RECLAIMING A PUBLIC RESOURCE: THE CONSTITUTIONALITY OF REQUIRING BROADCASTERS TO PROVIDE FREE TELEVISION ADVERTISING TIME TO CANDIDATES FOR FEDERAL OFFICE

SUSANNA M. ZWERLING*

* B.A., 1985, Wesleyan University; J.D., 1990, New York University School of Law. The author is an associate at Debevoise and Plimpton. This Note was written while she was an Associate Editor of the *Review of Law & Social Change.*

I would like to thank Professor Burt Neuborne for his help and advice in the preparation of this Note.

INTRODUCTION

"Why not . . . require that, near election time, both great parties be allowed, without expense, an equal amount of time on the air, to the end that both sides of all issues be fairly and adequately represented to the people?"

— Frank Knox, Alfred E. Landon's running mate on the 1936 Republican ticket.[1]

In the last half century, political campaigns have moved from the railroad whistle stops and town meetings to the airwaves. Television airwaves, like the train stations, town halls, and parks in which candidates traditionally campaigned, are public property. However, unlike the traditional fora, access to the broadcast media (other than in news broadcasts) costs presidential campaigns millions of dollars in each federal election cycle. As a result of the increased reliance of campaigns on the broadcast media, the costs of running for elective office have escalated dramatically.[2] During the last thirty years the real dollar cost of presidential campaigns alone has increased 500%, from just over $25 million in 1960 to $125 million in 1988.[3] This trend reflects an explosion of campaign spending on television advertising. While candidates for all offices spent just over $30 million on television advertising in 1970, that figure had ballooned to over $230 million in 1988.[4]

Currently, there are two proposed approaches to the dangers posed by escalating campaign costs: federal subsidization of campaign spending, and federal regulatory reduction of campaign costs. The combination of these approaches would require that broadcasters provide a specified amount of free television advertising time to candidates for federal office as a condition for the grant of a broadcast license. Candidates accepting free advertising time would, in turn, be required to refrain from purchasing any other television advertising time. This Note addresses the constitutionality of this combined approach to the problem of massive campaign spending on television advertising.

In recent decades, the only solution offered to resolve the problem of escalating campaign costs has been public subsidization of presidential campaigns. For example, in 1971, Congress passed the Federal Election Campaign Act [hereinafter FECA], providing full federal funding for presidential general election campaigns and matching funds for presidential primary campaigns.[5] Additional legislation has been proposed, but not yet passed, which would create public financing for campaigns for the Senate[6] and

1. CENTER FOR RESPONSIVE POLITICS, BEYOND THE 30-SECOND SPOT: ENHANCING THE MEDIA'S ROLE IN CONGRESSIONAL CAMPAIGNS 1 (1988).
2. *Id.* at 12.
3. N.Y. Times, Mar. 18, 1990, § 1, at 1, col. 1 (measured in constant 1960 dollars).
4. *Id.*
5. 2 U.S.C. §§ 431-456 (1988); 26 U.S.C. §§ 9001-9042 (1988).
6. *See* S. 2425, 101st Cong., 2d Sess. (1990); S. 2265, 101st Cong., 2d Sess. (1990); S. 2120,

the House of Representatives.[7] Like FECA, these bills generally take a two-pronged approach to the problem of campaign financing. First, they would provide public financing in an effort both to limit the amount of time candidates must spend fund-raising and reduce candidates' reliance on contributions from political action committees.[8] Second, they would limit the total amount of money candidates may spend in their pursuit of office in an effort to equalize the amounts opposing candidates may spend in the same race.[9]

Other proposals focus only on the second prong — limiting the expense of campaigns — through regulatory reduction in the cost of using the broadcast media for campaign advertising. This approach has met with limited success in the past. For example, a provision of FECA amended the Communications Act of 1934 [hereinafter the Communications Act][10] to limit the amount broadcasters may charge for political advertising in the time prior to the election.[11] Pending legislation would require broadcasters to charge lower advertising rates,[12] or provide advertising time free of charge,[13] to candidates running for federal office.

These proposals generally seek to "attack the problem of spiraling costs

101st Cong., 2d Sess. (1990); S. 1727, 101st Cong., 2d Sess. (1990); S. 1575, 101st Cong., 1st Sess. (1989); S. 137, 101st Cong., 1st Sess. (1989). These bills seek to complement and/or amend various provisions of FECA by creating a voluntary system of spending limits, financing portions of Senate general election campaigns, and limiting contributions by multicandidate political committees.

7. *See* H.R. 4298, 101st Cong., 2d Sess. (1990); H.R. 4282, 101st Cong., 2d Sess. (1990); H.R. 3115, 101st Cong., 1st Sess. (1989); H.R. 2556, 101st Cong., 1st Sess. (1989); H.R. 2189, 101st Cong., 1st Sess. (1989); H.R. 2194, 101st Cong., 1st Sess. (1989); H.R. 1133, 101st Cong., 1st Sess. (1989); H.R. 13, 101st Cong., 1st Sess. (1989); H.R. 36, 101st Cong., 1st Sess. (1989); H.R. 197, 101st Cong., 1st Sess. (1989). These bills generally would provide public financing for campaigns for seats in the House of Representatives.

8. 135 CONG. REC. S10268-01 (daily ed. Aug. 4, 1989) (statement of Sen. DeConcini).

9. *Id.* ("It is useless to talk of campaign reform if spending limits are not included — there is no reform without spending limits.").

10. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 451-613 (1981 & Supp. 1990).

11. 47 U.S.C. § 315(b) (1988). An original provision of FECA limited the amount a candidate for federal office could spend in using the communications media. FECA, Pub. L. No. 92-225, tit. 1, § 104(a), 86 Stat. 5 (1971), *repealed by* FECA Amendments of 1974, Pub. L. No. 93-443, tit. 2, § 205(b), 88 Stat. 1278 (1974).

12. S. 743, 101st Cong., 1st Sess., 135 CONG. REC. S3622 (1989) (providing a discount to federal candidates for broadcast advertising time prior to an election).

13. S. 2837, 99th Cong., 2d Sess., 132 CONG. REC. S12903-04 (1986) (providing free television time to national committees in elections for federal office).

See also Buckley v. Valeo, 424 U.S. 1, 247 (1976) (Burger, C.J., dissenting); CENTER FOR RESPONSIVE POLITICS, *supra* note 1, at 42-68; H. SMITH, THE POWER GAME: HOW WASHINGTON WORKS 707 (1988); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359, 422 (1972); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 644 (1982); N.Y. Times, Mar. 19, 1990, at A18, col. 1 (Editorial); Kampelman, *Cut Campaign Costs, Not Spending*, N.Y. Times, Dec. 20, 1989, at A27, col. 1 ("The principle behind the free TV time proposal is simple and clear: Allocated free time must be a condition of a station's broadcast license and must be the only TV time allowed the Congressional candidates outside of debates and bonafide news programming.").

of political Federal campaigns at its source,"[14] most often identified as the expense of media broadcast time.[15] Senator Claiborne Pell, a sponsor of proposed legislation taking this approach, argued that it is "essentially a no-cost bill in terms of the value of the media time that would be given to the political process."[16] According to Pell,

> the basic commodity of the bill is an existing public resource — namely the airwaves — which the Congress can properly require to be used for political debate . . . . If we are truly concerned about curbing the cost of campaigning, it makes sense to use an available public resource to substitute for this major category of expenditure.[17]

The proposals are based on the assumption that broadcasters are licensees of the federal government, broadcasting over publicly-owned airwaves. For simply the cost of an application, licensees are granted use of particular frequencies of the broadcast spectrum. The limited nature of the spectrum makes individual frequencies extremely valuable. The broadcasters with access to these frequencies, thus, have a government created monopoly, which in turn makes broadcasters responsible to the public. Such responsibility has been expressly created by statute. The Communications Act, for example, requires the Federal Communications Commission [hereinafter FCC] to base the grant of a broadcast license on what is consistent with the public interest.[18] It also requires broadcasters to allow federal candidates "reasonable access" to broadcasting time,[19] and to provide balanced coverage of issues of public importance.[20]

The first three Sections of this Note provide a foundation requirement for a discussion of the constitutionality of a two-pronged requirement that television broadcasters provide free advertising time to federal candidates and that candidates limit their television advertising. The statutory provisions regarding public financing of campaigns for federal office and the constitutionality of the concomitant restrictions on candidates' spending is described in Section I. Section II analyzes the statutory and regulatory scheme by which the federal government regulates the broadcast media in the public interest, and discusses the constitutionality of that regulation in light of the first amendment prohibition on government restriction of speech. Section III discusses the constitutional prohibition on the government's taking of private property for public use without just compensation, since one of the constitutional questions raised

14. S. 2837, 99th Cong., 2d Sess., 132 CONG. REC. S12,903-04 (1986).

15. *Id.* at S12,918.

16. *Id.*

17. *Id.*; *see also* CENTER FOR RESPONSIVE POLITICS, *supra* note 1, at 2 (quoting Robert Squier, media consultant with Squier-Eskew Communications: "It seems to me that since the people own the airwaves, we should not have to pay a ransom to the people we have licensed the airwaves to, in order to conduct the most important transaction in a democracy, the election.").

18. 47 U.S.C. § 307(a) (1988).

19. *Id.* § 312(a)(7).

20. *Id.* § 315(a).

by the proposed requirement is whether the government may require broadcasters to give up advertising time for which they would otherwise be receiving payment from advertisers. This Section also analyzes the relationship between the takings rule and the unconstitutional conditions doctrine, which prohibits the distribution of government benefits in an unconstitutional manner.

Finally, Section IV of this Note will argue that the requirement is not a taking of property, but a constitutionally permissible condition on the grant of a government license. The Note concludes that requiring broadcasters to provide free television advertising time to candidates for federal office violates neither the broadcasters' nor the candidates' first amendment right to free speech, nor the broadcasters' fifth amendment right to just compensation for the taking of their property for public use.

I.
FEDERAL REGULATION AND PUBLIC FINANCING OF ELECTIONS

A. Congressional Authority Over Voting

The right to vote is a constitutionally protected "fundamental right,"[21] and thus any regulation which infringes it is subject to strict scrutiny.[22] Where a regulation is designed to secure the right to vote, however, the courts have deferred to Congress' broad power to regulate the electoral process.[23] This power was made explicit over a century ago, when the Supreme Court found that the fourteenth amendment gave Congress the authority to intervene in situations where the right to vote is at stake.[24]

In the century that followed, congressional power over the election process has been steadily expanded. In *Smiley v. Holm*,[25] the Court held that congressional authority over the time, place, and manner of holding congressional elections must include the authority to "enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[26] The Court's subsequent decision in *Burroughs v. United States*[27] extended this authority to include presidential elections. Later, in *United States v. Classic*,[28] the Court further extended congressional authority to include regulation of primary elections for

21. *Ex parte* Yarbrough, 110 U.S. 651 (1884); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370-71 (1886) ("Though not regarded as a natural right . . . [voting] is regarded as a fundamental political right, because preservative of all rights.").

22. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

23. *See* Buckley v. Valeo, 424 U.S. 1, 13 n.16 (1975).

24. *Yarbrough*, 110 U.S. at 666 ("[W]hen Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself," it is acting within its authority.).

25. 285 U.S. 355 (1932).

26. *Id.* at 366-67.

27. 290 U.S. 534 (1934).

28. 313 U.S. 299 (1941).

congressional seats. As the legislative role in federal elections increased, it became necessary for Congress to develop comprehensive programs for dealing with the regulation of elections, which led to the creation of the Federal Election Commission [hereinafter FEC].[29]

B. Public Financing of Federal Campaigns

In 1971, Congress passed legislation which radically increased its role in regulating presidential elections and primaries. FECA created the apparatus for public financing of campaigns for national office and "provided public financing as an alternative way of financing candidates."[30] The legislation encompasses several public financing programs, including the Presidential Election Campaign Fund Act[31] and the Presidential Primary Matching Payment Account Act.[32]

In passing this legislation, Congress recognized that in modern elections, financial resources may mean the difference between winning elections and being shut out of the process entirely. Therefore, Congress "determined that providing public support for the three stages of the presidential selection process [primary, campaign, and convention] would advance the general welfare of the nation by reducing the reliance of presidential candidates on large contributors, thus reducing their influence on the outcome of elections and on the operation of government."[33] Once this omnibus legislation was in place, the task of regulating the electoral process became too vast for the legislature. Congress therefore created the FEC, an independent agency charged with the administration and formulation of policy under the Acts.[34]

The public financing of presidential campaigns is subject to several re-

29. 2 U.S.C. § 437(c) (1988).

30. H.R. 533, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2076.

31. 26 U.S.C. §§ 9001-9012 (1988). The Presidential Election Campaign Fund supports candidates who have either been nominated by a "major party" or who have qualified to have their names on the election ballot in 10 or more states. Eligible candidates of major parties are entitled to $20 million (in 1974 dollars) plus an adjustment for inflation. In addition to the initial $20 million, candidates received $1.8 million in 1976, $9.4 million in 1980, $20.4 million in 1984, and $26.1 million in 1988. Candidates of "minor parties," i.e., those whose candidates received between 5 and 25% of the popular vote in the preceding presidential election, are eligible for a subsidy keyed to the subsidies of the major parties.

32. 26 U.S.C. §§ 9031-9042 (1988). The Presidential Primary Matching Payment Account provides funding to individuals who seek a presidential nomination. An individual is determined to be seeking nomination if she: (a) takes the action necessary under the law of a state to qualify for nomination for election, and (b) receives contributions or incurs qualified campaign expenses. Qualifying candidates must have broad-based support, evidenced by at least $5000 of contributions in each of 20 states, no more than $250 of which may come from a single contributor.

33. Buckley v. Valeo, 519 F.2d 821, 879 (D.C. Cir. 1975) (per curiam) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

34. The legislative history of the amendments creating the FEC illustrate Congress' desire to have an independent agency charged with the enforcement of these laws. The Senate identified eight essential principles applicable to any legislation which provides public financing in federal elections, including "administration of campaign financial reporting and disclosure laws

strictions. The amount an individual may contribute to any federal candidate, including presidential primary candidates, is strictly limited.[35] Additionally, matching funds for presidential primary campaigns are tied to the individual contributions.[36] Public financing of general presidential campaigns is even more limited because federal campaign funding is conditioned upon candidates' limiting their expenditures to the amount received from the government.[37] Both the limitations on individual contributions to candidates and the limitation on overall expenditures by candidates have been challenged as violating the first amendment.

C. *First Amendment Concerns with Limitations on Campaign Spending*

In 1975, limitations on candidates' expenditures, as well as other provisions of FECA, were challenged in *Buckley v. Valeo*.[38] The Supreme Court ultimately struck down most of the congressionally imposed limitations on campaign-related expenditures, upholding only those limitations which were conditioned upon the voluntary acceptance of public funding. The limitations on independent expenditures by individuals and groups on behalf of campaigns, and the mandatory limitations on candidates' overall expenditures, were held to abridge "the ability of candidates, citizens and associations to engage in protected political expression."[39]

The two major restrictions upheld by the Court in *Buckley* were an overall spending limitation for presidential campaigns, conditioned upon the voluntary acceptance of public funds,[40] and a limitation on individual and group contributions made directly to candidates.[41]

The limitation on individual contributions to candidates was justified by the Court as an exercise of the government's interest in preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[42] Nevertheless, the Court could not reconcile the statutory limitations on candidates' personal spending on behalf of their own campaigns or individuals' independent contributions on behalf of candidates with the first amendment's protection of speech.[43] In contrast, the overall spending limitation was upheld because, though it may have infringed

---

and regulations by an independent elections commission with enforcement powers." H.R. REP. No. 689, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5589.

35. 2 U.S.C. § 441a(a) (1988).

36. 26 U.S.C. § 9034 (1988).

37. 2 U.S.C. § 441a(b) (1988).

38. Buckley v. Valeo, 387 F. Supp. 135 (D.D.C.), *certified to en banc court*, 519 F.2d 821 (D.C. Cir. 1975) (per curiam) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

39. Buckley v. Valeo, 424 U.S. 1, 58-59 (1976).

40. *Id.* at 57 n.65; *see also* 2 U.S.C. § 441a(b) (1988).

41. *Buckley*, 424 U.S. at 58.

42. *Id.* at 25.

43. *Id.* at 39 ("The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech.").

on the candidates' speech, it was entered into voluntarily.[44] The Court held that because the limitation was conditioned upon the voluntary acceptance of public funds, its infringement upon speech could not render the legislation unconstitutional.[45]

The Court concluded that the purposes of the first amendment are best served by the limitation on candidates' overall spending. The Court held that the limitation "is a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[46] Congress may thus legislate in order to protect the flow of ideas which inform political debate. However, even as Congress is responsible for ensuring that the public is well informed throughout the electoral process, it must be vigilant against violating the first amendment prohibition on the regulation of speech.

FECA, after *Buckley*, straddles the constitutional boundary. In providing funding to ensure candidates that they be given access to the electoral process, and in limiting candidates' spending in order to equalize that access, this legislation recognized that furthering the purposes of the first amendment may require deviation from strictly following its wording.

II.
THE FIRST AMENDMENT AND GOVERNMENT REGULATION OF BROADCASTERS

A. The First Amendment

The first amendment to the Constitution protects several fundamental rights from governmental interference.[47] One of these rights, the freedom of speech,[48] is essential to the development of an informed electorate upon which democratic government necessarily depends.[49] The freedom of speech, therefore, while protected as a personal right, is also essential to the public welfare.

Although protected, speech may be subject to regulation in certain circumstances.[50] Courts generally analyze regulations which impinge upon the freedom of expression by weighing the importance of the freedom of speech in the particular context against the importance of the governmental interest be-

44. *Id.* at 99.

45. *Id.* at 57 n.65.

46. *Id.* at 92-93.

47. U.S. CONST. amend. I.

48. The freedoms of speech, press, and association will all be referred to collectively as the freedom of speech. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 785 (2d ed. 1988).

49. *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 119-22 (1845).

50. Freedom of speech is a fundamental right, but it is not absolute. Whitney v. California, 274 U.S. 357, 373 (1926) (Brandeis, J., concurring) (clarifying the distinction between protected first amendment rights and absolute rights).

ing served by the regulation.[51] Under this analysis, a court must also consider the nature of the speech and the restriction at issue. When the speech being regulated occurs in a public forum, the analysis focuses on the impact of the regulation on the content of the speech.[52] Government regulations which restrict the content of speech are generally found to be unconstitutional.[53]

Since the first amendment protects the free exchange of ideas from governmental restriction, any such regulation which infringes upon the ability to express certain ideas is presumptively a violation of that amendment. Only in two very specific cases — when the speech constitutes an incitement to imminent lawless action,[54] or when the speech is both false and defamatory[55] — is the freedom of speech outweighed by the governmental interest in regulating the content of that speech.[56]

Government regulation of speech which does not interfere with the content of the speech, but merely regulates the time, place, and manner in which the speech occurs, is generally not found to violate the first amendment.[57] This type of regulation is generally upheld so long as the restriction does not unduly impede the flow of information and ideas,[58] it serves a significant governmental interest,[59] and it is reasonable in the given context.[60] An acceptable form of regulation of speech in public places often involves licenses or permits.[61]

Regulations which impose a prior restraint on expression are seen as par-

51. *See generally* Gertz v. Welch, 418 U.S. 323, 343-44 (1974) (favoring a general balancing of first amendment interests against state interests, but rejecting an ad hoc use of this test).

52. Speech in non-public fora may be regulated only when the distinctions drawn are reasonable in light of the normal use of the forum. *See generally* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806-09 (1985) (government did not violate first amendment by limiting solicitation of federal and military personnel to certain charitable organizations, where drive took place in non-public forum and alternative channels were available to the excluded groups).

53. *See* L. TRIBE, *supra* note 48, at 789 (stating that content-based regulation constitutes a limitation on "communicative speech," and defining such a limitation as government control or penalization of speech, either because of the specific message expressed, or because of the effect of the information or ideas imparted).

54. Brandenburg v. Ohio, 395 U.S. 444 (1969).

55. *Gertz*, 418 U.S. at 346.

56. Additionally, the content of speech determined to be obscene may be regulated. However, obscenity is not considered speech and thus is not protected by the first amendment. Roth v. United States, 354 U.S. 476, 485 (1957); *see also* Miller v. California, 413 U.S. 15 (1973) (sexually explicit mailings do not deserve first amendment protection); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973) (the first amendment does not protect the display of "hard-core" pornographic films).

57. *See* L. TRIBE, *supra* note 48, at 789-90 (referring to this as regulation of the noncommunicative impact of speech which nevertheless affects the ideas communicated; such regulation consists of government control of the flow of information and ideas in pursuit of other goals).

58. *Id.* at 792.

59. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 649 (1981).

60. *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

61. *Heffron*, 452 U.S. at 647-48.

ticularly burdensome on first amendment rights.[62] Laws which involve the prior restraint of speech — whether or not they directly affect the content of the speech — are generally subjected to the rigorous analysis reserved for content-based regulation. That is, the cases in which prior restraint is allowed are those "exceptional cases" involving national security, where the restriction is designed to prevent violence or revolution, or where the restriction is aimed against the dissemination of obscenity.[63] The American doctrine against prior restraints on the press, developed to protect the press from the requirement of government licenses and the corresponding threat of censorship,[64] is arguably contravened by the system of regulation of the broadcast industry. Broadcasters, whose programming is clearly protected from government regulation by the first amendment,[65] are nonetheless licensees of the government. Such licensing would violate the prohibition on prior restraint if applied to the print media. The nature of the broadcast media, however, requires the application of different standards.[66]

B. Regulation of the Broadcast Media

1. The Theory of Regulation

The differences between the treatment of the print and broadcast media are generally premised on the limited nature of the publicly-owned broadcast spectrum. Since the spectrum is a public resource, not unlike public waterways and land, the government is responsible for administering its use consistent with the public interest.[67] The broadcast media is obviously a vehicle for the exchange of ideas, thus implicating first amendment interests. At the heart of the first amendment is a concern for public access to information. Because the broadcast spectrum is a primary source of information and at the same time is limited in availability, the public interest requires that the government regulate the airwaves in order to foster the free exchange of information and ideas.

The government's interest in regulating the broadcast spectrum generally means that a regulation will be valid so long as it does not infringe upon the content of the broadcast speech, but only restricts the time, place, and manner of the broadcast.[68] Such regulation does not constrict, but instead expands, the free flow of ideas and information,[69] and is therefore reasonable in the

62. *See* National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (when a state imposes prior restraints, it must provide strict procedural safeguards); *see also* New York Times v. United States, 403 U.S. 713 (1971) (government bears the burden of showing a justification for the imposition of any prior restraint on expression).

63. Near v. Minnesota, 283 U.S. 697, 716 (1931).

64. *Id.* at 713.

65. *See, e.g.*, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (cable television broadcasting activities "plainly implicate First Amendment interests").

66. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

67. 47 U.S.C. § 307(a) (1988).

68. *See supra* text accompanying notes 57-60.

69. *See* L. TRIBE, *supra* note 48, at 792.

context of public ownership of the limited spectrum.[70] Additionally, as will be discussed, regulation of the broadcast media serves the public interest by providing an accessible forum for the discussion of issues of public concern.[71]

In *Red Lion Broadcasting Co. v. FCC*,[72] the Supreme Court stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[73] The Court found that in light of this paramount right, the danger that broadcasters would "exclude from the airways anything but their own views of fundamental questions"[74] justified the creation of a regulatory scheme, despite the consequent restrictions on broadcasters. Government regulation, then, is essential to ensure that broadcasters fulfill their responsibility to the listening and viewing public.

2. *Regulation in the Public Interest*

The Communications Act established a framework for the regulation of the burgeoning radio industry. In designing this legislation, Congress intended that use of the broadcast spectrum "be retained under the control of the Government."[75] Accordingly, the statute recognized the principle of governmental control of the broadcast spectrum as a basis for the legislation. While the initial source of regulatory authority was the public ownership of the broadcast spectrum, in the long run, the more important basis of federal regulation became the limited nature of the broadcast spectrum.[76]

In order to ensure the fair regulation of the media, Congress established the Federal Communications Commission [hereinafter the FCC].[77] In defining the FCC's powers, the Communications Act states that the FCC may grant licenses to broadcasters as the public interest requires.[78] This language is the basis of what has become known as the "public interest requirement." Further regulation designed to serve the public interest was incorporated into the Communications Act through later amendments. One such amendment[79]

---

70. *See infra* text accompanying notes 120-23.

71. *See infra* text accompanying notes 83-85.

72. 395 U.S. 367 (1969).

73. *Id.* at 390.

74. *Id.* at 394.

75. SENATE COMM. ON INTERSTATE COMMERCE, REGULATION OF RADIO TRANSMISSION, S. REP. No. 772, 69th Cong., 1st Sess. 2 (1926).

76. *See infra* text accompanying notes 120-23.

77. 47 U.S.C. § 151 (1988).

78. *Id.* § 307(a) ("The Commissioner, if public convenicnce, interest or necessity will be served thereby . . . shall grant to any applicant therefor a station license provided for by this chapter."); *see also id.* § 303 (setting forth powers and duties of FCC).

79. 47 U.S.C. § 315(a) states:

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

is the statutory basis of what has become known as the Fairness Doctrine.[80] Additional amendments established the requirement of access to the airwaves for political candidates[81] and required that candidates not be unfairly charged for broadcast advertising.[82]

The Communications Act explicitly set forth the public interest requirement, but from the outset, courts have played an important role in developing a standard for the public interest in broadcasting. The courts developed the beginnings of a public interest standard as early as 1929, prior to the Communications Act, holding that the "public interest requires ample play for the free and fair competition of opposing views and the commission believes that the principle applies . . . to all issues of importance to the public."[83] Later, once the public interest standard had been codified in the Communications Act, the Supreme Court clarified the FCC's role in protecting the public interest in the airwaves. The Court held that "[t]he term public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources,' " and that "ownership carries with it the power to select, to edit and to choose the methods, manner and emphasis of presentation."[84] In regulating the broadcast media in accordance with the public interest standard, the Court found that the FCC's role was "a broad one, a power 'not niggardly but expansive.' "[85] As the caretaker of an invaluable national resource, the FCC has a strong mandate to enforce the public interest requirement, but the broadcasters, in turn, have wide latitude in interpreting the requirement.

Unlike the public interest requirement, which had been developed by the courts prior to the Communications Act, the Fairness Doctrine had not been

---

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

80. *See infra* text accompanying notes 86-95.

81. 47 U.S.C. § 312(a)(7) (1988) ("The Commission may revoke any station license . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.").

82. *Id.* § 315(b)(1)-(2); *see also* 47 C.F.R. § 73.1940(b) (1989).

83. Great Lakes Broadcasting Co. v. Federal Radio Comm'n, 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

84. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 785 (1978) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

85. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969) (quoting NBC v. United States, 319 U.S. 190, 219 (1942)).

specifically recognized before the Communications Act was enacted. It was subsequently codified as an amendment to the Act,[86] and developed further through case law[87] and administrative regulation.[88] The regulatory expansion of the statutory language of section 315(a) was incorporated into FCC regulations in 1978,[89] making the requirements of the statute more specific. It is these regulations that have become known as the Fairness Doctrine.

The Fairness Doctrine employs a three-pronged approach to the requirement that broadcasters provide a forum for the presentation of a variety of ideas. First, the statute provides that broadcasters "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[90] Second, the regulations further ensure the presentation of opposing points of view by requiring that the victim of a personal attack on the airwaves be notified of the attack,[91] and that if the attack occurred during a station-sponsored editorial, the station must give the victim the opportunity to respond on the air.[92] Third, the regulations establish standards providing reasonable access to the broadcast media for candidates for public office, and the provision of equal non-advertising time on the air for competing candidates.[93]

Because its provisions are fairly specific and abridge broadcasters' first amendment freedoms, the Fairness Doctrine has been narrowly construed. As Judge Skelly Wright stated:

> the Commission has evolved a unique and narrow standard to guide its review when a licensee is charged with violating the Fairness Doctrine or its subsidiary rules . . . . The agency will find a violation only where it determines that the licensee's actions and decisions have been unreasonable or in bad faith. This standard applies to all components of the doctrine.[94]

This standard of review was expanded upon two years later by Judge Bazelon, also of the D.C. Circuit, who held that "[t]he agency . . . must provide a reasoned basis for its action, fully explaining the course it has taken in light of

86. 47 U.S.C. § 315(a) (1988). The 1959 amendment to the Communications Act made it clear that the public interest standard imposed a duty on broadcasters to discuss both sides of issues of public importance. Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (1959).

87. *See generally Red Lion*, 395 U.S. at 375-82 (citing a series of cases which furthered the development of the Fairness Doctrine). *See also* Public Media Center v. FCC, 587 F.2d 1322, 1328 (D.C. Cir. 1978) ("The fairness doctrine imposes two duties on a broadcaster: (1) it must present coverage of issues of public importance, and (2) such programming must fairly reflect differing viewpoints on controversial issues.").

88. 47 C.F.R. §§ 73.1910-.1940 (1989).

89. *Id.*; *see also* 43 Fed. Reg. 45,856 (1978).

90. 47 U.S.C. § 315(a) (1988).

91. 47 C.F.R. § 73.1920 (1989).

92. *Id.* § 73.1930.

93. *Id.* § 73.1940; *see also* 47 U.S.C. § 312(a)(7) (1988); *infra* text accompanying notes 96-102.

94. Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

relevant legal and policy issues."[95]

The constitutional protection of speech was originally designed both to encourage and ensure the discussion and debate of issues of general concern to the voting public. However, in recent decades, as electoral politics have moved to the airwaves, the protection of speech has become central to this process. In recognition of the unique role of airwaves as the medium through which candidates communicate with the electorate, statutes and regulations have been developed to ensure access to the broadcast media.

Initially, the section of the Communications Act on which the Fairness Doctrine is based specifically disavowed any requirement that broadcasters provide time to all political candidates.[96] The Act only protected candidates from being treated unfairly by broadcasters and merely required that they be charged "comparable rates at all times."[97] As the reliance of candidates on broadcasting increased, however, it became clear that a requirement that candidates be charged comparable rates "at all times" did not foresee the limited time period in which political advertising would be needed. A broadcaster could radically increase all rates in the weeks prior to an election in order that candidates would be charged rates "comparable" with other purchasers, then radically decrease all rates immediately after the election. In addition, candidates were disfavored in the commercial advertising market because their limited broadcast requirements precluded the purchase of time in bulk, a standard practice by which commercial advertisers pay favorable rates by purchasing advertising time over a longer period.[98] Thus, section 315 of the Communications Act was amended in 1972 to ensure that a broadcaster could not charge candidates more than it would charge other advertisers.[99] This amendment provided for a limitation on the charges which could be levied on political candidates for the use of the broadcast media.

While making use of the broadcast spectrum less costly for candidates, the amendment did not guarantee access. There was, however, an implied

95. Office of Communication of the United Church of Christ v. FCC, 590 F.2d 1062, 1069 (D.C. Cir. 1978).

96. 47 U.S.C. § 315(a) (1988) ("No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."); *see supra* note 79.

97. KVUE, Inc. v. Moore, 709 F.2d 922, 935 (5th Cir.), *aff'd*, 465 U.S. 1092 (1983).

98. *Id.* (citing S. REP. No. 96, 92d Cong., 1st Sess. 171, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1773, 1775).

99. The statute states:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed —
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. § 315(b) (1988); *see also* 47 C.F.R. § 73.1940(b) (1989).

right of access for candidates derived from the public interest standard of section 307(a), the general language of section 315, and the regulations promulgated pursuant to these statutes.[100] This was codified in 1972, when an amendment to the Communications Act required that broadcast licensees allow candidates "reasonable access" to advertising time on their stations.[101] Since the addition of section 312(a)(7) in 1972, the regulations have been expanded and amended to account for the newly explicit requirement.[102]

3. *Constitutional Challenges to Federal Regulation*

The constitutionality of regulation of the broadcast media has regularly been challenged as violating the first amendment. Even so, the statutory regulations discussed above — the public interest requirement,[103] the Fairness Doctrine,[104] and the political access rules[105] — have been upheld as constitutional.

The least controversial of these regulations, the public interest requirement, has been upheld by the Court on numerous occasions.[106] The Court has also recognized that the public interest requirement itself forms the basis of other regulations consistent with its standard for the allocation of broadcast licenses.[107] One such regulation is the Fairness Doctrine. As stated earlier, what has become known as the Fairness Doctrine is not simply the statute upon which this doctrine is based,[108] but rather, the statute in conjunction with corollary regulations.[109] The Court has found the Fairness Doctrine to be congressionally mandated and to "enhance rather than abridge the freedom of speech and press protected by the First Amendment."[110]

Other political access requirements apart from the Fairness Doctrine

---

100. Note, *The Right of "Reasonable Access" for Federal Political Candidates Under Section 312(a)(7) of the Communications Act*, 78 COLUM. L. REV. 1287, 1288 (1978).

101. 47 U.S.C. § 312(a)(7) (1988) states:

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

102. 47 C.F.R. §§ 73.1910-.1940 (1989).

103. 47 U.S.C. § 307(a) (1988).

104. *Id.* § 315(a); 47 C.F.R. §§ 73.1910-.1940 (1989).

105. 47 U.S.C. § 312(a)(7) (1988).

106. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

107. *Red Lion*, 395 U.S. at 379.

108. *See supra* text accompanying notes 86-95.

109. *Red Lion*, 395 U.S. at 369-70 (distinguishing the Fairness Doctrine itself from the statutory regulation).

110. *Id.* at 375. *But see* General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,453 (1985) (concluding that the Fairness Doctrine inhibits rather than protects the freedom of speech). The FCC's right to make such a determination was challenged unsuccessfully in Telecommunications Research & Action Center v. FCC, 801 F.2d 501, 518 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). *See also* Meredith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987) (because the Fairness Doctrine is a regulation independently generated by the

have also been challenged. In *CBS v. Democratic National Committee*,[111] the Court interpreted narrowly the statutory provision requiring "reasonable access" for all candidates[112] "as simply a restatement of the public interest standard" and held that the public interest requirement does not mandate broadcasters' acceptance of all paid advertising.[113] However, this decision was extremely narrow and did not address the constitutionality of the statutory provision. That issue was reached in *CBS v. FCC*,[114] in which the Court upheld the provision, finding that the "right of access . . . properly balances the First Amendment rights of federal candidates, the public and broadcasters."[115] The Court found that this provision "represents an effort by Congress to assure that an important resource — the airwaves — will be used in the public interest."[116]

C. *Application of the First Amendment to the Broadcast Media*

The framers of the Constitution recognized the importance of a free marketplace of ideas. The Court has stated that the authors of the Constitution:

> believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.[117]

Later, in applying this constitutional theory to the regulation of the broadcast media, the Supreme Court held that the first amendment "rests on the as-

---

FCC and not statutorily mandated, its continued enforcement may be subject to the FCC's discretion), *cert. denied*, 110 S. Ct. 717 (1990).

In an attempt to create statutory authority for the Fairness Doctrine, and to overturn the decision of the D.C. Court of Appeals, Congress passed the Fairness in Broadcasting Act of 1987, S. 742, 100th Cong., 1st Sess. *See also* Act of 1987, H.R. 1934, 100th Cong., 1st Sess. This would have codified the Fairness Doctrine by amending section 315(a) of the Communications Act to state that, "[a] broadcast licensee shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance. . . . The enforcement and application of the requirement imposed by this subsection shall be consistent with the rules and policies of the commission in effect on January 1, 1987." S. 742, 100th Cong., 1st Sess., 133 CONG. REC. S5218-32 (1987). President Reagan subsequently vetoed this legislation. President's Veto Message of June 19, 1987, 100th Cong., 1st Sess., 133 CONG. REC. S8438.

111. 412 U.S. 94 (1973).

112. 47 U.S.C. § 312(a)(7) (1988).

113. 412 U.S. at 121.

114. 453 U.S. 367 (1981).

115. *Id.* at 397.

116. *Id.*

117. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled*, Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also* Thornhill v. Alabama, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

sumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[118] Ultimately, this view of the freedom of the press requires that the government regulate the broadcast media in order to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[119]

Though the first amendment applies to broadcast as well as print media, the limited nature of the broadcast spectrum requires that first amendment standards be applied differently to the broadcast media.[120] As the Supreme Court held 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."[121] The Court in *Red Lion* underlined the spectrum scarcity issue, holding that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[122] The Court continued that this restriction is consistent with the people's interest in having the "medium function consistently with the needs and purposes of the First Amendment."[123] In other words, regulation of the broadcast media is necessary to protect the "marketplace of ideas" in an environment of limited resources.

Where the broadcast media are concerned, then, the first amendment interest in providing a forum for the free exchange of ideas may actually be better served by allowing rather than prohibiting government intervention, which the first amendment would otherwise require.[124] However, the effectiveness of the marketplace depends upon the neutrality of the government regulators. The government may regulate speech only when the regulation imposed is content-neutral and related to a substantial governmental interest.[125] The government's regulation of the broadcast media depends upon strict maintenance of neutrality, for the benefit of both the broadcasters and the public.[126]

---

118. Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . . That at any rate is the theory of our Constitution.").

119. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

120. *Id.* at 386.

121. *Id.* at 388.

122. *Id.* at 390.

123. *Id.*

124. *See generally* New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (legislation to enhance first amendment values is the rule, not the exception); Associated Press v. United States, 326 U.S. 1, 20 (1945) ("It would be strange . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.").

125. *See supra* text accompanying notes 57-60.

126. FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1977) ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."); *see*

In *FCC v. League of Women Voters*,[127] the Supreme Court clarified the constitutional limits of governmental regulation of broadcasting by defining the balancing test courts must apply in deciding whether broadcast regulations violate the first amendment. The Court stated that restrictions on broadcasters may be upheld only if "the restriction is narrowly tailored to further a substantial governmental interest."[128] In establishing this standard, the Court pointed out that "the fundamental distinguishing characteristic of the new medium of broadcasting that . . . has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.' "[129]

While establishing that regulations which impinge upon broadcasters' first amendment rights must advance a substantial governmental interest, *League of Women Voters* identified the perpetuation of the marketplace of ideas as such an interest. The Court held that regulations designed to "ensur[e] adequate and balanced coverage of public issues" serve a substantial governmental interest.[130] Such regulation of broadcasting is necessary, the Court held, "to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed."[131]

Though the first amendment explicitly proscribes governmental regulation of speech, achieving the goals of this amendment in the context of the broadcast media requires some such regulation. Accordingly, Congress has established a statutory scheme, composed of the public interest standard, political access provisions, and the Fairness Doctrine, which allows the broadcast spectrum to be used to further the ends of the first amendment.

III.
TAKINGS AND UNCONSTITUTIONAL CONDITIONS

The multi-billion dollar broadcast industry is built upon government-granted licenses for the use of the airwaves. The government's responsibility to regulate the broadcast spectrum in the public interest has resulted in certain conditions which broadcasters must follow,[132] necessarily limiting their freedom to use both their licenses and their broadcast facilities. These conditions

also Muir v. Alabama, 688 F.2d 1033, 1037 (5th Cir. 1982) (en banc) ("The First Amendment operates to protect private expression from infringement by government; such protection applies both to the right to speak and the right to hear and is operative in a variety of contexts."), *cert. denied*, 460 U.S. 1023 (1983); *Red Lion*, 395 U.S. at 390 ("It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.").

127. 468 U.S. 364 (1984).

128. *Id.* at 380.

129. *Id.* at 377 (quoting CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973)).

130. *Id.* at 380.

131. *Id.* at 377.

132. *See supra* text accompanying notes 90-102.

affect not only a licensee's first amendment right to broadcast as she chooses,[133] but also her right to maximize profit from the use of the license and broadcast facility, a right derived from the fifth amendment prohibition on the government's taking of private property for public use without just compensation.[134] This Section discusses the extent to which government regulation may be permissible in light of this prohibition.

A. The Takings Doctrine

Government regulations which infringe upon private economic interests are unavoidable. If compensation were required for all regulations which impinge upon private property rights, whether tangible or intangible, the government's capacity for action would be severely constrained.[135] Accordingly, the Court has recognized "that government may execute laws or programs that adversely affect recognized economic values."[136] However, the fifth amendment imposes several conditions on governmental takings of private property. First, there must be a public purpose behind the appropriation.[137] Second, in principle, the government is required to compensate a private party for the value of the property taken.[138] However, a government regulation or action which results in only a partial loss of control or diminution in value of private property may not constitute a taking, and the government may not be required to compensate the private party.[139]

A government regulation resulting in an appropriation or diminution in the value of a private property is less likely to be deemed a compensable taking than is a physical invasion of property.[140] There is no clear rule for determining when a government regulation which does not involve the physical occupation of private property effectively "goes too far" and constitutes a compensable taking.[141] Where the regulation effectively destroys the economic value of the property, it is likely to be deemed a compensable taking.[142] Where the regulation partially reduces, but does not eliminate, the value of the

133. *Id.*

134. U.S. CONST. amend. V.

135. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

136. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

137. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984). In general, the courts will give considerable deference to a legislature's determination of what constitutes a public purpose. *Id.* at 239-41.

138. *See* L. TRIBE, *supra* note 48, at 590.

139. *See Penn Cent.*, 438 U.S. at 131 (where land use regulation is reasonably related to the promotion of the general welfare, diminution in property value, standing alone, cannot establish a taking).

140. *Id.* at 124.

141. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also Penn Cent.*, 438 U.S. at 124 (noting that there is no set formula for determining when compensation is required).

142. *Pennsylvania Coal*, 260 U.S. at 414 ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.").

property, the proportional reduction in the value of the property is relevant to a determination of whether there was a compensable taking.[143] Even where the diminution is not significant, compensation may be required if the infringing regulation is not closely related to the public purpose served by the regulation.[144] However, where the property retains much of its value despite the regulation, and the regulation is closely related to the public purpose, compensation may not be required.[145]

The Court has acknowledged that determinations as to whether a compensable regulatory taking has occurred are generally dependent upon the circumstances of the case.[146] The relevant factors include whether the regulation advances a public interest, whether it includes at least some reciprocal benefit to the individual, and whether the burden on the commercial value of the property is not too great.[147] Whether compensation is required depends on the balance struck between these factors and the property interest at issue.

B. The Unconstitutional Conditions Doctrine

When the challenged regulation reduces the value of something outside the scope of traditional property rights, such as government benefits and licenses, the regulation may create an unconstitutional condition on the grant of the benefit even though there is arguably no fifth amendment violation.[148] The unconstitutional conditions doctrine generally states that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[149] The government benefits which are subject to unconstitutional conditions challenges are generally those which the government is permitted, but not compelled, to provide.[150] If the government is compelled to offer a particular benefit, it may not do so conditionally, as the mandatory nature of the benefit creates a property right in the beneficiary.[151] This doctrine thus differs from the takings doctrine, because the right which is being infringed upon by the government is not the individual's property right in the government benefit.[152] Rather, the doctrine applies in those cases where an individ-

143. *Id.* at 413; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (the test for a regulatory taking requires comparing the value that has been taken from the property with the value that remains in the property).

144. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

145. *Penn. Cent.*, 438 U.S. at 138.

146. *Id.* at 124.

147. *See* L. TRIBE, *supra* note 48, at 597; *see also Penn. Cent.*, 438 U.S. at 124 (relevant factors include whether the interference with property constitutes a physical invasion, or intrudes on distinct investment-related expectations).

148. L. TRIBE, *supra* note 48, at 681.

149. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

150. *Id.* at 1423.

151. *Id.*

152. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (distinguishing conditions imposed on licenses or regulations from outright takings of property).

ual is being asked to surrender another constitutionally protected right in exchange for the government benefit or grant.

As with regulatory takings, the Court has not enunciated a clear test for the constitutionality of conditions on government benefits or regulations. There are, however, several factors which are generally considered in such cases. First, the Court has considered whether the condition is imposed on a government grant made under the spending power.[153] The congressional appropriation of funds pursuant to this broad power may include conditions in furtherance of public policy.[154] However, even the spending power is subject to several limitations. Thus, congressional expenditures must be made "in pursuit of the general welfare."[155] Additionally, if the expenditures are to be conditioned upon a requirement, the requirement must be unambiguous.[156] Finally, the requirement upon which the grant is conditioned must be related to the particular federal program at issue.[157]

The second factor is the "germaneness" of the condition, or whether it is related to the purposes of the grant or benefit.[158] This determination is critical to the constitutionality of the condition. "The more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast, are suspect."[159]

The third factor is the relationship between the condition and the governmental purpose which it is intended to serve. Generally, if the condition does not burden a fundamental right, the standard for the relationship between the benefit and the condition will be reasonableness, the lowest level of scrutiny.[160] In her dissent in *South Dakota v. Dole*, in which state eligibility for federal highway funds was linked to lower state speed limits, Justice O'Connor framed the reasonable relationship test by stating that the condition on gov-

153. South Dakota v. Dole, 483 U.S. 203 (1987).

154. *Id.*; *see also* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1957) (the federal government may impose reasonable conditions relevant to the federal interest in a project).

155. South Dakota v. Dole, 483 U.S. at 207; *see also* United States v. Butler, 297 U.S. 1, 65 (1936) (the power granted Congress to lay taxes in order to provide for the general welfare was intended to limit its power to raise and spend money).

156. South Dakota v. Dole, 483 U.S. at 207; Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981).

157. South Dakota v. Dole, 483 U.S. at 207; Massachusetts v. United States, 435 U.S. 444, 461 (1978).

158. *See* Sullivan, *supra* note 149, at 1457; L. TRIBE, *supra* note 48, at 1436-54; *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987) (where a construction permit may constitutionally be altogether withheld, a permit condition that serves the same legitimate purpose does not constitute a taking).

159. Sullivan, *supra* note 149, at 1457.

160. *See* Selective Serv. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984) (holding that denial of federal aid to eligible male students who fail to register with Selective Service does not violate a fifth amendment privilege and is plainly a rational means to improve compliance with registration requirements). *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Congress may employ all means that are rationally related to ends within the scope of its enumerated powers); L. TRIBE, *supra* note 48, at 303 (the standard set in *McCulloch* is the primary standard for judicial review of legislative action).

ernment spending at issue should be "appropriately viewed as a condition relating to how federal moneys were to be expended."[161] If the right burdened by the condition on the government grant or benefit is a fundamental right, a higher standard of scrutiny must be applied.[162] The relationship between the condition and the purpose of the government program to which it is attached must be substantial, and it must advance a legitimate state interest. Conditions on government programs which burden such rights as free speech,[163] free exercise of religion,[164] and the right to property[165] have been subjected to this higher standard of scrutiny.[166]

The presidential campaign expenditure limitation upheld in *Buckley v. Valeo* is a salient example of the legitimate use of a condition on government benefits.[167] The constitutional problem posed by expenditure limitations was overcome by the substantial relationship between the limitation and the governmental interest in the creation of a publicly-funded "level playing field" in financing presidential campaigns.[168] However, several years after *Buckley*, the Supreme Court found a condition on government funds to be an unconstitutional limitation on free speech in *FCC v. League of Women Voters.*[169] The Court acknowledged that a condition which required recipients of public broadcasting funds to refrain from editorializing furthered a substantial government interest "in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the Government."[170] The Court, however, determined that there were less

161. South Dakota v. Dole, 483 U.S. at 217 (O'Connor, J., dissenting).

162. Sullivan, *supra* note 149, at 1426-28.

163. Buckley v. Valeo, 424 U.S. 1 (1976); *see also* California v. LaRue, 409 U.S. 109 (1972) (upholding a prohibition on explicitly sexual live entertainment as a condition of issuing licenses to sell liquor though such prohibition may have infringed on licensee's first amendment rights).

164. Sherbert v. Verner, 374 U.S. 398 (1963) (holding that unemployment benefits may not be denied by a condition which burdens a right protected by the free exercise clause).

165. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that the condition attached to a land permit did not serve the public purposes of the permit requirement, and therefore could not be imposed without compensation).

166. *See* Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. REV. 247 (1990). Judge Wald has proposed that strict scrutiny should be applied to conditions which burden government benefits, arguing that "denial of government benefits based on the exercise of a constitutional right should be recognized as the penalty it is, triggering strict scrutiny to assure relevance to the aims of the program which provides the benefits." *Id.* at 259. In practice, the application of such a standard would invalidate almost any condition on government benefits which impinges upon constitutional rights.

Judge Wald's proposal grows out of the concern that since the 1970s, the Court has increasingly been allowing government benefits to be conditioned upon restrictions which burden protected rights. *Id.* at 253-55. Judge Wald suggests that the courts are less likely to uphold a regulation which burdens a constitutional right directly than they are when that right is attached to a government grant or benefit. Her concern is that discriminatory regulations will be attached to government benefits if the trend of upholding such regulations continues. *Id.* at 263-64.

167. Buckley v. Valeo, 424 U.S. 1 (1976); L. TRIBE, *supra* note 48, at 783.

168. *Buckley*, 424 U.S. at 26-28.

169. 468 U.S. 364 (1984).

170. *Id.* at 395.

restrictive means of serving that interest, and struck down the condition at issue.[171] The recent trend of the Supreme Court has been to uphold conditions on government grants or benefits which would be unconstitutional were they not tied to the grants or benefits.[172]

The fifth amendment's proscription against government appropriation of private property is not an absolute prohibition. Rather, it is a requirement that when the government appropriates private property for public use, the private owner of the property must be justly compensated.[173] The language of the amendment thus recognizes that there are circumstances in which the public interest requires that private rights be abridged. The problem at the heart of the takings, regulatory takings, and unconstitutional conditions doctrines is determining when these circumstances exist.[174] Some conditions, such as the limitation on candidates' speech in *Buckley*, further the purposes of the government programs to which they are attached. In these cases, the surrender or limitation of the grantee's right may better serve the public interest which is at the heart of the program.

IV.
THE CONSTITUTIONALITY OF REQUIRING BROADCASTERS TO PROVIDE FREE TELEVISION ADVERTISING TIME TO CANDIDATES FOR FEDERAL OFFICE

The proposal that broadcasters should be required to provide a certain amount of time to certified candidates for federal office as a condition of receiving their licenses, and that the allocation of this time, in turn, should be conditioned on the candidates' foregoing the purchase of any other advertising time, could be challenged by both broadcasters and candidates as a violation of their constitutional rights.[175] Candidates may argue that their first amendment rights would be violated by the restriction on their purchase of additional television time. Broadcasters, in turn, may contend that the proposed requirement would violate their right to free speech by dictating what programming they must provide. They may also argue that since this requirement interferes with their right to maximize their profits, and could potentially cost them millions in advertising revenue,[176] it would violate their fifth amendment rights. This Note argues that the proposal survives each of these constitutional challenges.

171. *Id.* at 381, 395. The Court stated that the regulation would be upheld if it was "narrowly tailored to further a substantial governmental interest," the standard generally applied to conditions which burden fundamental rights. However, in striking down the restriction, the Court referred to the "least restrictive means" of achieving that purpose, a standard generally associated with strict scrutiny.

172. *See generally* Sullivan, *supra* note 149; Wald, *supra* note 166.

173. U.S. CONST. amend. V.

174. *See* L. TRIBE, *supra* note 48, at 605.

175. *Failures in a Political System Spur Momentum for Change*, N.Y. Times, Mar. 21, 1990, at A1.

176. *Id.*; *see also* CENTER FOR RESPONSIVE POLITICS, *supra* note 1, at 46.

A. Potential First Amendment Challenges to Limiting Candidates' Advertising

As a condition of receiving a grant of television advertising time, candidates for federal office would be required to forego any other television advertising. Because it is not a content-based regulation of candidates' speech, this requirement is not a prima facie violation of the first amendment. Instead, the connection between the government grant of advertising time and the limitation on candidates' television advertising should be analyzed as an unconstitutional condition.[177]

The Court in *Buckley v. Valeo* held that a limitation on candidates' spending in furtherance of their campaigns did not violate candidates' free speech rights.[178] The Court's analysis of the expenditure limitation and its purposes illustrated the instrumentality of the limitation to the goals of FECA as a whole. Without the limitation on expenditures, the goal of equalizing candidates' campaign expenditures would be unattainable. Thus, the limitation was determined to be a valid condition on the grant of federal funds.

In *Buckley*, a limitation on candidates' spending was unsuccessfully challenged as violating their free speech rights. A limitation on candidates' television advertising might, however, come even closer to infringing on the candidates' protected speech. *Buckley*'s holding that the limitation on candidates' spending did not violate the first amendment is a starting point for determining whether limitations on television advertising time are also constitutional. The constitutional issues are similar in both instances. The proposed limitation would be a voluntary condition on the receipt of a government benefit, which would require the surrender of a constitutional right.[179] Unlike the condition imposed in *Buckley*, the benefit is not pursuant to the congressional spending power, so there need not be a demonstration that the limitation is being made for the general welfare. The condition need only be germane to the purposes of the grant of television advertising time and must further a substantial governmental interest.

Like the public financing of candidates for federal elective office, free television advertising time is designed to increase and equalize access to the electoral process. This goal is accomplished not only by the grant of free time, but also, in part, by the limitation on the time candidates might otherwise purchase. The limitation on campaign spending is an example of how conditions on government benefits can further the goals of government programs.[180] Like the spending limitations accompanying public financing, the proposed

177. *See supra* text accompanying notes 149-66.

178. Buckley v. Valeo, 424 U.S. 1 (1976). The Court in *Buckley* did not analyze this as an unconstitutional condition. But see L. TRIBE, *supra* note 48, for an analysis of the spending limitation as a valid condition on a government grant.

179. *Buckley*, 424 U.S. at 95. The fact that the condition was voluntarily imposed was important to the Court's determination that it was not unconstitutional.

180. *See* L. TRIBE, *supra* note 48, at 783.

limitation on the advertising time a candidate may purchase is essential to the goals of the initial grant of television time.

The substantial governmental interest in equalizing candidates' access to the political process and the broadcast media has been affirmed by both Congress and the courts. With FECA, Congress determined that public financing of campaigns and the limitation on candidates' spending furthers the nation's interest in freeing candidates from financial constraints, and facilitates the "public discussion and participation in the electoral process, goals vital to a self-governing people."[181] Additionally, the Fairness Doctrine and the requirement of "reasonable access" to the broadcast media for political candidates further the governmental interest in fostering free speech and ensuring that the airwaves are used in the public interest.[182]

The proposed limitation on candidates' television advertising is a valid condition on the government grant of advertising time. It serves the purposes of the grant of advertising time by providing candidates with equal access to the broadcast media. The limitation also furthers the governmental interest in promoting public participation in, and equalizing candidates' access to, the election process.

B. Potential First Amendment Challenges to Requiring Provision of Broadcast Time

1. Constitutionality in Light of Traditional Principles of Free Speech

The Court has upheld regulations which distinguish between advertising and other programming as content-neutral regulation of subject matter.[183] In *CBS v. Democratic National Committee*,[184] the Court rejected the argument that "advertising time, as opposed to programming time, involves a 'special and separate mode of expression' because advertising content, unlike programming content, is generally prepared and edited by the advertiser."[185] Additionally, in *Lehman v. City of Shaker Heights*,[186] the Court upheld a distinction between commercial advertising and public-issue advertisements as a valid content-neutral distinction.[187]

The proposed requirement that broadcasters provide advertising time to candidates specifies that broadcast time must be dedicated to a certain subject matter—political advertising. However, because it specifies only the subject matter and not the content of the advertising, it is a content-neutral regula-

181. *Buckley*, 424 U.S. at 92-93.

182. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

183. *See generally* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) (examining the difference between content-based and content-neutral restrictions in order to illuminate the Court's conflicted treatment of subject-matter restrictions).

184. 412 U.S. 94 (1973).

185. *Id.* at 130-31.

186. 418 U.S. 298 (1974).

187. *Id.* at 303.

tion, and thus does not facially violate the first amendment. A content-neutral regulation must be narrowly tailored to serve a substantial governmental interest.[188] As the Court has reiterated on several occasions, the government clearly has an interest in "ensuring adequate and balanced coverage of public issues."[189]

The proposed requirement will be considered "narrowly tailored" only if there are no alternative means by which the governmental interest in ensuring broad access to the media might be served.[190] Recognizing the prohibitive costs of political campaigns, Congress has developed various mechanisms for providing public financing; however, they have not been sufficient.[191] Television advertising is one of the greatest expenses of campaigning, and, because of its cost, is not equally accessible to all candidates. Only through regulation can the candidates be assured equal access to television advertising, a crucial resource in modern political campaigns.[192]

2. *Constitutionality in Light of the Problems of the Broadcast Media*

Regulation of the broadcast media is grounded in the public ownership of the airwaves and the limited nature of the spectrum.[193] Because of the limited nature of the spectrum, Congress has adopted regulations such as the public interest requirement, the Fairness Doctrine, and the political access rules, with the goal of providing a forum for the free exchange of ideas.[194] Advertising costs are affected by scarcity, as well. As discussed above, regulation has been necessary to ensure that the government-controlled monopoly of the spectrum does not artificially increase the advertising rates to candidates.[195] The proposed requirement that broadcasters provide free advertising time to candidates is consistent with existing statutes which regulate the broadcast spectrum in the public interest and limit the costs of television advertisements purchased by political candidates.

In *CBS v. Democratic National Committee*,[196] the Supreme Court held

188. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984); United States v. O'Brien, 391 U.S. 367 (1968).

189. FCC v. League of Women Voters, 468 U.S. 364, 380 (1984); *see also* Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust and wide-open' public debate concerning matters of public interest would thrive.").

190. Metromedia, Inc. v. San Diego, 453 U.S. 490, 508 (1981) (plurality opinion); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980).

191. *See supra* text accompanying notes 30-37.

192. Even if the proposal were analyzed as a violation of broadcasters' first amendment rights, it would still survive the test for an unconstitutional condition. The condition is clearly germane to the government's purpose of regulating the broadcast media in the public interest and equalizing access to television advertising between candidates for federal office. In addition, the government has a substantial interest in providing access to the broadcast media for political candidates.

193. *See supra* text accompanying notes 120-23.

194. *See supra* text accompanying notes 83-102.

195. *See* 47 U.S.C. § 315(b) (1988); *supra* text accompanying notes 96-99.

196. 412 U.S. 94 (1973).

that the public interest standard may not be used to require broadcasters to accept all paid advertising.[197] This does not, however, preclude the proposed requirement that broadcasters provide advertising time to specified candidates. In *Democratic National Committee*, the Court was concerned that requiring broadcasters to accept all advertising would enable private parties to control the content of the airwaves.[198] A related concern was that the requirement would eliminate journalistic discretion, which is protected by the first amendment and required by the Communications Act.[199]

These concerns stem from the fear that a requirement that broadcasters accept all advertising would result in the use of the spectrum for purposes other than the furtherance of the public interest. The Court observed that the Fairness Doctrine's requirement that response time be provided for the presentation of opposing views only applied to responses to broadcaster-generated coverage, not to paid advertisements.[200] A requirement that time be provided in response to advertisers, the Court felt, would allow those with the most money to dominate public debate.[201]

The proposed limitation on candidates' purchase of additional time in return for equal, cost-free access for all candidates specifically addresses the Court's concerns. The limitation would allay the Court's fears about monopolization of the spectrum with campaign commercials. Also, in providing time to candidates free of charge, it eliminates rather than exacerbates the influence of money in determining broadcasters' agendas. The rejection of the requirement that broadcasters accept all advertisements thus in no way implicates the proposed requirement that broadcasters provide advertising time to candidates.

The Court's later decision in *CBS v. FCC*[202] upheld the requirement that broadcasters provide candidates "reasonable access" to advertising on their frequencies. This, more than the holding in *Democratic National Committee*, is analogous to the proposal that candidates be provided advertising time. By holding that candidates are entitled to access to the airwaves during campaigns, the Court has paved the way for requiring broadcasters to provide advertising time to candidates free of charge.

C. *Takings Challenges to Regulation of the Broadcast Media*

A further issue remains to be addressed, that is, whether a condition

197. *Id.* at 121.
198. *Id.* at 113.
199. *Id.* at 118.
200. *Id.* at 111 (affirming the "*Cullman* Doctrine," which states that "in fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views [in response to broadcaster generated coverage] if a paid sponsor is unavailable").
201. *Id.* at 123 ("If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed.").
202. 453 U.S. 367 (1981).

which requires broadcasters to provide free advertising time to candidates may be challenged as a "regulatory taking," a government regulation diminishing the value of property without just compensation. The Communications Act explicitly states that broadcasters have no property interest in the use of the spectrum. The license is designed to provide for the use of the spectrum, "but not the ownership thereof, by persons for limited periods of time . . . and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."[203] It is clear that the license is not the property of the broadcaster, but is issued by the government upon specific conditions "if public convenience, interest, or necessity" require.[204] Thus, a condition imposed upon this license is not a "taking" of property but a condition on a benefit which the government is not compelled but permitted to provide.

The requirement will undoubtedly infringe on the broadcasters' earning potential, and would therefore be subject to the unconstitutional conditions analysis.[205] Because the grant of a broadcast license is not made pursuant to the congressional spending power, the limitation need not be made in furtherance of the general welfare. It must, however, be germane to the purposes of the grant of a license, and must serve a substantial governmental interest.[206]

The requirement of germaneness is clearly satisfied. The system of regulation of the broadcast spectrum is based on the premise that the spectrum is a public resource, to be used in the public interest. The requirement that licensees provide advertising time to political candidates is closely related to the purpose for which licenses are granted.

In order to uphold the proposed condition, it must also further a substantial governmental interest. As previously discussed, the government's interest in regulating the broadcast media for the public good and in ensuring balanced coverage of issues of public importance have been determined to be substantial governmental interests.[207] Additionally, the public financing of federal campaigns has been held to further the governmental interest in fostering the public debate that is essential to the electoral process.[208] The proposed requirement serves both interests.

CONCLUSION

As spending in presidential campaigns began to increase dramatically in the 1970s, Congress instituted a series of reforms aimed at providing public financing for presidential primaries and general election campaigns. In recent years, additional proposals have suggested an expansion of public support for

203. 47 U.S.C. § 301 (1988).
204. *Id.* § 307(a).
205. *See supra* text accompanying notes 149-66.
206. *See supra* text accompanying notes 158-66.
207. *See supra* text accompanying notes 130-31.
208. Buckley v. Valeo, 424 U.S. 1, 91 (1976).

political campaigns. One such proposal would require licensees of the broadcast spectrum to provide free television advertising time to candidates for federal office. This requirement would reduce the costs of campaigns for federal office, while the concomitant restriction on candidates' purchase of additional advertising time would level the playing field in political races.

The proposal raises several constitutional issues. The first issue is the potential first amendment violation inherent in the limitation on candidates' speech. The Court has held that a limitation on candidates' campaign expenditures does not violate the first amendment if it is a condition on the voluntary acceptance of public campaign financing. It follows that a similar limitation on candidates' broadcast advertising during campaigns would not be a violation of the first amendment. The second question is whether the government may require broadcasters to broadcast certain prescribed material, in this case political advertising for eligible candidates, without violating the first amendment. The government's responsibility to regulate broadcast programming for the public interest gives rise to a right to require that licensees of the broadcast spectrum provide a certain amount of time to candidates for their campaign advertising. The final constitutional question is whether the government's requirement of the provision of this time constitutes a taking of the broadcasters' property or an unconstitutional condition on the broadcast licenses. It is not a taking of property, because it is a condition on the issuance of a license which is itself a government benefit. The government-imposed condition does create a diminution in the value of the license and of the broadcast station, but the condition is valid due to the government's interest in regulating the broadcast spectrum. The requirement that broadcasters provide advertising time is neither a regulatory taking nor an unconstitutional condition on the grant of the license. The requirement is related to the purposes of the license, and furthers the government's interest in fostering the political debate essential to the democratic process. It is therefore a valid government regulation.

The major constitutional problems resolved, the remaining problem is political. Due to their high public profiles and resulting superior ability to garner financial support, incumbent members of Congress have much greater access to television and to the purchase of advertising time than do their challengers. These elected officials can only lose by the provision of equal time to challengers and incumbents alike. Legislators must be convinced that the provision of free advertising time for candidates for the House, the Senate, and the presidency furthers the public interest in enhancing public participation and confidence in the electoral process.