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## Unreasonable Access: Disguised Issue Advocacy and the First Amendment Status of Broadcasters

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## **Cover Page Footnote**

Ph.D. candidate in Law, class of 2016, Yale University; J.D., 2010, University of Michigan Law School. I would like to thank Floyd Abrams, Jack Balkin, Vince Blasi, Molly Brady, Rebecca Crootof, Zach Herz, Eric Fish, Robert Post, Richard Primus, Reva Siegel, Gordon Silverstein, Rory Van Loo, and participants in the 2014 Freedom of Expression Scholars Conference at Yale Law School for their comments on earlier drafts of this Article. In the interest of full disclosure, I should note that I represented the broadcasters who were subject to the October 2012 FCC decisions discussed in this Article, along with my former colleagues at Covington & Burling LLP. Accordingly, I would also like to thank Kurt Wimmer, Eve Pogoriler, and Dustin Cho for their efforts in the trenches alongside me.

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Kerry L. Monroe \*

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## INTRODUCTION

Perched atop a mountain in rural West Virginia is a large, gray-ing, cinderblock bunkhouse that served as the unlikely shooting location for over a dozen television commercials in the months prior to the 2012 federal primary and general elections.<sup>1</sup> This is the compound of Randall Terry, founder in the 1980s of the notorious anti-abortion organization Operation Rescue, known for massive sidewalk protests of women's clinics and attention-seeking stunts that included delivering a dead fetus to Bill Clinton at the 1992 Democratic National Convention.<sup>2</sup> Following the contentious splintering of Operation Rescue in the 1990s and accompanying legal and financial troubles, Terry appears to have lost much of his influence

<sup>1</sup> See Matt Labash, *Randall Terry Shoots an Ad*, WKLY. STANDARD, Oct. 22, 2012, [http://www.weeklystandard.com/articles/randall-terry-shoots-ad\\_654411.html](http://www.weeklystandard.com/articles/randall-terry-shoots-ad_654411.html).

<sup>2</sup> *Id.*; see also Jacqueline L. Salmon, *Antiabortion Leader Randall Terry Returns, Using Same Old Incendiary Tactics*, WASH. POST, July 15, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071403317.html>.

within the anti-abortion activism community.<sup>3</sup> But while he may no longer attract enormous numbers of protesters to stand alongside him, he and his allies are learning to reach more listeners with fewer speakers. Where they once attracted media coverage of the protests they staged, they now seek direct access to the airwaves.<sup>4</sup>

During recent election seasons, Terry and his allies have presented themselves as candidates for federal elective office and have invoked statutory candidate access rights to force broadcasters to air graphic anti-abortion television advertisements—ads that many broadcasters would otherwise have refused to carry for a variety of reasons.<sup>5</sup> These reasons included concerns about content that could misinform or antagonize viewers and material in the ads that was potentially defamatory or allegedly violated copyrights held by third parties.<sup>6</sup> Ordinarily, members of the public have no right to speak on broadcast television stations, whether such access is sought for commercial, political, or other purposes. Broadcasters have no statutory or regulatory obligations to permit general public access to their stations, and, moreover, the Supreme Court has in-

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<sup>3</sup> See Salmon, *supra* note 2.

<sup>4</sup> Direct access also carries with it the benefit of controlling one's message. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 10 (2004) (“[I]n a world dominated by mass media, the recurring problem for people who want to speak effectively and reach large numbers of people is how to gain access to an effective podium. People can purchase access if they own a significant amount of property; in the alternative, they can stage media events to draw the mass media's attention. In the latter case, however, speakers cannot easily control their message.”).

<sup>5</sup> See Jennifer Preston, *Randall Terry Loses His Delegate to the Democratic Convention*, N.Y. TIMES BLOG (Mar. 16, 2012, 8:58 PM), [http://thecaucus.blogs.nytimes.com/2012/03/16/randall-terry-loses-his-delegate-to-the-democratic-convention/?\\_php=true&\\_type=blogs&r=0](http://thecaucus.blogs.nytimes.com/2012/03/16/randall-terry-loses-his-delegate-to-the-democratic-convention/?_php=true&_type=blogs&r=0).

<sup>6</sup> Broadcasters take a number of considerations into account when evaluating orders for time by commercial and political advertisers, including concerns about misinforming or antagonizing viewers, failure of ads to meet certain legal requirements, including Federal Elections Commission and Federal Communications Commission rules pertaining to sponsorship disclosure, and station liability resulting from publication of defamatory material or material violating intellectual property rights of third parties. The ads aired by Terry and his allies in 2012 raised a number of these concerns. See, e.g., Letter from Charles J. Harder, Counsel for Samuel L. Jackson, to WPLG (Oct. 15, 2012) (on file with author) (alleging that statements made in a Terry ad aired by the station were defamatory of Mr. Jackson); Letter from Joseph E. Sandler, Counsel for Jewish Council on Education and Research, to Station Manager, WPLG (Oct. 14, 2012) (on file with author) (alleging that the use of video in a Terry ad violated the Council's copyright).

licated that such a right-of-access system could be constitutionally problematic.<sup>7</sup> Candidates for federal elective office, however, do have a statutory right to purchase, at preferential rates and without broadcaster censorship, a “reasonable” amount of airtime on broadcast television stations during the windows preceding primary and general elections.<sup>8</sup> Although admittedly uninterested in winning any elections,<sup>9</sup> Terry spotted in these political broadcasting rights an opportunity to gain inexpensive, forced access to broadcast stations to “use . . . FCC laws for federal candidates to bring America face-to-face with [abortion].”<sup>10</sup>

Following a 2010 “prototype” effort that he deemed a resounding success,<sup>11</sup> Terry recruited fellow anti-abortion activists to present themselves as write-in or ballot candidates in federal races in order to buy airtime on broadcast television stations.<sup>12</sup> In 2012 a

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<sup>7</sup> See *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 126–27 (1973) (expressing concerns that broad public access rights for individuals or groups wishing to discuss public issues would require significant Federal Communications Commission oversight of the day-to-day operations of broadcasters, including “deciding such questions as whether a particular individual or group has had a sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired”); see also *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673–74 (1998) (noting that broad public rights of access would be inconsistent with the editorial discretion broadcasters exercise in the selection and presentation of their programming).

<sup>8</sup> See 47 U.S.C. §§ 312(a)(7), 315(a), 315(b) (2012). The political broadcasting statutes and regulations are discussed in detail in Part I.

<sup>9</sup> Preston, *supra* note 5.

<sup>10</sup> Kevin Derby, *Pro-Life Activist Randall Terry Looks to Defeat Barack Obama in 2012 Dem Primaries*, SUNSHINE STATE NEWS (Jan. 18, 2011, 11:28 AM), <http://www.sunshinestatenews.com/story/pro-life-activist-randall-terry-looks-defeat-barack-obama-2012-dem-primaries>.

<sup>11</sup> In 2010, Terry ally Missy Smith was on the ballot as the Republican candidate for the District of Columbia non-voting congressional seat, despite a request from D.C. Republican Party leadership that she not run. Her entire “campaign” effort consisted of purchasing broadcast television airtime to air graphic anti-abortion advertisements written and produced by Terry. Tim Murphy, *Aborted Fetuses to Star in 2012 Election Ads*, MOTHER JONES, Nov. 17, 2011, <http://www.motherjones.com/politics/2011/11/graphic-anti-abortion-ads-randall-terry-fcc>; Mike DeBonis, *Smith’s Anti-abortion Ads Bring Culture Wars Into D.C. Delegate Race*, WASH. POST (Oct. 28, 2010, 6:58 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/28/AR2010102806339.html>; Dugald McConnell & Brian Todd, *Graphic Anti-Abortion Ads Air on Washington Stations*, CNN (Oct. 27, 2010, 5:26 AM), <http://www.cnn.com/2010/POLITICS/10/26/anti.abortion.ads/index.html>.

<sup>12</sup> See Murphy, *supra* note 11; see also Press Release, Terry for President, Recruiting Candidates to Suppress Obama’s Vote in Florida – Key to Obama Losing Florida is

group of twelve of these activists, including Terry himself, purchased time in at least eighteen media markets.<sup>13</sup> The races entered by these “candidates” appear to have been chosen largely according to a strategy having more to do with the potential media impact of their ad buys than with any interest in holding a particular office or representing a particular set of voters.<sup>14</sup> For example, during the general election, Terry was on the ballot for Congress in the heavily populated 23rd district of Florida (despite being a West Virginia resident),<sup>15</sup> and was also on the ballot for President in three “safe Romney states” that border swing states—West Virginia, Ken-

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Suppressing his Catholic Democrat Vote (May 14, 2012), *available at* <http://www.christiannewswire.com/news/1203019704.html>.

<sup>13</sup> Press Release, Terry for President Campaign Committee, Graphic Halloween/Horror ‘Obama Nightmare’ Ad Airs in 7 Battleground States (Oct. 31, 2012), *available at* <http://www.christiannewswire.com/index.php?module=releases&task=view&releaseID=70771>. A search of the FCC database of station political files at [stations.fcc.gov](http://stations.fcc.gov) shows that Andrew Beacham placed orders on stations in the Louisville Nielsen Designated Market Area (Louisville “DMA”) and Evansville DMA; Gary Boisclair in Minneapolis-St. Paul DMA (during the primary election window only); David Lewis in Cincinnati DMA; David Macko in Cleveland DMA; Angela Michael in St. Louis DMA; Randall Terry in Amarillo DMA, Boston DMA, Chicago DMA, Cincinnati DMA, Denver DMA, Miami-Ft. Lauderdale DMA, Nashville DMA, Pittsburgh DMA, Washington, D.C. DMA, West Palm Beach DMA; and Stan Vaughan in Las Vegas DMA. The results of this search are significantly underinclusive, largely due to circumstances related to the 2012 implementation of FCC rules requiring station political files to be made available online. In the press release cited in this footnote, Terry claims that Alan Aversa and George Krail also ran the ads he produced in Iowa and Western Illinois; Virginia Fuller ran them in San Francisco, California; Russell Best ran them in Reno, Nevada; and Daniel Botelho ran them in Boston, Massachusetts and New Hampshire.

<sup>14</sup> *See, e.g.*, Press Release, *supra* note 12 (“The easiest, most cost effective way . . . to shake Christians from their slumber, and have “a teaching moment” that brings them back to God’s priorities – is to show images and use words that reflect God’s priorities in TV ads. We must show the babies’ mangled remains. And legally, the only way you and I are going to do that en masse is through TV commercials we can run as federal candidates.”).

<sup>15</sup> Terry FEC Form 2, Statement of Candidacy, (June 12, 2012), *available at* <http://docquery.fec.gov/pdf/865/12030821865/12030821865.pdf>. Constrained by the eligibility requirements for federal elective office enumerated in the U.S. Constitution, states may not limit ballots for Representative to those who currently reside in the state. *See generally* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). Article I, section 2 states: “No person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” In order to meet this requirement, a person must reside in the state he is representing by Election Day. *See* CASES OF CONTESTED ELECTIONS IN CONGRESS 224–25 (M. Clarke & D. Hall eds., 1834); *see also* Tex. Democratic Party v. Benkiser, 459 F.3d 582 (5th Cir. 2006).

tucky, and Nebraska.<sup>16</sup> In this way, Terry was able to invoke the candidate reasonable access privilege to buy airtime on television stations in major media markets in neighboring swing states, so long as the stations also broadcast into some portion of the state where he was on the ballot. By virtue of being on the ballot in West Virginia, for instance, Terry sought to air television ads in portions of Virginia, Ohio, Pennsylvania, Maryland, and the District of Columbia.<sup>17</sup> Some of Terry's allies appear to have chosen the districts in which they sought placement on the ballot based on similar audience-targeting considerations.<sup>18</sup> The ads aired by the activists, too, reflected an interest in expressing the group's views on abortion, rather than in campaigning for office. The template-style ads, each shared by most or all of the activists, typically contained no image or mention of the "candidate," the state in which he or she was running, or the office he or she purported to seek, other than in the mandatory disclosure at the end of the ad.<sup>19</sup>

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<sup>16</sup> Presidential Candidates on the 2012 General Election Ballots of Each State and the District of Columbia, <http://www.fec.gov/pubrec/fe2012/2012presgecands.pdf> (last visited Sept. 26, 2014); Letter from Randall Terry, Exhibit A to Gannett Co., Inc. Petition for Reconsideration in FCC Matter DA 12-1734, Nov. 2, 2012 (on file with author). Terry avoided being on the ballot for President in "swing states" so as not to attract any voters away from Mitt Romney in states where he expected the race between Romney and President Obama to be close. *Id.* Thus, he was very determinedly trying *not* to win votes with his "candidate" ads—his target audience was those in swing states who could see his ads but could not vote for him.

<sup>17</sup> Letter from Randall Terry, *supra* note 16.

<sup>18</sup> For example, David Lewis, a resident of the 2nd Congressional district of Ohio, was on the ballot against John Boehner in the 8th district of Ohio for the Republican primary and in the 4th Congressional district of Kentucky as an independent for the general election, allowing him to purchase airtime on television stations in nearby Cincinnati, Ohio and in Louisville, Kentucky. Lewis FEC Form 2, Statement of Candidacy (Feb. 13, 2012), <http://docquery.fec.gov/pdf/456/12030741456/12030741456.pdf>; Lewis Amended FEC Form 2, Statement of Candidacy (Oct. 9, 2012), <http://docquery.fec.gov/pdf/074/12030893074/12030893074.pdf>; Lewis WLWT-TV Cincinnati Sales Contract (Oct. 25, 2012), [https://stations.fcc.gov/collect/files/46979/Political%20File/2012/Federal/US%20House/KY-04/DAVID%20LEWIS/lewis%2010%2031%20\(13512765087331\).pdf](https://stations.fcc.gov/collect/files/46979/Political%20File/2012/Federal/US%20House/KY-04/DAVID%20LEWIS/lewis%2010%2031%20(13512765087331).pdf); Lewis WAVE-TV Louisville Sales Contract [https://stations.fcc.gov/collect/files/13989/Political%20File/2012/Federal/US%20House/KY-04/David%20Lewis/Lewis-Congress%20Oct%2019%20\(13505898045067\).pdf](https://stations.fcc.gov/collect/files/13989/Political%20File/2012/Federal/US%20House/KY-04/David%20Lewis/Lewis-Congress%20Oct%2019%20(13505898045067).pdf).

<sup>19</sup> Labash, *supra* note 1.

Unsurprisingly, numerous broadcast stations resisted airing these advertisements.<sup>20</sup> Many broadcasters worried that they would antagonize viewers by airing graphic ads that some would not realize the broadcasters were compelled by law to carry.<sup>21</sup> But there was a deeper concern here, as well—one that repeatedly surfaces in disputes over broadcast regulation. The Supreme Court has recognized that broadcasters have broad, constitutionally protected discretion in making programming decisions.<sup>22</sup> On that basis, broadcasters often have viewed restrictions on the content they air or requirements that they air content not of their choosing as serious incursions on their editorial freedom. Indeed, broadcasters had previously made such arguments in challenging the statutory reasonable access right for federal candidates.<sup>23</sup> With regard to orders for time placed by Terry and his allies, many broadcasters viewed extending reasonable access rights to individuals not seeking office as a significant expansion of this “limited”<sup>24</sup> public service obligation, and one that had the potential to become a significant burden on broadcasters’ editorial discretion. Moreover, due to the equal-opportunities rights that candidates have with respect to airtime purchased by others in the same race, an increase in the

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<sup>20</sup> See, e.g., *In re Terry*, 27 FCC Rcd. 598, 598 (Feb. 3, 2012); *In re Randall Terry for President*, 27 FCC Rcd. 13418, 13418 (Oct. 31, 2012); Response of WPLG to FCC Complaint by Randall Terry, Oct. 26, 2012 (on file with author); WSCV and WTVJ Brief in Support of WPLG-TV, Oct. 28, 2012 (on file with author); Response of WFLX (TV) to FCC Complaint by Randall Terry, Nov. 15, 2012 (on file with author); see also Press Release, Randall Terry, Are Catholic Voters the ‘New Negro’ of the Democratic Party? Will FCC Protect Pro-life Catholic Democrats from Political Segregation?, Feb. 2, 2012, <http://www.christiannewswire.com/news/1846918853.html>; Press Release, Terry for President Campaign Committee, FCC Rules Washington DC Stations Must Run Graphic Abortion Ads of Terry for President, Nov. 1, 2012, <http://www.christiannewswire.com/news/5678770786.html>.

<sup>21</sup> Telephone Interview with Kurt Wimmer, Partner, Covington & Burling LLP, Counsel for Gannett, Co., Inc., in Washington, D.C. (Apr. 2, 2014).

<sup>22</sup> See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (“As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination.”).

<sup>23</sup> See, e.g., *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding reasonable access as a limited incursion on broadcasters’ editorial discretion, justified as an attempt by Congress to balance the First Amendment rights of federal candidates, the public, and broadcasters, while ensuring that the airwaves are used in the public interest).

<sup>24</sup> *Id.* at 396.

number of pretextual candidates<sup>25</sup> could crowd out some speech of genuine candidates by decreasing the amount of airtime available to the latter group.<sup>26</sup>

However, in responding to October 2012 complaints filed by Terry and his allies, which alleged that a number of stations had violated the political broadcasting rules by refusing them access, the Federal Communications Commission (the “FCC” or the “Commission”) did not address broadcasters’ First Amendment arguments regarding the permissible scope of candidate access rights. Without appearing to consider the constitutional dimension of its decisions, the Commission focused on relatively narrow legal issues, unique to the facts of each case, to find that it was unreasonable for the stations to deny access—even where circumstances strongly suggested that the purported candidates were not actually seeking office and had no intention of becoming legally qualified to take office.<sup>27</sup>

Arguably displaying discomfort with its role of determining— or of overseeing broadcasters in determining—which individuals

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<sup>25</sup> I use the term “pretextual candidates” throughout this Article to refer to individuals who gain ballot access or present themselves as write-in candidates for a federal race in order to gain statutory political broadcasting rights, rather than in an attempt to gain office, or even to attract votes to themselves. While not all real-world situations are easily categorized, the basic distinction between a genuine candidate and a pretextual candidate is whether “the ads were made to support the campaign or the campaign was made to support the ads.” McConnell & Todd, *supra* note 11.

<sup>26</sup> In determining how much access is reasonable to afford one candidate, broadcasters take into account the number of other candidates in the race who could potentially make reasonable access and equal-opportunities claims. *See* FCC Political Broadcasting Primer, 100 F.C.C.2d 1476, 1523 (1984).

<sup>27</sup> *See* Telephone Decision of Robert Baker, Mass Media Bureau Policy Division Assistant Chief for Political Broadcasting, Federal Communications Commission, in the matter of the informal complaint of Andrew Beacham against station WAVE (Oct. 18, 2012) (a person on the ballot for Congress in one state who lives in another state is considered “qualified under the applicable local, State or Federal law” under 47 C.F.R. § 73.1940 by virtue of being on the ballot, even where he does not currently meet constitutional residency requirements to take office and has provided no evidence of or assurance of intention to relocate); *see also* Complaint of Randall Terry for President, 27 FCC Rcd. 13418 (Oct. 31, 2012) (where Randall Terry was on the ballot in West Virginia and the digital Washington, D.C. station refused him access, relying on a terrain-dependent coverage map to show that it did not broadcast a signal into West Virginia, station should instead have used a methodology analogous to that used in determining the contour of analog television stations and should have granted access to Terry).

are entitled to candidate political broadcasting rights, the Commission effectively created a bright-line rule requiring broadcasters to grant access to any person on the ballot for a federal race in the relevant geographic area.<sup>28</sup> This prophylactic rule has the benefit of preventing broadcasters from refusing to sell time to a candidate because they do not like what he has to say or because they perceive that the candidate has little chance of winning.<sup>29</sup> However, the rule also has the cost of forcing broadcasters, who are normally understood to exercise broad editorial discretion protected by the First Amendment, to air messages from some individuals who do not seek to hold office.

In this Article, I examine whether imposing such a prophylactic rule on broadcasters—rather than permitting them to exercise judgment, based on neutral factors such as those permitted in the context of write-in candidates,<sup>30</sup> to determine whether an individu-

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<sup>28</sup> In an informal decision considering a complaint by Andrew Beacham, an Indiana resident who was on the ballot for Congress in Kentucky, FCC political broadcasting staff stated that in evaluating whether a person “is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate” for purposes of FCC political broadcasting rules, the Commission’s policy is to defer to a state election agency’s decision to place that person’s name on the ballot. *See* Complaint of Randall Terry for President, 27 FCC Rcd. 13418 (Oct. 31, 2012). Beyond the question of whether deference to state agencies on questions of federal law is appropriate in this context, the Commission’s policy is troubling in at least two respects. First, it appears to assume, incorrectly, that the requirements a person must meet for federal ballot access are the same as the requirements to actually hold office in the event that one is elected. *See supra* note 15. Second, even with regard to ballot access requirements, state election agencies do not typically investigate whether an applicant for federal ballot access actually meets the relevant federal requirements.

<sup>29</sup> *See* *Becker v. FCC*, 95 F.3d 75, 81 (D.C. Cir. 1996) (striking down FCC policy permitting broadcasters to channel a candidate’s graphic anti-abortion ads to times when children were less likely to be in the audience because such a policy granted broadcasters standard-less discretion that would allow them to discriminate according to an ad’s message); Political Broadcasting Primer, *supra* note 26, at 1486 (broadcast stations may not refuse to grant reasonable access because they perceive that the candidate has low odds of winning).

<sup>30</sup> In the context of write-in candidates, broadcasters may ask an individual claiming a right to reasonable access to make a “substantial showing of bona fide candidacy.” 47 C.F.R. §§ 73.1940(b)(2), 73.1940(e)(2) (2013). Such a showing includes “evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning . . . includ[ing] making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters.” *Id.* § 73.1940(f). Notably, the single 2012 Terry decision the FCC made in favor of the broadcaster involved a situation in

al is entitled to reasonable access—can be constitutionally justified in light of broadcasters' First Amendment status and the legislative purposes of and constitutional justifications for the reasonable access statute. This Article is the first to consider this question and is also unique in taking an in-depth look at the current state of political broadcasting law, particularly in light of the changes that have taken place in the market for political advertising since the Supreme Court's decision in *Citizens United v. FEC*.<sup>31</sup> Although much attention is being paid, both in legal academia and in the mainstream press, to the money flowing into elections from campaign contributions, very little attention is paid to the legal framework governing the primary way that money is spent—on television advertisements.

Scholars who have written more generally on the intersection of broadcast regulation and the First Amendment have frequently been unimpressed by the Supreme Court's justifications—most famously the scarcity rationale elaborated in *Red Lion Broadcasting Co. v. FCC*<sup>32</sup>—for placing requirements on broadcasters that could not normally be placed on other speakers.<sup>33</sup> Some, most notably Owen Fiss and Cass Sunstein, have proposed an alternative justification for extending lesser constitutional protections to broadcasters—the dissemination of information and promotion of public debate necessary for democratic decision-making.<sup>34</sup> Under their theories, the central value of the First Amendment is furtherance of the democratic process, and any autonomous speech interests of individuals, including broadcasters (and, presumably, other media owners who come to play a similarly significant role in democratic discourse), are subordinate.

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which he purported to be a write-in candidate but had failed to make a substantial showing of bona fide candidacy. *In re Terry*, 27 FCC Rcd. 598 (Feb. 3, 2012).

<sup>31</sup> 558 U.S. 310 (2010).

<sup>32</sup> 395 U.S. 367 (1969).

<sup>33</sup> See, e.g., LEE BOLLINGER, *IMAGES OF A FREE PRESS* 87–97 (1991); LUCAS POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197–215 (1987); CHRISTOPHER S. YOO, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 914 GEO. L.J. 245, 266–306 (2003).

<sup>34</sup> See OWEN FISS, *LIBERALISM DIVIDED* 13–17, 36–38 (1996); CASS SUNSTEIN, *DEMOCRACY AND FREE SPEECH* 18–20 (1995).

Others, like Christopher Yoo in recent years, have argued that, given the technological convergence of communications media, there simply is no longer any adequate justification that would allow courts, Congress, and the FCC to treat broadcasters differently from other media owners.<sup>35</sup> Accordingly, “the First Amendment’s traditional respect for individual autonomy and traditional suspicion of government intervention,” requires that the higher standard of scrutiny applied to regulation of other media be applied to broadcasting as well.<sup>36</sup>

Still others have argued that our democracy is best served by a system in which various portions of the press are afforded differing degrees of autonomy under the First Amendment. Lee Bollinger, who has been credited with originating this idea,<sup>37</sup> has argued that while traditional print media should be maintained as an unregulated “benchmark” of the free press, newer electronic media, including broadcast radio and television, may serve as a laboratory of regulatory experimentation in which democracy-furthering rules, such as candidate access requirements, may be tested.<sup>38</sup> C. Edwin Baker has argued that a complex democracy such as ours requires various media to perform different functions, and, consequently, to be regulated differently.<sup>39</sup> Largely agreeing with Professor Baker, Jack Balkin has argued, “free speech values—interactivity, mass participation, and the ability to modify and transform culture—must be protected through technological design and through administrative and legislative regulation of technology, as well as through the more traditional method of judicial creation and recognition of constitutional rights.”<sup>40</sup>

Nonetheless, unlike Professors Fiss and Sunstein, this final group of scholars recognizes that regulation of new media must al-

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<sup>35</sup> See YOO, *supra* note 33, at 355–56.

<sup>36</sup> *Id.*

<sup>37</sup> See C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 188 (2002).

<sup>38</sup> See BOLLINGER, *supra* note 33, at 85, 120.

<sup>39</sup> BAKER, *supra* note 37, at 149, 187–92. According to Professor Baker, in a complex democracy, interest groups require media that will help mobilize people and promote their divergent interests. But complex democracy also requires “inclusive, nonsegmented media entities[] that support a search for general societal agreement on common goods.” *Id.* at 148–49.

<sup>40</sup> Balkin, *supra* note 4, at 44 n.74.

so take into account other First Amendment values, including the autonomy interests prized by Professor Yoo. Referring to the FCC ban on indecent language, Professor Bollinger urges the Supreme Court to end the FCC's "venture in morals regulation in broadcasting" because "[i]t is inconsistent with the First Amendment's general commitment to a system of extraordinary protections against censorship."<sup>41</sup> Acknowledging, at least implicitly, that media owners come to the table possessing the same autonomy interests as other private speakers, Professor Balkin describes broadcast regulation as "a quid pro quo, or contractual arrangement, [that] is constitutional to the extent that it promotes the values of a democratic culture."<sup>42</sup> Accordingly, a broadcast regulation should only be considered constitutional to the extent that "there is a clear nexus between the goals of the regulation and the purposes behind the hybrid system"—the comprehensive regulatory scheme that has allowed a small number of broadcasters to hold licenses not open to all in return for accepting various public service obligations and regulations.<sup>43</sup>

This Article builds on the theoretical foundations initiated by Professors Bollinger, Baker, and Balkin by exploring political broadcasting law within the larger context of the constitutional values underlying our system of broadcast regulation. I demonstrate that, from the inception of broadcast regulation, Congress has engaged in a balancing act, seeking not only to ensure that the broadcast medium would serve the public interest, but also to protect the medium from pervasive government control. Consistently with this legislative vision, the Supreme Court has, over the last thirty years, recognized that not only the public interest, but also broadcasters' First Amendment speech rights, must be taken into account when considering the constitutionality of granting members of the public, including candidates for public office, access to broadcast sta-

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<sup>41</sup> LEE BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 127 (2010).

<sup>42</sup> Balkin, *supra* note 4, at 44 n.74.

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

tions.<sup>44</sup> Nonetheless, the Court has provided little guidance as to how this should be done.

I argue that because Congress chose to use a system of predominantly private broadcasters to pursue the democratic First Amendment values embodied in the Communications Act—and because many of the requirements placed on broadcasters would normally be understood to violate the First Amendment rights of private speakers—courts should insist that the government not burden substantially more broadcaster speech than necessary to achieve its aims. This is particularly true where there are effective and low-cost alternatives to a burdensome policy.

In Part I, I describe the framework of political broadcasting law and regulations and explore the legislative history of reasonable access and the constitutional justifications the Court has given for upholding the provision against a First Amendment challenge by broadcasters. I place the Court's only ruling on reasonable access, *CBS, Inc. v. FCC*,<sup>45</sup> in the context of earlier and later cases considering the First Amendment status of broadcasters. In examining this legislative and judicial history of broadcast regulation, particularly with regard to access rights, I show that tension has always existed between serving the First Amendment needs of the public and protecting the First Amendment rights of broadcasters.

In Part II, I contrast the legal treatment of federal candidates with that of non-candidate political advertisers, arguing that incentives arising from political broadcasting law and market conditions for non-candidate political advertising cause a strategy like Terry's to be increasingly attractive for individuals seeking to broadcast their political views. I then discuss the FCC's 2012 decisions involving Terry and his allies, showing that the FCC's failure to address (and perhaps even fully to perceive the existence of) the First Amendment question raised by broadcasters illustrates the uncertainty created by the current state of case law, with regard to how competing First Amendment values should be weighed in the area of broadcast regulation.

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<sup>44</sup> See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *CBS, Inc. v. FCC*, 453 U.S. 367, 394 (1981); *CBS, Inc. v. Democratic Nat'l Comm'n*, 412 U.S. 94, 117 (1973).

<sup>45</sup> 453 U.S. 367 (1981).

In Part III, I observe that, in light of the history and purposes of broadcast regulation, as well as the development of case law since *Red Lion*,<sup>46</sup> a conception of broadcasters as trustees subject to extensive government regulation in furtherance of the public interest is far too simplistic. I argue that, under a better understanding of broadcast regulation, Congress has structured its regulatory scheme so as to incentivize broadcasters to produce coherent, balanced, and informative programming—content that is valuable to a democratic conception of the First Amendment and that is likely to be underproduced by the market. However, because Congress has chosen to use private speakers to carry out the essential tasks of informing the public and fostering public discussion and, indeed, because freedom from government control is necessary to these tasks, the First Amendment requires that the FCC maintain a close fit between the legislative ends it is tasked with furthering and the means it chooses for doing so.

Finally, I return to the FCC's policy in its October 2012 decisions, considering the potential the prophylactic rule has both to interfere with broadcasters' editorial freedom and also to reduce the opportunities for genuine candidates to speak directly to the public through the broadcast medium. In particular, because broadcasters must take into account the number of federal candidates who are eligible for reasonable access when deciding how much time to make available to each candidate, the Commission's requirement that broadcasters grant access to all candidates on the ballot, including pretextual ones, has significant potential to lead to the crowding out of genuine candidates' speech. I suggest an alternative policy—similar to that already in place in the context of write-in candidates—that would better achieve the legislative purposes of reasonable access and would burden less broadcaster and candidate speech activity. Under my approach, the Commission would permit broadcasters to evaluate evidence of campaigning activities in order to determine whether an individual on the ballot is a “bona fide candidate” entitled to reasonable access. This approach would help limit candidate political broadcasting privileges to those seeking to gain public office, rather than extending them to

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<sup>46</sup> 395 U.S. 367 (1969).

those who are simply seeking to gain access to a particularly effective platform.

## I. CANDIDATE POLITICAL BROADCASTING RIGHTS

In this Part, I describe the framework of political broadcasting law and regulations applying to candidate advertisers, highlighting the tension between furthering public-oriented First Amendment values and protecting broadcasters' free speech rights that has existed throughout the history of broadcast regulation. I first explore the history and purposes of statutory political broadcasting rights, including reasonable access and the closely related equal opportunities and lowest unit rate provisions. I then discuss the FCC's implementation of these laws through its rules and guidance. Finally, I explore the constitutional rationale for reasonable access given by the Supreme Court in *CBS, Inc. v. FCC*,<sup>47</sup> examining that case in the context of previous cases considering the constitutionality of access rights to broadcast stations and in light of subsequent developments.

### *A. History and Purposes of Statutory Political Broadcasting Rights*

During the technological infancy of radio communication, the Radio Act of 1912 was passed to coordinate point-to-point communication, the emergence of broadcasting radio signals to large audiences having not yet been anticipated.<sup>48</sup> By the 1920s, however, a radio broadcasting industry of private station owners had begun to emerge, following the failed attempt by the Secretary of the Navy to have the industry nationalized and controlled by the government.<sup>49</sup> Although dominated in some respects by large corporations holding patents to radio technologies,<sup>50</sup> the creation of broadcast stations quickly proliferated among a variety of non-profit and

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<sup>47</sup> 453 U.S. 367 (1981).

<sup>48</sup> See ROBERT W. MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935 13 (1993).

<sup>49</sup> *Id.* at 12-14.

<sup>50</sup> These corporations were not the broadcast networks we are familiar with today, but instead included such manufacturing and telecommunications companies as RCA, General Electric, AT&T, and Westinghouse. *Id.*

commercial organizations seeking to spread their messages to the public, including religious groups, labor unions, civic organizations, and colleges and universities, as well as newspapers, department stores, power companies, and automobile dealerships.<sup>51</sup> In the absence of broadcast regulation,<sup>52</sup> the situation became chaotic, due to widespread interference between broadcast signals.<sup>53</sup> In addition, the economic instability of the broadcast industry—resulting from station owners’ reliance on funds from their primary enterprises to support their stations, rather than on self-sufficient revenue models such as selling advertising—combined with the problem of signal interference to prevent the public from having reliably available sources of information on the airwaves.<sup>54</sup>

Faced with this chaos, Congress passed “emergency legislation” establishing the statutory framework of the broadcast system we have today, in the Radio Act of 1927.<sup>55</sup> The Federal Radio Commission (“FRC”), the predecessor to the FCC, was established on an interim basis to assign broadcast licenses and to bring order to the air, a task that was widely considered to require reducing the total number of broadcasters.<sup>56</sup> Without providing specific guidelines for the FRC to use in distributing broadcast licenses, the Radio Act of 1927 “called for the FRC to allocate licenses on the basis of which prospective broadcaster best served the ‘public interest, convenience, or necessity,’ a phrase adopted from public utilities law.”<sup>57</sup>

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<sup>51</sup> *Id.* at 14; *see also* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 4 (1959) (“On March 1, 1922, there were 60 broadcasting stations in the United States. By November 1, the number was 564.”).

<sup>52</sup> Herbert Hoover, as Secretary of Commerce, had developed an early broadcast licensing scheme. However, he discontinued all broadcast regulation after a court held that the Radio Act of 1912 had not given the Department of Commerce power to place additional criteria on radio licenses. *See* MCCHESENEY, *supra* note 48 at 16–17; *see also* *United States v. Zenith Radio Corp.*, 12 F.2d 614, 617 (N.D. Ill. 1926).

<sup>53</sup> MCCHESENEY, *supra* note 48, at 16–18; *see also* *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 104 (1973); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–76 (1969).

<sup>54</sup> *See* MCCHESENEY, *supra* note 48, at 14–15.

<sup>55</sup> *Id.* at 16–18.

<sup>56</sup> *Id.* at 17–18.

<sup>57</sup> *Id.* at 18.

### 1. Equal Opportunities for Candidates for Elective Office

In many respects, precisely how the FRC, and subsequently the FCC, should regulate broadcasters in the “public interest, convenience, or necessity,” was unclear in the early days of broadcasting.<sup>58</sup> Nonetheless, Congress clearly “chose to leave broad journalistic discretion with the licensee,”<sup>59</sup> rejecting both government control of the content aired on the broadcast medium and treatment of broadcasters as common carriers obligated to carry the speech of others on a nonselective basis.<sup>60</sup> Although an early version of the bill that became the Radio Act of 1927 would explicitly have deemed broadcasters to be common carriers for the purpose of “‘discussion of any question affecting the public,’” Congress ultimately adopted an amended version of the bill that eliminated the common carrier obligation.<sup>61</sup> Senator Dill, the principal architect of the Radio Act of 1927, introduced this amendment, stating, “[‘public questions’] is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time.”<sup>62</sup>

But Senator Dill’s amendment did leave in place a single exception to the general stance taken by Congress that broadcasters should not be required to provide access to members of the public—in the event that any candidate for public office was permitted to use a broadcasting station to transmit a message, any other candidate for the same office was to be afforded equal opportunities to

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<sup>58</sup> See *id.* at 18; see also CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT* 51–53 (2000).

<sup>59</sup> *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 105 (1973).

<sup>60</sup> *Id.* at 104–11 (discussing the legislative history of the Radio Act of 1927 and the Communications Act of 1934 with regard to the statute’s treatment of access rights for candidates and for discussion of public issues).

<sup>61</sup> *Id.* at 105–06 (quoting 67 CONG. REC. 12503 (1926)).

<sup>62</sup> *Id.* at 106–07 (quoting 67 CONG. REC. 12504 (1926)). In hearings leading up to the enactment of the Communications Act of 1934—the statute replacing the “emergency legislation” of the Radio Act of 1927—Congress again rejected a proposal that would have imposed an access obligation on broadcasters for members of the public wishing to discuss public issues. Congress instead enacted provisions specifically providing that “a person engaged in radio broadcasting shall not . . . be deemed a common carrier,” and that the FCC may not exercise “the power of censorship” over broadcast stations or regulate broadcasters so as to “interfere with the right of free speech by means of radio communication.” Communications Act of 1934, 47 U.S.C. §§ 153(h), 326 (2012).

use that broadcasting station.<sup>63</sup> Furthermore, broadcasters were prohibited from censoring any material broadcast by a candidate exercising his equal opportunities right.<sup>64</sup> The legislative choice to include this equal opportunities provision, while rejecting a similar provision for the discussion of public issues, reflects the “tightrope” approach to broadcast regulation that continues to this day.<sup>65</sup>

Although concerned with the evils of both government censorship of broadcast and “private censorship” by broadcasters of members of the public, Congress ultimately concluded that government censorship would be “the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.”<sup>66</sup> Nonetheless, recognizing the importance of allowing candidates for public office the opportunity to engage with the electorate in “full and unrestricted discussion of political issues,” Congress chose to ensure that broadcasters who make their facilities available to candidates do so on a nondiscriminatory basis.<sup>67</sup>

## 2. Reasonable Access and Lowest Unit Rate

To this day, candidates for public office remain the only members of the public who possess affirmative statutory rights to have their voices heard on broadcast stations.<sup>68</sup> And in addition to the “equal opportunities” rights candidates have possessed from the earliest days of broadcast regulation, Congress has since granted to candidates two other political broadcasting rights, “lowest unit rate” and “reasonable access.”<sup>69</sup> With the express intent of “increas[ing] a candidate’s accessibility to the media and to reduc[ing] the level of spending for its use,” Congress enacted the reasonable

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<sup>63</sup> Radio Act of 1927, 44 Stat. 1162, § 18 (1927).

<sup>64</sup> *Id.*

<sup>65</sup> *See* CBS, Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 104–05 (1973).

<sup>66</sup> *Id.* at 105.

<sup>67</sup> Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 529 (1959).

<sup>68</sup> *See* 47 U.S.C. § 312(a)(7) (2012).

<sup>69</sup> *Id.* §§ 312(a)(7), 315(b). Note that while equal opportunities and lowest unit rate are available to federal, state, and local candidates, reasonable access is available only to federal candidates.

access and lowest unit rate provisions as part of the Federal Election Campaign Act of 1971 (“FECA”).<sup>70</sup>

Aimed at reducing candidate spending, the “lowest unit rate” provision provides that, during the forty-five days prior to a primary election or the sixty days prior to a general election, state, local, and federal legally qualified candidates are entitled to pay broadcast stations a rate equal to the lowest rate paid by any other advertiser for a purchase of comparable time.<sup>71</sup> As I discuss below in Part II, in practice, the financial benefit of this provision to candidates is significant.

Reflecting a legislative desire to “give candidates for public office greater access to the media so that they [could] better explain their stand on the issues, and thereby more fully and completely inform the voters,”<sup>72</sup> the “reasonable access” provision states that the FCC may revoke a commercial broadcaster’s license for its “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.”<sup>73</sup> Prior to the enactment of reasonable access, it was understood that broadcast stations had a general duty, as part of their obligation to serve the public interest,

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<sup>70</sup> Hearings on S.1, S. 382, and S.956 before the Subcommittee on Communications of the Senate Committee on Commerce, 92d Cong., 1st Sess., 2 (1971) (remarks of Sen. Pastore); *see also* 118 CONG. REC. 325 (1972) (remarks of Sen. Devine).

<sup>71</sup> 47 U.S.C. § 315(b) (2012). In determining the appropriate reference for calculating the rate to be paid by a legally qualified candidate, a broadcaster looks to the length of the spot, the time period in which the ad runs (in the broadcasting industry, this is referred to as the “daypart”), and the class of time. *See* NATIONAL ASSOCIATION OF BROADCASTERS, POLITICAL BROADCAST CATECHISM 38–39 (17th ed. 2011). For example, two ads running in the same commercial break, at 8:01 p.m. and 8:02 p.m., may not be considered to be in the same “daypart” if one purchase order was for an ad to run between 8:00 p.m. and 9:00 p.m. on Thursday night and the other was for an ad to run during primetime on any weeknight the broadcaster chooses. “Class of time” most commonly refers to the “preemptibility” of an ad. For example, an advertiser may pay a premium to place an ad that cannot be preempted by any other advertisements. Another may choose a less expensive class of time that can be preempted with 48 hours’ notice.

<sup>72</sup> S. REP. NO. 92–96, at 20 (1971).

<sup>73</sup> 47 U.S.C. § 312(a)(7) (2012). The statute does not define “legally qualified federal candidate” or “reasonable amounts of time.”

to provide viewers with coverage of political races.<sup>74</sup> But candidates possessed no affirmative right to access broadcast stations. They possessed only a responsive right to access that could be invoked in the event that a broadcast station had chosen to grant access to an opposing candidate. Now, since the enactment of the reasonable access provision, legally qualified federal candidates have a statutory right to purchase a “reasonable” amount of time on broadcast stations, regardless of whether the station has previously provided such time to another candidate.

Nonetheless, like the enactment of the equal opportunities provision of the Radio Act of 1927, the passage of the “reasonable access” provision in 1971 reflects a legislative attempt to balance the information needs of the public with the free speech rights of broadcasters.<sup>75</sup> Congress foresaw the substantial impact this new requirement would have on broadcasters and, for that reason, limited the reasonable access provision to candidates seeking *federal* elective office.<sup>76</sup> Congress also chose to leave a significant amount of discretion with broadcasters regarding what type of programming access should be afforded to candidates. For example, legislators dropped a provision that would have required broadcasters to give candidates “maximum flexibility to choose their program format.”<sup>77</sup> The precise contours of the reasonable access right, however, including the degree and type of discretion to be retained by broadcasters in considering candidates’ reasonable access requests, have been shaped by its regulatory implementation by the FCC.

### *B. Regulatory Implementation of Reasonable Access*

Upon enactment of the statutory reasonable access provision, the FCC immediately recognized that Congress had not simply codified the Commission’s existing policy of taking into consideration

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<sup>74</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 378 (1981) (citing Comm’n Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1087–88 (1978) [hereinafter Comm’n Policy]).

<sup>75</sup> *See, e.g.*, 118 CONG. REC. 331 (1972) (remarks of Sen. Mahon) (discussing impact of proposed legislation on broadcasting industry); 118 CONG. REC. 331–32 (1972) (remarks of Sen. Hillis) (expressing concern that overregulation of broadcast would deal “a heavy blow to a free press and, most importantly, to a free society”).

<sup>76</sup> *CBS*, 453 U.S. at 380–81.

<sup>77</sup> 118 CONG. REC. 325 (1972).

a broadcaster's political programming in evaluating whether the broadcaster was meeting its public service obligations.<sup>78</sup> In response, the Commission promulgated rules implementing the provision and defining certain terms used in the statute. In language identical to the statute, the relevant rule states that the Commission may revoke a broadcast license "for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."<sup>79</sup>

Under FCC rules, a "legally qualified candidate for public office" is any person who: (1) "[h]as publicly announced his or her intention to run for nomination or office"; (2) "[i]s qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate"; and (3) has either, (a) "qualified for a place on the ballot," or (b) "publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law [to do so] . . . and makes a substantial showing that he or she is a bona fide candidate for nomination or office."<sup>80</sup> In later guidance and decisions, however, the Commission effectively has collapsed these requirements into a single test, where a person is on the ballot for a federal office. Filing the necessary papers to obtain a place on the ballot "is considered to be the equivalent of a public announcement of candidacy,"<sup>81</sup> and—as the Commission made clear in 2012 when considering the reasonable access rights of Terry ally Andrew Beacham—a person on the ballot is irrebuttably presumed to be qualified under the applicable federal, state, or local law to hold the office for which he is a candidate.<sup>82</sup> Thus, broadcasters may make no further inquiries into an

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<sup>78</sup> Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510, 537–38 (1972); *see also* Comm'n Policy, *supra* note 74, at 1088.

<sup>79</sup> 47 C.F.R. § 73.1944 (2013).

<sup>80</sup> *Id.* § 73.1940.

<sup>81</sup> FCC Political Broadcasting Primer, *supra* note 26, at 1480.

<sup>82</sup> In determining, for purposes of FCC rules, whether Beacham was legally qualified to hold the office of U.S. Representative from the state of Kentucky, the Commission deferred to the Kentucky election board's decision to place Beacham on the ballot. As a practical matter, Beacham, an Indiana resident, did not meet the constitutional requirement to represent Kentucky in office, and he had provided no evidence that he would become qualified by Election Day—nor had he even stated an intention to relocate.

individual's status as a legally qualified federal candidate once it has been demonstrated that he or she is on the ballot. By contrast, broadcasters may ask a person claiming to be a write-in candidate to make a substantial showing of bona fide candidacy by demonstrating that she has "engaged to a substantial degree in activities commonly associated with political campaigning."<sup>83</sup> Such activities typically include "making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing a campaign headquarters."<sup>84</sup>

Once a federal candidate's right to reasonable access has been established, a broadcaster must determine whether that candidate's request to buy time is reasonable. A broadcaster may take into account its "broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disruption that [would] be caused by political advertising, and the amount of time already sold to a candidate in a particular race."<sup>85</sup> A broadcaster may not consider such factors as whether a candidate is perceived to have a realistic chance of winning,<sup>86</sup> or the content of the candidate's campaign advertisement.<sup>87</sup> Candidates must be allowed to purchase time once their race is "in full swing," which includes at least the window during which candidates' lowest unit rate rights are active, but which a broadcaster

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Telephone Decision of Robert Baker, *supra* note 27. *But cf.* Complaint Under Section 315 (Lar Daly), 40 F.C.C. 270 (1956) (where candidate on ballot for race had notified state officials that he was withdrawing and evidence indicated that he was supporting another candidate for that office and seeking nomination for a different office, he had not made a clear showing that he was a legally qualified candidate for the first race); Complaint Under Section 315 (Am. Vegetarian Party), 40 F.C.C. 278, 278 (1956) ("[W]here initial doubt is present as to whether in fact a candidate is actually legally qualified for the office he seeks, then it is incumbent upon that candidate to prove his qualifications."); Socialist Worker Party, 39 F.C.C.2d 89 (1972) (where purported candidates did not meet constitutional minimum age requirements for holding the offices of President and Vice President, they could not be considered to be legally qualified candidates for those offices); Carter-Mondale Presidential Comm., 74 F.C.C.2d 631, 641 (1979) ("[W]e read the 'legally qualified' language as having an implicit temporal reference to the date(s) of requested access.").

<sup>83</sup> 47 C.F.R. § 73.1940(f) (2013).

<sup>84</sup> *Id.*

<sup>85</sup> Codification of the Comm'n's Political Programming Policies, 7 FCC Rcd. 678, 681 (1991).

<sup>86</sup> FCC Political Broadcasting Primer, *supra* note 26, at 1486.

<sup>87</sup> *Becker v. FCC*, 95 F.3d 75, 81 (D.C. Cir. 1996).

may determine has occurred earlier.<sup>88</sup> The Commission relies on “the reasonable, good faith judgments of [broadcasters] as to what constitutes reasonable access under all of the circumstances present in particular cases.”<sup>89</sup>

### *C. Court Consideration of the Constitutionality of Reasonable Access*

#### 1. CBS, Inc. v. FCC and Its Precursors

In the 1981 case *CBS, Inc. v. FCC*, broadcast networks NBC, CBS, and ABC challenged the constitutionality of the reasonable access statute, as implemented by the FCC, arguing that the provision “violate[d] the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion.”<sup>90</sup> At issue in the case was a request by the Carter–Mondale Presidential Committee (the “Committee”) to purchase time for a thirty-minute program during primetime once during a four-day period in December 1979.<sup>91</sup> The Committee intended to present a documentary outlining the record of the Carter administration, in conjunction with President Carter’s formal announcement of candidacy.<sup>92</sup> All three networks declined to make the requested time available. CBS, emphasizing the potential disruption of regular programming, instead offered to sell the Committee two five-minute spots at other times of day, just after the requested four-day period.<sup>93</sup> NBC and ABC replied that they were not yet prepared to sell any time for the 1980 Presidential campaign as early as December 1979.<sup>94</sup> The Committee then filed a complaint with the FCC, charging that the networks had violated their obligation to provide “reasonable access” to President Carter.<sup>95</sup> In a 4–3 vote, the Commission concluded that the reasons provided by the networks did not meet its standard

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<sup>88</sup> Comm’n Policy, *supra* note 74, at 1091.

<sup>89</sup> Codification of the Comm’n’s Political Programming Policies, 7 FCC Rcd. 678, 681 (1991).

<sup>90</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981).

<sup>91</sup> *Id.* at 371.

<sup>92</sup> *Id.* at 371–72.

<sup>93</sup> *Id.* at 372.

<sup>94</sup> *Id.* at 372–73.

<sup>95</sup> Complaint of Carter–Mondale Presidential Comm., 74 F.C.C.2d 631 (1979).

of reasonableness because the networks had not adequately considered all of the relevant factors in denying access.<sup>96</sup>

In reviewing the Commission's decision, the Supreme Court upheld reasonable access as a constitutionally permissible "effort by Congress to assure that an important resource—the airwaves—will be used in the public interest" and found that the Commission had "properly balance[d] the First Amendment rights of federal candidates, the public, and broadcasters."<sup>97</sup> Nonetheless, the fact that the Court recognized that broadcasters possessed such First Amendment rights to be balanced against others' was a significant development. Eleven years earlier, in *Red Lion Broadcasting Co. v. FCC*, the Court had stated:

A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. . . . 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 experience which is crucial here.<sup>98</sup>

As Robert Post describes, *Red Lion* "conceptualized broadcasters as public trustees, rather than as independent and private participants in public discourse."<sup>99</sup>

Just four years after *Red Lion*, however, in the 1973 case *CBS, Inc. v. Democratic National Committee*, the Court began to back away from the position that broadcasters did not retain indepen-

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<sup>96</sup> The Commission found that, while the broadcaster retains discretion in evaluating what constitutes reasonable access under all of the circumstances present in particular cases, reasonable access requires that a candidate's individualized needs be considered. *Id.* at 642-43. Absent unusual circumstances, federal candidates should not be excluded from buying time during primetime. *Id.* In addition, the Commission found that broadcasters had not adequately taken into account evidence that the 1980 presidential campaign was already "in full swing." The networks had instead simply looked to the date of the Democratic National Convention, eight months away, in determining that President Carter's reasonable access rights could not yet be invoked. *Id.* at 645-47.

<sup>97</sup> *CBS*, 453 U.S. at 397.

<sup>98</sup> 395 U.S. 367, 389-90 (1969).

<sup>99</sup> Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 152, 159 (1996).

dent speech rights, recognizing that Congress had permitted private broadcasting to develop with “the widest journalistic freedom consistent with its public obligations.”<sup>100</sup> Although still classifying broadcasters as “public trustees,” the Court crafted an intermediate position for broadcasters, “envision[ing] an ‘essentially private broadcast journalism held only broadly accountable to public interest standards.’”<sup>101</sup>

When the Court considered the constitutionality of reasonable access in *CBS, Inc. v. FCC* in 1981, the Court explicitly recognized for the first time that broadcasters’ free speech rights stemmed not just from the Communications Act, but from the First Amendment itself.<sup>102</sup> The Court thus signified that broadcasters would be treated, at least in some respects, “as participants in public discourse, with attendant constitutional protections.”<sup>103</sup> In upholding the Commission’s application of reasonable access to the broadcast networks, the Court emphasized the narrowness of the incursion on broadcasters’ free speech and the discretion retained by broadcasters in determining when and how their obligations should be fulfilled:

Section 312(a)(7) creates a *limited* right to “reasonable” access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced. The Commission has stated that, in enforcing the statute, it will ‘provide leeway to broadcasters and not merely attempt de novo to determine the reasonableness of their judgments.’ If broadcasters have considered the relevant factors in good faith, the Commission will uphold their decisions.<sup>104</sup>

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<sup>100</sup> 412 U.S. 94, 110 (1973).

<sup>101</sup> Post, *supra* note 99, at 159–60 (quoting *CBS*, 453 U.S. at 120).

<sup>102</sup> *CBS*, 453 U.S. at 370. Whereas in *Columbia Broadcasting System, Inc. v. Democratic National Committee* the Court had referred to broadcasters’ journalistic freedom as guaranteed by statute, in *CBS*, the Court explicitly recognized that broadcasters retained First Amendment speech rights.

<sup>103</sup> Post, *supra* note 99, at 160.

<sup>104</sup> *CBS*, 453 U.S. at 396.

The Court also carefully examined the constitutional interests served by reasonable access, stating, “The First Amendment ‘has its fullest and most urgent application precisely to the conduct of campaigns for political office.’”<sup>105</sup> The Court recognized that “‘it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.’”<sup>106</sup> Thus, the Court found that reasonable access “makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”<sup>107</sup>

## 2. Developments Since *CBS, Inc. v. FCC*

After *CBS, Inc. v. FCC*, it became clear that, although the Court was not prepared to abandon the long-standing view that broadcasters could be regulated in the public interest—especially where Congress seeks to further First Amendment values—any regulation requiring broadcasters to grant access to members of the public would need to survive some form of constitutional scrutiny more exacting than the deferential standard employed in *Red Lion*. Three years later, in *FCC v. League of Women Voters of California*, the Court reinforced the idea that the First Amendment limits the scope of permissible broadcast regulation.<sup>108</sup> According to the Court, because “broadcasters are engaged in a vital and independent form of communicative activity . . . the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power.”<sup>109</sup> Although recognizing that “the broadcasting industry plainly operates under restraints not imposed upon other media,” the Court observed, “the thrust of these re-

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<sup>105</sup> *Id.* (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

<sup>106</sup> *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976)).

<sup>107</sup> *Id.*

<sup>108</sup> *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (striking down a statutory provision forbidding any noncommercial educational broadcasting station receiving a grant from the Corporation for Public Broadcasting from engaging in editorializing).

<sup>109</sup> *Id.* at 377.

strictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern."<sup>110</sup> Citing its prior decisions in *Columbia Broadcasting System, Inc. v. DNC, CBS, Inc. v. FCC*, and, perhaps surprisingly, *Red Lion*, the Court noted in *League of Women Voters* that restrictions on broadcast programming had been upheld only where "narrowly tailored to further a substantial governmental interest."<sup>111</sup>

Then in 1998, in *Arkansas Educational Television Commission v. Forbes*, the Court recognized that requiring broadcasters to grant access to outside speakers—even political candidates—carries the potential of interfering with broadcasters' own speech activities.<sup>112</sup> The Court rejected a candidate's claim that his exclusion from a debate held by a public television station violated his First Amendment rights. In doing so, the Court stated, "In the case of television broadcasting . . . broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."<sup>113</sup>

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<sup>110</sup> *Id.* at 380.

<sup>111</sup> *Id.* at 380–81. While the intermediate scrutiny test from *League of Women Voters* has not disappeared from use, the contexts in which courts invoke it are unpredictable. *See, e.g.,* *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 464 (2d Cir. 2007) (applying *League of Women Voters* intermediate scrutiny test to evaluate constitutionality of restriction on indecent speech), *rev'd on other grounds*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Ruggiero v. FCC*, 317 F.3d 239, 244–45 (D.C. Cir. 2003) (rejecting both the *League of Women Voters* intermediate scrutiny test and the minimal scrutiny test from *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), choosing instead a "more than minimal rationality" standard for evaluation of the newspaper-broadcast station cross-ownership rule); *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (applying rational-basis review to local ownership rule because no class of broadcasters had been singled out); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567–69 (1990) (applying intermediate scrutiny test from *League of Women Voters* to evaluate constitutionality of minority ownership preferences), *overruled on other grounds by Adarand Constructors., Inc. v. Pena*, 515 U.S. 200 (1995). This test typically has not been used in the very limited number of cases brought to challenge access rights since 1984. *See, e.g.,* *Branch v. FCC*, 824 F.2d 37, 49–50 (D.C. Cir. 1987) (applying unclear lower standard of scrutiny in rejecting argument of news reporter, who was also a candidate, that the statutory equal-opportunities provision violated his First Amendment rights and those of the broadcast station that employed him).

<sup>112</sup> *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1996).

<sup>113</sup> *Id.* at 673.

The *Forbes* Court's reasoning underscores the significance of the Court's emphasis in *CBS, Inc. v. FCC* on the limited nature of broadcasters' reasonable access obligations and the discretion they exercise in fulfilling those obligations. Because "broadcasters . . . are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming," claims of access by outside speakers could interfere with broadcasters' constitutionally protected speech activity.<sup>114</sup> Although recognizing that some broadcasters might abuse their power in choosing among speakers, the *Forbes* Court noted that "[c]alculated risks of abuse are taken in order to preserve higher values."<sup>115</sup> Broad claims of access could result in "transferring 'control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals.'"<sup>116</sup> And while "[d]eliberation on the positions and qualifications of candidates is integral to our system of government," the *Forbes* Court found that, "[o]n logistical grounds alone, a . . . television editor might, with reason, decide that inclusion of all ballot-qualified candidates would 'actually undermine the educational value and quality of debates.'"<sup>117</sup> In the context of federal candidates' reasonable access rights, then, it remains to be seen precisely how broadly the Commission may constitutionally construe broadcasters' obligation to provide access to legally qualified federal candidates.

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<sup>114</sup> *Id.* at 673-74 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 125 (1973) ("When a . . . broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.")).

<sup>115</sup> *Forbes*, 523 U.S. at 673-74 (quoting *Columbia Broad. Sys.*, 412 U.S. at 124).

<sup>116</sup> *Forbes*, 523 U.S. at 674-75 (quoting *Columbia Broad. Sys.*, 412 U.S. at 124).

<sup>117</sup> *Forbes*, 523 U.S. at 676, 681. The Court was careful to note that, while it was disinclined to use its existing public forum doctrine to require public television stations to include all candidates in debates, it was not holding that "the First Amendment would bar the legislative imposition of neutral rules for access to public television stations." *Id.* at 675. Rather, the Court found that "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." *Id.*

## II. GAMING THE SYSTEM—PRETEXTUAL CANDIDATES

In this Part, I demonstrate that incentives arising from the distinct treatment of candidate and non-candidate advertisers under political broadcasting law, combined with recent market conditions for non-candidate political advertising, cause a strategy like Randall Terry's to be increasingly attractive for individuals seeking to broadcast their political views. I then discuss the FCC's 2012 decisions involving Terry and his allies, showing that the FCC's failure to address (and perhaps even to perceive) the First Amendment question raised by broadcasters illustrates the uncertainty created by the current state of case law.

### *A. Incentives to Game the System*

As discussed above, candidates for public office receive certain benefits with regard to broadcasting—reasonable access, lowest unit rate, and equal opportunities (including the no censorship portion of that provision)—that are not enjoyed by other members of the public. These benefits become all the more attractive when considering the comparative disadvantage of non-candidate political advertisers—those members of the public purchasing time on broadcast stations to air messages on issues of public importance or, more frequently as of late, to weigh in on the candidates in an upcoming election.

Unlike the preferred status enjoyed by candidate advertisers, non-candidate political advertisers enjoy no legal right of access, either affirmative or responsive, to broadcast stations.<sup>118</sup> As described above in Part I.A, prior to enactment of the Radio Act of 1927, Congress considered and rejected a version of the bill that included an equal-opportunities right for the discussion of public issues. While for many years the FCC's Fairness Doctrine functioned similarly to the way the failed legislative provision would have,<sup>119</sup> requiring broadcasters to provide an opportunity for the

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<sup>118</sup> See Codification of the Comm'n's Political Programming Policies, 7 FCC Rcd. 678, 685, n.54 (1991).

<sup>119</sup> This doctrine was upheld against First Amendment challenge in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

presentation of conflicting views on issues of public importance, the doctrine was eliminated nearly thirty years ago.<sup>120</sup>

Also in marked contrast to the statutory protection enjoyed by candidate advertisers,<sup>121</sup> when broadcasters do choose to sell time to non-candidate political advertisers, they may refuse to air particular messages or request modifications to the content of the ads. In practice, this happens for a variety of reasons. Broadcasters are sometimes concerned that a certain ad may misinform viewers or antagonize viewers or other advertisers and, occasionally, may refuse to air an ad failing to reflect any coherent message at all.<sup>122</sup> In addition, broadcasters are wary of incurring legal liability arising from the content of non-candidate political advertisements. During election season, broadcasters receive a constant flow of cease and desist letters from candidates claiming to have been defamed by ads sponsored by political action committees and other non-candidate advertisers.<sup>123</sup> Other legal concerns raised in non-candidate political advertisements include potential trademark and copyright infringement and violation of FCC and Federal Election Commission sponsorship disclosure requirements.

And while candidate advertisers receive the benefit of lowest unit rate for ads airing during the pre-election window, guaranteeing them a rate equivalent to, if not lower than, the lowest rate paid by any commercial advertiser for a comparable spot,<sup>124</sup> non-

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<sup>120</sup> See Complaint of Syracuse Peace Council, 2 FCC Rcd. 5043 (Aug. 6, 1987). The Commission found that the doctrine chilled speech on controversial issues by “provid[ing] broadcasters with a powerful incentive not to air controversial issue programming” above the minimal amount required to meet its regulatory obligations. *Id.* at 5049. The Fairness Doctrine was formally removed from the FCC’s rules in 2011. Press Release, FCC, FCC Chairman Genachowski Continues Regulatory Reform to Ease Burden on Businesses; Announces Elimination of 83 Outdated Rules (Aug. 22, 2011), available at <http://www.fcc.gov/document/genachowski-announces-elimination-83-outdated-media-rules>.

<sup>121</sup> See 47 U.S.C. § 315 (2012). Although the no-censorship provision in political broadcasting law is part of Section 315’s grant of equal-opportunities rights, FCC precedent supports the idea that censorship of candidate messages will not be tolerated even where only Section 312(a)(7) reasonable access rights are invoked. See Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 VILL. SPORTS & ENT. L.J. 85, 136 (1996).

<sup>122</sup> Telephone Interview with Kurt Wimmer, *supra* note 21.

<sup>123</sup> *Id.*

<sup>124</sup> See 47 U.S.C. § 315 (2012).

candidate political advertisers often pay rates higher than most commercial advertisers. This price difference is often substantial, for several reasons.

First, the cost of buying time tends to go up as the airdate nears and inventory decreases. This cost increase is often dramatic during the weeks leading up to federal elections, as inventory becomes extremely scarce.<sup>125</sup> Candidates placing last minute orders for time get the benefit of the price that commercial advertisers, who tend to book much further in advance, paid months earlier for ads airing the same day. Non-candidate advertisers, by contrast, must pay whatever the going rate is at the time they place their orders.

Second, in determining lowest unit rate, broadcasters must give candidates the benefit of the package rates that long-term commercial advertisers have paid for comparable spots.<sup>126</sup> For example, a frequent commercial advertiser who agrees to buy twenty spots might pay only \$150 for a spot that would normally cost \$200. A candidate paying lowest unit rate for the purchase of a comparable spot would pay only \$150, without having to purchase a package. Non-candidate advertisers who do not wish to buy an entire package of time will not receive this discount.

Finally, broadcasters often create a special rate class for non-candidate political advertisers, higher than the rate charged even commercial advertisers.<sup>127</sup> These rates reflect the higher costs associated with running non-candidate political advertisers, including legal fees for attorney review of ads.

In light of the benefits received by candidate advertisers, it is clear why a person wishing to air a political advertisement might prefer to be considered a legally qualified candidate. Broadcasters are required to air a candidate's message, whatever it is and however it is presented, charging below-market rates for doing so. Yet, this has been true since 1971, and non-candidate political advertis-

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<sup>125</sup> See Katy Bachman, *Political TV Ads Shatter Records*, ADWEEK, Oct. 24, 2012, <http://www.adweek.com/news/advertising-branding/political-tv-ads-shatter-records-144746> (“Some advertisers are paying five times what advertisers would normally pay to get on the air.”).

<sup>126</sup> For a detailed explanation of this point, see NATIONAL ASSOCIATION OF BROADCASTERS, *POLITICAL BROADCAST CATECHISM* 38–39 (17th ed. 2011).

<sup>127</sup> See *id.* at 36.

ers have, for the most part, tolerated broadcaster review of their messages and purchased time at market rates, despite the relative ease of getting on a ballot.<sup>128</sup> However, the incentives that might lead someone to obtain ballot access for a federal race in order to invoke candidate political broadcasting rights have increased in recent years. Most significantly, as the advertising prices paid by non-candidate political advertisers have skyrocketed, the disparity between rates paid by those advertisers and the rates paid by candidates has also grown dramatically. Outside spending on election advocacy, often in the form of broadcast television ads, tripled from 2008 to 2012, the first Presidential election year after *Citizens United v. FEC*<sup>129</sup> was decided, topping \$1 billion for the first time.<sup>130</sup> This increased spending has been reflected in increased demand for broadcast time and, accordingly, much higher prices for non-candidate political advertisers.<sup>131</sup>

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<sup>128</sup> While states are permitted to pass ballot access laws as part of their regulation of fair elections, states may not unduly burden the associational rights of voters and candidates. See *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Thus, ballot access tends to be reasonably attainable. For example, in the Florida congressional district where Randall Terry was on the ballot for the House of Representatives, he would have had to file the requisite “oath of candidate” form, pay the filing fee, and file a petition with at least 2,298 signatures. FLA. STAT. §§ 99.061, 99.095, 99.0955 (2011); see also 2012 Federal Qualifying Handbook, Florida Division of Elections, Oct. 2011, available at [http://election.dos.state.fl.us/publications/pdf/2011/2012\\_Federal\\_Qualifying\\_Handbook.pdf](http://election.dos.state.fl.us/publications/pdf/2011/2012_Federal_Qualifying_Handbook.pdf) (last visited Sept. 26, 2014).

<sup>129</sup> 558 U.S. 310 (2010).

<sup>130</sup> *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php](http://www.opensecrets.org/outsidespending/cycle_tots.php) (last visited Sept. 26, 2014). Independent expenditure and electioneering communication spending by outside groups quadrupled between 2006 and 2010, and 72% of political advertising spending by outside groups in 2010 came from sources that were prohibited from spending money in 2006. Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS.ORG, (May 5, 2011), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>. For analysis of the causal effects of *Citizens United* on political spending, see generally Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315 (2014).

<sup>131</sup> See Bachman, *supra* note 125; see also Standardized and Enhanced Disclosure Requirements for Television Broadcasters, 27 FCC Rcd. 4535 (Apr. 27, 2012) (“[P]olitical ad spending is rapidly increasing.”). While prices often rise across the board, for all advertisers and classes of time, candidates who buy expensive, last-minute spots are entitled to rebates down to lowest unit charge where it is determined that a comparable ad (typically ordered by a long-term commercial advertiser much further in

### B. FCC Tolerance of Pretextual Candidates

Obtaining ballot access in order to invoke candidate political broadcasting rights may also have become more attractive since 2012 due to the FCC's effective ratification of such a strategy. Prior to that time, it was not clear that the Commission would require broadcasters to air the ads of pretextual candidates under the reasonable access statute. After all, in *CBS, Inc. v. FCC*, the Court had emphasized the limited nature of the right created by the statute, the narrow purpose for which the right could be invoked (advancing one's candidacy once a campaign has commenced), and the FCC's policy of not reviewing *de novo* broadcasters' exercise of reasonable judgment with regard to when and how to fulfill their obligations under the statute.<sup>132</sup> And in the intervening years, the Commission had not decided upon a complaint against a broadcaster alleged to have denied reasonable access to a candidate on the basis that he was not actually seeking office.<sup>133</sup>

Yet in October 2012, faced with numerous complaints by Randall Terry and his allies that broadcast stations were refusing to air their ads, the Commission decided upon two of the complaints, one informally by political broadcasting staff and one through issuance of a memorandum opinion and order by the Chief of the Media Bureau. In each case, Commission staff found that it would not be reasonable for the station at issue to deny access.<sup>134</sup>

Both matters involved fairly egregious evidence that the individual claiming candidate reasonable access rights was not actually seeking to gain office. Randall Terry, who filed one of the complaints that was decided upon, had publicly proclaimed his strategy of taking advantage of federal political broadcasting law to force broadcasters to air his messages in states where he was "NOT" on

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advance) has aired at a lower price. Non-candidate political advertisers receive no such benefit.

<sup>132</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 397 (1981).

<sup>133</sup> Indeed, it is unlikely that broadcasters had engaged in such a practice more than occasionally, if at all. Even with regard to the widespread efforts of Terry and his allies in 2012, broadcasters tended to refuse reasonable access only where other legal issues arose with regard to the purported candidate's political broadcasting rights. Interview with Kurt Wimmer, *supra* note 21.

<sup>134</sup> Telephone Decision of Robert Baker, *supra* note 27; Complaint of Randall Terry for President and Pro-Life Candidates, 27 FCC Rcd. 13418 (Oct. 31, 2012).

the ballot.<sup>135</sup> He had also recruited like-minded anti-abortion activists to employ similar strategies. One of those recruits, Andrew Beacham, filed the other complaint decided by the FCC in October 2012. Beacham was an Indiana resident on the ballot for the U.S. House of Representatives in Kentucky. He provided no evidence, nor even an assertion, that he would relocate to Kentucky by Election Day in order to become qualified, under Article I, section 2 of the U.S. Constitution, to represent Kentucky in Congress.<sup>136</sup> In addition, the template-style issue advertisements Terry, Beacham, and their allies sought to run typically contained no image or mention of the “candidate,” the state in which he or she was running, or the office he or she purported to seek, other than in the mandatory disclosure at the end.<sup>137</sup>

In denying access to Terry and Beacham, the broadcast stations advanced two lines of argument. First, each case involved a disputed interpretation of an FCC rule or policy. In the Terry case, the Washington, D.C. broadcast station argued that no federal candidate was entitled to reasonable access on the station on the basis of his presence on the ballot in West Virginia.<sup>138</sup> In support of this argument, the station relied on a methodology employed by the FCC in several other contexts to demonstrate that it did not broadcast into West Virginia.<sup>139</sup> In the Beacham case, the Louisville, Kentucky station argued that because Beacham was not currently qualified to represent Kentucky in Congress and had provided no evidence that he would become qualified by Election Day, he was not a “legally qualified candidate” under FCC rules.<sup>140</sup>

Second, and more importantly for the purposes of this Article, both stations argued that interpreting the statutory reasonable access provision to require broadcasters to air ads of individuals not seeking office would unconstitutionally exceed the “narrow hold-

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<sup>135</sup> See Letter from Randall Terry, *supra* note 16.

<sup>136</sup> Telephone Decision of Robert Baker, *supra* note 27.

<sup>137</sup> See Labash, *supra* note 1.

<sup>138</sup> Complaint of Randall Terry, 27 FCC Rcd. 13418, 13420 (Oct. 31, 2012).

<sup>139</sup> *Id.*

<sup>140</sup> Telephone Decision of Robert Baker, *supra* note 27. Specifically, the station argued that Beacham failed to meet prong (a)(2) of 47 C.F.R. § 73.1940, which states that a legally qualified candidate for public office “[i]s qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate.”

ing of *CBS, Inc. v. FCC.*”<sup>141</sup> According to the broadcasters, “[o]nly because of the limited scope of [the statutory reasonable access provision] and the paramount interest in having the ‘electorate . . . intelligently evaluate the candidates personal qualities and their positions on vital public issues before choosing among them on election day’ did the Court conclude that the statute ‘properly balance[d] the First Amendment rights of federal candidates, the public, and broadcasters.’”<sup>142</sup> The stations argued that requiring broadcasters to grant access to Terry and Beacham to air material not aimed at advancing a genuine candidacy would impermissibly broaden the scope of reasonable access and would “no more serve[] the interest of informed voting than would granting a right of access to any private individual or organization advocating a political opinion.”<sup>143</sup>

The FCC, however, has remained silent with regard to the stations’ constitutional arguments, addressing only interpretations of FCC rules or policy in its October 2012 decisions. The Commission decided in favor of Terry by establishing that a different methodology should be employed for determining a station’s signal contours than the one that the Washington, D.C. station had used, without appearing even to consider the broadcasters’ contention that requiring them to grant access to a pretextual candidate would violate their First Amendment rights.<sup>144</sup> And, more significantly, the Commission decided for Beacham by holding that it would defer to a state election commission’s choice to place an individual on the ballot, in determining whether that person is a legally qualified federal candidate entitled to reasonable access.<sup>145</sup> The FCC thus chose to defer judgment of whether a purported candidate is legally qualified under FCC rules to state agencies that do not typically review whether an applicant for federal ballot access meets the relevant constitutional requirements, and that are constitutionally prohibited from placing additional requirements—such as requiring a candidate to be a resident of the state as of the time he is

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<sup>141</sup> See Gannett Petition for Reconsideration, *supra* note 13, at 16.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Complaint of Randall Terry, 27 FCC Rcd. 13418, 13421–22 (Oct. 31, 2012).

<sup>145</sup> Telephone Decision of Robert Baker, *supra* note 27.

placed on the ballot—on ballot access for federal races.<sup>146</sup> In this way, the Commission sent the unmistakable message that it will neither prevent the invocation of reasonable access rights by individuals who obtain ballot access without actually seeking to gain office, nor allow broadcasters to do so.

The FCC thus effectively established a bright-line rule—any person on the ballot for a federal race must be afforded reasonable access<sup>147</sup>—where it might instead have allowed broadcasters to consider, as part of their judgment of how much and what kind of access is reasonable, evidence that the purported candidate is not actually seeking office. As discussed in Part III.B, the Commission could have permitted stations to make this determination by employing neutral factors similar to those already in use when evaluating whether a write-in candidate has made a “substantial showing of bona fide candidacy” and is thereby entitled to reasonable access.<sup>148</sup>

The Commission’s bright-line rule has the benefit of preventing broadcasters from abusing any hypothetical discretion (to evaluate whether a purported candidate has engaged in substantial campaigning activity) by denying access to a candidate on the ballot because they do not like what he has to say or because they believe he has little chance of winning. But the rule also has the cost of forcing broadcasters, who are normally understood to exercise broad editorial discretion protected by the First Amendment, to air messages from some individuals who do not seek to hold office. The Commission’s employment of this prophylactic rule thus reflects its apparent position that such an additional incursion on

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<sup>146</sup> See *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

<sup>147</sup> There may be an exception to this in the primary election context, where a political party disavows a person’s eligibility for the party’s nomination. See *Complaint of Randall Terry against WMAQ-TV*, *supra* note 19; *Petition for Reconsideration by Larouche Exploratory Committee*, 11 FCC Rcd. 10423 (Sept. 15, 1996). Leaving the decision of whether a person is a bona fide candidate in the hands of the relevant political party may alleviate any FCC concerns of content discrimination (or the perception of content discrimination) by broadcasters or by the FCC itself.

<sup>148</sup> In the context of write-in candidates, broadcasters look to neutral criteria, such as the extent to which the purported candidate has made campaign speeches and distributed campaign literature, in determining whether an individual invoking reasonable access rights has made “a substantial showing that he or she is a bona fide candidate.” 47 C.F.R. § 73.1940(b)(2) (2013).

broadcasters' editorial discretion is constitutionally permissible—justified by virtue of broadcasters' obligations to serve the public and because the bright-line rule ensures that no genuine federal candidate will be denied the opportunity to address the public through the use of broadcasting.

However, the state of the law following *CBS, Inc. v. FCC*<sup>149</sup> and *Forbes*<sup>150</sup> is not so clear. While *Red Lion* remains good law, and with it the idea that the government may regulate broadcast to pursue certain public goods, including the First Amendment values underlying reasonable access, that is only half the story. Broadcasters, too, possess speech rights protected by the First Amendment, and the Court has been clear that “broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.”<sup>151</sup> It is, therefore, uncertain how much, and in what ways, the FCC may burden broadcasters' speech in enforcing reasonable access consistently with the First Amendment. I turn to this question next.

### III. WALKING THE TIGHTROPE OF BROADCAST REGULATION

In this Part, I argue that the government may use its regulatory powers to impose order in the use of a shared resource—the atmosphere—that is easily accessible for incompatible uses, in order to pursue certain democratically agreed-upon objectives unrelated to the suppression of speech. In constructing its broadcast licensing scheme, Congress sought to incentivize broadcasters to produce coherent, balanced, and informative programming—content that is valuable to a democratic conception of the First Amendment and that is likely to be underproduced by the market. However, because Congress has chosen to use private speakers to carry out the essential tasks of informing the public and fostering public discussion and, indeed, because freedom from government control is necessary for these tasks, the First Amendment requires that the FCC

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<sup>149</sup> 453 U.S. 367 (1981).

<sup>150</sup> 523 U.S. 666 (1998).

<sup>151</sup> *Id.* at 673.

maintain a close fit between the legislative ends it is tasked with furthering and the means it chooses for doing so.

In the case of reasonable access, Congress has sought to ensure candidates for public office the opportunity to engage with the electorate in order to “more fully and completely inform the voters” on candidates’ positions on the issues.<sup>152</sup> However, because any grant of access to outside speakers necessarily limits the speech of broadcasters, the right created by Congress, as interpreted by the Supreme Court, is narrow, “invoked by [federal candidates] only for the purpose of advancing their candidacies once a campaign has commenced.”<sup>153</sup> By contrast, the prophylactic rule imposed by the FCC in its October 2012 decisions has significant potential to interfere with broadcasters’ editorial freedom and to reduce the opportunities for genuine candidates to speak directly to the public through the broadcast medium. For these reasons, this policy raises serious constitutional questions. Where, as here, an alternative policy exists that would better achieve the legislative purposes of reasonable access and would burden less speech, courts should reject the FCC’s choice of a more burdensome policy.

#### *A. Pursuing Communications Policy Through Structural Regulation*

In light of the history and purposes of broadcast regulation, as well as the development of case law since *Red Lion*, a conception of broadcasters as trustees subject to extensive government regulation in furtherance of the public interest is far too simplistic. From the early days of broadcast regulation, Congress has rejected FCC censorship of broadcast or treatment of broadcasters as common carriers.<sup>154</sup> Instead of retaining pervasive government control of the airwaves, Congress chose a licensing system of predominantly private broadcasters in order to “strike a proper balance of private and public control.”<sup>155</sup> The Supreme Court, recognizing this, has made it clear that, in regulating broadcast, the FCC must “walk a ‘tightrope’ to preserve the First Amendment values written into

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<sup>152</sup> *CBS*, 453 U.S. at 379.

<sup>153</sup> *Id.* at 396.

<sup>154</sup> *See supra* Part I.A.1.

<sup>155</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 104 (1973).

the [Communications Act].”<sup>156</sup> In justifying intrusions on broadcasters’ constitutionally protected speech rights, the FCC needs more than a rationale explaining the origin of the government’s regulatory powers over the broadcast medium.<sup>157</sup> The Commission must also identify the First Amendment values Congress is pursuing through its exercise of regulatory powers and evaluate whether its policies further those values without intruding unnecessarily on broadcasters’ speech.

### 1. The Origin of Congress’s Regulatory Power Over Broadcast

Regulation of the broadcast medium has always “represent[ed] something of a First Amendment anomaly.”<sup>158</sup> Broadcasters are subject to programming obligations, as well as restrictions on the content of their speech, that would be considered unconstitutional if imposed on other media.<sup>159</sup> For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court struck down a statute granting candidates for public office a right to reply to newspaper criticism, despite having upheld an analogous FCC broadcast policy just five years earlier, in *Red Lion*.<sup>160</sup> The Court has justified this difference in treatment on the unique physical characteristics of the broadcast spectrum, explaining in *Red Lion*, “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>161</sup> On the basis of spectrum scarcity, the government was permitted to place conditions on li-

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<sup>156</sup> *Id.* at 117.

<sup>157</sup> And, as I discuss *infra*, even with regard to providing this initial rationale, the “scarcity” of the broadcast spectrum is a descriptively weak basis on which to rest the government’s regulatory power over broadcast. See R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); YOO, *supra* note 33, at 245; Balkin, *supra* note 4, at 20.

<sup>158</sup> YOO, *supra* note 33, at 255.

<sup>159</sup> See *id.* at 260–66.

<sup>160</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254 (1974) (holding that “governmental coercion” to publish material that newspapers would otherwise not have chosen to publish infringed on the editorial freedom guaranteed to the press under the First Amendment).

<sup>161</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

censees “in favor of others whose views should be expressed on this unique medium.”<sup>162</sup>

a) Beyond Scarcity

As others have documented well, the scarcity rationale has been the target of criticism on many fronts over the years.<sup>163</sup> As early as 1959—before *Red Lion* was decided—Ronald Coase offered his economic critique of the rationale, observing:

[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are scarce, but this of itself, does not call for government regulation.<sup>164</sup>

Other finite resources, such as land, have not been thought to require extensive administrative oversight once the initial scheme of property rights has been defined.<sup>165</sup> And even in the context of scarce communicative resources, like major metropolitan newspapers, the Court has not considered scarcity alone to be a basis to treat media owners as public trustees.<sup>166</sup> More recently, Christopher Yoo has argued that in putting forth spectrum scarcity as the justification for broadcast regulation, the Court engaged in circular logic, failing to recognize that the reason the broadcast spectrum is scarce is that the government apportioned only a small number of the radio frequencies of the electromagnetic spectrum for use of broadcast technology.<sup>167</sup> And perhaps the criticism of the scarcity

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<sup>162</sup> *Id.* at 390.

<sup>163</sup> *See, e.g.,* YOO, *supra* note 33, at 266–91.

<sup>164</sup> Coase, *supra* note 157, at 14.

<sup>165</sup> YOO, *supra* note 33, at 268.

<sup>166</sup> Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1127 (1993); *see also* BOLLINGER, *supra* note 41, at 60.

<sup>167</sup> The electromagnetic spectrum is the range of all possible frequencies of electromagnetic radiation. However, technologies such as television and radio broadcasting, mobile phones, and wireless networking transmit data using only a portion of the spectrum called the radio frequencies—in common parlance, these technologies transmit radio waves. In order to minimize interference from conflicting radio signals and to make sure that there are adequate opportunities to use various technologies that transmit radio waves, the FCC gives permission to operators of different types of

rationale most frequently heard today is that it has been undermined by the digital revolution. As Jack Balkin writes, “Broadcast media now compete with cable, satellite, and the Internet for viewer attention. In theory, at least, digital technologies offer everyone the potential to become broadcasters.”<sup>168</sup>

Spectrum scarcity is clearly a poor description for the limitations of the broadcast medium that have led the federal government to intervene in its use. The atmosphere is all around us. The broadcast spectrum is actually exceedingly accessible, rather than scarce. A tremendous number of people could broadcast at the same time and on the same frequency, at such signal strengths that they reach much the same (or at least a greatly overlapping) geographic area.<sup>169</sup> They simply could not all effectively reach large audiences, due to signal interference.<sup>170</sup>

The descriptive weakness of the spectrum scarcity rationale does not mean, however, that there is no legitimate basis for government regulation of broadcasting.<sup>171</sup> Broadcast regulation can in-

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technology to transmit waves at only a particular range of frequencies. In the case of certain types of technology, including television broadcasting, the FCC further assigns a particular frequency at which a particular licensee may operate.

<sup>168</sup> Balkin, *supra* note 4, at 20.

<sup>169</sup> See Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25, 39–41 (2002).

<sup>170</sup> Professor Benkler, arguing that treatment of spectrum as a commons would incentivize development of “smarter” broadcast receivers, describes signal interference thusly:

“Interference” describes the condition of a stupid lone receiver faced with multiple sources of radiation that it is trying to decode but, in its simplicity, cannot. To solve this problem, we created and have implemented since 1912 a regulatory system that prohibits everyone from radiating electromagnetic waves at frequencies that we know how to use for communication, and then permits in individual cases someone, somewhere, to radiate within tightly regulated parameters of frequency, power, location, and timeframe, designed to permit the poor, lonely, stupid receivers to deliver to their human owners intelligible human messages.

*Id.* at 39–40.

<sup>171</sup> See Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 944 (2006) (“Once a principle calls a practice into question, those who would defend the challenged practice must develop a rationale for distinguishing the practice from other practices to which the principle applies . . . . [T]he scarcity rationale can be deployed to limit the free speech principle. Further political contestation, however, can disrupt these mediating strategies. At some point a rationale no longer

stead be understood to have originated as a form of structural regulation, addressing the twin problems of signal interference and economic instability.<sup>172</sup> Professor Balkin analogizes the most basic form of broadcast regulation to a type of zoning:

Government sets up a plan that allows people to broadcast in different frequencies in different locations, with differing strengths and at different times, in order to facilitate successful broadcast transmission and reception. It can also regulate the kinds of technologies used for transmission and reception in order to manage and prevent interference.<sup>173</sup>

As discussed above in Part I.A, Congress intervened into the chaos that marked the early days of broadcasting in order to reduce the total number of broadcasters. Due to the large number of broadcast stations transmitting signals at similar frequencies, it was difficult for the public to reliably receive radio transmissions. And because early broadcasters had not yet developed profitable business models, stations often disappeared quickly after opening up shop. Congress's intervention, in the form of the Radio Act and, later, the Communications Act, made possible the development of a self-sufficient broadcasting industry capable of dependably serving the public.<sup>174</sup>

#### b) Choosing a Regulatory Scheme

In exercising its regulatory power to coordinate the transmission of wireless radio signals, Congress chose from a variety of possible regulatory schemes.<sup>175</sup> At one end of the spectrum, Congress could have passed one of the bills introduced to create a gov-

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appears plausible or legitimate, and that is the point at which it begins to break down as a method of legitimation. This is what happened with the scarcity rationale during the 1980s, when the FCC embarked on a period of whole-scale deregulation of the broadcast media and abolished the fairness doctrine that the Court had upheld in *Red Lion v. FCC.*"

<sup>172</sup> Jack Balkin, *The Fairness Doctrine, Part II—The Constitutionality of Broadcast Regulation*, BALKINIZATION (Aug. 8, 2007), <http://balkin.blogspot.com/2007/08/fairness-doctrine-part-ii.html>.

<sup>173</sup> *Id.*

<sup>174</sup> *Supra* Part I.A.

<sup>175</sup> *See* Coase, *supra* note 157, at 5.

ernment monopoly of wireless communications.<sup>176</sup> Congress might even have chosen to create a private monopoly by extending a license to a single corporation, had it taken the position urged by some stakeholders, including the U.S. Navy. Concerned with the hindrance of “public business,” including response to distress calls, caused by pre-regulatory “bedlam” on the airwaves, Secretary of the Navy Josephus Daniels testified: “There are only two methods of operating the wireless: either by the government or for it to license one corporation—there is no other safe or possible method of operating the wireless.”<sup>177</sup>

At the other end of the spectrum, Congress could have auctioned off private property rights to transmit signals using a particular portion of the electromagnetic spectrum, as Ronald Coase championed in the 1950s.<sup>178</sup> According to Professor Coase, the broadcasting industry should “be able to obtain frequencies on the same basis as it now obtains its labor, buildings, land, and equipment”—according to how much broadcasters, as compared to those who would use those frequencies for other purposes, are willing to pay for them.<sup>179</sup> Under this theory, public needs can be served by government entities, who would pay for property rights

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<sup>176</sup> See *id.* at 3–4.

<sup>177</sup> *Id.* at 2–3. Although these calls for government or corporate monopolization of wireless communications in the United States primarily predated the proliferation of broadcast—rather than point-to-point—radio communications, concerns for public welfare have led the governments of other countries to establish national noncommercial broadcast services to the exclusion of private broadcasting. For example, until 1993, Israel permitted no commercial broadcasting. Instead, following the recommendations of United Nations Education, Science, and Culture Organization (“UNESCO”) experts, Israel operated a public broadcasting service intended to advance national goals, including introducing the Hebrew language to new immigrants, integration of immigrants into the civic, economic, social, and cultural life of the country, and the provision of equal opportunity of education for all. See Amit Schejter, *The Cultural Obligations of Broadcast Television in Israel*, 56 INT’L COMM. GAZETTE 183, 184–85, 188 (1996).

<sup>178</sup> Coase, *supra* note 157, at 17–18 (“There can be little doubt that the idea of using private property and the pricing system in the allocation of frequencies is one which is completely unfamiliar to most of those concerned with broadcasting policy . . . . This ‘novel’ theory’ (novel with Adam Smith) is, of course, that the allocation of resources should be determined by the forces of the market rather than as a result of government decisions.”).

<sup>179</sup> *Id.* at 20–21.

in frequencies in order to use those frequencies for various types of radio transmissions, including public broadcasting.<sup>180</sup>

Instead, Congress chose to walk a middle path, creating a renewable licensing system for a primarily private broadcast industry, while reserving the right to ensure that licenses were held by those who would devote at least some of their time and resources to serving the public interest. In doing so, Congress reduced the number of broadcasters, enabling the remaining broadcasters to reach large audiences and enabling audiences to reliably receive broadcasters' signals. This regulatory scheme also provided the stability necessary for a self-sustaining private broadcast industry to arise, reinforcing the reliability of television service for the public.

Short of retaining government control of all radio frequencies without adequate justification for that action—essentially substituting regulation of a common resource for the nationalization of that resource—it is unclear why Congress would have been constitutionally prohibited from choosing one broadcast regulatory scheme over another.<sup>181</sup> The First Amendment is not normally thought to dictate the government's choice of granting licenses for use of certain radio frequencies, as compared to auctioning more permanent property rights or maintaining the availability of the airwaves as a public commons. Indeed, the FCC currently does each of these things, with regard to different technologies and portions of the spectrum.<sup>182</sup>

Yet any legislative choice of a broadcast regulatory system necessarily has implications for how broadcast radio and television are used as communications media. For example, as Professor Coase recognized, a system of property rights in broadcast frequencies would have been inconsistent with regulations for the operation of broadcast stations as detailed as we currently have, because such regulations “would severely limit the extent to which the way the frequency was used could be determined by the forces of the mar-

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<sup>180</sup> See *id.* at 21.

<sup>181</sup> See Balkin, *supra* note 172 (“The threshold constitutional question is whether government has any obligation to choose one kind of zoning system over another. The answer is that, within very broad parameters, it does not.”).

<sup>182</sup> See Philip J. Weiser & Dale N. Hatfield, *Policing the Spectrum Commons*, 74 *FORDHAM L. REV.* 663, 666–74 (2005).

ket.”<sup>183</sup> But, as C. Edwin Baker thoroughly demonstrated, due to unique characteristics of media products—including difficulties of pricing products with significantly higher first-copy costs and the influence of advertisers on the content produced by media companies—“the divergence between what the market produces and what people want can be expected to be massive.”<sup>184</sup> Thus, it is reasonable to believe that under a market-based broadcast property rights system, broadcast communications would have reflected commercial interests, rather than the public interest, even more than they do now.<sup>185</sup>

Similarly, it is unclear why Congress would not have been constitutionally permitted to establish a common-carriage system for broadcast—essentially a system of government-run or privately run public access channels—like the one it established for some other communications carriers, including telephone companies.<sup>186</sup> Yet,

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<sup>183</sup> Coase, *supra* note 157, at 25.

<sup>184</sup> Baker, *supra* note 37, at 96. According to Baker, “[F]our features of media products can lead to results contrary to what the audience what the audience wants—what it would pay for.” *Id.* at 14. First, because media products have large first-copy costs and very low costs for additional consumers, charging the average cost excludes people who would pay for the story or broadcast than it costs to include them among the recipients, while setting the price at marginal cost would create insufficient incentives to produce the media product. *Id.* at 9–10, 20–40. Second, although media products often produce significant externalities—for example, an entire society, not just newspaper readers, may benefit from the exposure of government corruption—media companies are often unable to capture those benefits in revenue. *Id.* at 10–11, 41–62. Third, because advertisers, not just consumers, pay for the transmission of media content, content choices often reflect advertisers’ interests instead of audiences’ preferences. *Id.* at 11–12, 88–95. Finally, the combination of multiple purchasers with varied preferences, including preferences that are not yet formed, “enhances the opportunity for [advertisers] to influence content away from what the audience wants in the dimensions about which the audience finds knowledge most difficult to obtain.” *Id.* at 12–14, 87–95.

<sup>185</sup> *See id.* at 115 (“Given the immense scale of potential positive externalities, market-based firms will produce and deliver drastically inadequate amounts of ‘quality’ media content (with ‘quality’ meaning here content that has significant positive externalities).”).

<sup>186</sup> In a system of common carriage, such as that operated by telephone companies, all members of the public must be allowed use of the communications system on a nondiscriminatory basis. *See, e.g., Iowa Telecomm. Servs., Inc., v. Iowa Util. Bd.*, 563 F.3d 743, 745–47 (8th Cir. 2009) (describing the treatment of common carriers under the Communications Act of 1934). In the context of broadcast television, a government-enforced system of common carriage would likely operate similarly to that of a public access channel on cable television or the type of public forum operated by the government that is only open for use by one speaker or group of speakers at a time, such as a stage in a

looking to cable television public access channels to illustrate the point, we can assume that the programming available on public-access broadcast stations would have looked markedly different than the professionally created programs we now see on commercial and public broadcast television channels.<sup>187</sup>

And even within the licensing scheme that has been established by Congress, regulations that would normally be thought of as “zoning” regulations, rather than as programming regulations, nonetheless have a tremendous impact on the content of communications. For instance, the First Amendment is not normally thought to have anything to say with regard to the geographic area for which a broadcast license is granted. Yet, the Federal Radio Commission’s decision in 1928 to set aside certain frequencies for “clear channels” on which licensed stations could transmit high-power signals across vast geographic regions allowed for the creation of national radio networks—for the first time connecting Americans with an instantaneous, nationally shared set of knowledge and experiences.<sup>188</sup> By contrast, with the national networks already in place by the time television was developed, Congress and the FCC decided to award television licenses locally, rather than nationally (as has been done in many other countries)—a policy that has promoted the availability of locally oriented news and other content.<sup>189</sup>

If all, or at least a very substantial portion of, broadcast regulation affects the nature of communications that take place within the broadcast medium, it should not only be constitutionally permissible for Congress and the Commission to consider those effects in

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public park. Owners of broadcast stations would be able to set rules and procedures for use of the station but would probably not be permitted to discriminate between speakers or messages. *Cf.* *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 760–66 (1996).

<sup>187</sup> Consider the difference between the television shows created by and transmitted on MTV or CNN and the typical programming on cable public-access channels.

<sup>188</sup> *See* STEVEN WALDMAN, FCC, *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE* 276 (July 2011), *available at* [http://transition.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf) (asserting that the creation of clear channels allowed business models to develop more quickly because radio stations could attract national—not just local—advertising).

<sup>189</sup> *See id.*

deciding what policies to implement—but such consideration of how different communications policies will affect the medium should actually be expected of legislators and regulators, as a matter of good governance. Moreover, as the examples described in this section show, there is no clear line between “zoning” regulation and content regulation. There is instead a variety of forms of regulation having greater or lesser impacts on the speech that is broadcast. To the extent that Congress has chosen to exercise its coordination power over the electromagnetic spectrum to pursue a particular vision for how the broadcast medium can best be structured to serve the public, evaluation of the constitutionality of a broadcast regulation should not turn on whether the regulation is expressed in terms of geographic area, signal strength, and radio frequency, rather than as station ownership restrictions, access rights for outside speakers, or requirements that licensees air certain types of programming pursuant to their public interest obligations. Instead, as I show next, courts should evaluate the permissibility of the objectives pursued through broadcast regulation and, taking into account the speech interests involved, should insist that government actors select a rule well-adapted to furthering those objectives.

## 2. Regulating Broadcast to Pursue Communications Policy

If the First Amendment protects not just our individual rights to speak and be heard, but also our collective right to deliberate and to determine the shape of our government and our society,<sup>190</sup> then we must be able to produce a technological and regulatory infrastructure that can facilitate that deliberation.<sup>191</sup> Even where no individual may possess a judicially enforceable right to receive “in-

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<sup>190</sup> See, e.g., Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 487 (2011); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948).

<sup>191</sup> See Balkin, *supra* note 4, at 52; see also C. EDWIN BAKER, *MEDIA CONCENTRATION & DEMOCRACY* 126 (2006) (“If the ultimate beneficiary is the audience or the public—either as media consumers or as citizens who profit from a press that serves democratic needs—whether ownership restrictions violate the First Amendment should depend primarily on whether the regulation and the government’s capacity to regulate serves or disserves the public’s interest in an ideal media order.”).

formation from diverse and antagonistic sources,”<sup>192</sup> we collectively possess the right to pursue it as a constitutional norm.<sup>193</sup> Accordingly, when Congress exercises its regulatory powers over broadcast—an exercise that, as described above, necessarily involves making decisions about the nature of communications to be promoted within the medium—it may, at least within certain parameters, pursue a communications policy furthering democratically agreed-upon objectives. Courts have found this sort of communications-conscious broadcast regulation to be permissible even where pursuit of such policies may burden broadcasters’ speech rights.<sup>194</sup>

Nonetheless, because we also value highly the rights and contributions of individual speakers in public discourse, including those who are engaged in editorial activities, the speech of broadcasters must also be protected.<sup>195</sup> Broadcast regulation should aim to facilitate speech, rather than to silence broadcasters.<sup>196</sup> And the method of regulation chosen should not burden substantially more broadcaster speech than is required to accomplish regulatory objectives. As the Court noted in *League of Women Voters*, “the thrust of . . . restrictions [on the broadcasting industry] has generally been to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern.”<sup>197</sup> But even where the government has pursued this highly

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<sup>192</sup> *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) (quoting *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945)) (finding that the public interest standard of the Communications Act necessarily invites reference to this First Amendment goal).

<sup>193</sup> See Balkin, *supra* note 4, at 52–53; see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (“[T]he unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins.”).

<sup>194</sup> See, e.g., *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>195</sup> See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673–75 (1998); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379–81 (1984); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 261 (1974).

<sup>196</sup> See BOLLINGER, *supra* note 41, at 127 (broadcast regulation should be about expanding the range of speech available and not about silencing broadcasters); see also J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1134–1139 (1996) (critiquing constitutional justifications for content-based regulation of violence and indecency).

<sup>197</sup> *League of Women Voters*, 468 U.S. at 380.

regarded purpose, requirements that unduly intrude on broadcasters' editorial discretion—including those that would “tend to turn broadcasters into common carriers”—have been struck down.<sup>198</sup>

Although the Court's decision in *Turner Broadcasting System, Inc. v. FCC* does not apply to broadcast, that decision demonstrates a similar, balanced approach to media regulation.<sup>199</sup> The Court recognized that the government may pursue democratically valuable, communications-conscious goals in regulating a medium that had come under its regulatory purview, so long as media owners' speech interests were not disproportionately burdened.<sup>200</sup>

In *Turner*, the Supreme Court considered a provision of the Cable Act requiring cable operators to carry a minimum number of broadcast stations. In regulating the cable industry, “Congress employed ‘its regulatory powers over the economy to impose order upon a market in dysfunction.’”<sup>201</sup> The Court recognized that cable operators engage in speech activity protected by the First Amendment and that this speech was burdened by the “must-carry” provision, because it reduced the number of channels cable operators had available to carry other programming.<sup>202</sup> Nonetheless, the Court found that the provision would pass constitutional muster so long as it furthered an important governmental interest unrelated to the suppression of free expression, without burdening substantially more speech than was necessary.<sup>203</sup> Although remanding the case for further development of the record, the Court accepted as constitutionally permissible—and, indeed, as furthering First Amendment values—the government's interests of: “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”<sup>204</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> *See Turner*, 512 U.S. at 664.

<sup>200</sup> *See id.*

<sup>201</sup> *Id.* at 635 (quoting *Turner Broad. Sys., Inc. v. FCC*, 859 F. Supp. 32, 40 (D.D.C. 1993)).

<sup>202</sup> *Turner*, 512 U.S. at 636, 644–45.

<sup>203</sup> *Id.* at 662.

<sup>204</sup> *Id.* at 663–64. The Court found that these purposes were unrelated to the suppression of speech because they were “not activated by any particular message spoken

Similarly, in choosing from many regulatory options to establish a licensing scheme to overcome widespread signal interference and economic instability in broadcast, Congress has pursued a particular vision of how the medium could best be used to serve public First Amendment interests, including the broad dissemination of ideas from a wide variety sources, providing communities with “an outlet for exchange on matters of local concern,” and ensuring the availability of a free source of information on important matters.<sup>205</sup> Because producing objective, comprehensive, and informative programming is a public good, private, unregulated media organizations are unlikely to deliver adequate amounts of diverse, quality content.<sup>206</sup> We can, therefore, understand the purpose of the broadcast licensing scheme—including the conditions placed on licenses—as a form of communications policy, seeking to incentivize private broadcasters to produce programming that informs viewers and contributes to setting the agenda for public discussion.

Congress gave to private broadcasters not just renewable interests in the use of portions of the spectrum, but also an accompanying role to play in serving the public. Broadcasters do not simply facilitate a diverse array of speech by others—if this had been Congress’s only aim, a system of common carriage might have done just as well. Rather, broadcasters endeavor to use their independent editorial discretion to present speech of their own, together with speech of others, in a coherent, balanced way that fosters public discourse across societal divides.<sup>207</sup> Cass Sunstein describes television broadcasters as “general-interest intermediaries,” who expose us to unplanned and unchosen encounters that cause us to learn what many of our fellow citizens think and why they think it

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by cable operators,” and because they “confer[red] benefits upon all full-power, local broadcasters, whatever the content of their programming.” *Id.* at 655.

<sup>205</sup> *See id.* at 662–63.

<sup>206</sup> Baker, *supra* note 37, at 115; *see also* Balkin, *supra* note 172 (“Because information is a public good, valuable and useful information will likely be underproduced by market forces acting alone, so government investments in and regulations of information production can help make up the slack, so long as they do not otherwise violate the First Amendment. Therefore, the government may impose conditions on licensees if they help promote this goal.”).

<sup>207</sup> *See* Baker, *supra* note 37, at 143–47; CASS SUNSTEIN, *REPUBLIC.COM 2.0* 29–32 (2009).

and also create a shared focus of attention for many people.<sup>208</sup> Without this shared focus, we may no longer have a sufficient common set of experiences or knowledge from which to draw. Such a set of shared information is necessary for forming a common identity as members of the same society,<sup>209</sup> as well as for the formation of the public opinion through which we govern ourselves in a democracy.<sup>210</sup> While there is certainly an important role for partisan and interest group media to play in the formation of public opinion, without common knowledge across group lines and some semblance of a common agenda for public discourse, dialogue between those groups or members of those groups cannot happen.<sup>211</sup> Broadcast media “allow ‘different classes and groups to take part in the same public dialogue’ and ‘promise a culture of mutuality that facilitates agreement and compromise.’”<sup>212</sup>

Broadcast is certainly not the only medium capable of being employed to perform this intermediary function,<sup>213</sup> but it is easy to see why Congress chose commercial television broadcasting to play this role. Broadcast television is a visually and aurally appealing technology that is accessible to people from many demographic

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<sup>208</sup> SUNSTEIN, *supra* note 207, at 29–32. Sunstein contrasts this to the experience of relying exclusively on filtered news—what he calls “The Daily Me.” As it becomes increasingly easy, with the help of the Internet, to access news and information targeted toward our own particular needs, interests, and views, we risk missing out on learning things or hearing views that we would not have chosen for ourselves but that may be interesting or important to us.

<sup>209</sup> See Baker, *supra* note 37, at 158–60.

<sup>210</sup> See Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995).

<sup>211</sup> See Baker, *supra* note 37, at 148–49; see also SUNSTEIN, *supra* note 207, at 57 (“To say the least, it will be difficult for people armed . . . opposing perspectives to reach anything like common ground or to make progress on the underlying questions. Consider how these difficulties will increase if people do not know the competing view, consistently avoid speaking with one another, and are unaware how to address divergent concerns of fellow citizens.”).

<sup>212</sup> Baker, *supra* note 37, at 189.

<sup>213</sup> Many newspapers, too, for example, have played a similar role for several decades. However, prior to the 1950s, “a majority of American papers . . . explicitly identified themselves as favoring one of the two political parties.” Tim Groeling & Erik Engstrom, *Who Cleans Up When the Party’s Over? The Decline of Partisan Media and Rise of Split-Ticket Voting in the 20<sup>th</sup> Century* 7 (APSA 2009 Toronto Meeting Paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1451393](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451393).

groups for both entertainment and information.<sup>214</sup> It can be used to deliver a lot of content quickly and effectively (particularly as compared to technologies predating it).<sup>215</sup> And when used for the entertainment purposes that make it attractive to commercial advertisers, such offerings also attract viewers, building audiences for programming offering information and perspectives on matters of public importance. Those entertainment offerings, too, can inform and educate viewers, in addition to providing them with shared cultural experiences.

Moreover, in placing conditions on broadcast licenses that seek to induce private broadcasters to foster informed and inclusive public discourse, Congress and the Commission have had the opportunity to ensure that these tasks are performed in a nonpartisan, balanced way, while at the same time maintaining significant government distance from the formation of public opinion. Following more than a century of domination of the newspaper industry by papers affiliated with political parties, the notion of neutral, nonpartisan media arose with television after World War II.<sup>216</sup> This objectivity is important because the news media, including most broadcasters, are responsible for enabling citizens to form informed, thoughtful opinions on public policy.<sup>217</sup> And because the

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<sup>214</sup> Filipe R. Campante & Daniel A. Hojman, *Media and Polarization*, 1, 20 (Yale U. Leitner Program Working Paper, Nov. 2010), available at [http://www.yale.edu/leitner/resources/papers/CampanteHojman\\_Nov\\_2010.pdf](http://www.yale.edu/leitner/resources/papers/CampanteHojman_Nov_2010.pdf) (“TV was unquestionably a highly accessible medium. It required considerably less attention and cognitive ability than newspapers or magazines. As such, it was also much more amenable to the kind of incidental learning that would particularly affect individuals who are not that motivated for politics to begin with. In addition, while it might be the case that the price of buying a TV set would represent a significant barrier in many contexts, the very rapid pace at which Americans bought them upon the introduction of TV broadcasting belies this concern . . .”); see also PEW RESEARCH CENTER, PEW RESEARCH FACEBOOK NEWS SURVEY, (Sept. 2, 2013), available at [http://www.journalism.org/files/2013/10/topline\\_facebook\\_news\\_10-2013.pdf](http://www.journalism.org/files/2013/10/topline_facebook_news_10-2013.pdf) (concluding that seventy-two percent of American adults “sometimes” or “often” watch local television news).

<sup>215</sup> Campante & Hojman, *supra* note 214, at 20.

<sup>216</sup> Groeling & Engstrom, *supra* note 213, at 20.

<sup>217</sup> See generally WALTER LIPPMAN, *PUBLIC OPINION* (1920). Such objectivity is not always easy to find. Cable television has bred partisan news channels that have been demonstrated to impact the behavior of voters and, directly, the behavior of elected representatives. Kevin Arceneaux, Martin Johnson, Rene Lindstaedt, and Ryan J. Vander Wielen, *Democratic Representation and the Emergence of Partisan News Media: Investigating Dynamic Partisanship in Congress*, available at <http://papers.ssrn.com/sol3/papers.cfm?>

democratic legitimacy of the state “flows from the accountability of the state to the public opinion of its population,” it is vital that the formation of public opinion not be unduly influenced by the government.<sup>218</sup> As Robert Post notes, it is for this reason that “from its inception . . . First Amendment doctrine has primarily sought to protect from government regulation an independent realm of speech within which public opinion is understood to be forged.”<sup>219</sup>

Congress has thus given private broadcasters an important role to play in serving the public—a role that cannot not be performed either by an open forum or by government-controlled broadcasting. It is the very fact of broadcasters’ independence that enables broadcasters to serve the public as Congress conceived. And this independence lies at the heart of the Court’s observation that the constitutionality of broadcast regulation depends upon careful calibration of the First Amendment interests of the public and those of broadcasters.<sup>220</sup>

Where Congress seeks to further a particular speech interest through broadcast regulation—intervening in the media market to correct the underproduction of a public good, as it has in the case of reasonable access<sup>221</sup>—courts should insist that the FCC use rules well adapted to the legislative objectives of the statute it is implementing.<sup>222</sup> “When the Government defends a regulation on speech . . . [i]t must demonstrate that the recited harms are real,

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abstract\_id=2324786. Neither do Internet media organizations appear to be good candidates to act as general-interest intermediaries for public discourse. Not only is relatively little original newsgathering and reporting done by online-only media organizations, but the large number of Internet speakers and the rise of Internet interest communities have contributed to audience fragmentation. See Balkin, *supra* note 4, at 10; SUNSTEIN, *supra* note 207, at 22–26.

<sup>218</sup> Post, *supra* note 99, at 151.

<sup>219</sup> *Id.*

<sup>220</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (“The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it ‘has no authority and, in fact, is barred by the First Amendment and [§ 326 of the Communications Act] from interfering with the free exercise of [broadcasters’] journalistic judgment) (internal citations omitted); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380–81 (1984); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973).

<sup>221</sup> See *Baker*, *supra* note 37, at 119–20; see also *CBS, Inc. v. FCC*, 453 U.S. 367, 377–83 (1981).

<sup>222</sup> See *League of Women Voters*, 468 U.S. at 380.

not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>223</sup> Not only is the public’s right “to be fully and broadly informed on matters of public importance . . . not well served by” a restriction whose net effect is “to diminish rather than to augment ‘the volume and quality’” of speech,<sup>224</sup> but the Commission’s failure to maintain a close fit between means and ends undermines the constitutional basis for restricting broadcasters’ speech.<sup>225</sup> If broadcasters’ First Amendment speech rights are to have any content at all, it must be the case that government interference with broadcasters’ programming choices can be justified only to the extent that countervailing interests are actually furthered. Broad, prophylactic rules that undermine broadcasters’ exercise of editorial freedom without netting a proportional gain in some other similarly important interest simply cannot be reconciled with the idea that broadcasters “are engaged in a vital and independent form of communicative activity” such that “the First Amendment must inform and give shape to the manner in which Congress”—and by extension, the FCC—“exercises its regulatory power.”<sup>226</sup>

*B. Reasonable Access and the Means-Ends Fit of the Commission’s Prophylactic Rule*

In this Part III.B, I examine the relationship between the legislative aims of reasonable access and the Commission’s choice of a prophylactic rule requiring a broadcaster to grant access to an individual on the ballot for a federal race, even where there is strong evidence that such individual is not seeking to gain office. I argue that this rule has significant potential to burden broadcasters’ speech and to reduce the opportunities for genuine candidates to speak directly to the public through the broadcast medium. I then propose an alternative policy that, I believe, would better achieve the legislative purposes of reasonable access and would burden less speech.

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<sup>223</sup> *Turner*, 512 U.S. at 664.

<sup>224</sup> *League of Women Voters*, 468 U.S. at 398–99.

<sup>225</sup> *See id.* at 379 n.12 (“[W]ere it to be shown by the Commission that the fairness doctrine ‘[h]as the net effect of reducing rather than enhancing speech,’ we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*].”).

<sup>226</sup> *Id.* at 364.

### 1. The Ends of Reasonable Access

In enacting the reasonable access provision as part of the Federal Election Campaign Act, Congress sought to further an interest central to the First Amendment.<sup>227</sup> The Supreme Court has emphasized, “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”<sup>228</sup> Congress enacted reasonable access to “give candidates for public office greater access to the media so that they [could] better explain their stand on the issues, and thereby more fully and completely inform the voters.”<sup>229</sup> This purpose is unrelated to the suppression of speech. As the Court has recognized, reasonable access “makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”<sup>230</sup> And like the cable regulation at issue in *Turner*, reasonable access is “not activated by any particular message spoken” by broadcasters, and Congress has “confer[red] benefits upon all [legally qualified federal candidates] whatever the content of their programming.”<sup>231</sup>

Nonetheless, because any grant of access rights to broadcast stations necessarily reduces the time available for other speech,<sup>232</sup> the Court in *CBS, Inc. v. FCC* emphasized the “*limited*” nature of the reasonable access right in upholding it against a First Amendment challenge by broadcasters.<sup>233</sup> As conceived of by the Court, reasonable access is narrow in scope, “pertain[ing] only to federal candidates,” and narrow in its foreseeable application, being “invoked by [federal candidates] only for the purpose of advancing

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<sup>227</sup> See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (asserting that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office”).

<sup>228</sup> *Buckley*, 424 U.S. at 14–15.

<sup>229</sup> S. REP. NO. 92-96, at 20 (1971).

<sup>230</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981).

<sup>231</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994).

<sup>232</sup> *Cf. id.* at 644–45.

<sup>233</sup> *CBS*, 453 U.S. at 396.

their candidacies once a campaign has commenced.”<sup>234</sup> The Court also emphasized that broadcasters retain the power to make individualized judgments in response to requests for access, and that the FCC would “provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments.”<sup>235</sup>

## 2. The Commission’s Employment of Its Prophylactic Rule

The interpretation of reasonable access employed by the FCC in its October 2012 decisions—requiring broadcasters to grant access to any person on the ballot for federal office, even where there is strong evidence that an individual is not seeking office—is not nearly so cabined as the Court’s description of the candidate right in *CBS, Inc. v. FCC*. The Commission’s policy enables persons wishing merely to get the attention of the public to circumvent broadcaster review and to use airtime for any purpose. By essentially disguising themselves as candidates and, thereby, disguising their issue advocacy as candidate speech, these individuals gain access to a limited commodity—broadcast time—thereby displacing the speech of others.

The Commission’s employment of this prophylactic rule is problematic for at least three reasons. First, requiring stations to grant access to pretextual candidates does not further the legislative aims of reasonable access. The purpose of reasonable access is not to provide a right of access to broadcast stations for persons who wish to discuss public issues, something Congress has considered and declined to do on multiple occasions.<sup>236</sup> Reasonable access was instead meant to provide voters with information about those who seek to govern them. Fully informed voting requires an understanding of who a candidate is and what views he or she holds,<sup>237</sup> and Congress decided that this interest would best be served by granting federal candidates the opportunity directly to

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See *supra* Part I.A.

<sup>237</sup> See *CBS*, 453 U.S. at 396 (In enacting reasonable access, Congress sought to provide candidates “the opportunity to make their views known so that the electorate may intelligently evaluate [their] personal qualities and their positions on vital public issues.”); see also *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976).

address the public. Issue advocacy simply does not serve this purpose.<sup>238</sup>

Second, requiring stations to air the messages of pretextual candidates does not simply add more political speech to the mix. Rather, to the extent that, as I discuss above in Parts II.A and II.B, increasing incentives to game the system cause more individuals disingenuously to present themselves as federal candidates, this behavior has significant potential to crowd out the speech of candidates who are genuinely seeking to gain office.<sup>239</sup> Insofar as reasonable access furthers First Amendment values by “enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process,”<sup>240</sup> implementing the statute in such a way as to diminish communications from genuine candidates to the electorate undermines this constitutional justification for interference with broadcasters’ programming decisions.

In determining how much time to sell each candidate, broadcasters must take into account the number of federal candidates entitled to invoke political broadcasting rights.<sup>241</sup> For example, in a Presidential election year, a Washington, D.C. station must ensure that it has adequate inventory of advertising time to provide reasonable access to, and to accommodate equal opportunities claims of, all candidates for President and the Senate race in each of the four states covered by the station’s broadcast signal,<sup>242</sup> as well as for all of the candidates on the ballot for the House in each of the

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<sup>238</sup> One could, of course, argue that issue advocacy serves other First Amendment purposes and that the Commission could constitutionally implement an affirmative right of access for discussion of public issues. *See, e.g.,* SUNSTEIN, *supra* note 207, at 179. However, the Commission could not do so under the guise of implementing reasonable access. *See Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (stating that agency interpretation of a statute must be consistent with the congressional purpose of the statute).

<sup>239</sup> *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 681 (1998) (noting that the inclusion of all ballot-qualified candidates in a debate might “actually undermine the educational value and quality of debates”).

<sup>240</sup> *CBS*, 453 U.S. at 396.

<sup>241</sup> FCC Political Broadcasting Primer, *supra* note 26, at 1523; *see also CBS*, 453 U.S. at 387.

<sup>242</sup> For this purpose, I refer to the District of Columbia as a “state.”

fifteen Congressional districts.<sup>243</sup> The more candidates there are on these ballots, the greater is the likelihood that broadcasters will need to hold back additional inventory from candidates who have already purchased time, or even to limit an initial purchase of time, in order to ensure that some time remains available for purchase by others on the ballot who are entitled to access, including pretextual candidates.<sup>244</sup> While broadcasters could take some measures to increase exposure for bona fide federal candidates, such as holding debates that exclude pretextual candidates<sup>245</sup> or increasing news coverage of bona fide candidates,<sup>246</sup> such measures alone cannot compensate for the loss of candidates' unmoderated opportunities to speak directly to voters—the value of which is the rationale for giving candidates reasonable access rights in the first place.<sup>247</sup>

Moreover, while state candidates or proponents of state ballot initiatives have no federal rights equivalent to reasonable access, broadcasters are expected to keep viewers informed on state and local races as part of their obligation to serve the public interest and typically do sell time to candidates for state office.<sup>248</sup> However, when inventory becomes scarce, broadcasters may choose not to provide state candidates direct access to viewers by selling them advertising time, instead limiting broadcast coverage of state races to news programs. Requiring broadcasters to sell time to pretextual federal candidates thus perversely privileges the sale of access to pretextual candidates over access by genuine state candidates. In

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<sup>243</sup> For example, using the methodology identified by the Commission in *In re Randall Terry*, at least one Washington, D.C. station would be required to provide reasonable access to candidates in at least fifteen congressional districts: seven in Virginia, six in Maryland, one in West Virginia, and the District of Columbia.

<sup>244</sup> See FCC Political Broadcasting Primer, *supra* note 26, at 1523. Broadcasters do, of course, devote time to other programming during election season. *Id.* (“Congress clearly did not intend, to take the extreme case, that during the closing days of the campaign, stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising.”).

<sup>245</sup> *Forbes*, 523 U.S. at 682–83 (finding that broadcasters may exercise editorial discretion in choosing among candidates for a debate, taking into consideration such factors as voter support).

<sup>246</sup> An appearance by a candidate in a “bona fide newscast” or “bona fide news interview” does not trigger equal-opportunities rights for other candidates. 47 U.S.C. §§ 315(a)(1)-(2) (2012).

<sup>247</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 395–96 (1981).

<sup>248</sup> FCC Political Broadcasting Primer, *supra* note 26, at 1522.

this way, the Commission's policy has the potential not only to undermine the purposes of and constitutional justifications for reasonable access with regard to federal candidates, but to reduce speech by state candidates as well.

Finally, forced access by pretextual candidates for their disguised issue advocacy necessarily burdens broadcasters' own speech activities, including broadcasters' exercise of editorial discretion in selecting programming that most effectively contributes to the coherent, balanced mix they believe will best serve their viewers. "To agree that debate on public issues should be 'robust, and wide-open' does not mean that we should exchange 'public trustee' broadcasting . . . for a system of self-appointed editorial commentators."<sup>249</sup>

Not only does time provided under any mandatory access scheme take away time the broadcaster would otherwise have been free to program, but the burden placed on broadcasters' editorial freedom by being required to provide time to pretextual candidates is significant in an additional respect. Because broadcasters are prohibited from censoring candidate ads,<sup>250</sup> they are unable to prevent candidates from airing material that is misleading, false, defamatory, or otherwise irrational or uncivil. Fortunately, people hoping to win elections usually do not want to come across as untrustworthy, irrational, or uncivil. However, the very fact that broadcasters cannot censor candidate ads appears to motivate individuals who wish to air this kind of content to become pretextual candidates.<sup>251</sup> Unlike broadcasters, who are accountable to viewers and to the FCC for their programming choices,<sup>252</sup> and genuine candidates, who are accountable to voters for how they portray themselves in their campaign advertisements, pretextual candidates—who do not seek to win votes—are accountable to no one.<sup>253</sup> Insofar

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<sup>249</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 125 (1973).

<sup>250</sup> 47 U.S.C. § 315(a) (2012).

<sup>251</sup> *Supra* Introduction.

<sup>252</sup> *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674–75 (1998) (Broad claims of access could result in "transferring 'control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals.'").

<sup>253</sup> Of course, this is true only to the extent that pretextual candidates avoid incurring legal liability for the contents of their advertisements.

as the primary task of broadcasters as independent editors is to present a selection of programming that will inform discussion of public issues and foster conversation across societal divides,<sup>254</sup> the forced inclusion of material by pretextual candidates is likely to be counterproductive.<sup>255</sup>

### C. *An Alternative Approach*

As discussed throughout this Article, Congress and the Supreme Court have long recognized that broadcast regulation requires careful calibration of the First Amendment interests on both sides of the equation. To the extent possible, any burden on broadcaster speech should be balanced out by a gain in another speech interest. In some cases, this fine-tuning might be difficult to achieve or might be particularly burdensome for the government. In such instances, a court evaluating a challenge to a statute, or to an FCC rule or policy, might determine that the importance of furthering the public's First Amendment interests necessitates that a broadcaster carry some speech that does not itself further those interests. Where, however, a low-cost alternative policy exists that would burden less speech, courts should reject the government's choice of a more burdensome policy. This is especially true where the alternative policy would also better achieve the government's objectives.

At least one such alternative exists here. In place of its informal prophylactic rule, the Commission could instead allow—either through a revised interpretation of the statutory reasonable access requirement or, if it deems necessary, through an amendment to the relevant FCC rules—broadcaster evaluation of whether an individual on the ballot for a federal race is a “bona fide candidate.”<sup>256</sup> In other words, the Commission could permit broadcasters to evaluate available evidence in order to determine whether such an individual is genuinely seeking to gain public office, rather than simply seeking to gain a platform for speech.

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<sup>254</sup> *Supra* Part III.A.2.

<sup>255</sup> *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 398–99 (1984) (finding that where the effect of a regulation is to diminish the quality of coverage of public issues, the regulation does not serve the public's right to be informed).

<sup>256</sup> 47 C.F.R. § 73.1940(b)(2) (2013).

In fact, the Commission has already formulated neutral factors for making such a determination. As discussed above in Part I.B, under FCC rules, where a person claims reasonable access rights on the basis of a federal write-in candidacy, broadcast stations may ask the purported candidate to show that he has substantially undertaken activities commonly associated with political campaigning.<sup>257</sup> These activities “normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing a campaign headquarters.”<sup>258</sup>

A similar set of criteria could be evaluated where a person claiming reasonable access rights is on the ballot for a federal race. There is no reason to think that broadcasters are incapable of applying such criteria in a nondiscriminatory manner. Broadcasters are already accustomed to engaging in, and indeed are required to engage in, individualized evaluation of what constitutes reasonable access under all of the circumstances present in each particular case.<sup>259</sup> And broadcasters are experienced with evaluating, in the write-in context, whether a purported candidate has engaged in enough campaigning activity to be considered a bona fide candidate. The FCC has not expressed concern that broadcasters are doing a poor job conducting this review, nor has the Commission indicated that its review of broadcasters’ decisions has been administratively burdensome.

Admittedly, permitting broadcasters to evaluate the substantiality of a purported candidate’s campaigning activity is no fool-proof method to weed out all who would attempt to abuse candidate political broadcast rights. A person who is willing to invest sufficient time and energy in campaigning, even if he is doing it in order to gain access to broadcast stations for issue advocacy, would be able to pass this test. Nonetheless, as the Commission undoubtedly understood when it decided to require a substantial showing of bona fide candidacy for write-in candidates, such a burden would make a strategy of disingenuously invoking reasonable access rights

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<sup>257</sup> *Id.* §§ 73.1940(b)(2), 73.1940(f).

<sup>258</sup> *Id.* § 73.1940(f).

<sup>259</sup> *See, e.g.*, Complaint of Carter–Mondale Presidential Committee, 74 F.C.C.2d 631, 642–43 (1979).

significantly less attractive—not to mention harder for the same person to carry out in multiple locations.<sup>260</sup> For that reason, employment of this policy would infringe less on broadcasters' speech activities—and would leave time for more speech by genuine candidates—than would the bright-line rule employed by the Commission in its October 2012 decisions. It would, therefore, help narrow the scope of the FCC's interpretation of reasonable access to one more consistent with the purpose of, and the constitutional justification for, reasonable access.

### CONCLUSION

How to conceive of the First Amendment rights of broadcasters—and indeed whether such rights should be placed on the scale at all, opposite the rights of the public as listeners and viewers—has been contested for decades. In other First Amendment contexts, it is the right of the speaker, not of the listener, that is paramount. Yet in the broadcast context, Congress sought to ensure that a new communications technology would develop in a way that would best serve the needs of all Americans, rather than the fortunate few who acquired licenses to speak.

In this Article, I have demonstrated that the reasonable access right for federal candidates, as conceived of by the Supreme Court in *CBS, Inc. v. FCC*, can be justified on the basis of our collective right to receive information necessary to make informed choices among candidates for office. Under a theory of free speech that conceives one of its fundamental purposes as the furtherance of democracy, such a legislative aim must be considered constitutionally permissible. Nonetheless, because the First Amendment also values both editorial freedom and the autonomy of all persons par-

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<sup>260</sup> See, e.g., Complaint of Randall Terry, 27 FCC Rcd. 598 (Feb. 3, 2012) (finding that it was not unreasonable for a station to deny access to Terry where his campaign stops in Illinois were limited to a small geographic section of the state and the only piece of literature he claimed to have distributed “was labeled ‘generic brochure’ and lacked the legal disclaimers required for public dissemination, suggesting that it was never physically distributed in the state”). Note that in the context of write-in candidacy for President, a candidate who has made a substantial showing of bona fide candidacy in at least ten states is considered a legally qualified candidate in all states. 47 C.F.R. § 73.1940(e)(2) (2013). If the FCC were to adopt the alternative policy I propose here for ballot candidates, a similar allowance could be made for presidential candidates.

ticipating in public discourse, the view that private broadcasters have retained no independent speech rights cannot be correct. Therefore, the policies the FCC selects to implement reasonable access should burden no more speech than necessary to achieve its legislative purposes. As I have shown, the prophylactic rule employed by the Commission in its October 2012 decisions was imprecise and, in fact, counterproductive. In proposing an alternative policy that would burden less broadcaster and candidate speech, I offer a solution that attempts to further the democratic goals of reasonable access while also protecting the editorial freedom of broadcasters.