[t]he licensee is required to respect the candidate's choices in this area and not attempt to substitute his judgment for that of the candidate." *Id.* at 1166.

241. In a case involving a virulently and explicitly racist and inflammatory political advertisement by a candidate for the Democratic nomination for Senator from Georgia in the 1970s, the FCC refused to advise licensees that they could decline to air the advertisement without violating § 315. Letter to Lonnie King, 36 F.C.C.2d 635, 636-37 (1972). See also *supra* notes 79, 99 & 238 and accompanying

In the past, the FCC has also deemed impermissible refusals to air candidate material that is "vulgar" or "in bad taste" or harmful to the station's image.<sup>242</sup> The Commission has enforced the "no

text. The mayor of Atlanta had issued an executive order urging broadcast stations not to accept advertising with such racist language on the ground that it was calculated to incite listeners to violence. *Id.* The Atlanta office of the NAACP and other organizations petitioned the Commission to tell broadcast stations that they could permissibly decline to air the Stoner filth.

The FCC held that:

the relief requested in your letter would amount to an advance approval by the Commission of licensee censorship of a candidate's remarks . . . . Despite your report of threats of bombing and violence, there does not appear to be that clear and present danger of imminent violence which might warrant interfering with speech which does not contain any direct incitement to violence. A contrary conclusion here would permit anyone to prevent a candidate from exercising his rights under Section 315 by threatening a violent reaction. In view of the precise commands of Sections 315 and 326, we are constrained to deny your requests.

*Id.*

Interestingly, Senator Baker noted in the Senate Report on the campaign reform legislation that would later become the Federal Election Campaign Act that he had offered an amendment to the bill in the Commerce Committee that would have permitted broadcasters to refuse to air racially inflammatory political advertisements. S. REP. NO. 92-96, 92nd Cong., 1st Sess. 95 (1971), *reprinted in* 1972 U.S.C.A.N. 1818-19 (additional views of Mr. Baker):

under present law . . . licensees . . . are prohibited from censoring the material broadcast in political advertisements . . . even though the material may be designed solely to arouse the most base prejudices of the community against the opposing candidate . . . . It seems to me that there is no public interest in requiring licensees to broadcast racially inflammatory material simply because such material is contained in the political commercials of a candidate for public office. The amendment which I have proposed would permit a licensee to refuse to broadcast such material subject to the safeguard that the licensee would be liable for damages to a candidate for such refusal if it can be shown that the refusal was prompted by considerations other than concern for public health, safety and welfare.

*Id.* The proposed amendment was not accepted in Committee. *Id.* at 95-96. Baker reintroduced his amendment during final Senate deliberations over one of the contending election reform bills in 1971. Senator Pastore asked Baker to withdraw the amendment and bring up the subject at the next scheduled meeting between the Subcommittee on Communication and the FCC. Senator Baker complied with the request to withdraw. *See* 117 CONG. REC. 13295 (daily ed. Aug. 5, 1971).

242. Gloria Sage, 62 F.C.C.2d 135 (1976), *rev. denied*, 63 F.C.C.2d 148 (1977); *Western Conn. Broadcasting Co.*, 43 F.C.C.2d 730 (1973). *Gloria Sage* involved a complaint about a five minute political program by Ellen McCormack which a viewer attacked as "a vulgar airing of her anti-abortion views[.]" 62 F.C.C.2d at 135. In *Western*, the station barely avoided having its license revoked as a result of the general manager's deletions of Democratic candidates scripts. (Despite these problems, however, the station's license was not revoked because the overall programming in the field of public affairs was "good enough to tip the scales against revocation." *Id.* at 741. The station was fined the maximum monetary fine allowed at the time, however. *Id.*) The standard the broadcaster had used for his editorial decisions was "good taste," and, in his view, "[m]aterial was not in good taste if it involved name-calling, a person's reputation, or an exaggeration, or seemed other-

censorship" provision against licensee attempts "to prohibit the expression of what it considered 'objectionable' speech."<sup>243</sup> Also, it has bluntly stated that a station "refus[ing] to carry [a] commercial because it found the content 'offensive' would be subject to complaint by the candidate and disciplinary action by the Commission."<sup>244</sup>

The FCC similarly suggested that section 315's prohibition of broadcaster censorship, along with section 326's non-censorship mandate to the Commission, precluded it from preventing the broadcast of political advertisements alleged to be false and misleading.<sup>245</sup> Indeed, broadcasters could not even censor political programming consisting of spliced and edited material susceptible to distortion.<sup>246</sup>

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wise objectionable." *Id.* at 732. See *supra* note 222 (discussing *Western*). See also *Notice on the Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2270; 43 Fed. Reg. 36,342, 36,374 (1978) (citing and characterizing *Sage* and *Western* as examples of censorship of candidates).

243. Barry Commoner & LaDonna Harris, 87 F.C.C.2d 1, 6 (1980).

244. *Id.* at 6. In *Barry Commoner* itself, the candidate claimed that § 315 was violated by NBC's initial refusal to accept an advertisement containing the word "bullshit," and the network's subsequent transmission of the unedited commercial to its affiliates with an advisory as to the offensive nature of the ad's language, allowing affiliates to refuse to broadcast the commercial. *Id.* The Commission did not find NBC to have violated the "no censorship" provision, but did advise the network in the future to assure that its advisories clarified the obligation to broadcast even offensive political speech aired under § 315. *Id.* In *dictum*, the Commission also made clear that if the affiliated broadcast stations had in fact refused to carry the commercial because of its offensive content, that would be a proper subject of disciplinary action by the Commission. *Id.* at 6-7.

The issue of obscene speech during a § 315 use arose in *In re Larry Flynt*, 1984 FCC LEXIS 2675 (1984). Flynt, the publisher of *Hustler* magazine who for a time sought the Republican nomination for President, claimed that a radio station had impermissibly censored him during an appearance covered by § 315. *Id.* The Commission did not reach the issue of the claimed censorship, because it found that Flynt was not a legally qualified candidate for public office subject to the protections of § 315. *Id.* at 4-5. See also *supra* note 42.

245. Alan S. Burstein, 43 F.C.C.2d 590, 591 (1973). See also *In re Lane Denton v. The LBJ Co.*, 61 F.C.C.2d 1163 (1976), *supra* note 240 (concluding that licensee violated § 315 in refusing to air misleading, deceptive ad).

246. *Capitol Broadcasting Co.*, 10 R.R.2d 579 (1967) (refusing to designate for hearing renewal application of broadcast station that had aired political program by one candidate that his opponent characterized as distorted and misleading because it consisted in large part of a "debate" collated from various preexisting film clips). *Capitol Broadcasting* boasts a strong dissent by Kenneth Cox, arguing that § 315 should not be read to prevent broadcasters from investigating claims that political advertising is false and deceptive. *Id.* at 585. The majority did not pass on the substantive question of whether the video was in fact fraudulent or distorted. Instead, it dealt with the claim as a simple issue in which the licensee could not censor the material broadcast by a political candidate because it was aired as part of a use protected under § 315. *Id.* at 582.

The FCC has also consistently held that a broadcaster cannot dictate the content of political advertisements by limiting the subject matter or the scope of their discussions. Having qualified for broadcast time under the equal opportunities of section 315, "the candidate for political office cannot thereafter become disqualified by refusing to meet the station licensee's standard for orthodox campaign speeches."<sup>247</sup>

Nor has the FCC limited its interpretation of censorship either to outright refusal to air a political spot or to deletion or change of content.<sup>248</sup> Conditions potentially affecting the political spot's content have been deemed impermissible. Thus, for example, the FCC has held that a licensee cannot condition a candidate's appearance on his limiting his comments to one topic<sup>249</sup> or extracting the candidate's promise to discuss only matters discussed by other candidates.<sup>250</sup> Nor can a station ask for a candidate's script or tape in

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247. In *WMCA Inc.*, for example, the FCC found that a broadcast station had violated § 315 by refusing to air advertisements by the Socialist Labor Party candidate for New York City Council President. 40 F.C.C. 241 (1952). The licensee had justified its refusal on the ground that "candidates must make a substantial showing of their qualifications in their radio scripts[,] and this candidate's ads eschewed discussion of the election and the candidate's qualifications in favor of philosophical discussions about Socialist ideology. *Id.* at 241-42. The FCC made clear that a licensee could not, under § 315, "condition the use of broadcast time to exclude the advancement of party doctrine as a method by which a candidate may elect to pursue that office." *Id.* at 243. See also Pat Paulsen, 33 F.C.C.2d 835, 836 (1972) ("[s]ince candidates may broadcast whatever material they desire, a licensee under no circumstances could limit such a candidate to 'political uses' only . . .").

248. See Barry Commoner & LaDonna Harris, 87 F.C.C.2d 1, 5 (1980).

249. See, e.g., *WANV, Inc.*, 50 F.C.C.2d 177, 179 (1974), *forfeiture aff'd*, 54 F.C.C.2d 432 (1975), *application for remission of forfeiture denied*, 36 R.R.2d 1163, 1170 (1976) (fining station for inviting city council candidate to appear on condition that he limit his comments to topics discussed in previously broadcast station editorial and for providing tape of candidate's comments to his opponent). The FCC in *WANV* interpreted § 315

to mean that neither the content nor the format of . . . appearances could be chosen by the station without candidates' prior consent with full knowledge of their rights under Section 315 . . . . It must be emphasized that a licensee cannot indiscriminately set the format of political speeches any more than it can excise out 'undesirable' language.

36 R.R.2d at 1167. Indeed, the Commission took the position that allowing broadcasters so to condition candidates' political speech would not only be a violation of § 315, but also "would inevitably result in broadcasters setting the tone of election campaigns by affording them the power to choose the issues on which elections are decided . . . a result which is totally inconsistent with the legislative history of Section 315 of the Communications Act and its predecessor." *Id.* at 1166. See also *WMCA*, 40 F.C.C. 241 (1952); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Joseph L. Doston, Ameron Broadcasting, Inc. (WERE(AM)), 7 F.C.C.R. 6537 (1992), *application for remission of forfeiture denied*, 9 F.C.C.R. 228 (1994).

250. Hon. Allen Oakley Hunter, 40 F.C.C. 246, 247 (1952); *WMCA*, 40 F.C.C. 241 (1952).



advance in order to clear its content.<sup>251</sup> Even a broadcaster policy of requiring political candidates to sign indemnification forms prior to airing their advertisements was found to constitute a violation of section 315's "no censorship" provision because of the requirement's tendency to chill or discourage speech that the broadcaster was legally obliged to carry.<sup>252</sup> The FCC has suggested that even threats of litigation and discussions of indemnification unduly burden the section 315 equal opportunity right.<sup>253</sup> The Commission has also made clear that the cancellation of all broadcasts by candidates in a particular election because the broadcast licensee did not approve of the material to be broadcast by the first candidate is censorship under section 315 even though there was no technical deletion or editing of parts of a program.<sup>254</sup>

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251. *Western Conn. Broadcasting Corp.*, 43 F.C.C.2d 730 (1973). Of course, this does not mean that broadcasters cannot ask for pre-broadcast review in order to determine whether the advertisement is a "use" under § 315 and whether the statutorily proper sponsorship identification has been included in the advertisement. See *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2272 (1978).

252. *In re Complaint by Senator Hubert Humphrey*, 35 F.C.C.2d 112, 113 (1972) ("[A]n indemnification promise is likely to be inhibiting with respect to the content of the candidate's use, as well as his decision on whether or not to use the station's facilities."), *petition for review denied sub nom.* D.J. Leary, 37 F.C.C.2d 576, 577 (1972) ("an indemnification requirement . . . is likely to inhibit a candidate's use of a broadcast facility and possibly to affect his decision on whether to utilize a station to address the public."). See also *supra* note 239 and *infra* note 253 (discussing the impermissible chilling effect of threats of future libel litigation) and *Curran Communications Inc.*, 89 F.C.C.2d 1046 (1982) (noting that broadcasters may not intimidate candidates into making changes in their commercials by warnings of legal liability, although finding factual insufficiencies to support liability under § 315 in *Curran* itself).

253. *In re Radio Station WPAM, Curran Communications Inc.*, 81 F.C.C.2d 492, 495 (1980) (in admonishing the station for its mention of defamation litigation in the course of accepting a political ad, the FCC ruled that "in the future any attempts by a licensee to coerce a candidate to revise his political announcement, albeit by threat of litigation or otherwise, will be considered censorship."). The Commission in the *Barry Commoner* case then cited the *Curran* case for the proposition that threats of litigation even against the sponsor of a political advertisement, rather than against the candidate himself, constituted prohibited censorship under § 315. *Barry Commoner & LaDonna Harris*, 87 F.C.C.2d 1, 5 & n.12 (1980).

254. *Port Huron Broadcasting Co.*, 12 F.C.C. 1069, 1071 (1948). See also *Hammond for Governor Committee*, 69 F.C.C.2d 946, 947 (1978) (since licensees cannot exercise power of censorship over political broadcasts whether they are first uses or equal opportunities responses to first uses under § 315, FCC refuses to issue declaratory ruling that licensee's failure to censor political use that may have violated National Association of Broadcasters Code of ethics is violation of law). See also Jack H. Friedenthal & Richard J. Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 479-80 (1959) ("The unequivocal language of the refusal clause appears to be overriding, and therefore the censorship clause should be applied only to situations in which some time is actually provided [and subsequently withdrawn].").

The FCC has also rejected attempts to interpret the political advertising rules contextually, in light of claimed charges of manipulation. In a number of cases, for example, it is possible to discern an underlying argument that particular candidates were not in fact serious seekers of office, but were simply using their candidacies and the political campaigning rules in order to obtain section 315 protection for a particular political message unrelated to their purported candidacies.<sup>255</sup> Ironically, one of those cases involved an unsuccessful attempt on the part of a listener to have an anti-abortion candidate's remarks censored.<sup>256</sup> Although it was claimed that the candidate was actually seeking to influence an abortion measure then being considered by the state legislature rather than advancing her own candidacy, the FCC held that no censorship of her comments was permissible under section 315.<sup>257</sup>

c. Differences between Channeling and Censorship:

Even if *WDAY* is right in its reading of the legislative history and the 1927 legislature intended to adopt an absolute prohibition of censorship, and even in light of the FCC's virtually uniform refusal to allow the imposition of conditions on political ads under section 315, the questions remain of what is to be defined as censorship and whether channeling should be deemed censorship. The FCC's response to those questions seems predicated on the fact that allowing temporal displacement of advertisements is not the same as deleting or editing political statements.<sup>258</sup> Before this decision by the Commission, however, the FCC staff had given a diametrically opposing interpretation, refusing to permit channeling under section 315 presumably because of a view that censorship can take

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255. *WMCA, Inc.*, 40 F.C.C. 241 (1952), is a good example. See also *supra* note 247. In *WMCA*, the broadcaster was clearly arguing that the "no censorship" provision of § 315 was not intended to protect the ideological propaganda of a candidate not advertising his candidacy during his use:

Mr. Hass admitted that the Socialist Party was utilizing the election campaign to propagandize the Socialist program; and that this had nothing to do with the duties of the President of the New York City Council . . . [T]he action of station WMCA was not censorship in violation of Section 315 because the broadcast was a device for the use of an election to spread propaganda unrelated to the office.

*Id.* at 242. See also Pat Paulsen, 33 F.C.C.2d 835, 836 (1972) (explaining that political candidates are not restricted to political uses and "may broadcast whatever material they desire").

256. *Gloria Sage*, 62 F.C.C.2d 135 (1976), *rev. denied*, 63 F.C.C.2d 148 (1977). See also discussion *supra* note 242.

257. *Gloria Sage*, 62 F.C.C.2d at 135-36.

258. *November Ruling*, *supra* note 16, at 7648-49.

many forms besides outright refusal to air and that channeling should be characterized as a form of censorship.<sup>259</sup>

Expansive definitions of censorship have their pedigree in the broad rhetoric of the Supreme Court's majority opinion in *Farmers Educational & Cooperative Union v. WDAY*. As quoted above, the Court's focus on whether there was *any* examination of expression in order to prevent publication of objectionable material might lend support to the view that any administrative review should be considered censorship. *WDAY* is not dispositive, however. The review and subsequent channeling of advertisements by broadcasters might not meet the *WDAY* Court's triggering test of "examination . . . in order to prevent publication of 'objectionable' material."<sup>260</sup> By contrast to the situation in *WDAY*, the anti-abortion candidates using graphic imagery are not entirely precluded from getting their message to the voting public. In *WDAY*, the complete elimination of speech from the air was at stake. The channeling solution to a conflict between the interests in political debate and social welfare was not an option available in the defamation context of *WDAY*.

Moreover, the majority opinion in *WDAY* reasoned that permitting broadcasters to censor allegedly libelous statements would undermine section 315's basic purpose: "full and unrestricted discussion of political issues by legally qualified candidates."<sup>261</sup> In the Court's view, Congress sought to foster the development of radio as a medium of communication of political ideas "by insuring that . . . candidates when broadcasting were not to be hampered by *censorship of the issues they could discuss*."<sup>262</sup> Allowing broadcasters to edit out libelous material would both limit issues candidates could discuss and ensure that certain speech did not receive airplay at all. This would naturally frustrate "full and unrestricted discussion of political issues." The scenario of permissive broadcaster channeling does not raise the same concerns.

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259. Letter to Pepper and Gastfreund, *supra* note 22; see *supra* notes 35-39 and accompanying text.

260. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 527 (1959) (emphasis added). Resting the decision on this slender a reed, however, is problematic. After all, there was actual deletion of material at issue in *WDAY* and the issue of channeling was simply not before the Court. Under those circumstances, an attempt to limit the Supreme Court's language in *WDAY* to the prevention of publication (rather than including constraints on publication or inconveniences attendant on publication as well) would seem to be weighing the Court's dictum too far.

261. *Id.* at 529.

262. *Id.* (emphasis added).

In any event, the *WDAY* Court's broad language should not be applied woodenly to all situations concerning political uses under section 315. Admittedly, the *WDAY* Court dealt with defamatory speech, which arguably could be said to be as harmful both to the individual and to truthful public debate as any harm to children suggested in the graphic advertising context. Yet, the Court's central argument for prohibiting broadcaster excision of such harmful material was the difficulty of defining defamatory material and the chilling effect of permitting censorship. In *WDAY*, the Court contrasted the interest in full and free public debate with the likelihood that permitting editing for defamation would have a highly chilling penumbral effect on all sorts of non-defamatory speech as well. That concern is arguably less salient in the graphic ad context. Although the determination of harm in expressive contexts also involves difficult and contestable judgments, defamation is a legal conclusion and the graphic anti-abortion ads arguably present a far smaller universe of discretionary factual and legal judgment than what is involved in the editing of defamation.<sup>263</sup> Finally, the victim of defamation would still have a cause of action against the defaming politician, thereby creating a disincentive for defamatory speech. The harm to the individual could potentially be redressed in the defamation context. All of these factors stand in contrast to the situation at hand, involving graphic anti-abortion ads.

Even if *WDAY* is properly read to provide an extremely broad interpretation of censorship in section 315, however, subsequent Supreme Court precedent may undermine its application to channeling. In *FCC v. Pacifica*,<sup>264</sup> for example, the Supreme Court affirmed the FCC's channeling of George Carlin's "seven dirty words" monologue — an explicitly political routine — to hours during which children would be less likely to be in the listening audience. In so doing, the Court exempted the notion of channeling from statutory and constitutional infirmity in the context of indecent speech. Justice Stevens' opinion held that section 326, the ban on censorship by the FCC, did not limit the Commission's authority to impose sanctions on those who engage in obscene or indecent

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263. Admittedly, if the *November Ruling* were interpreted as the basis of a policy permitting channeling of all advertisements whose explicit and graphic content might disturb children, this distinction would be less clear. The legal distinctions are still finer in the defamation context, however, and the potentially expansive use of the *November Ruling* is best addressed in context.

264. 438 U.S. 726 (1978).

broadcasting when children are likely to be in the audience.<sup>265</sup> If channeling ordered by the government is not to be deemed censorship under section 326, then, it could be argued, the authorization of channeling by the private broadcaster should not be deemed censorship under section 315 either.<sup>266</sup>

The bottom line is that there is no clear legislative or judicial precedent on whether channeling these advertisements to late night hours violates the anti-censorship provision of section 315. On the one hand, it could be argued that channeling is nothing more than temporal censorship, no less dangerous than the ordinary variety of content deletion. Part of the candidate's control of her image is the control not only of the content of her speech itself, but also of the audience that it seeks to reach. While no access right can realistically be interpreted as affirming the candidate's every wish and whim,<sup>267</sup> ignoring the candidate's temporal strategy undercuts (and arguably thereby censors) her message.

In support of such an argument, one could cite the FCC's apparently liberal past interpretation of its anti-discrimination regulation in regard to time choices for advertising. The touchstone for finding a violation of the regulation appears to be whether a candidate was placed at a disadvantage vis-a-vis her opponent as a result

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265. In the decision below, Judge Tamm had concluded that the FCC's declaratory order — that WBAI had violated § 1464's prohibition on indecent broadcasts — constituted censorship and was therefore prohibited by § 326. *Pacifica Found. v. FCC*, 556 F.2d 9, 18 (D.C. Cir. 1977). See also *Pacifica*, 438 U.S. at 733. The Supreme Court held that the FCC's action was not prohibited censorship under § 326. *Id.* at 735. First, Justice Stevens opined that although the prohibition in § 326 against censorship "unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves," the statute would not "deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." *Id.* Therefore, the opinion concluded that "the subsequent review of program content is not the sort of censorship at which the statute was directed . . ." *Id.* at 737. Second, Justice Stevens found that § 326's history made it clear that it was not intended to limit the Commission's power to regulate the broadcast of indecent, obscene or profane language because

[a] single section of the 1927 Act is the source of both the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

*Id.* at 737-38. See also discussion *supra* notes 105-06 and accompanying text.

266. Admittedly, on the other hand, the extent to which *Pacifica* can serve as the definitive word on this issue is unclear. After all, *Pacifica* dealt with the FCC's channeling of material that was assumed by all parties to be indecent and thereby subject to regulation under § 1464 of the Criminal Code.

267. See *supra* Section II.A.1.b.

of a broadcaster's actions.<sup>268</sup> The FCC has found a denial of equal opportunities when opposing candidates have been offered the same amount of time, but the time offered to one is likely to attract a smaller audience.<sup>269</sup>

The candidates could argue that channeling the anti-abortion material is tantamount to isolating it from — and treating it differently than — other political speech that broadcasters do not see as harmful to children. They could contend that such isolation amounts to a discrimination or denial of equal opportunities in the event that opposing candidates do not use this kind of advertising and therefore do not have limitations placed on their audience reach.<sup>270</sup> The permission to channel this material suggests that these particular political candidates are being penalized for their choice to adopt a particular format as part of their statutorily-protected advertising.

On the other hand, the FCC's approach does not permit broadcasters to bury these ads and make the appropriate audience unavailable. Even if the ads are channeled by a broadcaster to safe harbor hours, they will still be available for viewing by the only appropriate audience under section 315 — namely the voting public. In other words, section 315's statutory purpose is to enhance the electoral public's debate about candidates. It is not designed to assure a forum to reach populations to whom the election-related speech would be irrelevant.<sup>271</sup> Moreover, if we interpret the "no

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268. Letter to Joseph L. Doston, 7 F.C.C.R. 6537, 6538 (1992).

269. See *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2260 (1978) (citing E.A. Stephens, 11 F.C.C. 61 (1945)).

270. While channeling all political advertisements to late night hours would eliminate the discrimination, it would violate the Commission's political advertising rules as to those advertisements that are not harmful and, more generally, would impoverish public debate.

271. It could be argued that although the late night audience is almost all adult, most television-viewing adults are not reached by late night television. The effect of channeling any video programming to late night hours can be mitigated by the now-ubiquitous VCR, however. People not awake to watch programs during the evening can still see tapes of them at other times. Admittedly, the VCR allows commercials to be "zapped" or eliminated, and permits unsupervised children to happen upon otherwise channeled material. Moreover, not everyone owns or has access to a VCR. Nevertheless, the overall effect of VCR capacity is to permit many people to control the timing of their television viewing despite the set broadcast schedule. Such control also presumably extends to children's access to videotaped material in the home. Furthermore, although it is not per se necessary to have identical safe harbor periods for indecency and graphic political advertisements, the safe harbor for indecency is now ten o'clock p.m. to six o'clock a.m. The early part of that safe harbor is certainly adequate for access to voting adults. (It might be desirable for the FCC — either on its own or in response to a remand from the Court of Appeals — to determine the appropriate safe harbor period for graphic political ads that could reasonably be found harmful to children. This would en-

ensorship" provision of the statute as designed to promote each candidate's own political voice and its unfettered content, that goal is not undermined by the mere fact of moving the timing of the broadcast.<sup>272</sup> In addition, the Commission's interpretation of the political advertising rules still calls for good faith and individualized determinations in order to avoid any possible violations of the anti-discrimination principle.

Finally, if the FCC's interpretive rhetoric about broadcaster discretion in section 312(a)(7) is to have full meaning, reading the section 315 "no censorship" provision as precluding any FCC leeway to schedule the placement of graphic political advertisements harmful to children would be problematic in terms of a structural reading of the statute. Although, as noted above, the "no censorship" mandate of section 315 is best interpreted as applicable to section 312(a)(7) political uses as well, it should not be interpreted in such a way as to undermine the flexibility statutorily granted in section 312(a)(7).

Accordingly, although both legislative background and prior precedent can be mined for absolutist rhetoric about censorship of political ads, the statutory purposes of the Communications Act would not be frustrated by the FCC's November Ruling approach and a reviewing court could reasonably uphold the FCC's authority to adopt such a reading.

### 3. *The Proper Level of Deference on Judicial Review:*

The ease with which the statutory component of the November Ruling would pass muster depends on the standard of review adopted by a reviewing court. That, in turn, requires that we address two questions. First, whether the extremely deferential stan-

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tail a more detailed review of the harm posed by graphic ads to children of various ages.)

272. With regard to the anti-discrimination gloss on the censorship prohibition of § 315, channeling can be read not to constitute the kind of discrimination between candidates that would be prohibited by the regulation. Discrimination would involve different treatment on the basis of non-neutral grounds. The FCC presents the option of channeling material that would be harmful to children as a neutral principle that applies across the board to all candidate speech about abortion. On this view, channeling is not a pernicious distinction used to isolate and disadvantage any particular viewpoint. As broadcasters have a statutory duty to effectuate the public interest, and as the protection of children is a compelling interest, it could be argued that a uniform prohibition on political ads harmful to children (linked with a requirement of individualized and accountable application) would be consistent with both statutory and regulatory purposes under § 315. In addition, the Commission's interpretation of the political advertising rules still calls for good faith and individualized determinations that would be designed to avoid any possible violations of the anti-discrimination principle.

dard of what one commentator has called "*Chevron* acceptance"<sup>273</sup> applies to the November Ruling, which is nominally an adjudication and not a legislative rule. Second, even if *Chevron* would in principle be applicable to this kind of administrative decisional format, whether the Supreme Court's apparently increasing ambivalence toward full application of *Chevron* — demonstrated by the Court's increasing reluctance to find legislative ambiguity or silence sufficient to trigger *Chevron* deference — would lead to independent judicial interpretation here.

If a statute's plain language is silent or ambiguous with respect to a specific issue before an administrative agency, *Chevron* establishes that a court must give deference to the agency's interpretation of the statute so long as that interpretation is reasonable.<sup>274</sup> The agency's interpretation of the silent or ambiguous statute may not be disturbed as an abuse of discretion "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent."<sup>275</sup>

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273. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 (1990).

274. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *Chevron's* two-step test for judicial review of agency interpretations of statutes administered by the agency is as follows:

First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* (footnotes omitted).

275. *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). See also Seidenfeld, *supra* note 120, at 103 (noting that *Rust* Court gave *Chevron* deference despite "blatantly political" impetus for Development of Health and Human Services' new regulations interpreting statutes that prohibited expenditure of family planning funds for programs including abortions). The court applying *Chevron* need not find that the particular construction adopted by an agency was "the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Moreover, deference is paid by courts to administrative agency interpretations of ambiguous statutes even when a particular interpretation constitutes a sharp break from prior interpretations by the agency. *Rust*, 500 U.S. at 186-87; *Chevron*, 467 U.S. at 862-64. But see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44, 50-51, 58 (1983) (requiring agencies which change their policies to "articulate a reasoned explanation for [their] departure from prior norms."). Revised interpretations deserve deference because agencies are designed to adapt their regulations in order to address changing circum-



The lower courts in administrative law cases have reflexively cited *Chevron* and routinely accorded deference to agency constructions of ambiguous statutes so long as the agency readings are not manifestly unreasonable.<sup>276</sup> Indeed, although *Chevron* itself involved a legislative rule, and its rationale for deference was most clearly applicable to such legislative rules,<sup>277</sup> lower courts have applied *Chevron* to other, non-rulemaking proceedings.<sup>278</sup> The FCC decision here is both an adjudication and a declaration adopted after a proceeding that called for public comment, akin to a formal notice and comment rulemaking.<sup>279</sup> Therefore, even if the *Chevron* level of deference is thought by the Court to be appropriate only in the context of rulemakings, the rationale for the *Chevron* standard is easily applicable to the November Ruling because of the legislative character of the Commission's action. The November Ruling should not be denied review under the deferential *Chevron* ap-

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stances. *Rust*, 500 U.S. at 187. Thus, when the agency has provided a reasoned analysis for the change, deference is still warranted.

Admittedly, the inquiry under *Chevron* is not merely intended as a rubber stamp of all interpretations of a statute by its enforcing agency. The "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)). When courts believe that agencies' interpretations are inconsistent with a statutory mandate or frustrate congressional policy underlying the statute, then deference is not appropriate. *Id.* at 97 (citing *NLRB v. Bron*, 380 U.S. 278 (1965)).

276. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 3.2, at 110 (3d ed. 1994); Pierce, *Hypertextualism*, *supra* note 100, at 749-50; Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1029-36, 1058-59; Seidenfeld, *supra* note 120, at 84, 94-96, 100.

277. The *Chevron* approach was animated by a concern about the anti-democratic effects of allowing a politically unaccountable judiciary to interpret ambiguous statutes to favor judicial policy preferences rather than preferring the interpretations of politically accountable administrative agencies. *See Chevron*, 467 U.S. at 865-66. *See also* Schacter, *supra* note 120, at 613-18 (noting, in context of describing *Chevron* as an example of a "preservationist" approach to democratic legitimacy, that "[t]he ability to protect democratic values by ensuring political accountability (through the president) for an agency's interpretive choices constitutes the primary justification for the *Chevron* rule"); Seidenfeld, *supra* note 120, at 97 (noting "theory that agencies are more politically accountable than courts").

278. Anthony, *supra* note 273, at 4, 42-43.

279. Although styled an affirmance of the Mass Media Bureau's decision that the abortion ad at issue was not indecent, the Commission's language was much broader and involved discussion of the propriety of broadcaster channeling of material found harmful to children.

proach solely because it was a declaratory ruling and not a *de jure* rulemaking proceeding.<sup>280</sup>

The application of *Chevron*'s lenient standard of judicial deference to the Commission's November Ruling would likely lead to judicial acceptance of the agency's decision. First, both sections 312(a)(7) and 315 fit the first step of the *Chevron* doctrine — namely, a finding that the statute in question is silent or ambiguous on the issue at hand. With respect to section 312(a)(7), the statute requires a finding of reasonableness and it is understood that the FCC is charged with making the reasonableness determination. The Court, in another context, opined that a ratemaking statute's requirement of "reasonableness" should initially be interpreted by an agency and deserved *Chevron* deference.<sup>281</sup> Although the term "reasonable" in the context of section 312(a)(7) is not used in the same context or manner as its use in the ratemaking statute, there is little reason to believe that the Court's rationale for deferring to administrative interpretation in that case would not apply to the graphic anti-abortion ad situation as well. As for section 315, the statute simply does not address whether channeling to protect children is to be considered "censorship" — exemplifying Congressional silence.

To the extent that both sections 312(a)(7) and 315 are silent or ambiguous, the second *Chevron* question is whether the administrative agency's interpretation of the statute was reasonable. It is very difficult to conclude that any agency interpretation was completely unreasonable,<sup>282</sup> and the FCC's rationale of interpreting the silent statutes here in light of important societal interests in the pro-

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280. See Anthony, *supra* note 273, at 36-63 (taking position that judicial deference is only appropriate for legislative regulations and other agency actions possessing force of law).

281. *Northwest Airlines v. County of Kent*, 114 S. Ct. 855, 863 (1994) (noting, in dictum, that the term "reasonable" should initially be defined and applied by agency). See also Pierce, *Hypertextualism*, *supra* note 100, at 754, 762 (discussing *Northwest*). In the context of criticizing the Supreme Court's increasingly wooden textualism in statutory interpretation, Professor Pierce rued that "[t]he only statutory term that a majority of Justices found to be sufficiently ambiguous to justify deference to an agency's construction was the word 'reasonable.'" *Id.* at 762.

282. One commentator has observed that judges have found agency interpretations of statutes unreasonable under step two of *Chevron* only if they would actually frustrate the policies Congress was seeking to effectuate by legislating. Seidenfeld, *supra* note 120, at 96 ("[s]o long as the interpretation furthers some statutory goal, a reviewing court has no business reversing the agency determination, even when the court believes that the agency interpretation reflects an unjustified balance of competing interests."). See also *id.* at 100 ("[a]t step two, courts almost never overturn agency interpretations as unreasonable.").

tection of children certainly is not irrational. Thus, *Chevron* would likely require judicial affirmation of the Commission's decision.<sup>283</sup>

Admittedly, there is currently a debate about the continuing vitality of the *Chevron* doctrine at the Supreme Court level. Unlike the lower courts, the Supreme Court's administrative law decisions in the past several terms have not consistently and automatically applied *Chevron*.<sup>284</sup> Some commentators suggest that the Court's post-*Chevron* administrative law jurisprudence is "so confused that it is difficult to determine what remains of the original, highly deferential test."<sup>285</sup> Apparently as a result of an increasing use of textualism rather than legislative intentionalism as its approach to statutory interpretation, the Court has recently acknowledged the existence of statutory ambiguity only rarely, thereby eliminating the second step of the *Chevron* inquiry in most cases involving agency constructions of statutes.<sup>286</sup>

Even the increasingly textualist Supreme Court recently applied a deferential version of the *Chevron* test to a statute using the

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283. For an argument that reviewing courts should be required to scrutinize the reasonableness of administrative agencies' statutory interpretations at step two of the *Chevron* analysis in order to promote deliberative democracy, see Seidenfeld, *supra* note 120, at 128-30.

284. Merrill, *Executive Precedent*, *supra* note 120, at 980-85; Merrill, *The Chevron Doctrine*, *supra* note 120, at 359-60; Pierce, *Hypertextualism*, *supra* note 100, at 750-62.

285. See Pierce, *Hypertextualism*, *supra* note 100, at 750. See also Merrill, *Executive Precedent*, *supra* note 120, at 980-85 (concluding that "judicial understanding that informs the deference question is probably more confused today than it has ever been").

286. Pierce, *Hypertextualism*, *supra* note 100, at 750 & n.9 (citing similar authority). See also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512-20 (arguing that although courts should always defer to agency interpretations of ambiguous statutes, statutes should rarely be found ambiguous). It should be noted that the textualists (like Justice Scalia) were not initially hostile to the *Chevron* approach, but became increasingly so. Pierce, *Hypertextualism*, *supra* note 100, at 777-78; Wald, *Sizzling Sleeper*, *supra* note 120, at 308 n.179 (pointing to Scalia's support for *Chevron* deference).

The version of textualism that has emerged from some of the recent Supreme Court cases is an aggressive one, in which the textualist statutory interpreter constructs the meaning of the statutory terms by selecting among dictionary definitions. See, e.g., Merrill, *The Chevron Doctrine*, *supra* note 120, at 372. Pierce, *Hypertextualism*, *supra* note 100, at 752 (accusing Court of engaging in "hypertextualism," meaning "finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage."). Professor Pierce is highly critical of this "hypertextualism," arguing that it suffers from the same defects as the extremes of intentionalism it was designed to curb. He warns that the Court's administrative law jurisprudence will lead to incoherence among the lower courts trying to follow the Supreme Court's lead and will undermine administrative agencies' attempts to implement rational national regulatory policies. *Id.* at 752, 762-66.

term "reasonable," however, as previously noted. Thus, the change in the Court's interpretive approach could theoretically affect the reading of section 315 only. The application of a more stringent level of judicial review of the FCC's action could potentially create some difficulties for that aspect of the November Ruling. The beauty of *Chevron* from the vantage point of the administrative agency is that its application forecloses a judicial search for the "real" legislative intent behind a statute, substituting unquestioning acceptance of the agency's view. Whatever its shortcomings, the traditional standard of review of agency action not subject to *Chevron* deference involves the court in an independent assessment of the meaning of the statute.<sup>287</sup> The traditional reviewing court under a less deferential standard of review would seek to discern the legislative purpose in the political advertising rules and thereby attempt to define a rule consistent with what the legislature would have done had it expressly contemplated the question of graphic anti-abortion imagery in political advertisements.<sup>288</sup> Some scholars have added to this purposive analysis a set of factors considered by courts, including the importance of agency expertise in the particular question, consistency of prior administrative interpretation, closeness of the administrative interpretation to the statutory enactment date, and the possibility of congressional acquiescence.<sup>289</sup> In theory, although the agency's interpretation of its statute "is a substantial input and counts for something,"<sup>290</sup> the court is the final interpreter and approves the agency view "only if it is deemed correct."<sup>291</sup>

A court could presumably argue that the "no censorship" provision of section 315 reflects neither congressional silence nor ambiguity sufficient to trigger the second step of *Chevron*. It could search for dictionary definitions of censorship that would be capacious in their coverage and therefore cover the issue of time channeling, at least by implication. With regard to the meaning of censorship, however, the common understanding and common dictionary definitions seem to focus on affirmative interference and

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287. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); Anthony, *supra* note 273, at 3, 13.

288. See, e.g., Posner, *supra* note 104, at 817 (advising judicial attitude of "imaginative reconstruction").

289. Anthony, *supra* note 273, at 14 n.51 (citing relevant authority). Needless to say, critics have attacked both these factors individually, and also the entire enterprise of intentionalist statutory interpretation based on such factors. See, e.g., *supra* note 120 and sources cited therein.

290. Anthony, *supra* note 273, at 13.

291. *Id.*

change, rather than time displacement.<sup>292</sup> Even under a less deferent standard, then, it is likely that the FCC's November Ruling would be deemed to be consistent with the Communications Act. Moreover, even when *Chevron* acceptance is not applied, judicial review of agency adjudications in practice is usually rather deferential.<sup>293</sup> Agency interpretations of statutes they administer are virtually always given "special consideration," "respectful consideration," or deference, even if they do not qualify for the complete acceptance that would follow from a full-fledged application of the *Chevron* standard. Finally, even if a reviewing court were simply to review the FCC's November Ruling *de novo*, without special consideration, the agency's action might well pass such a review. A court could arrive at the conclusions suggested above after a review of the doctrinal issues, the legislative background, the policies addressed by the Commission and its prior approaches.

### B. The Constitutional Dimension:

Even if the channeling of political speech harmful to children is statutorily permissible under sections 312(a)(7) and 315, there still remains the question of the constitutionality of the November Ruling. Unlike some possible alternative rulings, the Commission's decision seems designed to avoid constitutional difficulty.

The effect of the FCC's position in the November Ruling is: (1) to assure the agency's continuing power to censor sexualized indecent speech by avoiding another constitutional attack on the definition of indecency, while at the same time (2) removing content-based regulation of political speech from constitutional challenge by the simple expedient of permitting, but not compelling, private broadcasters to channel such speech.

The first question is whether the FCC's decision not to interfere with private broadcasters' choices to channel graphic ads to

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292. See, e.g., AMERICAN HERITAGE ILLUSTRATED ENCYCLOPEDIA 290 (Houghton Mifflin Co. 1987) (defining censorship as "[t]he act or process of censoring," with censoring defined as "[t]o examine and expurgate."); BALLANTINE'S LAW DICTIONARY 185 (3d ed. 1969) ("An examination . . . for the purpose of appraising its decency and prohibiting publication or production where the same is found objectionable as indecent, obscene or immoral . . ."); BLACK'S LAW DICTIONARY 224 (6th ed. 1990) (stating virtually same thing); OXFORD ENGLISH DICTIONARY 1030 (2d ed. 1989) (defining censorship as "official supervision"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 220 (Merriam-Webster 1990) (defining censorship as "the institution, system or practice of censoring," with censoring defined as "to examine in order to suppress or delete anything considered objectionable").

293. Anthony, *supra* note 273, at 47-52.

late night hours is constitutionally permissible, or whether the FCC has an affirmative constitutional obligation to mandate carriage of such political ads. In other words, does any party — candidate or viewer — have a legitimate claim that her First Amendment rights require the FCC to make an affirmative decision rather than punting to private action?

The answer to this first question under current doctrine is almost surely “no.” The Supreme Court has held that there is no constitutionally mandated general right of access to the broadcast media.<sup>294</sup> Despite that, some have argued that the audience for broadcast speech has a First Amendment interest in untrammelled exposure to political speech.<sup>295</sup> Although the Supreme Court’s broadcast cases have historically contained *dicta* about the paramount First Amendment rights of viewers and listeners,<sup>296</sup> First Amendment jurisprudence will not bear this level of affirmative and unconstrained incursion on broadcaster editorial judgments. Moreover, sections 312(a)(7) and 315, even were they read to constrain the FCC’s discretion more directly than the November Ruling suggests, are still statutory commands and not constitutional mandates.

The second constitutional question is whether a court would find a First Amendment violation in the FCC’s decision to leave channeling to broadcaster discretion simply because that decision

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294. *CBS, Inc. v. DNC*, 412 U.S. 94, 110 (1973). Admittedly, the *CBS v. DNC* decision came down during the heyday of the fairness doctrine, and the Court used the broadcaster’s obligation to provide full and fair coverage of public issues as a factor undermining the lower court’s finding that licensees would impermissibly discriminate by accepting commercial advertisements and refusing editorial ads. *Id.* at 128-31. To the extent that the Court’s opinion on access hinges on the Commission’s belief that the fairness doctrine adequately addresses the issue, the demise of the fairness doctrine might be thought to cast doubt on the continuing vitality of the *CBS v. DNC* holding on rights of access. I believe such a reading of the case would be mistaken, however, especially as many of the justifications for deleting the fairness doctrine also support arguments against a general right of access.

295. The WACCI-VCR Statement of Issues, *supra* note 25, implies an argument of this sort.

296. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), in which the Court noted that:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

For an interesting account of the “creative misreadings” of the marketplace metaphor that have expanded this dictum into the access right of a case like *CBS v. FCC*, see David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 892-904 (1986).

would permit private parties to discriminate among political messages on the basis of content or viewpoint. In other words, would the non-intervention decision fail because it did not provide sufficiently clear bases for the exercise of broadcaster discretion, even though the state would not itself actually be exercising the discretion conveyed.

A facial challenge under the First Amendment lies whenever a licensing statute gives a government agency unbridled discretion to regulate expressive activity.<sup>297</sup> Under that principle, there would be a potential First Amendment problem if the Commission had broadly expanded its definition of indecency to include graphic political advertising, or if it had mandated channeling of such material on the grounds of its harmfulness to children. This would be so especially if the agency did not provide sufficient guidelines to constrain the discretion of administrative actors. The general characterization of "harmfulness" is sufficiently malleable that, without constraining guidelines, the standard could mask impermissible discriminations based on content and thereby frustrate constitutional review.<sup>298</sup>

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297. See, e.g., *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (holding unconstitutional portions of city ordinance regulating placement of newsracks on public property, and giving mayor discretion to deny newsrack permit application and condition permit on any terms he deemed necessary and reasonable); *Freedman v. Maryland*, 380 U.S. 51 (1965) (striking down state motion picture censorship statute that required advance submission of movies to Board of Censors, lacked sufficient safeguards for confining censors' action to judicially determined constitutional limits, and effectively permitted ban without judicial participation); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding facially invalid local ordinance that comprehensively prohibited the distribution of literature of any kind without first obtaining written permission from City Manager).

298. Admittedly, as a statement about specific types of graphic anti-abortion advertisements, the *November Ruling* is probably not to be read as broadly as the text suggests. In addition, the Commission's *November Ruling* does contain some guidelines to direct the exercise of broadcaster discretion. As is discussed below, the *November Ruling* proposes three standards for broadcaster discretion on grounds of harm to children. See *infra* notes 380-89 and accompanying text. Moreover, the FCC has a continuing statutory duty with regard to station operations, including periodic license renewal. Although the agency now eschews content-review of programming, broadcasters' statutory obligations to operate in the public interest and the FCC's oversight of that operation might provide the kind of accountability that would cure any initial appearance of standardless delegation. It is possible, therefore, that a court might consider the *November Ruling* standards sufficient to pass constitutional muster under the standardless delegation doctrine, particularly when interpreted in context. In *Lovell*, *Freedman*, and even *City of Lakewood*, *supra* note 297, there was a striking lack of standards at all (unlike the *November Ruling*). The standards do not have to be explicit and completely concrete in order to satisfy the First Amendment. So long as there are "procedural safeguards designed to obviate the dangers of a censorship system[.]" the First Amendment is not a bar. *Freedman*, 380 U.S. at 738-39.

The narrow constitutional question is whether the Commission may permit the private broadcasters to do what it might not be able to do constitutionally by direct government action. Is the private broadcaster's license to channel under the November Ruling to be considered a delegation of state power requiring constitutional testing? This is a close question which raises the thorny issue of state action.<sup>299</sup> I conclude that the constitutional question would probably be resolved in the Commission's favor under current doctrine, although there are conflicting strands of constitutional law that could support a different state action reading.

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Indeed, the guidelines for broadcaster discretion in the *November Ruling* resemble the types of procedural safeguards cited approvingly as examples in *Freedman*. (There, the Court said that the burden of proving that a film was unprotected expression must rest on the censor, and that only procedures requiring judicial determinations would suffice to impose valid final restraints. *Id.* The administrative review by the FCC under the *November Ruling*, as well as the broadcaster's burden as described below, would appear to satisfy the spirit of the *Freedman* Court's language). In addition, in *CBS v. FCC*, 453 U.S. 367, 394-96 (1981), the Court found that the FCC's interpretation and implementation of the reasonable access provision of § 312(a)(7) did not violate the First Amendment. Those standards were not articulated in a significantly more precise fashion than the directions in the *November Ruling*. Nevertheless, a standardless delegation argument would be possible if the FCC itself had mandated channeling. It could be argued that the "reasonableness" notion interpreted in *CBS v. FCC*, for example, was less vague — both in the Commission's rhetoric of broadcaster discretion and in its enforcement practice of *de facto* deference to candidates' needs — than the notion of harm to children under the *November Ruling*. If such an argument would be successful, then the question of whether the channeling should be attributed to the state — and should therefore become subject to constitutional review — or whether it should simply be considered private action becomes the critical inquiry.

299. The state action doctrine is assertedly based on the notion that the Constitution does not regulate the affairs of private parties, but rather, only of the state. See R. ROTUNDA, J. NOWAK & J. YOUNG, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 523-77 (2d ed. 1992); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 & n.1 (2d ed. 1988). Accordingly, the First Amendment guarantees only that Congress shall make no law abridging the freedom of speech, and does not directly regulate private parties. *CBS v. DNC*, 412 U.S. at 114; *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952). To the extent that the private broadcasters' decisions pursuant to the *November Ruling* are not attributable to the state, there is no trigger for First Amendment review.

This discussion concerns the argument that the FCC's *November Ruling* should be subjected to review under the First Amendment even though it did not mandate channeling. It does not address the constitutional claims of private parties for broadcaster channeling. If the broadcaster is not deemed to be a state actor, however, then a constitutional claim by a disappointed candidate against a broadcaster would not be countenanced by the courts. In addition, the discussion does not address any statutory claims against broadcasters by candidates because the courts have not implied a private right of action under § 315 of the Communications Act. *Forbes v. Arkansas Educ. Television Comm. Network Found.*, 22 F.3d 1423, 1427-28 (8th Cir. 1994), *reversing in part and aff'g in part*, *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990); *Arons v. Donovan*, 882 F. Supp. 379, 384-85 (D.N.J. 1995). (Note that the cases are silent on the issue of a private right of action under § 312(a)(7), but that presumably the same result obtains).



Although the deference to private parties was made in a governmental declaratory order (and therefore is nominally a governmental act), it is probable under current state action precedent that the wholly permissive character of the ruling — the fact that broadcasters themselves have the choice to make timing decisions on harmful ads — would be deemed to eliminate the direct state action necessary to trigger a finding of First Amendment violation. Although the state action doctrine is amorphous at best when dealing with anything other than the most direct state order, it is likely that under the Supreme Court's narrow interpretation of the ambit of state action in recent years, there would not be sufficient governmental involvement, either in the permissive stance taken by the FCC toward private conduct or in a broadcaster's decision to channel an anti-abortion ad, to subject the broadcaster's decision to constitutional scrutiny.<sup>300</sup> This is particularly so because the FCC's November Ruling could be conceived to return to broadcasters a discretion to program that they would have but for sections 312(a)(7) and 315 and some FCC precedents that could be said to read the statutory rights more broadly than necessary.

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300. Countless articles have criticized the state action doctrine, labeling it, among other things, incoherent, inconsistent, grounded on an unworkable public/private distinction, and a proxy for substantive judgments about the constitutional status of the examined action. See, e.g., ROTUNDA, *supra* note 299, at 573-76; TRIBE, *supra* note 299, at 1690. See also Charles L. Black, Jr., *The Supreme Court 1966 Term - Forward: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Kenneth M. Casebeer, *Toward a Critical Jurisprudence — A First Step By Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503-05 (1985); Jesse Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757; Frank I. Goodman, *Comments: Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331 (1982); Harold Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Henry P. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979 (1986); Thomas D. Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745 (1981); Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587 (1991).

The Rehnquist Court's state action decisions have been characterized as adopting a particularly narrow definition of the constitutional trigger of state action and have been subjected to searching critique on that ground. See, e.g., Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781 (1992); cf. Strickland, *supra*, at 587 n.1 and sources cited therein (suggesting some movement toward a more embracing view of state action in some of the Court's opinions).

The governmental action inquiry involves a determination of "whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."<sup>301</sup> Private conduct is fairly attributable to the state if the state is not merely passive toward the underlying private conduct and instead provides significant encouragement and endorsement.<sup>302</sup>

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301. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 176-77 (1972). See also ROTUNDA, *supra* note 299, at 526-27.

302. Obviously, the state action precondition for constitutional review is clear in the context of overt and direct activities of governmental officials and employees. But findings of state action are not limited to direct governmental action, however. As the Court put it in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), in finding state action in the application of state law in a civil action between private parties, "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." Yet, "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." *Jackson*, 419 U.S. at 349-50.

The state is to be deemed responsible for private acts when it has compelled the private action by law or otherwise. See *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)). Some Supreme Court cases also suggest that state action might be found when the government and the private actor are so closely intertwined that they are in a symbiotic relationship or virtually a joint venture, see, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), or when the private party performs tasks that are traditionally exclusively reserved to the state. See, e.g., *Flagg Bros.*, 436 U.S. at 159-64; *Jackson*, 419 U.S. at 352-54; *Marsh v. Alabama*, 326 U.S. 501 (1946).

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), however, the Court stated that the government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004. See also, *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982) (holding that receipt of substantial public funding by private school will not itself convert school's activities into state action); *Jackson*, 419 U.S. 345, 357 (1974) (explaining that state utility commission's mere approval of regulated utility's request does not change the request to state action); *Moose Lodge*, 407 U.S. at 176-77 (holding that regulation, albeit detailed, did not "foster or encourage" private defendant's racial discrimination). The Court has made clear that the state's "mere acquiescence in a private action" does not transform the private act into state action. *Flagg Bros.*, 436 U.S. at 164. Moreover, the acts of a private entity are not characterizable as state action simply because the entity is subject to general state regulation. See, e.g., *Jackson*, 419 U.S. at 357 (insufficient state action to trigger relief under § 1983 for public utility's termination of electric service without due process, despite extensive regulation of utility, partial monopoly status, and election to terminate service in a manner found permissible by state utility commission). In the broadcasting context itself there was no majority in support of the proposition that broadcasters are state actors and therefore constitutionally required to provide general access to the air for paid editorial advertisements. *CBS v. DNC*, 412 U.S. at 94. In *CBS v. DNC*, Chief Justice Burger, and Justices Stewart, Rehnquist (and probably Douglas) concluded, even though the FCC had specifically permitted the private conduct, that a broadcast licensee's refusal to accept paid editorial advertisements was not governmental action for First Amendment

On the one hand, it could be argued that the FCC's November Ruling should be deemed to constitute encouragement and tacit endorsement of the broadcasters' foreseeable channeling activity without adequate standards. After all, given the controversial character of the ads and the public outcry when they aired, it is highly unlikely that broadcasters would not choose to exercise their discretion to channel at least some of the commercials to times of the day when fewer children are in the audience.<sup>303</sup>

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purposes. Chief Justice Burger found, *inter alia*, that the FCC had not fostered the licensees' policy and had merely declined to command acceptance because the subject was a matter within the area of journalistic discretion. *Id.* at 121. Justices White, Blackmun and Powell considered it unnecessary to decide the governmental action issue and concurred on other grounds. *Id.* at 147-58.

There is no formal test for the amount of contact which will subject private persons' activities to constitutional restrictions. *ROTUNDA*, *supra* note 299, at 543. As to the question of how much encouragement would be considered sufficient to trigger a finding of state action, the fact that the Court has not recently found state action on these grounds makes the inquiry quite speculative. *See ROTUNDA*, *supra* note 299, at 544 ("how much encouragement . . . is necessary is, to say the least, unclear[.]"). As commentators have noted, however, if the Court did not find sufficient involvement and encouragement in *Blum*, 457 U.S. at 991, which addressed nursing home patient transfer decisions made pursuant to state and federal regulations requiring periodic assessments of the level of care for Medicaid patients, then it is difficult to predict what level of involvement would jump the state action hurdle under the Court's approach. *See, e.g.*, Strickland, *supra* note 300, at 620 (arguing that *Blum* decision raises doubt that any regulation short of a specific directive to perform challenged action or to make challenged decision will suffice to treat activity as state action).

303. For a similar argument in the context of the Cable Act, *see, e.g.*, Michael I. Meyerson, *The First Amendment and FCC Rule Making Under the 1992 Cable Act*, 17 HASTINGS COMM. & ENT. L.J. 179, 192-95 (1994). *See also* Ronald J. Krotosaynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 320, 322 n.107 (1995) (assuming state action in discussion of case on constitutionality of Cable Act indecency provisions).

Supreme Court precedent can be cited in support of such a view. In *Smith v. Allwright*, 321 U.S. 634 (1944), for example, the Court held that the exclusion of African-Americans from voting in a Democratic primary to select nominees for the general election was state action in violation of the Fifteenth Amendment. The Court so held even though the exclusion had been effected by a resolution of a private actor — the Democratic state convention — that party membership would be limited to white citizens. One could also argue from *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), that the delegation of licensing discretion to private parties should be attributable to the government. There, the Court held that a state statute vesting in the governing bodies of schools and churches veto power over the issuance of liquor licenses within 500-foot radii violated the Establishment clause of the First Amendment. *Reitman v. Mulkey*, 387 U.S. 369 (1967), can also be mined for support, and was the basis of the panel's affirmative finding of state action in *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993), *vacated*, 56 F.3d 105 (D.C. Cir.) (en banc), *cert. granted*, 116 S. Ct. 471 (1995). In *Reitman*, the Court affirmed a state court decision striking down as unconstitutional a state constitutional amendment that prohibited the state from limiting the right of any person to dispose of his real property in his absolute discretion, thereby encouraging discrimination by implicitly repealing an earlier fair housing

On the other hand, the FCC's November Ruling is precisely drafted to emphasize the agency's neutrality with respect to broadcaster decisions to channel.<sup>304</sup> All the Commission has done with its November Ruling, it assures us, is to allow broadcasters to exercise discretion to consider the interests of children in making scheduling decisions for political spots. Therefore, the FCC's decision is arguably tantamount to "mere approval of or acquiescence in" private acts, and thereby not a proper subject for attribution of those acts.<sup>305</sup> Mere permission to do something that a private party

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statute that prohibited private racial discrimination in housing. For ways in which this precedent can be distinguished from the *November Ruling* context, see discussion *infra* note 305.

304. *November Ruling*, 9 F.C.C.R. at 7647.

305. See *id.*, at 7 (citing and discussing *Blum v. Yaretsky*, 457 U.S. at 991). Like *Blum*, the channeling decisions permitted by the *November Ruling* require good faith, professional judgments on the part of individual licensees in connection with each challenged advertisement. See *Blum*, 457 U.S. at 991. A mere suspicion that broadcasters might evade those judgments and simply find harm in the vast majority of cases would probably not be deemed to trigger state action. See, e.g., *Kuczo v. Western Conn. Broadcasting Co.*, 41 R.R.2d 1224 (1977) (because licensee's action in violating § 315 was not specifically approved by the FCC, station censorship not tantamount to state action despite monopoly status of licensees).

Moreover, the Supreme Court cases pre-dating the Rehnquist Court that can be used in support of arguments that would broadly attribute private action to the state are also distinguishable on their facts from what is involved in the *November Ruling*. In *Smith v. Allwright*, 321 U.S. 634 (1944), for example, the Court found that the place of the primary in the electoral scheme was such that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." *Id.* at 660. In addition, that the system for the selection of party nominees for inclusion on general election ballots was heavily statutory was deemed to make the Democratic party an agency of the state for these purposes. *Id.* at 663. The traditional state function argument can also serve to distinguish *Larkin v. Grendel's Den, Inc.*, which dealt with the delegation to private parties of licensing powers ordinarily vested in governmental agencies. *Larkin*, 459 U.S. at 116 (1982). That is not the case in the context of the graphic anti-abortion advertisements, where editorial freedom on the part of broadcasters is the norm and where holding otherwise would assume the conclusion about the proper extent of broadcaster freedom under the political broadcasting rules of the Communications Act. *Reitman v. Mulkey*, 387 U.S. 369 (1967), also presented different circumstances. The Supreme Court in *Reitman* rejected the argument that the constitutional amendment prohibiting interference with private freedom merely restored the power to discriminate that private owners of property had previously had prior to the passage of fair housing laws prohibiting private discrimination. The Court did not envision what happened in *Reitman* as a mere restoration of the *status quo ante*. *Id.* at 381. Rather, the Court found that the constitutional amendment was intended to authorize, and did authorize, racial discrimination; that "the right to discriminate is now one of the basic policies of the State . . . [and that the constitutional amendment] will significantly encourage and involve the State in private discriminations." *Id.* Moreover, because *Reitman* involved a constitutional amendment, future enactment of fair housing laws would be foreclosed without another constitutional amendment. See *Alliance*, 56 F.3d at 110 (relying on this distinction). The permission granted by the *November Ruling* for broadcasters to take the welfare

will predictably do does not automatically transform that action into state action. If the D.C. Circuit recently found no state action sufficient to trigger constitutional review of some permissive provisions of the 1992 Cable Act regarding indecency on leased access channels, then it is highly unlikely that broadcaster action permitted by the FCC's November Ruling would trigger scrutiny under the First Amendment in the D.C. Circuit.<sup>306</sup>

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of children into account when making determinations about when to air political advertisements does not entail either the traditional state function or the level of affirmative and intentional encouragement as would automatically be considered state action under these precedents.

306. See *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir.), cert. granted, 116 S. Ct. 471 (1995). Admittedly, the court of appeals stayed its mandate pending the filing of petitions for *certiorari* in the Supreme Court. And the United States District Court for the Southern District of New York recently granted a preliminary injunction prohibiting Time Warner Cable of New York City from scrambling the late-night, sexually oriented program "Midnight Blue" that is cablecast on a Time Warner leased access channel. *Goldstein v. Manhattan Cable TV, Inc.*, 90 Civ. 4750, 1995 U.S. Dist. LEXIS 13716 (S.D.N.Y. Sept. 20, 1995). Judge Sand entered the injunction in order to maintain the status quo until possible Supreme Court resolution of the constitutional issue. *Id.*

Nevertheless, the argument that the *November Ruling* is state action is far weaker than the argument for state action in *Alliance*. Therefore, although the en banc opinion in *Alliance* is strong support for the result in the *November Ruling*, an affirmation of *Alliance* is not necessary to a likely finding that the permissive *November Ruling* should not be considered state action. In *Alliance*, the court upheld FCC orders implementing § 10 of the Cable Television Consumer Protection and Competition Act of 1992, part of which permitted cable operators to refuse to carry leased access programming that they believed to be indecent and another part of which compelled cable operators carrying such material to "zone" it to a separate channel and block it until requested to unscramble by viewers. *Alliance*, 56 F.3d at 115. The majority opinion emphasized that the statute and regulations in question merely restored to cable operators their option to reject indecent cable programming, an option that had been denied them under the previous cable legislation. *Id.* The court stated that:

[t]o suppose that whenever Congress restores to cable operators editorial discretion an earlier statute had removed, the operators' exercise of this discretion becomes state action subject to the First Amendment, not only would disable the legislature from correcting what it perceives as mistakes in legislation, but also would deter it from experimenting with new methods of regulating.

*Id.* The court held that neither the existence of expressed legislative preferences for the elimination of indecency on cable, nor the form of legislation that "encourages" private action in the sense of making it possible, would be sufficient to transform private cable operator decisions to reject indecent access programming into state action. *Id.* Judge Wald's dissent emphasized the fact that, when read together, the statutory provisions regarding indecency on cable were far from permissive. Even if the majority's reasoning is rejected on review, however, the *November Ruling* does not have the same coercive effect as the indecency provisions of the Cable Act could be deemed to have.

### III. THE WISE POLICY APPROACH TO "HARMFUL" POLITICAL ADVERTISING

A prediction of the likely doctrinal outcome does not end the inquiry. Ultimately, the assessment of the FCC's November Ruling involves an evaluation of policy.<sup>307</sup> In leaving decisions about anti-abortion advertisements to broadcasters, the FCC has taken a particular policy decision that has both institutional and substantive aspects. Cogent arguments — supported by various visions of the public interest and the proper role of the administrative agency in editorial decisions — can be made both in support of and in opposition to the FCC's approach to graphic anti-abortion images in political advertising. I will sketch out both positions, and conclude that the FCC's approach, while dangerous, is the more socially desirable at least as an initial experiment. I will then propose a standard for FCC review of broadcaster decisions under the November Ruling that more explicitly articulates the FCC's approach in light of both the possible abuses of broadcaster discretion and the likelihood of strategic behavior by candidates.

As is often the case with complex social issues, support for the FCC's November Ruling might well cross ideological lines. Albeit for different reasons, broadcasters, mainstream conservative proponents of "family values," political progressives and even some traditional libertarians might find merit in the FCC's approach.<sup>308</sup> The policy arguments about channeling graphic political speech can be gathered from all these points of view.

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307. Under administrative law principles, the deferential *Chevron* approach would effectively obligate courts to accept the FCC's policy decision. Other standards might shift the policy analysis to a reviewing judge.

308. A number of news articles quote broadcasters, pro-choice and pro-life advocates, and political leaders in opposition to the presentation of graphic anti-abortion advertising. See, e.g., Jackson, *supra* note 1 (quoting Bill Price, president, Texans United for Life, and Janie Bush, executive director, CHOICE); Harry A. Jessell, *Broadcasters Oppose Widening Indecency Net to Include Political Anti-Abortion Advertisements*, BROADCASTING, Feb. 1, 1993, at 54. See also Mary Dieter, *Leising's Old Fashioned Campaign Beat Bailey's "Offensive" Tactics*, COURIER-J. (Louisville), May 5, 1994, at 4B (noting Indiana Right to Life Political Action Committee's endorsement of Michael Bailey's Republican opponent); Maureen Groppe, *Indiana: Myer Steps Past 4 Challengers to Face Tough November Foe*, 52 CONG. Q. WKLY. REP., May 7, 1994, at 1145 (noting GOP chairman's pleasure in Leising's political win over Michael Bailey); Brian Stonehill, *Sex and Violence*, MIAMI HERALD, July 9, 1995, at C1 (observing that, by keeping both sex and violence as single issue, Washington left and right weigh in against Hollywood). For observations about ideology-crossing coalitions in other contexts, see, e.g., DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY*, 26-32 (1989) (describing alliance of feminists and social conservatives regarding regulation of pornography); Schacter, *supra* note 120.

## A. Policy Assessments of the November Ruling:

Broadly speaking, there are two sorts of policy arguments about the FCC's approach to graphic anti-abortion ads. One set of arguments is institutional, and focuses on the policies regarding the appropriate decisionmaking entity. The other set of arguments is substantive, focusing on the pros and cons of channeling political speech from the points of view of various target groups. That is, the FCC's November Ruling involves both consideration of the agency's own institutional role and of the public interest.

1. *Institutional Arguments:*

## a. Government Neutrality and Editorial Freedom:

Many who focus on the government's role in the regulation of broadcasting would easily support the FCC's position entirely on the basis that it leaves the channeling decision to the discretion of the private broadcaster.<sup>309</sup> They might do so on the basis of concerns for broadcaster autonomy and government neutrality. These arguments could be based on notions of institutional competence, namely, the view that the broadcaster is a more competent institutional actor to exercise editorial discretion and make the broadcast schedule decision. They could also be grounded on deeper normative notions about the appropriate relationship between governmental agencies and the press, rooted in the policies of the First Amendment. Furthermore, both those who are doubtful about access rights in general and those who are merely disenchanted with their particular interpretation and application by the FCC in the context of section 312(a)(7) would applaud the agency's decision to return to a model of broadcaster discretion in this context. Thus, advocates of broadcaster discretion would support the November Ruling against both increased governmental control and more unfettered candidate access.

Some might take an entirely deregulatory position from the outset. They would oppose both the 312(a)(7) right of access to

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309. In fact, as a strategic matter, some broadcasters might choose not to have the discretion to channel, preferring instead to be able to deflect complaints about their judgments by simply saying that they were forced to act by government. It would be most convenient for their relations with political advertisers, for example, for the stations to be able to take the position that they were channeling these ads because they were ordered to do so by the FCC. While we can only speculate as to the broadcaster petitioners' interests in mounting a campaign to have graphic abortion ads labeled indecent, this explanation seems quite plausible. However, it is likely that no broadcaster would publicly admit to this kind of strategic thinking in an area involving expressive rights.

the airwaves and the section 315 prohibition on censorship. They could claim that generalized access rights assure nothing but a melee of voices on the air and pose immense problems of administrability.<sup>310</sup> Opponents of access rights also argue that there is today nothing in the nature of broadcasting that suggests that we ought to give broadcasters less discretion to determine when to broadcast an advertisement than we give newspapers to determine where to place the advertisements.<sup>311</sup> On this view, discretion to channel distasteful political speech is the preferred position between untrammelled access and total censorship.

Even those who do not entirely condemn political access rights, however, could still argue that they should not be interpreted to require complete capitulation to the desires of candidates wishing to display graphic anti-abortion images. One might say, for example, that the general access right approved by section 312(a)(7) does not require that broadcasters lose all discretion to channel harmful material. Proponents of editorial discretion would argue that there is a public interest both in exposure to a broad spectrum of public debate and in the protection of children. On this view, the hard questions about balancing those interests and access to the air should be left much more directly to the editorial discretion of broadcasters than to the dictates of self-interested candidates, enforced by the intrusive oversight of government.<sup>312</sup>

Broadcaster discretion, on the view of its proponents, promotes important values including journalistic freedom and government neutrality as to speech and social values. Those who are concerned about governmental neutrality in the "marketplace of ideas" would clearly approve of the FCC's decision to leave the issue of channeling to the good faith decisionmaking of the broadcaster. The FCC's decision does not necessarily adopt any particular substantive viewpoint on abortion or politics. It merely leaves the choice to the individual licensee. This takes the government out of

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310. Indeed, even the Supreme Court in *CBS v. DNC*, in the context of rejecting a generalized access right to the air under the First Amendment, enumerated problems attributable to access regimes. *CBS v. DNC*, 412 U.S. at 123-29. For an argument that access is problematic because it provides merely the illusion of diversity, see, e.g., David L. Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1 (1973).

311. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down Florida "right to reply" statute obligating newspapers to provide access to politicians attacked by newspapers).

312. The problem of graphic anti-abortion advertising is a relatively easy one for those who believe in total broadcaster control of content over the air and who reject broad access notions, and even for those who, short of that, would seek to establish few regulatory limits on broadcaster editorial judgments.



the business of either censoring candidate speech or foisting any particular candidate speech on an unwilling public. In addition to all the policy reasons to support the displacement of government as arbiter in controversial issues of expression, supporters of the November Ruling on institutional grounds also argue that private broadcasters are affirmatively more knowledgeable and accountable decisionmakers — capable of assessing the local strength of competing interests — than is the bureaucracy of the FCC.

b. Two Critiques of Institutional Arguments for Broadcaster Discretion:

Critics of the institutional arguments in support of the FCC's approach could contend that the FCC's holding in its November Ruling is unjustifiable, strategic and dangerous, and that the wise policy on the part of the FCC would have been to read the political advertising rules strictly and compel broadcasters to allow the anti-abortion advertising throughout the broadcast day. These critics could make two responses to the institutional arguments. The first is an empirical claim, based on the economic incentives for broadcaster behavior. The second is an argument based on the FCC's administrative strategy. Critics could also raise broader philosophical issues about the rationale for privileging the value of governmental neutrality and the coherence of claims of government neutrality in general.<sup>313</sup>

(1) Mercantile Pressures on Broadcasters:

Critics have observed that commercial broadcasting suffers from a particular sort of blandness that arises from advertising support. Advertiser desire to avoid any controversy that might affect consumer goodwill creates a significant incentive for broadcasters not to offend the purchasing public.<sup>314</sup> As a result, broadcasters

313. These arguments are beyond the scope of this paper.

314. See, e.g., *CBS v. DNC*, 412 U.S. at 187 (Brennan, J., dissenting) ("[A]ngry customers are not good customers and, in the commercial world of mass communications it is simply 'bad business' to espouse — or even to allow others to espouse — the heterodox or controversial."). C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 27-28, 30, 56-58 (1994); C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2153-56 (1992); Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 694-98 (1994) and sources cited therein; Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 34 (1993); Weinberg, *supra* note 120, at 1155-56 and sources cited therein. See also Rhonda Brown, *Ad Hoc Access: The Regulation of Editorial Advertising on Television and Radio*, 6 YALE L. & POL. REV. 449, 470 (1988) (explaining reasons for which elimination of fairness doctrine obligations unlikely to lead to expanded forum for opinion on broadcast stations); Karen Peart, *At Odds With the*

have sought to keep offensive or tasteless advertising off the air, with offensiveness and tastelessness being measured from the point of view of the more sensitive elements of the mass public.<sup>315</sup> As everyone involved in the abortion ad issue concedes, the graphic ads definitely offend many people. Broadcasters would likely wish to be able to reject or channel such unpopular material.

Moreover, newspaper accounts indicate that some viewers commenced lawsuits against stations and candidates in order to enjoin the broadcast of the graphic abortion imagery.<sup>316</sup> The expense of such litigation might constitute an additional economic incentive for broadcasters to funnel virtually all graphic anti-abortion advertising to safe harbor hours if they have the option to do so.

There are several responses to these institutional arguments. None of the lawsuits against broadcasters was successful, as could easily have been predicted.<sup>317</sup> Therefore, rational broadcasters

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*Ads; Controversial Advertising*, 125 SCHOLASTIC UPDATE, No. 14, May 7, 1993, at 16 (quoting ABC-TV executive as saying that "[a]s an overall policy, we do not accept controversial advertising of any sort[.]"). Similarly, much has been written on the mainstream and conventional character of much news coverage, given the press' reliance on elite (usually governmental) sources. See, e.g., Robert M. Entman, *Putting the First Amendment in its Place: Enhancing American Democracy Through the Press*, 1993 U. CHI. LEGAL F. 61 (1993) and sources cited therein. For a description of the uncontroversial and mainstream character of early radio fare as a result of commercial sponsorship, see, e.g., MCCHESENEY, *supra* note 197, at 92-98.

315. For many years, personal products advertising was not allowed by the networks. See Bruce Horowitz, *Women Will Model Bras in TV Ads as Decades-Old Taboo Falls*, L.A. TIMES, Apr. 21, 1987, pt. 4 (Business), at 1; Herbert Rotfeld, *Power and Limitations of Media Clearance Practices and Advertising Self-Regulation*, 11 J. PUB. POL'Y & MARKETING 87 (1992); Gary Shinnars, *Offensive Personal Product Advertising on the Broadcast Media: Can It Be Constitutionally Censored?*, 34 FED. COM. L.J. 49 (1982). These days, while more frank advertising is allowed by broadcast stations, even governmentally prepared and quite modest public service announcements about condom use and safe sex have been edited, relegated to late night hours or simply not accepted for broadcast at all. See, e.g., Karen de Witt, *U.S. Aims Candid AIDS Prevention Ads at Young*, CHI. TRIB., Jan. 5, 1994, at N1; Karen Peart, *supra* note 313, at 16.

More generally, a number of sophisticated commentators have addressed the tendency of media corporations to stick to mainstream views and increasingly use the First Amendment as a sword in order to do so. See, e.g., J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375-87; Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 942 (1993) (discussing "rightward shift in political center of gravity of free speech argumentation"); Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 973 (1995) (describing views of new "speech regulators" who justify regulatory agenda on ideological drift); Weinberg, *supra* note 120; Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965, 967 (1993).

316. See *supra* note 15.

317. See *Bailey Plans*, *supra* note 1; Maddox, *Graphic Ads*, *supra* note 2.

would significantly discount the future costs and risks of such suits in making their channeling decisions.<sup>318</sup>

Moreover, there is no guarantee that broadcasters would uniformly choose to channel all graphic political ads to late night hours. It is unlikely that all broadcasters would end up with monolithic responses to every graphic ad in every market. Even within parameters of conventionality, there is sufficient room for differences of judgment among broadcasters. Controversial advertising increasingly has found a home in the print medium, and the growing fragmentation of audience in the electronic marketplace might well lead to a greater degree of tolerance for challenging advertising by some electronic media owners.

Finally, the observation that broadcasters have economic incentives to over-channel political speech does not necessarily mean either that channeling should be undertaken by the government, or that all political messages should be aired at a time of the candidate's choosing. It may, however, place a burden on the agency to take such incentives into account and to place some constraints on broadcaster discretion in order to counterbalance the economic incentives for blandness.

## (2). The Strategic Character of the November Ruling:

Some critics may contend that the permissive structure of the November Ruling is precisely its problem from the point of view of institutional legitimacy. More specifically, they could say that the FCC should not be able to achieve indirectly what it may not mandate directly. Had the FCC expanded its definition of indecency to include these ads, channeling would have been mandated and the Commission's ruling would have been subject to First Amendment testing. This Article has shown that the FCC's expressed reasons for refusing to characterize this material as actionably indecent are not intellectually compelling or doctrinally necessary. Therefore, the FCC avoided constitutional challenge solely because it permitted, but did not mandate, the channeling.<sup>319</sup> Because it structured its decisions to evade stringent constitutional review by hiding behind the open-endedness of available legal doctrine and the narrowness of current state action precedents, some might fault the FCC's ap-

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318. This assumes that a low chance of winning deters suits from being brought. Admittedly, groups may bring suits, despite a slight chance of winning, for non-economic reasons. Nevertheless, although legal fees can affect broadcaster positions significantly, the low risk of damage recovery undoubtedly has an important effect on broadcaster perceptions of threat.

319. See *supra* notes 297-306 and accompanying text.

proach as overly strategic and manipulative of the administrative and judicial process.

Another way to phrase this argument is to suggest that, *in fact*, the November Ruling does not provide for editorial diversity and government neutrality. Rather, it could be argued, the government simply uses the illusion of neutrality and autonomy to achieve a result that it might not otherwise have been able to justify. This is because, as noted above, economic incentives will arguably lead most major broadcasters to channel graphic anti-abortion ads. Therefore, the FCC's decision is in operation nothing more than an invitation for most broadcasters to channel. Moreover, it is an invitation to do so without the kind of clear guidance that would minimize discriminations on the basis of content and viewpoint. Our commitment to ideas of free expression and robust debate suggests that a policy implicitly promoting one particular substantive value is to be avoided. And while the particular decisionmakers in the anti-abortion ad situation will be private broadcasters rather than the government as such, there is danger in having any one powerful decisionmaker — whether the government or the broadcaster impelled by economic considerations — deciding what is “good” or “acceptable” political debate.

On the other hand, it seems counter-intuitive, from the policy point of view, to criticize the FCC for an Order that avoids constitutional and statutory problems. The FCC faced three choices in dealing with the question of graphic anti-abortion ads: mandating channeling, permitting channeling, or forbidding channeling. Mandating channeling would require the FCC to make direct judgments about the content of ads in general or in particular cases. Indeed, it would enroll the government on the other side of a controversial debate and require intrusive governmental oversight into the implementation of the mandate. Similarly, a requirement to forbid channeling and permit the ads to run at any time could be read effectively to place the government's imprimatur on a substantive view not only about the protection of unborn children, but also about the question of women's power and social roles.<sup>320</sup>

Proponents of the FCC's strategy would contend that it allows various forces to operate in determining the place of the ads relatively free of government interference. Leaving the matter up to the broadcaster's discretion would allow different broadcasters to

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320. This insight has been ably argued in Stephen J. Schnably, *Normative Judgment, Social Change, and Legal Reasoning in the Context of Abortion and Privacy*, 13 N.Y.U. REV. L. & SOC. CHANGE 715 (1984-85).

make different decisions — station by station, market by market, and commercial by commercial — whether to channel any given graphic ad. The Commission could appropriately decide as a normative matter that broadcasters could look to their local communities to determine whether the public sphere is robust enough to tolerate such ads during the daytime. Local markets are in many ways distinct, each with its own demographic characteristics. And members of the community may have a better opportunity to influence broadcaster decisions than do the cumbersome processes of administrative agencies such as the FCC. Therefore, what the community wishes to see on the air can be reflected more accurately if broadcasters have discretion over their political advertisement schedules. In addition, while broadcasters as a class are in fact powerful, particularly because they can serve as bottlenecks on the information people can transmit over the mass media, it would be naive to think of the political candidates at issue here as being powerless individuals pitting themselves against a center of private power virtually as coercive as government. They too are part of an increasingly vocal and organized interest group. Without governmental intervention into the selection of material to be aired, there might be a negotiated balancing of candidate influence and broadcaster assessments of the strength of competing interests at the local level.

Even if a parallelism of action would often result, the constitutionally significant notion of state action today suggests that permission to do something a private party will predictably want to do should not be considered an illegitimate governmental policy choice. It would be a bootstrap, undermining the state action notion, to claim that administrative attempts to conform to it are thereby illegitimate. Nor should the inevitable line-drawing and selection of precedent from super-saturated doctrinal fields be considered *ipso facto* questionable.

The political advertising statutes do not call for an interpretation that would require virtually complete capitulation to federal political candidates. We might be particularly loath to have the FCC explicitly adopt such a reading of the statute, especially as it undermines government neutrality and broadcaster autonomy. All general objections to the notion aside, it could be argued that there is something to be said for the government's refusal to read a statutory command unnecessarily broadly in a fashion that would undermine broadcaster editorial discretion. Editorial discretion permits

broadcasters to balance harm to children and political speech on a case-by-case basis.

Despite such arguments in favor of government neutrality and broadcaster editorial autonomy, however, critics' concerns about broadcasters' economic incentives and strategic administrative decisions are powerful warnings. The fear of a chilling effect on political speech by censorious and discriminatory (or even timid) broadcasters with the blessing of government is a worrisome scenario. The "local self-determination and negotiation" model does not fully quell those concerns. The community benefits to be gained by looking to community views of what should be channeled are balanced by the difficulties of resting political access rights on community views. This approach could predictably have the effect of reflecting the views either of the majority in a community or those of a well-organized and vocal minority interest group. This in turn is manipulable, limits the dissemination of unpopular views, and promotes orthodoxy. Moreover, while the FCC's elegant end-run of constitutional review is beneficial from the point of view of formal governmental neutrality and consistency with the First Amendment, it is institutionally worrisome in its lack of candor. These observations of the complexity of the institutional arguments for broadcaster discretion counsel vigilance with regard both to broadcasters and to the Commission.

## 2. *The Substantive Arguments for Channeling:*

In addition to policy arguments about institutional roles, graphic anti-abortion advertising raises substantive issues implicating the FCC's statutory mandate to promote the "public interest." The substantive arguments can be articulated positively or negatively, and divided into arguments based on harm to society<sup>321</sup> and harm to children. I conclude here that even though the societal arguments in favor of channeling are illuminating, the child-protective rationale is the most supportable. The substantive arguments in support of the FCC's November Ruling proceed from the assumption that even if all broadcasters exercised the discretion provided by the FCC's approach and channeled all graphic anti-

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321. The substantive arguments of those who would regulate this kind of political advertising for reasons grounded in protection of public debate do not single out the broadcaster discretion element as a legitimating factor. In addition, some of their arguments would justify banning or mandated channeling of these sorts of ads. Nevertheless, the Commission's laissez-faire approach is a close second best for people who have a substantive objection to this kind of advertising.

abortion advertising, their substantive decisions to do so would be laudable as a policy matter.

a. The Protection of Political Debate:

One set of substantive arguments for the regulation of graphic anti-abortion ads is based on the protection of political debate. This notion, in turn, is grounded on a particular theory of politics and the role of mass media. On this view, public debate should be rational and based on truthful and complete information. Those who adhere to this view would argue that the Communications Act does not demand complete access and untrammelled political debate in the mass media. In fact, there is a significant societal sentiment that, while it is desirable in some ways to allow politicians their own voices on the air, there is also something democratically unsatisfying about a political debate conducted primarily through paid political advertising.

On the other hand, there are significant slippery slope dangers of using a single theory of politics, particularly this view of politics, to legitimate the disciplining of political speech. Difficult policy issues are raised by the related arguments about non-deceptive and rational political discourse.

(1). Arguments from Manipulation:

Disapproval of unrestricted airing of graphic anti-abortion advertisements is frequently rooted in an argument based on distaste for political manipulation. For example, many viewers object to what appears to be the strategic and manipulative character of some of these advertisements and anti-abortion candidacies.<sup>322</sup>

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322. See, e.g., Booth, *supra* note 1; *Crossfire*, *supra* note 4 (comments of Janelle Yamarick, director of Georgia Abortion Rights Action League, labeling the ads "crude, misleading and false"); John Harmon, *Anti-Abortion Ad Rattles TV Station; Court Asked to Declare it Indecent*, ATLANTA J. & CONST., Oct. 29, 1992, at E4; Jackson, *supra* note 300; Walston, *supra* note 4. See also Sheppard, *supra* note 3, at 407-08.

There are many senses in which such advertisements could be characterized as manipulative. The text discusses a number. Two additional particular instances should be mentioned, however. Some of these ads lead to a charge of incitement. As the comments of Planned Parenthood in the FCC's proceeding preceding the *November Ruling* point out, Howard Phillips, one of the anti-abortion congressional candidates, aired an ad which featured a series of pictures of dead and aborted fetuses with a voiceover that concluded as follows: "Here are some of the names, addresses and faces of the abortionists who kill for money and who commit their grizzly deeds in our state." Comments of Planned Parenthood, *supra* note 8, at 4. The ad then identified — by picture, name and home address — a former medical director of Planned Parenthood of Greater Iowa while the narrator stated: "Howard Phillips urges you to contact these baby killers and urge them to mend their ways." *Id.* at 4-5. When the ad identified the current medical director, the narra-

Some of the candidates have essentially admitted that they were not serious candidates for the offices they were formally seeking, and were not waging campaigns designed to win seats.<sup>323</sup> They were

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tion assured that "[a] vote for Howard Phillips is a vote to prosecute the baby killers for premeditated murder." *Id.* See also *supra* note 8 and accompanying text.

Moreover, exposure to graphic anti-abortion imagery has been claimed to trigger violent anti-abortion protest behavior. For example, the attorney for the convicted murderer of a physician who performed abortions claimed that his client's actions were influenced by excessive exposure to graphic images of abortion. See, e.g., William Rabb, USA: *Defendant Guilty, Sentenced to Life in Doctor's Murder*, REUTER NEWSWIRE, March 6, 1994; *Id.* at Mar. 4, 1994 (repeating abortion doctor killer Michael Griffin's claim that repeated viewings of graphic anti-abortion videos poisoned his mind); *infra* note 330. While the context of these claims in a criminal trial necessarily requires that they be taken with a grain of salt, it is nevertheless significant that charges of manipulation and brainwashing have been associated with the abortion images even by a person of the same political stripe as the candidates who seek to air the ads.

For a critique of manipulative television political spots and a pitch for "fair, accurate, contextual, comparative, engaged campaign discourse . . .[.]" see KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* 11 (1992).

323. Michael Bailey, for example, has said that he entered the congressional race to "make sure TV stations would have to run his anti-abortion ads without censorship." Leslie Scanlon, *Woman Again Tries to Block Abortion Ads Candidate*, COURIER-J. (Louisville), Apr. 25, 1992, at 9A. "TV stations never accepted my pro-life scripts before," said Mr. Bailey. *Id.* "Running for Congress gave me the opportunity to say 'Hey, you've got to run these.'" Jan Hoffman, *The 1992 Campaign: Media; Picture is Jumbled on Which Abortion Messages Can Get on TV*, N.Y. TIMES, June 11, 1992, at A18. See, e.g., *Nightline*, *supra* note 10 (Jackie Judd, ABC News: "As for Michael Bailey, he will admit that he got into the race for the purpose of getting the anti-abortion footage on the air. Critics say that's cynicism at its worst."); *Crossfire*, *supra* note 4 (comments by Rep. Dornan: "Not one of those . . . candidates was even on the radar screen till they ran those ads, and like the horrible films of the Holocaust, it's educating America that we're killing babies with a beating heart and brain waves."). Although Michael Bailey himself bemoans his political loss, which he appears to attribute to broadcasters and the FCC, he admits to the ideological purpose of his ads: "because our ads were kept off the air before 8:00 P.M., hundreds of unborn babies, whose mothers might have seen the truth and made the decision to keep them, were aborted in the weeks that followed." Bailey, *supra* note 1, at 162. Republican Senate candidate Rod Beck of Idaho stated: "[m]y eventual goal, of course, is to be elected to the U.S. Senate. My primary goal, however, is to save the lives of children." Dan Popkey, *Idaho Senate Candidate Airs Graphic Anti-Abortion Ads*, GANNETT NEWS SERVICE, May 18, 1992.

On the other hand, some of these candidates "bristle [ ] at claims that [they are] taking advantage of the rules to use the airwaves as a pulpit." Ed Garsten, *Political Candidate Allowed to Run Controversial Ads*, CNN, INSIDE POLITICS, Transcript No. 291-5, Mar. 15, 1993 (discussing Republican congressional candidate Ken Callis and quoting Callis' disclaimer: "First of all, I'm not doing it just to get the commercials on. Secondly, if getting elected was not an issue, I would drop out today."). See also Scott Rothschild, *Democrats Engage; Hutchinson's Fight is in Court*, AP POLIT. SERVICE, Feb. 11, 1994, 1994 WL 3356755 (quoting anti-abortion and pro-gun rights candidate Stephen Hopkins as saying: "if I'm elected you will have someone who will kick butt and take names and not worry about the fallout"). Even Michael Bailey has said that he has a broader platform of "conservative Christian positions," Scanlon, *supra* note 323, and, in response to the suggestion that his



simply taking advantage of access opportunities fortuitously afforded by the law to obtain otherwise unavailable media coverage for their cause.<sup>324</sup>

Section 312(a)(7) requires a commitment to provide access to candidates "on behalf of [their] candidacy." The single-issue candidacies of Michael Bailey and his cohorts were designed more as generic platforms for the anti-abortion position, regardless of the candidate, than as opportunities for the presentation of particular, well-rounded political personas. While the statutory language does not define the term "candidacy," and while notions of political campaigns centered on the candidate rather than her beliefs do not have any intrinsic desirability, it could be argued that the Congressional commitment to a candidate-centered politics is not promoted by cookie-cutter scripts for indistinguishable candidates.

The graphic ads themselves, as well as the candidacies, are subject to the charge of manipulation. First, it might be argued that the decision to use such graphic ads to make the anti-abortion point was intended as a political ploy, to manipulate both the political process and the system of political coverage by the press in this country. As noted above, the very fact that anti-abortion candidates were attempting to air graphic ads of abortions itself created controversy and became a news story. Accordingly, the ads were re-broadcast and discussed in talk shows for free.<sup>325</sup> Second, several of the ads' sponsors publicly affirmed their intentions to shock viewers with their images.<sup>326</sup> Advertisements designed to elicit shock — a

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was not a legitimate run, that "it's not based on the facts. We are running this race to win, we have from the very beginning . . . ." *Nightline*, *supra* note 10.

324. Michael Bailey explained his candidacy thus:

And I was reading the law, the reasonable access law, that said if you are a federal candidate and you run for high office in America, your television ads, by law, cannot be censored, they must be aired during prime time, and they must be aired for the lowest political rate. And I went, "Eureka, praise god, there's a way to get the truth on television."

*Nightline*, *supra* 10 (comments of Michael Bailey). See also *id.* (comments of Mark van Loucks, plaintiff in court case to enjoin graphic ads: "in my judgment, this is indeed a sham and a fraud. These people, in my opinion, are not legitimate candidates for public office. They're hiding behind the skirts of Section 315 of the communications act."); Sheppard, *supra* note 3, at 408-09 (discussing and rejecting this argument).

325. See *supra* note 10. Michael Bailey "got almost as much free publicity from the local media . . . as he did in terms of . . . the amount of minutes that his ads ran." *Nightline*, *supra* note 10 (comments of Prof. Thomas Wolf, Indiana Univ. Southeast). See also JAMIESON, *supra* note 322, at 123-35 (concerning incorporation of ads into news and effect of ads on news); Perl, *supra* note 46 (quoting Becker opponent as saying that Becker's ad campaign "was a political ploy to get as much political exposure as he could.").

326. See *supra* note 11.

programmed response to gore — instead of a thoughtful political stance might be said to be definitionally manipulative.<sup>327</sup>

Indeed, the graphic approach to political ads in general seems largely designed to prey on viewers' preconceptions. For example, California State Controller Gary Davis, running in the Democratic primary for Governor Pete Wilson's Senate seat in 1992, showed a thirty second commercial featuring scenes of the Los Angeles riots and the April 29 beating of white trucker Reginald Denny by African-American men.<sup>328</sup> The appeal to prejudice is also particularly

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327. Such advertisements might even have the opposite effect than desired, by offending people and alienating potential adherents. Whether because of a concern that viewers would feel manipulated, or from the fear that they would simply feel offended by the images, Michael Bailey did not receive the endorsement of his local anti-abortion group. See *infra* notes 354-59 and accompanying text. See also Michael Basil et al., *Positive and Negative Political Advertising: Effectiveness of Ads and Perceptions of Candidates*, in TELEVISION AND POLITICAL ADVERTISING VOLUME I: PSYCHOLOGICAL PROCESSES 245, 250 (Frank Biocca ed. 1991) and sources cited therein (on reactions to negative advertising); JAMIESON, *supra* note 322, at 262-63 (describing negative voter response to Pat Buchanan ad featuring scenes from gay documentary *Tongues Untied*); MONTAGUE KERN, 30-SECOND POLITICS: POLITICAL ADVERTISING IN THE EIGHTIES 209 (1989) (concluding that "hard-sell [negative] ads have greater potential for backfiring"); MICHAEL PFAU & HENRY C. KENSKI, ATTACK POLITICS: STRATEGY AND DEFENSE 11-12, 158 (1990) (concerning "backlash-generating potential" of negative ads).

Naturally, many factors interact to determine the success of a given advertising campaign. Research on the effectiveness of negative advertising has produced complex and even inconsistent results. For discussions about the negative political ad, see generally BRUCE L. FELKNOR, POLITICAL MISCHIEF: SMEAR, SABOTAGE, AND REFORM IN U.S. ELECTIONS (1991); JAMIESON, *supra* note 321; KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, NEGATIVE POLITICAL ADVERTISING (1991); KERN, *supra*; FRANK I. LUNTZ, CANDIDATES, CONSULTANTS, AND CAMPAIGNS (1988); PFAU & KENSKI, *supra*; TELEVISION AND POLITICAL ADVERTISING VOLUME I: PSYCHOLOGICAL PROCESSES 197-263 (Frank Biocca ed. 1991); Spencer F. Tinkham & Ruth Ann Weaver-Lariscy, *A Diagnostic Approach to Assessing the Impact of Negative Political Television Commercials*, 37 J. BROADCASTING & ELEC. MEDIA 377, 377-78 (1993); Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 179 (1992).

328. Associated Press, *Candidates Using Graphic TV Ads*, CHI. TRIB., May 24, 1992, at C5. This is not to say that shocking ads were not broadcast prior to 1992, nor that negative television and radio advertising has not made a place for itself in political life. Lyndon Johnson's famous *Daisy* ad — which suggested that Barry Goldwater would lead the country to nuclear war — is a famous example of classic negative campaigning and visceral politics. See EDWIN DIAMOND AND STEPHEN BATES, THE SPOT: THE RISE OF POLITICAL ADVERTISING ON TELEVISION 121 (1988); JAMIESON, *supra* note 322, at 54; PFAU & KENSKI, *supra* note 327 at 5-12; Jeffrey A. Levinson, Note, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, 72 B.U. L. REV. 143, 157 n.51 (1992). More recently, for example, Republican Presidential candidate Pat Buchanan ran an ad accusing President Bush of supporting "pornographic and blasphemous art," the ad apparently contained footage, from the documentary *Tongues Untied*, of scantily clad gay men dancing. JAMIESON, *supra* note 322, at 262-63; Lafayette, *Candidate's Ads*, *supra* note 1. As noted above, Larry Flynt once threatened to run for president and air X-rated clips in his campaign advertising. See *supra* note 42. Further, surely no one

evident in Bailey-produced ads for an Ohio congressional candidate running on an anti-homosexuality platform in 1994. The ads were described by Bailey as being "the most powerful anti-homosexuality ads ever to hit American television," featuring a number of men kissing passionately.<sup>329</sup> Obviously, these images were designed to elicit an automatic reaction of distaste from a largely homophobic population.

In addition to seeking an automatic reaction of disgust, the graphic anti-abortion ads have been claimed to be misleading in blowing up one inch fetuses to video screen size and showing third trimester abortions, thereby implicitly and erroneously suggesting that such late procedures are typical.<sup>330</sup>

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needs reminding of the infamous Willie Horton ad in the Bush-Dukakis presidential contest. See, e.g., JAMIESON, *supra* note 322, at 15-42. See also sources cited *infra* note 339. However, viewers might easily find that these anti-abortion ads use qualitatively more graphically shocking imagery than any other political advertisement seen on television. See, e.g., TV Monitor, *Abortion 0, Braves 1*, THE HOTLINE, July 7, 1992 (quoting unidentified woman regarding Becker ad: "I thought it was the most graphic commercial I've ever seen in my life and so extremely distasteful.").

329. Tom Dorsey, *Bailey is Putting Graphic Ads on Abortion, Gays Back on TV*, COURIER J. (Louisville), Feb. 24, 1993, at 2C. Ironically, the possibility of ads featuring graphic images of homosexuality was one of the arguments offered by Mark van Loucks, a viewer who sued to enjoin the anti-abortion ads, in support of his view that this type of advertising would be harmful to children and should be channeled or banned. *Nightline*, *supra* note 10 (Mr. van Loucks: "next time we'll have a gay rights advocate running for Senate wanting to show sexual intercourse between two men in day [crosstalk] television, or maybe . . . an animal rights activist . . ."). For a careful description of the ways in which negative political ads trigger visceral responses and stereotypes, see JAMIESON, *supra* note 322, at 64-101.

330. See, e.g., Booth, *supra* note 1 (noting abortion rights advocates' claim that graphic anti-abortion ads are misleading in part for this reason); *Crossfire*, *supra* note 4 (discussing claim that portrayal of third trimester abortions as typical is misleading because no more than one percent yearly are third trimester abortions); *Nightline*, *supra* note 10 (comments of Janet Benshoof, Center for Reproductive Law & Policy); *Crier & Company*, *supra* note 4 (on rarity of third trimester abortions). State law severely limits the availability of third trimester abortions in many jurisdictions. See also Jerry Gray, *House Acts to Ban Abortion Method, Making Use Crime*, N.Y. TIMES, Nov. 2, 1995, at 1 (noting congressional vote to ban dilation and evacuation abortion performed in third trimester) [hereinafter Gray, *House Acts*].

The ads have also been characterized as misleading in a broader fashion. One commentator argued that the abortion debate in 1992 showed "the unwillingness of some individuals to deal with the real, critical economic and social problems that face America. It's always easier, in tough times, to talk about morality, to beat up on women than it is to come up with hard answers to real social and economic problems." *Crier & Company*, *supra* note 4 (comments of Ellen Chesler, author of *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA*). In a similar vein, one of the anti-abortion candidates' opponents said that the graphic tactics ignored the public outcry against the ads and obscured other issues, such as reforming health care, reducing the federal deficit, and enhancing the state's economic development. Harmon, *supra* note 322, at E4.

For an argument that negative political ads should be regulated on deceptiveness grounds, see generally May, *supra* note 327.

Finally, the manipulative aspect of the advertisements is arguably exacerbated in the larger social context in which they are to be assessed. The meaning and power of these ads are in large measure contextual. Therefore, it may be that seeing a graphic anti-abortion ad today — against the backdrop of the increasingly anti-abortion Republican-controlled Congress and a rash of abortion clinic violence and murder — sends a far different message than it would if a woman's right to choose to have an abortion were more clearly and broadly protected legally and in practice.<sup>331</sup> Perhaps the ads would not exist if the increasing growth of a vocal minority of extreme pro-life advocates<sup>332</sup> were not combined with weakened and disheartened women's groups<sup>333</sup> and the decreasing protection of

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331. Recent years have seen such a clear and publicly noted pattern of violence and harassment against persons and institutions that provide abortions that citations are hardly necessary. See, e.g., *National Org. of Women v. Scheidler*, 968 F.2d 612, 615 (7th Cir. 1992), *rev'd on other grounds*, 114 S. Ct. 798 (1994) (describing alleged criminal acts by abortion foes); *Abortion Clinic Violence: Oversight Hearings on H.R. Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 99th Cong., 1st and 2d Sess. (1985 and 1986); Sandra G. Boodman, *Abortion Foes Strike at Doctors' Home Lives; Illegal Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1 (reporting six-fold increase in acts of violence and terrorism against abortion clinics, workers and physicians between 1990 and 1992); Mary Pat Flaherty, *Antiabortion Activists Tell of Grand Jury Questions on Violence*, WASH. POST, Feb. 24, 1995, at B3; Laurie Goodstein & Pierre Thomas, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1; Comments of Planned Parenthood, *supra* note 8, at 12-13. The anti-abortion tactics have ranged from murder, harassment, vandalism, intimidation of abortion service providers and their families, fire-bombing and destruction of clinic property to campaigns designed to tie up family planning clinic phone lines, and interfering with appointments scheduling by making fictitious appointments. See Boodman, *supra*; Comments of Planned Parenthood, *supra* note 8, at 12; Goodstein & Thomas, *supra*. Some anti-abortion activists have defended violence against abortion workers. See, e.g., Flaherty, *supra* (describing anti-abortion activists who see murder of abortion providers as "justifiable homicide."); Rabb, *supra* note 322 (comments of Ku Klux Klansman John Burt and Paul Hill, leader of Defensive Action). As discussed above, these ads have even been linked with violence against abortion providers. See, e.g., Rabb, *supra* note 322; discussion *supra* note 321. They have been characterized as "psychological terrorism." Kunerth, *supra* note 3 (quoting Jane Johnson of Planned Parenthood).

332. See, e.g., Boodman, *supra* note 331; Eliza Newlin Carney, *Evangelicals in GOP Ranks*, NAT'L J., July 29, 1995, at 1947; Alissa J. Rubin, *As Congress Takes Up Social Issues, Whose Values Will Prevail; After 100 Days of Silence, Antiabortion Back-Benchers Are Gearing Up for Battle*, WASH. POST, May 7, 1995, at C3. See also LAURENCE TRIBE, *ABORTION: A CONFLICT OF ABSOLUTES* 139-96 (1990) (discussing development of "New Right"). For a thorough account of the rightward turn in this country in general, see generally KENNETH KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993). On the growth of social conservative groups opposed to sex on the air, see cites collected in Levi, *supra* note 68, at 97-98 & nn.234-38.

333. See, e.g., SUSAN FALUDI, *BACKLASH* (1994); Nina Easton, *"I'm Not a Feminist But . . ."*; *Can the Women's Movement March Into the Mainstream?*, L.A. TIMES (Magazine), Feb. 2, 1992, at 12. I am not claiming that the feminist movement is mori-

abortion rights by the courts,<sup>334</sup> state legislatures,<sup>335</sup> and the House of Representatives.<sup>336</sup> That they are, however, suggests to some that unfettered access to all dayparts for this kind of assaultive speech is particularly bad social policy.

On the other hand, this is an extraordinarily dangerous argument, hinging suppression on the fear of the growing political power of a group with whose views the critic does not agree. And allowing broadcasters to channel these political ads on the ground that the candidates' campaigns are not serious is similarly dangerous.<sup>337</sup> The notion of conditioning political access on whether a

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bund; indeed, the conservative Congress' recent attack on reproductive rights has galvanized women. See, e.g., Debbi Wilgoren, *Gingrich, GOP Favorite Targets at NOW Rally; Tens of Thousands Turn Out to Support Women's Rights*, WASH. POST, Apr. 10, 1995, at B1. Until this political sea-change, however, it is fair to observe that the increasing size, efficiency, mobilization and organization of the right to life movement was not matched by similar cohesion and efficacy in the women's movement.

334. For examples of the Supreme Court's constriction of the abortion right, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989). While none of these cases have overturned the right established in *Roe v. Wade*, 410 U.S. 113 (1973), they have obviously burdened its exercise.

335. See, e.g., Richard J. Thurman Ballwin, *Letters from the People, State Tests Limits with Abortion Bill*, ST. LOUIS POST-DISPATCH, May 1, 1995, at 6B (describing Missouri Senate Bill 279, requiring women to obtain permission from unskilled, volunteer case managers before seeking abortion); Rogers Worthington, *State by State, Laws Create Confusion*, CHI. TRIB., June 30, 1992, at 4C (describing "growing patchwork of state laws that will further constrict women's access" to abortion). Cf. Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1432, 1449-55 (1995) (reviewing David J. Garrow, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994)) (although arguing that state governments have respected Supreme Court decisionmaking authority in area of abortions, observing that "most elected government action has sought to limit abortion rights.").

336. See, e.g., Editorial, *Abortion Under Fire*, THE PROGRESSIVE, Aug. 1995, at 9 (discussing Republican fight against abortions); Gray, *House Acts*, *supra* note 330; Jerry Gray, *Family Aid Plan Rejected in House*, N.Y. TIMES, July 21, 1995, at A1; Jerry Gray, *Issue of Abortion is Pushing its Way to Center*, N.Y. TIMES, June 19, 1995, at A1; Judith Havemann, *Abortion Foes Win Senate Vote; Ban on Coverage in Federal Health Plan Moves to Conference*, WASH. POST, Aug. 6, 1995, at A1; Janet Hook, *Abortion Funding Limits Clear House; Legislation: Bill Passes on 215-206 Vote and Would Allow States to Deny Medicaid Money in Cases of Rape and Incest. Issue is Tied to Controversial Spending Measure*, L.A. TIMES, Aug. 4, 1995, at A1; Carol Jouzaitis, *Senate OKs Bill Cutting Abortion Funding for Federal Employees*, CHI. TRIB., Aug. 6, 1995, at 6C; Rubin, *supra* note 332; *Late-Abortion Ban Sent to House Floor*, L.A. TIMES, July 19, 1995, at A11; Warren Vieth, *Senate Acts to Limit Abortion Coverage to Rape, Incest Cases*, L.A. TIMES, Aug. 6, 1995, at A1.

337. Note, of course, that the FCC's *November Ruling* would not permit the channeling of these ads simply because they were perceived as manipulative. The only expressly asserted justification for channeling of this material is feared harm to children. In addition, although I have set out the argument, I take the position that this basis for regulation is too dangerous and inconsistent with First Amendment values.

candidate believes that she is likely to win is problematic, and not only because of the difficulty of establishing the "seriousness" of a candidacy. Fringe party candidates often know that they will not win elections, but wish to familiarize the public with their views as *they* articulate them. Having an objectively verifiable possibility of winning an election (or at least a subjective belief in the likelihood of success) should not be a litmus test for participation in politics. In addition, creating public debate about the advertisement, and thus the issue, arguably furthers rational political discourse.

Reliance on the manipulative character of the graphic anti-abortion imagery, while also question-begging, is more administrable. It is possible to imagine a deceptiveness type of standard (akin to an FTC analysis) that could more justifiably be applied to the anti-abortion ads. Yet, the anti-abortion candidates deny that the ads are misleading and defend their use of third trimester fetuses on the ground, *inter alia*, that fully formed babies are less offensive to view than the results of earlier abortions.<sup>338</sup> Even if this justification is given the low level of credence that it appears to deserve, there would still be the question of distinguishing the deceptiveness of graphic anti-abortion advertising from the deceptiveness of other kinds of more traditional political advertising.<sup>339</sup>

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338. See, e.g., Booth, *supra* note 1 (quoting Jimmy Fisher to effect that "it is better to see the whole baby . . . than half a baby").

339. Critics of political ads generally have charged some of them with being intentionally deceptive and misleading. This is particularly true of negative political advertising. See, e.g., JAMIESON, *supra* note 322, at 59-63, 84-101 (describing ways in which political television ads invite false inferences as result of peripheral processing of visual cues and use of veiled cues); Lance Conn, Note, *Mississippi Mudslinging: The Search for Truth in Political Advertising*, 63 Miss. L.J. 507 (1994); May, *supra* note 327. Moreover, it may well be argued that smoother and more subtle advertising is in fact far more dangerous because it will not provoke reaction, but will have unchecked underground effects.

More generally, it can be said that all advertising is intended to be manipulative in some sense. After all, advertisers wish to convince potential buyers that they should choose the advertised product. They often do so by subtly playing up associations with desirable cultural symbols and models of identity. Critics of "consumer culture" or advertising culture complain that these unrealistic images have deleterious effects both on individuals and on the social fabric as a whole. See, e.g., STUART EWEN, *ALL CONSUMING IMAGES* (1988); Stephen J. Schnably, *A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 385-89 (1993) and sources cited therein.

Nevertheless, on the particular effectiveness of visual political cues that foil argument and persuade without analytic scrutiny of the message, see generally JAMIESON, *supra* note 322.

## (2). The Pros and Cons of a Model of Deliberative Politics:

In an argument related to the charge of manipulation, we might find these graphic abortion images offensive and inappropriate to the extent that they can be said to undermine a certain substantive vision of rational political discourse.<sup>340</sup> Our political discourse consistently employs the rhetoric of the well-informed electorate.<sup>341</sup> The attempt to inject shock — the visceral — into political discourse is antithetical to the idea of a politics that is supposed to be informed and deliberative. A softer version of this is the notion that sensible decisions are not made in the heat of the moment. These graphic ads are designed to sway by the power of the image, substituting for reflection on the issues as a whole. Just as criticism of negative advertising rests in part on the argument that attack ads are designed to elicit simplistic and knee-jerk reactions to complex problems,<sup>342</sup> criticism of graphic anti-abortion ads as well can rest on their improperly and incommensurately sensationalistic effects on public discourse about a complex and controversial social problem.

The bottom line, on this view, is that there are many ways to express a political viewpoint — and even the horror of abortion —

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340. Jackson, *supra* note 1 (quoting NARAL executive to effect that ads “in-flame tensions rather than try to responsibly explore the issue of choice”). See, e.g., *Crossfire*, *supra* note 4 (comments of New York Democrat Rep. Nita Lowey: “I think that instead of rationally discussing the issue . . . we are showing this graphic, ugly, disgusting, obscene photograph . . . I think this is a cheap way to discuss an issue, and let’s get together and discuss this issue rationally.”); *Nightline*, *supra* note 10 (Prof. Thomas Wolf, Indiana Univ. Southeast: “He has corrupted the system, both from the standpoint of what we would ordinarily accept as being appropriate for television, and from a standpoint of what the campaign should do, presenting issues, presenting differences of positions, in a rational, unemotional situation.”).

341. This is frequently cast as the aspirational norm against which current practice is compared and found wanting by observers from all political vantage points. It is fashionable to bemoan a politically uninformed and apathetic electorate, declines in voter participation, and a news media insufficiently committed to in-depth coverage of political issues. Journalism critics call for engaged, informed debate on public issues. See, e.g., JAMIESON, *supra* note 322. Politicians and academics question the effectiveness of the 30-second spot in promoting informed citizenship. See *supra* note 136, *infra* 342, 348-49. Civic republican legal theorists aspire to a system of free expression designed “to ensure a well-functioning deliberative process among political equals.” CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 84 (1993). See also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 72-73, 82 (1993).

342. For criticism of negative political ads on these grounds, see May, *supra* note 327, at 181-83, 189; Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663, 664-73 (criticizing political spots generally); Victor Kamber, *Political Discourse Descends into Trivia*, *ADVERTISING AGE*, Feb. 25, 1991, at 20. See generally JAMIESON, *supra* note 322.

powerfully and viscerally without having these sorts of video excerpts of "reality." Channeling these ads might well create an incentive for pro-life groups to invent powerful alternative advertisements making the same point. If we can regulate in the indecency area by reference not to the subject of sex, but to the manner of presentation, then this area of graphic anti-abortion advertisements should be dealt with analogously.

On the other hand, proponents of reasonably strong political access rules would argue that this substantive argument should fail both because of broadcaster incentives for ineffective political coverage and, more generally, because of the need for a full, robust and inclusive vision of politics not limited to rationalist discourse. There are also obvious weaknesses in paternalistic arguments that prevent speakers from choosing their preferred form of expression because of a view that they could accomplish their goals more effectively in different ways.

The anti-abortion candidates could respond that shock is the first step to opening closed or inattentive minds and leading to thought on the issue. It could also be argued that the image of politics as reasoned discourse is bloodless, conventional, and mainstream. There is no intrinsic reason to prefer such a politics to one of the heart as well as the mind. From flag burning<sup>343</sup> to wearing expletives on one's jacket in a courtroom,<sup>344</sup> the law has taken cognizance of the role of passion, shock, and confrontation in the context of political speech. Shock value may be an important way to begin a process of informing and mobilizing the public.

Views of speech as a tool of enlightened and rational political discourse adopt an anti-populist notion of why we protect expression constitutionally.<sup>345</sup> Indeed, it may well be that the kind of shocking discourse exemplified by the anti-abortion ads reflects what is out there in at least some parts of the heartland. If a visceral attachment to a viewpoint and a belief in the value of an emotive politics exist in popular culture, then the attempt to exclude their

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343. *Texas v. Johnson*, 491 U.S. 397 (1989).

344. *Cohen v. California*, 403 U.S. 15 (1971). For a discussion of the constitutional problems of regulating political speech with a view to improving public debate, see, e.g., Moran, *supra* note 342, at 680-717.

345. Cf. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995) (reviewing CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* and noting elitist and anti-populist strains in civic republican discourse).



expression from the arena of media politics evidences the adoption of a particular — and exclusionary — vision of politics.<sup>346</sup>

Finally, perhaps the fundamental difficulty with promoting a political discourse requiring rational inquiry and serious attention to the full ramifications of complex problems is that some social problems — and abortion may be one of these — are incapable of being resolved or even discussed in a rational and deliberative way with everyone. The notion of a rational and deliberative politics that these ads may undermine assumes that all participants in the discussion speak the same language and can address issues cooperatively, with many shared assumptions. But those who wish to air graphic anti-abortion advertisements fundamentally disagree that rational discourse about the subject of abortion is either possible or likely to lead to consensus.<sup>347</sup> To them, abortion is simply murder and not a social policy issue susceptible to cool and calm reason. Indeed, the imposition of calm reason on the horrifying image is an effective way to cut off the only vocabulary that some opponents of abortion believe is properly available to discuss the issue.

The substantive argument for a politics of reason is, moreover, a bad fit for the kind of channeling rationale adopted by the FCC in the anti-abortion context at issue here. After all, protecting children by channeling these advertisements to late night hours does not serve to assure us of the kind of adult political sphere that our rationalist notions of politics might be said to promote. After the children are in bed, the adults will be bombarded by messages inconsistent with the deliberative model of politics. It may well be, then, that the FCC's channeling approach is simply underinclusive from the point of view of influencing a desired politics of reason. Yet, complete exclusion of particular types of political speech on grounds of a homogeneous theory of a good politics would be unconstitutional if a state actor were to mandate it, and is surely just as bad as a policy matter if a private party were to effectuate it. Furthermore, the category of speech covered by the November Ruling is underinclusive relative to the category of irrational, visceral-appeal political advertising.

Moreover, we do not currently have the kind of engaged and deliberative democracy or reasoned public discourse that a disap-

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346. This is not to deny, of course, the exclusionary character of the ads themselves and of this kind of popular political discourse.

347. See Gary Lawson, *Thayer Versus Marshall*, 88 Nw. U. L. REV. 221, 221 (1993) (on rhetoric and invective as natural substitutes for rational discourse when political culture contains no consensus about how to resolve normative questions in a rational way).

proval of this kind of anti-abortion advertising might suggest.<sup>348</sup> Although we are not saturated with the "gut level" kind of discourse that the anti-abortion ads represent, our conventional politics has all too often been criticized as not much more than image politics.<sup>349</sup> As noted above, we have become used to seeing hard-hitting negative advertising during political campaigns.<sup>350</sup> Indeed, one of the central complaints about television coverage of political campaigns is that it emphasizes the "horse race" character of politics, fixates on the image of the candidate, and eschews reasoned, informative, issue-oriented discourse that illuminates systemic social problems.<sup>351</sup> If the rest of politics is not thoughtful, then why discriminate against a particular form of shocking and dissenting speech appropriated in this case by a particular interest group? In any event, in channeling away gut level discourse, we may be protecting not rational discourse, but merely conventional image politics.<sup>352</sup>

It could be said, nevertheless, that just because we do not currently have an engaged public sphere does not mean that we should exacerbate the situation. Additionally, despite the surface appeal of the argument that we should decline the invitation to a bloodless and elitist form of rationalist politics, common sense tells us that there is a spectrum of political speech between desiccated rationality on the one hand and gut-wrenching gore on the other.

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348. See generally RICHARD SENNETT, *THE FALL OF PUBLIC MAN* (1978). Cf. Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 4, 26-29 (1995) (arguing, in context of reviewing campaign finance legislation, that average citizen is not politically engaged).

349. For analyses of political advertising and news coverage of political contests, including criticisms of image politics and "horse race" news coverage of election contests, see, e.g., DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* (1987); DIAMOND, *supra* note 328; ROBERT J. DINKIN, *CAMPAIGNING IN AMERICA* 159-68 (1989); ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS* (1989); KATHLEEN HALL JAMIESON, *PACKAGING THE PRESIDENCY: A HISTORY AND CRITICISM OF PRESIDENTIAL CAMPAIGN ADVERTISING* (1984); JAMIESON, *supra* note 322; KERN, *supra* note 327; LARRY SABATO, *THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS* (1981); MARTIN SCHRAM, *THE GREAT AMERICAN VIDEO GAME* (1987); Rebecca Arbogast, *Political Campaign Advertising and the First Amendment: A Structural-Functional Analysis of Proposed Reform*, 23 AKRON L. REV. 209, 215-16 (1989); Cambell, *supra* note 42, at 527 & nn.31-33; Shiffrin, *supra* note 314, at 701-06 & n.69; Leonard C. Shyles, *The Relationships of Images, Issues and Presentational Methods in Televised Political Spot Advertisements for 1980's American Presidential Primaries*, 28 J. BROADCASTING 405, 406 (1984).

350. See discussion *supra* notes 328 & 341-42 and accompanying text.

351. See, e.g., Campbell, *supra* note 42, at 527. While it is beyond the scope of this paper, I should note that this kind of criticism of all television coverage of political campaigns suffers from the defects of all generalizations.

352. See *supra* note 349 and accompanying text.

Despite all this, however, we should be wary of substantive arguments based on a preferred theory of politics. They run counter to fundamental assumptions underlying First Amendment values, and would, in my view, entail far too great a danger of tyranny in the core expressive context of politics.

### (3). The Ambiguous Effect of the Political "Market":

Another substantive argument for allowing broadcaster discretion to channel graphic anti-abortion ads is that the ordinary market constraints on broadcast content do not operate in the same way in the political realm. With regard to other contexts, the usual expectation is that if viewers really find the broadcast material offensive, they will alert advertisers and broadcasters, who will ultimately change the programming in response.<sup>353</sup> In the political context, the market syllogism — that there will be complaints from viewers to candidates about undesirable campaign advertising, that the candidates will not win, and that they will therefore moderate their advertising in the next campaign — relies on far more indirect chains of causation than those traditionally assumed in the ordinary programming context. For example, we do not know that these candidates intend to win. We do not know that, if they lose, they will deem their failure to be caused by the offensiveness of their advertising. We do not know that they would change their advertisements to increase their chances of winning, as they are not traditional candidates who pick issues and create campaign strategy, *inter alia*, by focus group. Finally, they might win even without change.

On the one hand, the fate of this kind of advertising may well be influenced by the voting public. Many pro-life proponents and Republicans distance themselves from these kinds of tactics and graphic ads, which they fear will offend people and have a boomerang effect. In Indiana, for example, the Republican chairman said that he was "extremely pleased" with the victory of State Senator

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353. I am not proposing that the relationship of viewers, programmers, broadcasters and advertisers is such that viewers in fact have a consistent and timely constraining effect on program content. Although the success of a number of consumer boycotts appears to suggest some truth to the notion of market correction of broadcast content without regulation, it is not necessary to go so far in order to make the argument in text. See Patrick M. Fahey, *Advocacy Group Boycotting of Network Television Advertisers and Its Effects on Programming Content*, 140 U. PA. L. REV. 647, 691 (1991). That argument proposes that even if the viewer market is as disciplining a force as might be thought in the ordinary course, certain peculiarities of the anti-abortion candidacies stretch the analogy.

Jean Leising over Michael Bailey.<sup>354</sup> Leising even received the endorsement of the Indiana Right to Life Political Action Committee.<sup>355</sup> Moreover, of the three Congressional candidates who used these ads in Georgia, two lost and one was forced into a runoff in the Republican primary in 1992. This too might suggest that the ads will backfire politically.<sup>356</sup> Some commentators have opined that advertising like this will have the effect of getting "the true believers, the strong pro-life people to the polls" without changing the minds of the majority of Americans, who are somewhere in the middle.<sup>357</sup> In addition, the ambivalent reaction of the public to negative political attacks generally<sup>358</sup> suggests that viewers feel that one-sided and negative political advertisements are manipulative.<sup>359</sup>

On the other hand, Michael Bailey, for example, did win the Republican nomination in his first try in 1992<sup>360</sup> and was characterized as one of the best known politicians in southern Indiana who "commands unusual loyalty in his followers, many of whom feel a

354. Groppe, *supra* note 308. Democrats attributed Leising's victory in the primary to the Republican party's "quiet determination to keep Bailey from defeating a mainstream candidate again." Dieter, *supra* note 308. See also Jackson, *supra* note 1 (quoting Bill Price, President of Texans United for Life, on his criticism of Stephen Hopkins' graphic ads on the ground that they might alienate too many people). See also *supra* note 327.

355. William J. Booker & John R. O'Neill, *Graphic Picture This Time Shows Bailey Far Behind Sen. Leising*, INDIANAPOLIS STAR, May 4, 1994, at A10; Lewis, *supra* note 11.

356. See *Crossfire*, *supra* note 4 (remark of Kingsley). See also Booth, *supra* note 1 (quoting Kathleen Hall Jamieson for proposition that ads may mobilize opponents and attract funds from groups and individuals sympathetic to abortion rights). Moreover, the climate of anti-abortion violence, although it may make the abortion advertisements more menacing and fraught with danger for women viewers, may also make the ads appear even more to be artifacts of the fringe, demonizing all candidates who would align themselves to the radical anti-choice view.

357. *Crier & Company*, *supra* note 4 (comment of Ann McDaniel, White House correspondent for Newsweek).

358. As noted above, negative political attacks may either assist or backfire against the candidate employing them. See *supra* note 327. Despite the recent conclusion of some social scientists and political consultants that negative political ads are effective (for example, in enhancing recall), the data suggest that voters report a distaste for such advertising and, especially, for the "hard sell" attack version. See, e.g., JOHNSON-CARTEE & COPELAND, *supra* note 327, at 30-31. This does not mean, of course, that such a distaste will translate into votes against candidates using them.

359. See *supra* notes 322, 327 & 339. Although the social science data I examined did not fully specify why viewers and research subjects reported a dislike for some negative political advertising, one possibility is that they felt manipulated even as they were processing the negative information in a particularly efficient way. See, e.g., Basil et al., *supra* note 327, at 258-59 (noting better recall for negative ads, but increased dislike of candidate in negative campaign).

360. Dieter, *supra* note 308.

religious zeal for his candidacy."<sup>361</sup> Although he ultimately faced a runoff, Daniel Becker finished first in the Republican congressional primary in his district in 1992.<sup>362</sup> Stephen Hopkins ran for the House in 1992 and the Senate in 1993, "when he placed seventh in the 24 candidate field."<sup>363</sup> These candidates were previously complete unknowns.<sup>364</sup> Even if the controversial commercials did not help their candidacies, they did spotlight the issue of abortion.<sup>365</sup> Some of the candidates saw shock and offense as a measure of their success in changing the grounds of the abortion discussion.

b. The Protection of Children:

The FCC did not rely on substantive arguments about the protection of a particular image of politics in order to justify its November Ruling. Instead, it hinged its decision on the possibility of harm to children from exposure to certain of these graphic anti-abortion ads, and accordingly permitted broadcasters to consider the protection of children in deciding when to air the material.

The notion of harm to children has both an empirical and a normative component. The empirical component in turn refers both to the generalized beliefs of lay persons and to expert assessments of harm, grounded in social science data. There is evidence that the candidates using these graphic anti-abortion images wish to air them during daytime hours precisely and intentionally to shock and traumatize children.<sup>366</sup> At least some of them believe that children's shocked reactions can be used to sway their parents' political beliefs about abortion. The trauma to children, then, would not be an unintended and unanticipated consequence, but, rather, an intentional program by at least some of the graphic ad candidates. (Others take the position that any harm to children should simply be disregarded in favor of advertising "the truth.")

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361. Mary Dieter, *Choices Plentiful in Usually Active Congressional Races*, COURIER-J. (Louisville), May 1, 1994, at B1.

362. Jay Bookman, *Voters Engage in Rebellion*, ATLANTA J. & CONST., July 23, 1992, at A14.

363. Jim Simmon, *Next Rulings Come From Texas Voters*, HOUS. CHRON., Feb. 27, 1994, Voters Guide, at 1.

364. *Crossfire*, *supra* note 4 (comments of Rep. Dornan).

365. See, e.g., Cabell, *supra* note 10 (concerning free publicity generated for candidates by controversial ads); *supra* notes 10, 325.

366. See *supra* note 11 & 322. Some of the Bailey ads include a disclaimer that the ad "is not suitable for small children; that is because abortion is so evil it is not suitable for America." David Goetz, *Indiana Candidate to Show Aborted Fetuses in TV Ads*, COURIER-J. (Indiana), Apr. 15, 1992, at A1.

These candidates' assumptions that children will be shocked are apparently borne out by social science theories and data. There was some evidence in the FCC's docket proceeding on graphic anti-abortion ads that small children experienced physical and psychic harm as a result of exposure to this kind of graphic imagery. Social science data support the proposition that young children learn from images, cannot distinguish images from reality, and have strong visual memory.<sup>367</sup> Because of this visual trigger, graphic and horrifying images have a more traumatic effect on children, particularly young children, than they do on the average adult.

The traumatic effect of these images may be reinforced by their transmission over the powerful and intrusive television medium. We have a deep ambivalence about television — denigrating the medium and fearing its power and effects while simultaneously spending many hours per day tied to “the tube” and constructing our popular culture by reference to television benchmarks.<sup>368</sup> The escalating debates concerning violence on television prove, at the very least, that there is a significant public belief in the power and effectiveness of television.<sup>369</sup> Indeed, the entire regime of advertis-

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367. See, e.g., Joanne Cantor, *Confronting Children's Fright Responses to Mass Media*, in *MEDIA, CHILDREN, AND THE FAMILY: SOCIAL SCIENTIFIC, PSYCHODYNAMIC, AND CLINICAL PERSPECTIVES* 139 (Dolf Zillmann et al., eds. 1994) (noting that “studies published in every decade starting with the 1930s have indicated that transitory fright responses to mass media stimuli are quite typical, and that enduring, and sometimes severe, emotional disturbances occur in a substantial proportion of children”); JUDITH VAN EVRA, *TELEVISION AND CHILD DEVELOPMENT* 6-28, 83-93 (1990) (summarizing data on children's cognition of television, including importance of perceptual salience for comprehension by young viewers and youngsters' difficulties in distinguishing between reality and television programming, and discussing effects of television violence on children); Catherine N. Doubleday & Kristin L. Droege, *Cognitive Developmental Influences on Children's Understanding of Television*, in *CHILDREN & TELEVISION: IMAGES IN A CHANGING SOCIOCULTURAL WORLD* 23 (Gordon L. Berry & Joy Keiko Asamen, eds. 1993); Marguerite Fitch et al., *From Television Forms to Genre Schemata: Children's Perceptions of Television Reality*, in *CHILDREN & TELEVISION: IMAGES IN A CHANGING SOCIOCULTURAL WORLD* 38 (Gordon L. Berry & Joy Keiko Asamen, eds. 1993). See generally *CHILDREN'S UNDERSTANDING OF TELEVISION: RESEARCH ON ATTENTION AND COMPREHENSION* (Jennings Bryant & Daniel R. Anderson, eds. 1983); ROBERT M. LIEBERT & JOYCE SPRAFKIN, *THE EARLY WINDOW: EFFECTS OF TELEVISION ON CHILDREN AND YOUTH* (1988) (reviewing literature on effects of television violence).

368. There are countless critical assessments, both in the lay and scholarly communities, of television's impact on popular culture. See, e.g., DOUGLAS KELLNER, *TELEVISION AND THE CRISIS OF DEMOCRACY* (1990); *TELEVISION: THE CRITICAL VIEW* (Horace Newcomb, ed. 1987); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* (1985); *AMERICAN MEDIA AND MASS CULTURE: LEFT PERSPECTIVES* (Donald Lazere, ed. 1987); Elizabeth Kolbert, *Americans Despair Of Popular Culture*, N.Y. TIMES, Aug. 20, 1995, § 2, at 1.

369. For a sampling of the large non-social science literature on television violence, see, e.g., SUNSTEIN, *supra* note 341, at 66-67; Terry L. Etter, *The Knock-Down, Drag-Out Battle Over Government Regulation of Television Violence*, 3 COMM'LAW

ing — political or otherwise — is based in large part on the notion that the publicity will persuade the viewer or listener.<sup>370</sup> Whatever the current social science assessment of the power of television,<sup>371</sup> it is commonly agreed that TV has some effect on social mores and behavior.<sup>372</sup>

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CONSPECTUS 31 (1995); Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978); Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM & MARY BILL RTS. J., 107 (1994); Symposium, *Television and Violence*, 22 HOFSTRA L. REV. 773 (1992) [hereinafter *Hofstra Symposium*]; Laurence S. Winer, *The Signal Cable Sends, Part II — Interference from the Indecency Cases?*, 55 FORDHAM L. REV. 459, 524 & n.330 (1987); Ian Matheson Ballard, Note, *See No Evil, Hear No Evil: Television Violence and the First Amendment*, 81 VA. L. REV. 175 (1995); Stephen J. Kim, Comment, "Viewer Discretion is Advised": A Structural Approach to the Issue of Television Violence, 142 U. PA. L. REV. 1383 (1994); Sissela Bok, *TV Violence, Children, and the Press: Eight Rationales Inhibiting Public Policy Debates*, Discussion Paper D-16 (The Joan Shorenstein Barone Center for Press, Politics, Public Policy, Apr. 1994). For newspaper reports of current lay opinion as to the effect of television violence, see *infra* note 371.

370. See, e.g., Kevin Robins and Frank Webster, *Broadcasting Politics: Communications and Consumption*, 27 Screen nos. 3-4 (1986), reprinted THE MEDIA READER 135 (Manuel Alvarado and John O. Thompson eds. 1990) (exploring development of television as "the greatest selling medium ever devised"). That is why so much is spent on advertising yearly. See, e.g., Levinson, *supra* note 328, at 146 (describing federal candidates' broadcast advertising expenditures).

371. There has been much debate on the effect of television violence among social scientists tracking the social role of the medium. For overviews of the social science data regarding the effects of television violence, see, e.g., SUNSTEIN, *supra* note 341, at 266 nn.46-50; Arbogast, *supra* note 349, at 216-20; Ballard, *supra* note 369, at 185-91 and sources cited therein; Bok, *supra* note 369, at 2-7; Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1534-51 (1995); *Hofstra Symposium*, *supra* note 369, at 807-54; Kim, *supra* note 369, at 1383 n.2; Robert S. Koppel, *The Applicability of the Equal Time Doctrine and the Reasonable Access Rule to Elections in the New Media*, 20 HARV. J. ON LEGIS. 499, 512-13 (1983); Kristine Oswald, Comment, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385 (1994).

372. Edwards & Berman, *supra* note 371. The raging debates on television violence demonstrate that a significant percentage of the public also believes that exposure to television violence has at least some harmful effects on children. See, e.g., Lawrie Mifflin, *Spurned by Industry, V-Chip Retains Some Mighty Friends*, N.Y. TIMES, July 17, 1995, at D7; Todd S. Purdum, *Clinton Takes on Violent Television*, N.Y. TIMES, July 11, 1995, at A1; Robin Schatz, *Speaking of . . . Media; Laws Will Not Totally Stem Violence*, NEWSDAY, July 16, 1995, Money & Careers, at 1; Robin Schatz, *Swearing to Deter TV Violence; Some Tube-Inspired Foulness from their own Kids Spurs Lawmakers*, NEWSDAY, July 13, 1995, at A45; Jube Shiver, Jr., *Interest Revived in Technology that Blocks Profanity on TV*, L.A. TIMES, July 11, 1995, at D1; Adam Walinsky, *The Crisis of Public Order*, MIAMI HERALD, July 9, 1995, at C1 (excerpted from ATLANTIC MONTHLY, July, 1995); Robert W. Welkos, *The Times Poll; Public Echoes Dole View on Sex, Violence*, L.A. TIMES, June 14, 1995, at A1; *Pediatricians Urge Entertainment Industry to Tone down Media*, ATLANTA J. & CONST., June 9, 1995, at B5.

Last summer, Bob Dole chose attacks on Hollywood and television as linchpins of his presidential platform on the ground of the effect of the media. See, e.g., Dan Balz & Thomas B. Edsall, *Dole's Blast at Hollywood Resonates; Theme Has Appeal Far Beyond Social and Religious Conservatives*, WASH. POST, June 2, 1995, at A1; John M. Broder, *Dole Indicts Hollywood for Debasing Culture; Politics: He Assails Entertain-*

The empirical argument in the graphic advertising context is actually a less controversial claim than that. It is not analogous to the anti-violence argument that watching violence on television will cause children to act violently. Rather, the claim is simply that children, because of the way they process images, will be particularly frightened and traumatized by these graphic images that they cannot clearly enough distinguish from reality. The causal nexus is therefore far more direct than that claimed for other social effects of television. Therefore, a substantive argument in support of the FCC's November Ruling could rest — as the FCC's decision itself did — on the value of protecting children from harmful material on a powerful and virtually unavoidable medium.

In addition, the average American home has a number of television sets and the average American spends many hours per week watching television. Thus, television is intrusive into the home<sup>373</sup> — an invitee into what many see as the intimate locus of self-realization and the zone of private control. In reality, parents argue that they have very limited capacity to control children's access to harmful television. Permitting broadcasters to channel graphic images would enable parents to assert some additional control over the timing and circumstances under which their children would be exposed to this material.<sup>374</sup>

The empirical probability of some harm to children leads to a normative question: how to balance such harm against the interest

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ment 'Depravity.' Remarks in L.A. Are Strongest By Any Current Presidential Candidate, L.A. TIMES, June 1, 1995, at A1; William Claiborne, *Dole Scores Entertainment Industry, Time Warner for 'Debasing' America*, WASH. POST, June 1, 1995, at A6. President Clinton himself joined the bandwagon. See, e.g., Purdum, *supra*. One of the best examples in recent memory of assumptions about the power of television to affect values is the national discussion prompted by then-Vice President Quayle's criticism of the *Murphy Brown* television program on the ground that its main character had become a single mother. See, e.g., Douglas Jehl, *Quayle Deplores Eroding Values; Cites TV Show*, L.A. TIMES, May 20, 1992, at A1; Barbara Vobejda, *Can a Sitcom Change Society? Debate Rises Over Popular Culture's Effect on American Values*, WASH. POST, May 21, 1992, at A1. While it is questionable whether mere lay beliefs about the effects of television, without support in social science data, could provide an adequate legal and policy basis for channeling, there is, in fact, such social science support.

373. FCC v. Pacifica Found., 438 U.S. 726, 727-28 (1978).

374. The argument from parental control of the home requires limitation. That parents in principle should have the right to oversee the development of their children is one thing. That certain parents should be able to control the material available to other households through the mass media simply because they do not wish their own children exposed to particular views is another thing altogether. That is not the argument I intend to make in text. Rather, I wish simply to point out that in the narrow area of material that is demonstrably harmful to smaller children, the desirability of channeling that material to prevent such harm is reinforced by arguments grounded in parental control.



in an unfettered sphere of political advertising. Indeed, the question with respect at least to some candidates' graphic ads is the extent to which we will tolerate the intentional exposure of children to horrifying material as a tool to accomplish ideological ends.

Those who support the FCC's approach in the November Ruling take the position that, since the graphic political advertising will be available to voters during safe harbor hours (not to mention by way of reference in the broadcast news and print press), and since one purpose of airing these ads during the day may be intentionally to traumatize children for ideological purposes, sound policy would dictate a regulatory approach designed to protect children from such strategic and harmful effects.

Admittedly, talismanic references to the protection of children can serve to mask the intrusive character of regulatory interventions.<sup>375</sup> Hinging access rights on broadcaster views of harm to children runs a risk of authorizing political censorship. Therefore, it is important as a policy matter to subject child-based justifications to close scrutiny, to determine whether the mere reference to children will undermine other important interests.

First, it could be argued against the child-protection rationale that the November Ruling does not require broadcasters to channel these advertisements. The broadcaster autonomy approach adopted by the FCC predictably leads to localism and potentially inconsistent scheduling decisions even within local markets. If children are really harmed by this kind of material, channeling at the broadcaster's discretion does not necessarily solve the problem.

Nevertheless, lodging discretion in the private hands of broadcasters means that the public has an opportunity to convince licensees to channel the material to promote the protection and welfare of children. Between this public pressure and the economic incentives to avoid controversial programming discussed above, it is likely that most broadcasters will channel the worst ads to safe harbor hours. In any event, the fact that the regulation is underinclusive does not mean that it should not be undertaken as a policy matter. At least, it can reduce the likelihood and extent of harm to children. A regulation that would mandate channeling would not have the benefit to some candidates of having their ads aired in the daytime, and a regulation mandating full-day access would ensure more widespread harm to children watching television during the day.

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375. I have previously made this argument in connection with the FCC's regulation of indecency. *Levi, supra* note 68.

Second, it could be argued that the harm to children argument in this case is overdrawn and discriminatory because, while explicit abortion ads are clearly horrible and unpleasant, violence on television as a whole may be more harmful to children than the isolated exposure to the anti-abortion ads.<sup>376</sup> Candidates like Michael Bailey and Daniel Becker contend that children are already exposed to massive doses of graphic violence during prime time viewing of entertainment and news, and that the argument from harm is nothing short of "hypocrisy."<sup>377</sup> Why single out this sort of material, rather than focusing on the whole effect of the medium?

Yet, while there is a useful warning in this claim about over-arguing from harm, the anti-abortion ads can be distinguished from ordinary television violence. Virtually nothing on mainstream over-the-air television today has the same level of graphic and explicit imagery, paired with terrifying voiceovers, as these anti-abortion ads. Even news photos of corpses do not involve the gruesome close-up shots of severed, blood-covered limbs as are contained in these ads. The risk of harm to children — and the corresponding rationale for channeling — is thus greater here.

Third, and most powerful, is the classic civil libertarian slippery slope argument against channeling. What is deemed to be too visceral and too harmful varies between communities and changes over time.<sup>378</sup> Harm and offensiveness are defined by shifting personal and cultural norms and necessarily depend on the perspective of the viewer. As noted above, the harm-based justification for regulation of political speech involves not only an empirical but also a normative component. Why protect against certain harms and not others? Why protect one group in society against expressive harms and not others? For example, an African-American person may be as offended by an advertisement in which there is the appearance of rational discourse about racist theories as others might be about actually seeing an abortion, or a gun control ad that

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376. Cf. Bailey, *supra* note 1, at 161.

377. *Nightline*, *supra* note 10 (comments of Daniel Becker) (referring to horror movies such as *Nightmare on Elm Street*); Perl, *supra* note 46 ("[I]ive births, actual murders and dead bodies are shown during prime time, but abortion shows must be viewed along with pornography and other filth from midnight to 6 a.m." according to Becker); Cary Willis, *Bailey files Complaint Over Station Limiting Ad*, *COURIER-J.* (Louisville), Apr. 7, 1994, at B1 (Bailey "ask[ing] viewers to examine the 'hypocrisy' of a TV station that is 'showing dead bodies nightly' on newscasts but won't show aborted fetuses.").

378. The local community standard referenced in obscenity determinations is an example of judicial recognition of heterogeneity in values.

shows a child being blown up, or an anti-fur ad showing an animal in a trap.

The simple, although not complete, answer to this question is the special interest we have as a society in the protection of children and the defense of parental power to guide children's development.<sup>379</sup> It does not, and is not intended to, answer the broader questions of how to deal with offensive and hurtful speech more generally. Whether or not we support a laissez-faire attitude toward speech because there is no universal, unchangeable, and meta-cultural notion of what is offensive, it seems clear that material which has a demonstrable empirical effect on children is a sufficiently distinguishable situation as to be capable of resolution without engaging in a wholesale post-modern critique of libertarian notions of free speech. Admittedly, notions of what is harmful to children change over time, just as do notions of offensiveness. Nevertheless, with children we are paternalistic. Given what is at stake, we act on our current understandings of harm to children even while recognizing the contingency of our notions of harm.

Genuine broadcaster concerns with the welfare of children are nevertheless amplified by the advertiser pressure on commercial broadcasters to avoid offending the audience. And there is a significant danger of political discrimination, a chilling effect on constitutionally protected dissent, and the proverbial slippery slope. Accordingly, to the extent possible, the FCC's review of broadcaster decisions in this area must account both for perverse results arising from factors beyond the protection of children, and for the likelihood of content-based decisions on channeling.

### B. The Better Alternative:

My initial intellectual response to this problem was a civil libertarian argument that it would not be good policy to interfere with political speech, that the manner of expression is often as important as the content, and that there was something a bit shady about the FCC having its cake and eating it too in the November Ruling's shift of the predictable channeling decision to private actors. I fo-

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379. There is, of course, a high level of irony in the fact that we hew to this notion as an aspirational norm and employ the rhetoric of child welfare and family self-determination in the face of a harrowing national problem of child abuse and poverty. Nevertheless, if the question is between protecting and not protecting the psychological welfare of children even with respect to a single aspect of their lives, social policy should counsel protection. (The issue of the relationship between the social interest in the protection of parental authority over children and the independent social interest in child welfare is beyond the scope of this paper.)

cused on the fact that the end result of the November Ruling was retention of the by-now traditional regulatory approach to indecency — which I think is not a good idea — joined with adoption of a new sort of liberalism into the interpretation of reasonable access for federal candidates under section 312(a)(7) — which I also thought was not a good idea in the abstract. I concluded — in a troubled fashion — that if we were to take the reasonable access rule seriously, we should not allow broadcasters the free discretion to channel to late night hours all these and other political ads they consider harmful. The danger of broadcaster censorship of a particular kind of speech would be simply too great, I feared.

Then I had the opportunity to view a few of the advertisements. The reality provided a gut-wrenching counterpoint to my abstract fears of the slippery slope of broadcaster discretion. Simply put, I changed my mind. I felt manipulated, disgusted and offended by the derogatory images of pro-choice women and the women's movement, by the appropriation of images of the Holocaust, by the clinical neutrality of the "medical" voiceover providing misleading information about abortions. That did not convince me, however, to change my view. I am enough of a First Amendment traditionalist to believe that offensive political speech deserves protection. But the personal experience of an afternoon of nausea and subsequent flashbacks to the grotesque and mangled images in the ads sufficed to convince me to accept the argument that some of this material would be tantamount to a traumatic assault on children.

I then had to think through my traditional liberal responses to any suggestion of governmental interference with political speech. Could any standards be developed that would minimize concerns about enhanced media power over political speech, while at the same time minimizing the likelihood that small children would be exposed to the images of abortions that it would be hard to believe would not scar even the hardest among us? Assuming that allowing room for broadcaster discretion despite the political advertising rules is the better regulatory approach to the problem of graphic imagery, the question remains whether there are any useful ways to direct the broadcasters' deployment of that discretion.

The FCC's November Ruling does not grant broadcasters complete and untrammelled discretion to channel any political advertising they do not like. There are a number of attempts in the decision to constrain the exercise of licensee censorial discretion. Although these constraining standards are ultimately imperfect as expressed, they contain the seeds of a common-sense approach to

this kind of political advertising that seems best to balance the conflicting interests identified above.

The FCC's attempt to guarantee that its new approach is consistent with its obligations to enforce the political advertising rules is based on three limiting principles: individualized consideration; provision of alternative access "to times with as broad an audience potential as is consistent with the federal candidate's right to reasonable access;"<sup>380</sup> and a requirement that channeling not be used as a "pretext" for denying access.<sup>381</sup>

On their face, these standards appear to address the FCC's quite proper concern that broadcasters not use the discretion provided them under the November Ruling in bad faith, in order to promote candidacies or messages they like and bury those of which they disapprove. Yet they also raise administrability questions.

First, the meaning of the FCC's notion of individualized consideration is unclear in this context. As noted above, the Commission traditionally has held that the Communications Act required broadcasters to consider candidates' individualized campaign needs rather than simply treating all candidates fungibly.<sup>382</sup> With the exception of news programming, the practical reality of individualized consideration in the past required giving candidates the access requested unless the licensee could show such significant disruption of the broadcast schedule that assent to the candidate's demands would not be practicable.<sup>383</sup>

What the FCC seems to mean by individualized consideration in its November Ruling is a determination on the part of the broadcaster that any given anti-abortion ad featuring graphic imagery is too harmful to be shown at a time when large numbers of children are likely to be in the audience.<sup>384</sup> This adds a different element into the individualized consideration required of the broadcaster; it requires the individualized articulation of the candidate's needs to

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380. *November Ruling*, 9 F.C.C.R. 7638, 7647 (1994).

381. *Id.* (quoting *CBS v. FCC*, 453 U.S. 367, 387 (1981)).

382. *See* Section II.A.1.b. *supra*.

383. *Id.*

384. The language of the opinion is quite confusing on this issue. On the one hand, the Commission emphasizes the need for individualized consideration. On the other hand, its description of such individualized consideration is puzzling: "any decision to channel must be based on the reasonable, good faith judgment of the broadcaster that political advertisements containing graphic abortion imagery should not be aired when there is a reasonable risk that large numbers of children may be in the audience." *November Ruling*, 9 F.C.C.R. at 7647. While that statement in its terms seems to call for a generalized conclusion by broadcasters, the Commission's subsequent assurance that "[s]uch a decision necessarily requires an individualized assessment" suggests a different reading.

be balanced against the potential harm to children of the particular advertisement. The FCC in its November Ruling states that in making the requisite individualized determination, the broadcaster "must carefully balance federal candidates' specific time requests against factors relating to the protection of children in the audience."<sup>385</sup> However, the FCC provides neither standards nor guidance on how the balance should be struck, nor any suggestions for the basis of the broadcaster's assessment of "factors relating to the protection of children in the audience."<sup>386</sup> Won't all candidates be able to argue from need, focusing on their desire to reach more adults in prime time? If all graphic anti-abortion advertisements are not to be channeled on a blanket basis, then what will the "reasonable" broadcaster use to distinguish between one graphic ad and another? As between the amorphous notion of the protection of children and the individualized campaign need of a Congressional candidate whose anti-abortion message is designed to air, say, at the moment of maximum influence for a piece of pending legislation, the November Ruling does not define the basis on which the FCC's mandated balancing is to take place.<sup>387</sup>

The FCC's second limiting element — alternative provision of access — is arguably also unclear. The November Ruling's language providing for alternative access is simply circular. How can we decide whether a candidate has been provided "access to times with as broad an audience potential as is consistent with the federal candidate's right to reasonable access"? On what basis can we decide whether the broadcasters have "air[ed] those advertisements in time periods in which the audience potential is broad enough to meet their reasonable access obligations"?<sup>388</sup>

Third, the FCC's admonition that broadcasters not use their discretion to channel harmful political advertisements for pretextual political reasons is either simply hortatory — and therefore not particularly meaningful — or a real enforcement signal — and therefore deeply troubling to supporters of editorial discretion and a free press. To be administrable, a subjective good faith standard for broadcaster decisions to channel harmful political advertisements would likely entail a much more searching review of broad-

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385. *Id.*

386. *Id.*

387. Even though the balance between concern about children's viewing and the needs of candidates is arguably lacking well-defined standards under the *November Ruling*, however, the calculus has been in theory standardless for years under the FCC's traditional interpretation of § 312(a)(7).

388. *November Ruling*, 9 F.C.C.R. 7638, 7648 (1994).

caster decisionmaking than many civil libertarians would think wise. Therefore, it could be argued, if we are to avoid the morass of undue government intrusion into editorial discretion, the November Ruling's good faith standard cannot really be interpreted to have teeth. If, on the other hand, it does not have teeth, then candidates lack any protection against broadcasters' mercantile imperatives or political misuses of the license.<sup>389</sup>

The main effect of the FCC's first limiting principle is to place the burden on the broadcaster to show that he attempted reasonably and in good faith to compare the importance of that articulated campaign need with the degree of harm feared for children from the imagery of the particular advertisement. It would be rational for broadcasters faced with that burden to consider, *inter alia*, the length of the advertisement and the degree to which its images are graphic and horrifying. When interpreted along with the second limiting principle, this ensures that the FCC faced with a complaint could establish the level of the broadcaster's willingness to work with individual candidates flexibly, within the parameters of the degrees of harm to children predicted for different sorts of graphic images.

With regard to the meaning of the FCC's second limiting factor, it is a commitment in principle to alternative access which, if not perfect, is almost as good as the candidate's preferred slot. At a minimum, this principle would require that broadcasters not develop a pattern of channeling all graphic anti-abortion ads to extremely late night slots when no voters except night workers and insomniacs would realistically be able to see them. A consistent pattern of shunting controversial political ads into the dead times of the broadcast night would indicate that a more searching inquiry into the basis of the broadcaster's decisions would be advisable.

With respect to the third constraint on broadcaster discretion articulated in the November Ruling, evidence of discrimination motivated by distaste for political content would be hard to unearth without significant intrusion into the state of mind of the broadcaster. However, both First Amendment values and an expansive notion of unfettered political discourse might suggest that a verifiable standard of harm and reasonable broadcaster behavior be used by the FCC in reviewing complaints in order to limit the level of permissible intrusion.

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389. Cf. Note, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 221, 229 (1981).

Thus, under this approach, the candidate who chose to use a particularly jarring and graphic format of advertising would be forewarned that his commercial might be moved to a safe harbor period. In turn, the broadcaster who chose to move the ad to a safe harbor would have to justify the reasonableness of its channeling decision if an abuse were claimed. The broadcaster would have to show that it was reasonable in deciding that a particular graphic advertisement would pose sufficient risks of harm to children to warrant channeling. This is not to say that the FCC or a different broadcaster could not have come to a different substantive conclusion. Rather, the standard requires the channeling broadcaster to provide evidence of a rational decisional process with a rational and non-arbitrary result.

Ordinarily, I would be troubled by increasing administrative discretion to inquire into the editorial decisions of broadcasters. The notion that the FCC should return to the business of detailed review of programming decisions is worrisome: a wide-ranging investigative approach would put important First Amendment values in jeopardy. In this instance, however, we can think of the proposed approach as a burden-shifting device which broadcasters accept when they choose to channel political speech. Their choice to channel the speech justifies a level of administrative review that would not be appropriate if there had been no expressed statutory interest in free political speech. The importance of political speech and the Communications Act's presumption that federal candidates should receive access to the air justify the decision to impose the burden on the broadcaster.

Because harm is an elastic and relative concept and because candidates will certainly make strategic attempts to entrap broadcasters in the FCC's legal web, however, the Commission should be very careful in the way in which it deploys its "reasonable good faith" standard. One can easily foresee a battle of the experts between the broadcaster's psychiatrist and those hired by a candidate whose graphic advertisement has been postponed till late night viewing on the issue of whether children would be harmed by seeing the images at issue. And if the broadcasters' harmfulness decisions were grounded not on the views of experts, but on some broader notion of general social consensus, then there would be even more obvious problems of verifiability. That is why deference to a rational process within supportable boundaries seems the best option.



Nevertheless, one can argue that so long as it focuses on the reasonableness of the broadcaster's decision rather than substituting its substantive judgment for that of the licensee, the use of an "objective" standard of possible harm to children will at least require broadcasters' channeling decisions to be tailored and justified, rather than mechanically triggered by blanket preconceptions.<sup>390</sup> With regard to the ideological broadcaster, the rest of its channeling decisions could be analyzed to demonstrate a discriminatory impact on certain viewpoints. With regard to the non-ideological broadcaster, the proposed approach would likely have a practical effect. The time and expense associated with the burden of proving a reasonable concern about harm to children may be sufficient to discipline at least some excessive cautiousness on the part of the ordinary, non-ideological broadcaster. An objective standard of harm splits the difference between FCC interrogation of station personnel as to their subjective views of the ads' harmfulness on the one hand, and total FCC capitulation to broadcaster justifications on the other.

Finally, it might be useful for broadcasters to employ the device of the disclaimer, in lieu of safe harbors, for some graphic advertisements.<sup>391</sup> Although disclaimers and warnings are not an

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390. By using the term "objective," I mean to refer in a short-hand fashion to the notion of consensus. Admittedly, consensus can be measured in any number of ways, including by reference to the judgment of experts and by reference to popular expressions of will. Neither of those methods of establishing consensus is value-neutral. Moreover, experts will disagree; our assessment of popular will often will depend on the loudness of the voices making themselves heard (rather than some empirically verifiable and undistorted view of what all the citizens "really think"); and often the expert view will conflict with the sense of popular will. Thus, different decisionmakers can come up with different versions of consensus. Moreover, it has been suggested that consensus-based theories are majoritarian, mainstream, and, by accepting the status quo as a starting point, implicitly conservative.

I do not rely on consensus out of a naive desire to blind myself to these observations. Rather, I use the notion of consensus as to harm strategically, as a burden-shifting device that allows for the exercise of some broadcaster discretion without unduly involving the government in second-guessing the subjective rationales of broadcasters who decide to channel any given advertisement.

391. The FCC staff has previously permitted advisories before these commercials. Letter to Pepper and Gastfreund, *supra* note 22, at 5600. See also Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Wayne Brewies, KLOL(FM), 5 F.C.C.R. 4643 (1990) (establishing that content-neutral disclaimers acceptable when not used selectively). Yet disclosure is far from a panacea in this situation. As the *Pacifica* Court pointed out, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). Many commenters in the Commission's docket proceeding regarding graphic anti-abortion advertising made this point repeatedly. Admittedly, unlike the radio broadcasts at issue in *Pacifica*, television would allow a visual disclaimer to

appropriate substitute for channeling for very harmful material, there may be some graphic advertisements that broadcasters may reasonably conclude can be aired at some point during prime time, with continuous warnings. Evidence that a broadcaster had experimented with disclaimers as well as channeling would augment the record of reasonableness and individualized decisionmaking.

The benefit of the kind of approach suggested here is not that it will "correctly" address any given instance of broadcaster judgment about channeling shocking and harmful political ads. After all, it would be at this point hopelessly naive to believe that we could come up with a predictable and mechanically applicable rule that would assure that only those graphic political ads which are "truly" harmful to children would be channeled to safe harbor hours. The real benefit of this approach is that it will give discretion to broadcasters on a day-to-day basis about a controversial political question, while assuring that broadcaster decisions will be reviewed and debated in other, open fora. The limelight will surely discipline the most risk-averse behavior to which mercantile imperatives could drive broadcasters — namely, channeling all potentially controversial commercials to late night hours. Even if any particular actions are not deterred by the possibility of review in various fora, that review can prompt a broader discussion of the political questions entailed by the graphic ad issue. The review can include the FCC, the courts, and even the Congress, and can provide an opportunity to address the political advertising rules and the various theories of free speech and democracy that underlie our beliefs about how broadly we should interpret those rules.<sup>392</sup>

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run on the bottom of the television screen throughout the duration of offensive material. Yet, a safe harbor might be better than running a continuous disclaimer. First, the viewer sees the images simultaneously with the disclaimer. Second, children watching alone would not necessarily understand the disclaimer or switch the channel, especially if they could not read. There is a real question, then, as to whether this sort of "warning labels" solution averts the harm, or whether it simply provides an illusion of a solution. Nevertheless, the possibility of advisories may allow broadcasters to make more tailored and refined judgments about their responses to different graphic ads. Advisories, while far from perfect, allow broadcasters the option of channeling some ads and merely adding warnings to others considered less harmful to children.

392. I do not mean to suggest that Congress can easily amend a statute if it does not like the judicial or administrative interpretations of the legislation. Many articles have claimed that congressional constraints on statutory interpretation by other branches is unrealistic in most instances and does not reflect the complicated calculus of factors that lead to congressional action and inaction. On the practical difficulties with the notion of legislative correction, see, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 353-90 (1991); Pierce, *supra* note 100, at 764 n.108.

## CONCLUSION

The question of whether broadcasters should be allowed to channel graphic political speech to safe harbor hours despite the equal opportunities and reasonable access rules of the Communications Act of 1934 is a difficult one. The FCC's decision to permit such channeling of graphic anti-abortion ads has repercussions far beyond that specific factual context. Its rationale can extend to the use of graphic imagery of countless other sorts in political advertising. The gun control proponent, the animal rights activist, the supporter of stiff criminal penalties for rape — issue candidates of all political persuasions — may be affected by the FCC's decision and limited in the kind of visual strategy they can deploy in support of their candidacies.

As a strictly doctrinal matter, it is likely that the FCC's November Ruling will pass both statutory and constitutional muster on judicial review. Because both the reasonable access provision of section 312(a)(7) and the "no censorship" element of section 315 do not specifically speak to the issue of channeling graphic political ads, the FCC's declaratory decision would most appropriately receive extremely deferential review under *Chevron*. Although some rhetoric in the legislative history of the provisions — particularly section 315 — and some prior court and FCC interpretations of the political advertising rules could be used to support the conclusion that political advertisements should be aired by broadcasters on a non-discretionary common carrier basis, the FCC's decision in the November Ruling is a rational interpretation of the statutory scheme and therefore deserving of judicial assent. With regard to the constitutional status of the decision, this Article has concluded that a successful First Amendment challenge is unlikely. It would be surprising if a reviewing court would find sufficient state action under current interpretations of the doctrine to trigger constitutional review in light of the FCC's strategy of leaving channeling entirely to the good faith discretion of broadcast licensees.

This is not the end of the story, however. The FCC's outcome raises difficult issues of policy. A number of arguments can be made in support of the FCC's decision, ranging from claims about our obligation to promote a rational, deliberative and non-deceptive political culture to claims about the social benefits of broadcaster autonomy and the protection of children from harm. Yet there are strong arguments as well — grounded both in the Constitution and in public policy — for the social benefit of untrammelled political discourse and the dangers of permitting virtually standar-

dless private broadcaster interference with expression at the core of the First Amendment.

This Article concludes that, on the whole, the FCC's decision to permit broadcaster channeling of anti-abortion political ads so graphic as to be harmful to children is the better alternative as a matter of policy. It does so, however, not because of a substantive desire to improve political discourse or an unquestioning belief in the benefit of broadcaster autonomy. After all, our commitment to freedom of expression should not only extend to political discourse we find pleasant and congenial. And broadcasters are faced with economic and institutional incentives that might well promote a censorious culture and prompt virtually automatic decisions to channel all controversial political imagery. Moreover, there is a certain discomfort (even if no doctrinal problem under current law) in rewarding administrative agencies for the kind of strategic decision-making that permits effects indirectly that the constitution might have disallowed the government from achieving directly. The Article supports the results of the November Ruling primarily because the imagery used in many of the graphic anti-abortion ads that have aired since 1992 is simply too shocking and harmful to small children to warrant mandated carriage at any hour of the candidate's choosing.

While the best arguments in support of the FCC's action are grounded in broadcaster editorial autonomy and the protection of children, blanket recitations about editorial freedom and protecting the young should not be used to justify incursions on speech without some safeguards against abuse. Because of the tension between channeling and untrammelled political speech, and because of the mercantile pressures on broadcasters to be risk-averse regarding controversy, this Article proposes that upon complaint, the FCC review broadcaster decisions for signs of excessive zeal in channeling. I suggest that broadcasters bear the burden of showing that their decisions to channel were reasonable pursuant to a standard of "objective" reasonableness regarding both the process and the ultimate conclusion as to the likelihood of harm to children from the particular advertisement channeled. Such a reasonableness standard would ordinarily entail deference to broadcaster decisions taken pursuant to a rational process, so long as the conclusion of likely harm were rational and non-arbitrary. Although such standards are themselves subject to criticism on grounds ranging from undue interference with broadcaster decisions to questions about the administratability of "objective" tests, they can in fact serve both

as adequate substantive grounds for review and as hortatory devices and deterrents to excessive channeling of political speech by broadcasters.

Today, the most the FCC can offer us is an experiment. Modern politics takes place largely over the television screen with thirty second political spots and negative attack advertisements. Because we live in a culture in which most people do not watch thorough, balanced and dispassionate discussions of political issues, candidates increasingly wish to invoke the most visually immediate spot format for their campaigns. The FCC should not seek to redesign media politics simply because it does not like that particular form of advertising strategy. Yet when the welfare of children is at issue in a context in which there is no *a priori* reason to deprive broadcasters of editorial discretion, the November Ruling's opportunity for broadcasters to balance candidate autonomy over the most important modern political forum with community control to protect children is a rational approach. Whether that balance is struck reasonably in any given context cannot be assessed in advance and in the abstract. As in all things, the test of the FCC's decision will (and should) be experience.