Regulating From Typewriters in an Internet Age: The Development & Regulation of Mass Media Usage In Presidential Campaigns

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“There is nothing more fickle than the masses, nothing more unfathomable than people’s intentions, nothing more misleading than the entire process of an election.” - Marcus Tullius Cicero1

ABSTRACT: The American election process has become a misleading process of campaign promises and self-promotion, thus diluting its primary and most fundamental purpose. This discrepancy can be traced to three primary groups; (1) the candidates, who supplied the motive; (2) the mass media, who supplied the means; and (3) the electorate, who so far have allowed it to happen. Seeking to remedy the situation lawmakers have turned to regulations of the media in attempt to assure fairness and nurture the marketplace of ideas. These numerous attempts at fairness have been met with a mixed reception and mixed results leading to questions about the effectiveness of such measures and their unintended consequences. Through a detailed examination of the development of the relationships between the candidates, mass media and the electorate from the very first true campaign to modern day we can see the intricacies and perhaps the futility of such attempts regulations. Looking forward to the future it seems probable that the evolution of these relationships have just begun and any attempts to stifle...

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this natural development should be approached with caution. Ultimately, it is, as it has always been, the electorate’s responsibility to assure the electoral process is well served by all parties.

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I. INTRODUCTION

This paper takes an in depth look at the relationship of the electoral process, the mass media and how they are effected by governmental attempts to balance free speech concerns with fair elections.

The earliest of democracies were frequently concerned with electioneering, a concern that was often justified. In the days of the Roman Republic, following a highly contested election for his country’s highest office, the consulship, Lucius Linius Murena, found himself on trial for bribery and electioneering. At trial, Murena’s lawyer, the Roman Senator and orator Marcus Tullius Cicero, struck out against recently enacted

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election law that ironically enough he had proposed, *Lex Tullia de Ambitu*. His argument was simple; the political climate required a man of Murena’s military experience to hold the consulship. “There is nothing more fickle than the masses, nothing more unfathomable than people’s intentions, nothing more misleading than the entire process of an election process.” Cicero’s words spoken in defense of Murena not only bypassed the electorate in order to achieve the “right” result, but also encapsulate the problem faced by those seeking to balance fair elections with free speech.

Today, the election process is highly regulated. This regulation often conflicts with principles of free speech and fair election. Even in the earliest democracies there was a deeply rooted concern that the majority would have the dominant power and dominate the minority by sheer will, or dominant resources without contributing meaningfully to a proper discussion of the

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3 Richard A. Bauman, Lawyers in Roman Transitional Politics: A Study of the Roman Jurists in Their Political Setting in the Late Republic and Triumvirate, 18 (C.H. Beck, 1985) (lex Tullia de Ambitu prescribed heavier penalties on candidates who gave bribes to voters, than its predecessor law, *Lex de Ambitu*).

4 See, Tom Holland, Rubicon: The Last Years of the Roman Republic 203-205 (Random House, 2003) (the political climate of the Roman Republic was tense as they were in the throws of the Catiline conspiracy causing significant political unrest.).


7 Crawford v. Marion County Election Bd., 553 U.S. 181, 196 (2008) (plurality opinion); Richard Briffault, Issue Advocacy: Redrawing the Elections/politics Line, 77 Tex. L. Rev. 1751, 1763 (1999) (“Campaign communications are a crucial part of elections, and, as the Supreme Court has indicated, may be regulated in order to advance the goals of deliberative, democratic decision-making.”)

issues, a concern that has persisted in the minds of many philosophers. This paper examines, in a society increasingly driven by media, how the government might level the playing field to promote balanced dialogue.

II. THE MISLEADING ELECTION PROCESS THAT IS CAUSED BY POLITICAL CAMPAIGNS AND THE USE OF MASS MEDIA

"Politics, in a sense, has always been a con game.”
-Joe McGinniss

A. The Elementary Purpose of Elections is For the Governed to Govern.

The roll that elections play is central to collective political decision-making, and thus they are our most important mechanism for securing

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11 Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 906, (2010) (the Court acknowledges that, “television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times”.)
12 JOE MCGINNIS, THE SELLING OF THE PRESIDENT, 18 (Penguin Group, 1988) (“Politics, in a sense, has always been a con game. The American voter, insisting upon his belief in a higher order... which promises another, better life; and defends passionately the illusion that the men he chooses to lead him are of finer nature than he. It has been traditional that the successful politician honor this illusion. To succeed today, he must embellish it. Particularly if he wants to be President.”)
The election process is the opportunity given to the electorate to choose who will hold public office and provides them with an opportunity to vet the candidates thoroughly. This, in theory, weeds out the candidates viewed as undesirable, or believed to be self-promoter out to make cultivate some measure of appeal so that he can pursue his own interest. In the United States this competing interest of society versus the individual was considered early on, when trying to sell the American people on the new Constitution Alexander Hamilton acknowledged the dangers that would be faced every election cycle:

[V]igor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.

In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth. You will, no doubt, at the same time, have collected from the general scope of them, that they proceed from a source not unfriendly to the new Constitution.  

Centuries have now past from Hamilton’s warning and it is apparent with the new modes of media that there is more to guard against than the founding fathers ever contemplated. Although the electoral process was designed in part to weed out potential despots and other threats to democracy these safeguards can be made less effective by the manipulation of mass media.

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B. The Brief History of the Development of Mass Media, Campaigning

1. The Humble Beginning of the Mass Media as a Campaign Tool

The mission of politicians has always been to control perception by controlling the presentation of the information, a lesson politicians have had to learn and relearn with each new incarnation of media. Following two Presidential campaigns by George Washington in which there was not much of a campaign, America got its first real taste of media based campaigning in 1796 in what was termed the country’s first “media blitz”\footnote{See, Neil A. Hamilton, Presidents: A Biographical Dictionary, 416 (Ian C. Friedman Rev., Infobase Publishing 3rd ed., 2010) (George Washington ran unopposed in the 1788 and 1792 Presidential Election.)} America got its first real taste of media based campaigning in 1796 in what was termed the country’s first “media blitz”\footnote{See, Neil A. Hamilton, Presidents: A Biographical Dictionary, 416 (Ian C. Friedman Rev., Infobase Publishing 3rd ed., 2010) (George Washington ran unopposed in the 1788 and 1792 Presidential Election.)} handbills, pamphlets and campaign literature where dispensed by the campaigns of Jefferson and Adams.\footnote{Hanes Walton, Sherman C. Puckett & Donald Richard Deskins, Presidential Elections, 1789-2008: County, State, and National Mapping of Election Data (University of Michigan Press, 2010); Robert V. Friedenberg, Communication Consultants in Political Campaigns: Ballot Box Warriors, 4 (Greenwood Publishing, 1997)} Each campaign did its best to undercut the viability of the other through the media.\footnote{Hanes Walton, Sherman C. Puckett & Donald Richard Deskins, Presidential Elections, 1789-2008: County, State, and National Mapping of Election Data (University of Michigan Press, 2010); Robert V. Friedenberg, Communication Consultants in Political Campaigns: Ballot Box Warriors, 4 (Greenwood Publishing, 1997)} The wide reach of newspapers gave the message of candidate a sense of durability, making it more difficult for candidates to play to the crowd.\footnote{Craig Allen Smith, Presidential Campaign Communication: The Quest for the White House, 57 (Polity, 2010).} In the century that followed the politics changed, but the overall strategy was limited to newspapers, usually party affiliated, person-to-person communications and public appearances.\footnote{See, Robert V. Friedenberg, Communication Consultants in Political Campaigns: Ballot Box Warriors, 5-15 (Greenwood Publishing, 1997). Craig Allen Smith, Presidential Campaign Communication: The Quest for the White House, 55 (Polity, 2010); See also, Joseph S. Tuman, Political Communication in American Campaigns, 129 (SAGE, 2008).} At times these events speeches and debates, such as the famed Lincoln/Douglas debates, attracted as much as 15,000\footnote{Joseph S. Tuman, Political Communication in American Campaigns 129 (SAGE, 2008).} followers to a single...
event in addition to being published for distribution.\textsuperscript{22}

Advances in technology soon forced a new approach by Presidential office holders. With the invention of microphone and the public address system, debuting during the 1920 campaign allowed candidates to speak directly to voters who would ordinarily be out of earshot. This oft-overlooked invention is overshadowed by the creation of the radio, which favored those whose voice where pleasant to the ear.\textsuperscript{23} In the end this early marriage between the mass media and campaigning would seem to be little more than a casual acquaintance with the arrival of the next great media innovation.

2. The Effects of Presidential Debates, Television and Richard Nixon

During the first nationally televised Presidential debate, John F. Kennedy taught Richard M. Nixon how to play to the camera. Upon arrival at the CBS studio on 26\textsuperscript{th} of September Vice President Richard Nixon banged his knee while exiting the back seat of his Oldsmobile.\textsuperscript{24} The sharp pain inflicted by the side of the door would prove to be the highlight of the night for Nixon, who was still recovering from a twelve-day stay in a hospital for a similar injury that had lead to an infection. During the preparation for the Debate Nixon opponent, Kennedy recognized the importance of the occasion and grilled the Debates producer director Don Hewitt on staging details in addition to practicing responses out loud for two day prior to the broadcast. Nixon treated the entire endeavor simply “just another campaign appearance.”\textsuperscript{25} Preparation and a banged up knee were not Nixon’s only problems as network executives who greeted him noted, that he did not look well. Indeed, the Vice President had a temperature of a hundred and two degrees. Kennedy arrived and he refused the use of CBS’s top

\textsuperscript{22} See, \textsc{stephen arnold douglas abraham lincoln, the lincoln-douglas debates}, (douglas l. wilson & rodney o. davis eds., knox college, 2008).
\textsuperscript{23} \textsc{Craig Allen Smith, Presidential Campaign Communication: The Quest For the White House}, 56 (Polity, 2010). (Al Smith a Democratic Gubnatorial candidature’s campaign was among the first to extensively use the radio in a political campaign in 1928, to little effect possibly because of his strong urban New York accent, when contrasted with later candidates with more patrician voices like Franklin D. Roosevelt.).
\textsuperscript{24} \textsc{Alan Schroeder}, \textsc{presidential debates: fifty years of high-risk tv 1} (Columbia University Press, 2008).
make-up artist, Nixon did so as well perhaps out of machismo, but much to the dismay of his own TV advisor Ned Rogers, “What I tried to explain to Dick was he has a certain characteristic of his skin where it’s almost transparent. And it was a very nice thought to say ‘I don’t want any makeup,’ but he really needed it in order to have what we would call even an acceptable television picture.”

By the time the lights had gone down and the debate had ended there was little question that something unprecedented had happened. While the substance of the debate itself dominated the filled the newspapers the next day, the impressions and the personalities of the debaters themselves was what resonated the most with the voters as roughly seventy million Americans got up close and personal with their presidential candidates. Nixon appeared, tense, haggard and at times simply ill, while Kennedy appeared healthy and confident. In the eyes of the overwhelming majority of television viewers Kennedy won the debate and in turn eventually the election. However, an equally overwhelming percentage of radio listeners believed that Nixon won. Unfortunately, for Nixon roughly 87 percent of American homes had televisions by 1960 making television a dominant media force to be reckoned with. Many people credit Kennedy’s approach with ushering in the modern media based campaign.

Nixon remained undeterred. While running against Hubert Humphrey in the 1968 Presidential Election, Nixon made an appearance on 60 minutes where Mike Wallace, while discussing Nixon’s failures eight years earlier, asked if he had given any thought to the role of style and charisma in campaigning and leading, to which Nixon replied, “When style and charisma connotes the idea of contriving, of public relations, I don’t buy it at all.” Despite his public dismissal, his biographers tell a different story:

29 KERWIN SWINT, DARK GENIUS: THE INFLUENTIAL CAREER OF LEGENDARY POLITICAL OPERATIVE AND FOX NEWS FOUNDER ROGER AILES, 7 (Union Square Press, 2008).
30 GARY DONALDSON, THE FIRST MODERN CAMPAIGN: KENNEDY, NIXON, AND THE ELECTION OF 1960, 94 (Rowman & Littlefield, 2007) (“The Kennedy organization was, in fact, the first truly modern campaign organization.”)
31 DAVID BLUM, TICK... TICK... TICK...: THE LONG LIFE AND TURBULENT TIMES OF 60 MINUTES, 41 (HarperCollins, 2005).
McGinniss wrote that Nixon’s 1968 campaign was the first modern Presidential campaign.\(^\text{32}\) While many of his tactics were not new in the strictest sense—the use of ad agencies\(^\text{33}\) and relying on television commercials\(^\text{34}\)—Nixon utilized these tools better and more broadly than any of his predecessors.

Once this campaign strategy of selling of the candidate to the mass media caught on, there has been little space between them. The bond was in fact so natural that many wondered what took so long, “It is not surprising then, that politicians and advertising men should have discovered one another. And, once they recognized that the citizen did not so much vote on a candidate as make a psychological purchase of him.”\(^\text{35}\) This union would continue to evolve Al Gore invented the Internet.\(^\text{36}\)

3. Howard Dean and Barrack Obama Refined The Use of the Internet in Presidential Campaigns

The internet caused another paradigm shift in the election law to the point that the famed president and editor in chief of The Huffington Post,

\(^{33}\) Id. at 27. (The practice of hiring an ad agency during the election process was first practice in 1952, but perfected by Dwight D. Eisenhower who kept a firm on retainer.)
\(^{36}\) ERIC C. COLL, TELECOM 101: TELECOMMUNICATIONS FOR NON-ENGINEERS, 332 (Teracom Training Institute, 2001). (The internet was develop as part of a national security project linking sub-networks of government organizations, universities and research institutes under the name DARPA and later ARPA net. Al Gore did play a role in funding its development through tax payer dollars in its early stages.); CNN.com Transcript: Vice President Gore on CNN's 'Late Edition'http://www.cnn.com/ALLPOLITICS/stories/1999/03/09/president.2000/transcript.gore/index.html (last access March 29, 2012) (this myth of huberous on the part of the Former Vice President stems from the following statement, "During my service in the United States Congress, I took the initiative in creating the Internet. I took the initiative in moving forward a whole range of initiatives that have proven to be important to our country's economic growth and environmental protection, improvements in our educational system.")
Arianna Huffington declares, “Were it not for the Internet, Barack Obama would not be the President. Were it not for the Internet, Barack Obama would not have been the nominee.”

The most recent evolution of the relationship of mass media and the election process began four years earlier with Howard Dean, former Governor of Vermont.

While the Internet was not new in 2004, it had yet to have its full potential realized. Howard Dean’s campaign manager Joe Trippi focused on the Internet as a means to maximize the number of small donations and identify like minded people through the website MeetUp.com. Trippi, believing the current state of the electoral process to be a “hope-killi

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39 Michael J. Malbin, A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004, 5 Election L.J. 2, 12 (2006) (“[The campaign utilized Meetup.com] a Web site that helps arrange meetings in public places among like-minded people on self-defined subjects, ranging from food tastes to Wicca. After an initial test quickly garnered 2,700 Dean supporters, the campaign paid Meetup.com a fee of $2,500 to continue organizing—all of this for a site that would eventually boast 190,000 Dean members”).


41 Michael J. Malbin, A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004, 5 Election L.J. 2, 12 (2006) (The McCain campaign reportedly raised a total $6.4 million over the Internet in all. However, according to McCain’s campaign staff, many of his Internet donors after New Hampshire were repeat donors who were solicited over the telephone and then steered to the campaign’s Web site to make a contribution); ROBERT E. DENTON JR. ET AL., THE POLITICAL CAMPAIGNS AND COMMUNICATION WITH THE ELECTORATE IN THE TWENTY-FIRST CENTURY, in COMMUNICATOR-IN-CHIEF: HOW BARACK OBAMA USED NEW MEDIA TECHNOLOGY TO WIN THE WHITE HOUSE, ed. Robert E. Denton Jr. & John Allen Hendricks, 1, 3-4 (Lexington Books, 2010). (The 1992 Clinton campaign was the first to extensively use the e-mail and listserv distribution of information).
the campaign’s support base and organize its volunteers, and most importantly raise money.\textsuperscript{42}

The result Dean, a long shot candidate by all accounts including his own,\textsuperscript{43} where significant. Soon his campaign that began with a campaign consisting of Trippi, a staff of seven, just over four hundred known supporters and $100,000 in the bank found their guy leading the poll while raising more than $50 million over the course of a year.\textsuperscript{44} The strategy also produced less overhead cost, allowing the campaign to get the most bang for their buck.\textsuperscript{45} This influx of capital allowed him to opt out of public financing like the other major players that year giving him more financial flexibility.\textsuperscript{46}

Over the same period, the eventual Democratic nominee, John Kerry who was relying on major donors who could afford to write $2,000 checks, was dead in the water.\textsuperscript{47} Dean’s surprising success would be short lived. Dean would later crash and burn in a cornfield in Iowa, a media gaffe\textsuperscript{48} many


\textsuperscript{43} JOE TRIPPI, THE REVOLUTION WILL NOT BE TELEVISIONED: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING, xiv (HarperCollins, 2004). (During a discussion regarding the release of the sealed records of his governorship in Vermont or dropping out of the race, Dean said, “I never thought it would go this far, I was going to raise my profile, raise health care issue, shake up the Democratic Party. Help change the country. But I never thought \textit{this} would happen. Don’t you understand? I never thought I could actually win. I wanted to . . . but I never really thought it could happen.”); Michael J. Malbin, \textit{A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004}, 5 Election L.J. 2, 12 (2006).


\textsuperscript{45} Michael J. Malbin, \textit{A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004}, 5 Election L.J. 2, 13 (2006) (By scrapping direct mail and raising his money through the Internet, instead of spending a dollar for every dollar raised, the Internet holds out the possibility of spending less than a nickel.).

\textsuperscript{46} Michael J. Malbin, \textit{A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004}, 5 Election L.J. 2 (2006) (The general opinion among political professionals has been that no serious candidate in the future can afford to accept public funding.).


believe ultimately spelled his doom and lead to him dropping out of the race.49

The Dean campaign may have retreated to the annals of history, however, the tactics developed for using the Internet where just getting started. The nominations eventual victor, Kerry, changed tactics and went from tacking a $6 million mortgage on his house just to keep pace with Dean to setting fund raising records of his own.50 Just like the Presidential Debate in 1960, this was just the first taste of what the new media could do for a political campaign.

1950s-style ballroom after the devastating results were apparent. The fist-shaking, red-faced candidate — sleeves rolled up and face twisted in determination — gave a concert-tour-like list of states where his insurgent campaign would rebound, noticeably including his rivals' homes. 'And then we're going to Washington, D.C., to take back the White House!' he shouted. Then, he ended with a guttural yell.'); JOE TRIPPI, THE REVOLUTION WILL NOT BE TELEVISION: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING (HarperCollins, 2004) (Explaining the implication of the gaffe and the role television continued to play, Trippi said, “I remember, at the time, thinking that Howard had given a great boost for our supporters in the room, yet I knew this was going to play badly on TV. (What I didn’t know was that it would play and play and play badly) Howard wasn’t thinking about the cameras.”).

49 Steve Kornacki, The Howard Dean Nominee, THE NEW YORK OBSERVER (June 26 2008) http://www.observer.com/2008/06/the-howard-dean-nominee/ (accessed 27 2012, March) (“[H]is once-overpowering presidential campaign collapsed in the cornfields of Iowa – and when he let out a scream that made him as much laughingstock as loser.”)

50 Joe Trippi, The Revolution Will Not Be Televised, MSNBC, (July 24, 2004) http://www.msnbc.msn.com/id/5353944#.T3Hxvlahxgi (last visited March 27, 2012) (In each of the four months after clinching the nomination, Kerry raised at least $30 million, twice the Dean campaign’s record from the previous December, at least $44 million of that was contributed online.)
During Dean’s campaign, Obama was busy running for the Senate, but he was paying attention to the new strategy and looked to expand on the lessons learned. Obama started with the same approach that Howard Dean took in 2004; he raised vast sums of money by targeting small donations through the Internet and mobilized his supporters through the Internet, but he did not stop there. Among the new tools Obama employed was the video sharing site, YouTube, which allowed them to create and deliver content more effective than traditional television ads. According to Trippi, the Obama campaign’s YouTube content was watched for 14.5 million hours by Americans and to buy 14.5 million hours on broadcast TV it would cost a candidate approximately $47 million. Additionally, he argued that those who viewed the campaign videos on the internet viewers chose to watch

them or received them from a friend instead of having their football game or favorite television shows interrupted, making it all the more effective.\textsuperscript{54} Perhaps the most powerful tool utilized by the Obama campaign was social media.\textsuperscript{55} During the election the use of these social networking cites were integral to the Obama campaigns ability to utilize young voters amassing 830,000 MySpace friends and 2.4 Million Facebook supporters by the end of October 2008, four times the number of his Republican counterpart\textsuperscript{56} and dwarfing the number of online supporters Dean had in 2004 through MeetUp.com.\textsuperscript{57} The Internet had given the American people a new way to interact with the candidate on a grander scale; just as the 1960 debate once did, allowing them to interact on a much grander scale. During the Web 2.0 summit the Arianna Huffington suggested that the level of interaction of medium allowed for voters to fact check and vet the candidates to an unprecedented degree.\textsuperscript{58} Trippi echoed Huffington’s enthusiasm asserting, “This medium demands authenticity, and television for the most part demanded fake. Authenticity is something politicians haven’t been used


\textsuperscript{58} See, The Web and Politics, YouTUBE (Nov. 10, 2008) http://www.youtube.com/watch?v=CBeePcCOBQM (accessed March 27, 2012) (Arrianna Huffington referenced the Mccain campaign’s claim that Governor Sarah Palin opposed the so-called bridge to nowhere in Alaska, saying “Online there was an absolutely obsessive campaign to prove that wrong, The McCain campaign ignored that for a few day and kept repeating the line. And then they dropped it, because simply they couldn’t continue repeating it.”); Clair Cain Miller, How Obama’s Internet Campaign Changed Politics, THE NEW YORK TIMES (November 7, 2008) http://bits.blogs.nytimes.com/2008/11/07/how-obamas-internet-campaign-changed-politics/ (last visited March 27, 2012).
Such vetting would certainly be wonderful news to those hoping for a fair and complete exchange while weighing the candidates, but not all are convinced that authenticity is the only thing that is encouraged by the medium.

C. The Purpose of Elections is Forced to Compete with the Process of Elections

If indeed the purpose of the election process is to vet the candidates and weigh them based on where they stand on the issues, it easy to see how the process can be perverted into something else that falls well short of this most noble of goals. While image has always been used to sell a candidate to some degree, with the rise of each new medium, it become easier for the threat of ambition, feared by Alexander Hamilton, hide itself behind a mask of zeal. Put another way as Marshall McLuhan noted, “the medium is the message.” In other words the effects of a message are not derived only from the content of message, but in how it is conveyed.

Nixon’s 1968 campaign serves as the perfect example of this, having learned their lesson eight years earlier Nixon’s campaign realized that “[w]ith the coming of television, and the knowledge of how it could be used to seduce voters, the old political values disappeared. Something new, murky, undefined started to rise from the mists.” The whole of the campaign strategy was constructed around the idea put forth by media guru Marshall McLuhan, “The party system has folded like the organization chart. Policies and issues are useless for election purposes, since they are too specialized and hot. The shaping of a candidate’s integral image has taken the place of discussing conflicting points of view.” This approach marked a

60 See, Tom Holland, Rubicon: The Last Years of the Roman Republic, 193, 206 (Random House, 2003) (Even Julius Ceasar had to manage his image during his rise through the ranks of the Roman Senate.); Craig Allen Smith, Presidential Campaign Communication: The Quest for the White House, 10 (Polity, 2010) (A persuader exploits his or her image and credibility to identify with the desired audience.).
63 Craig Allen Smith, Presidential Campaign Communication: The Quest for the White House, 56 (Polity, 2010).
64 Joe McGinniss, The Selling of the President, 28 (Penguin Group, 1988).
65 Joe McGinniss, The Selling of the President, 28 (Penguin Group, 1988).
sharp departure for Nixon 1960 approach to television that placed priority on the substance,\textsuperscript{66} and successfully increasing the difficulty for anyone to fathom the intentions of a candidate as they try to sell themselves and their programs.\textsuperscript{67} The sell job was an undertaking Nixon proved to be quite effective in, until Watergate.\textsuperscript{68} The discovery that the American people had purchased a lemon did little to discourage others candidates from trying to sell their image or the voters from buying it. This led Daniel Boorstein to observe:

“In the last half-century we have misled ourselves, not only about how much novelty the world contains, but about men themselves and how much greatness can be found among them. . . . We have become so accustomed to our illusions that we mistake them for reality. We demand them. And we demand that there be always more of them, bigger and better and more vivid.”\textsuperscript{69}

Sixty years later the power of selling an image has remained an ever-present force in the race for the presidency.\textsuperscript{70} Still the question remains unanswered as to what effect does this type of campaigning have on actual consumer awareness when they walk down the aisle marked, President? In the marketplace of ideas how are voters to make an informed choice, when

\textsuperscript{66} GARY DONALDSON, THE FIRST MODERN CAMPAIGN: KENNEDY, NIXON, AND THE ELECTION OF 1960, 112-113 (Rowman & Littlefield, 2007) (“Nixon was convinced that he had great television appeal. Just before the 1960 campaign began, Nixon told Earl Mazo, ‘I think I am a pretty fair judge of political television. . . . Above everything else, a candidate to be effective on television must know what he is talking about, believe deeply in the rightness of his cause, and speak naturally and sincerely just as if he were carrying on a conversation with two or three people in a typical American home which he had happened to visit.’” After the first 1960 debate Kennedy expressed the wish that he had more time prior to the debate to study the issues.).

\textsuperscript{67} JOE MCGINNIS, THE SELLING OF THE PRESIDENT, 27 (Penguin Group, 1988) (“Leonard Hall Former National Republican Chairman said: ‘You sell your candidates and your programs the way a business sells its products.’”).

\textsuperscript{68} See, Richard Nixon, President Nixon’s Resignation Speech, (August 1974, 1974) http://www.pbs.org/newshour/character/links/nixon_speech.html (last visited March 27, 2012). (“From the discussions I have had with Congressional and other leaders, I have concluded that because of the Watergate matter I might not have the support of the Congress that I would consider necessary to back the very difficult decisions and carry out the duties of this office in the way the interests of the Nation would require.”)

\textsuperscript{69} DANIEL BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 6, 45 (Vintage, 1992).

\textsuperscript{70} See, CRAIG ALLEN SMITH, PRESIDENTIAL CAMPAIGN COMMUNICATION: THE QUEST FOR THE WHITE HOUSE, 9-10 (Polity, 2010).
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bombarded by attack ads and image-based ads in place of substantive discussion on television? Is Joe Trippi’s last hope for democracy truly the last safe haven where candidates can be fully and truly vetted?

As the election process has tried to catch up to the Internet age some critics have labeled the online tactics, employed by the Obama campaign and many of his supporters, as the equivalent of online vandalism, asserting that the online strategy involved utilizing “Internet trolls” to infiltrate the opposition websites, comment section and chat rooms using false names and trying to derail discussion of the issue. Some supporters have even openly embraced the offensive approach as they actively and openly try to stifle and minimize the voice of opponents using these mass media tools as part of a self described all-out campaign of “guerrilla warfare and sabotage.” These tactics, described as a “coordinated, facts-be-damned, multimedia takedown” have lead to a call to arms by those who feel targeted, again diluting the selection of the marketplace of ideas with disinformation and distractions, where reasoning and meaningful discussion where intended to reside.

The history of relationship between the election process and the mass media in the United States has seen vast and unanticipated changes though the years. From the most basic use of print newspaper to the most modern viral video campaign each step up the evolutionary ladder has lead to a better connection between the electorate and their candidates. With each avenue that has arisen connecting voter and the candidate, there has risen those who wish to control and manipulate, whether they be regulators, candidates or

73 Ben Smith, Media Matters’ War Against Fox, POLITICO (March 26, 2011) http://www.politico.com/news/stories/0311/51949.html (accessed March 27, 2012) (Media Matters, Founder David Brock likened the group’s strategy to “guerrilla warfare and sabotage” explaining that the group is assembling opposition research files not only on Fox News top executives but on a series of midlevel officials. It has hired an activist who has led a successful campaign to press advertisers to avoid Glenn Beck’s show as part of an overall strategy to suppress the opposing messages rather than to address it.).
74 Donald Lambro, BREITBART: Online activists on the right, unite!, (March 30 2009) http://www.washingtontimes.com/news/2009/mar/30/rules-for-conservative-radicals/ (last visited 27 2012, March). (“Internet hooligans are spewing their talking points to thwart the dissent of the newly-out-of-power. We must not let that go unanswered.”)
third party activist in an effort to achieve the “right” result. These actors force the electorate to be increasingly on its guard, a task many believe the American people cannot achieve without a little help.

III. The Unfathomable Intentions of People Undermine the Rationale For Creating Fairness By Regulation

“L’enfer est plein de bonnes volontés et désirs” - Saint Bernard of Clairvaux

A. The Forks in the Paved Road: The Good Intentions of Early Attempts at Fairness in the Media

When it comes to the election of the Presidency each piece of legislation designed to assure the fair and open election has proved to be a double edged sword. The success of any legislation is dependent on the skill and honesty of those who wield it.

1. The Sedition Acts Were the First Electoral Speech Restriction Placed on the American People

Despite the United States fine reputation for the maintaining freedom of speech and freedom of the press, its history is spotted with missteps dating back to some of the earliest days of the republic. John Adams Sedition Acts served as a way to stifle discussion against his policies, while leaving his chief political rival and open to attack. While it could be argued, and was by the Acts Federalist proponents, that the Act was designed to protect truth and forbade only libel, incendiaryism and other evils. Even if the intentions of the Acts passage were as the proponents alleged it is difficult to discount the results. The message was clear as reported by the Boston Centienl, “Whatever American opposes the Administration is an Anarchist, a Jacobin and a Traitor.” It was difficult to hide that the only individuals and newspapers that were prosecuted under the Act were affiliated with or

75 CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS, 542 (Houghton Mifflin Harcourt, 1997) (Translates to “Hell is full of good intentions or wishes.” The phrase from which, “the road to hell is paved with good intentions” is believed to be derived.”)

76 See, The Sedition Act of 1798 ch. 74, 1 Stat. 596 (1845) (Suspiciously absent from the act was protection against publishing “false, scandalous, and malicious writing” about the acts of the vice President who at the time was Thomas Jefferson, Adams chief political rival.).


The chilling effect in the press was evident when Jefferson and Adams took to
the campaign trail in 1799. As a political strategy the tactic backfired, the
Act proved incredibly unpopular and the voters expressed their displeasure
by voting Jefferson into office despite the Act, which he allowed to
expire. Perhaps it was the blatancy of the prosecutions or the ineffective
use of the media by John Adams himself, in either case this thinly veiled
suppression of free speech did not sit well with voters or historians and
remains a dark black spot on his record others have sought to avoid.

Indeed political censorship of the newspapers for election purposes
fell by the wayside for the most part, with few taking up the Adam’s mantel of
leaving the freedom of the presses almost sacrosanct leaving libel as the
primary restriction on this type of media.
For the most part America did not entertain the idea of restrictions of the media during election time until the introduction of the radio as a mainstay. While most people, particularly political candidates took time in fully grasping the full power that these new mediums possessed, not everyone was blindsided with the invention of radio, even that bastion of shortsightedness, Congress noted, “The future possibilities and potentialities of wireless communication, from a commercial, educational, social, and political standpoint are inconceivable. Its power for good or evil can not be overestimated.”

In fact restrictions on broadcasts have been around almost as long as the ability to broadcast, beginning with the Radio Act of 1912 mandated that all radio stations in the United States be licensed by the federal government and gave wide regulatory powers over radio communication to the Secretary of Commerce and Labor, before it was replaced by the more extensive Radio Act of 1927 which first gave lip service regulating the use of campaigns for elective office over the airwaves. Real regulation, in the context of mass media and elections, did not kick in until the passage of the Communications Act of 1934 giving the Federal Communications Commission (FCC) the power to regulate and enforce its regulations.

2. The Reign of the Fairness Doctrine

The next major regulation of election related speech was the Fairness Doctrine. The Fairness Doctrine was among the most restrictive of these regulations in recent memory was the Fairness Doctrine. While not directed at candidates for public office the Fairness Doctrine regulated broadcasters’ representation of controversial issues, which is closely tied to the strategy

as 1905 newspaper where “treated the same as other speakers when it comes to freedom of the press claims in libel cases, and that this view ‘has been affirmed by the courts of this country and England with great uniformity.’”); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) (“A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.” The Court also noted that government-enforced right of access to newspaper space inescapably ‘dampens the vigor and limits the variety of public debate.’). Regulation of Radio Communications, H.R.Rep. No. 404, 69th Cong., 1st Sess. 6 (1926) (minority view of Ewin L. Davis).


88 See, § 18 c. 169, 44 Stat. 1166. (The original act ordered stations to give equal opportunities for political candidates, but gave the Federal Radio Commission no means of enforcement.).

put forth by any campaign for public office. The Fairness doctrine required broadcasters to: (1) devote a reasonable amount of time to covering controversial issues of public importance; and (2) in doing so provide a reasonable opportunity for citizens to present conflicting views on such issues.\footnote{Mark A. Conrad, \textit{The Demise of the Fairness Doctrine: A Blow for Citizen Access}, 41 Fed. Comm. L.J. 161, 162 (1989).} The doctrine’s origins can be traced back through a long series of FCC rulings beginning with the \textit{Great Lakes Broadcasting Co. v. Federal Radio Commission}.\footnote{Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 370 (1969).} Aspects of the doctrine where codified in the form of FCC regulations in 1967.\footnote{Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 370 (1969).} In addition to the standard doctrine several corollaries were adopted through the years requiring additional “fairness” in certain situations. Among the corollaries to doctrine were: (1) the \textit{Cullman rule}, mandates air time to the presenter of another viewpoint of a controversial issue, even if the spokesman cannot pay for the time; (2) the “personal attack” rule, mandates that a response be allowed to air when the honesty and character of an individual or group is attacked; (3), the ‘political editorial’ rule, requires that a broadcaster aid opposing parties wishing to respond to that broadcaster’s statements in support of a particular candidate.\footnote{Mark A. Conrad, \textit{The Demise of the Fairness Doctrine: A Blow for Citizen Access}, 41 Fed. Comm. L.J. 161, 164 (1989).}

The doctrine was a mainstay in the broadcasting industry until the FCC reconsidered the doctrine in \textit{Syracuse Peace Council v WTVH},\footnote{2 FCC Red 5043, 63 R.R.2d 541 (1987) (The FCC concluded the that enforcement of the Fairness Doctrine violated the rights of broadcasters.).} marking the end of the fairness doctrine, which had begun to dwindle with arrival of the Reagan administration.\footnote{Mark A. Conrad, \textit{The Demise of the Fairness Doctrine: A Blow for Citizen Access}, 41 Fed. Comm. L.J. 161, 163 (1989) (“Since 1981, the FCC, led by Reagan Administration appointees, has adopted a \textit{laissez faire}, `survival of the economic fittest’ strategy in order to promote business interests.”)} During the Doctrine’s heyday it was argued by the Supreme Court that without the Doctrine:

\begin{quote}
“\[S\]tation owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed . . . . Freedom of the press from governmental interference under the First Amendment
\end{quote}
does not sanction repression of that freedom by private interests.”

It's worth noting that the court's stringent defense of the Doctrine by the Court came five years before the in a unanimous opinion Justice Burger remarked, “Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate.” The distinction of course being that Burger’s opinion was speaking in the context of newspapers, which is an unlicensed industry and at least in theory is free from the confines of scarcity of frequencies faced by television.

In recent years there have been occasional calls for rebirth of the Fairness Doctrine. Those in favor of the recall typically cite the dominance of conservative talk radio, which in the minds of some promotes a populist and one-sided viewpoint in a very intolerant and unpleasant manner that prejudices listeners. This argument is usually countered by claims of liberal bias by the National Public Radio or the traditional big three television channel balance out any discrepancy in choice and balanced or not leaves open the possibility of elevating an opposing opinion higher than its merit through force feeding the public and abridging the speech of broadcasters. These initial considerations completely ignores of the Internet, the alleged champion of the masses. Not everyone has turned a blind eye to the newest medium, The Office of the Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, is on the record of purposing a version of the Fairness Doctrine for the Internet, “A system of limitless individual choices, with respect to communications, is

97 Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256, (1974); see also, Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 375-76 (1969) (“Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government.”).
100 INTERNATIONAL DEBATE EDUCATION ASSOCIATION, THE DEBATABASE BOOK: A MUST-HAVE GUIDE FOR SUCCESSFUL DEBATE, 97-98 (IDEA, 2009).
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not necessarily in the interest of citizenship and self-government, and efforts
to reduce the resulting problems ought not be rejected in freedom’s name.”103 To date no revival of the doctrine seems to be unlikely.104

3. An Introduction to Equal-Time Laws

In some ways perhaps the most consistent and best known form of
media regulation in the election context is equal time law.105 This type of
regulations is found in Section 315(a) of the federal Communications Act
and applies to all candidates for public office.106 While popularly known
as an equal time requirement, this provision is probably more appropriately
described as an equal opportunity requirement, in that it was intended to give
candidates an equal opportunity to persuade voters, not necessarily
quantitative parity.107 Additionally for the purpose of the statute the
definition of “candidate” has been extended to include supporters of a
candidate, thus requiring equal treatment of supporters of opposition
candidates.108 The statute bars censorship by the broadcaster of the
candidate’s opportunity to reply.109 Recognizing the inherent difficulty of
meeting such a restrictive regulation, there are a number of caveats available

103 CASS R. SUNSTEIN, REPUBLIC.COM 2.0, 137 (Princeton University Press,
2007); U.S. Regulatory Czar Nominee Wants Net ‘Fairness Doctrine’, WORLD
April 3, 2012) (Despite his supporting the extension of the Fairness Doctrine to
the Internet, Sunstein has acknowledged, the difficulty in regulating the Internet
and that doing so as he purported would, “almost certainly unconstitutional.”).
104 See, Jim Abrams, Senate bars FCC from revisiting Fairness Doctrine, THE
SEATTLE TIMES (February 26, 2009)
http://seattletimes.nwsource.com/html/politics/2008789917_apfairnessdoctrine.h
tml (last visited April 3, 2012).
105 MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY,
MASS MEDIA LAW: CASES AND MATERIALS, 117 (Foundation Press 8th ed.,
2011).
106 MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY,
MASS MEDIA LAW: CASES AND MATERIALS, 117 (Foundation Press 8th ed.,
2011); 47 U.S.C.A. § 315(a).
107 MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY,
MASS MEDIA LAW: CASES AND MATERIALS, 117 (Foundation Press 8th ed.,
2011).
108 MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY,
MASS MEDIA LAW: CASES AND MATERIALS, 117 (Foundation Press 8th ed.,
2011).
109 MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY,
MASS MEDIA LAW: CASES AND MATERIALS, 117 (Foundation Press 8th ed.,
2011).
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4. The Use of Price Fixing to Achieve Fairness

A third type of regulation used to balance the relationship between broadcasters and candidates is found in Section 315(b) of the federal Communications Act which forbids stations from charging candidates more than their “lowest unit rate.” In other words, they must offer the best rate that they would to other advertisers for the same airtime. Additionally, broadcasters must keep meticulous records of requests by political candidates to purchase ad time as part of campaign spending regulations. Such provisions have been held facially constitutional, but have left open the possibility of an as-applied challenge. This provision ties into the idea that unregulated speech encourages corruption and allows wealth to inappropriately influence policy decisions. To date no such “lowest unit

rate,” rule exists for Internet advertising as it is outside the Federal Election Commissions jurisdiction.\textsuperscript{116}

The viewpoint is similar to concerns of proponents of both fairness and equal opportunity, who are concerned with the powerful broadcasters miscasting or skewing public opinion by favoring their own. All this supporting the “sufficiently important” governmental interest in “the prevention of corruption and the appearance of corruption.”\textsuperscript{117} With the aforementioned integral relationship between the media and candidates for office and the efforts of candidates to sell themselves to the public the concerns seem valid and the intentions noble.

B. Making Asphalt: Regardless of Intention the Case for Fairness Based Regulations is Rationally Inconsistent

1. Free Speech is a Competing Value Against the Rationale for Regulations Election Time Speech

Much of the reasoning behind the argument for unfettered free speech in our society is based on the high premium placed on diversity in the marketplace of ideas, which will ultimately lead to success in the quest for truth. One the greatest proponents of this view was John Stewart Mill who described the silencing of opinion as a peculiar evil.\textsuperscript{118} Today, technological advancements have left the American people with a conglomeration of radio and television outlets, owned by the influential and profit-minded, licensed and regulated by the government,\textsuperscript{119} and the wild west Internet. Seeing how these new mediums of mass media have been employed it easy to conclude

corruption, the perception of corruption among citizens, and the undue influence of wealth on politics).

\textsuperscript{116} Federal Election Commission, Quick Answers to General Questions (April 25, 2012) http://www.fec.gov/ans/answers_general.shtml#internet (last visited April 25, 2012) (“While many campaign-related Internet activities are not subject to FEC regulations, some--most notably paid advertising--are subject to certain restrictions.”).


\textsuperscript{118} John Stewart Mill, Utilitarianism, Liberty and Representative Government (E.P. Dutton & Co. Inc, 1951) (“[T]he peculiar evil in silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”)

that the current state of affairs is far from anything the Founding Fathers conceived when drafting the Bill of Rights. This unprecedented power has led many to conclude that a degree of government interference is not only preferable, but is necessary to preserve the quality of the marketplace of ideas.

Yet in this search of truth, can such regulations truly be effective or does their application actually undercut their own rationale? By both limiting and requiring a specific kind of speech, the speech itself ceases to be free, thus silencing or at the very least distorting the expression of opinion. Indeed some have argued that “[n]o man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents,” only to have their arguments cast aside. Additionally, with the emergence of the Internet as a research tool many experts have argued that this isolation of power held by broadcasters to champion a viewpoint and wield influence is as dated as the pre-Julian calendar. Even if the Internet is the great equalizer the threat of guerrilla warfare and sabotage in chatrooms and comments sections of political websites, cut strongly against any such diversity of thought, giving strength again to the peculiar evil

2. By its Nature Fairness Regulations Yield Themselves to Unfairness

The basic problem with any regulation seeking fairness, whether it be

122 Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 386 (1969) (The challengers of the fairness doctrine argued that this principle of free speech should be applied to broadcasters, the Court disagreed.).
mandating the presentation of opposition viewpoints, giving candidates equal time or regulating cost, is who determines what is in fact, fair and balanced. Regulators seeking to assure a fair election often find themselves handicapped by the question of what constitutes fair and at times much to the horror of some see that determination used against their interest. Additionally no matter how meticulously written it is easy to see how regulation could be used to amplify one voice while drowning out another.

Currently, the Federal Communication Commission must make that determination using the “rule of reason” in enforcing equal time laws. In these case-by-case determinations denials must be reasonable and pay good faith attention to access requests from “legally qualified” candidates. The reasonable good-faith denials are only justified if the broadcaster faces a realistic danger of substantial program disruption-perhaps caused by insufficient notice to allow adjustments in the schedule or of an excessive number of equal time requests. The FCC utilized a similar standard while the fairness doctrine was in effect, when adjudicating fairness complaints involving editorial advertisements, news slanting and political editorializing. Like much of American jurisprudence based on a reasonableness standard or requiring good faith these rules sound ideal, but seem to be left open for abuse. Just ask former Presidential candidate Ross Perot.

125 See, Richard A. Bauman, Lawyers in Roman Transitional Politics: A Study of the Roman Jurists in Their Political Setting in the Late Republic and Triumvirate, 18 (C.H. Beck, 1985) (Cicero’s role in passage of Lex Tullia de Ambitu and the defense of Murena.).
126 CBS, Inc. v. F.C.C., 453 U.S. 367, 386, (1981) (The Commission is empowered to “‘[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act],’ the agency has developed standards to effectuate the guarantees of § 312(a)(7).”).
127 In order to be “legally qualified” under the Commission's rules, a candidate must: (a) be eligible under law to hold the office he seeks; (b) announce his candidacy; and (c) qualify for a place on the ballot or be eligible under law for election as a write-in candidate. Persons seeking nomination for the Presidency or Vice Presidency are “legally qualified” in: (a) those states in which they or their proposed delegates have qualified for the primary or Presidential preference ballot; or (b) those states in which they have made a substantial showing of being serious candidates for nomination. Such persons will be considered “legally qualified” in all states if they have qualified in 10 or more states. See, 1978 Primer, 69 F.C.C.2d, at 2216-2218.
Following a strong showing for a third party candidate in the 1992 election Perot\textsuperscript{130} sought the Presidency in 1996 only to find that some equal opportunities were more equal than others.\textsuperscript{131} Despite garnering 18.91\% of the popular vote just four years earlier,\textsuperscript{132} Perot found himself excluded from important media events, particularly the presidential debates between President Bill Clinton and Bob Dole.\textsuperscript{133} The reason given by the Commission on Presidential Debates, a nongovernmental entity, was that Perot did not have a realistic chance of winning.\textsuperscript{134} Seeking to have his voice heard Perot sought participation through the courts only to be told that it was permitted by Federal Election Commission regulation that permitted an eligible nonprofit organizations to stage candidate debates, provided that they employ “pre-established objective criteria” to determine who may participate.\textsuperscript{135} Such non-participation by third party candidates is not unheard of; indeed the first televised debates between Kennedy and Nixon were made possible only because Congress agreed to lift the equal time rule.\textsuperscript{136} If all candidates had been given equal time in 1960 on television there would have been 14 additional candidates.\textsuperscript{137}

It is easy to sympathize with the decision to exclude 14 peripheral candidates from a debate, with limited time and interest of it is easy to see how the discussion could be diluted. However, limiting any discussion to only two options in a discussion as complex as running the country of the United States is incredibly shortsighted as well. Especially when a

\textsuperscript{136} GARY DONALDSON, \textit{The First Modern Campaign: Kennedy, Nixon, and The Election of 1960}, 113 (Rowman & Littlefield, 2007).
\textsuperscript{137} GARY DONALDSON, \textit{The First Modern Campaign: Kennedy, Nixon, and The Election of 1960}, 113 (Rowman & Littlefield, 2007).
significant portion of the population viewpoint would be potentially represented. Indeed the idea of equal time and the fairness doctrine tends to yield themselves to a two-option format and in terms of election, a two-party system. Because of the finite resource of time and the quest for ratings it would be understandable for most media outlets to cast such discussion in an *us versus them* light, a reoccurrence that would plague Perot’s 1996 campaign.

Perot again tried to take advantage of the equal time rules when Networks repeatedly gave free time to coverage of Democratic and Republican nominations and appearances by Clinton and Dole on ABC’s 20/20 program as each time his claims were disregarded as an exception to the rule as a bona fide news event.\(^\text{138}\) Even with this incredibly lopsided

amount of news coverage Perot claimed 8.4% of the popular vote.\footnote{David Leip, \textit{1996 Presidential General Election Results}, Dave Leip's Atlas of U.S. Presidential Elections \url{http://uselectionatlas.org/RESULTS/national.php?year=1996} (last visited April 4, 2012).} Suggesting at minimum that you need at least 10% of the population behind your candidate if he/she is to be entitled to equal airtime. Certainly the goal of these types of media regulations is not to alienate 8.4% of the voting public during election time.

A second possible flaw may not lie in the regulation itself, but in who makes the decision. When the FCC ruling against Perot it is worth noting that the then Chairman Reed Hundt and the commissioners that made the ruling, Rachelle Chong, Susan Ness and James Quello\footnote{In re Request of Fox Broadcasting Co., Public Broadcasting Service, and Capital Cities/ABC, Inc., 11 FCC Rcd. 11101 (1996); Federal Communication Commission, "NEWSReport No. MM 96-27," \url{FCC.gov}, (October 4, 1996) \url{http://transition.fcc.gov/Bureaus/Mass_Media/News_Releases/nrmm6027.txt} (last visited April 4, 2012).} were all appointed or confirmed to their post by President Bill Clinton,\footnote{Federal Communication Commission, \textit{Former FCC Chairman Reed Hundt: Biography}, (March 8, 2005) \url{http://transition.fcc.gov/commissioners/previous/hundt/biography.html} (last visited April 4, 2012); Federal Communications Commission, \textit{Former Commissioner Rachelle Chong: Biography}, (March 8, 2005) \url{http://transition.fcc.gov/commissioners/previous/chong/biography.html} (last visited April 4, 2012); Federal Communications Commission, \textit{Former Commissioner James Quello: Biography}, (March 8, 2005) \url{http://transition.fcc.gov/commissioners/previous/quello/biography.html} (last visited April 4, 2012); Federal Communication Commission, \textit{Former Commissioner Susan Ness: Biography}, (March 8, 2005) \url{http://transition.fcc.gov/commissioners/previous/ness/biography.html} (last visited April 4, 2012).} who according to exit polls, would have received 38% of votes that where cast for Perot in 1992.\footnote{Steven A. Holmes, \textit{THE 1992 ELECTIONS: DISAPPOINTMENT -- NEWS ANALYSIS An Eccentric but No Joke; Perot's Strong Showing Raises Questions On What Might Have Been, and Might Be}, \textit{THE NEW YORK TIMES}, (November 5, 1992) \url{http://www.nytimes.com/1992/11/05/us/1992-elections-disappointment-analysis-eccentric-but-no-joke-perot-s-strong.html} (last visited April 4, 2012) (It should be noted that the same exit polls indicated that out Perot supporters, 38% would have voted for Bush 38% would have voted for Clinton and the rest would have gone home had Perot not been on the ballot.).} While in this particular case misconduct by the former chairman and his commissioners should not be inferred, the vested interest is hard to ignore.

Putting pencil to paper most will find that 38% of the 19,743,821 votes is...
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7,502,651.98 votes that could have been viewed as Clinton’s for the taking. Proponents of regulating for fairness in elections have argued along the lines of those articulated by Cass Sunstein, who argued that a system of limitless individual access to information (i.e. the internet) is not necessarily in the best interest of electorate and individually or as a whole. Furthermore, Sunstein contends that any “efforts to reduce the resulting problems ought not to be rejected in freedom’s name.” This position does not take into account or consider that political majorities are by design not only the ones who adopt such measures, but are also responsible for enforcing them fairly and impartially. Absent the rise of the platonist philosopher king, a fiction some have criticized by some as being the basis for a number of notorious totalitarian regimes, at best those charged with

144 David Leip, 1996 Presidential General Election Results, Dave Leip’s Atlas of U.S. Presidential Elections http://uselectionatlas.org/RESULTS/national.php?year=1996 (last visited April 4, 2012) (Math assumes that 38% of difference between Perot total votes in 1992 and 1996 went to Clinton as a result of reduced media exposure, the total voter turnout for the two elections varied drastically.).
148 See, KARL RAIMUND POPPER, THE OPEN SOCIETY AND ITS ENEMIES: HEGEL AND MARX, 29 (Routledge Classics, 2003) (In Popper’s view Plato’s political program rest upon the assumption that existing states are decayed forms of a pre-existing perfect state. From this Plato’s formula of establishing the perfect state and then resisting all change as described in Plato’s “republic” is identical with modern totalitarianism.); RODNEY CASTLEDEN, ATLANTIS DESTROYED, 1 (Routledge, 1998); See also, Raymond H. Anderson, Ayatollah Ruhollah Khomeini, 89, the Unwavering Iranian Spiritual Leader, THE NEW YORK TIMES, June 4, 1989, http://www.nytimes.com/1989/06/04/obituaries/ayatollah-ruhollah-khomeini-89-the-unwavering-iranian-spiritual-leader.html?pagewanted=4&src=pm (last visited April 5, 2012) (“In the 1920’s,
finding the proper bounds of a previous limitless individual choice are subject to similar if not the exact same system of limitless individual choices. Ironically enough recent studies suggest that liberals, the traditional proponents of the fairness-based restrictions, are far less likely to understand the rational behind their opposition’s viewpoints, than are their conservative and moderate counterparts. These findings suggest that even the most sincere advocate for restrictions in the name of fairness may not be the best judge to determine what is in fact fair. At worse such regulations opens the door for social engineering and the idealism of the majority to run rough shot over meaningful discussion of ideas, making freedom of speech and open discussion of ideas a fond memory.

IV. THE ELECTORATE’S ROLE IN THE ELECTION PROCESS DEMANDS A FICKLE APPROACH

“[T]he opinions of people are indeed unascertainable for the simple reason they are non-existence. Opinions are formed in a process of open discussion and public debate, and where no opportunity for the forming of opinions exists, there may be moods . . . but no opinion.” -Hannah Arendt

A. Selective Exposure and Futility of Fairness Regulation

If Hannah Arendt is correct and the masses as a group or even as individuals have nothing more than moods and not reasoned opinions, it calls into question the purpose and effectiveness of elections once more, and in doing so raises deeper philosophical concerns. Under such a construction media outlets intended to bring the public together to measure public opinion

Ayatollah Khomeini followed his tutor to Qum, where he completed his studies, worked as a teacher and became interested in Islamic mysticism and Plato's "Republic," which may have helped shape his vision of an Islamic state led by a philosopher-king.

149 WAYNE OVERBEC, MAJOR PRINCIPLES OF MEDIA LAW, 449 (Thomson Wadsworth, 2007).
152 HANNAH ARENDT, ON REVOLUTION, 269 (Penguin, 1991) (“In this system the opinions of people are indeed unascertainable for the simple reason they are non-existence. Opinions are formed in a process of open discussion and public debate, and where no opportunity for the forming of opinions exists, there may be moods—moods of the masses and moods of individuals, the latter no less fickle and unreliable than the former—but no opinion.”)
are truly just an artificially “hyper” construction, with no real presence.\footnote{153} This presupposes that for there to be true compromise the public must be true participants in public life. Without true participation, citizenry at large is sitting out the development of both society and government and simply allowing the process to run its course.

Whether the politicians and media alike have influenced moods or opinions of the masses in practice may be little more than semantics. In either case when looking to regulate the use of media in elections perhaps the operative question that should be asked, regardless of free speech and First Amendment concerns is, how effective was the doctrine in contributing to the marketplace of ideas? Some suggest that the expansion of regulation would be of little meaningful consequence when it comes to influencing public ideas.\footnote{154} Suggesting that the public migrates to the media that most closely conforms to their preexisting bias.\footnote{155} This phenomenon labeled selective exposure.\footnote{156}

While selective exposure does not exclude the possibility of exposure to nonlikeminded opinions, it is a tendency and in some cases a strong one.\footnote{157} The act can be as simple as turning on Fox News instead of MSNBC, or it can be centered around changing your opinion of article based on whether it was published in the \textit{New York Times} or the \textit{Wall Street Journal}.\footnote{158} An even more subtle version of selective exposure can be the selective retention, that

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\item\footnote{153} See, \textsc{Hannah Arendt}, \textit{On Revolution}, 269 (Penguin, 1991); \textsc{Eric Louw}, \textit{The Media and Political Process}, 24 (SAGE Publications, 2010).
\item\footnote{154} See, \textsc{Dennis K. Davis & Stanley J. Baran}, \textit{Mass Communication Theory: Foundations, Ferment, and Future}, 163 (Cengage Learning, 5th ed. 2011) (Most people were not intelligent or interested enough to use media to form meaningful political attitudes, those that do tend have the ability to limit the effectiveness of the media effort to influence opinion.).
\item\footnote{155} \textsc{Dennis K. Davis & Stanley J. Baran}, \textit{Mass Communication Theory: Foundations, Ferment, and Future}, 163 (Cengage Learning, 5th ed. 2011) (“Klapper’s phenomenistic, or reinforcement, theory provided a powerful argument for media as reinforcing of the status quo, unable to have powerful effect.”).
\item\footnote{156} \textsc{Natalie Jomini Stroud}, \textit{Niche News: The Politics of News Choice}, 31 (Oxford University Press, 2011) (For the purpose of this discussion selective exposure is defined as: “[T]he tendency of people to expose themselves to mass communications in accord with their existing opinions and interests and to avoid unsympathetic material.”).
\item\footnote{157} Natalie Jomini Stroud, Niche News: The Politics of News Choice, 31 (Oxford University Press, 2011).
\item\footnote{158} Natalie Jomini Stroud, Niche News: The Politics of News Choice, 8 (Oxford University Press, 2011).
\end{itemize}}
is the failing to remember or in some cases misremembering events in a way that suits one’s outlook.

This issue was one of the concerns of fairness doctrine proponent Cass Sunstein when he noted that in a society when individuals can “filter” what they want to read see and hear so effectively, it becomes increasingly difficult to come into contact with information and viewpoints that were not actively sought out. With the rise of the Internet it is becoming increasingly easy to do just that, just as it has become easier to access information that otherwise would not have been available. Still Sunstein insists: “When options are plentiful, things are much better. But there is also a problem, from the standpoint of freedom, when people’s past choices lead to the development of preferences that limit their own horizons and their capacity for citizenship.” So how can this be combated and what of freedom? Sunstein gives no specifics saying only, “But if I am correct, one thing is clear: a system of limitless individual choices with respect to communications is not necessarily in the interest of citizenship and self-government, and efforts to reduce the resulting problems ought not to be rejected in freedom’s name.”

While Sunstein presents a valid point, regarding the potential pitfalls of self-limiting of political discussion, without any specification of what is meant by “effort to reduce the resulting problems” there are some disturbing undertones to his words. Mr. Sunstein seems to be critical of a limited horizon in all cases, even if the choice to create those preferences was based on past choices of a previously unlimited horizon. This urge to see the citizenry reach the “right” choice undoubtedly should be a concern of both those seeking to create fairness and freedom in the election process and those meant to participate in the election process. More disturbing still is recent research suggesting that selective exposure is a significantly more of a problem to those who consider themselves to be politically sophisticated, as they are more likely to actively seek out information that enforces their own beliefs. The same research suggests that the common man even when he does practice selective exposure he or she takes a far milder

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163 Like the philosopher king himself Cass Sunstein. See, Supra.
164 Andrew Chadwick, Routledge Handbook of Internet Politics, 151 (Routlege, 2009).
approach, than someone who is politically sophisticated. These studies further call into question the effectiveness of regulations seeking fairness.

A recent study conducted by University of Virginia Professor, Jonathan Haidt, suggests that selective exposure may be more of a symptom rather than the actual problem. Haidt argues that people are fundamentally intuitive creatures and are not strictly rational. Haidt points out that when you ask a person a moral question, time their responses and while scanning their brains, their answers and brain activation patterns indicate that they reach conclusions quickly and produce reasons later only to justify what they’ve decided. This in no way means that people are incapable of reason. People can and do reason, but they typically reason in order to support their conclusions. These conclusions are typically drawn completely separate of media influence, instead Haidt argues that these conclusions are derived from six fundamental ideas that commonly undergird moral systems: care, fairness, liberty, loyalty, authority and sanctity. Haidt argues these moral systems are not ignorant or unfounded; rather Haidt compares them to how people acquire a taste in food. When it comes to morality people start with what they are given. If the taste suits them, they ask for seconds. If it does not, they move on to the salad

165 ANDREW CHADWICK, ROUTLEDGE HANDBOOK OF INTERNET POLITICS, 151 (Routlege, 2009) (“Most people … are simply not so rigid their information-seeking behavior that they will expose themselves only to ideas that they find congenial. To the extent selective exposure occurs at all, it appears to do so under special conditions that do not typically arise in situations of mass persuasion.” Additionally, even if seeking supportive messages, “research has generally been unable to consistently demonstrate that people avoid contradictory messages.”).
Furthermore, the study shows that if time is given for reasonable consideration and contemplation a person is more likely to respond to a well-reasoned argument and adjust their moral decision accordingly. \(^{174}\) Haidt research suggests that the electorate needs to consciously try to understand one another instead of using reason to parry opposing views. \(^{175}\)

These fears based on selective exposure when viewed on the micro level can be very persuasive in bringing the casual observer to alarm,\(^{176}\) however on the macro level the bite of a selectively exposed society looses much of its teeth. As Thomas Jefferson observed, "[W]henever the people are well informed, they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."\(^{177}\) By and large history has born Jefferson out. When the information has been made available whether it be, Watergate, Vietnam War, the Civil Rights movement and even more recently healthcare, discussions took place and the voters responded in volatile times. The process is rarely timely, especially in the eyes of those wronged, but the vote is the most powerful instrument ever devised by man for breaking down injustice.\(^{178}\)

Even on the micro level in the past century regulations intended to encourage a complete and fair understanding of the issues and candidates appear to have had little effect on selective exposure phenomenon. Indeed the phenomenon was first noted in the heyday of both the fairness doctrine and equal time laws.\(^{179}\) Today there is little reason to believe that even if Fox


\(^{174}\) See, Jonathan Haidt, The Righteous Mind: Why Good People Are Divided by Politics and Religion, 69–70 (Pantheon, 2012) (in an experiment that gave subjects the opportunity to make a moral judgment, subjects were more likely to be tolerant of the conduct described in the fact scenario if they were forced to wait two minutes before passing judgement.).


\(^{176}\) Andrew Chadwick, Routledge Handbook of Internet Politics, 151–52 (Routlege, 2009).


News and MSNBC where required to place links to one another’s web pages those who engages in selective exposure would be likely to left click on the link.\textsuperscript{180} Even if selective exposure powerful as some argued who is to say they will not still choose to go channel surfing once they have heard what they wanted to hear under a fairness doctrine regime. At the end of the day the Government cannot legislate people into full participation, even if the citizenry is left moody and without an opinion on the matter.

B. The Importances of Being Fickle In a World Without Opinion

Selective exposure, while a relevant factor in presidential election, has not affected the whole of the electorate as evident by the diversity of our presidents’ political affiliations in the last century.\textsuperscript{181} As the number of independent voters rise in America, the Presidency in recent years has placed them in a new light.\textsuperscript{182} The United States Census Bureau projects the population of the United States of America as home to 313,315,660 individuals.\textsuperscript{183} Yet typically through out the development of United States voters have had primarily only two meaningful options to make regarding electing public officials, particularly presidents. It is naïve at best to assume that of this growing population only two primary opinions carry any weight. Indeed as discussed earlier to some extent the American people find themselves pigeonholed into two choices, perhaps in part out of Media bias or possibly because of collation building in an attempt to avoid a spoiler effect.\textsuperscript{184} In either case it goes along way as the unaffiliated voters struggle

\textsuperscript{180}\textsc{Adam Thierer Brian C Anderson, A Manifesto for Media Freedom} (Encounter Books, 2008) (An “electronic sidewalk” has been purposed requiring that partisan websites must carry links to opposing views.).

\textsuperscript{181} See,\textsc{ Marcus Stadelmann, U.S. Presidents For Dummies} 364-72 (Wiley Publishing, 2002).

\textsuperscript{182} Huma Khan,\textit{ Independent Voters on the Rise but Do They Matter?} ABCNEWS.COM (January 9, 2012) http://abcnews.go.com/blogs/politics/2012/01/independent-voters-on-the-rise-but-do-they-matter/ (last visited April 6, 2012) (Independent voters are not a myth, and they absolutely sway elections. The present and highly competitive political era in which we live is a direct result of a decrease in partisan attachment.).

\textsuperscript{183} United States Census Bureau,\textit{ U.S. & World Population Clocks} (April 6, 2012) http://www.census.gov/main/www/popclock.html (accessed April 6, 2012)(The data is consistent with Census 2010 data and the most recent national population estimates.).

\textsuperscript{184} \textsc{William Poundstone, Gaming the Vote: Why Elections Aren’t Fair (And What We Can Do About It)}, 20 (Hill and Wang, 2008). (The spoiler effect is the term used to described when a third-party “spoiler diverts enough votes from one of the front-runners to hand the election to his rival. Typically
to find a candidate that suits their viewpoint. However, reform of the Electoral College is not our discussion point, but rather the role of the electorate in a world where true discussion of the issues seems to have been stymied.

If we are to believe that true individual participation by the masses has become pipe dream as Arendt contends, we must ask ourselves if the fickle nature Cicero scornfully referenced is truly such an undesirable trait in today’s political climate? The common definition of fickle connotes as marked by lack of steadfastness, constancy, or stability. In a political climate with a narrow selection of candidates, bent on selling a pre-packaged image of themselves to the voters, it would seem that those voters that are fickle enough to look past selective exposure would be the better part of virtue. At the very least the ability to detach from past preferences and weigh the options will in some respect facilitate participation in the marketplace of ideas and enable the voter to guard against political con jobs.

C. Responsibility of the Masses: Guarding Against the “Right” Result

If Joe McGinniss’ characterization is correct and politics are best described as a con game, then the American voters truly have their work cut out for them. Indeed, a pessimist could easily described what many victorious politicians claim to be the “will of the people” as nothing more than a measure of how many people fell for which lies laid out through a targeted media campaign. Surveys and studies of all types point to an electorate void of reasoned and informed opinions of consequence. With much the electorate on autopilot with each new political controversy, it is easy to fall into the thinking “efforts” should be made to encourage the electorate to broaden their horizons.

Until the aforementioned fiction of the platonic philosopher king

the spoiler and the spoilers supporters are believed to have more in common with the candidate that may have one had it not been for the spoiler candidate.)

189 JAMES BOVARD, ATTENTION DEFICIT DEMOCRACY, 1 (Macmillian, 2005).
bears the duty to protect against the right result will continue to fall strictly on the masses. As James Madison pointed out, “A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives”.191 Today the people’s access to the vast arsenal of information has never been greater. Thanks to the Internet the reaches of man comes one giant step closer to his grasp, allowing him the opportunity to battle against the ever evolving political spin like never before.192 Joe Trippi’s argument that the Internet is the best weapon against a “hope-killing process” that the elections have become is but a hollow hope without the electorate’s individual decision to utilize it.193

V. LOOKING TO THE FUTURE OF THE ELECTORATE, MEDIA & CAMPAIGNING

“Facebook doesn’t organize, people do. Twitter won’t govern, people will.” - Marwan Bishara194

A. The Modern Campaign and the Modern Electorate Are Developing at an Alarming Rate

The role of mass media has never been greater in our society. It truly touches every facet of our modern lives especially our political lives. Whether you are googling Ron Paul,195 or just following the primary season, the media’s role is ever present.196 Bombarded by candidate-approved messages Americans are asked and to some extent actively manipulated into lending their support. As technology continues to develop undoubtedly so will these tactics. The 2008 Obama campaign has barely scratched the

191 MARK LLOYD, PROLOGUE TO A FARCE: COMMUNICATION AND DEMOCRACY IN AMERICA, 11 (University of Illinois Press, 2006).
surface of using these new mediums’ potential through fundraising and mobilization of its followers.

Moore’s Law, states that the number of transistors on a chip will double approximately every two years.\textsuperscript{197} To date that statement has held true with each passing decade,\textsuperscript{198} standing as a symbol of technological development and vision of strength for the future. But, just as consistent as these advancements have been made, so has been the consistency of delays in politicians realizing the potential of the advancement.\textsuperscript{199} Just as 16 years passed between the first Presidential campaign commercial and the first full-scale television campaign,\textsuperscript{200} it seems likely America has seen only the very tip of the internet/social media iceberg.

This phenomenon affects not only the candidate’s efforts but also those seeking to regulate. With few exceptions the legislative process has and will likely continue to be a long and drawn out process akin to making sausage.\textsuperscript{201} If the slow pace of legislation that has been the standard continues it is easy to see how legislators and regulators could find themselves with a typewriter mindset in an Internet age, adopting regulations that are obsolete and incapable of performing its already monumental task on the day they go into effect.

This was a lesson that America’s neighbor to the south, Mexico, has learned the hard way, after severely reforming their own election process in the wake of a highly contested election in 2006 for Mexico’s Presidency.\textsuperscript{202} In response to the no-holds-barred political warfare that had taken place the previous year legislation was passed in 2007 to civilize what was viewed as

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\textsuperscript{198} \textsc{Peter Grego}, \textit{Astronomical Cybersketching: Observational Drawing With PDAs and Tablet PCs} 24 (Springer, 2009).

\textsuperscript{199} \textsc{Dennis W. Johnson}, \textit{Routledge Handbook of Political Management}, 174 (Routledge, 2009).

\textsuperscript{200} \textit{See}, \textsc{Joe McGinniss}, \textit{The Selling of the President} (Penguin Group, 1988).


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These new strict regulations were designed to regulate the type of language used in political advertisements while tightening the official campaign period to just 89 days, in addition to limits on campaign spending and abolishing the Mexican equivalent of political action committees. The legislatures have seen their carefully crafted legislation overmatched and outgunned by the internet crawling with automated programs or armies of volunteers manning Twitter accounts. The anonymity provided by the web, along with these guerrilla tactics make those who violate Mexico’s new laws hard-to-trace for those looking to enforce the new law and easily disavowed the campaigns that benefited from the dirty work. Before the first election cycle had passed it has become abundantly clear that the Internet has outrun these strict typewriter legislations.

As the next election cycle comes to fruition the ground rules are set. For now the internet remains untamed. What limited efforts to regulate some nonpolitical aspects of web have been met with blunt force, by both the media and the electorate alike, and has left the Internet largely free from government restriction for now.
day and for the most part only cause a stir only when *Law & Order* reruns are compromised.\(^{209}\) While newspapers continue in their long settled nest of limited regulation.\(^{210}\) Still, Americans should not be comfortable with the status quo.

Internationally, the full scope of what tools like the media, particularly social media, and high-speed Internet connection is capable as illustrated by Arab Spring where these new media played a vital role in toppling entire regimes.\(^{211}\) At the same time when Americans are still figuring out the role of cutting edge mass media can play in our Presidential elections as across the world people are using it to influence the very brand of government that will rule over them.\(^{212}\) This feat is no less impressive considering the sizable restriction of free speech by the over turned regimes. As the capabilities of technology continue to spiral out of control and those seeking to use it on a large scale will continue to scramble to catch up it is important to remember, “Facebook doesn’t organize, people do. Twitter won’t govern, people will.”\(^{213}\)

traffic was so great that the Senate website shut down while as many as eight million looked up their representatives’ phone numbers.; Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, THE NEW YORK TIMES, January 18, 2012, http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?_r=1&hp (last visited April 18, 2012) (“Internet activists rallied opposition to the legislation through Internet blackouts and cascading criticism, sending an unmistakable message to lawmakers grappling with new media issues: Don’t mess with the Internet.”).

\(^{209}\) ROBERT DUDLEY, MELVIN DUBNICK & ALAN GITELSON, *AMERICAN GOVERNMENT*, 239 (Wadsworth, 10th ed. 2011) (In 2008, NBC fearing equal time demands pulled reruns of *Law & Order* episodes in which Thompson, an actor and former Senator, appeared.).


B. Why the “Right” Result is Wrong the Wrong Choice

Many of the proponents of regulation of the media during campaign season express a frustration with the actual discussion that takes place, the lack of critical participation and the closed minded nature of many in the electorate. Opining that if they would reason together then surely they would reach the right decision. In an elected government the temptations is always present to aid the electorate to reach that “right” decision.

Just over two thousand years ago, standing in the forum, Murena’s lawyer, the former consul Marcus Tullius Cicero, had a clear view of the challenges his country faced. Cicero’s client and successor of the consulship, Murena’s primary political opponent, Lucius Segis Catinia or Catiline, posed a threat to Rome and its constitution. 214 A year earlier, Catiline a Senator with big aspirations had lost the Consulship to Cicero and Antonius Hybrida, 215 before losing again to Murena and his co-consul Decimus Junius Silanus, 216 effectively ending his political career. 217 The defeat ultimately left Catiline heavily in debt and still lusting for power. 218 Enlisting a number of political degenerates and other men of senatorial and equestrian rank, Catiline hatched a plan unite the poor and violently seize power. 219 Following the initial discovery of the conspiracy by Cicero, Catiline fled Rome under the pretext that he would be going into voluntary exile. 220 Soon rumors swirled in Rome that Catiline was preparing an army

214 Tom Holland, Rubicon: The Last Years of the Roman Republic 202 (Random House, 2003) (In a society as competitive as Rome the need need to fence in those who would do harm to the constitution was very real.)
215 Tom Holland, Rubicon: The Last Years of the Roman Republic, 197-98 (Random House, 2003) (Won the consulship in a landslide with Antonius Hybrida coming in ahead of Catiline who finished a distant third.).
217 See, John T. Ramsey Sallust, Sallust’s Bellum Catilinae, 16-17 (Oxford University Press, 2007) (following a second defeat for the consulship Catilines hopes of succeeding at the office had faded tremedously.)
218 Tom Holland, Rubicon: The Last Years of the Roman Republic, 199 (Random House, 2003).
219 John T. Ramsey Sallust, Sallust’s Bellum Catilinae, 18-19, 105 (Oxford University Press, 2007) (the conspiracy was made up of supporters of Catiline as well as those who similarly believed their political careers to be shattered.).
in the countryside and panic began to set in around the city.221 The political climate of the day was dire and the need for a man of action was great.222

Seeing the choice faced, Cicero decided to make the “right” choice for the electorate. Using his legendary oratory Cicero obtained the modern day equivalent of jury nullification his own election law, *Lex Tullia de Ambitu.*223 The jury’s verdict of acquittal224 cut harshly against the idea of fair elections in the public, but was widely accepted as the right choice under the situation. One could ask if it is truly unfair for one party if everybody was cheating,225 the case still calls into question the purpose of elections and the role free speech is intended to play in achieving the “right” result in the face of the challenges put forth by the masses, the electoral system and the people with influence over both. In an era where the media consisted mostly of town criers,226 the use of political rhetoric and the ability to control any relevant information about the situations was the key to both Murena’s election and his acquittal.

The immediate impact was all the great orator could hope for, but long-term the malfeasance proved costly. The decision reaffirmed past practices of Sulla and helped undermine the legitimacy of the electoral process.227 While this did not by itself open the door to the Julius Caesar, Octavian, Mark Antony and eventually the end of the Roman Republic,228 much more

222 See, TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC, 202 (Random House, 2003) (Rome was in crisis following the Catiline conspiracy, and many feared that he was not the sole conspirator.).
223 RICHARD A. BAUMAN, LAWYERS IN ROMAN TRANSITIONAL POLITICS: A STUDY OF THE ROMAN JURISTS IN THEIR POLITICAL SETTING IN THE LATE REPUBLIC AND TRIUMVIRATE, 18 (C.H.Beck, 1985) (*lex Tullia de Ambitu* prescribed heavier penalties on candidates who gave bribes to voters, than its predecessor law, *Lex de Ambitu.*)
227 See, TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC, 99-104 (Random House, 2003) (Sulla advanced on Rome following a civil war and set himself up as dictator, bypassing all election laws. All the while he sought to rebuild republican ideals of Rome. He eventually resigned his office in 81 B.C.).
228 TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC, 326, 350 (Random House, 2003) (Following a civil war with Pompey the Great,
was at play, but without legitimacy a democracy cannot stand.\textsuperscript{229}

Impairing the very cords that tie any democracy together strikes forcefully at the foundations of that democracy.\textsuperscript{230} In Rome, it was a case of bribery, today the threat is far less brazen, the restriction of speech of both the electorate and candidates by regulation of mass media. When proponents of regulations seek to broaden the horizon of an already diverse populous they assume higher knowledge.\textsuperscript{231} This is an arrogance that Cicero, for all his virtues, also possessed only to fall victim to unintended consequence in the face of his best intentions. There is virtue in a closed mind on an issue, if the door was closed after careful considerations. Neither, President, FCC chairman, or a distinguished law professor possess the qualities the philosopher king necessary to deem, such a carefully considered conclusion, wrong and in need of regulatory correction.

VI. CONCLUSION

“In order that all men may be taught to speak the truth, it is necessary that all likewise should learn to hear it.” – Samuel Johnson\textsuperscript{232}

A democracy requires unfettered political speech to shape and determine the ends of democratic society.\textsuperscript{233} This requirement is not without responsibility and obligation on the part of all actors within the democracy.\textsuperscript{234} The media, both traditional and cutting edge, must find a way

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\textsuperscript{229} See, ROGER CHARLTON, POLITICAL REALITIES: COMPARATIVE GOVERNMENT, 23 (Longman, 1989) (The legitimacy of a democracy is derived from the popular perception. Elected government must abide by democratic principles in governing and must be legally accountable to its people.).

\textsuperscript{230} Thomas I. Emerson, \textit{Toward A General Theory of the First Amendment}, 72 Yale L.J. 877, 907 (1963) (“It is a basic element in the democratic way of life, and as a vital process it shapes and determines the ends of democratic society.”).

\textsuperscript{231} See, CASS R. SUNSTEIN, REPUBLIC.COM 2.0, 137 (Princeton University Press, 2007).


\textsuperscript{234} Thomas I. Emerson, \textit{Toward A General Theory of the First Amendment}, 72 Yale L.J. 877, 907 (1963) (“[T]here is a real problem of reconciling freedom of expression with the other values and objectives sought by the good society. All
to contribute to the marketplace without dominating it, an uphill battle considering media is driven by commercial interests, ideology, and the musings of anyone with time to blog. Media has been and will remain a tool only as good as the task it is set to do. Just as candidates for public office have a responsibility to promote the discussion of their ideas and not sell a vacant image, the masses have an obligation to take part in public life and form opinions in a meaningful way guarding against manipulation.235

Thus far those seeking to regulate these interactions in the United States have enjoyed limited success. To date regulators have not even made a meaningful attempt at the regulatory nightmare that is the Internet, that continues to develop and evolve at breakneck speeds. The sheer speed of these developments make an already impossible task all the more daunting. As long as these regulators well intentioned or not give at least lip service to the first amendment and voting rights, the sum of these regulations and media mediums will continue to fall on the masses, who are ultimately charged with guarding the democracy against the ambitions of men with unfathomable intentions as we all navigate through a misleading electoral process. As these relationships continue to develop it will certainly be a challenge to decipher the truth in the face of manipulation and bravado. This is a challenge that can successfully be met head on with resolve and a little effort. It is an obligation that becomes harder to meet with each passing election cycle and each new advancement.

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