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The law, imagery and televised campaign advertising: A legal analysis of the constitutionality of restricting external imagery in televised campaign advertising for federal office

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THE LAW, IMAGERY AND TELEVISED CAMPAIGN ADVERTISING:

A LEGAL ANALYSIS OF THE CONSTITUTIONALITY OF RESTRICTING EXTERNAL IMAGERY IN TELEVISED CAMPAIGN ADVERTISING FOR FEDERAL OFFICE

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THESIS ACCEPTANCE

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ABSTRACT

The possible effects of external imagery in televised political campaign advertising upon our electoral system, coupled with the current public interest in this area, could lead to a call for legislation restricting televised political advertisements to a "talking head" format.

This study found that a statute regulating televised political campaign advertisements in this manner would violate the first amendment to the United States Constitution.

The regulation of external imagery would not be a valid time, place and manner restriction because external imagery is compatible with messages on the television medium and the regulation of external imagery would not be content-neutral.

It is unlikely that the courts would find the regulation to be a valid content-based restriction because a compelling government interest does not exist.

This study concludes that the best solution to the problems presented by external imagery in televised political advertising is not for government intervention, but for the citizens and the press to be actively involved in political affairs.

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CHAPTER ONE

INTRODUCTION

David Ogilvy, the famous advertising copywriter, once remarked, "the day will come when candidates are elected by polls, rather than polling booths."[1] Ogilvy understood advertising's influence over public perception, so it did not surprise him that candidates would use this power to achieve their political ends.

Over the past forty years, candidates have become media literate and televised presidential campaign advertising has evolved into a useful, sophisticated and sometimes controversial campaign tool.

Recently, popular interest in this area has increased dramatically and a large number of magazine articles, dealing exclusively with televised political campaign advertisements, have appeared.[2] This popular interest has caused many citizens to become polarized in their views on this topic.[3] Supporters of televised presidential campaign advertising claim that these ads offer tremendous advantages to political

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[1] R. SPERO, THE DUPING OF THE AMERICAN VOTER 20 (1980).

[2] A check of The Reader's Guide to Periodical Literature shows that in 1952, the year televised spot advertising began, there were no articles published that dealt specifically with this form of advertising; however in 1988, 28 such articles appeared. These articles are representative of the increased interest and concern among the lay public with televised political advertising.

[3] L. KAID, D. NIMMO, & K. SANDERS, NEW PERSPECTIVES ON POLITICAL ADVERTISING. 108, (1986).

campaigns.[4] Proponents argue that political ads are a practical application of the repetition research in brand-name advertising, have a low cost-per-thousand price and can reach undecideds and nonsupporters rather than only those voters already in favor of a candidate.[5]

While this form of advertising does have its supporters, others are questioning its effect on our electoral system.[6] One of the main concerns about televised political advertising involves the imagery in these ads. Critics are concerned that televised political advertising is becoming more image than information and that this is damaging our democratic process.[7]

Discussing image in paid political spot advertising is difficult, in part, because the concept of image is often used in two legitimate, but categorically different ways.[8] One method of defining image involves examining image in terms of the internal characteristics of the candidate. In other words, what does the candidate's presentation style and use of non-verbal language tell viewers about the candidate's character?[9] While these attributes may have power over the voter's perception of the candidate, they are too deeply attached to the candidate's personality to be practically regulated

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[4] Id.

[5] Id.

[6] Diamond, A Candidate for All Channels, 5 AM. FILM 28, 32 (1980).

[7] Zuckerman, The Made-for-TV Campaign, 103 TIME 66, (1988).

[8] KAID, NIMMO & SANDERS, supra note 3 at 113.

[9] Id. at 114.

by law. This definition of image will be beyond the scope of this thesis.

It is the second definition of image that this thesis will be concerned with. Under this definition, image is seen in terms of external factors.[10] Image in this sense distinguishes between straight "talk-to-the-camera" formats of internal image and the more complex production techniques of external image which use still and moving pictures, fast cutting, music and symbolism in an effort to define and shape a candidate's image. External image is the use of image techniques external or outside of the candidate in order to shape or define a candidate's image.

The possible effects of external imagery upon our electoral system, coupled with the current public interest in this area, could lead to a call for the regulation of external imagery in televised presidential campaign advertising.

Regulating political advertising has always been difficult for lawmakers because attempts to regulate it often violate the first amendment of the United States Constitution. This thesis will examine from a legal perspective whether legislation restricting televised political advertisments to a "talking head" format would be constitutionally permissible.

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[10] Id. at 113.

CHAPTER TWO

LITERATURE REVIEW

Before the specific topic of this thesis can be explored, some background information on imagery and televised presidential campaign advertising is required. This section will explore the development of televised presidential campaign advertising and the current legal limitations and protections upon its content. This section will conclude with a summary of the studies on imagery in political advertisements and the legislative response to this problem.

I.The Development of Televised Presidential Campaign Advertising

A.Early History

The use of televised presidential campaign advertising can be traced to the early days of the broadcast industry. In the beginning, radio broadcasts had corporate sponsors, but no direct advertising was allowed on the radio.[11] During the 1920's broadcasters began selling short spaces of time to advertisers and it was not long before politicians saw an opportunity to reach potential voters. In 1924, presidential candidates John W. Davis (Democrat) and Calvin Coolidge (Republican) bought radio

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[11] Diamond & Bates, The Last Hurrah 21 NEW YORK 31, 36 (1988).

time in order to broadcast their speeches. The Republicans spent $120,000 on radio and the Democrats spent $40,000. The Republicans won.[12]

The first political spots were broadcast four years later when the Republicans organized 6,000 'Minute Men' from all over the country to present brief radio talks on behalf of the Republican ticket. Scripts were sent in advance, so that the same talk was given nationwide on a particular day.[13]

Motion pictures were used in 1934 to carry phony newsreels of staged events. These crude experiments became the model for the televised political campaign commercial when television rose to prominence during the early 1950's.[14] Following World War II, the television industry grew and it was not long before political parties saw that television was the future of political campaigning.[15]

The first use of the television commercial for political purposes was during the Eisenhower campaign of 1952. Eisenhower's campaign staff found through a Gallup poll that Americans were most concerned about the war in Korea, corruption in

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[12] Id. at 36.

[13] Id.

[14] See, Mitchell, How Media Politics was Born 39 AM. HERITAGE 34 (1988). In 1934, muckraker Upton Sinclair was a Democratic candidate for governor in California. Conservatives saw Sinclair's program to end poverty as a Bolshevik plan to re-distribute wealth. These conservatives hired an ad agency and Whitaker and Baxter (America's first political consulting firm) to produce these newsreels. One spot featured a "bum" getting off a train in California and saying "Sinclair says he will take the property of working people and give it to us." These spots were shown in movie theaters between features thanks to Louis B. Mayer, head of MGM studios and a power in the California Republican party. Id.

[15] C.THOMPSON, TELEVISION AND PRESIDENTIAL POLITICS: THE EXPERIENCE IN 1952 AND THE PROBLEMS AHEAD 4 (1956). Television coverage of the 1948 Republican convention demonstrated that television would have an impact on how campaigns were run. Politicians, who were conscious of a new, larger, unfamiliar, and unpredictable audience, arranged the convention's itinerary so that the dull items would be disposed of during the day and important events would fall during the televised evening hours. Id.

Washington and inflation.[16] In order to grab the public's attention, a series of television commercials were developed based on these three themes. Once developed, these commercials saturated the east and midwest[17] for three weeks.[18]

According to Ben Duffy, one of the ad men on the campaign,"the approach was one of merchandising Eisenhower's frankness, honesty, and integrity."[19] Through these commercials, the Republicans sought to reach the non-voter and not necessarily the vote-switcher.[20]

While Eisenhower used the television medium effectively, his Democratic opponent Adlai Stevenson found adapting to television difficult. While Eisenhower was simplifying his messages in order to appeal to a television audience, Stevenson seemed to be "more concerned with the literary quality of his speeches, than with the projection of himself over television."[21]

Television played a substantial role in the 1956 presidential elections[22] and was one of the primary reasons that Eisenhower decided to run for re-election.[23] The

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[16] SPERO, supra note 1 at 35.

[17] Eisenhower's support was weakest in these areas.

[18] See SPERO, supra note 1, for a detailed examination of Eisenhower's campaign.

[19] Spero, supra note 1 at 35.

[20] Thompson, supra note 15 at 59.

[21] B. RUBIN, POLITICAL TELEVISION 34 (1967).

[22] Allen, Our First "Television Candidate: Eisenhower over Stevenson in 1956 65 JOURNALISM Q. 352 (1988). (An examination of the impact of television on the 1956 Presidential campaign).

[23] Id at 354. According to Allen, Eisenhower, who was recovering from a heart attack in 1955, doubted whether he had the physical ability to endure the demands of heavy campaign traveling. With television, Eisenhower could reach a large number of voters without traveling and would only need to travel to critical

election of 1956 was a watershed year which changed the entire nature of Presidential campaigning. One of the reasons for this change was the growth of television. In 1952, television was seen in only 37% of American homes, by approximately only 50 million people.[24]

However, by 1956 television had grown dramatically and was now reaching 76% of American homes in all 48 states. An additional 60 million people were able to watch presidential politics for the first time.[25] Another reason that television was important in 1956 was that it allowed candidates to end the "whistle stop" campaign.[26]

While the Republican party was effectively learning how to use this new technology, the Democrats were still having a difficult time adapting to television.[27] The emerging importance of television to the presidential campaign of 1956 caused both Republicans and Democrats to take a closer look at this new technology and to

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areas. Id.

[24] Id at 352.

[25] Id.

[26] Id at 355. According to Allen, the "whistle stop" campaign was a political mainstay from at least 1928 through 1952. Whistle stopping was more than just a campaign tradition, it gave voters lasting in-person impressions. The physical presence of presidential candidates was seen as an offering to grass-roots party leaders, who returned the favor with a broad-based local support for the candidate. With the introduction of high-speed aircraft and television, whistle stopping was abandoned for "surgical" campaigning in which personal time was reserved for critical areas and television was utilized for broad appeal and support. Id.

[27] Id at 356. According to Allen, the Democrats had difficulty raising the funds necessary to use television and had a difficult time finding advertising agencies (who did not want to offend their Republican clients) to represent them. Perhaps the worst problem that the Democrats faced was the inability of Democratic candidate Adlai Stevenson to adapt to television. Stevenson refused to read a speech from a teleprompter and often lost his place in the speech. He often did not finish a speech on time and would just fade to black.

re-examine their campaigning techniques.[28]

The 1960 election was a strange time in the development of televised presidential campaign advertising. By 1960, television had penetrated into most American homes and the political use of television for presidential campaigning had become accepted practice. The Republicans were learning to use television effectively in order to achieve their ends while the Democrats were beginning to see the necessity of including television in their campaign strategy.

The use of television advertising for campaign purposes was not without its detractors.[29] Criticism of televised presidential campaign advertising dramatically affected Richard Nixon in 1960. Nixon was one of the early masters of political marketing. In the California Senate race of 1950, for example, Nixon won by a landslide after distributing his notorious "pink sheet" in order to discredit his opponent Helen Gahagan Douglas.[30] While Nixon believed in the power of television, the

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[28] One attempt to use television advertising to change Stevenson's "egg head" image and make him identifiable to the common man, came in Stevenson's "Man from Libertyville" spot. This spot showed Stevenson, his son and his daughter-in-law, carrying groceries into the candidate's farmhouse. Stevenson pauses at the door still holding his grocery bags and discusses the high cost of living. After he gives his speech, the daughter-in-law takes the bag from Stevenson and says kiddingly, "You're a big help." Stevenson replied with a chuckle,"Oh, I forgot to deliver the groceries and made a speech instead."

[29] V. PACKARD, THE HIDDEN PERSUADERS 175 (1957) With the increased use of television technology by Presidential candidates, many Americans were concerned about the effects of television on the political process. In a 1956 issue of the Nation's Business, a magazine published by the United States Chamber of Commerce, a prediction was made: "Both parties will merchandise their candidates and issues by the same methods that business has developed to sell goods. These include scientific selection of appeals; planned repetition. . . No flag waving faithfuls will parade the streets. Instead corps of volunteers will ring doorbells and telephones. . . Candidates need in addition to rich voice and good dictation, to be able to look sincerely at the T.V. camera." Id.

[30] Comment, Misrepresentation in Political Advertising: The Role of Legal Sanctions, 36 EMORY L.J. 853, 856 (1987).

emerging controversy regarding televised political advertising caused him to fear having the "Madison Avenue" label attached to him.

Originally Nixon had planned to carry his message to the American voter through the most imaginative use of television ever displayed in a national campaign.[31] To do this, Nixon had enlisted the aid of some of the brightest and most talented men in the field.[32] These top-level planners and volunteers assumed that they would be allowed to experiment with the medium, so they designed a campaign "to use the medium as it had never been used before."[33] However, because of the public concern over televised political advertising, Nixon could not bring himself to either approve or disapprove the plans of his television advisors.[34] As Nixon's television advisors watched the progress of the 1960 campaign, it became apparent that Nixon was ignoring them and was not going to use their ideas.[35] In the end, from July 25-the night of Nixon's acceptance speech in Chicago- until October 25, three months went by in which Nixon did not appear on television with control over the circumstances.

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[31] T. WHITE, THE MAKING OF THE PRESIDENT-1960 312 (1961).

[32] Id. at 312.

[33] Id.

[34] Id. According to White, Nixon feared the "Madison Avenue" label so much that he moved his television advisors, some of the finest brains of New York's advertising agencies, into an unmarked office on Vanderbilt Avenue in New York, one block east of Madison Avenue, in order to avoid this label. Id.

[35] Id. at 313. The fact that they were being ignored and their elaborate work was going to die a "still death," cause a considerable amount of discontent among the advisors. According to one of the directors, "You could have taken the key to the Republican National Committee, locked the door, thrown the key into the Potomac, shipped all hundred and seventy-five employees off to the Virgin Islands and saved money-for all that he ever listened to us." Id. Another member said, "We used to meet for strategy sessions at the University Club- and we were like ten guys in a house of mirrors entrancing each other. We satisfied each other with how smart we were-but nobody could get through to Dick." Id.

Many experts believe this cost him the election. Nixon's only commercial during the campaign showed Nixon as the strong "cold warrior." In this "talking head" spot, Nixon declared, "We must never let the Communists think we are weak . . . And so I say, let's not tear America down. Let us speak up for America."

John Kennedy, on the other hand, had learned from his party's mistakes in the 1950's and developed a plan for using television to create a positive image of himself. Kennedy became a master of imagery. He flew instead of driving so that he could get dramatic television coverage of enthusiastic crowds waiting to greet him at airports.[36] He also exercised a tremendous amount of control over the film PT 109, which told the story of John Kennedy, the war hero. This movie had a tremendous impact on the public's perception of Kennedy.[37] Once president, Kennedy would also be quick to cancel any prerecorded films which showed him in an unfavorable light.[38]

According to Joseph Benny, author of John F. Kennedy and the Media: The First Television President, "In Marshall McLuhan's terms, Kennedy can be perceived as a cool candidate on a cool medium-television. Knowing the effect of television on politicking, he took full advantage of it. Campaigning for president, Kennedy demonstrated a futuristic understanding of television."[39]

"The timing of his (Kennedy's) half-hour shows," according to Theodore

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[36] J. BENNY, JOHN F. KENNEDY AND THE MEDIA: THE FIRST TELEVISION PRESIDENT 24 (1987).

[37] Id. at 26.

[38] Id. at 24.

[39] Id. at 36.

Sorensen, a campaign insider on Kennedy's campaign, "was carefully selected with an eye to what programs would be displaced, thus displeasing their fans. Five minute spot presentations were also strategically placed at the end of popular shows."[40]

Kennedy used television to achieve three goals: to become a nationally recognized political figure; to prove that a Catholic could be elected president by discussing the issue openly; and to show that despite his youth, he was not "too inexperienced."[41] One spot that Kennedy used to address the Catholic issue had a young Kennedy with a microphone in his hand declaring, "There is no article of my faith that would in any way inhibit-I think it encourages- the meeting of my oath of office." Kennedy achieved his goals and defeated the well-known Nixon.

B. Televised Presidential Campaign Advertising Comes of Age.

It was during the 1964 presidential elections that campaign commercials actually came of age. Campaign strategists, analyzing the last twelve years of campaigning, found that the media can have an effect on a candidate's image. The Nixon/Kennedy debates, for example, showed the power of appearance.[42]

Many changes occurred in presidential campaign advertising at this time. Campaign commercials were no longer just innocent experiments. Instead, they became aggressive and manipulative campaign tools. Both parties hired advertising

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[40] T. SORENSEN, KENNEDY 220 (1965).

[41] BENNY, supra note 41 at 27.

[42] According to Melvyn Bloom, author of Public Relations and the Presidency, people who had heard Nixon on the radio thought that he won. Those that saw him on television judged Kennedy the winner. This was attributed to Kennedy's better appearance.

agencies to handle their television advertising[43] and committed large sums of money to advertising. The Democratic National Committee reportedly had a budget of around $4 million set aside for advertising, most of which was for television. Network television accounted for $1.7 million, with the remainder of the broadcast fund set aside for televised "spot" ads.[44] The Republican National Committee allegedly had $4.8 million budgeted for advertising their national candidates, with all but around $200,000 set aside for national television.[45]

The role of the media advisor also changed during this time. Originally, media consultants were technicians who would purchase air time, check the lighting, supervise the makeup, arrange the set and time the speech.[46] These people had very little voice in campaign strategy. President Johnson changed all that. Under Johnson, the role of the media advisor changed from that of a technical advisor, unwelcome at strategy sessions, to that of a campaign insider. Media consultants were now responsible for the strategy of the campaign's advertising and often its communication strategy as well.[47]

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[43] The Democrats hired Doyle, Dane, Bernback, Inc. and the Republicans were represented by Erwin Wasey, Ruthrauff & Ryan, Inc. a subsidiary of the Interpublic Group of Companies, Inc.

[44] Rubin, supra note 18 at 185.

[45] Id.

[46] K. JAMIESON, PACKAGING THE PRESIDENCY 35 (1984).

[47] Id. at 36.

These changes allowed "slicker," creative and more effective commercials to be produced.[48] Johnson's commercials, while considered "classics" in political advertising today, were considered very controversial in 1964. Johnson's famous Daisy spot[49], for example, depicted a little girl counting as she pulls petals off a daisy. Suddenly a man's voice begins to count backwards from ten. As he reaches zero an atomic explosion fills the screen. While the mushroom cloud expands, Johnson's voice says, "These are the stakes, to make a world in which all of God's children can live, or to go into the darkness. We must either love each other or we must die." An announcer then urges voters to "vote for President Johnson on November third. The stakes are too high for you to stay home." Even though the Daisy spot never mentioned candidate Barry Goldwater's name, Johnson's media men were able to play upon the "bomb" paranoia of the 1950's and early 60's, and succeeded in portraying Goldwater as an irresponsible man ready to start atomic warfare. Johnson, in contrast, was presented as a man of peace.[50]

With the strong impact of this commercial, Republicans were naturally upset. Barry Goldwater said, "The homes of America are horrified and the intelligence of Americans is insulted by weird television advertising by which the Administration

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[48] The themes of the 1964 election commercials were issues of foreign policy, morality and peace for the Republicans, while the Democrats concentrated on taking the record of the Administration to the American people.

[49] Aired September 7, 1964 during the NBC-TV Monday Night at the Movies showing of "David and Bathsheba."

[50] See Spero, supra note 1 for a detailed analysis of Johnson's advertising.

threatens the end of the world unless all-wise Lyndon is given the nation for his very own."[51]

The "Daisy" spot was not an isolated incident. Other Johnson spots were also controversial. One such spot took advantage of a statement Goldwater had made earlier in the year when he said, "Sometimes I think this country would be better off if we could just saw off the Eastern seaboard and let it float out to sea." The Democrats used this statement in a spot showing a representation of the United States with a saw separating the Eastern seaboard while Goldwater's comment is repeated. This spot caused Dean Burch, the Republican National Chairman, to issue a statement criticizing the Democratic party for a campaign based upon "slanted, biased and fraudulent propaganda which is unparalleled in American political history."[52]

While the Democrats generally are remembered for their contribution to negative advertising during the 1964 elections, the Republicans were far from innocent. For example, one of Goldwater's themes was morality. In an attempt to bring this theme to the voting public, a half-hour paid documentary was presented on this subject. The purpose of this advertisement was to show how Johnson was allowing this country to morally decay.[53] This film, which was titled "Choice," was sponsored by a front group called Mothers for a Moral America. It was designed to show the need for a

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[51] Rubin, supra note 18 at 186.

[52] Id.

[53] Id. at 187.

more moral America. To demonstrate this need, staged scenes of immorality were presented.[54] This advertisment created tremendous controversy. National Broadcasting Company officials debated on whether this film could be broadcast without extensive editing[55] and Barry Goldwater himself urged the party to withdraw the film and cancel bookings.[56] Many observers at the time feared that the proliferation of "below-the-belt" advertising would open a Pandora's box which could seriously demean democratic standards.[57] While it was hoped that campaign advertisements would be reformed, there was serious doubt over whether they would be.[58]

In his second bid for the presidency and re-election, Nixon once again added to the development and sophistication of political television advertising.[59] Nixon appeared to have learned from his mistakes in 1960 and found himself in much more comfortable waters during the late 1960's and early 1970's. The public was growing used to political advertising and Nixon was able to use his skill in this area to his advantage. Part of the responsibility for Nixon's later advertising success belongs to

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[54] One scene shows a speeding Lincoln charging down the road with beer cans being tossed out the window from time to time. According to Rubin, this was "an obvious allusion to news reports of the previous Easter that the President had been drinking beer while driving his car near the LBJ ranch." Other scenes showed violence and street looting; teenagers doing the "twist" with frenzy; shots of a young girl in a topless bathing suit with young men staring; a montage of pornographic magazines and the marquees of "adult" theaters.

[55] Rubin, supra note 18 at 187.

[56] Id.

[57] Id.

[58] Id.

[59] See, J. MCGINNISS, THE SELLING OF THE PRESIDENCY 1968 (1969) and SPERO, supra note 1 for a close look at Nixon and his advertising strategies.

"The November Group," Nixon's "in-house" advertising agency, which was completely independent of existing agencies and devoted only to the task of the election.

One of Nixon's best commercials (1972) positioned Nixon as a diplomat who wants peace and not the cold warrior of the past. His "Tanya" spot used footage taken during his trip to the Soviet Union in May of 1972. In this spot, Nixon described visiting a Leningrad cemetery and tells of how, "Yesterday, I laid a wreath at the cemetery which commemorates the brave people who died during the siege of Leningrad . . . I saw the picture of a twelve-year-old girl . . . Her name was Tanya . . . As we work for a more peaceful world let us think of Tanya and the other Tanyas . . . everywhere."

During his bids for election, Nixon was hit with some strong advertising from his opponents. In 1968, Hubert Humphrey used a classic commercial which posed on the screen the question: "Agnew for Vice-President?" The soundtrack of this spot consisted solely of a man's laughter, which starts out in a mocking tone and grows increasingly out of control. At the end of the spot, a statement appears which says, "This would be funny if it weren't so serious." In 1972, George McGovern hit Nixon with a 30 second commercial showing Nixon's face replacing Washington's on a shrinking one dollar bill. Neither of these commercials was able to hurt the popular Nixon.

When Nixon left office, America was in the midst of major problems. A bloody and unpopular war had ended, Watergate had revealed corruption at the top levels of government and the President was forced to resign in disgrace. Clearly,

there were major problems facing the presidential candidates in 1976. Television advertising was used to combat the credibility problem faced by government. During this period, political advertising matured to the level of a product commercial. In fact, many of the spots at that time were so polished that they could almost be mistaken for product commercials.[60] Politicians were using advertising to its limit and did not mind being labeled "Madison Avenue."[61]

Both sides committed vast sums of money to television advertising.[62] This advertising was used to address the domestic concerns on the minds of Americans. The grass-roots Carter commercials showed Carter in work shirts with the sleeves rolled up, walking through peanut fields to the beat of a guitar. This spot used "jump-cuts, pans to the faces in the crowd and cutaways to new shots of the candidate.[63] Carter's "Executive" commercials showed candidate Carter on the

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[60] Spero suggests that Carter through his friendship with Coca-Cola chairman J. Paul Austin, was able to make use of Coke's advertising and marketing departments for his "Walls around Washington" commercial. Spero claims that this is a typical Coke commercial with Carter inserted in place of the product.

[61] There were limits though as to how "slick" a candidate himself could stand to be. Gerald Ford for example had one "slice of life" commercial made which showed two young women, who looked like they just walked out of a detergent ad, meeting in front of a Ford headquarters. The following dialogue took place:
First Woman: "Ellie! Are you working for President Ford?"
Ellie: "Only about 26 hours a day!"
First Woman: "When did this start?"
Ellie: "Well, let me ask you something. Notice anything about those food prices lately? . . . President Ford has cut inflation in half."
First Woman: "In half? Wow!"
These ads were pulled after two days when the White House called them "unpresidential."

[62] D. CHAGALL, THE NEW KINGMAKERS 109 (1981). Each side spent $ 10 million for advertising- $ 7 million of that on television. Commercials saturated 480 local television stations and 1800 radio outlets around the country, while a hundred different thirty- and sixty-second spots played on the three networks and their affiliates. Id.

[63] Id.

campaign trail, speaking to an off-camera audience. In this spot he urges his audience to "Listen to me carefully. Watch television, listen to the radio. If you hear me tell a lie or make a misleading statement or avoid a controversial issue-if I ever do any of those things-don't support me."[64]

Finally, in a five minute biography created by media consultant Gerald Rafshoon,[65] the themes of home, family, mother and country were pushed. During these five minutes, the copy repeated the words "hard work," "family," "home," "land," and "love" a minimum of six times each.[66] The images moved constantly in order to give the impression of action and variety.[67] The whole point of this ad, according to Rafshoon, was to show Carter the man.

Through these commercials, Carter was addressing the American public's concerns about political corruption and the current state of America. Carter was presenting himself as a new face, not one of the old power elite. He was telling voters that he could return to America the values that it was founded on.

Gerald Ford's commercials stressed the themes of decency of and the progress that the country had made since Nixon's resignation.[68] John Deardourff and Doug Bailey, Ford's media consultants, decided to let television and radio do most of the

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[64] Id. at 110.

[65] Rafshoon was immortalized by Gary Trudeau in the comic strip Doonsbury. The word "Rafshoonery" was used by Trudeau to depict image and symbol manipulation for the purpose of gaining votes.

[66] CHAGALL, supra note 69 at 110.

[67] Id.

[68] Id.

work and to keep Ford away from live encounters. This was done in order to avoid blunders.[69]

Because of a late start in advertising, Deardourff decided to use the advertising in a three-week blitz during the last part of the campaign.[70] Several types of commercials were produced. One group consisted of a quintet of five minute documentaries.[71] The second group consisted of 30 and 60 second spots showing Ford with old people, workers, women and children as well as "man on the street" interviews. Another group of ads were directed at regional concerns and were aimed at Mexicans in the Southwest, Cubans in Florida and Puerto Ricans in New York. In addition to these spots, a package of anti-Carter and pro-Ford commercials were also prepared. Even though both candidates were closely tied and both sides had a large arsenal of negative ads to draw on, none of the negative ads were used because both sides wanted to end the campaign on a positive note.[72]

C. Modern Uses.

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[69] Id. Ford had put his foot in his mouth several times in the past, but possibly the worst blunder made was during the second presidential debate when he told the audience that "there was no Soviet domination of Eastern Europe and under the Ford administration there will never be." When questioned on this statement, Ford hurt himself further by saying, "The Yugoslavians don't consider themselves dominated by the Soviet Union. The people of Poland don't consider themselves dominated." To this, Carter replied, "I'd like to see Mr. Ford convince Polish-Americans and Hungarian-Americans in this country that those countries don't live under the domination of the Soviet Union!" Id.

[70] Id. at 111.

[71] Id. The names of these mini-documentaries were "The Ford Family," "A Ford Biography," "The President's Accomplishments," "Ford as a Leader" and "Feeling Good," a montage of film and music aimed at ending the campaign on a high note. The theme of these spots was "he's making us proud again."

[72] Id. at 119. Chagall states that in addition to wanting to end the campaign positively, both sides feared the backlash that could damage their position in an already tight race.

The presidential campaign of 1980 made some tremendous changes in the televised political commercial. Political advertising became known as political communication to media consultants. This is not just a fancy phrase, according to David Sawyer; "[w]hen we take on a candidate, we handle all media aspects of the campaign: print, radio, TV-the works."[73]

Many things changed in political communications since 1968, a time Sawyer labels the "dark ages of political communication."[74] In addition to handling all phases of the campaign, media consultants also make more sophisticated use of polls. When used correctly, according to Sawyer, this allows for a two-way communication between the candidate and the voter.[75] According to Sawyer, while polling has been around for a while, there had been a steady development of its techniques, especially the area of attitudinal studies-the ability to anticipate shifts in political attitudes.[76] To demonstrate how this works, Sawyer compares Kennedy's use of polls in 1960 to what could be done today. Polling in 1960 showed Kennedy had a Catholic problem. Today, polling would not only show the extent of the problem, but what kind of people make up this problem and why.[77] This is important because certain trade-offs might be involved. For example, "one voter might be adamantly against a Catholic

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[73] Arlen, supra note 66 at 107.

[74] Id. at 107.

[75] Id.

[76] Id. at 108.

[77] Id.

candidate, while another might feel O.K. about him if there were a certain trade-off involved- if the candidate took care of him in some other area."[78]

There is also an increased use of focus groups, where preselected groups of 15-20 people selected on a psycho-demographic basis are put together in a room to discuss their opinions on a topic.[79] This is another way that media consultants can pinpoint the concerns of the voters.

Media consultants often pre-test ads in focus groups. This allows campaign strategists to determine what the public's reaction to an advertisement will be before they distribute it to the public at large. According to media consultant Robert Goodman, pre-testing with focus groups is not always reliable,"but they can sometimes keep you from making a terrible mistake."[80]

These techniques were used by Ronald Reagan to address the anxieties of the American public during his campaign for office. Reagan enlisted the aid of Peter Dailey, the Los Angeles ad man who was one of the brains behind Nixon's devastating electoral- and popular-vote victory in 1972.

Dailey's task involved convincing the undecideds that Reagan was an experienced administrator with solid accomplishments behind him.[81] To do this

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[78] Id.

[79] Id.

[80] E. DIAMOND & S. BATES, THE SPOT 357 (1988).

[81] Id. at 215.

Dailey ran a five minute documentary showing Reagan as an effective governor of California.[82] Because America was in the midst of both domestic and foreign problems, Reagan used a series of "issue" spot commercials, which pushed his vision of the future - a strong and proud America. These spots were filmed in an "Oval Office" library setting with Reagan speaking quietly, persuasively, and effectively.[83] On inflation, Reagan proclaimed, "We do not have inflation because, as President Carter says, we lived too well. We have inflation in great measure because the federal government has lived too well."[84] On the subject of unemployment, Reagan said, "We'll beat the unemployment problem by allowing America's economic system to do what it does best-produce. Expand, produce some more, expand some more, and at every step of the way create new jobs."[85] One other spot called "Peace," which was designed to fight the "trigger-happy" image of Reagan that Rafshoon was exploiting, showed Reagan at the podium during the Republican convention. Reagan was shown saying, "Of all the objectives we seek, first and foremost is the establishment of lasting world peace." This was followed by a cut to Reagan sitting in an "Oval Office" setting. "Nancy and I have traveled this great land of ours many

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[82] Id. This documentary was given high saturation during a six week period. It began with Reagan's Screen Actor's Guild work in negotiating contracts and then shifted to his work as Governor of California. According to the narrator, "In 1966, he was elected governor of the state of California, next to the President, the biggest job in the nation. What he inherited was a state in crisis. Working with volunteers, he got things back on track." The visuals showed Reagan signing bills and shaking hands with judges.

[83] Id. at 216.

[84] Id.

[85] Id.

times over the years and we've found that Americans everywhere yearn for peace just as we do. It is impossible to capture in words the feelings we have about peace in the world, and how desperately we want it for our four children and our children's children."[86]

While Reagan proclaimed he wanted peace, he made it clear that he believed that peace could only come through strength. This theme was shown in a series of spots. One spot begins with newsreel scenes of the Soviet leadership reviewing Russian missiles in Red Square. Reagan portrayed himself as a man ready to meet the Soviet Challenge.

While the "slick" commercials of the past campaigns had been successful, it was very important that Reagan's commercials did not seem "Hollywood." Thus, during Reagan's campaign of 1980 the use of the "anti-commercial" was born. Dailey used "the old talking head" format to avoid any association of Reagan the candidate with Reagan the actor. There was a strategy behind this. According to Dailey, "the slightest hint of that kind of production would have been disastrous, invalidating everything we did. We simply showed a nice man who ran a very complex state very successfully. Every campaign is based on situation analysis. Once you think you have a formula that applies to all situations, you're in big trouble."[87]

The basic theme of all the Reagan commercials in 1980 was very similar to

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[86] Id.

[87] Id. at 217.

Eisenhower's "Time for a change" theme. Following every Reagan commercial were the words, "The time is now for Reagan, Reagan for President."[88]

For Carter in 1980, the first wave of television commercials centered on the themes of the complex domestic and foreign responsibilities of the Presidency and Carter's interaction with ordinary citizens- in a suburban backyard, in an old folks' home and at a building site.[89] Rafshoon used five-minute film essays to describe the Presidential roles of Chief of State, Commander-in-Chief and Planner of the Nation's Future. The tone was academic and reminiscent of old newsreels.[90] These commercials were skillfully made and highly professional-even though they were not very effective politically.[91]

Phase two of the Republican advertising strategy occurred late in the campaign

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[88] Id. at 216.

[89] Id. at 217.

[90] Id. The "Commander-in Chief" ad, which was aimed at dispelling Carter's weakling image, showed Carter reviewing troops and inspecting missiles and aircraft carriers, while a narrator said,"When President Carter sits down at the White House with the Secretary of Defense, he brings a hard military professionalism to the meeting. This President is an Annapolis graduate. He spent eleven years in the Navy. And he knows what he's talking about. President Carter has always worked for a strong military, knowing the importance of being strong. The final shot showed Carter, Sadat and Begin signing their famous treaty, while the narrator concluded," In the end, President Carter knows our final security lies not only with having a strong defense, but in being willing to sit down and negotiate for peace."

The "Chief of State" ad, called "The President Alone," used fast cuts and swirling action in order to show Carter deeply involved in the frenzied activity of running the country. The narrator boasted of Carter's "hammering out an energy policy, deregulating air and trucking industries, organizing the Camp David talks, and reducing federal regulations and paperwork." Id at 218. Then as night approached, Carter was shown climbing a stairway at the White House and entering a study. "The responsibility at the White House never ends. Even at the end of a long working day there is usually another cable addressed to the Chief of State from the other side of the world where the sun is shining and something is happening." As the light in the study flashed on, the voice concluded,"And he's not finished yet."

[91] Id. at 218. Voters, according to the polls, did not doubt that Carter worked hard and kept long hours. They did however, question the effectiveness of his work. This was something that the ads never satisfactorily addressed.

(Oct. 10) when Reagan's camp released the first anti-Carter commercials. These spots compared the type of leadership that Carter had given during his term with what Reagan had to offer.

Now that the first series of commercials had given the public a chance to know Reagan,[92] it was time to rally the troops, according to Dailey.[93] Dailey said,"By the last week we felt we had communicated as much as we could about Reagan, so we launched an all-out attack on Carter, with more production values, more wheat-waving things."[94] One thirty-second spot called "Flip-flop" dramatized the perception of inconsistency on Carter's part. In this spot Carter's campaign promises were compared to present realities. This commercial ridiculed Carter and damaged his credibility-his strongest trait.[95] Perhaps the most devastating negative spot for Carter was one featuring Ted Kennedy at the podium urging: "If we want to get rid of inflation, if we want to get rid of unemployment, if we want to get rid of high interest rates, then we've got to get rid of Jimmy Carter!" The frame was then frozen and the words,"Vote for a new beginning, Reagan for President," appeared.

Carter's final commercials were desperate last minute attempts to win back voters. They consisted of endorsements and a few negative commercials playing on

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[92] His lack of recognition had dropped from 40 percent earlier in the campaign to 26 percent by October 10.

[93] Chagall, supra note 69 at 271.

[94] Id.

[95] Id. at 272. The visuals showed Carter's face grinning as the narrator quoted a campaign promise and then cut to Carter grimacing as his actual performance was contrasted with it.

the Reagan fears that had been dispelled by that time.[96]

Media consultant Tony Schwartz felt that Dailey's work for Reagan was far more effective than that produced for Carter.[97] According to Schwartz, "The best ads in this whole election are those from the Republican National Committee, showing a truck driver outside his truck and a guy in his TV repair shop saying they've always voted Democratic, but they're going to vote Republican for a change. Those ads speak directly to what people feel in terms of the economy. They are so convincing that even though they're done by actors, they come across as real."[98]

The elections of 1984 were relatively uneventful in terms of excitement and political advertising. The popular Reagan was running for re-election against the less popular Walter Mondale, himself reminiscent of the disastrous Carter presidency.

Reagan's memorable ads in 1984 featured a metaphorical bear stalking the woods with a voice-over asking, "Isn't it smart to be as strong as the bear." Mondale used a series of negative ads reminicient of those used by Johnson in the 1964 election. These ads tried once again to emphasize the "trigger-happy" image that Reagan successfully fought in 1980. One ad featured a flashing red phone with a voice over warning that once Reagan puts "killer weapons in space . . . computers will take control." This was reminiscent of Johnson's famous Red Phone spot which asked, "You wouldn't want it in inexperienced hands, would you?" Mondale later

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[96] Id. at 277.

[97] Id. at 246.

[98] Id.

scrapped his "Red Phone" spot for another spot reminiscent of Johnson's "Daisy" commercial. This ad, which was set to the tune of Crosby, Stills, Nash & Young's "Teach Your Children," alternates scenes of nuclear missiles being launched with images of children. While some of Mondale's spots were tough and powerful, they could not shake the image of the "great communicator."

The 1988 campaign further refined the nature of political advertising. According to Laurence Zuckerman, "If 1960 was the year that television became a decisive factor in a national campaign, 1988 is the year that television was the campaign."[99] Both sides shielded its candidates from spontaneous contact with the press and instead relied upon advertising and carefully planned television appearances to shape the image of its candidates. Each image was geared around the issues that were to be emphasized during the campaign. [100]

The campaign started with the introductory or biography ads which stressed the candidate's ties to 'the people' and their upscale accomplishments. To accomplish this, Mike Dukakis was portrayed as the son of Greek immigrants and George Bush's war hero background was shown, complete with old newsreel footage of his being rescued after being shot down over the Pacific.

The second stage involved highlighting the issues. These "issue ads" usually do not get very specific.[101] This is not so much a matter of the limitations of a 30

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[99] Zuckerman, supra note 7 at 67.

[100] The messages for 1988 were realism, toughness, and competence.

[101] Diamond & Bates, 30-Second Elections 17 NEW YORK 46, 46-51 (1984).

second format, but instead it is a campaign decision;[102] a politician is less likely to get into trouble if he remains relatively ambiguous.[103]

Dukakis' spots show a man of passion and moral leadership. His "Shelter" ad showed images of the homeless, one within sight of the White House, while Dukakis says," I hope if I'm president and Mr. Gorbachev comes to visit me, that we'll have a country in which there are not people sleeping on streets and in doorways."[104] Bush's "The Future" spot portrayed the Vice-president's granddaughter being swept into her grandfather's arms, while Bush claims," I hear the quiet people others don't: the ones who raise the families, pay the taxes . . . .." The object in both of these spots was to show a more caring face than that of Reagan.

The third stage of the media campaign is that of the 'negative' or 'comparison' advertising.[105] The intended effect of these ads is to create a negative feeling toward the target of the message and a positive feeling toward the advertisement's sponsor.[106] These advertisements usually begin when the race gets close. When the race tightened after the first presidential debate, negative ads began to surface. One such spot shows a strong-looking Bush next to a weak-looking Dukakis while the voice says," He

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[102] Id.

[103] Id.

[104] Diamond & Bates, supra note 11 at 36.

[105] Id. at 31.

[106] Garramone, Voter Responses to Negative Political Ads 28 J. OF BROADCASTING & THE ELECTRONIC MEDIA 250, 250 (1984).

allowed first-degree murderers to have weekend passes from prison."[107] Dukakis countered this blow by putting out 'capsule' case studies dealing with the 'middle-class squeeze' issues- health care, tuition costs, and housing.[108] One such case study showed a boy in Houston who was kept from participating in sports because his family had no medical coverage.

The fourth and final stage of the modern campaign occurs in the final days of the campaign. During this time the negative spots are pulled and replaced with more "upbeat" material.[109] The purpose of this is to end the campaign on a positive note and to give the candidates one last opportunity to discuss their views on a subject.

II. The Law and Televised Presidential Advertising Content

After seeing how televised presidential campaign advertising has grown and developed over the last 40 years, it is important to examine the legal restrictions that presidential candidates and their consultants are under when determining the content of their commercials. The legal implications of televised presidential campaign advertising are both complex and interesting. This section will examine how the content of televised presidential campaign advertisements fit into the federal regulatory scheme of television advertising.

Federal law grants the area of presidential campaign advertising broad freedom.

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[107] Diamond & Bates, supra note 11 at 37.

[108] Id.

[109] Id.

The Federal courts have consistently ruled that political speech is strongly protected by the First Amendment.[110] This protection extends to the content of political broadcasts of legally qualified candidates for the Presidency of the United States.[111] Because of this, there are very few legal restrictions on candidates for Federal office and their advertising.

Because the First Amendment[112] applies to political campaigns, any restriction placed upon speech can be upheld only if it meets the most stringent standards.[113] These standards require a compelling state interest which operates without unnecessarily restricting free expression.[114]

The primary legal obligation placed upon the political candidate is that she identify the persons who paid for or authorized the political advertisement.[115] The

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[110] Columbia Broadcasting System v. FCC, 629 F.2d 1, 24 (D.C. Cir. 1980).

[111] Columbia Broadcasting System v. FCC, 453 U.S. 367, 377 (1981).

[112] The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . ..

[113] Baldwin v. Redwood City, 540 F.2d 1360, 1367 (9th Cir. 1976).

[114] Brown v. Hartlage, 456 U.S. 45, 52-54 (1981).

[115] According to 2 USC § 441d (a)(1980):
Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication-

1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons, but authorized by a candidate, an authorized political committee of a candidate, or its agent, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall

constitutionality of this type of statute has been upheld by the courts.[116] While the sponsorship requirement is a restriction on political speech which is protected under the First Amendment, there is a compelling government interest in informing the electorate and allowing the electorate to make its own appraisal of the reasons why a particular candidate was being supported or opposed by an individual or groups.[117]

Extremely broad statutes requiring identification have been held unconstitutional. In Talley v. California,[118] the United States Supreme Court invalidated a broad California statute forbidding the distribution of all anonymous circulars, stressing the chilling effect caused by the identification of those holding unpopular views. The court ruled that the extreme breadth of the statute made the law unconstitutional.

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clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or the candidate's committee.

A candidate for purposes of this statute is defined as:
an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election-

(A)if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B)if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

[116] United States v. Scott, 195 F. Supp. 440, 443-444 (D.N.D. 1961).

[117] Id. at 443.

[118] 362 U.S. 60 (1960).

However, in United States v. Insco,[119] a Federal District Court rejected the argument that the predecessor to 2 USC § 441d[120] was unconstitutional under Talley. The court found that the federal statute was limited in its coverage to requiring fairness in federal elections and did not preclude anonymous criticism of oppressive practices and laws as referred to by the majority in Tally. Therefore the narrowness of the federal statute combined with the substantial government interest in providing voters with information on the source of political messages so that they can make informed judgments about the credibility of the messages makes the requirement of disclosure constitutional.

Aside from the requirements of sponsorship identification, the candidate is granted broad protection on the content of his televised political commercials.

In addition to being free from government censorship of the political advertisement, the candidate is also protected from censorship of his message by the licensed broadcaster.[121]

The constitutionality of preventing broadcast stations from censoring a candidate's material was upheld by the United States Supreme Court in order to allow the full

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[119] 365 F. Supp. 1308, 1312 (D. Fla.1973).

[120] 18 USC § 612. This section required writings or other statements to contain the names of the persons responsible for the publication or distribution of the materials

[121] 47 USC § 315 (a)(1972) 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 provision of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

and unrestricted discussion of political issues by legally qualified candidates.[122]

A licensee also cannot censor advance copies of a candidate's scripts. Candidates do not have to submit a script and the submission of a script cannot be used as a condition for the use of broadcast facilities if the purpose of the submission is censorship over content.[123] Licensees can require scripts from candidates only for the purposes of aiding in the preparation of a program (i.e. time allocation, to determine if the appearance constitutes a use, to determine whether the paid broadcast carries the required sponsorship identification or to insure that the broadcast is the agreed upon length).[124]

In consideration for this freedom from censorship, the court has ruled that § 315 grants a licensee a federal immunity from liability for libelous statements that are made by the candidate.[125]

While there has never been any adjudication on this matter, there appears to be an exception to the rule that licensees cannot censor the material of candidates. It appears that broadcasters could refuse to broadcast obscene materials put forth by the candidate. This exception would be granted because the broadcast of obscene materials would require the broadcaster to violate sections of the criminal code in order to

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[122] Farmers Educational & Coop. Union v. WDAY Inc., 360 U.S. 525, 527-31 (1958).

[123] Milton Gross, FCC Fairness & Political Broadcast Branch, Remarks made during session of Broadcast Education Association Meeting, April 12, 1980, Las Vegas, Nev.

[124] Id.

[125] Farmers at 535.

comply with § 315.[126]

III. Related Studies and Research in Televised Political Advertising

A. Imagery in Political Advertising

As mentioned in chapter one, there are two legitimate but categorically different ways of examining images in televised political advertising. One method involves examining image in terms of the internal characteristics of the candidate and the other involves examining externally controlled factors.

In recent years, researchers have examined some of the effects of imagery in televised political advertising on voters:

This research has shown that the purpose of television ads in political campaigns is that of image-builders, rather than vehicles of voter information. This means that a candidate's professional qualifications in television advertising have been relegated to a position of secondary importance.[127] Author Joe McGinniss states that on television, a candidate does not need ideas; it is "his personality viewers want to share."[128] According to McGinniss, the style in political ads becomes the substance.[129]

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[126] FCC Staff Memo submitted by Chairman Fowler to Congressman Luken on January 19, 1984, Political Primer, 100 FCC 2d 1476,1513.

[127] O'Keefe & Sheinkopf, The Voter Decides: Candidate Image or Campaign Issue? 18 J. OF BROADCASTING 403, 410 (1974).

[128] MCGINNISS, supra note 64 at 22.

[129] Id. at 23.

Similarly, Kaid and Davidson found that "when candidates use television to project themselves to voters, they engage primarily in a form of pseudointerpersonal communication in which television's visual element and its capacity to induce intimacy is used to portray candidates as the candidates believe voters wish to see them."[130]

Research has also shown that paid spot advertising is an effective vehicle for image building by candidates. While there has been some conflict by researchers over this generalization,[131] there is strong evidence which points to the fact that paid political spot advertising can have an impact on how voters see candidates and ultimately how they will vote. [132]

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[130] KAID, NIMMO & SANDERS, supra note 3 at 185.

[131] T.E. PATTERSON & R.D. MCCLURE, THE UNSEEING EYE 111 (1976) Patterson and McClure have expressed skepticism over paid political spot advertising's effect on the candidate's image. According to Patterson and McClure, "In presidential politics, advertising image-making is a wasted effort. All the careful image planning-the coaching, the camera work, the calculated plea-counts for nothing." Patterson and McClure based this conclusion on their study of the 1972 presidential campaign. But See, KAID, NIMMO & SANDERS, supra note 3 at 214. In later research, contributor Donald Cundy questions Patterson and McClure's conclusions about the role of political advertising on candidate image. According to Cundy, in Patterson's later study (T.E. PATTERSON, THE MASS MEDIA ELECTION (1980)) there is the prominence of image in the comments of the respondents and one can not help but wonder where they came from. Secondly, according to Cundy, the "unequivocal nature of the conclusions (including the distinction between presidential and lesser offices) appears to exceed the limitations of the data." Thirdly, it is implausible that political advertising is capable of exerting a significant impact on the vote, information levels, and general affective responses to the candidate, as suggested by Patterson and McClure's research, yet somehow it acquires massive impotence in the area of image. Finally Cundy states that the evidence from several other studies dealing specifically with the relationship between political advertising and image formation is inconsistent with Patterson and McClure's 1976 work.

[132] Other researchers have found that paid political spot advertising has an effect on how the voter perceives the candidate. Wattenberg found a strong indication of a relationship between mass media advertising and candidate image. Wattenberg, From Parties to Candidates: Examining the Role of the Media 46 PUB. OPINION Q. 216 (1982) Keating and Latane found that the television appearance by a candidate can have a significant effect on a candidate's image. Keating & Latane, Politicians on TV: The Image is the Message 32 J. OF SOC. ISSUE 116 (1976) Cundy found that paid political spot commercials can make a significant impact on voter images of political candidates. KAID, NIMMO & SANDERS, supra note 3 at 232 Kinder found that voters construct images of candidates that reinforce and support their own political opinions. Those voters who admired a candidate tended to see him as promoting policies they themselves favored, while those displeased with a candidate showed the opposite tendency, although less consistently and less powerfully. Kinder, Political Person Perception: The Asymmetrical Influence of Sentiment & Choice on Perceptions of Presidential Candidates, 36 J. OF PERSONALITY

Kelly and Mirer[133] found that a voter's choice is influenced primarily by their evaluation of the candidate. Other factors play a role only when the voter has no clear preference for any particular candidate.[134] Markus suggests that candidate image has become one of, if not the most important element in a voter's decision in the American electoral system.[135]

Diamond and Bates[136] argue that many people mistakenly believe that image-making is easier than image-remaking and that challengers that were unknown have an advantage over familiar faces. Diamond and Bates in their study of research and actual campaign practices found otherwise. According to Diamond and Bates, "a well-planned, well-executed media campaign can shift voter perceptions of a candidate, even

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& SOC. PSYCHOLOGY 859, 868 (1978) Meyer and Donohue found that the results of Preston's 1967 study applies to political advertising (Preston, Logic & Illogic in the Advertising Process, 44 JOURNALISM Q. 231, 237 (1967), This study found that viewers attributed facts and information to ads that actually were not directly stated in the ads). Meyer and Donohue's study found that people tend to misperceive the contents of paid political advertising and in the case of high-credibility candidates, they read in more positive information than is in the actual ad. This means that favorably predisposed voters are more careless in their interpretations of political ads for their favorite candidates and are more careful in listening to the ads for candidates that are not preferred. Therefore, a campaign ad writer could make vague and guarded statements without concern because the candidate's supporters will read in positive elements not specifically mentioned in the ads. Meyer & Donohue, Perceptions & Misperceptions of Political Advertising, 10 J. OF BUS. COMM. 29, 38(1973).

[133] Kelly & Mirer, The Simple Act of Voting, 68 AM. POL. SCI. REV. 572 (1974).

[134] Markus & Converse, A Dynamic Simultaneous Equation Model of Electorial Choice, 73 AM. POL. SCI. REV. 1055 (1979) and Foti, Fraser & Lord, Effects of Leadership Labels & Prototypes on Perceptions of Political Leaders, 67 J. OF APPLIED PSYCHOLOGY 326 (1982).

[135] Markus, Political Attitudes During An Election Year: A Report on the 1980 NES Panel Study, 76 AM. POL. SCI. REV. 538 (1982).

[136] DIAMOND & BATES, supra note 88 at 262.

a highly visible incumbent."[137]

Even though evidence points to the fact that voters' perceptions of candidates play an important role in election outcomes, there has been little research directed to discovering why candidates are perceived in certain ways. The majority of the research that has been conducted in the area of imagery and political advertising has dealt with the non-verbal character attributes of candidates. These studies suggest that the personal qualities of candidates play a key role in candidate perception and this consideration has a major impact on voters' preferences.[138]

Several studies have shown that the public is looking for certain definable characteristics in political candidates.[139] One study in particular found that the public is looking for a candidate that is extremely competent, extremely high in character, quite composed and sociable, slightly extroverted and slightly similar to voters in attitudes and beliefs. This study also found that the voter's ideal candidate would be

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[137] Id. These authors give the example of the remaking of Chicago mayor Jane Byrne. Byrne entered the campaign with many image problems; she was seen as "vindictive, erratic, impatient, someone who does not keep her promises and who is not concerned about me." Advertising was used to soften her image so that she always appears to be "listening to people, understanding their concerns and responding with appropriate actions." Visible symbols were used to re-enforce this message. The mayor was seen in advertisements as a hard worker, listening and talking to citizens in their own neighborhoods. Her day-to-day conduct was made to conform with this message. She could no longer "mix-it-up" with the press and she had to pay more attention to black concerns. The end result was that Byrne was successful in her re-election bid. Id.

[138] See,Rosenberg, Bohan, McCafferty & Harris, The Image and the Vote: The Effect of Candidate Presentation on Voter Preference, 30 AM. J. OF POL. SCI. 108 (1986) (This study examined the nonverbal aspects of candidate's presentation on voter's perceptions and preferences and found that non-verbal aspects of candidates do influence voter's perceptions of candidates and this can significantly affect the viewer's voting choice).

[139] Douglas, The Verbal Image: Student Perceptions of Political Figures, 39 SPEECH MONOGRAPHS, 10, 1 (1972); Philport & Balon, Candidate Image in a Broadcast Debate, 19 J. of Broadcasting 184 (1975); D. NIMMO & R. SAVAGE, CANDIDATES & THEIR IMAGES 60-61 (1976)

neutral in similarity in terms of background and personality.[140]

With appropriate pretesting and control over a candidate's public appearances, a consultant could significantly manipulate the image presented to voters[141] and this could effect the outcome of a political campaign.[142]

When the political consultant constructs an image for a candidate, it is very important that the advertising is compatible with what people find as the reality of the candidate himself. Diamond and Bates found that if the "mediated reality" presented by television advertising is contradicted by reality as a person actually experiences it, the "Ottinger Effect" occurs. The Ottinger Effect-the dissonance between the image of the candidate and the substance of the candidate-can destroy the image built by the candidate through his advertising.[143]

The majority of research on image manipulation in political campaigns has been conducted on the area of personal attributes of the candidate. There has been very little research performed on the use of external imagery which uses symbolism, editing and camera techniques as a means of influencing voters. The work that has been conducted in this area shows that imagery is widely used in presidential campaigns and

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[140] Hellweg, An Examination of Voter Conceptualizations of the Ideal Political Candidate, 44 S. SPEECH COMM. J. 382 (1979)

[141] Rosenberg, Bohan, McCafferty & Harris, supra note 156.

[142] DIAMOND & BATES, supra note 88 at 44.

[143] Id. at 368. The Ottinger Effect was named after a congressman from New York's Westchester County who ran for the U.S. Senate in 1970. His advertising campaign, directed by media consultant David Garth, pictured a decisive, vigorous campaigner in shirt-sleeves, However, when Ottinger appeared in a live three-way debate with his opponents, he appeared to the TV audience as slow and unsure of himself. Ottinger lost, in part, because of the dissonance between the advertised Ottinger and the real Ottinger. Id. at 247.

suggests that these techniques may have some impact on elections.

Stuart Ewen, in his study of the use of image and style in contemporary culture,[144] claims that image management has become a necessity in politics and that the powers of appearance have come to shape the way we comprehend matters of substance.[145] While the use of image management in presidential elections can be traced back at least as far as the presidency of Andrew Jackson, in recent years political style has become the product of coordinated and carefully managed sales campaigns.[146] Political campaigns have produced tokens[147] to put their image before the public ever since presidential elections became mass participation events in the early nineteenth century.[148] However, with the rapid increase in technology,[149] the

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[144] S. EWEN, ALL CONSUMING IMAGES, (1988).

[145] Id. at 259.

[146] Id. at 266. The best representation of the power of image making in politics comes from the career of Ronald Reagan. Reagan and his presidency, according to Ewen, represented the unequivocal triumph of "image-making" in politics. Reagan was trained as a Hollywood actor and later served as a spokesperson for General Electric Corporation. Reagan's apprenticeship in Hollywood provided him with the opportunity to practice numerous images. According to Ewen:

> At times we can close our eyes and hear the impassioned and honest tones of Spencer Tracy. When an aura of simple trustworthiness is called for, he can draw upon his folksy Jimmy Stewart routine, replete with a shake of the head and an implied "Aw, gee." as the unyielding executioner of social programs, he becomes the "last angry man," true to his own inner sense of justice, painfully misunderstood. As the assassin of women's rights, he opts for the antiseptic mainstream; he and Nancy become Ward and June Cleaver. As a militarist he assumes the pose of the indignant good guy, out to right the world's wrongs. In defining America's enemies, world struggles for power are couched in the familiar idiom of Star Wars, or some medieval costume drama. We are implored to join a heroic crusade against the dread "Evil Empire," or to throw in our lot with the "freedom fighters" south of the border. The plots are all familiar, tried and true. The Hollywood narrative supplies a stylistic model for political consciousness. Id. at 268-269.

[147] For example, badges, flags and posters.

[148] Davies, The Drama of the Campaign: Theatre, Production & Style in American Elections, 39 PARLIAMENTARY AFFAIRS 98, 98 (1986).

use and sophistication of images in political campaigns have increased.[150] Today, televised political ads[151] are used as one of the primary methods of shaping a politician's image with the American public.[152]

Images and emotional appeals are used in televised political advertising because they work well with the television medium.[153] Producers of television's content must use the larger, grosser human emotions[154] in the content of the programming because these emotions are easier to convey with television's technical limitations. These emotions do not require a great amount of detail to express and have a more powerful impact than ideas that are more subtle.[155]

Image oriented political advertising typically features a soft focus and warm colors in order to transmit a caring message. Similarly, these ads use inspirational music and pictures associating the candidate with the flag or other national symbols in

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[149] Particularly in the form of radio and television.

[150] Davies, supra note 170 at 98.

[151] Which are based almost entirely on the results of polling and stress only those points that the pollsters tell the admen will evoke a response from the voters.

[152] Davies, supra note 170 at 104.

[153] J. MANDER, FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION 270 (1978) According to Mander, the structure of the television medium itself predetermines the boundaries of its content. Id. at 261. One of the biases of television's structure is the limitation of the technology. Mander argues that some types of information can be conveyed through television and some can be conveyed only after it has been reshaped, redefined, packaged and made courser than before. Mander also argues that some information cannot be conveyed. Id. at 266. Because of these technical limitations and the fact that subtle ideas do not work well on television, the content of television must be adjusted to compensate for these limitations. Id. at 270.

[154] Such as hate, nationalism, fear, jealousy and violence.

[155] MANDER, supra note 175 at 270.

order to create an appeal to patriotism.[156] Cinema verite' methods may also be used in scenes designed to emphasize a candidate's direct involvement with constituents-even though the "constituents" in the ad may be actors.[157]

In addition to using broad emotional appeals in its content, political advertisers also use technique as a replacement for the content.[158] These techniques[159] are designed to hold our attention and manipulate our emotions. They occur at a rapid pace and change quickly so that the viewer will not become bored.[160]

As a result political dialogue is becoming an "emotional orgy."[161] Paul Taylor of the Washington Post states that while political campaigns should be the feast of democracy, they are in reality junk food.[162] Voters today live in a world in which image has emerged as the predominant expression of meaning.[163] Citizens are encouraged to accept the autonomy of images and the implication that substance is unimportant and not worth pursuing. The impact of all this could be seen in the

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[156] Id.

[157] Id.

[158] Id. at 302.

[159] Such as zooms, cuts, fades, changes in size, camera angles, sound tricks etc.

[160] MANDER, supra, note 170 at 302. According to Mander, during the average television program 8-10 technical events occur per minute and during the average commercial, which must fight even harder to keep its audience's attention, 10-15 events occur during a 30 second spot. Id. at 304.

[161] The Public Mind: Image & Reality in America (Public Broadcasting System Broadcast, produced by WNET/New York, 1989).

[162] Id.

[163] EWEN, supra note 166 at 271.

1988 Presidential campaign in which the major issues addressed were prison furloughs and flags.[164] These two topics were found through focus groups to be "hot button" issues which instantly caused people to react emotionally.[165] By using these emotional issues, candidates were able to divert from real complex issues facing Americans and devote the discussion of issues to relatively isolated or insignificant matters.[166]

While the topics of flags and furloughs for prisoners were relatively unimportant issues at the presidential campaign level, they were perfect material for spot advertisements. These topics created symbols that were short, visual and emotional.[167] They suggested a lot, but told very little. Most importantly they presented messages by candidates that were nearly impossible to oppose.[168] The end result of the widespread use of imagery and symbols in the televised spots of the 1988 campaign was that the public was diverted from the real issues facing America.[169]

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[164] The Public Mind: Image & Reality in America, supra, note 183.

[165] Id.

[166] Id.

[167] Id.

[168] Id.

[169] Id.

IV. LEGISLATIVE RESPONSE

The possible effects of external imagery upon our electoral system have led Congress to attempt to regulate this area. During the 98th Congress, an amendment to the Federal Election Campaign Act of 1971 was proposed.[170] This bill restricted paid televised political advertisements to a "talking head format."[171] The bill contained the following provisions:[172]

I. PURPOSE

The purpose of this act is three-fold. First, this act seeks to insure access and equality to the political process by restricting spot advertising which has contributed greatly to the high cost of advertising. Secondly, this act seeks to increase the informed choice of voters by enhancing full, fair and rational debate on the issues. The Act's final purpose is to futher the purposes of the first amendment. According to the Act, advertisments which employ external imagery have served to frustrate the intent of the first amendment by obscuring, rather than providing full, fair and rational debate on the merits of the issues and the candidates. Also, these advertisements may have contributed to declining political involvement, weakened political parties and created negative public attitudes toward the political process itself. Finally, the

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[170] For the full text of the Act, see appendix one.

[171] Under this bill, the background for the ad must be filmed, televised or taped at the same time and with the same camera as that filming, televising or taping the speaker. The background must also be the filming, taping or televising of an actual scene or an actual event at the time of the event and not a staged reproduction.

[172] The full text of the bill is reproduced in the appendix.

television medium's unique characteristics[173] make its messages virtually unanswerable and less susceptible to the usual constitutional remedy of more or more diversified speech.

II. REQUIREMENTS

In order to alleviate these problems, the amendment would require the speaker to use a "talking head" format.[174] Secondly, the advertisement must identify the speaker and an identification of the candidate the speaker is authorized to speak for, if the speaker is an alternative speaker. The advertisement must also identify the person who paid for the advertisement.

The background of the advertisement must be filmed at the same time as the speaker, with the same camera and it must depict an actual scene or event and not a staged reproduction of an event.

The Act states that the advertisement may contain the identity of the candidate's party and the office he is seeking. It may also state whether the candidate is seeking election or reelection, as well as solicitations for contributions. Finally, handbill, full

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[173] The act states that television is a unique medium because of the limitations in points of access, the cost of such access, and the pervasiveness, its emotive content and effectiveness of its reach.

[174] According to the act, "the advertisement may not contain any visual or auditory material other than the voice and image of the candidate or alternative speaker speaking into the camera for the duration of the advertisment and certain specified written material.

text reproductions, closed caption technology and similar methods are permissible.

III. STANDING

Under the act, any person who believes a violation has occurred may file a complaint with the Federal Communications Commission (FCC).

IV. REMEDIES

Under the Act, the FCC is authorized to seek a permanent or temporary injunction or restraining order. If the FCC fails to do this within five days of receiving a complaint, the private complaining party may file in federal district court, a civil action for relief if he can show that the person involved committed a violation of the act. Relief will be limited to a permanent or temporary injunction or restraining order.

V. SUMMARY

There are two legitimate but categorically different ways of examining image in televised political advertising. One method involves examining image in terms of the internal characteristics of the candidate and the other involves examining externally controlled factors.

Researchers have examined the effects of image in televised presidential campaign advertising. They have found that televised presidential campaign advertising primarily serves as an image-builder for candidates. Research has shown that political consultants could manipulate the non-verbal image of the candidate and that this

manipulation could have an effect on voting behaviors. The manipulated image which is presented to voters, however, must match how voters see the reality of the candidate.

Very little research has been conducted on the effects of external imagery in televised political advertising. The studies that have been conducted have found that this form of imagery is in wide use in presidential campaigns and suggest that it may have some effect on viewers.

Because of the controversial nature of external imagery in televised political advertisements, Congress has introduced legislation restricting the advertisements to "talking head" spots. This legislation has not been passed into law as of this time.

CHAPTER THREE

METHODOLOGY

I. STATEMENT OF PURPOSE

The controversy surrounding external imagery may lead Congress to reintroduce the legislation which would limit televised political ads to "talking head" spots. Because any law which restricts an element of televised political advertising is bound to be challenged on constitutional grounds, a study which examines the constitutionality of this legislation would benefit Congress.

The purpose of this thesis is to determine whether a Congressional statute which would limit televised political advertisments for federal offices to a "talking head" format would violate the first amendment to the United States Constitution.

II. METHODOLOGY

There are four theories upon which the statute could be said to violate the first amendment. It may be argued that the statute is an invalid time, place and manner restriction, an invalid content based restriction, that the statute is overbroad or that the statute is unconstitutionally vague.

Because of the legal nature of this research question, traditional legal research will be used.

Traditional legal research in the area of Constitutional law consists of:

1) Developing a research problem.

2) Researching the general background of a problem through secondary sources.

3) Developing a list of cases which relate to the problem.

4) Reading and analyzing these cases in order to trace how the law has treated this area.

5) Shepardizing these cases to insure that they are still valid law.

6) Analyzing the results and drawing conclusions.

After examining the federal courts response to restrictions on political advertising, each of the four arguments against the statute will be examined and conclusions will be drawn as to whether this statute violates the first amendment.

CHAPTER FOUR

DISCUSSION

There are four first amendment theories which apply to this statute. It may be argued that the statute is not a valid time, place and manner restiction. Secondly, it might be argued that the statute is not a valid content-based restriction. Third, the statute may be attacked as being "void for vagueness." Finally, the statute may be overbroad. After examining how the courts have interpreted the protections on political advertising, these four arguments will be examined.

I. THE COURTS AND RESTRICTIONS ON POLITICAL ADVERTISING

In Lehman v. City of Shaker Heights,[175] a candidate for political office brought an action against a city because of its refusal to accept his political advertisements for use on the city's rapid transit vehicles. The United States Supreme Court held that the advertising space on the city transit system was not a public forum and that the refusal to accept the political advertisement did not violate the first amendment.

The Court held that the nature of the forum and the conflicting interests involved are important in determining the degree of protection afforded to speech by the first amendment.[176] According to the Court, because viewers of street car signs are a captive audience, who are present as a matter of necessity and not choice, the restriction advanced a substantial interest of the city.[177]

In United States S.W. Africa/Namibia Trade & Cultural Council v. United States,[178] the plaintiff claimed that his first amendment rights were violated when officials from the Federal Aviation Administration refused to approve a political advertisement for display in various advertising areas of federally-owned airports. The Court of Appeals held that this refusal violated the first amendment. According to the Court, the advertising area was a public forum because it was not separated from the terminal itself. Because of the open nature of the airport terminal, there was no risk

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[175] 418 U.S. 298 (1974).

[176] Id. at 302.

[177] Id. at 304.

[178] 708 F.2d 760 (1983).

of a captive audience being present as there was in Lehman.[179]

According to the Court, because this restriction did not restrict all display advertising, but only political advertising, it was content-based and not a valid time, place and manner restriction. It must therefore be analyzed under those criteria.

The Court reaffirmed the policy that content-based restrictions are presumed invalid unless a substantial or compelling state interest is involved. The court found that the restriction gave government significant control over the type of ideas to which the public would be exposed[180] and that the regulation screened out non-controversial political messages as well as controversial ones.[181] The regulation also demonstrates a governmental approval of paid commercial advertisements, but not political advertisements. This reverses the normal preference for noncommercial speech.[182]

The government's interest in ensuring advertising revenue was not threatened by the controversial posters because less drastic methods of protecting this interest were available. Similarly, the use of disclaimers on the posters would avoid the appearance of governmental approval of controversial positions. The Court finally found that administrative complications alone did not justify the restriction.[183] Therefore, in balancing the governmental interests, the court found that the interests were not

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[179] Id.

[180] Id. at 768.

[181] Id.

[182] Id.

[183] Id at 772.

compelling and therefore could not override the first amendment protection granted to the advertisements.

In City of Antioch v. Candidates' Outdoor Graphics Service,[184] a city ordinance limiting the posting of political signs to a 60 day period before an election was challenged. The Court found that the ordinance was not a valid time, place and manner restriction because the ordinance did not determine whether and at what times the exercise of first amendment rights were compatible with the normal uses of a particular forum.[185] The Court also found the ordinance to be an unconstitutional content-based restriction.[186] There is a governmental interest in protecting the aesthetic appearance of a community because if uncontrolled, the community could be subject to visual blight and pollution.[187] However, the ordinance in question did not adequately accommodate these goals in connection with the public's right to be informed.[188]

Each medium has its advantages and problems.[189] The use of the temporary political sign offers candidates certain advantages. It give them the opportunity to gain name recognition, target potential supporters and test the political waters before

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[184] 557 F. Supp. 52 (N.D.Cal.1982).

[185] Id. at 56.

[186] Id. at 61.

[187] Id. at 60.

[188] Id.

[189] Id. at 58.

using more expensive mediums.[190] While candidates may have alternative tools available, these alternatives are unsatisfactory because of they are more expensive and less effective. Because of the interest in allowing the candidates to use this important political campaign tool and the availability of less drastic alternatives to control the problems[191] this ordinance did not meet the standard necessary to be a valid content-based restriction.[192]

In Lebron v. Wash. Metro. Area Transit Authority,[193] an artist whose political poster was denied display space in subway stations by a transit authority sued to compel the transit authority to display a poster critical of the Reagan Administration. The United States Court of Appeals held that the transit authority's refusal to accept the poster for display in its subway stations because of its content violated the artist's first amendment rights.

The court found that the restriction was not a valid time, place and manner restriction because the authority's assessment of deceptiveness involved a judgment about the substance and content of the message. To justify the content-based restriction, the state argued that it was trying to advance the interest of preventing purposeful deception. The court found that the poster was not deceptive because a

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[190] Id.

[191] Such as the regulation of size, design and construction of the posters, instituting clean up or removal requirements and prohibiting the posting of the signs where it would block or obscure vital signs or utilities. Id. at 61.

[192] Id. at 61.

[193] 749 F.2d 893 (D.C. Cir. 1984).

reasonable person would see the poster as a biased portrayal of an idea. The poster, which was an obvious photo-montage, portrayed an implausible scene and contained a disclaimer. Because there was no pretense of objectivity, this poster could not be deceptive.[194] The court stated that in balancing the various interests, the thumb should be on the speech side of the scale.[195] When a message is significantly ambiguous to allow a discerning viewer to recognize it as something other than an actual event, then the courts should not restrict the speech.[196] This, coupled with the fact that the courts wish to avoid deciding on the truth or falsity of political messages, led the court to hold that this was not a valid content-based restriction.[197]

In Penthouse Intern. Ltd. v. Koch,[198] a magazine brought an action against subway authorities challenging the rejection of a poster featuring a caricature of a political figure portrayed as an almost nude male "stripper." The magazine claimed that the subway authorities violated their first amendment rights by refusing to display the advertisement on the grounds that its content was offensive.

The Court found the poster to be political speech. It held that often the distinction between commercial speech (which is subject to greater regulation) and

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[194] Id. at 897.

[195] Id. at 898.

[196] Id.

[197] Id.

[198] 599 F. Supp. 1338 (S.D.N.Y. 1984).

political speech is not always clear-cut.[199] Just because an advertisement is a paid commercial message does not deprive it of its political message and content.[200] "If the message is integrally related to the exposition of thought which may shape our concepts of the whole universe of man, then it is political speech."[201] The court also found the subway to be a public forum.[202] Because the advertisement was political speech in a public forum, the state could not regulate the message without a narrowly drawn regulation which furthers a compelling state interest.[203]

The Court rejected the interests advanced by the state. It found that there was no captive audience present because the advertisements were displayed in an open area and not on the inside of the subway cars.[204] The Court also rejected the argument that the posters were a public nuisance. A public nuisance according to the Court must be loud and intrusive and not passive.[205] An advertisement is not a public nuisance just because it is in bad taste. In finding the subway authority's rejection of the advertisement to be unconstitutional, the Court emphasized the importance of

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[199] Id. at 1344.

[200] Id. at 1345.

[201] Id. at 1344.

[202] Id. at 1347.

[203] Id. at 1349.

[204] Id. at 1347.

[205] Id. at 1350.

uninhibited, robust and wide-open debate on public issues."[206]

II. TIME, PLACE AND MANNER RESTRICTIONS.

The first amendment does not give people a right to propagandize their views, whenever, however and wherever they please.[207] The proper test for a time, place and manner restriction depends upon the type of forum that the speech occurs in. Television is certainly not a public forum[208] and therefore is not subject to the traditional time, place and manner test.[209] Similarly, television is not a non-public forum[210] and therefore subject to that standard of regulation.[211]

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[206] Id. at 1351.

[207] Greer v. Spock, 424 U.S. 828, 836 (1976); Adderly v. Flordia, 385 U.S. 39, 48 (1967).

[208] Television is not a public forum. In Muir v. Ala. Educ. Television Comm'n, 668 F.2d 1033 (5th Cir. 1982), the United States Court of Appeals held that television is not a public forum for first amendment purposes because Congress did not create a right of access for viewers to television broadcast stations. id. at 1040.

[209] The test for whether the regulation of speech is a constitutionally permissible time, place and manner restriction in a public forum is (1)whether the law is necessary to furthering a significant governmental interest Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98 (1972); (2) whether the restriction is content neutral Hudgens v. NLRB, 424 U.S. 507, 520 (1976); (3) whether the restriction places no undue burden or absolute prohibition on free speech. Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); Heffron v. Intl. Soc'y for Krisna Consciousness, 452 U.S. 640, 648 (1981); Consol. Edison v. Public Serv. Comm'n of New York, 447 U.S. 530, 535 (1980); (4) whether there are ample alternative channels of communication for the information left open. id.

[210] Public facilities which are not particularly linked to expression are referred to as "non-public forums." See, Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985). Television, by definition is linked to expression and it is especially linked to expression as a result of its access requirements to candidates during elections under section 315.

[211] First amendment protection is granted little protection in non-public forums. The court will be quick to conclude that speech related conduct interfers with the facilities normal operations. Even a symbolic, rather than direct operational, interference will be enough to permit the government to ban the expressive activity. See, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 988-89 (1988). In a non-public forum, the government may not only ban all expressive activity, it may also be selective about which speakers it will give access to and which subject matters it will permit to be discussed, so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. A speaker may be excluded from a non-public forum

Television most likely fits into the category of semi-public forums[212] and therefore must be analyzed under that test.

In Grayned v. City of Rockford,[213] the United States Supreme Court ruled that in order to determine whether a time, place and manner restriction in semi-public forums is reasonable, the nature of the forum must be considered in light of the type of speech activity that is being regulated.[214] If the speech activity is found to be compatible with the place's normal activity, then it must be determined what governmental interest is promoted by the regulation and whether it is legitimate.[215]

The initial inquiry under Grayned is whether the expressive activity being regulated is appropriate for the place used as a forum. Brown v. Louisiana[216] illustrates this prong of the Grayned analysis. In Brown, five black men were convicted under a breach of the peace statute for standing silently in the reading room of a segregated public library in protest of racial discrimination. The Supreme Court

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if he wishes to address a topic not encompassed within the purpose of the forum or if he is not a member of the class of speakers for whose special benefit the forum was created. However, the government violates the first amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. See, Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985).

[212] Semi-public forums consist of facilities which were not created primarily for the purpose of furthering expression, but which nonetheless are closely linked to the interchange of ideas. Television was not created primarily for the purposes of furthering political ideas, but it is closely linked to the interchange of political ideas because of the requirements of sec. 315 of the Communications Act.

[213] 408 U.S. 104 (1972).

[214] See, id. at 116.

[215] Id.

[216] 383 U.S. 131 (1966).

ruled that the statute unconstitutionally violated the men's first amendment rights.[217] According to the Court: "[T]he circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. . . . Were it otherwise, a factor not present in this case would have to be considered."[218] Through this statement, the Court implied that if the men had engaged in a loud disruptive protest their activities would not have been protected by the first amendment.

It may be argued that the broad protections given to political speech were enacted to provide the public with the information necessary for making rational voting choices. Those favoring restrictions may argue that television's purpose is to operate in the public's interest, convenience and necessity. Televised political ads should conform to these standards by providing information which would aid voters in making rational voting choices, not irrational ones. Critics may argue that external imagery in televised presidential campaign advertising is not quietly providing relevant information to voters on issues of concern, but instead substitutes flash, style and emotion for issue information.[219] This makes external imagery incompatible with the purposes of television broadcasting and therefore it can be constitutionally regulated.

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[217] Id. at 142.

[218] Id.

[219] See, The Public Mind, supra note 179.

The courts are not likely to accept this argument. The Court in Antioch said that each medium has its special advantages and problems.[220] Television is a visual medium which relies on strong visual messages to gain viewer interest.[221] While the emphasis on visual information may create viewer interest, it can also mean that the information presented is not always "hard facts." This does not follow that information is not being presented, it merely means that the information presented may not be the most useful information.

The use of extrnal imagery can be differentiated from cases such as Brown, in which the method of communication was clearly inconsistent with what a person would expect in that surrounding. With television, viewers expect strong emphasis on visuals and softer information. External imagery in television does not upset their expectations, because it is not inconsistent with what they would expect in that forum.

Because the speech activity is compatible with television's normal activity, it must be determined whether a legitimate government interest is being promoted by the regulation.[222]

The governmental interests involved here do not appear to be legitimate because regulations are not content-neutral. In Africa/Namibia, the Court found that the regulation was not content-neutral because it did not restrict all display advertising,

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[220] 557 F. Supp. at 58.

[221] See MANDER, supra note 171.

[222] 408 U.S. at 116.

only political advertising.[223] In the same manner, the regulation of external imagery does not apply to all advertising, only political advertising. In Lebron, the Court found that because the government was making value judgments about the substance and content of the message through its restriction, it was not content-neutral.[224] By regulating external imagery, the government is making a value judgment about the quality of its substance. It is essentially labeling external imagery as bad information. For the same reasons that the regulations were found not to be content neutral in Africa/Namibia and Lebron, the court will likely find that the regulation of external imagery in televised presidential campaign advertising is also not content neutral. Therefore, the regulation would not be a valid time, place and manner restriction.

III. CONTENT-BASED RESTRICTIONS

Because regulating external imagery in televised presidential campaign advertising would not be a valid time, place and manner restriction, it must be determined whether the regulation would be a valid content-based restriction. Because the activity involves protected political speech[225] and occurs in a semi-public forum,[226] the first

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[223] 708 F.2d at 768.

[224] 749 F.2d at 899.

[225] External imagery is constitutionally protected under the area of "speech-plus." Speech-plus occurs when the physical action element of expression combines with the speech element to become an important method of communicating an idea. Kucinich v. Forbes, 432 F. Supp. 1101,1111 (E.D. Ohio 1977). As discussed earlier, in televised presidential campaign advertising, there is a strong emphasis on the visual conduct. The visual conduct of the ad serves to re-enforces the verbal portion by adding an emotional emphasis to the spoken message.Id.

amendment rights of the communicator must be balanced against the state's interest in regulating the speech.

In order to defeat a candidate's right to express himself through external imagery in televised presidential campaign advertising, there must be a compelling government interest involved.[227]

The few cases in which the federal courts have ruled on issues related to political advertising demonstrate some trends which may be helpful in predicting how the courts will balance the competing interests when determining the constitutionality of regulations on external imagery.

The courts seem to adhere to a strong libertarian standard when ruling on political advertising issues. The courts emphasize the importance of wide-open debate on political elections and preserving the "free marketplace of ideas." The libertarian standard is followed through the presumption of the invalidity of governmental regulation of political advertising and the attempt to keep government from having too much control over the type of ideas to which the public will be exposed. The libertarian stance of the court in political advertising issues can also be seen in the "hands off" attitude by the court in deciding the truth or falsity of political messages.

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[226] Television is not generally a public forum. In Muir v. Ala. Educ. Television Comm'n, 688 F.2d. 1033 (5th Cir. 1982). the United States Court of Appeals ruled that because Congress did not create a right of access for viewers to television broadcast stations, television is generally not a public forum for first amendment purposes. Id. at 1040. As discussed earlier, television best fits within the designation of a semi-public forum.

[227] See, O'Brien, 391 U.S. at 377.

The courts also recognize the importance of the various campaign tools available to the candidate and exhibit a policy of allowing the political candidate full use of these tools to communicate their message. The courts permit the use of these tools even though the use may infringe on certain governmental interests.

The universal exception to this "hands off" attitude appears when a captive audience is involved. The courts recognize the right of a person to be free from messages that they cannot avoid and will allow restrictions on political advertising on this basis.

Based on these trends, the following conclusions may be drawn regarding the balancing of the competing interests involved in external imagery in televised presidential campaign advertising:

A.Rationality in Elections

A central premise of democratic theory is that electoral outcomes should be rational rather than irrational. In other words, election outcomes should reflect the true, reasoned and informed choice of the people.[228] Our system of government was designed to allow citizens to choose leaders that will guide the nation toward the attainment of societal benefits[229] and allow citizens in elections to select the best

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[228] See, e.g., C. BECKER, MODERN DEMOCRACY 14 (1941) (an assumption of the theory of democratic government is that "its citizens are rational creatures"); THE FEDERALIST No. 49, at 351 (J. Madison) (B. Wright ed. 1961) ("[I]t is the reason, alone, of the public that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.").

[229] See THE FEDERALIST No. 10 at 134 (J. Madison)(B. Wright ed. 1961) (the best leaders will be citizens "whose wisdom may best discern the true interest of their country" and who will be "least likely to sacrifice it to temporary or partial considerations").

leaders from among the available candidates.[230] This function is fulfilled only when electoral outcomes are rational. Irrational voting raises the possibility of electing candidates who are, at best, less capable than other contenders, or at worst, incompetent, unscrupulous or corrupt. Because of this, irrational electoral outcomes resulting from irrational voting threaten the proper functioning and, ultimately, the survival of the democratic state.[231]

As demonstrated, studies suggest that external imagery in televised presidential campaign advertising damages a rational democratic process. In order for a rational democracy to work, the voter must collect information on which to base his decision.[232] This information collection depends on accurate, relevant information on the candidate's positions on the issues faced by the nation[233] being available to the

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[230] Frequent elections were meant to ensure that the people continuously reassess the quality of their government, See THE FEDERALIST No. 52, (J. Madison) and the opportunity to reelect an incumbent allows the electorate "to prolong the utility of his talents and virtues." THE FEDERALIST No. 72 (A. Hamilton); cf. THE FEDERALIST No. 64, at 421 (J. Jay) (B. Wright ed. 1961) (although there was some disagreement at the Constitutional Convention of 1787, the Framers generally believed that elected bodies would be "composed of the most enlightened and respectable citizens"); THE FEDERALIST No. 68, at 442 (A. Hamilton) (B. Wright ed.)(the electoral system devised to elect the President "affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.").

[231] THE FEDERALIST No. 6, at 109 (A. Hamilton) (B. Wright ed. 1961)([Some causes of war] take their origins entirely in private passions; in the attachments, enmities, interests, hopes and fears of leading individuals in the communities of which they are members. Men of this class, whether the favorites of a king or of a people. . . have not scrupled to sacrifice the national tranquility to personal advantage or personal gratification.

[232] See, A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, THE AMERICAN VOTER 169-170 (1960).

[233] See, id. at 216-65. The key to rational voting lies more in the reasoning processes than in the consideration or lack of any particular issues. Characteristics normally thought to be unrelated to a candidate's qualifications-e.g. race, see Anderson v. Martin, 375 U.S. 399, 402 (1964)(state may not print candidate's race on ballot because to do so would improperly put state imprimatur on racially-based voting)- may under certain circumstances, form the basis for a rational vote. For example, a voter may be acting rationally when he votes solely on the basis of race where the voter believes that minority representation in elected bodies must be increased or that black candidates will do more to advance the interests of black

voters.[234]

It may be argued that external imagery dilutes the informational value of the spots.[235] If members of a democracy are to successfully govern themselves, they must have easy access to a reasonably accurate and complete account of the facts needed to make informed decisions on the candidates. Studies indicate that very little rational information is being presented in today's advertisements.[236]

Candidates rarely use advertising to take a specific position on an issue.[237] While candidates are capable of taking a stand in 30 seconds,[238] most choose not to for strategic reasons.[239] Taking a specific stand alienates a share of the audience and when trying to win a campaign, a candidate does not want to do anything which will separate him from potential supporters.[240] Instead an "emotional orgy" takes place

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citizens than will white candidates. Such a vote is really an issue-based vote, since the issues of concern to the voter involve race and the voter is simply using the candidate's race as a shorthand for calculating the responsiveness of the candidate to those issues. A vote based on race is irrational when there is no reasoned connection between race and the electoral issues of concern to the voter.

[234] An "issue voter who is proceeding on misinformation cannot be counted as 'rational'" insofar as his vote does not express "what the voter intended and [is] thus subversive of meaningful dialogue." Converse, Public Opinion and Voting Behavior, in 4 HANDBOOK OF POLITICAL SCIENCE 75, 121 (F. Greenstein & N. Polsby eds. 1975).

[235] See, The Public Mind, supra note 179.

[236] Id.

[237] DIAMOND & BATES, supra note 88 at 357.

[238] It is possible for a candidate to take a very clear stand in 30 seconds. For example, Eisenhower's promise to go to Korea took less than 30 seconds and so did McGovern's promise to end the Vietnam War.

[239] DIAMOND & BATES, supra note 88 at 357.

[240] Id.

using external imagery,[241] in which voters are not being informed, but manipulated.[242]

The use of external imagery in televised presidential campaign advertising to misrepresent facts and deceive the public is also causing great concern.[243] Today's communication consultants are experts in the use of half-truths and outright lies.[244] The misrepresentation and exaggeration is best illustrated through negative advertising. Negative advertising often uses the record of the candidate to convey a misleading impression by omitting important elements of context by selectively quoting from the candidate's articles and speeches or using distorted statistics that purport to "say it all," but which in reality say nothing.[245]

This lack of rational information is causing presidential elections to become more irrational in nature[246] causing some to fear that an incompetent, unscrupulous or corrupt candidate with a good television persona could be put into a powerful position.[247] Arguably, a candidate that is well-known and experienced in front of a camera can portray himself as competent and knowledgeable, even if he is not.[248]

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[241] The Public Mind, supra note 179.

[242] See, id.

[243] See generally, Winsbro, supra note 34.

[244] See generally, Winsbro, supra note 34.

[245] See, D. HUFF, HOW TO LIE WITH STATISTICS (1956).

[246] The Public Mind, supra note 179.

[247] See, Rosenberg, Bohan, McCafferty & Harris, supra note 156; SPERO, supra note 1.

[248] See generally, Rosenberg, Bohan, McCafferty & Harris, supra note 156.

It is unlikely however that the courts will find this to be a substantial government interest which would allow government to step in and regulate content. The courts, through their decisions on political advertising, have reaffirmed their devotion to the free marketplace of ideas concept. This means that ideas and content, both good and bad, should be allowed to compete without governmental interference. There are three reasons why this result is likely. Televised political advertising is only one method of obtaining information on candidates. Voters may look to the press, to the candidate's own "paper trail" or even to the opposition to provide additional information on a candidate. Placing restrictions upon the use of external imagery in televised presidential campaign advertising is therefore not the least drastic means of combating some of the problems present in today's elections.

The courts also allow for the full use of political tools. It is likely that the court will allow a liberal use of television advertising in the same way that they allowed the political signs in Antioch. This would be consistent with the preference the courts have for the uninhibited campaign communication over other governmental interests.

The paucity of research on external imagery may also cause the court to avoid placing restrictions on external imagery. While the available research suggests that external imagery has a negative effect on our elections, there is no solid evidence of this. For these reasons, the courts will likely find that the rationality of elections is not a significant interest which would justify restrictions on an aspect of political advertising.

B.The Expense of Television Advertising.

External imagery in televised presidential campaign advertising has driven up the cost of Presidential campaigns.[249] While broadcast advertising in general is expensive, the use of external imagery with its sophisticated techniques have added to this high cost.[250] While exact figures are difficult to determine,[251] the cost of running for office has increased dramatically over the past 35 years and much of this increase can be attributed to the cost of television advertising.[252]

While there are legislative limits on the total amount that candidates may spend on an election,[253] the laws permit candidates to allocate the money in any way they choose.[254] Increasingly, most of the budget is being set aside for television advertising.[255]

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[249] Diamond & Bates, supra note 11 at 32.

[250] Id.

[251] The Federal Election Commission depends on the figures reported by the candidates. The accuracy of these figures are difficult to determine.

[252] According to Diamond and Bates:

> From 1912 to 1952, each national party spent about the same amount of money per vote cast in the national elections. Then, with the introduction of television, campaign expenditures skyrocketed. By 1968, the Republican and Democratic committees were spending three times as much per vote as they had sixteen years earlier. Moreover, the share of spending going to television has increased at an even faster rate and at the expense of other campaign methods. Total political spending (adjusted for inflation) has tripled since 1952 while the amount spent on TV has increased at least fivefold. Diamond & Bates, supra note 11 at 32.

[253] Specifically the Federal Election Campaign Act.

[254] A. SALDICH, ELECTRONIC DEMOCRACY: TELEVISION'S IMPACT ON THE AMERICAN POLITICAL PROCESS 41 (1979).

[255] Id.

When the cost of communication drives up the price of campaigning, serious damage can occur to the right to participate in the political process. Robert Kennedy, former U.S. Attorney General and brother of President John F. Kennedy, said in a study of campaign costs:

> The mounting cost of elections is rapidly becoming intolerable for a democratic society, where the right to vote, and to be a candidate, is the ultimate political protection. We are in danger of creating a situation in which our candidates must be chosen only from among the rich, the famous, or those willing to be beholden to others who will pay the bills. Heavy dependence on the relatively few who can meet these enormous costs is not only demeaning and degrading to the candidates, it engenders cynicism about the political process itself.[256]

Critics fear that the high cost of television will drive out the less wealthy or put them in hock to special interest groups.[257] While the high cost of campaigning began before the introduction of television to the political scene,[258] the introduction of television has sent costs soaring. As Theodore H. White remarked, "TV is no medium for a poor man."[259]

This high cost of campaigning has caused some critics to fear that candidates will go outside the law in order to pay for their campaigns.[260] These fears were

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[256] Id. at 40.

[257] Id.

[258] R. GILBERT, TELEVISION & PRESIDENTIAL POLITICS 91-92 (1972). Campaign costs began to rise dramatically with the introduction of radio. During the 1932 election, expenditures for radio doubled over what they were for the 1928 election. By 1948, radio had such a high priority on campaigns that campaign leaders did everything they could to raise the substantial sums of money necessary to use radio. Id.

[259] Id at 109.

[260] SALDICH, supra note 90 at 41.

realized when it was revealed during the Watergate hearings that the Committee to Reelect the President had gathered a secret fortune, known as a "slush fund" for campaign expenses. This money was secretly provided by special interest groups that expected or were promised political favors in return.[261]

The expense of elections, due in part to the expense of advertising is unlikely to be found to be a compelling state interest. In Antioch, the court stated that each medium has its own advantages and problems. Like the political signs in Antioch, television advertising offers numerous advantages to the political candidate. Television advertising offers the candidate a low cost per thousand price and the ability to reach undecideds and non-supporters, rather than only those voters already in favor of a candidate.[262] However, while television advertising does provide certain advantages, television advertising, like the signs in Antioch, has problems associated with it. Television is a very expensive medium and those who cannot afford it will be excluded.

Because alternative forms of campaigning are available, it is unlikely that the court will find a compelling state interest present. Restricting external imagery will not allow more people to use the medium. It will only limit the utility of the medium.

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[261] One example of the favors granted to these special interest groups occurred when Nixon granted a one cent increase in the price of milk immediately after Nixon had announced a price freeze. That was his thank you to the milk industry for the $2 million that they had contributed to his reelection campaign. Using the Department of Agriculture's estimated milk consumption in 1977, Saldich found that this increase would bring in about $400,000 every year; a good annual return on a one-time campaign investment. Id.

[262] KAID, NIMMO & SANDERS, Supra note 3 at 108.

C. Privacy and Captive Audience Concerns

Another interest which could be furthered by the regulation of external imagery involves the area of privacy. The first amendment generally recognizes that a person has the right to be left alone[263] and no one has the right to press even good ideas on an unwilling recipient.[264] A person's home is afforded special protection under this right of privacy[265] and under the appropriate circumstances the communicator's first amendment rights may bow to privacy interests.[266] In Kovacs v. Cooper,[267] for example, the United States Supreme Court ruled that the first amendment rights of the operator of a sound truck on a public street would have to yield to the privacy rights of the bordering homes who were unwillingly being subjected to the messages from the sound truck.

It may be argued that the external imagery is forcing its way directly into viewers' homes through their television sets. It can be argued that a person's home is not an open, public place and that dwellers have no choice but to have the advertising message "thrust upon them by all the arts and devices that skill can

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[263] Rowen v. United States Post Office Dept., 397 U.S. 728, 736 (1970).

[264] Id. at 738.

[265] Id. The Supreme Court has ruled that the ancient concept that a man's home is his castle into which not even the king may enter has not lost its vitality in today's society.

[266] See, e.g., Rowen, 397 U.S. at 736 (right to be let alone balanced against the right to communicate).

[267] 336 U.S. 77 (1949).

produce."[268] In Columbia Broadcasting System v. Democratic Nat'l. Comm.,[269] the United States Supreme Court recognized the captive nature of the broadcast audience. According to the Court:

> [Broadcast] listeners do not have the same option that the reader of publications has-to ignore advertising in which he is not interested-and he may resent its invasion of his set. As the broadcast media became more pervasive in our society, the problem has become more acute. . . . Written messages are not communicated unless they are read and reading requires an affirmative act. Broadcast messages are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly an ordinary habitual television watcher can avoid these commercials only by leaving the room, changing the channel or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[270]

Finally, while the concerns over privacy and viewers being a captive audience may seem like a valid argument for a substantial government interest, it is likely that the courts will reject this argument also. A person viewing televised presidential campaign advertising at home is not a member of a captive audience as would be a person on a streetcar. In Lehman v. City of Shaker Heights,[271] the Supreme Court reversed its earlier concerns about the captive audience effect of broadcast advertising. In Lehman, the Court differentiated political advertising on buses from broadcast

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[268] Lehman, 418 U.S. at 302.

[269] 412 U.S. 94 (1973).

[270] Id. at 128.

[271] Id. at 299.

advertising entering homes. According to the majority opinion and the concurring opinion by Justice Douglas, one who tunes in on an offensive program at home can either turn it off or tune in another station if he wishes.[272] He can avoid the message entirely without exerting great effort. A televised political advertisement does not have the intrusive effect necessary to circumvent first amendment protection. Therefore, it is likely that the courts will find that there is no captive audience present.

Therefore, based on first amendment theory, public policy considerations and court opinions examining political advertising, the courts may find that because of the strong protections placed upon political speech, the availability of alternative means of obtaining political information and the lack of research into the effects of external imagery, the court will likely find that a compelling state interest in regulating external imagery does not exist. Therefore, a content-based restriction upon external imagery in televised presidential campaign advertising would not be constitutional.

IV. OVERBREADTH

A statute is overbroad if in addition to proscribing activities which may constitutionally be forbidden, it also sweeps within its coverage, speech or conduct which is protected by the guarantees of free speech.[273]

In recent years, the use of overbreadth analysis in first amendment cases has

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[272] Id. at 302, 307.

[273] See, Thornhill v. Ala., 310 U.S. 88 (1940).

been significantly curtailed. In Broadrick v. Oklahoma,[274] the United States Supreme Court held that the overbreadth must be substantial compared with the legitimate applications of the statute.[275] In Broadrick, the court distinguished between statutes primarily regulating conduct and those directly governing speech.[276] In situations where a statute regulates pure speech, standard overbreadth analysis applied. [277] However, in cases in which a statute governs conduct, which happens to contain expressive content, the "strong medicine" of complete invalidation of the statute should not be applied.[278] Instead, for facial invalidation to be appropriate, the "overbreadth of the statute, must not only be real, but substantial, judged in relation to the statute's plainly legitimate sweep."[279] The court found that although a statute may be applied to a constitutionally protected expression, there was no substantial overbreadth when such potential applications of the statute were not numerous enough compared with the body of permissible applications.

Under this analysis, the overbreadth analysis would not apply to the statute at hand. First of all, as the preceding section demonstrated, it is unlikely that external imagery in televised political ads would lack protection under the first amendment.

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[274] 413 U.S. 601 (1973).

[275] Id. at 615.

[276] Id.

[277] Id.

[278] Id. at 613.

[279] Id. at 615.

Because the statute restricts constitutionally protected expression, the overbreadth analysis is not appropriate.

Even if external imagery in paid televised political advertisements were found to be unprotected expression, the statute would not be overbroad. While it could be argued that in addition to proscribing external imagery (assuming it was constitutional), it also sweeps within its coverage protected speech by prohibiting political messages other than those relating to campaigns. For example, if the president sponsored a commercial advocating a "just say no to drugs," program, he may be restricted in his presentational methods by this statute. The advertisement involves an expenditure for the broadcast of a televised paid political advertisement. While it may have absolutely nothing to do with a campaign, it does advocate a certain political position (that drugs are a problem and must be eliminated). This is clearly a protected message, outside of the purposes of the statute, but it may be conceivably covered under the statute. It may be argued that this statute would place strong restrictions on an important message and eliminate its effectiveness.

It is unlikely that this argument would prevail however. External image is not pure speech because it contains conduct elements through the use of imagery. Therefore, there must be substantial overbreadth for the statute to be invalidated under this theory. The potential unconstitutional application of the statute is remote at best and is therefore not numerous compared to the body of permissible applications. Nearly every conceivable application of this statute would involve the type of political advertising "spots" that have been the source of problems. In fact, the statute itself

makes it very clear that the act applies exclusively to this type of advertising.[280] Therefore, this statute would not be found to be substantially overbroad.

V. VAGUENESS

A statute is void for vagueness if the conduct forbidden by the statute is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ to its application."[281]

Theoretically, the prohibition on statutory vagueness is based on the Due Process Clause's requirement that people be given fair notice of what conduct is prohibited. In the first amendment arena, vagueness may have a chilling effect because a person does not know whether or not his conduct will ultimately be held to be constitutionally protected, so he may decline to exercise his right of speech. The other main function of the vagueness doctrine is to curb the discretion afforded to law enforcement officers or administrative officials.

The statute at hand would not be found vague under this standard. The statute is specific on what each of the terms mean and its application is clearly and carefully articulated. Therefore, because the conduct forbidden is not so unclearly defined that persons of common intelligence must necessarily guess at its meaning and differ to its application, the statute is not vague.

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[280] This is evidenced by the fact that the statute would be an amendment to the Federal Election Campaign Act; it discusses candidates and its purposes involve promoting fair elections.

[281] Connally v. General Construction Co. 269 U.S. 385,391 (1926).

CHAPTER FIVE

CONCLUSIONS

It appears that this statute would violate the first amendment to the United States Constitution.

The regulation of external imagery would not be a valid time, place and manner restriction because external imagery is compatible with messages on the television medium and the regulation of external imagery would not be content-neutral.

It is unlikely that the court would find the regulation to be a valid content-based restriction because a compelling government interest does not exist. The courts have taken a strong libertarian stance in their rulings on political advertising. Because of the strong protection given to political advertising, the availability of alternative sources of political information and the paucity of research on the actual effects of external imagery, the courts will likely find that preserving the rationality of elections is not a substantial state interest which would justify the restrictions.

The courts' allowance of the liberal use of political campaign tools and the availability of alternative forms of communication to candidates would suggest that the

problems associated with the expense of television advertising would not be a substantial state interest.

Finally, because television viewers are not a captive audience, external imagery in televised presidential campaign advertising does not raise privacy problems. Therefore, there is no substantial state interest present which would justify the restriction of external imagery in televised presidential campaign advertising.

A.LIMITATIONS OF STUDY

There are two unavoidable limitations to this study. First, the use of the balancing test by the courts which weighs the relative importance of the conflicting values makes it difficult to predict how the courts would actually rule. This problem with the balancing test was articulated by Justice Black's dissent in Barenblatt v. United States.[282] Black criticized the balancing test because the test often misinterprets the factors to be weighed.[283] Until the matter goes before the Court, it is difficult to predict what weight will be given to the various interests involved. If the weights are shifted by the courts, the results of this study could be changed.

A second limitation of this study comes from the lack of research conducted in the area of external imagery. The research that has been conducted on external imagery in televised presidential campaign advertising merely suggests that external imagery has some power over viewers and that it is damaging rationality in elections.

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[282] 360 U.S. 109 (1959)(Black, J., dissenting).

[283] Id. at 144-145.

If research finds concrete evidence of specific negative effects, then a substantial interest would more likely be found. If research were to find that no negative effects could be linked to external imagery, than there would be no substantial interest.

B.CONCLUDING REMARKS

It is possible that regulating external imagery in these advertisements might solve some of the problems currently associated with televised presidential campaign advertising by forcing candidates to provide information instead of relying on visuals to stir up viewer's emotions. The increased flow of "hard" information would be consistent with the ideas behind the concept of rational elections.

While regulating external imagery through legislative action may appear attractive, it appears from the trends exhibited by the courts in ruling on political advertising issues that the libertarian notion of the "free-marketplace of ideas" should continue to control, even in the electronic age. This is the most desirable result. It is far better to have a flow of ideas free from government intervention. When we allow government to determine what ideas we are to be subjected to when making our political decisions, we run the risk of allowing government to determine what information is "good" and what information is "bad." This is very dangerous in a free society and it is especially offensive when the information presented deals with our political choices.

The best solution to the problems presented by external imagery in televised political advertising is not government intervention, but for the citizens and the press to take their duties of active involvement in political affairs seriously. This concept

was at the foundation of our government and it should remain there.

BIBLIOGRAPHY

Allen, Craig. "Our First "Television" Candidate: Eisenhower over Stevenson in 1956" Vol. 65 Journalism Quarterly pages 352-59 (Summer 1988).

Arlen, Michael J. "The Air" Vol. 55 New Yorker pages 107-17 (February 18, 1980).

Benny, Joesph. John F. Kennedy and the Media: The First Television President Lanham: University Press of America (1987).

Bloom, Melvyn. Public Relations and the Presidential Campaigns. New York: Thomas Y. Crowell Company, 1973.

Campbell, Angus, P. Converse, W. Miller & D. Stokes, The American Voter New York: Wiley (1960).

Chagall, David. The New Kingmakers. New York: Harcourt Brace Jovanovich, 1981.

Davies, Philip. "The Drama of the Campaign: Theater, Production & Style in American Elections" Vol. 39 Paralimentary Affairs pages 98-114 (1986).

Diamond, Edwin. "A Candidate for all Channels" Vol. 5 American Film pages 28-32 (May 1980).

Diamond, Edwin. "The Last Hurrah" Vol. 21 New York pages 34-37 (1988).

Diamond, Edwin & Stephen Bates. "30 Second Elections" Vol. 17 New York pages 846-51 (1984).

Diamond, Edwin, & Stephen Bates. The Spot. Cambridge: MIT Press, 1988.

Diamond, Edwin, & Stephen Bates. "Hot Spots" Vol. 21 New York pages 28-32 (February 15, 1988).

Douglas, Jack. "The Verbal Image: Student Perceptions of Political Figures" Vol. 39 Speech Monographs pages 1-15 (1972).

Ewen, Stuart. All Consuming Images New York: Basic Books (1988).

Garramone, Gina. "Voter Response to Negative Political Ads" Vol. 61 Journalism Quarterly pages 250-59 (Summer 1984).

Gilbert, Robert. Television & Presidential Politics North Quincy: Christopher Publishing House (1972).

Hellweg, Susan. "An Examination of Voter Conceptualization of the Ideal Political Candidate" Vol. 44 Southern Speech Communication Journal pages 373-85 (1979).

Jamieson, Kathleen. Packaging the Presidency. New York: Oxford University Press, 1984.

Kaid, Lynda, Dan Nimmo & Keith Sanders. New Perspectives on Political Advertising, Carbondale: Southern Illinois University Press (1986).

Keating, John & Bibb Latane. "Politicians on TV: The Image is the Message" Vol. 32 Journal of Social Issues pages 116-32 (1976).

Kelly, Stanley & Thad Mirer. "The Simple Act of Voting" Vol. 68 American Political Science Review pages 572-91 (1974).

Kinder, Donald. "Political Person Perception: The Asymetrical Influence of Sentiment & Choice on Perception of Presidential Candidates" Vol. 36 Journal of Personality & Social Psychology pages 859-87 (1978).

Mander, Jerry. Four Arguments for the Elimination of Television. New York: Quill, 1978.

Markus, Gregory. "Political Attitudes During an Election Year: A Report on the 1980 NES Parcel Study" Vol. 76 American Political Science Review pages 538-60 (1982)

Markus, Gregory & Philip Converse. "A Dynamic Simultaneous Equation Model of Electoral Choice" Vol. 73 American Political Science Review pages 1055-70 (1972).

McGinniss, Joe. The Selling of the Presidency 1968 New York: Trident Press, 1969.

Meyer, Timothy & Thomas Donohue. "Perceptions & Misperceptions of Political Advertising" Vol. 10 Journal of Business Communication pages 29-40 (1973).

Mitchell, Greg. "How Media Politics was Born," Vol. 39 American Heritage pages 34-41 (Sept.-Oct. 88).

O'Keefe, Timothy & Kenneth Sheinkopf. "The Voter Decides: Candidate Image or Campaign Issues" Vol. 18 Journal of Broadcasting page 403-11 (1974).

Packard, Vance. The Hidden Persuaders New York: Washington Square Press, 1957.

Patterson, T. & R.D. McClure. The Unseeing Eye New York: G.P. Putnam's Sons (1976).

Philport & Balon. "Candidate Image in a Broadcast Debate" Vol. 19 Journal of Broadcasting pages 181-94 (1975).

Rosenberg, Bohan, McCafferty & Harris. "The Image and the Vote: The effect of Candidate Presentation on Voter Preference" Vol. 30 American Journal of Political Science pages 108-27 (1986).

Rubin, Benard. Political Television Belmont: Wadsworth Publishing Co. Inc., 1967.

Saldich, Anne. Electronic Democracy: Television's Impact on the American Political Process New York: Praeger (1979).

Sorenson, Theodore. Kennedy New York: Harper & Row (1965).

Spero, Robert. The Duping of the American Voter New York: Lippicott and Crowell, 1980.

Thompson, Charles. Television and Presidential Politics Washington D.C.: The Brookings Institution, 1956.

Wattenburg, Martin. "From Parties to Candidates: Examining the Role of the Media" Vol. 46 Public Opinion Quarterly pages 216-27 (1982).

White, Theodore. The Making of the President-1960, New York: Atheneum (1961).

Winsbro, Jack. "Misrepresentation in Political Advertising: The Role of Legal Sanctions" Vol. 36 Emory Law Journal pages 853-916 (1987).

Zuckerman, Laurence. "The Made-for TV Campaign," Vol. 132 Time pages 66-71 (November 14, 1988).

APPENDIX

98TH CONGRESS
2D SESSION

H. R. 5307

To amend the Federal Election Campaign Act of 1971 to regulate political advertising in campaigns for Federal elective office.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 1984

Mr. CONYERS (for himself and Mr. MCHUGH) introduced the following bill, which was referred to the Committee on House Administration

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A BILL

To amend the Federal Election Campaign Act of 1971 to regulate political advertising in campaigns for Federal elective office.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fairness in Political Advertising Act".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds and declares that—

(1) the costs of campaigns for Federal elective office have increased at such a rate and to such a point as to threaten both access to and equity within the political process;

(2) a principal reason for the increase in campaign costs is the growing dependence on the part of candidates, parties, and interest groups on the use of television advertising and, specifically, spot advertising, as the primary mode of political campaigning;

(3) such advertisements have served to frustrate the intent of the first amendment, obscuring rather than providing a full, fair, and rational debate on the merits of the issues and candidates;

(4) these advertisements may have contributed to declining political involvement, weakened political parties, and negative public attitudes toward the political process itself;

(5) television is a unique medium because of the limitations in points of access, the cost of such access, and the pervasiveness and effectiveness of its reach;

(6) similarly, television advertising is unique in its effect and emotive content, being virtually unanswerable and less susceptible to the usual constitutional remedy of more, or more diversified, speech;

(7) both commercial and political advertising have been regulated in the past in light of factors of compelling Federal interest; and

(8) there is, because of factors herein enumerated, a compelling Federal interest in regulating the manner,

but not the content, of political advertising through television, and to explore other ways to constrain the costs of political campaigns.

(b) The purposes of this Act are—

(1) to regulate the manner of presentation of political advertising on television in order to reduce the costs of political campaigns,

(2) to strengthen the ability of citizens to make informed choices between or among candidates for office, and

(3) generally to further the purposes of the first amendment to the Constitution of the United States.

AMENDMENT TO FEDERAL ELECTION CAMPAIGN ACT OF 1971

SEC. 3. (a) The Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) is amended by inserting after section 323 the following new section:

"TELEVISED PAID POLITICAL ADVERTISING

"SEC. 324. (a) No person may make any expenditure for the broadcast of any televised paid political advertisement, unless such advertisement meets the following requirements:

"(1) The advertisement may not contain any visual or auditory material other than—

"(A) the voice and image of the candidate or alternative speaker speaking into the camera for the duration of the advertisement, and

"(B) written material consisting of the matter required by paragraph (2) and the matter permitted by paragraph (3).

"(2) Each such advertisement shall contain—

"(A) an identification of the speaker;

"(B) an identification of the candidate, if the speaker is an alternative speaker who is authorized by the candidate to speak on behalf of such candidate; and

"(C) an identification, in accordance with the rules and regulations promulgated by the Commission, of the person or persons who paid for the broadcast of such advertisement.

"(3) Such an advertisement may contain—

"(A) an identification of the candidate's party and the office sought by the candidate,

"(B) a statement as to whether the candidate is seeking election or reelection,

"(C) a solicitation for contributions, and

"(D) hand signs, full text reproduction, closed caption technology, or the like.

"(4) The background or backdrop for any such advertisement—

"(A) shall be filmed, televised, or taped at the same time and with the same camera as that filming, televising, or taping the candidate or alternative speaker, and

"(B) must be the filming, taping, or televising of an actual scene or an actual event at the time of such scene or event, and may not include any staged reproduction of any event or scene.

"(b) For purposes of this section—

"(1) the term 'candidate', with respect to a televised paid political advertisement, is limited to a candidate (as defined in section 301(2) of this Act) for a Federal office the election to which is influenced by such advertisement;

"(2) the term 'alternative speaker' means, with respect to a televised paid political announcement—

"(A) the chairman of any political party, or

"(B) if no candidate or authorized committee makes an expenditure for such advertisement—

"(i) any individual who has made an expenditure for such advertisement, or

"(ii) the treasurer or chief executive officer of any political committee or other or-

ganization which has made an expenditure for such advertisement, or

"(C) an individual designated by a candidate or any person described in subparagraph (A) or (B), but not more than one individual may be designated for any televised paid political announcement.";

"(3) the term 'televised paid political advertisement' means a paid political advertisement broadcast by means of television or direct satellite broadcast, or transmitted by cable television—

"(A) which does not exceed ten minutes in duration, and

"(B) for which any person makes an expenditure, and

"(4) the term 'paid political advertisement' means any communication which is made for the purpose of influencing the outcome of any election for Federal office, or for the solicitation of any contributions.

"(c)(1) Any person who believes a violation of this section has occurred may file a complaint with the Commission in accordance with section 309(a)(1) of this Act.

"(2) For the purposes of taking action upon a complaint filed pursuant to paragraph (1), the Commission may act

without regard to the time frames set forth in this Act with respect to—

"(A) notification of and response from the person alleged to have committed the violation set forth in paragraph (1) of section 309(a) of this Act; and

"(B) correction of violations by informal methods set forth in paragraph (4)(A) of section 309(a) of this Act.

"(3) If the Commission commences an action with respect to such complaint under paragraph (4)(A), (5), or (6) of section 309(a) of this Act, the aggrieved person may intervene as a matter of right as a party in the Commission proceeding.

"(4) If the Commission fails to seek a permanent or temporary injunction or a restraining order under paragraph (6) of section 309(a) of this Act within five days after the filing of a complaint under paragraph (1), the person who filed such complaint may institute a civil action for relief, limited to a permanent or temporary injunction or a restraining order, in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

"(5) In any civil action instituted by a person under paragraph (4), the court may grant a permanent or temporary injunction or restraining order upon a proper showing that

the person involved has committed a violation of this section.".

(b) Section 306(b)(1) of such Act (2 U.S.C. 437c(b)(1)) is amended by striking out "The" at the beginning of the second sentence and inserting the following in lieu thereof: "Except as provided in section 324(c)(4) of this Act, the".

(c) Section 307(e) of such Act (2 U.S.C. 437d(e)) is amended by striking out "section 309(a)(8)" and inserting in lieu thereof the following: "sections 309(a)(8) and 324(c)(4)".

(d)(1) Except as provided in paragraph (2), this Act and the amendments made by this Act shall take effect upon the date of enactment and shall apply to all Federal elections.

(2) The amendments made by this section do not apply to televised paid political advertising broadcast before the Federal election immediately following the calendar year of the date of enactment of this Act.

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