

Cato Institute Policy Analysis No. 112: Political Advertising Regulation: An Unconstitutional Menace?

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Executive Summary

Last spring, you could have confidently made four prediction's about the fall campaigns:

First, many candidates will rely heavily on negative television commercials. For guidance here, forget professional codes of ethics, party leaders' admonitions, and candidates' precampaign promises; look instead at recent history. In 1986, attack ads became so prevalent that the Washington Post labeled it the "Year of the Negative."^[1] In early 1988 several presidential candidates aired attack ads, and some hit home. In fact the demise of one candidate, Paul Simon, was widely attributed to his refusal (until it was too late) to air negative ads. In the fall, televised rhetoric in the presidential election is likely to be at least as harsh, and many races for lower offices will be much rougher. Inevitably a few campaigns (probably no presidential ones) will air undeniably cheap shots.

Second, more than one political columnist will point to those cheap shots and shake his head over the republic's future. Recall 1982, when David Broder fretted that negative campaigning could "cripple a healthy democracy." Recall 1984, when Jack Germond and Jules Witcover wrote that "voters are brainwashed, misled and deceived." And recall 1986, when Tom Wicker complained that "hit-and-run television spots" provided "no more useful or reliable information than, say, one of those commercials in which male-bonded yuppies or superannuated jocks extol the virtues of beer guzzling."^[2]

Third, opinion surveys will show that the vast majority of voters side with the columnists. In a 1983 Harris poll, 82 percent of the people polled said political ads are too negative.^[3] In an election year that percentage is likely to go even higher.

The fourth prediction follows from the first three: voters and policymakers will talk about regulating or banning political ads, especially negative ones. They will say that such ads divert money from people-oriented political activities, weaken the political parties, give unchecked power to sleazy political consultants, mislead and alienate viewers, reduce voter turnout, and debase political rhetoric.

Such criticisms are off-base. In a modern political campaign, commercials constitute a candidate's "best opportunity," as Mark Shields has written, "to explain why the race is being made, how he differs from his opponent and what he wants to do in office."^[4] Proposals to clean up commercials would undercut that opportunity, perhaps eliminate it entirely. Voters would end up knowing less about candidates.

But even if such commercial spots did harm the political system in clear-cut, demonstrable ways, the proposed regulations would almost certainly be ruled unconstitutional. Campaign speech, including political ads, enjoys maximal First Amendment protection. In short, practical considerations and the Constitution both argue against regulating political commercials.

Proposals for Curbing Political Ads

In recent years several proposals to regulate political candidates' TV commercials have been advanced. These proposals are likely to reappear this year. Some proposals would ban all ads.[5] Other would ban only short (30- and 60-second) political ads.[6]

The proposals that are likely to get the most attention would ban production material in some or all ads. The ads could show only the speaker addressing the camera. They could no longer include "voice-overs; anonymous faces; actors playing the part of politicians; demagogic scene settings; devices such as graphs, charts and the like; talking cows; nuclear weapons and any other paraphernalia that would tend to provide unnecessary emotive content to a political message." [7]

That description comes from Curtis Gans, director of the Committee for the Study of the American Electorate and the father of the no-props approach. Gans ran Eugene McCarthy's New Hampshire campaign in 1968, when McCarthy's stronger-than- expected showing helped convince President Lyndon B. Johnson to retire. "I didn't need demagogic television," Gans said in 1983. "All I needed was the war in Vietnam to be going on, and Lyndon Johnson to appear on the tube. . . . Where there is real dissatisfaction with the incumbent, the incumbent can get ousted without these devices. And where it is created dissatisfaction, he probably shouldn't be ousted." [8]

McCarthy's "children's crusade" may have been the last of its kind. For the demise of retail politics, Gans blames television. In a 1979 Washington Monthly article, he urged a step that would, he wrote, help restore "the health and welfare of American democracy: abolish the paid political television commercial." It was, he admitted, "an idea whose time has not yet come." [9] After the 1982 elections, with all the hand- wringing about that campaign's negative ads, Gans decided maybe the time had come. Banning all political ads was still not a "salable idea," he said; but he thought that a ban on production material might prove salable.[10]

In Gan's view, the regulation would substantially abolish political commercials. Charles Guggenheim, a political consultant and filmmaker (who favors a length requirement for political ads), has said that the no-props approach would have the effect of "boring people to death during political campaigns." [11] Because talking heads are so boring, many candidates would put their resources elsewhere. Negative ads in particular, Gans has predicted, would be virtually eliminated. When candidates go on the attack, they prefer to do so with humor, indirection, and symbols. If forced to address the camera themselves, most office seekers would opt to remain positive.[12]

Gans outlined the proposal before the Senate Rules Committee in 1983 and helped with the "Fairness in Political Advertising Act," sponsored by Sen. Warren Rudman and Sen. Daniel Inouye in 1984 and again in 1987.[13] The Rudman-Inouye bill would require commercials to show only one speaker (the candidate or an alternative) in front of an actual backdrop that was filmed with the speaker.[14] Gans has continued to voice his support for the measure.[15]

Two less restrictive bills were also introduced. The Clean Campaign Act, sponsored by Sen. John Danforth and Sen. Ernest Hollings in 1985, would penalize ads that directly or indirectly referred to the candidate's opponent (principally negative ads) unless the sponsoring candidate made the reference "in person." [16] Negative ads could continue to use production material as long as references to opponents were made by the candidate, and positive ads would not be affected at all.

A 1987 bill sponsored by Sen. Dan Evans, based on a proposal by the National Association of Broadcasters, would penalize ads unless the sponsoring candidate was "identified or identifiable during 100 percent of the time." [17] The requirement would seem to be satisfied if the candidate's name was printed across the screen, regardless of the accompanying visuals. However, the bill's text and statements by Senator Evans indicate that it was intended to encourage candidates to display their faces and not merely their names. The discussion in this paper will assume that

the more restrictive interpretation applies.[18]

Although the three bills (and similar proposals) take different approaches, all would limit the content of political commercials.[19] The bills' supporters argue that the limitations would significantly improve the American political system in several ways.

Political Spots in the Modern Campaign

All of the criticisms of political television advertising fail under close scrutiny.

The Inouye-Rudman bill states that campaign costs have increased to the point that they "threaten both access to and equity within the political process" and that television commercials are the principal reason for this state of affairs.[20] True, the cost of political campaigns has risen steeply, and television advertisements seem to be the main culprit. In the general elections of 1952 (the first year in which TV ads played a significant role), television and radio costs accounted for 4.3 percent of total political spending. By 1986 the figure had increased more than fivefold, to 24.3 percent, and in some races well over half of expenditures went to TV. The amounts involved have become enormous: the 1984 presidential nominees spent about \$50 million on TV time, and the 1986 House and Senate candidates spent about \$86 million. The 1988 figures are likely to be even higher.[21]

Although those figures are huge, they are dwarfed by the airtime expenditures of commercial advertisers. In 1986 Proctor & Gamble spent more than five times what the House and Senate candidates were spending on TV airtime: \$456 million.[22] If, as campaign finance scholar Herbert Alexander has said, political advertising costs are the "tuition we pay for our education on the issues," then the question may be whether candidates are underspending, not overspending.[23]

More important than absolute cost is cost-effectiveness, and in this regard television spots stand out. According to one estimate, a 1983 campaign spent about .5 cents to reach a voter by television. The cost for a newspaper ad was 1.5 cents; for direct mail, 25 cents.[24] Out-of-home alternatives, such as political rallies, are even less efficient.

In some campaigns, of course, media markets do not match electoral boundaries, thus making television advertising inefficient. For this reason more than half of the candidates for the House use little or no television.[25] For most large-area races, however, the situation is much as Mark Shields has described it: "Political television spots are the contemporary political campaign." [26] The proposals to restrict political commercials would hamper the candidate's most efficient way of communicating with voters.

Length

Critics of television spots often insist that nothing important can be said in 30 seconds. Several responses are possible.

First, important points can be made briefly. After hearing the conventional wisdom expressed at a Harvard gathering, political consultant John Deardourff dashed off this script: "I believe that the question of abortion is one that ought to be reserved exclusively to a woman and her doctor. I favor giving women the unfettered right to abortion. I also favor the federal funding of abortions through Medicaid for poor women as an extension of that right to an abortion, and I oppose any statutory or constitutional limitations on that right." After reading the script aloud, Deardourff told the group: "That's twenty-four seconds. I don't know how much more one needs to know about that subject in order to form an opinion." [27] Although most campaigns avoid such specifics, the reasons are based more on political pragmatism than on limitations of length.

Second, the flip side of the brevity criticism is equally invalid: More time does not always produce specificity. Most five-minute spots are biographical profiles that concentrate on a candidate's personal history and say little or nothing about issues.

Third, brief spots speak to much larger audiences than does longer programming. Few people bother to change channels to avoid a 30-second ad. Half-hour political programs, in contrast, lose at least a third of the audience and often considerably more.[28]

Fourth, brevity has always been an important element of political success. "Effective leaders," as an Aspen study group concluded, "are typically those with an ability to popularize complex issues by reducing them to short-hand labels." [29] Senator Hollings, a cosponsor of the Clean Campaign Act, ably illustrated the importance of brief labels during the hearings on the act. The title "Clean Campaign Act" had been a mistake, Hollings said, because it made people think of "us politicking again, and this is going to make things clean as compared to dirty." Better, he explained, would be a title like "Political Exposure Act": "I mean, they all think politicians are devious and working behind the scenes, so if you can get political exposure, that maybe would sell them." [30]

Finally, some consultants have begun using political ads in conjunction with other forms of political advertising. In 1988, for instance, the Pete du Pont and Pat Robertson campaigns both aired spots that urged viewers to read newspaper inserts for additional details about the candidates' stances. [31]

Information and Emotion

Critics also accuse political commercials of impeding thoughtful discussion of the issues. But in a well-known study of the 1972 presidential campaign, Thomas Patterson and Robert McClure concluded that voters learned a great deal about the issues and the candidates' positions from TV ads--more, in fact, than they learned from news coverage. [32] Whether or not the comparison still holds true, TV spots do provide a type of information that rarely makes the news. Commercials concentrate on what the candidate believes is important; news coverage favors confrontation, scandal, and the horse race, regardless of the importance to the candidates or the electorate. [33]

In explaining candidates' priorities and views, some commercials rely on production material. Consultant David Garth devised the use of words superimposed on the screen to saturate a commercial with information. Voters, he believed, felt challenged by the saturation and would watch the ads more attentively in an effort to absorb all the information. [34] Other consultants have used charts and graphs to provide more information than a talking head could convey.

Information can also be conveyed metaphorically. President Reagan's "Bear" ad of 1984 showed a grizzly bear lumbering across the landscape and, at the end, confronting a man on a hilltop. The voice-over talked about a "bear in the woods" that some people consider "tame" and others consider "vicious and dangerous." "Since no one can really be sure who's right," the announcer said, "isn't it smart to be as strong as the bear?" [35] The metaphor helped viewers comprehend the idea of peace through strength.

Symbols also help convey information efficiently. Dozens of social security cards have been ripped apart in television spots since 1964, when Johnson's campaign started the tradition, to warn voters that the opponent would cut social security benefits. The same charge could be made by a talking head, but less quickly and less effectively (though no less unfairly). Efficient communication, as E. D. Hirsch has pointed out, requires shared reference points. Today, many such reference points are visual. [36]

While the role of information is important, emotion also plays a part in voters' choices. Voters want to feel an emotional connection to the candidate and the issues, and the connection is most effectively made through production material. Republican consultant Robert Goodman, for example, has proven adept at plugging into voters' state pride with songs ("Hear what they're saying about West Virginia/Kind of got the feeling we're on our way") and glossy aerial footage of mountains and streams. Douglas Bailey and John Deardourff used music ("I'm Feelin' Good about America") and patriotic images in Gerald Ford's 1976 presidential campaign. Even Curtis Gans has said that the Ford TV campaign managed to "capture the essence of what was at stake." [37]

Although a ban on production material would generally make emotion more difficult to convey, it would in one respect lend new emphasis to an emotional aspect of a candidacy: the focus would be on the candidate's appearance and the sound of his or her voice. Twenty years ago filmmaker Gene Wyckoff predicted that television would bar "homely men of stature and capability" from elective office. [38] His prediction has not come true, thanks in part to production material in ads. Banning production material, as Fred Wertheimer told the Senate Commerce Committee, might "turn campaigns even more increasingly into 'beauty contests'" by disadvantaging "any candidate who does not have a 'pretty face' and appealing television presence, even though that candidate might well be the most qualified and have

positions most in tune with the constituency." [39]

Lies and Demagoguery

Critics of spots often argue that TV has undermined political debate. Gans, for instance, has suggested that "demagogic trappings" may "crowd out free speech and the rational discussion that was intended by the First Amendment." [40] But such an argument romanticizes the past. "Never," Daniel Boorstin has written, "was there a more outrageous or more unscrupulous or more ill-informed advertising campaign than that by which the promoters for the American colonies brought settlers here." [41] Abigail Adams wrote that the 1800 presidential campaign between her husband, John, and Thomas Jefferson was enough to "ruin and corrupt the minds and morals of the best people in the world." [42]

Indeed, the bills' talking-head requirement runs counter to the prevailing practice of earlier years. Political debates in pamphlets and newspapers, including debates about the proposed Constitution, were largely conducted behind such pseudonyms as Publius (Alexander Hamilton, James Madison, and John Jay in *The Federalist*). In the Washington administration, cabinet members Thomas Jefferson and Hamilton leveled anonymous attacks at each other through newspapers they sponsored. As president, Jefferson continued to publish anonymous items in a friendly newspaper. [43]

History aside, personal presentation hardly forecloses demagoguery. On election eve 1952, President Harry S Truman introduced Democratic nominee Adlai Stevenson to a nationwide TV audience by saying that the election "may decide whether we will find lasting peace, or be led into a third world war." [44]

Just as the voters rejected Truman's bombast, they often reject high-gloss bombast produced for TV ads. In fact ad writers and candidates know that cheap shots tend to diminish the sponsoring candidate's own support. It simply is not true that, as Gans told the Senate Commerce Committee, media advisors have created elections in which "the public has no one to hold accountable." [45] They hold the candidates responsible.

So too does the press. Although reporters closely cover media consultants, they take candidates to task for the ads they air. [46] In 1984, for example, columnists belittled Gary Hart's inability to cancel a TV ad that he had disavowed; four years later, leading newspapers criticized Richard Gephardt for airing inaccurate and misleading ads. [47] The press is particularly quick to pounce when a candidate has attacked his opponent. As a preemptive defense, some campaigns give reporters documentary evidence to support the allegations made in spots. [48]

While voters and reporters are judging whether an attack has gone too far, the victim often tries to sway their decision. Jeff Greenfield has termed this the Joseph Welch Ploy, after the Boston lawyer who upbraided Sen. Joseph McCarthy on live TV ("Have you no sense of decency, sir?"). [49] Such ploys have become commonplace; they appeared in at least 10 races in 1986 alone. One candidate labeled his on-the-attack opponent "Dirty Harry." Another chided his opponent, "That's not the way the game is played in the state of Maine." Still another said that her opponent's allegations had "shocked the people of this state." [50] Minnesota senator David Durenberger's campaign ads fired off what may have been 1988's first Welch Ploy more than four months before the election: "Skip Humphrey should know this kind of personal mudslinging just isn't in the tradition of Minnesota." [51] Sometimes the Welch Ploy works; sometimes it does not. The point is that ads are not (as Gans has said) "basically unanswerable." [52]

Voter Turnout

Gans and others have argued that negative advertising inclines voters to stay home. Although voting rates have declined sharply as the use of TV ads has increased, the causal connection is far from clear. In some elections, turnout has fallen after heavy advertising. [53] But in others, advertising has apparently increased public interest and, hence, voter turnout. In North Carolina's strident 1984 James Hunt-Jesse Helms race, for example, voter registration rose 16 percent, and more people voted than in any previous North Carolina senatorial election. [54] The 1986 Florida gubernatorial election was characterized by strident ads, and experts predicted that voters would show their disgust by staying home. Instead, 61 percent of registered voters came to the polls, six percentage points above the state's average for off-year elections. [55]

Incumbents

Many staunch opponents of negative advertisements have used attack ads themselves. Sen. John Danforth, cosponsor of the Clean Campaign Act, relied in part on negative ads in his 1982 race.[56] Another cosponsor, Sen. Paul Simon, landed his share of blows on his 1984 opponent, Sen. Charles Percy, in what has been called Hone of the roughest negative campaigns in recent years."[57] In 1986 Ted Strickland, the Republican nominee for governor of Colorado, aired some of the most vicious spots in that vicious year and then announced that if elected he would propose legislation prohibiting people who air negative ads from holding public office.[58] Terry Dolan, the late chairman of the National Conservative Political Action Committee, labeled this the "stop-me-before-I-kill-again" approach.[59]

The point here is not merely that elected officials hold their noses and broadcast attack ads. It is that negative commercials are most frequently the tools of challengers. In most elections the challengers begin with lower name recognition and approval than do incumbents. To convince voters that change is necessary, challengers must do more than explain their own views and qualifications; they must also contrast themselves to the incumbents. Incumbents, meanwhile, can coast along on positive ads and ignore their opponents, at least until the race tightens.

Thus, negative ads threaten incumbents, and incumbents who vote to ban them are voting to make their offices more secure. Gans admitted as much in a 1983 interview. "The reason that this seemingly outlandish idea has a shot," he said, "is because, in its initial effect, it's proincumbent." [60]

No Magic Bullets

There is nothing magical about political advertising, positive or negative, with or without production material. It does not overwhelm the viewer's natural skepticism or subvert his rational faculties. It provides information that some voters accept, some reject, some ignore, and some misunderstand. In most races, especially for high-level offices, voters obtain information from other sources as well, particularly the news media.[61]

Some of the best-known political consultants admit that their Hollywood reputation (as featured in such films as "The Candidate" and "Power") is vastly overblown. Of more than a hundred statewide races he has worked on, Robert Goodman believes his work has made the decisive difference in "only three or four." "The very best people in this business," Democratic consultant Robert Squier has said, "probably understand only about five to seven percent of what it is that they do that works. The rest is all out there in the unknown." [62]

Constitutional Problems

Even if banning production material would have only beneficial results, the law would still have to survive judicial scrutiny. In essence a court would have to find that the intended results of the ban are sufficiently important, and that they could not be achieved without the resultant impact on free speech.

Sponsors of the bills have recognized the problems. Senator Danforth, opening hearings on the Clean Campaign Act, admitted that the bill "certainly raises constitutional questions." [63] To help answer these questions, supporters of the proposals commissioned two legal memorandums. One memo concluded that the regulation "may survive constitutional challenge." [64] The other concluded that it would have a "reasonable possibility" of being upheld in the courts.[65] Lukewarm though they are, both assessments seem unduly optimistic. The proposed bans on production material have virtually no chance of being ruled constitutional.

The Status Quo

Current law requires broadcasters to treat political candidates more favorably than other advertisers, including not only commercial advertisers but also political parties, political action committees, and other noncandidate political organizations.

First, broadcasters must give candidates for federal office "reasonable access" to the airwaves. Although public service time would legally suffice, stations also provide opportunities to buy commercial time.[66] Second, broadcasters must give all candidates in a given election equal opportunities to purchase commercial time--even if doing so requires them

to preempt commercial advertisers.[67]

Third, broadcasters must sell the time at a so-called lowest-unit rate--that is, the lowest rate charged for an ad in the particular time slot--even if other advertisers must buy multiple ads to qualify for the discount.[68] A commercial advertiser might have to buy a hundred spots in order to get the lowest-unit rate; a candidate qualifies with just one spot. In practice, however, campaigns are wary of relying too heavily on these bargain-basement ads because they can be preempted by higher-paying advertisers. In the 1984 West Virginia gubernatorial race, incumbent Arch Moore's campaign learned that Clyde See's campaign was using lowest-unit-rate time slots exclusively. The Moore campaign offered a higher rate for time that could not be preempted and managed to destroy See's ad schedule.[69]

These rules are statutory rules, created by Congress, and are not, of course, constitutional doctrines. Accordingly, Congress could repeal them. If it did so, and broadcasters were free to treat candidates' ads like other ads, then the number of political ads would decrease. Prices would rise once broadcasters were free of the lowest-unit-rate requirement, and many broadcasters, including the three networks, probably would reduce the airtime they allot for political ads, especially in prime time. As a Harvard study pointed out, political commercials are most numerous at the time of year when some of broadcasters' best customers, auto manufacturers, want to introduce their new products.[70] Indirectly, then, Congress could eliminate many candidate ads.

But although Congress could repeal the statutory rules for all political commercials, it could not necessarily do so only for production-material commercials. The line it drew would have to meet First Amendment standards.

Regulatory Mechanisms

Before addressing the First Amendment issue, we should briefly note that the different proposals would employ different enforcement mechanisms. The differences have little constitutional significance; the Supreme Court generally does not distinguish between speech regulations that punish by withholding a statutory benefit (such as the lowest-unit rate) and those that punish by imposing a penalty.[71]

Two proposals would discourage such ads indirectly. The Evans bill would apply the lowest-unit rate and the access rules only to ads in which candidates were identifiable throughout. Candidates could air other ads, but broadcasters would be able to refuse them or to charge more than the lowest-rate for them. The Danforth-Hollings Clean Campaign Act would deny the lowest-unit rate and the access benefits to ads that referred to a candidate's opponent unless the sponsoring candidate personally made the reference. Danforth-Hollings would also add a further disincentive to negative advertising: broadcasters who accepted such ads would be obligated to provide equal time, at no charge, to the candidate referred to. Both the Evans bill and the Clean Campaign Act would be enforced by the Federal Communications Commission.[72]

The Inouye-Rudman Fairness in Political Advertising Act takes a more direct approach. It would prohibit candidates from airing political ads (of under 10 minutes' duration) containing production material. The Federal Election Commission would principally enforce the ban.[73]

Constitutional Standards

The Supreme Court's approach to speech-related regulations can be described as presenting two hurdles to federal regulators: a regulation is constitutional only if (1) it establishes a governmental interest at a high level of importance, and (2) no reasonable alternative policy could establish that interest at the same time and exert a lesser impact on free speech. In other words, the Court has determined that the government must show that it has a valid reason for suppressing speech and that it is suppressing as little speech as possible.[74]

The difficulty of the first hurdle depends on how the regulation would affect speech. The highest standard, "compelling state interest," is required when the regulation would directly affect the speech's content.[75] An intermediate standard, "substantial state interest," is apparently required when the regulation would directly affect speech based on content and concerns broadcasting.[76] A low standard, "significant state interest," is required when the regulation, though it affects speech, would rest on concerns unrelated to content, such as the speech's time, place, or manner; an example is a law banning sound trucks during nighttime hours.[77] Much depends on which state interest standard applies. Very

few regulations survive the highest standard; many (but not all) survive the lowest standard.

Political Speech. When the affected speech concerns politics, a court will be especially exacting in its scrutiny. A court would probably be unwilling, for example, to accept a speculative or theoretical argument that a regulation would pursue a particular state interest. Instead, it would demand specific persuasive evidence.[78]

The Supreme Court, though it has by and large avoided formally ranking different forms of speech, has frequently suggested that political speech stands near the pinnacle. The Court has held that First Amendment protections have their "fullest and most urgent application precisely to the conduct of campaigns for political office." [79] Scholars and public officials have agreed. Judge Robert Bork, whose Supreme Court nomination foundered in part on his narrow interpretation of the First Amendment, enshrined political speech as the most highly protected.[80] Senator Inouye, introducing his Fairness in Political Advertising Act, said: "Political speech is, of course, supreme among the types of speech protected by the Constitution." [81]

Protected political speech includes political advertising. The landmark 1964 Supreme Court case *New York Times Co. v. Sullivan*, which made it much harder for public officials to prevail in libel suits, concerned an advertisement in the Times, not a news story.[82] Because the production-material ban would clearly impinge on pure political speech, a court would examine it with special care.

Time. Place. Manner. Which of the three possible standards would a court apply? Proponents of the ban have argued for the lowest standard, "significant state interest." They have said that the regulation would not restrict what a candidate could say on television, but only how he could say it by requiring (or encouraging) him to make statements in person. Thus, the proponents say, the ban affects the "manner" of speech, not the content. The argument, as Gans has admitted, "attempts to use the manner criterion creatively"--in all likelihood too creatively for a court to accept.[83]

The Danforth-Hollings bill would be triggered by content. The bill would prohibit production material in advertisements that referred to a candidate's opponent. The Supreme Court has repeatedly ruled that the government may not ban a form of expressive activity based on the message conveyed. For example, the Court struck down a law that prohibited people from displaying a red flag in opposition to government but that allowed other displays of red flags; a law that prohibited all picketing except labor picketing; and a state university's rule that prohibited religious groups from using facilities that were available to all other student groups.[84] The same reasoning would apply to a law prohibiting production material if (and only if) the ad referred to another candidate. Danforth-Hollings, then, could not qualify for the low, "significant state interest" standard.

The Inouye-Rudman and Evans bills would require candidates to be on screen throughout the ad. Although the question is a bit closer, it is likely that courts would rule that the forbidden production material is "content" rather than "manner," and thus kick these regulations out of the low standard of judicial scrutiny.

In two areas, the Supreme Court has applied content-level protection to the type of material that the bills would ban. First, the Court has protected the elements of rhetoric. For example, in *Cohen v. California* the Court ruled that the words "Fuck the Draft" on a man's jacket were protected speech.[85] The Court did not hint that the obscenity was a "manner" of speech or that the state could permissibly have required Cohen to change his message to "Down with the Draft." [86] "Matters of taste and style" in speech, which the Court ruled were beyond government regulation, would seem to embrace production material in political advertising.[87] In fact, the argument that production materials appeals to viewers' emotions rather than their minds would seem at least as applicable to Cohen's message. Other cases have taken a similar tack.[88]

Second, the Court has protected a variety of nonverbal expressive activities, including displaying a flag and wearing an armband or a military uniform.[89] The symbolic speech of production material deserves similar treatment.

Proponents of the regulation might argue that it merely addresses the "secondary effects" of speech, but not speech itself. The Supreme Court accepted this argument in one case, ruling that a city could permissibly ban adult-film theaters from certain areas based on fears of neighborhood blight and similar consequences. Even though the regulation affected only theaters that showed sexually explicit films--an apparent content trigger--the Court applied the time-

place-manner criteria because, in essence, the state was worried about what happened outside the theater, not inside it.[90] However, the loophole is a small one. Where the alleged secondary effects result from "the impact of the speech on its audience," five justices would refuse to apply these criteria and treat the regulation as content-based.[91] Most of the purported problems of political advertising result from its impact on viewers, and so the regulation would fall outside this exception.

In fact, all time-place-manner regulations must establish a state interest unrelated to the content of the speech being suppressed.[92] For instance, a ban on nighttime sound trucks would apply even if the sound truck was broadcasting in a foreign language that no listener understood; the harm comes from the noise, not the message. Under this limitation, advocates of the production-material ban could no longer talk about the impact of the ads on voters, candidates, or the political system in general, because all such impacts stem from the ads' contents. The only surviving state interest would probably be in reducing the cost of political campaigns.

Broadcasting Regulation. If the regulation could not qualify for the lowest standard of judicial scrutiny, a court would choose between "substantial state interest" and "compelling state interest." Either standard might reasonably apply. The Supreme Court has used the intermediate standard, "substantial," where a regulation affects broadcasting. In cases where a regulation affects broadcasting, and the higher, or "compelling," standard where a regulation falls in both categories, a court might go either way based on the divergent lines of precedent.[93] The choice probably would not significantly affect the case outcome. Proponents of the regulation would be unable to demonstrate that it pursues a "substantial state interest" by the least restrictive means possible, much less a "compelling state interest."

What State Interests? We turn now to the various state interests that supporters have claimed that television advertising restrictions would promote.

Campaign Costs. Congress may have a legitimate interest in reducing the costs of political campaigns in order to open the system to less wealthy candidates or to prevent the dangers of corruption that inhere in campaign fund raising.[94] The Evans and Danforth-Hollings versions, however, would raise the airtime costs of production-material ads (while leaving the airtime costs of no-prop ads stable). True, those bills would encourage candidates to use no-production ads, and thereby save money on production costs. However, production costs account for a minute portion of campaign costs, less than 4 percent in the 1986 midterm campaigns, while TV airtime accounted for 21 percent.[95]

The Inouye-Rudman version would, by banning all production-material ads, declare an expensive but efficient communication tool off-limits to candidates, forcing them to utilize less efficient communication channels. As a consequence, either campaign costs would increase or the quantity of candidate-voter communication would decrease. The first possibility contradicts the purported state interest. The second possibility runs counter to the Supreme Court's language in *Buckley v. Valeo*: "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign." [96]

Regardless, the regulation would fail the least-restrictive-means test. Congress could reduce campaign costs in ways that would not limit what candidates may say to voters, such as by increasing the statutory discount for political commercials.

Corruption. Eliminating electoral corruption qualifies as a substantial state interest.[97] But thus far the Court has limited "corruption" to individual, overt dangers such as trading money for votes; it has not yet extended the concept to cover broader, systemic corruption.[98] The elements of systemic corruption, then, must be considered individually.

Civility. Gans told the Senate Commerce Committee that the ban was intended "to restore debate, civility, answerability and discussion to the campaign process in television." [99] The problem here is that restoring civility would not qualify as an adequate state interest: the First Amendment protects uncivil political debate too. The Supreme Court has spoken of our "profound national commitment to the principle that debate on public issues should uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [100] Speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." [101] The

constitutionally protected "right to criticize public men and public measures . . . means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." [102] Even when the speech is "untrue or inaccurate" and may be causing "distortions" in the political process, the Court has held, we generally "depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas." [103]

Persuasiveness. Special regulation of TV ads was necessary, Gans told the Senate Commerce Committee, because of the medium's unique persuasiveness. Television, he said, "is to conventional means of communications what nuclear weaponry is to conventional weaponry." [104] But the court has ruled that persuasiveness is not a justification for regulation. "The fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" [105]

Rationality. One problem with production-material ads, Gans told the Senate Rules Committee, is that they "cannot be rationally debated. They reach a level of emotion beyond which rational debate is not possible." [106] Even if the charge were valid, the Supreme Court has ruled that speech cannot generally be restricted merely because people may act irrationally upon hearing it. For example, the Court has ruled that a municipality worried about "white flight" may not prohibit "For Sale" signs in front of houses. "If dissemination of this information can be restricted," the Court said, "then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.'" [107] In Jerry Falwell's 1988 libel case against Hustler, the Court refused to permit the punishment of speech merely because it "may have an adverse emotional impact on the audience." [108] The justices have extended the notion to the electoral context: "The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech." [109] A narrow exception might exist for speech that demonstrably bypasses the rational faculties, such as subliminal advertising, but production material could not qualify.

Fairness. The Court has consistently struck down laws that would limit the speech of some people in order to promote fair discussion. "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," the Court has held, "is wholly foreign to the First Amendment." [110] Accordingly, the Court has ruled that government may not limit the speech of corporations or political organizations based on a fear that their speech might overwhelm others' speech; and government may not ban newspapers from publishing election-day editorials based on a fear that candidates might be unable to respond to last-minute charges. [111] Although the Court has suggested that it might uphold a speech restriction where the speech "threatened imminently to undermine democratic processes," the "imminent" requirement makes this exception so small as to be virtually meaningless. [112]

Although government may not level the playing field by silencing some speakers, it might be able to do so by amplifying some speakers. In *Red Lion Broadcasting Co. v. FCC* the Supreme Court upheld broadcasting's fairness doctrine, including rules requiring broadcasters to give political candidates free response airtime under certain circumstances. The Court noted the concern that broadcasters might become timid in order to avoid activating the response-time rules, but the Court concluded that the possibility was "at best speculative." [113]

The Danforth-Hollings bill would require broadcasters to give response time for ads that referred to the opponent unless a candidate personally made such a reference. Even if the bill's supporters succeeded in explaining why victims of indirect, production-material attacks are more deserving of response time than victims of direct, talking-head attacks, they would also have to show that the requirement would not chill candidates' expression. The danger of a chilling effect seems greater with Danforth-Hollings than in *Red Lion*. There, the Court could assume that, if a chilling effect appeared, the FCC could reduce it through the affirmative requirements it imposes on broadcasters. [114] Under Danforth-Hollings, no federal agency could reduce the chill by ordering political candidates to speak out.

The magnitude of the chilling effect would depend in part on who bore the cost. If the cost were imposed on the candidate whose ad triggered the equal time, the chill would be obvious: government would be substantially increasing the cost of certain speech. It would seem natural for broadcasters to impose the cost on the responsible candidate in this way. The Commerce Committee's constitutionality study asserts that broadcasters would probably spread the cost among all advertisers, but it offers no evidence in support. [115]

Although the chilling effect would be more debatable if the cost was not borne by the candidate, it would still exist. Campaigns will rarely want to provide a forum for opponents, a powerful but perhaps ignoble chilling effect. A political ad conveys its message not merely by content but also by repetition. Repetition suggests to voters that a particular view is widespread; in this sense advertising expenditures, like campaign contributions, "vary with the size and intensity of the candidate's support." [116] Equal time, then, might suggest equal popularity. Campaigns that wanted to avoid fostering that impression would refrain from airing certain commercials-- a straightforward chilling effect.

Disclosure and Accountability. Some proponents of the regulation have emphasized that it would keep voters from being misled about who had sponsored an advertisement. [117] It is not clear whether courts would accept this interest as sufficiently weighty. The Supreme Court has struck down a law that prohibited the distribution anonymous leaflets. The reason, the Court said, was that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." [118] The Court might, however, decide differently when confronted with a law applicable only to campaign literature. [119] (Such laws do exist, but their constitutionality has never been adjudicated. [120]) The Court would seem particularly likely to uphold a disclosure law as applied to literature produced by independent political groups, because voters might reasonably conclude that the candidate supported by the literature was responsible for it. [121]

Even if sponsor identification is a sufficiently powerful state interest, however, the talking-head regulation fails the least-restrictive-means test. A court would tell Congress to strengthen the existing requirement that ads bear the name of the sponsor.

Other Factors. Several other legal arguments could also be made against the proposals.

Best medium: Where a regulation addresses the time, place, or manner of speech, it may be struck down if it fails to "leave open ample alternative channels for communication of the information." [122] Given the cost-effectiveness of television, one could argue that alternative media are poor substitutes. Newspaper ads, pamphlets, buttons, and the like "are less likely to reach persons not deliberately seeking" the message, and they "may be less effective medial for communicating the message"--factors that the Court has found important. [123]

Viewpoint: Regulations triggered by the viewpoint of speech are always unconstitutional. A regulation that primarily restricts anti-incumbent speech, as Danforth-Hollings would, could conceivably be construed as a viewpoint regulation, discriminating against expressions of dissatisfaction with the status quo. [124]

Motive: The law might be struck down if the record indicated that, as Gans suggested, legislators voted for it in order to protect themselves from challengers. Although the Court generally does not examine legislative motive, an exception may exist where the motive alleged is self-perpetuation in public office. [125]

Openness: Political ads are open, public forms of communication, a factor that the Supreme court has viewed favorably. [126]

Slippery slope: As the Supreme Court wrote in extending First Amendment protection to the "Fuck the Draft" jacket: "We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." [127]

Vagueness: Even if the regulation survived the hurdles discussed above, it might collapse on the grounds of vagueness. The Evans version is ambiguous in its basic requirement, whether the candidate's face or merely his name must be on screen throughout. The Danforth-Hollings version is also vulnerable, with its trigger of ads that "refer" to the opposing candidate. During his battle against Sen. Edward Kennedy for the 1980 Democratic nomination, President Carter's campaign aired ads with the tagline: "You may not always agree with President Carter, but you'll never find yourself wondering if he's telling you the truth." [128] Would such a veiled reference to Chappaquiddick activate the regulation? The Danforth-Hollings "in person" requirement is also ambiguous; it could reasonably require the candidate's voice, face, or both.

Noncandidate Organizations

The Inouye-Rudman and Danforth-Hollings bills would restrict noncandidate organizations as well as candidates. Inouye-Rudman would treat candidate and noncandidate political ads alike, prohibiting all production material. Danforth-Hollings would treat noncandidate ads more restrictively than candidate ads: whereas candidate ads would trigger equal time only if they referred to the opponent and used production material, all noncandidate ads would trigger equal time, regardless of the content or the presentation. (The Evans bill would not affect noncandidate organization.) Other proposals have also sought to apply an equal-time obligation to noncandidate ads.[129]

The Supreme Court has granted substantial protection to independent groups. It has struck down spending limits applied to such groups, treating the groups as proxies for their contributors. "Contributors obviously like the message they are hearing from these organization and want to add their voices to that message," the Court explained.[130] As discussed above, the Court has also ruled that government may not reduce the volume of some messages in order "to enhance the relative voice of others." [131] The equal-time requirement would cause at least as severe a chill on noncandidate groups as on candidate groups. It is naive to say, as one commentator has, that "the bill would ultimately trigger more, not less, speech," given the several ways in which the equal-time requirement could discourage independent groups from speaking.[132]

If forced to choose, the Supreme Court would presumably favor candidate ads over noncandidate ads. The Court has, for example, allowed broadcasters to refuse noncandidate ads but required broadcasters to accept candidate ads (although in those cases the Court was upholding actions of Congress and the FCC).[133] The Court has also indicated that it might uphold restrictions on corporate political speech if the speech "threatened imminently to undermine democratic process"; under the same circumstances, the Court might also allow restriction on independent groups' speech.[134] But Congress has not yet demonstrated that such a choice is necessary. For now and for the conceivable future, the proposed regulations as applied to noncandidate and candidate campaigns would be found unconstitutional.

Conclusion

Testifying before the Senate Commerce Committee, Curtis Gans said that the proposed legislation would help reduce "unnecessary turnover in public office." [135] An opponent of the proposal, political consultant Bob Squier, offered a somewhat different perspective: the Clean Campaign Act, he said, should have been called the "Incumbent Protection Act." [136]

"Unnecessary turnover" is a subjective concept; any elected official would view the turnover of his position as unnecessary. From an objective viewpoint, however, turnover does not seem to be particularly worrisome. In the 1984 and 1986 election, 79 percent of senators seeking reelection won; in the House, the figure exceeded 97 percent.[137] These reelection rates confirm the enormous advantages that incumbents enjoy over their opponents. Incumbents usually receive considerably more money in campaign contributions than do challengers--more than twice as much in recent elections.[138] Incumbents also get much more press coverage, further widening the name-recognition gap.[139] Then there are important resources that challengers lack: the franking privilege, videotaped reports sent to local TV stations and cable outlets, and now the promise of video reports mailed directly to constituents.[140]

Even if a high turnover rate did justify some sort of systemic change, candidate-voter communication would hardly be the place to start tinkering. "[The First] Amendment," as the Supreme Court has held, "embodies our trust in the free exchange of ideas as the means by which the people are to choose . . . between candidates for political office." [141] That trust is arguably the ultimate foundation of our electoral democracy. It deserves more respect than the would-be regulators have demonstrated.

FOOTNOTES

[1] "Topic A: The Year of the Negative," Washington Post, November 2, 1986. See also Richard L. Berke, "Mud: There Seems to Be More of It This Year," New York Times, August 27, 1986, p. A18; Paul Taylor, "Negative Ads Becoming Powerful Political Force," Washinaton Post, October 5, 1986, p. A1.

[2] David S. Broder, "When Campaigns Get Mean," Washington Post, October 31, 1982, p. C7; Jack W. Germond and

Jules Witcover, *Wake Us When It's Over* (New York: Macmillan, 1985), p. xix; Tom Wicker, "Big Losers of 1986?" *New York Times*, November 14, 1986, p. A35, Tom Wicker, "The Road Not Taken," *New York Times*, October 24, 1986, p. A35.

[3] See Deborah Baldwin, "The Mud Slingers," *Common Cause Maaazine*, March-April 1986, p. 31.

[4] Mark Shields, "Decent Exposure: The Blessings of Political Ads," *Washington Post*, October 24, 1982, p. B2.

[5] See Curtis B. Gans, "How to Take the Big Money Out of Politics," *Washington Monthly*, April 1979, pp. 40-42. Discussion of proposals to give candidates free airtime lies beyond the scope of this paper.

[6] See H.R. 480, 100th Cong., 1st sess. (1987) (proposal for voluntary federal funding of certain costs in House elections; candidates who accepted federal funds could not purchase ads of less than five minutes' length); John E. O'Toole, "Let's Abolish TV Political Spots," *Columbia Journalism Review*, January-February 1972, pp. 56-68; Charles Guggenheim, "For Accountability in Political Ads," *New York Times*, October 15, 1985, p. A31.

[7] Curtis Gans, testimony before the Senate Committee on Rules and Administration, September 29, 1983 (available from Committee for the Study of the American Electorate) (hereafter cited as Gans testimony), p. 3.

[8] Curtis Gans, interview with, Committee for the Study of the American Electorate, Washington, D.C., July 26, 1983 (Stephen Bates and Edwin Diamond) (hereafter cited as Gans interview). [9] Gans, "How to Take the Big Money Out," p. 40. [10] Gans interview.

[11] Senate Committee on Commerce, Science, and Transportation, *Clean Campaign Act of 1985: Hearings before the Senate Committee on Commerce, Science, and Transportation, 99th Cong., 1st sess., On S. 1310, September 10 and October 8, 1985*, p. 51 (hereafter cited as Clean Campaign Act hearings). [12] Gans interview.

[13] Gans testimony; U.S., Congress, Senate, S. 2509, 98th Cong., 2d sess. (1984); S. 577, 100th Cong., 1st sess. (1987).

[14] It would not apply to paid political programs of more than 10 minutes' length. S. 2509 (1984); S. 577 (1987).

[15] Curtis B. Gans, "Is TV Turning Off the American Voter?" *New York Times*, July 3, 1988, pp. 24, 28.

[16] Clean Campaign Act hearings. Whereas the Rudman-Inouye bill would flatly prohibit some ads, the other two bills would discourage the ads by letting broadcasters charge more for them and/or refuse to air them. Enforcement mechanisms will be explained below.

[17] S. 979, 100th Cong., 1st sess. (1987).

[18] The text indicates that the bill is intended "to regulate the manner of presentation . . . in order to reduce the cost of political campaigns," which seems to go beyond constant display of the candidate's name. S. 979, sec. (b)(2). A news release from Evans's office also implies that the bill would require the candidate to be on screen throughout the ad. "Evans Introduces Campaign Finance Reform Legislation," news release, April 10, 1987; "Sen. Evans Introduces Campaign Reform Bill," *Washinaton Journal-American*, April 13, 1987.

[19] See "Senatorial Election Campaign Act of 1987," S. 2, 100th Cong., 1st sess. (1987); "Curb Political Ads: Congress," *Advertisina Aae*, April 9, 1984, p. 2; Thomas M. Durbin, "The Fairness Doctrine and the Equal Opportunities Doctrine," *Congressional Research Service*, 1988, pp. 7-10.

[20] S. 577, secs. 2(a)(1)-(2).

[21] Andrew Rosenthal, "Ad Man for Schrafft's Gets Ready to Sell Bush," *New York Times*, May 8, 1988, p. 18; "Total Charges for Political Broadcasts: General Elections, 1952-1972," chart prepared by Committee for the Study of the American Electorate, Washington, D.C.; "1986 Candidates Spent Less than 25% of Funds on Broadcast Time,"

news release, National Association of Broadcasters, 1987, summarizing study by Aristotle Industries (hereafter cited as Aristotle Industries).

[22] Broadcast Advertisers Reports, National Association of Broadcasters.

[23] Quoted in Paul Houston, "TV and High Tech Send Campaign Costs Soaring," Los Angeles Times, October 2, 1986, p. 20.

[24] Thomas E. Patterson, "It's Not the Commercials, It's the Money," Television Quarterly, (Spring 1983), p. 75.

[25] "Carving Up the Country," National Journal, February 20, 1988, p. 466; Andrew Rosenthal, "On the Air: \$97 Million Spent in '86," New York Times, July 14, 1987.

[26] Shields, "Decent Exposure," p. B1.

[27] Quoted in Edwin Diamond and Stephen Bates, *The Spot: The Rise of Political Advertising on Television*, rev. ed. (Cambridge: MIT Press, 1988), pp. 381-82.

[28] Sig Mickelson, *The Electric Mirror* (New York: Dodd, Mead, 1972), p. 62.

[29] Patterson, "It's Not the Commercials," p. 74.

[30] Clean Campaign Act hearings, p. 72.

[31] Jerry Hagstrom and Robert Guskind, "Hitting the Spot," National Journal, January 9, 1988, p. 76.

[32] *The Unseeing Eye: The Myth of Television Power in National Elections* (New York: Putnam's, 1976).

[33] See generally Thomas E. Patterson, *The Mass Media Election* (New York: Praeger, 1980).

[34] See Diamond and Bates, *Spot*, p. 318.

[35] Quoted in *ibid.*, p. 27.

[36] E. D. Hirsch, Jr., *Cultural Literacy* (Boston: Houghton Mifflin, 1987).

[37] Diamond and Bates, *Spot* pp. 239-47, 293-98; Gans interview.

[38] Quoted in Diamond and Bates, *Spot*, pp. 239-47, 293-98; Gans interview.

[39] Clean Campaign Act hearings, p. 51.

[40] Gans interview.

[41] Daniel J. Boorstin, "The Rhetoric of Democracy," in Robert Atwan, Barry Orton, and William Vesterman, *American Mass Media* (New York: Random House, 1978), pp. 41-42.

[42] Quoted in "Political Invective: It's Not What It Used to Be," U.S. News & World Report, July 16, 1984, p. 86.

[43] Richard L. Rubin, *Press, Party, and Presidency* (New York: Norton, 1981), pp. 11-14; James Sterling Young, *The Washington Community 1800-1828* (New York: Harcourt Brace Jovanovich, 1966), pp. 173-74.

[44] Quoted in Diamond and Bates, *Spot*, p. 50.

[45] Clean Campaign Act hearings, p. 29.

- [46] Bill Peterson, "Campaigns as Big Business," Washinaton Post, November 10, 1986, p. A7.
- [47] Diamond and Bates, Spot, pp. 21-23; "Mr. Gephardt's Reckless Driving," New York Times, February 13, 1988, p. 26; Richard Benedetto, "Gephardt Sitting on Front-Runner Hot Seat," USA Today, February 11, 1988, p. 4A.
- [48] Diamond and Bates, Spot, p. 360.
- [49] Jeff Greenfield, *Playing to Win* (New York: Simon & Schuster, 1980), pp. 226-27.
- [50] "Dirty Harry & Associates," *Campaigns & Elections*, November-December 1986; "Negative Spots Likely to Return in Election '88," *Advertising Age*, September 14, 1987, p. 70; Jerry Hagstrom and Robert Guskind, "Selling the Candidates," *National Journal*, November 1, 1986, p. 2624. For other examples, see Paul Taylor, "Negative Ads Becoming Powerful Political Force," Washinaton Post, October 5, 1986, p. A6.
- [51] Ad played on "The McLaughlin Group," Public Broadcasting Service, July 9, 1988.
- [52] "Is TV Turning Off?" p. 28.
- [53] *Ibid.*
- [54] Clean Campaign Act hearings, p. 79 (testimony of Terry Dolan national chairman, National Conservative Political Action Committee).
- [55] Peterson, "Campaigns as Big Business," p. A6.
- [56] Nicholas Lemann, "Barney Frank's Mother and 500 Postmen," *Harper's*, April 1983, p. 37; Steven Stark, "Negative TV Ads under Fire," *Boston Globe*, October 13, 1985.
- [57] David Nyhan, "Was Simon Outfoxed in Iowa?" *Boston Globe*, January 31, 1988, p. 77.
- [58] "Do as I Say, Not as I Do," *Washington Post*, October 31, 1986, p. A6.
- [59] Clean Campaign Act hearings, p. 79.
- [60] Gans interview.
- [61] See Diamond and Bates, Spot, pp. 351-53.
- [62] Quoted in *ibid.*, pp. 353-54.
- [63] Clean Campaign Act hearings, p. 1.
- [64]- David H. Remes, "Memorandum on Constitutional Issues Raised by Proposed Restrictions on Television Advertising in Federal Election Campaigns," Committee for the Study of the American Electorate, July 11, 1983.
- [65] Newton N. Minow, letter to Senator John C. Danforth, June 17, 1985, p. 1, accompanying Newton N. Minow, Ben W. Heineman, Jr., Lawrence A. Miller, and Grier C. Raclin, "Clean Campaign Act of 1985--Preliminary Constitutional Analysis," June 17, 1985 (hereafter cited as Minow et al., "Constitutional Analysis").
- [66] 47 U.S.C. 312(a)(7); *CBS, Inc. v. FCC*, 453 U.S. 367- (1981). See generally George H. White, "A Study of Access to Television for Political Candidates," Report to Campaign Finance Study Group, Institute of Politics, Harvard University, 1978.
- [67] 47 U.S.C. 315(a).
- [68] 47 U.S.C. 315(b).

[69] Jerry Hagstrom and Robert Guskind, "Shopping for Airtime," National Journal, February 20, 1988, p. 465.

[70] White, "Study of Access," p. 50.

[71] See, for example, FCC v. League of Women Voters, 468 U.S. 364 (1984).

[72] S. 979; S. 1310, Clean Campaign Act, 99th Cong., 1st sess. (1985); Minow, letter to Danforth, p. 2. The aspects of these proposals that would affect noncandidate organizations will be discussed separately below.

[73] Senate, S. 577, 100th Cong., 1st sess. (1987), sec. 324 (c).

[74] That general approach has several exceptions, where the First Amendment offers less or no protection: obscenity, pornography, indecency, defamation, commercial speech, fighting words, and speech that poses a clear and present danger of lawless action. All seem plainly inapplicable to political ads, although Gans has suggested that ads may be analogous to pornography or to crying "fire" in a crowded theater. Gans testimony, p. 11.

[75] See Boos v. Barry, 108 S.Ct. 1157, 1164 (1988).

[76] The Court applied the "substantial" test as just such an intermediate approach in FCC v. League of Women Voters, 468 U.S. 364, 380 (1984). To confuse matters, however, the Court has on occasion used "Substantial" to describe its highest standard. See City of Renton v. Playtime Theatres, 106 S.Ct. 925. (1986). It is clear that the Court applies a midlevel approach to broadcasting. the approach's precise parameters. and seemingly the terminology. remain uncertain.

[77] See Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 648 (1981).

[78] See, FCC v. League of Women Voters, 468 U.S. at 397.

[79] Buckley v. Valeo, 424 U.S. 1, 15 (1976) (per curiam) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 [1971]). See also Brown v. Hartlage, 456 U.S. 45, 53 (1982); Mills v. Alabama, 384 U.S. 214, 218 (1966).

[80] See Robert Bork, "Neutral Principles and Some First Amendment Problems," Indiana Law Journal 47 (1971):1.

[81] Senate, Congressional Record, February 23, 1987, p. S2389.

[82] 376 U.S. 254 (1964). The protection extends to advertising placed by the candidate himself. See Buckley, 424 U.S. at 52.

[83] Gans testimony, p. 9. See also Remes, "Memorandum on Constitutional Issues," pp. 5-14, Minow et al., "Constitutional Analysis," pp. 26-30.

[84] Strombera v. California, 283 U.S. 359 (1931) (red flag); Carey v. Brown, 447 U.S. 455 (1980) (labor pickets); Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (religious groups).

[85] 403 U.S. 15 (1971).

[86] But compare 403 U.S. 15 at 27 (Blackmun, J., joined by Burger, C.J., and Black, J., dissenting) (Cohen's jacket was "mainly conduct and little speech").

[87] Cohen v. California, 403 U.S. at 25.

[88] See, for example, FCC v. League of Women Voters, 468 U.S. 364, 396 (1984) (noting that public broadcasting stations may broadcast political opinion as commentaries or news interviews, but not even considering the notion that a ban on editorializing would, because of the alternatives, affect merely the manner of speech).

[89] *Spence v. Washington*, 418 U.S. 405 (1974) (American flag with peace symbol attached); *Stromberg v. California*, 283 U.S. 359 (1931) (red flag); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (armband); *Schacht v. United States*, 398 U.S. 58 (1970) (uniform). See also Laurence H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988), p. 839; Daniel A. Farber, "Content Regulation and the First Amendment: A Revisionist View," *Georgetown Law Journal* 68 (1980):727, 747.

[90] *City of Renton v. Playtime Theatres*, 106 S.Ct. 925, 929 (1986).

[91] *Boos v. Barry*, 108 S.Ct. 1157, 1163 (1988) (opinion of O'Connor, J., joined by Scalia and Stevens, JJ.); 106 S.Ct. 925, 929 at 1171 (Brennan, J., concurring in the judgment, joined by Marshall, J.). Question also exists whether the secondary-effects approach applies beyond sexually explicit speech at all.

[92] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 648 (1981).

[93] See *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984) (broadcasting; intermediate standard). But see *supra* note 77 on the uncertainties surrounding this standard. On candidate's speech, see *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982): "When a State seeks to restrict the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one." Political broadcasts will seemingly be accorded intermediate protection; *FCC v. League of Women Voters* concerned editorials. However, a political broadcast by a candidate might earn the highest protection, given the Court's strong language in *Brown v. Hartlage*.

[94] The Court has expressly avoided deciding whether Congress may permissibly seek to open the political system to less wealthy candidates. *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976). The Court has recognized a weighty state interest in reducing corruption. 424 U.S.1 at 26. In pursuing these (and related) interests, however, Congress may not generally restrict campaign expenditures. See *Buckley v. Valeo*.

[95] Aristotle Industries study.

[96] 424 U.S. at 57 (footnote omitted).

[97] See 424 U.S. at 26; *Brown v. Hartlaae*, 456 U.S. 45, 52 (1982).

[98] See Tribe, *American Constitutional Law*, p. 1136.

[99] Clean Campaign Act hearings, p. 31.

[100] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See also *Boos v. Barry*, 108 S.Ct. 1157, 1164 (1988)

[101] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948). See also *Cohen v. California*, 403 U.S. 15, 25 (1971).

[102] *Cohen v. California*, 403 U.S. at 26 (quoting *Baumaartner v. United States*, 322 U.S. 665, 673-674 [1944]).

[103] *Brown v. Hartlaae*, 456 U.S. 45, 61 (1982) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 [1974]).

[104] Clean Campaign Act hearings, p. 30.

[105] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978) (quoting *Kingsley International Pictures v. Regents*, 360 U.S. 684, 689 [1959]). See also Tribe, *American Constitutional Law*, p. 809, n. 16.

[106] Gans testimony, p. 10. See also S. 577, Fairness in Political Advertising Act, secs. 2(a)(6), 2(b)(2); S. 979, sec. (a)(3).

[107] *Linmark Associates, Inc. v. Willingboro Township*, 431 U.S. 85, 96 (1977).

[108] *Hustler Magazine v. Falwell*, 108 S.Ct. 876, 882 (1988).

[109] *Brown v. Hartlaae*, 456 U.S. 45, 60 (1982).

[110] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

[111] 424 U.S. 1 at 39-51 (independent political groups); *Bellotti*, 435 U.S. 765 (corporations); *Mills v. Alabama*, 384 U.S. 214 (1966) (editorials). See also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (government may not require a newspaper to publish rebuttals).

[112] *First National Bank of Boston v. Bellotti*, 435 U.S. at 789 (1978).

[113] 395 U.S. 373, 393-394 (1969).

[114] *Ibid.*

[115] Minow et al., "Constitutional Analysis," pp. 44-47.

[116] *Buckley v. Valeo*, 424 U.S. at 56 (1976). See Kenneth L. Karst, "Equality as a Central Principle in the First Amendment," *University of Chicago Law Review* 43 (1975):20, 40.

[117] See, for example, Clean Campaign Act hearings, p. 63 (testimony of Newton N. Minow).

[118] *Talley v. California*, 362 U.S. 60, 65 (1960).

[119] See Tribe, *American Constitutional Law*, p. 1132 and n.

[120] For example, 2 U.S.C. 441d (Federal Elections Campaign Act requirement applicable to all candidates' literature and advertising). Many states have similar requirements; their courts have split on the constitutional issue. See "Validity and Construction of State Statute Prohibiting Anonymous Political Advertising," 4 A.L.R. 4th 741-55.

[121] Compare *FCC v. League of Women Voters*, 468 U.S. 364, 395 (1984) (government may require a disclaimer to keep the public from wrongly inferring that a message has originated with or been endorsed by the government); *McCreary v. Stone*, 739 F.2d 716, 728 (2d Cir. 1984) (same), affirmed by an equally divided court sub nom. *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

[122] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, (1981) (quoting *Virainia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 [1976]).

[123] *Linmark Associates v. Willingboro Township*, 431 U.S. 85, 93 (1977).

[124] Three justices rejected such an approach in *Boos v. Barry*. A ban on protest picketing within 500 feet of foreign embassies, they concluded, was not viewpoint-based because it applied equally to embassies representing countries of all different viewpoints. 108 S.Ct. at 1163 (opinion of O'Connor, J., joined by Scalia and Stevens, JJ.) One might try to distinguish *Boos* by arguing that incumbent officials represent a narrower range of viewpoints than do all foreign embassies.

[125] On the normal refusal to consider motive, see *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Six justices, however, have indicated that motive is relevant when a legislature is accused of drawing district lines in a way that discriminates against the party out of power, a principle that would seem equally applicable to legislation that discriminates against candidates out of power. See *Davis v. Bandemer*, 106 S.Ct. 2797, 2813-14 (plurality opinion of White, J., joined by Brennan, Marshall, and Blackmun, JJ.); 106 S.Ct. 2797 at 2832 (Powell, J. joined by Stevens, J., concurring in part and dissenting part).

[126] *Brown v. Hartlage*, 456 U.S. 45, 57 (1982).

[127] *Cohen v. California*, 403 U.S. 15, 26 (1971).

[128] Quoted in Diamond and Bates, Spot, p. 276.

[129] See "Campaign Reform Act of 1987," 100th Cong., 1st sess. (1987); John Heinz, "Don't Scapegoat the PAC's," New York Times, January 13, 1986, p. A15.

[130] Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 495 (1985). Compare Buckley v. Valeo, 424 U.S. 1, 56 (1976) (per curiam).

[131] Buckley v. Valeo, 424 U.S. 48-49 (1976).

[132] Note, "The Clean Campaign Act of 1985: A Rational Solution to Negative Campaign Advertising Which the One Hundredth Congress Should Reconsider," Journal of Law and Politics 3 (1987):727, 730.

[133] Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973) (noncandidate ads); CBS, Inc. v. FCC, 453 U.S. 367 (1981) (candidate ads).

[134] First National Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978).

[135] Clean Campaign Act hearings, p. 14.

[136] Phil Gailey, "Control of TV Ads in Elections Urged," New York Times. June 18, 1985, p. A18.

[137] Congressional Quarterly Almanac, vol. 40 (Washington: Congressional Quarterly Press, vol. 40 (1984); *ibid.*, vol. 42 (1986). [138] Edie N. Goldenberg and Michael W. Traugott, "Mass Media in U.S. Congressional Election," Legislative Studies Quarterly 12 (1987):317, 322-23, Table 2.

[139] This is particularly true in House races. See generally Peter Clarke and Susan H. Evans, *Covering Campaigns: Journalism in Congressional Elections* (Stanford, Calif.: Stanford University Press, 1983); Goldenberg and Traugott, "Mass Media in Congressional Elections."

[140] "Videotape Newsletters OK'd for Senate," Campaign Industry News 2, no. 2 (1988).

[141] *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).