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OFFENSIVE POLITICAL SPEECH FROM THE 1970S TO 2008: A BROADCASTER'S MORAL CHOICE

LAVONDA N. REED-HUFF*

INTRODUCTION

In early 2008, the North Carolina Republican Party asked two North Carolina television broadcast stations to air a political advertisement it sponsored, titled “Extreme,” which declares Democratic Party presidential candidate Barack Obama “too extreme for North Carolina.”¹ Citing ethical and moral concerns, general managers at each North Carolina broadcast station rejected the

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1. North Carolina Republican Party, *Extreme*, <http://www.youtube.com/watch?v=JXxkctYRAZQ>. The advertisement seeks to attack Obama and two North Carolina gubernatorial candidates by linking them to Obama, who the advertisement declares is “just too extreme for North Carolina.” *Id.* The advertisement includes sound bites taken from sermons of Reverend Jeremiah A. Wright, Jr., the former pastor of Obama. *See id.* Reverend Wright, a minister in the Trinity United Church of Christ in Chicago, came under attack during Obama’s bid for the Democratic Party presidential nomination when tapes of some of his sermons were circulated over the Internet and on various news channels. *See, e.g., id.*, ABC News Report, *Jeremiah Wright*, <http://www.youtube.com/watch?v=36T1fnIafC0>. In the sermons, Reverend Wright preached loudly to the congregation in a preaching style common to many ministers grounded in African-American tradition such as animation, allegory, and hyperbole. *See* Barack Obama, Speech on U.S. Race Relations (Mar. 18, 2008), http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html?pagewanted=1&_r=2 (transcript), http://www.nytimes.com/interactive/2008/03/18/us/politics/20080318_OBAMA_GRAPHIC.html# (video). In one of the most controversial sermons, excerpts of which were replayed countless times by broadcasters, Wright questioned America’s adherence to the word of God as it related to America’s record on international relations, civil rights and human rights. *See* ABC News Report, *supra*. The most oft-quoted sound bite included his admonition that “[t]he government . . . wants us to sing ‘God Bless America,’ no, no, no, not ‘God Bless America,’ ‘God Damn America!’” *Id.* For those unfamiliar with the African-American church experience, his shouting was off-putting and offensive. For others, his remarks were considered by many to be unpatriotic, racist, and divisive. *See, e.g.*, Fox News Channel Report, *Jeremiah Wright, Obama and United Church of Christ*, <http://www.youtube.com/watch?v=0FUnBi1i90E>; *See also* Editorial, *A Shameful, Ugly Ad*, N.Y. TIMES, Apr. 26, 2008, at A20; Rev. Jeremiah A. Wright, Jr., Remarks to National Press Club (April 28, 2008), in CHI. TRIB., Apr. 28, 2008, available at <http://www.chicagotribune.com/news/nationworld/chi-wrighttranscript-04282008,0,5339764,full.story>.

advertisement and then came under fire from North Carolina Republican Party members for lack of fairness and for quelling free speech.² Negative campaign advertisements are nothing new, and Senator Obama's opponents surely are armed with similar advertisements for use in the future.³ In particular, opponents of

2. See David Ingram, *TV Stations Refuse to Air Controversial Republican Ad*, CHARLOTTE OBSERVER, Apr. 24, 2008. See also *North Carolina GOP: North Carolina Stations Censoring Free Speech*, TARGETED NEWS SERV. Apr. 28, 2008. Republican Party spokesman Brent Woodcox expressed disappointment with the decisions of the two stations not to air the advertisement, stating "[y]ou're going down a very dark path that could end up saying, 'These are the kinds of things you can say in a political debate, and these are the kinds of things you can't . . .' ". Ingram, *supra*. Woodcox continued, "[t]hose aren't the principles this country was founded on." *Id.* North Carolina Republican Party Chairman Linda Daves, commented on the broadcasters' refusal to air the "Extreme" political advertisement:

The comments made by Mr. Pomilla and Mr. Hefner [the North Carolina broadcast station general managers] are completely misinformed and off-base. Our ad is not inflammatory nor does it involve any implications about race. It is an ad about judgment that asks a question even Barack Obama has called a "legitimate political issue." Not one of the stations that have declined to run our ad citing its supposedly "inflammatory" content have offered one shred of evidence or explanation about how it involves race. I have repeatedly reiterated my position that this ad has absolutely nothing to do with race. I challenge the station managers at these stations to release their full reasoning for declining to run the ad, including any evidence that they may muster to justify their claims that this ad is about race. I challenge them to answer questions about what factors were involved in their determination and I challenge them to explain to me if an ad featuring Hillary Clinton and offensive comments by one of her associates would also be declined.

Though they are under no legal obligation to do so, it is in keeping with fairness and the principles of free speech that these stations give some manner of legitimate reasoning for their decisions in this matter. Political speech should not be silenced without any basis or justifiable complaint. No matter one's position on this ad, the media should be the most protective of basic rights to free speech guaranteed both by the letter and the spirit of the Constitution. Unfortunately, far too often, conservative political speech is discriminated against and silenced by liberal media outlets without any outcry or indignation. I promise you that will not be the case here. *North Carolina GOP: North Carolina Stations Censoring Free Speech, supra*.

3. In fact, another advertisement in North Carolina titled "Victims" sought to paint Barack Obama as weak on gang violence and likely to be weak on terrorism. See Ryan Teague Beckwith & Bill Krueger, *Independent Ad Will Attack Obama in N.C.*, NEWS & OBSERVER (Raleigh, N.C), Apr. 24, 2008, at B5. This advertisement was the first in a campaign to paint Obama as weak on crime and terrorism. Michael Scherer, *A Willie Horton Hit on Obama?*, TIME, Apr. 22, 2008, available at <http://www.time.com/time/politics/article/0,8599,1733873,00.html>. Floyd Brown, a man known for crafting the famous Willie Horton advertisements attacking Democratic presidential candidate Michael Dukakis in 1988, is the leader and financial supporter of the group leading the campaign, called the National Campaign Fund. *Id.* See also *infra* Part II-B-1 for discussion of Horton advertisement. Of the

Obama are certain to continue attacking him because of his race, his name, his religion, his youth, his ivy-league education, and other personal characteristics, despite the fact that he won the election overwhelmingly in November 2008 to become the first African-American ever elected to the U.S. presidency. It is likely that some of these advertisements will be race-baiting and overtly racist. More importantly, the majority of these advertisements may come from third parties who support a particular political party, such as political action committees, not actual candidates for public office.⁴ Such incendiary, race-baiting third party political advertisements and political speech do little to nothing to serve the public interest or the political process.

Broadcasters have a significant responsibility to serve the public interest⁵ of a large and diverse public. At times, meeting this federal obligation requires broadcasters to make difficult choices about what messages actually serve those goals, and which do not, while being careful not to run afoul of the broadcasting laws or offend the First Amendment.⁶ The two North Carolina broadcasters have embraced the significant responsibility they have to the public. Their refusal to air this incendiary and unnecessarily divisive third party campaign advertisement signals that they understand the role broadcasters play in serving the public interest even in the context of political campaigns. Undoubtedly, they and other broadcasters will be

Obama presidential bid, Brown stated, “[i]t is absolutely critical that Obama’s negatives go up with Republicans.” Scherer, *supra*.

4. See Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 481–82 (2008).

5. Since the earliest days of governmental regulation of broadcasting, broadcast licensees have been obligated to serve the “public convenience, interest [and] necessity” of their communities of license. See Radio Act of 1927, 44 Stat. 1162, 1166 (1927); see also Communications Act of 1934, 47 U.S.C. § 151 (2006) (creating the Federal Communications Commission and stating the creation of the Act to be “for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communications . . .”); Communications Act of 1934, 47 U.S.C. § 214 (2006) (certificate of public convenience and necessity required for common carriers to add, extend, discontinue or reduce a telecommunications line). See also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1990) (“Congress assigned to the Federal Communications Commission . . . exclusive authority to grant licenses, based on ‘public convenience, interest, or necessity,’ to persons wishing to construct and operate radio and television broadcast stations in the United States.”) As licensees of a limited right to use the public airwaves, licensees must serve the interests of those local communities in which they are licensed. 47 U.S.C. § 307 (2006). See also *Nat’l Broad. Co., v. United States*, 319 U.S. 190, 215 (1943) (“The criterion governing the exercise of the Commission’s licensing power is the ‘public interest, convenience, or necessity.’”). There is, however, no precise definition of the terms “public convenience, interest, and necessity.”

6. See U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech . . .”).

faced with balancing these diverse interests of the public, candidates, and supporters of candidates as they consider similar requests in the future.

Broadcasters play an important role in shaping the messages and images conveyed to the general electorate in any given political campaign season. When the two television broadcasters in North Carolina refused to air the anti-Obama campaign advertisement, their decision raised an oft-asked question: what obligation, if any, do broadcast licensees have to air political advertisements with which they disagree, find offensive, or determine do not further the public interest obligations of broadcast licensees?⁷ The North Carolina broadcasters' decision to reject the "Extreme" advertisement not only evidences the power broadcast licensees have to influence the political discourse, but also their willingness to wield it.

The issue of the broadcast of offensive political speech—particularly racially divisive, oppressive, and incendiary speech—is both a legal and moral question. The legal question is whether broadcasters may refuse to broadcast offensive candidate-sponsored and third party-sponsored political speech, including political advertisements, without incurring legal liability.⁸ The moral question, on the other hand, is whether broadcasters should refuse to air political speech not otherwise protected by federal political broadcast rules if such speech undercuts larger and more prevailing virtues and morals. The latter question is particularly important in a time when many in the American public appear more focused on racial reconciliation than at any other time in recent history.⁹

The North Carolina broadcasters' refusal to air the "Extreme" advertisement and other negative advertisements highlights the tension between the moral and legal obligations of broadcasters and the unique role broadcasters have in shaping the civility of discourse during political campaigns. These licensees are not the first to reject an offensive political advertisement, but their refusal to air this

7. See, e.g., Ingram, *supra* note 2.

8. See *In re* Complaint by Julian Bond, Atlanta NAACP, Atlanta, Georgia, Concerning Political Broadcasting, 69 F.C.C.2d 943, 944 (1978) ("*In re* Complaint by Julian Bond"); *In re* Complaint by Atlanta NAACP, Atlanta, Ga. Concerning Section 315 Political Broadcast by J.B. Stoner, 36 F.C.C.2d 635, 636–37 (1972) ("*In re* Complaint by Atlanta NAACP").

9. That approximately 18 million Democrats cast a vote for Barack Obama in the Democratic primary indicates that America, at least in part, is moving towards a post-racial society. See CNN.com Election Center 2008, available at <http://www.cnn.com/ELECTION/2008/primaries/results/candidates/#1918>; John Heilemann, *The Color-Coded Campaign; Why Isn't Obama Doing Better in the Polls? The Answer No One Wants to Hear*, N.Y. MAGAZINE, Aug. 18, 2008.

advertisement serves as a good example of broadcasters' willingness to take a moral and ethical stand against hateful, malicious, nonproductive, and divisive speech intended to stoke the country's racial fires.¹⁰

This three-part article suggests that the public interest obligations of broadcast licensees require them to reject offensive and hateful political speech directed at racial minorities when that speech is not protected under political broadcast laws.¹¹ Part I of this article will review the relevant federal statutes, regulations, and policies regarding a broadcaster's obligations to air political advertisements.¹² It also will address the First Amendment in the context of political broadcast advertisements.¹³

Part II of the article will highlight numerous examples of offensive political speech from the 1970s through 2008 that have appeared on the television and cable airwaves in political advertisements, on the campaign stump, in news coverage, and in other political fora intended to further political agendas.¹⁴ It will focus mainly on the use of racially offensive speech and racial hate speech, but will also briefly consider political advertisements featuring gruesome images depicting aborted fetal tissue, as there is a small

10. See Ingram, *supra* note 2. Senator John McCain requested that the North Carolina GOP pull the advertisement, but state party officials refused to do so. See Joseph Curl & Christina Bellantoni, *McCain, GOP Split on Wright Ad; N. Carolina Party Stands By Attack*, WASH. TIMES, Apr. 26, 2008, at A1; Michael Luo & Elisabeth Bumiller, *North Carolina G.O.P. to Run Ad Using Obama's Ex-Pastor*, N.Y. TIMES, Apr. 24, 2008, at A22; David Ingram, *Wright Ad Will Run, Repeats N.C. GOP*, CHARLOTTE OBSERVER, Apr. 24, 2008. Joe Pomilla, general manager of WSOC in Charlotte, supported his decision to not air the advertisement by stating that, "I just don't think it's appropriate to be on our air, . . . I think it's offensive, and I'm not real comfortable with the implications around race." Ingram, *supra* note 2. Mr. Pomilla went on to say that the issue isn't about limiting debate, stating that "[t]here are other values that come into play. Ethics come into play . . . and you've got to draw the line somewhere." *Id.* Jim Hefner, vice president and general manager of WRAL, called the advertisement "inflammatory" and said his station makes conscious decisions about what to air, and has refused to air advertisements from conservative and liberal groups alike. *Id.* Hefner went on to say, "We're going to make decisions, and it's not going to be a popular decision with all folks." *Id.*

11. See, e.g., 47 U.S.C. § 312(a)(7) (2006) (granting reasonable access to broadcast airwaves for candidates for federal political office); 47 U.S.C. § 315(a) (2006) (granting equal opportunities to access airwaves for all political candidates).

12. See *infra* Part I.

13. See *infra* Part I-D; see also U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

14. See *infra* Part II.

body of law in that context that is relevant to the discussion.¹⁵ The examples in this Part provide analysis and insight into the negative tone of political speech in recent decades and highlight the implications of broadcasters' moral choices to accept or reject certain political speech, including their coverage of news events.¹⁶

Finally, Part III of this article will discuss the role broadcasters play and the moral choices they must make in maintaining integrity and civility in the political election process, particularly in a climate in which candidates, reluctant to utter overtly racist speech themselves, readily allow third parties to say such things on their behalf.¹⁷ Part III also proposes a test to guide broadcasters in making these determinations and addresses critics of this moral obligation.¹⁸ The article suggests that broadcasters, in the current political climate, have far more influence in shaping public opinion and the political process than ever before. This influence is rooted in their statutory power to reject offensive third party political speech.¹⁹ In sum, this article contends that broadcasters should reject racially divisive and offensive third-party political advertisements that do not further the public interest.

I. BROADCASTERS' FEDERAL OBLIGATIONS TO POLITICAL CANDIDATES

This Part will explain a broadcaster's obligation to air certain political advertisements.²⁰ It also will explain a broadcaster's

15. See *infra* Part II-C-2; 18 U.S.C. § 1464 (2006) (prohibiting the broadcast of obscene, indecent, or profane language). The Federal Communications Commission has often found in favor of the political candidate (and against the broadcaster) in cases involving candidate-sponsored advertisements containing racially offensive speech and abortion-related images. See, e.g., *Becker v. FCC*, 95 F.3d 75, 84–85 (D.C. Cir. 1996) (holding that anti-abortion images were not indecent and that scheduling the anti-abortion advertisements to air during times of the day when children would not be watching restricted the candidates' ability to "fully and completely inform the voters," as envisioned by Congress in 47 U.S.C. § 315(a) and 47 U.S.C. § 312(a)(7)); *In re Complaint by Julian Bond*, 69 F.C.C. 2d 943 (1978); *In re Complaint by Atlanta NAACP*, 36 F.C.C. 2d 635 (1972); Letter Ruling, *Gillett Communications of Atlanta, Inc.*, 7 F.C.C.R. 5599 (1992). Those cases dealt with the applicability of three conflicting federal statutes: 47 U.S.C. § 312(a)(7), 47 U.S.C. § 315(a), and the federal prohibition against the broadcast of indecent, obscene, and profane material within 18 U.S.C. § 1464.

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part III.

19. See 47 U.S.C. § 312(a)(7) (2006) (requires broadcasters to provide reasonable access to air time to candidates for federal elective office, but includes no air time requirement for third party advertisements).

20. See *infra* Part I-A.

obligation to provide equal access to the airwaves for political candidates, and the statutory prohibitions against censoring political speech.²¹ Next, the Zapple Doctrine, which grants a “quasi-equal opportunity” to air time for third party supporters of a political candidate, and its relation to the broadcasting laws, will be briefly discussed.²² Finally, the article will examine the relevance and impact of the First Amendment on third party political broadcast advertisements.²³

A. Broadcasters' Obligation to Provide Federal Candidates Reasonable Access to Broadcast Stations

Generally, there is no affirmative right to speak on a broadcast station.²⁴ Section 312(a)(7) of the Communications Act, as amended, however, affords legally qualified candidates for federal elective office an affirmative right of reasonable access to broadcast stations.²⁵ The statute does not confer this right upon state or local candidates, nor does it provide access to third party supporters of federal candidates.²⁶

21. See *infra* Part I-B.

22. See *infra* Part I-C.

23. See *infra* Part I-D.

24. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-14 (“[T]he Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities. . . Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several occasions and considered various proposals that would have vested private individuals with a right of access.”) (internal citations omitted) (1973); *CBS, Inc. v. FCC*, 453 U.S. 367, (1981) (declining to depart from the FCC’s construction of Section 312(a)(7) “as affording an affirmative right of reasonable access to individual candidates for federal elective office”). While there may be a history of race-baiting in the print media, this article will focus primarily on the broadcast media.

25. 47 U.S.C. § 312(a)(7) (2006).

26. Section 312(a)(7) does confer upon federal candidates a right of access to a broadcast station during prime time, so as to reach the greatest number of voters, but it does not confer a right of access to any particular placement on a station’s broadcast schedule, and broadcasters may be able to refuse candidates’ ads during particular times of the day. *In re Comm’n Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C. 2d 1079, 1090-91 (1978) (“[T]here may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day.”); see also *In re Public Notice Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C. 2d 516, 517 (1974); *Becker v. FCC*, 95 F.3d 75, 80-81 (D.C. Cir. 1996). These circumstances are not defined. *Id.* at 80. The Commission has indicated that in weighing these factors, it will focus on two issues: “(1) [H]as the broadcaster adverted to the proper standards in deciding whether to grant a request for access, and (2) is the broadcaster’s explanation for his decision reasonable in terms of those standards?” *CBS, Inc. v. FCC*, 629 F.2d 1, 18 (D.C. Cir. 1980). Moreover, the statute does not confer a right to free air time, although broadcasters may

Pursuant to the statute, a broadcaster's license may be revoked in the event of a broadcaster's "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy."²⁷

The statute does not define the term "reasonable access," nor do the Federal Communications Commission (FCC)²⁸ regulations offer any one particular definition. The FCC, however, uses an individualized, case-by-case set of interpretive factors to be considered to effectuate the reasonable access requirements of Section 312(a)(7).²⁹ These factors include a candidate's "stated purposes in seeking air time, . . . the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of [47 U.S.C.] §315(a)."³⁰

In reasonableness determinations, broadcasters must justify denials of access to the airwaves by citing "a realistic danger of substantial program disruption," and may not use any of the above factors as "pretexts" for denial of access.³¹ While the FCC generally accords broadcasters deference, provided they demonstrate that they have acted reasonably and in good faith, the FCC does not give deference to blanket policies that deny access to a particular station, and likely will find such policies to be unreasonable.³² This case-by-case determination of reasonableness was upheld by the U.S. Supreme Court in *CBS, Inc. v. FCC*.³³ The Court explained that the FCC's practice of case-by-case determinations neither "improperly involved

donate time if they so choose. See *In re* Codification of the Comm'n's Political Programming Policies, 7 F.C.C.R. 678, 681 (1991).

27. 47 U.S.C. § 312(a)(7) (2006) (added to the Communications Act by the Federal Election Campaign Act of 1971, Pub. L. No. 92-225).

28. Hereinafter referred to as "the FCC" or "the Commission."

29. *CBS, Inc. v. FCC*, 453 U.S. 367, 387 (1981).

30. *Id.* See also *In re* Codification of the Comm'n's Political Programming Policies, 7 F.C.C.R. 678, 681 (articulating formal guidelines for reasonable access for federal candidates); *In Re* Public Notice Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971, 47 F.C.C.2d 516, 516-17 (1974); *In re* Comm'n Policy in Enforcing Section 312(a)(7) of the Communications Act 68 F.C.C. 2d 1079, 1089 n.14 (1978).

31. *CBS, Inc.*, 453 U.S. at 387.

32. *Id.* at 387-88.

33. *Id.* at 386-94 (holding that the FCC did not abuse its discretion in using a case-by-case analysis to determine that a broadcast network did not provide "reasonable access" to candidates for the 1980 presidential election).

[the FCC] in the electoral process,” nor did it “seriously impair[] broadcaster discretion.”³⁴

In today's political climate, tax-exempt lobbyists, special interest groups, political action committees, and entities organized subject to Section 527 of the U.S. Tax Code have deep pockets and a powerful voice, and their influence in shaping voters' opinions cannot be denied.³⁵ These entities, loosely referred to as “527s,” spend millions of dollars for smear and attack advertisements against political candidates, but these funds are often spent beyond federally regulated money given directly to campaigns or political action committees.³⁶ Because the right of reasonable access, however, is limited to legally qualified candidates for federal elective office, these “527s” and state political parties are not entitled to the reasonable access that Section 312(a)(7) grants.³⁷ The lack of an affirmative right of reasonable access, coupled with a broadcaster's commitment to the public interest, may in part limit the influence of third parties seeking to derail unfairly a candidate's campaign through negative, misleading, and divisive advertisements.

34. *Id.* at 388.

35. *See generally* Ryan, *supra* note 4. Political organizations are tax-exempt organizations under Section 527 of the federal tax code. 26 U.S.C. § 527 (2006). Other organizations, such as certain types of corporations, may also be influential in political campaigns, and are similarly tax-exempt under 26 U.S.C. § 501(c)(4) (2006).; *see also* Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2673 (2007) (holding that Bipartisan Campaign Reform Act of 2002 (BCRA), which made it a crime for any labor union or incorporated entity to use its general treasury funds to pay for any electioneering communication, was unconstitutional as applied to certain campaign advertisements of a non-profit advocacy group asserting that particular lawmakers used a filibuster to delay voting on federal judicial nominees). The BCRA defines “electioneering communication” as “any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office [and that] is made within 60 days before a general, special, or runoff election . . . or 30 days before a primary or preference election . . .” 2 U.S.C. § 434(f)(3)(A) (2006). There was no consensus among the Court on the basis of the finding of unconstitutionality of the BCRA. *See Wis. Right to Life*, 127 S. Ct. at 2673 (majority opinion), 2676–87 (Scalia, J., concurring).

36. *See* Alec MacGillis, *Ruling Could Spur More Ads; Decision on Campaign Finance May Mean Influx of 'Soft Money'*, WASH. POST, June 27, 2007, at A4 (discussing Supreme Court decision in *Wis. Right to Life* and its potential influence on “soft money” contributions from unions and corporations to political parties in the future); *see also* Ryan, *supra* note 4, at 471–73.

37. *See* 47 U.S.C. § 312(a)(7) (2006).

B. Broadcasters' Obligation to Provide Equal Opportunities and the Prohibition Against Censorship

Pursuant to Section 315 of the Communications Act of 1934, as amended, broadcasters must provide opposing candidates for the same elective office equal opportunities to use their stations in furtherance of the candidates' political campaign.³⁸ Section 315 offers equal opportunity of air time not only for federal candidates, but for state and local candidates as well.³⁹ The statute provides: "[i]f any licensee shall permit any person who is a legally qualified candidate⁴⁰ for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . ."⁴¹

Section 315 does not afford candidates the same right of reasonable access that Section 312 provides to federal candidates, but

38. 47 U.S.C. § 315(a) (2006). These obligations extend to cable and direct broadcast satellite service ("DBS") channels only to the extent that the relevant programming is carried on a cable television or DBS system channel "subject to the *exclusive control*" of the cable or DBS provider. 47 C.F.R. § 76.205(a) (2008) (applying equal opportunity provisions to cable television systems); 47 C.F.R. § 25.701(b)(4)(ii) (2008) (applying equal opportunity provisions to DBS providers); *see also* 47 C.F.R. § 76.5(p) (2008) (defining "origination cablecasting"); 47 C.F.R. § 25.701(b)(2) (2008) (defining "DBS origination programming").

39. 47 U.S.C. § 315(a) (2006).

40. "A legally qualified candidate for public office is any person who (1) [h]as publicly announced his or her intention to run for nomination or office; (2) [i]s qualified under the applicable local, State, or Federal law to hold the office for which he or she is a candidate; and (3) has met the [other] qualifications set forth [for particular offices]." 47 C.F.R. 73.1940(a) (2008). In addition, a candidate must make "a substantial showing that he or she is a bona fide candidate for such nomination." 47 § 73.1940(b), (d), (e) (2008); *see also In re Complaint Under Section 315 of the Communications Act of 1934 as Amended*, 40 F.C.C. 423 (1965); Public Notice, Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C. 2d 832, 860 (1970).

41. 47 U.S.C. § 315(a) (2006). "Use" has been defined as "a candidate appearance (including by voice or picture)" not otherwise exempt under the statute. 47 C.F.R. § 73.1941(b) (2008); *see also In re Complaint of D. J. Leary, Nat'l Media Dir., Humphrey Campaign, Against Columbia Broadcasting System, Regarding Indemnification Forms*, 37 F.C.C. 2d 576, 578 (1972). Only voluntary appearances that are "controlled, approved, or sponsored" by legally qualified candidates apply. Letter to Senator John F. Kelly, 7 F.C.C.R. 5216, 5216 (Jul. 31, 1992). Fleeting appearances by a candidate do not constitute "use." Telecomms. Research & Action Ctr. v. FCC, 917 F.2d 585, 586 (D.C. Cir. 1990) (under the "fleeting use" doctrine, brief candidate appearances "do not constitute 'uses' within the meaning of Section 315."); *see also In re Request of Oliver Productions, Inc. for Declaratory Ruling*, 4 F.C.C.R. 5953, 5954 (1989). In addition, disparaging uses of a candidate's voice or picture by an opponent does not constitute "use" under Section 315 and therefore would not "trigger the equal opportunities clause." *In re Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. 678, 684 (1991) (use by a legally qualified candidate is any "positive" appearance and excludes disparaging uses by an opponent); *In re Codification of the Commission's Political Programming Policies*, 9 F.C.C.R. 651, 651 (1994).

instead mandates that once a broadcaster provides one legally qualified candidate for public office access to its station, it must provide the same access, under the same terms, to other legally qualified candidates for the same public office.⁴² A broadcaster may not discriminate against one candidate in favor of another as it relates to rates charged, terms of use of the facilities, or types of services offered.⁴³ As is the case with Section 312, this section affirmatively applies only to advertisements by candidates and their authorized campaign committees, but not to third parties.⁴⁴

This right of equal access to legally qualified candidates for public office provided in Section 315 is subject to the following four exceptions: “(1) bona fide newscast[s];⁴⁵ (2) bona fide news interview[s];⁴⁶ (3) bona fide news documentar[ies] (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary);⁴⁷ [and] (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).”⁴⁸

42. Compare 47 U.S.C. § 312(a)(7) (2006) with 47 U.S.C. § 315(a) (2006). It applies to requests by candidates and their authorized campaign committees or representatives. Section 301 Federal Election Campaign Act of 1971.

43. Political candidates must be offered prices at the lowest unit charge in the 45 days preceding a primary election in which the person is a candidate, and 60 days preceding a general or special election in which the person is a candidate. 47 U.S.C. § 315(b)(1) (2006); see also *CBS, Inc. v. FCC*, 453 U.S. 367, 377 n.5 (1981).

44. See 47 U.S.C. § 312(a)(7) (2006); 47 U.S.C. § 315(a) (2006).

45. 47 U.S.C. § 315(a)(1) (2006).

46. *Id.*; see also *In re Complaint under Section 315, Station KFDX-TV*, 40 F.C.C. 374, 374 (1962) (“[b]ona fide news interviews” must be regularly scheduled for the purposes of Section 315(a)); *In re Request of Capitol Radio Networks for Declaratory Ruling*, 11 F.C.C.R. 4674, 4674 (Apr. 18, 1996) (“In determining whether a program qualifies as a ‘bona fide news interview,’ the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the broadcaster or an independent producer controls the program; and (3) whether the broadcaster’s or independent producer’s decisions on format, content, and participants are based on newsworthiness rather than on an intention to advance an individual’s candidacy.”) (citation omitted).

47. 47 U.S.C. § 315(a)(3) (2006); see also *In re Complaint of Victor E. Ferrall, Jr.*, 46 F.C.C. 2d 1113, 1114 (1974) (for the FCC to determine that a documentary is a “bona fide news documentary,” the candidate’s appearance “must be incidental to the presentation of the subject [matter]” and not simply to advance the individual’s campaign, among other factors).

48. 47 U.S.C. § 315(a)(4) (2006); see also *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 426 (D.C. Cir. 1980) (three factors will be considered to determine whether coverage of a candidate’s press conference is exempt from triggering the equal opportunity clause for an opponent as on-the-spot coverage of a news event: (1) whether the conference is broadcast live; (2) whether the broadcaster makes a good faith determination that the conference is a bona fide news event; and (3) whether the broadcaster demonstrates any favoritism toward the candidate); *Nat’l Org. for Women, New York City Chapter v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977) (The Commission will not question a broadcast licensee’s judgment as to what constitutes news “unless there is extrinsic evidence of deliberate

In addition to the equal opportunity provisions of Section 315, the statute also prohibits broadcasters from censoring political broadcast material, such as campaign advertisements, covered by that section.⁴⁹ Thus, when a broadcaster chooses to broadcast a political advertisement, it may not censor a political candidate's advertisement in any way, regardless of whether the candidate is running for federal, state, or local office. The statute provides: "such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."⁵⁰ The anti-censorship provision in Section 315 is limited to the advertisements of legally qualified candidates and does not extend to third party-sponsored political advertisements.⁵¹

distortion or news staging . . . or unless the licensee consistently fails to report news events of public importance that could not in good faith be ignored.") (citations omitted).

49. 47 U.S.C. § 315(a) (2006). Broadcasters' channeling political speech to certain hours of the broadcast day has been interpreted as constituting impermissible censorship. *See* *Becker v. FCC*, 95 F.3d 75, 84–85 (D.C. Cir. 1996) (holding that channeling political advertisements to the safe harbor hours of 10:00 p.m. to 6:00 a.m. was impermissible pursuant to §§ 312(a)(7) and 315); *see also* 47 U.S.C. § 326 (2006) (prohibiting the FCC from censoring broadcast material). The so-called safe harbor hours are those hours of the broadcast day from 10:00 p.m. to 6:00 a.m. when children are less likely to be in the viewing audience and when indecent material may be broadcast. *See* *Action for Children's Television v. FCC*, 58 F.3d 654, 669–70 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996).

50. 47 U.S.C. § 315(a) (2006). Another federal statute, 47 U.S.C. § 326 (2006), prohibits the Federal Communications Commission from censoring speech. The Commission, however, may sanction certain speech such as indecent material after the fact. 18 U.S.C. § 1464 (2006).

51. *See supra* note 40 (discussing definition of "legally qualified candidate"); *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 529 (1959) (stating that allowing broadcasters to censor political remarks "would undermine the basic purpose for which [Section] 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates." *Farmers Educ. & Coop. Union of America* does not appear to extend this immunity to political advertisements sponsored by third parties.

Sections 312 and 315 were invoked in an interesting way during the 2004 presidential campaign. In the Fall of 2004, the Sinclair Broadcast Group ("Sinclair") ordered all of its broadcast stations, over 60 in total, to show the film "Stolen Honor: Wounds That Never Heal" ("Stolen Honor"), a film featuring Vietnam veterans criticizing Democratic candidate John Kerry's anti-war activities upon returning to the U.S. following his wartime service. Jim Rutenberg, *Broadcast Group to Pre-empt Programs for Anti-Kerry Film*, N.Y. TIMES, Oct. 11, 2004, at A19. Airing the film would have preempted regularly scheduled primetime television programming. *Id.* The portrayal was not positive, but rather was intentionally disparaging. *Id.* Democrats claimed that Sinclair violated the equal time provision by categorizing the movie as "news" and thus not triggering the equal opportunity provision of Section 315 so Kerry could respond. *Id.* The party also claimed that the film amounted to a prolonged free political advertisement for George W. Bush that violated the fairness rules by not also airing a pro-Kerry advertisement of equal length. *Id.* In an interesting twist, if the anti-Kerry film were deemed to be a political advertisement and a "use" of the broadcast airwaves by Kerry, instead of news, that would trigger the reasonable access and equal time provisions of Sections 312

Because broadcasters may not censor candidate-sponsored political advertisements pursuant to Section 315, courts have recognized broadcaster immunity for defamatory content in political advertisements.⁵² In *Farmers Educational & Cooperative Union*, the U.S. Supreme Court addressed the difficult decision a broadcaster must make when deciding to air a potentially libelous political advertisement.⁵³ In the spirit of fostering a “full and unrestricted discussion of political issues by legally qualified candidates,”⁵⁴ as was contemplated by the legislature in enacting the censorship provision of Section 315, the Court upheld the prohibition against censorship, but at the same time afforded the broadcasters of these advertisements immunity from libel suits.⁵⁵ Broadcasters, however, do not enjoy immunity from liability relating to all political speech.⁵⁶ In particular, broadcasters are not immune from lawsuits when candidates’ political advertisements contain indecent, obscene, or profane material.⁵⁷ Nor do broadcasters enjoy immunity from defamatory statements made in political advertisements by third parties not contemplated by the provisions in Section 315.⁵⁸

Sections 312 and 315 provide guidelines for broadcasters and political candidates as they participate in an election. In today’s political environment, however, many political campaign advertisements, particularly the negative and inflammatory ones, are sponsored not by a candidate in a race, but by third parties such as political action committees, political parties, or third-party supporters of a particular candidate or political party.⁵⁹ The “Extreme”

and 315 and therefore give equal opportunities for opponents George W. Bush or Ralph Nader to appear on television because it was John Kerry whose image appeared in the movie. *Id.*

52. See *Farmers Educ. & Coop. Union of Am.*, 360 U.S. at 535.

53. *Id.* at 527.

54. *Id.* at 529.

55. See *id.* at 535.

56. See generally *id.* (protection from liability is limited to when broadcasters cannot censor the defamatory statements they air).

57. See Samantha Mortlock, Comment, *What the [Expletive Deleted] is a Broadcaster to Do? The Conflict Between Political Access Rules and the Broadcast Indecency Prohibition*, 14 GEO. MASON L. REV. 193, 193–94 (2006); see also 18 U.S.C. § 1464 (2006).

58. See *Farmers Educ. & Coop. Union of Am.*, 360 U.S. at 544 (Frankfurter, J., dissenting) (“ . . . the Communications Act does not govern relations between stations and third persons”).

59. See MacGillis, *supra* note 36 (reporting on Supreme Court’s decision in *FCC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007)). In *FCC v. Wis. Right to Life, Inc.*, the Court ruled on the constitutionality of the Bipartisan Campaign Reform Act (BCRA), 2 U.S.C. § 441b(b)(2), and found unconstitutional those provisions of the BCRA that made it a federal crime for labor unions and corporations to use their general treasury funds to pay for electioneering communications referring to a candidate for federal office and targeting the

advertisement in North Carolina was sponsored by such a third party—the state political party—and therefore was not entitled to air time.⁶⁰ Thus, the broadcast licensees in North Carolina were under no obligation to run the advertisement under either Section 312 or Section 315, and were well within their rights to reject the advertisement and any similar third party-sponsored advertisement.

C. The Zapple Doctrine

The Zapple Doctrine, named for a case brought by Nicholas Zapple, then-Chief Counsel for the Senate Communications Subcommittee, is a principle describing what has been termed a “quasi equal opportunity” for third party supporters of a political candidate.⁶¹ The Commission created this doctrine to deal with potential political imbalances that could be brought about by the influence of third party supporters of candidates seeking to enhance a candidate’s campaign but seeking to avoid triggering the equal opportunities provided to opposing candidates by Section 315.⁶² The Zapple Doctrine does not entitle supporters of a candidate to buy the same amount of air time as opposing third parties, but rather entitles a supporter of a candidate an opportunity to buy comparable air time.⁶³ The anti-censorship provisions of Section 315 do not apply in this context.⁶⁴ Similarly, the immunities granted to broadcasters of defamatory political speech do not appear to extend to third party advertisements aired pursuant to the Zapple Doctrine, as access to the station would not be pursuant to either Section 312 or Section 315.⁶⁵ Though considered to be related to

electorate that are aired within 30 days of a federal primary election or within 60 days of a federal general election in the jurisdiction in which that candidate is running for office. *Wis. Right to Life, Inc.*, 127 S. Ct. at 2659.

60. See *Extreme*, <http://www.youtube.com/watch?v=JXxkctYRAZQ>; see also *supra* note 40 (discussing definition of “legally qualified candidate”).

61. *In Re Request* by Nicholas Zapple, Communications Counsel, Committee on Commerce for Interpretive Ruling Concerning Section 315 Fairness Doctrine (“Nicholas Zapple”), 23 F.C.C. 2d 707, 707–09 (1970).

62. See *id.* at 709–10 (Comm’r Johnson, concurring).

63. *Id.* at 707–08.

64. See generally *Farmers Educ. & Coop. Union of Am.*, 360 U.S. 525 (1959) (discussing anti-censorship provisions as related to advertisements of “legally qualified candidates”).

65. See *id.* at 535 (linking together the anti-censorship provision of Section 315, the immunity from liability inherent in the anti-censorship provision, and the overall purpose of Section 315 to allow equal opportunities for legally qualified candidates).

the now-defunct Fairness Doctrine,⁶⁶ the Zapple Doctrine appears to have survived the repeal of the Fairness Doctrine.⁶⁷

D. First Amendment Concerns

Political speech enjoys significant First Amendment protection.⁶⁸ As mentioned above, there is no general affirmative right to speak on a broadcast station.⁶⁹ Generally, the FCC defers to the judgment and reasonableness of broadcast licensees to determine who will be allowed to speak on a broadcast station.⁷⁰ In the political broadcast context, Congress, in Section 312(a)(7), provides candidates for federal office a right of reasonable access to broadcast stations.⁷¹ Congress also has provided equal opportunities for opposing candidates, regardless of whether the office is federal, in Section

66. The Fairness Doctrine required broadcast licensees to cover controversial issues of public importance, to provide balanced coverage of differing viewpoints, and to give free response time to individuals or groups covered by a station's news report. *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110–11 (1973); *Nicholas Zapple*, 23 F.C.C. 2d at 707–09. The Fairness Doctrine was repealed by the Commission in 1987. *See generally In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act* (“1974 Fairness Report”), 48 F.C.C. 2d 1 (1974), *recon. denied*, 58 F.C.C. 2d 691 (1976), *aff'd sub nom. Nat'l Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *see also In re Complaint of Syracuse Peace Council Against Television Station WTVH*, Syracuse, New York, 2 F.C.C.R. 5043 (1987) (repealing the Fairness Doctrine on the basis that the Doctrine contravenes the First Amendment and therefore no longer served the public interest, that it had the effect of chilling speech, and that it imposed substantial burdens on the editorial freedom of licensees and journalists). The Zapple Doctrine, however, was never expressly repealed.

67. *See supra* note 66.

68. *See, e.g., FCC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2659 (2007) (“[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”).

69. *See, e.g., Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102, 119 (1973) (“[N]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because ‘the public interest’ requires it ‘is not a denial of free speech.’ . . . The First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts.” (internal quotations and citation omitted)).

70. *See, e.g., In re Applications of WQED Pittsburgh And Cornerstone Television, Inc.*, 15 F.C.C.R. 202, 213 (1999) (explaining that the Commission will defer to the broadcaster's judgment regarding programming choices unless they are arbitrary or unreasonable); *see also CBS, Inc. v. FCC*, 453 U.S. 367, 387 (1981) (“If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance.”).

71. *See discussion supra* Part I-A; 47 U.S.C. § 312(a)(7) (2006). In contrast, no such right exists in the context of the print media. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974) (holding a state “right of reply” statute unconstitutional on First Amendment grounds as applied to newspapers).

315.⁷² Third party non-candidates, by contrast, lack a clear constitutional First Amendment right or a statutorily created right of access to a broadcast station as they are not explicitly mentioned or considered in Sections 312 or 315.⁷³ A broadcast licensee may bar any party not contemplated by the reasonable access provisions of Section 312, or by the equal opportunity provisions of Section 315 pursuant to the licensee's fulfilling its public interest obligations.⁷⁴ The two North Carolina broadcasters thus were within their right to refuse to air the third party anti-Obama advertisement because its sponsor, the North Carolina Republican Party, lacked a constitutional or statutory right to speak over the broadcast airwaves.

Hate speech also enjoys significant First Amendment protection despite causing overall harm to society at large as well as psychological harm to the groups and individuals targeted by the speech.⁷⁵ Generally, the First Amendment protects racist speech except when it constitutes "fighting words," creating a true threat of violence.⁷⁶

The anti-censorship provisions in Sections 326 and 315⁷⁷ of the Communications Act evidence the freedoms afforded political candidates wishing to use the public broadcast airwaves in furtherance of their campaigns.⁷⁸ In the political broadcast context, the FCC

72. See 47 U.S.C. § 315(a) (2006). Prior to 2000, the FCC had granted political candidates the right to respond to personal and political attacks made against the candidate on a broadcast station. See 47 C.F.R. § 73.1920 (1999) (Personal Attack Rule); 47 C.F.R. § 1930 (1999) (Political Editorials Rule). These rules were struck down by the D.C. Circuit in 2000. *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000).

73. See 47 U.S.C. §§ 312(a)(7), 315(a) (2006); see also note 66 *supra* and accompanying text. The Zapple Doctrine may, however, afford a quasi-equal opportunity to third party non-candidates. See *Nicholas Zapple*, 23 F.C.C. 2d 707, 707-08 (1970).

74. See 47 U.S.C. §§ 312(a)(7), 315(a) (2006).

75. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 381, 391 (1992) (finding unconstitutional a city ordinance banning bias-motivated crimes such as cross burnings because the statute prohibited otherwise permitted speech and stating that "[t]he First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects").

76. See, e.g., *Virginia v. Black*, 538 U.S. 343, 366-67 (2003) (holding, in a case involving cross burning, that the First Amendment protects symbolic speech but permits a state to prohibit cross burnings committed with the intent to intimidate); see also *R.A.V.*, 505 U.S. at 381; *In re KGEZ(AM)*, 22 F.C.C.R. 8395, 8397 (2007) (denying petitions to deny license renewal and reiterating that "if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable and congenial." (citation omitted)); *In re Application of Zapis Communications Corp.*, 7 F.C.C.R. 3888, 3888-89 (1992) (stating policy of refraining from interfering with broadcasters' choice of programming).

77. See 47 U.S.C. §§ 315(a), 326 (2006).

78. *Id.*

acquiesced to the anti-censorship rule in the case of U.S. senatorial candidate J.B. Stoner, discussed in Part II of this article.⁷⁹ In that case, the FCC upheld the anti-censorship provision of Section 315 and rejected efforts to characterize Stoner's racist speech as indecent or obscene⁸⁰—speech that is prohibited on the broadcast airwaves.⁸¹ Despite the offensive tone and language of Stoner's advertisement, the Commission correctly upheld Stoner's right to air his advertisement in furtherance of his federal campaign pursuant to Sections 312 and 315. Had this advertisement been sponsored by a third party non-candidate, a broadcaster would have been fully within his right to reject the advertisement for the benefit of the public interest, much the same way as did the two North Carolina broadcasters in early 2008 provided the third party had not requested air time pursuant to opportunities provided by the Zapple Doctrine.

In the broadcast context, courts have interpreted the First Amendment as protecting the public's right to know⁸² as well as a broadcaster's right to journalistic freedom.⁸³ Legislators and courts have recognized the influence of the broadcast media and its ability to transmit information to the public. Legislators and courts, however, have treated broadcast stations differently from the print media based on concerns about scarcity—particularly the limited and finite number of broadcast media stations.⁸⁴ Congress' grant of the rights to reasonable access and equal access to the airwaves in Sections 312 and 315, respectively, acknowledges these constraints.

79. See *infra* Part II-A.

80. See generally *In re* Complaint by Atlanta NAACP, Atlanta, Ga. Concerning Section 315 Political Broadcast by J.B. Stoner, 36 F.C.C. 2d 635 (1972).

81. See 18 U.S.C. § 1464 (2006) (sanctioning those who broadcast "obscene, indecent, or profane language" with fines or imprisonment). In *In re* Complaint by Julian Bond, the FCC addressed the relationship between the anti-censorship prohibitions of Section 315 and 326 and the prohibition of indecent or obscene language on radio and television in 18 U.S.C. § 1464, and explained that "[t]he First Amendment and Section 326 . . . impose severe restrictions on the scope of the Commission's authority in enforcing the statutory prohibition against the broadcast of 'obscene, profane, or indecent language.'" 69 F.C.C. 2d 943, 944 (1978). See also Clay Calvert, *Imus, Indecency, Violence & Vulgarity: Why the FCC Must Not Expand Its Authority Over Content*, 30 HASTINGS COMM. & ENT. L.J. 1, 4, 10–16 (2007) (suggesting that any attempts to expand the definition of broadcast indecency to include racist and sexist speech will be void for vagueness).

82. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (affirming the right to receive information); *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981).

83. See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973) (reasoning that Congress intended for private broadcasters to have full journalistic freedom so long as it was consistent with their obligations to serve the public interest).

84. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974) (addressing the technical and physical limitations of broadcasting as compared to print media).

Such concerns about scarcity of outlets may not be as profound in current times considering the number of media outlets available, including broadcast television, radio, cable, satellite, print, and the Internet.⁸⁵ When Congress passed the statutes granting broadcast rights to political candidates, there were far more newspapers in the country than today.⁸⁶ Today, newspapers arguably are more scarce than broadcast stations and certainly more scarce than Internet websites and blogs.⁸⁷ Newspaper readership is down and advertisers are spending more money in broadcasting than they are in the print media.⁸⁸

Nevertheless, the standard granting political candidates, but not others, limited access to the broadcast airwaves appropriately furthers the public interest without unduly burdening broadcast licensees' journalistic freedoms. Broadcast licensees, however, have no statutory or constitutional obligation to grant third parties access to their facilities for the purpose of airing political advertisements, particularly those that contain offensive materials.

85. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396–401 (1969). *But see* *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401–02 (3d Cir. 2004) (finding that the larger number of media outlets available does not “render[] the broadcast spectrum less scarce”); *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C. 2d 145, 151 (1985) (“[T]he Court’s [*Red Lion*] decision was necessarily premised upon the broadcasting marketplace as it existed more than sixteen years ago.”).

86. In 1927, there were 2,901 daily newspapers in circulation. *Historical Statistics of the United States, Millennial Edition* (2006) (online subscription database), available at <http://hsus.cambridge.org/HSUSWeb/toc/hsusHome.do>. In 1935, there were 2,037. *Id.* By 2006, the number of daily newspapers in the United States had dropped to 1,437. U.S. Census Bureau, *Statistical Abstract of the United States: 2008 705* (2008), available at <http://www.census.gov/compendia/statab/tables/08s1102.pdf>. As of February 2007, the number had dropped to 1,422. Editor & Publisher International *Yearbook: The Encyclopedia of the Newspaper Industry* (2008).

87. KIRAN DUWADI, SCOTT ROBERTS, & ANDREW WISE, *MEDIA OWNERSHIP STUDY TWO: OWNERSHIP STRUCTURE AND ROBUSTNESS OF MEDIA*, 2–11 (2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf (number of newspaper owners down 8% from 2002–2005 and locally owned newspapers down 5%; number of daily newspapers in 2005 was 1445 versus over 13,000 radio stations, over 1700 television stations, and millions of Internet websites). Despite the dwindling numbers, there is always the possibility of more entrants to the newspaper industry. This is not so with broadcast spectrum. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401–02 (3d Cir. 2004). There is a limited amount of broadcast spectrum available for use. *Id.*

88. See Paul Bond, *For First Time, B’cast Beats Papers for Ads*, *HOLLYWOOD REPORTER*, Aug. 5, 2008. Advertising dollars for television expected to reach \$51 billion while newspapers will reach only \$46.8 billion. *Id.*

II. FOUR DECADES OF OFFENSIVE POLITICAL SPEECH

This Part highlights some of the most racially offensive incidents of political speech over the past four decades to illustrate the moral choices facing broadcasters as they serve the public interest.⁸⁹ The examples discussed herein illustrate the negative tone of modern political speech and the prevalence of explicit and implicit racially offensive speech in recent political campaigns. This Part is organized chronologically by decade for the purpose clarity and of illustrating how racially offensive political discourse has developed over time.

A. The Seventies: J.B. Stoner, Georgia, 1972.

In 1972, just a decade after the height of the modern civil rights movement, one particular political candidate boldly spewed racial epithets and hatred via political campaign advertisements with the goal of stirring the pot of racial tension in the United States.⁹⁰ Such blatant use of racial epithets is much less common in the modern political environment. Today, candidates and their supporters use much more subtle and coded means of delivering the same message of hatred, fear, and divisiveness. During his U.S. senatorial campaign in Georgia, J. B. Stoner made the following political announcement:

I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.⁹¹

89. See *infra* Part II-A-E.

90. See *In re Complaint by Atlanta NAACP*, 36 F.C.C. 2d 635, 635-36 (1972).

91. *Id.*

J. B. Stoner lost the election.⁹²

Broadcasters of the Stoner advertisement could not have legally rejected the racist advertisement.⁹³ They were in fact required to air this advertisement pursuant to Section 312 because Stoner was a candidate for federal elective office.⁹⁴ Additionally, to the extent broadcasters had granted use of their station facilities to any other candidate for that office, the broadcaster was required to afford Stoner equal opportunities pursuant to Section 315.⁹⁵ Broadcasters also could not censor the advertisement pursuant to Section 315.⁹⁶

Despite the laws protecting Stoner's right of access to the broadcast station, broadcasters and civil rights activists sought to reject the advertisement and other Stoner advertisements, claiming that the broadcast constituted obscene, indecent, and hateful speech potentially harmful to society.⁹⁷ In response to Stoner's racist tirade, civil rights activists requested that the FCC ban use of the word "nigger" as obscene or indecent in accordance with the U.S. Supreme Court's holding in the 1978 case of *FCC v. Pacifica Foundation*.⁹⁸ In *Pacifica*,

92. See Douglas Martin, *J.B. Stoner, 81, Fervent Racist and Benchmark for Extremism*, *Dies*, N.Y. TIMES, Apr. 29, 2005, at C13. In 1980, Stoner was convicted of the 1958 bombing of a Birmingham, AL church. *Id.* He served over three and a half years of a 10-year sentence. *Id.*; Joe Holley, *Virulent Segregationist J.B. Stoner Dies*, WASH. POST, Apr. 28, 2005, at B6; Saeed Ahmed, Bill Montgomery, *J.B. Stoner, 81, Unbowed White Supremacist*, ATL. JOURNAL-CONST., Apr. 27, 2005, at B5.

93. See 47 U.S.C. § 312(a)(7) (2006).

94. *Id.* See also discussion *supra* Part I-A.

95. See 47 U.S.C. § 315(a) (2006); see also discussion *supra* Part I-B. Airing Stoner's advertisement would likewise have triggered equal opportunities for Stoner's opponents. *Id.*

96. See 47 U.S.C. § 315(a) (2006); see also discussion *supra* Part I-B.

97. See *In re Complaint by Atlanta NAACP*, 36 F.C.C. 2d 635, 635 (1972); *In re Complaint by Julian Bond*, 69 F.C.C. 2d 943, 943-44 (1978); *In re Complaint by Atlanta NAACP*, 36 F.C.C. 2d 635, 635-36 (1972).

98. *In re Complaint by Julian Bond*, 69 F.C.C. 2d 943, 943-44 (1978); see *FCC v. Pacifica Found.*, 438 U.S. 726, 729-30, 750-51 (1978). Federal law prohibits the broadcast of indecent, obscene, or profane material over the broadcast airwaves. 18 U.S.C. § 1464 (2006). This section provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both." *Id.* Indecent programming is "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *In re a Citizen's Complaint Against Pacifica Found. Station WBAI (FM) New York, NY*, 56 F.C.C. 2d 94, 98 (1975); see also *Pacifica Found.*, 438 U.S. at 738-41. The FCC felt that the issue should be decided based on principles similar to the law of public nuisance, which favors channeling behavior over outright prohibitions, and the Court upheld the FCC's decision. *Id.* at 731, 749-51. The Court did not express any disagreement with the FCC's view that channeling material that depicts or describes sexual or excretory activity in a patently offensive way should be limited to times of the day when children are less likely to be in the audience. *Id.* at 731-33, 749-51. 47 U.S.C. § 326 does not prohibit the FCC from reviewing the content of broadcast material and sanctioning licensees who broadcast indecent, obscene, or profane material. *Id.* at 738. Profanity may include material

the Court upheld a prohibition against the broadcast of indecent material over the broadcast airwaves during hours of the day when children were likely to be in the audience.⁹⁹ Misreading the Court's holding in *Pacifica*, the National Association for the Advancement of Colored People (NAACP), in 1978, filed a claim with the FCC asking to have the Commission add the word "nigger" to its list of obscene words.¹⁰⁰ In response, the FCC concluded that use of the racial epithet "nigger" is neither indecent nor obscene under its rules.¹⁰¹ The FCC explained that no matter how offensive the term, it does not describe sexual organs, sexual or excretory activity, or sexual conduct in a patently offensive manner, as is required by the agency's rules.¹⁰² In rejecting the NAACP's claim, the FCC stated that "even if the Commission were to find the word 'nigger' to be 'obscene' or 'indecent,' in light of [the anti-censorship provisions of] Section 315[,] [it] may not prevent a candidate from utilizing that word during his 'use' of a licensee's broadcast facilities."¹⁰³ Had this been a third party-sponsored advertisement, it would have been the most obvious and appropriate example of an advertisement a broadcaster should reject as offensive and against the public interest.

B. The Eighties

The decade of the 1980s included a few notable instances of offensive political speech, including advertisements sponsored by

that, while harmful to children, may not meet the definition of indecent. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 466–67 (2d Cir. 2007) (rejecting a new definition of "profane" adopted in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004), that would "substantially overlap with the statutory term 'indecent'").

To determine whether material is obscene, a trier of fact looks to the following three guidelines: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, ... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Roth v. U.S.*, 354 U.S. 476, 489 (1957) for the first factor). Indecent and profane material enjoys some First Amendment protection, while obscene material does not. *See, e.g., id.* at 23–24; *Pacifica Found.*, 438 U.S. at 745–47.

99. *Pacifica Found.*, 438 U.S. at 738, 749–51.

100. *See In Re Complaint by Julian Bond*, 69 F.C.C. 2d 943, 943–44 (1978). In 1972, the NAACP unsuccessfully requested that the FCC advise its broadcast licensees that they were not obligated to broadcast Mr. Stoner's advertisements. *In Re Complaint by Atlanta NAACP*, 36 F.C.C. 2d 635 (1972).

101. *In re Complaint by Julian Bond*, 69 F.C.C. 2d at 944.

102. *Id.*

103. *Id.*

George H.W. Bush attacking Democratic presidential candidate Michael Dukakis,¹⁰⁴ as well as race-bating advertisements, voter prejudices, and dishonesty in pre-election and exit polls in the 1982 and 1986 California gubernatorial races.¹⁰⁵ Broadcasters had varying opportunities to decide whether and how much to carry the material.

1. George H.W. Bush Attacks Michael Dukakis with Willie Horton Advertisements

In 1988, supporters of George H.W. Bush and Dan Quayle sponsored a television advertisement attacking opponent Michael Dukakis as weak on crime and punishment of first-degree murderers, specifically attacking his stance on the death penalty.¹⁰⁶ The advertisement exploited the state of Massachusetts' grant of a furlough to a convicted murderer, African-American Willie Horton, through a furlough program intended to reacquaint rehabilitated offenders with society.¹⁰⁷ Willie Horton was serving a life sentence in Massachusetts for the murder of a store clerk.¹⁰⁸ He was granted a furlough that was legal under a state furlough program inherited by Dukakis, the Governor of Massachusetts at the time.¹⁰⁹ Unfortunately, Horton did not return to prison as was intended under the program.¹¹⁰ Instead, he fled to Maryland where he raped a woman.¹¹¹ He was captured by Maryland authorities, tried in the state, and is currently incarcerated there.¹¹² The advertisement, which was arguably designed to play on voters' prejudices of African-American men and to conjure up fear of being victimized by an African-American man, prominently featured Horton's haunting image.¹¹³ The script of the advertisement read:

Bush and Dukakis on crime. Bush supports the death penalty for first-degree murderers. Dukakis not only opposes the death penalty, he allowed first-degree murderers to have weekend passes from prison. One

104. See *infra* Part II-B-1.

105. See *infra* Part II-B-2.

106. See *Willie Horton*, National Security Political Action Committee (1988), available at <http://www.youtube.com/watch?v=lo9KMSSEZOY>.

107. See *George Bush and Willie Horton*, N. Y. TIMES, Nov 4, 1988, at A34.

108. *A Murderer May Kill Dukakis' Bid*, ST. PETERSBURG TIMES, Oct. 28, 1988, at 6A.

109. *George Bush and Willie Horton*, *supra* note 107.

110. *A Murderer May Kill Dukakis' Bid*, *supra* note 108.

111. *Id.*

112. NationMaster.com, *Willie Horton*, Encyclopedia, <http://www.nationmaster.com/encyclopedia/Willie-Horton> (last visited Nov. 5, 2008).

113. See *George Bush and Willie Horton*, *supra* note 107.

was Willie Horton, who murdered a boy in a robbery, stabbing him nineteen times. Despite a life sentence, Horton received ten weekend passes from prison. Horton fled, kidnapped a young couple, stabbing the man and repeatedly raping his girlfriend. Weekend prison passes. Dukakis on crime.¹¹⁴

The National Security Political Action Committee (NSPAC), a third party, sponsored Bush's advertisement, which was a final-hour effort to sink Dukakis' campaign.¹¹⁵ Bush overwhelmingly defeated Dukakis in the 1988 election.¹¹⁶ Because the advertisement was not a request for use of the station by a legally qualified federal candidate, under Sections 312 and 315, broadcasters were not required to air the advertisement.¹¹⁷ Broadcasters made the wrong choice to accept and air this particular incendiary and race-baiting advertisement. This advertisement would not have triggered an equal opportunity for Dukakis because it would not be considered a use of the station by Bush under Section 315, as neither Bush nor Quayle appeared in the advertisement.¹¹⁸

The decidedly negative and race-baiting advertisement changed the tone of the campaign and perhaps affected the outcome of the election.¹¹⁹ The Horton advertisement received much news coverage after it was broadcast, which resulted in much more free news coverage for Bush and in the end, successfully aroused racial fears

114. *Willie Horton*, National Security Political Action Committee, *supra* note 106.

115. *Id.*; see *A Murderer May Kill Dukakis' Bid*, *supra* note 108.

116. See Paul Taylor, *Bush Elected 41st President by Large Margin As Democrats Retain Dominance in Congress; GOP Loses Ground in Governorships*, WASH. POST, Nov. 9, 1988, at A1.

117. See 47 U.S.C. §§ 312(a)(7), 315 (2006).

118. See 47 U.S.C. § 315(a) (2006); 47 C.F.R. § 73.1941(b) (2008); see also *supra* note 41 and accompanying text for discussion of definition of "use" under Section 315. "Use" has been defined as any positive use of a candidate's voice or picture in a context not otherwise exempt under the statute. *In re* Complaint of D.J. Leary, 37 F.C.C.2d 576 (1972). Personal appearances by the candidate constitute "use.". *Id.* at 578. Fleeting appearances by a candidate or disparaging uses of a candidate's voice or picture by an opponent do not constitute use. *Telecomm. Research & Action Ctr. v. FCC*, 917 F.2d 585, 586 (1990)(under the "fleeting use" doctrine, brief candidate appearances "do not constitute 'uses' within the meaning of Section 315"); *In re* Request of Oliver Productions, Inc. for Declaratory Ruling, 4 F.C.C.R. 5953, 5954 (1989); *In re* Codification of the Commission's Political Programming Policies, 7 F.C.C.R. 678, 684 (1991)(use by a legally qualified candidate is "any 'positive' appearance" and excludes disparaging uses by an opponent); *In re* Codification of the Commission's Political Programming Policies, 9 F.C.C.R. 651, 651 (1994)(disparaging use of a candidate's voice or picture is not a use).

119. See Edward Walsh & David Hoffman, *Dukakis Blasts GOP 'Garbage', Lags 52-45% in Poll*, WASH. POST, Oct. 20, 1988, at A1.

among the electorate. Such a result could have been avoided, however, had broadcasters adhered more closely to their obligation to serve the public interest.

2. 1980s: Tom Bradley, George Deukmejian, and the “Bradley Effect”

Tom Bradley’s¹²⁰ losses in the 1982 and 1986 California gubernatorial races gave rise to a phenomenon commonly referred to as the “Bradley Effect.”¹²¹ The Bradley Effect describes the phenomenon whereby a candidate of color performs significantly worse against a white candidate than pre-election polls predicted.¹²² The theory behind this effect is that white voters conceal their unwillingness to vote for a candidate of color by telling pollsters that they are undecided or that they will vote for a minority candidate, but when they are alone in the voting booth, they vote for the white candidate.¹²³

Throughout the 1982 campaign for California governor, commentators and others expected Bradley to be the forerunner.¹²⁴ Unexpectedly, Bradley lost by 93,000 votes despite pre-election polls that showed he was leading by seven percent and an election-day exit poll by the Field Institute that indicated a Bradley win.¹²⁵ Broadcasters were so confident in the exit polls’ predictions of Bradley’s lead that they projected a Bradley win, necessitating a later correction of their reports.¹²⁶

It should be noted that the polls correctly predicted the other contests held that day.¹²⁷ However, for the Bradley contest, certain factors contributed to the misleading results of the exit polls. A large

120. Tom Bradley was a longtime public official in Los Angeles, California, having served for many years as a Los Angeles police officer, and for 20 years as a five-term mayor of the City of Los Angeles. See Robert Reinhold, *Los Angeles Mayor, Once Challenged, Regains Stride*, N. Y. TIMES, Jan. 29, 1989.

121. Denise Gellene, *Campaign '08: Advertising: Getting Inside Voters' Minds*, L.A. TIMES, Feb. 10, 2008, at A22; see also Carol M. Swain, *Reauthorization of the Voting Rights Act: How Politics and Symbolism Failed America*, 5 GEO. J. L. & PUB. POL'Y 29, 37 (2007); Denise Gellene, *Campaign '08: Advertising: Getting Inside Voters' Minds*, L.A. TIMES, Feb. 10, 2008, at A22.

122. *Id.*

123. See generally, THOMAS F. PETTIGREW & DENISE A. ALSTON, *TOM BRADLEY'S CAMPAIGNS FOR GOVERNOR: THE DILEMMA OF RACE AND POLITICAL STRATEGIES* (1988).

124. See *id.* at 16–18.

125. *Id.* at 17–19. The Field Institute poll conducted the weekend before the election indicated that 7 percent were undecided. *Id.* at 17. Other polls had Bradley winning but by such a small margin that it was “too close to call.” *Id.* at 17–18.

126. See *id.* at 18.

127. *Id.* at 18–19.

number of older, conservative voters refused to grant pollsters an exit interview.¹²⁸ Pollsters, however, did not track data on the demographics of the nonresponsive voters.¹²⁹ These pollsters have been criticized for several ineffective polling methods.¹³⁰ First, the pollsters allegedly did not select a sufficiently diverse and representative sampling of precincts.¹³¹ The sample also was criticized for over-representing minority precincts and under-representing conservative precincts.¹³² Finally, the pollsters were chastised for not adequately accounting for the larger-than-expected number of absentee ballots.¹³³ Bradley ran for California governor again in 1986.¹³⁴ In contrast to the 1982 election, Bradley never led in the polls in 1986 against the then-incumbent George Deukmejian.¹³⁵ Bradley was largely viewed as a dignified, quiet, non-confrontational candidate,¹³⁶ much like Barack Obama. He did not make race a major issue, but instead ran an issues-based campaign.¹³⁷ Nevertheless, race found its way into the campaign.¹³⁸ Subtle racially-tinged messages appeared in pre-election campaign advertisements, mailings, and other public statements in the 1982 campaign.¹³⁹ For instance, Deukmejian claimed that he would “represent all Californians.”¹⁴⁰ Bradley supporters found this phrase to be coded language suggesting that Bradley would not or could not represent white constituents.¹⁴¹ In a less subtle radio advertisement for Deukmejian, an actor with a southern accent said, “Daddy told me never to trust a skunk or a politician.”¹⁴² “Skunk” was a derogatory term used in the pre-World War II South, commonly used to refer to African-Americans.¹⁴³ Another advertisement featured an

128. *Id.* at 19.

129. *Id.*

130. *Id.* at 19–21.

131. *Id.* at 20.

132. *Id.*

133. *Id.* Some scholars have also focused on the strategic reasons for Bradley’s loss. *Id.* at 21–22. They have theorized that Bradley’s losses were attributed to his failure adequately to mobilize minority and liberal white voters, instead appealing too much to moderate white voters. *Id.* at 22.

134. *See id.* at 59.

135. *Id.* at 59–60. In 1986, Bradley earned 37.4 percent of the vote, while Deukmejian earned 60.5 percent. *Id.*

136. *Id.* at 5.

137. *See id.* at 16.

138. *Id.*

139. *Id.* at 33–34.

140. *Id.* at 33.

141. *Id.*

142. *Id.*

143. *Id.*

African-American man breaking into a white family's home, and then showed the African-American man in jail.¹⁴⁴

It appears that Deukmejian sponsored the advertisements.¹⁴⁵ Because Deukmejian sponsored the advertisements in support of his candidacy for state office, rather than federal, office, Section 312(a)(7) was inapplicable as a means of acquiring access to broadcast air time.¹⁴⁶ Moreover, provided broadcasters did not accept these advertisements subject to the equal opportunities provisions in Section 315, broadcasters should have rejected them because they served no constructive purpose to the good of the political race or to the public interest. They seem to have harmed a candidate and the political process and were contrary to the public interest. However, if the broadcasters had accepted the advertisements subject to the equal opportunities provision of Section 315, then the broadcasters would have had to air the advertisements and could not have censored them.¹⁴⁷

C. *The Nineties*

1. *Harvey Gantt*

In the 1990s, Harvey Gantt forged two unsuccessful campaigns in North Carolina—one in 1990 and another in 1996—against white candidate Jesse Helms for a seat in the U.S. Senate.¹⁴⁸ In a theme that reemerged in 2008 North Carolina politics,¹⁴⁹ Helms tried to frame the campaigns as relating to “North Carolina values” espoused by conservative Republicans versus the “extreme liberal values” of his Democratic opponent.¹⁵⁰

144. *Id.* at 33–34.

145. See Peter H. King, *Glamour Boys; Consultants Are King in a Media Age*, L.A. TIMES, Nov. 9, 1986, at A1.

146. See 47 U.S.C. § 312(a)(7) (2006) (granting reasonable access only for legally qualified candidates for federal elective office).

147. See 47 U.S.C. § 315 (2006).

148. See JESSE HELMS, *HERE'S WHERE I STAND: A MEMOIR* 189–90, 192, 250–52 (2005). Jesse Helms was a five-term U.S. Senator from North Carolina and an avowed segregationist. See generally WILLIAM A. LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM* (2008). Ironically, in the 1960s and 1970s, Helms was a full-time editorialist for WRAL, one of the same television broadcast stations rejecting the anti-Obama advertisement in 2008. See *id.* at 70; see also ERNEST B. FURGURSON, *HARD RIGHT: THE RISE OF JESSE HELMS* 257 (1986); Ingram, *supra* note 2.

149. See *supra* notes 1–2 and accompanying text.

150. Bart Barnes & Matt Schudel, *N.C. Senator's Hard-Line Conservatism Helped Craft Republican Social Agenda*, WASH. POST, July 5, 2008, at A1.

Throughout his lengthy political career, Jesse Helms was a fount of race-baiting campaign tactics and racist hate speech.¹⁵¹ Helms unleashed his racist beliefs as early as the 1950s, when he was a young political staffer, and continued throughout his five terms in the U.S. Senate.¹⁵² In 1990, broadcasters in North Carolina ran a pro-Helms advertisement commonly referred to as “White Hands” or simply “Hands.”¹⁵³ In “Hands,” viewers saw the arms and hands of a white man opening and then crumpling an employment rejection letter.¹⁵⁴ The voice-over says:

You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair?

151. See, e.g., *id.* Helms is believed to be a pioneer of negative political campaign television advertisements. *Id.* As an aide to the 1950 Senate campaign of North Carolina Republican Willis Smith, he helped create racist advertisements and other racist propaganda to defeat former University of North Carolina president, Frank Porter Graham. *Id.* One such advertisement stated, “White people, wake up. Do you want Negroes working beside you, your wife and daughters in your mills and factories?” and made clear that “voting for Graham meant a vote to end segregation.” LINK, *supra* note 148, at 38. Once, he had photographs doctored to illustrate Frank Graham’s wife dancing with an African-American man. *Id.* Smith won the election. Barnes & Schudel, *supra* note 150. Senator Helms refuted most of these allegations in his memoir. See HELMS, *supra* note 148, at 32–37.

On at least one occasion, he referred to the University of North Carolina as the “University of Negroes and Communists.” Press Release, Fairness & Accuracy in Reporting (“FAIR”), *Media Downplay Bigotry of Jesse Helms* (Aug. 31, 2001), <http://www.fair.org/index.php?page=1871>; see also FURGURSON, *infra* note 148, at 77–79. (discussing Helms’ prejudices against intellectual elites, liberalism, and communism). He called African-American civil rights activists “Communists and sex perverts.” Press Release, FAIR, *supra*. Discussing civil rights protests, Helms said, “The Negro cannot count forever on the kind of restraint that’s thus far left him free to clog the streets, disrupt traffic, and interfere with other men’s rights.” *Id.* In the *New York Times*, he stated, “Crime rates and irresponsibility among Negroes are a fact of life which must be faced.” *Id.* He also reportedly, on at least one occasion, sang “Dixie” in the elevator to Senator Carol Mosley-Braun, the first African-American female senator, bragging to a fellow senator, “I’m going to make her cry. I’m going to sing ‘Dixie’ until she cries.” See LINK, *supra* note 148, at 407; see also *Senator Hits Helms With Verbal Dart*, CHI. SUN-TIMES, Aug. 5, 1993, at 3.

Once on “Larry King Live,” a guest called in and praised Helms for “everything [he’s] done to help keep down the niggers.” Press Release, FAIR, *supra*. Helms responded by saluting and saying, “Well, thank you, I think.” *Id.* On Helms’ career, David Broder of the Washington press corps editorialized, “To the best of my knowledge, Helms has never done what the late George Wallace did well before his death—recant and apologize for his use of racial issues. And that use was blatant.” David S. Broder, Editorial, *Jesse Helms, White Racist*, WASH. POST, Aug. 29, 2001, at A21. Broder described Helms as “the last prominent unabashed white racist politician in this country . . .” *Id.* Broder found unforgivable Helms’ “willingness to pick at the scab of the great wound of American history, the legacy of slavery and segregation, and to inflame racial resentment against African Americans.” *Id.*

152. Barnes & Schudel, *supra* note 150.

153. See Jesse Helms “Hands” Ad, <http://www.youtube.com/watch?v=KJiywCdXMzk>.

154. *Id.*

Harvey Gantt says 'It is.' Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications. You'll vote on this issue next Tuesday. For racial quotas—Harvey Gantt. Against racial quotas—Jesse Helms.¹⁵⁵

In the 1990 Senatorial election, Helms won sixty-five percent of the white vote and six percent of the African-American vote.¹⁵⁶ Overall, Helms won approximately fifty-four percent to Gantt's approximately forty-six percent of votes.¹⁵⁷ The Bradley Effect¹⁵⁸ may have come into play during this election; at various points in the campaign, polls, including exit polls, showed Gantt leading Helms.¹⁵⁹ Clearly, the pre-election and exit polls proved unreliable.

A third party Republican committee, not Helms himself, sponsored the "Hands" advertisement.¹⁶⁰ Provided air time was not granted pursuant to the Zapple Doctrine and even though Section 312 did not require broadcasters to air the advertisement because the request for air time came from a third party, not a federal candidate,¹⁶¹ broadcasters wrongly decided to air the advertisement anyway. This advertisement would not have triggered an equal opportunity for response by Gantt because it was not a positive use of air time by Helms himself, but rather a classic negative attack advertisement by a third party supporter—the political committee. It might have triggered an equal opportunity for third party supporters of Gantt under the Zapple Doctrine. If this advertisement had been sponsored and paid for by Helms himself, under current law, a broadcaster would have been required to air it due to the affirmative right to the airwaves granted to federal candidates under Section 312, even if it were offensive to the licensee and to a significant number of members of the viewing and voting public.¹⁶² This is exactly the type of advertisement

155. *Id.* See also HELMS, *supra* note 148, at 191.

156. Kenneth J. Cooper, *Helms Defeats Gantt; Poll Hours Disputed*, WASH. POST, Nov. 7, 1990, at A27.

157. *Id.*

158. See discussion *supra* Part II-B-2.

159. See Cooper, *supra* note 156; TONY L. POWELL, NORTH CAROLINA: RACE OF THE CENTURY, HARVEY GANTT VS. SENATOR JESSE HELMS: ISSUES VS. LOYALTY 78 (2006).

160. See Jesse Helms "Hands" Ad, *supra* note 153; see also HELMS, *supra* note 148, at 191.

161. See 47 U.S.C. § 312(a)(7) (2006).

162. See *id.*; see also *e.g.*, Becker v. FCC, 95 F.3d 75, 78–79, 84–85 (D.C. Cir. 1996) (refusing to allow content-based channeling of an anti-abortion advertisement).

broadcasters should reject. The broadcasters' decision to run the advertisement, despite the lack of any statutory obligation to do so, appears to have polluted the election process and to have negatively impacted Gantt's candidacy.

In addition, if Helms' opponent had requested use of a broadcast licensee's station under Section 315, the licensee would have had to afford Helms an equal opportunity for access under the same terms as his opponent even if the material were overtly race-baiting and harmful to the public interest.¹⁶³ Moreover, the potentially reluctant broadcaster would be prohibited from censoring Helms' advertisements, including channeling the advertisement to hours of the broadcast day with smaller audiences.¹⁶⁴

2. *The Abortion Advertisements*

In the 1992 U.S. Congressional race, Daniel Becker of Georgia attempted to convey his anti-abortion stance by funding and broadcasting television campaign advertisements depicting aborted fetuses.¹⁶⁵ The advertisements seemed designed specifically to repulse viewers and voters and to sink the campaigns of their pro-choice opponents.¹⁶⁶ The broadcast station that aired Mr. Becker's advertisement received numerous complaints about the gruesome images depicted over the broadcast airwaves.¹⁶⁷ The broadcaster then asked the FCC to declare the advertisements indecent and to permit broadcasters to channel those advertisements to hours when children were less likely to be in the viewing audience.¹⁶⁸ The FCC's Mass Media Bureau found that the advertisement was not indecent.¹⁶⁹ On appeal, the D.C. Circuit, in *Becker v. FCC*, did not find the advertisements indecent, reasoning that they did not fall within the FCC's definition of the term.¹⁷⁰ Moreover, the court held that broadcasters were not legally permitted to channel the advertisements

163. See 47 U.S.C. § 315(a) (2006); see also *Farmers Educ. & Coop. Union of Am.*, 360 U.S. 525, 529–30 (1959).

164. See 47 U.S.C. § 326 (2006) (prohibiting the FCC from censoring broadcast material). See also Letter Ruling, *Gillet Communications of Atlanta, Inc.*, 7 F.C.C.R. 5599, 5599–600 (Aug. 21, 1992); *Becker*, 95 F.3d at 80; *Farmers Educ. & Coop. Union of Am.*, 360 U.S. at 529–30.

165. See *Becker*, 95 F.3d at 76–77; David Jackson, *TV Ads on Abortion Raise Speech, Obscenity Issues; Senate Hopeful May Air Spots With Dead Fetuses*, DALLAS MORNING NEWS, Feb. 14, 1993, at 39A.

166. See Jackson, *supra* note 165.

167. *Becker*, 95 F.3d at 77.

168. *Id.* at 80.

169. *Id.* at 77.

170. *Id.*

to particular hours of the day, as such action failed to provide political candidates reasonable and equal access to broadcast outlets¹⁷¹ and violated laws prohibiting censorship of political speech.¹⁷²

The *Becker* court stated, “[w]e are faced, then, with competing interests—the licensee’s desire to spare children the sight of images that are not indecent but may nevertheless prove harmful, and the interest of a political candidate in exercising his statutory right of ‘access to the time periods with the greatest audience potential.’”¹⁷³ The D.C. Circuit observed that in light of this statutory conflict, the FCC typically affords licensees the final say.¹⁷⁴ The D.C. Circuit, however, took a different approach than did the FCC, finding the FCC’s approach “frustrates what the Commission itself has identified as Congress’s primary purpose in enacting Section 312(a)(7); namely, to ensure ‘candidates access to the time periods with the greatest audience potential False’”.¹⁷⁵ The court found that the D.C. Circuit reversed the finding of the FCC and found the abortion advertisement not indecent and thus permissible at periods with the greatest potential audiences—those times outside the safe harbor.¹⁷⁶

The abortion advertisements case and the J.B. Stoner case involving racially offensive speech¹⁷⁷ had similar results based on similar reasoning. Because the court and the FCC found that the material in each of those cases did not meet the FCC’s definition of “indecent,” and because both cases involved requests for air time by a political candidate for federal elective office, broadcasters could not legally refuse to air the advertisements, censor the material, or channel the advertisements to times of the day when children were less likely to view them.¹⁷⁸ Despite Becker’s victory in court, he lost the

171. See 47 U.S.C. §§ 312(a)(7), 315(a) (2006).

172. *Becker*, 95 F.3d at 84–85; see also 47 U.S.C. § 315(a) (2006).

173. *Becker*, 95 F.3d at 80 (quoting Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971 (*Licensee Responsibility*), 47 F.C.C. 2d 516, 517 (1974)).

174. *Id.*

175. *Id.* at 79–81 (citing *Licensee Responsibility*, 47 F.C.C.2d at 517); see also *In re Comm’n Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C. 2d 1079, 1090 (1978) (“We believe that under Section 312(a)(7) a candidate not only must be afforded an opportunity to address a prime-time audience, but must be allowed flexibility to do so in the manner best suited to his or her campaign.”).

176. *Becker*, 95 F.3d at 84–85.

177. See discussion *supra* Part II-A.

178. See *Becker*, 95 F.3d at 80, 84–85; *In re Complaint by Julian Bond*, 69 F.C.C. 2d 943, 944 (1978).

election,¹⁷⁹ a result perhaps attributable to voters' reaction to the repulsive advertisements.

D. Attack Advertisement Against Harold Ford, 2006

In 2006, an advertisement in Tennessee endorsing Republican Bob Corker attacked Harold Ford, Jr., the Democratic candidate for a U.S. Senate seat.¹⁸⁰ The Corker advertisement used sexually suggestive and race-baiting visual images to suggest that Ford, an African-American, frequented sex parties and had sexual liaisons with white women.¹⁸¹ In the advertisement, the bare shoulders and face of a young blonde woman appeared on the screen as the woman said that she met Ford at a Playboy party.¹⁸² The advertisement closed with another camera shot of the scantily clothed young blonde winking and asking Ford to call her.¹⁸³ Ford lost the election.¹⁸⁴

The Republican National Committee, not Corker himself, sponsored the anti-Ford advertisement.¹⁸⁵ Therefore, broadcasters were not legally compelled to air the advertisements and could have censored the material to be less racially and sexually offensive or channeled the advertisement to the broadcast safe harbor.¹⁸⁶ Nevertheless, broadcasters did choose to air the advertisements. Furthermore, because Corker did not appear in the advertisement and was not the recipient of air time, the advertisement probably did not constitute a "use" by Corker under Section 315 and therefore would not trigger an equal opportunity for Ford to be entitled to equivalent

179. David G. Savage, *Court Limits TV Control of Political Ads*, L.A. TIMES, Sept. 14, 1996, at A3.

180. See *Too Hot for Corker*, <http://www.youtube.com/watch?v=cWkrwENN5CQ>. The advertisement, titled "Too Hot for Corker," sponsored by the Republican National Committee, opens with an African-American woman posing the question "Harold Ford looks nice. Isn't that enough?" *Id.* Then the camera captures short sound bites from a series of people who appear to be citizens on a city street making comments about how Ford wants to protect the privacy of terrorists, will increase taxes, favors gun control, is not worried about the threat of North Korea, and has taken money from producers of pornographic movies—"Who hasn't?," the citizen chuckles. *Id.*

181. See Eugene Robinson, *Does the Code Still Work?*, WASH. POST, Oct. 27, 2006, at A23.

182. See *Too Hot for Corker*, *supra* note 180.

183. *Id.*

184. Peter Whoriskey, *Corker Grabs Narrow Victory Over Ford*, WASH. POST, Nov. 8, 2006, at A35.

185. See *Too Hot for Corker*, *supra* note 180.

186. See 47 U.S.C. §312(a)(7) (2006) (requiring reasonable access to legally qualified candidates for federal elective office); 47 U.S.C. § 315(a) (2006) (applying anti-censorship provisions to advertisements of legally qualified candidates for public office).

amounts of air time. However, the Zapple Doctrine might have afforded a quasi-equal opportunity for similar third parties supporting Ford.¹⁸⁷ In other words, the advertisement arguably could have entitled supporters of Ford, not Ford himself, to comparable time on the broadcast stations carrying the advertisement.¹⁸⁸ In sum, this advertisement should have been rejected because of its inappropriateness and race-baiting language.

E. Offensive Political Speech in Areas Other Than Traditional Broadcast Advertisements

The following discussion and some of the following examples, while not addressing a particular political advertisement, nevertheless illustrate the tone and prevalence of explicit and implicit racially offensive speech in recent political campaigns.¹⁸⁹ The appearance of a candidate in most of the examples in this section would fall under one of the “news exceptions” to the provisions in Section 315,¹⁹⁰ and thus would not trigger any equal opportunity obligations for the opposing candidate.

1. George Allen Calls Bystander “Macaca” on the Campaign Trail in Virginia: 2006

During the 2006 U.S. Senate race in Virginia, which pitted former Virginia governor George Allen against former naval officer and former Secretary of the Navy, Jim Webb, Allen committed a major gaffe during a stump speech before a small gathering of supporters and journalists.¹⁹¹ While not as blatantly vitriolic in its delivery, Allen’s comment nevertheless harkens back to the racist rants of Georgia candidate J.B. Stoner in the 1970s.¹⁹² During the informal presentation, Allen repeatedly referred to a person in the audience, later determined to be a young man of Indian descent, as “macaca.”¹⁹³

187. *Nicholas Zapple*, 23 F.C.C. 2d 707, 708–09 (1970); see discussion of Zapple Doctrine *supra* Part I-C.

188. *Nicholas Zapple*, 23 F.C.C. 2d at 709.

189. See *infra* Parts II-E-1-2.

190. See discussion on news exception *supra* Part I-B.

191. See Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology; Name Insults Webb Volunteer*, WASH. POST, Aug. 15, 2006, at A1. Section 315 does not apply to this type of on-the-spot news coverage. See 47 U.S.C. § 315(a) (2006); 47 U.S.C. §312 (2006).

192. See discussion of Stoner *supra* Part II-A.

193. See Meet the Press News Interview, <http://www.youtube.com/watch?v=wRfP3vj8Gl8>. The word has multiple meanings, depending upon its spelling. Craig & Shear, note 191. The Merriam-Webster Dictionary defines “macaque” as follows: “any of a genus (*Macaca*) of monkeys of Asia, Africa, and the East Indies, with a long or short tail that

In his free-flowing and seemingly unscripted speech, Allen seemed to pick on the man and stated the following: "This fellow here, over here with the yellow shirt, macaca, or whatever his name is. He's with my opponent. He's following us around everywhere. And it's just great . . . Let's give a welcome to macaca, here. Welcome to America and the real world of Virginia."¹⁹⁴

Later, when asked what he meant by his use of the term, Allen seemed to feign ignorance and offered that the word sounded like "mohawk," the style in which he believed the target of his insult wore his hair.¹⁹⁵ Of his "welcome to America" comment, Allen explained that he was simply referring to the real world outside the Washington, D.C. beltway.¹⁹⁶ Allen's opponents were indeed skeptical of his explanation.¹⁹⁷ The fact that Allen nonchalantly used this racial insult evoked memories of the racist rants of campaigns past. The incident seemed to invoke race where it had not, to that point, played much of an obvious or significant role in the campaign.¹⁹⁸ The incident illustrates the fact that some politicians' racist remarks are not limited to African-Americans; indeed, all non-whites appear to be fair targets in the game of racist and race-baiting politics.

Because this statement was not part of a political advertisement but rather a stump speech, it falls under the exception for on-the-spot coverage of a bona fide news event and, therefore, would not trigger an equal opportunity for air time for Webb.¹⁹⁹ In the end, Webb narrowly defeated Allen.²⁰⁰

is not prehensile, including the rhesus monkey and Barbary ape." *Webster's New World College Dictionary* 809 (3d ed. 1996). It also is considered a racial slur against African natives in some European cultures. Craig & Shear, *supra* note 191.

194. Craig & Shear, *supra* note 191.

195. Craig & Shear, *supra* note 191.

196. *Id.*

197. See Editorial, *What Did Mr. Allen Mean?*, WASH. POST, Aug. 17, 2006, at A24; Michael D. Shear, 'Macaca' Brouhaha: Fierce Guessing on What Allen Meant, WASH. POST, Aug. 17, 2006, at T4.

198. See Bill Turque, *An Ascent Shadowed By Questions On Race*, WASH. POST, Oct. 26, 2006, at A1; S.R. Sidarth, *I Am Macaca*, WASH. POST, Nov. 12, 2006, at B2; Michael D. Shear, *Sen. Allen's Apologies Are Causing Him Trouble; Confederate Group Is Latest to Get Upset*, WASH. POST, Sept. 29, 2006, at B1; Michael D. Shear, *Senate Race Already Has One Loser: Va.'s Image; Gaffes Get Laughs But Cause Damage*, WASH. POST, Oct. 2, 2006, at B1; Michael D. Shear, *Allen, Webb Face Scrutiny of the NAACP; Separate Hour-Long Interviews Touch on Wide Range of Sensitive Issues*, WASH. POST, Oct. 21, 2006, at B1.

199. See 47 U.S.C. § 315(a)(4) (2006).

200. See Michael D. Shear, *Va. Makes It Official: Victory Is Webb's; Tally Shows Allen Lost by 9,329 Votes*, WASH. POST, Nov. 28, 2006, at B1. Webb got 49.59 percent to Allen's 49.20 percent of the votes cast. *Id.*

2. *Other Attacks Against Barack Obama, 2007-2008*

Despite the largely uplifting messages of hope, inspiration, and unity resulting from the 2008 presidential election campaign, the race to the White House has revealed some very ugly truths about American society. Although Obama, much like Tom Bradley in the 1980s in California, tried to minimize the issue of his race in the primary season, it took center stage on more than one occasion.²⁰¹ Despite the support Obama received from a significant number of white voters,²⁰² and despite Obama's attempts to maintain an inspirational campaign that rose above race, gender, age, ethnicity, and religion,²⁰³ nearly ten percent of American voters stated that they would not vote for an African-American for president regardless of the candidate's qualifications.²⁰⁴

The statistics on the question of whether one would vote for an African-American for president were even more startling in certain areas of the country. In Kentucky, for instance, where nearly ninety percent of voters are white, a poll found that twenty-one percent of voters said race played an important part in their decision.²⁰⁵ Of those who said race was an important factor, eighty percent voted for Hillary

201. In March 2008, in response to questions surrounding the comments of Reverend Jeremiah Wright, Obama delivered a groundbreaking speech on race in America in Philadelphia. See Barack Obama, Speech on U.S. Race Relations, *supra* note 1.

202. In the Democratic primary, Obama secured thirty-nine percent of the overall white vote, forty-five percent of white men, fifty-three percent of whites ages 18–29, and forty-seven percent of whites with income over \$100,000. See ABC News Poll, 2008 Primary Wrap-Up, available at <http://www.abcnews.com/PollingUnit/2008ExitPolls>.

203. See, e.g., See Senator Barack Obama, Speech on U.S. Race Relations, *supra* note 1.

204. See Stevie Lacy-Pendleton, *Taking a Broom First to Our Own Dirty House*, STATEN ISLAND ADVANCE (N.Y.). Apr. 25, 2008, at A24. See also Joseph Gerth, *Kentucky Presidential Primary; Results Raise Questions on Role of Racial Views*, COURIER-JOURNAL (Louisville, Ky.), May 22, 2008, at 1A; Jon Cohen & Jennifer Agiesta, *3 in 10 Americans Admit to Race Bias; Survey Shows Age, Too, May Affect Election Views*, WASH. POST, June 22, 2008, at A1; *News & Notes: Roundtable: Poll Reveals Americans' Racial Attitudes* (National Public Radio broadcast June 25, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91884410>. A poll conducted by the Washington Post and ABC News showed that nearly half of Americans believed race relations in the United States were either "not good" or "poor." Washington Post and ABC News Pre-election Poll, conducted June 12–15, 2008, available at http://www.washingtonpost.com/wp-srv/politics/documents/postpoll_061608.html. Three in ten admitted to feelings of racial prejudice. *Id.* Sixty-three percent of African-Americans polled said race relations were "not so good" or "poor." *Id.* Whites, on the other hand, responded quite differently: fifty-three percent of whites responded that race relations were excellent or good. *Id.* The gap between whites' and African-Americans' perceptions of race relations reportedly is the widest since 1992. *Id.* Just under fifty percent of people believed Obama would be a "risky" choice for president, whereas fifty-six percent of people said McCain would be a safe pick. *Id.* Seventeen percent responded that Obama would over-represent the interests of African Americans. *Id.*

205. Gerth, *supra* note 204.

Clinton and only sixteen percent voted for Obama in the Democratic primary elections.²⁰⁶ These statistics became more meaningful near the end of the Democratic primary season, when it became clear that Obama was struggling to connect with white voters with limited education and below-average economic status.²⁰⁷ Pre-election polls showed that low- and working-class white Americans or Americans with no or little college education were less inclined to vote for Obama than were their wealthier or more educated white counterparts.²⁰⁸

The exact impact of the Bradley Effect remains unclear as it relates to Senator Barack Obama's 2008 presidential campaign.²⁰⁹ Some commentators believe that early in Obama's campaign, there may have been a "reverse Bradley Effect."²¹⁰ In other words, some believe that when polled, whites would be reluctant to admit publicly that they would vote for an African-American candidate, or that African-Americans may have been untruthful and reluctant to admit to white pollsters that they supported Obama.²¹¹ This reluctance by African-American voters might have been rooted in a fear of harming Obama's campaign efforts. Specifically, African-American voters might have feared that if they reported that they were voting for Obama, non-African-Americans would view Obama as being overly sympathetic to African-Americans to the detriment of other Americans, and thus create a backlash from non-African-American voters. This phenomenon could have resulted in both an under-count of African-American votes and an over-count of white votes for Obama in pre-election polls and exit polls. Interestingly, Obama's

206. *Id.*

207. Al Cross, *With Kentucky in the Spotlight, What Does It Show?*, COURIER-JOURNAL (Louisville, Ky.), May 18, 2008, at 3H.

208. See Mark Blumenthal, *Age or Education?*, http://www.pollster.com/blogs/age_or_education.php (Apr. 30, 2008).

209. See Robert Novak, Op-Ed., *Obama's Bradley Effect?*, WASH. POST, Feb. 11, 2008, at A13 (offering an opinion of Obama's loss to Senator Hillary Clinton in the California presidential primary).

210. See, e.g., Steve Peoples, *Is Race a Factor for R.I. Voters?*, PROVIDENCE J.-BULL. (R.I.), Nov. 2, 2008, at 1; Robert Rupp, *"Bradley Effect" in Reverse*, CHARLESTON GAZETTE (W.Va.), Oct. 30, 2008, at P4A; Anil Ananthaswamy, *Will Barack Obama Bury the "Bradley Effect"?*, NEW SCIENTIST, Oct. 25, 2008, at 16; Kathleen Parker, *The Reverse-Bradley Effect*, WASH. POST, Oct. 22, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/10/21/AR2008102102328_2.html?sid=ST2008102200187&s_pos=; Jay Cost, *Testing the Bradley Effect – Are Opinion Polls Making Accurate Predictions About Barack Obama?*, NAT'L REV., Oct. 20, 2008; Eugene Kane, Op-Ed., *"Bradley Effect" Could Skew Votes*, MILWAUKEE J. SENTINEL, Oct. 19, 2008, at B3; Joel Schwartz, *Polls May Underestimate Obama's Support By 3 to 4 Percent*, U. OF WASH. NEWS, Oct. 9, 2008, <http://uwnews.washington.edu/ni/article.asp?articleID=44314>.

211. *Id.*

significant margin of victory also could be attributed to an undercount of white votes by pre-election polls where whites might have been reluctant to admit to pollsters that they planned to vote for an African-American candidate.

As the campaign finally reached the last primary states, opponents of Obama exploited this growing racial and economic divide, characterizing Obama as an exotic, extreme, and out-of-touch elitist—essentially, not “one of us.”²¹² Opponents of Obama engaged in coded and potentially harmful attempts to invoke the issue of race and to play on the fears, insecurities, and prejudices among certain working class white voters.²¹³ These attempts worked: although he ultimately won the Democratic Party nomination, Obama lost significantly among working class white voters.²¹⁴

Over the course of the campaign, numerous attacks and rumors about Obama’s religion, heritage, patriotism, and the like emerged in both expected and newly created places.²¹⁵ In addition to the classic

212. Dan Balz, *McCain-Obama So Far: Positively Negative*, WASH. POST, June 26, 2008, at A6; Howard Kurtz, *Applying a Personal Touch to the Campaign*, WASH. POST, June 23, 2008, at C1; Michael Powell & Jeff Zeleny, *Tagged as Elitist, Obama Shifts Campaign from High-Flown to Folksy*, N.Y. TIMES, May 6, 2008, at A23.

213. See Brent Staples, Op-Ed., *Barack Obama, John McCain and the Language of Race*, N.Y. TIMES, Sept. 21, 2008, at A22; John Heilemann, *The Wal-Mart Frontier*, N.Y. MAG., Sept. 14, 2008.

214. Cross, *supra* note 207.

215. See, e.g., Mary Mitchell, *‘A Girl from the South Side’ Talks: Are They Black Enough? Michelle Obama Says That’s an Issue for Society, Not Just a Problem for Her Husband*, CHI. SUN-TIMES, Aug. 5, 2007, at A4; Taylor Kessinger, *Internet Idiocy: The Latest Pandemic*, ARIZ. DAILY WILDCAT, Jan. 28, 2008; Michael Smerconish, *Internet Rumors and the Endless Fight*, TIMES UNION (Albany, N.Y.), June 21, 2008, at A9. Various individuals attempted to attribute to Obama the extreme, allegedly anti-American words of his pastor, Rev. Jeremiah Wright. See Rev. Jeremiah A. Wright, Jr., Remarks to National Press Club, *supra* note 1. Implying that the Obamas are not patriotic and could have terrorist connections, the media made an issue of their victory “fist bump,” referring to it as a “terrorist fist jab.” See *Fox News’ ‘Baby Mama’ Adds Drama For Obama*, PITT. POST-GAZETTE, June 14, 2008, at D4. Repeated xenophobic references to his middle name “Hussein” implied that Obama might have been a Muslim and not truthful about his Christian faith. See Mark Morford, *With Obama, All the Right Sees Is Race*, SAN FRAN. CHRON., Feb. 29, 2008, at E3; Irfan Yusuf, *Bigots Shield Behind Conservative Façade*, N.Z. HERALD, Feb. 28, 2007. References have been made to the Muslim faith of Obama’s ancestors suggesting that he, too, is Muslim and thus unacceptable to fill the presidency. See *All Things Considered: Does Race Matter In ‘08?* (National Public Radio broadcast Sept. 11, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=94523754>; Tony Karon, *Hillary’s ‘Southern Strategy’: Muslim-Baiting*, ATLANTIC FREE PRESS, Dec. 25, 2007. Political talk show hosts and Internet bloggers also have routinely referred to his middle name “Hussein” to invoke comparisons to radical Muslims and terrorists. See, e.g., *Schlüssel: Should Barack Hussein Obama Be President “When We Are Fighting the War of Our Lives Against Islam”?*, Media Matters for America, Dec. 20, 2006, available at <http://mediamatters.org/items/200612200005> (commenting on December 18, 2006 column by “right-wing pundit” Debbie Schlüssel titled

negative television advertisements, blog postings and political advertisements on the Internet played a significant role in the campaign to smear Obama's image and confuse voters.²¹⁶ Chain e-mails circulating throughout the Internet that contained false assertions, rumors, and innuendos about Obama proved to be pervasive, persuasive, and particularly pernicious.²¹⁷ In particular, these negative messages have attempted to cast Obama as "too black" or "not black enough," or they accuse him appealing to "white guilt" and not adequately challenging the "white power structure."²¹⁸ Some

Barack Hussein Obama: Once a Muslim, Always A Muslim); see also *McCain Supporter Repeatedly Refers to Barack 'Hussein' Obama*, HUFFINGTON POST, Feb. 26, 2008, available at http://www.huffingtonpost.com/2008/02/26/mccain-supporter-repeated_n_88542.html.

Photographs have circulated in print, on television, and on the Internet showing Obama in tribal African dress during a ceremonial official visit to the continent. See Joe Gandelman, *Drudge Says Clinton Staffers Circulate 'Dressed' Obama Photo*, MODERATE VOICE, Feb. 25, 2008. Photograph available at http://www.outsidethebeltway.com/archives/obama_in_muslim_garb/. On the CBS television interview program *60 Minutes*, Hillary Clinton, in a trailing and decidedly unconvincing sentence, fed into suspicions that Obama might be Muslim and not Christian. The line of questioning on *60 Minutes* went as follows:

Steve Kroft: "You don't believe that Sen. Obama is a Muslim?"

Clinton: "Of course not. . . There's nothing to base that on—as far as I know."

60 Minutes (CBS television broadcast, Mar. 2, 2008), available at <http://www.youtube.com/watch?v=LHFREDHB-nQ&feature=related>. An on-screen graphic on the Fox News Channel referred to Barack Obama's wife, Michelle Obama, as "Obama's Baby Mama." See Fox News: Michelle Obama is "Obama's Baby Mama", <http://www.youtube.com/watch?v=TVZEZL2LmA8>; see also Fox News' "Baby Mama" Adds Drama for Obama, *supra*. "Baby Mama" is a somewhat derogatory slang term used to describe the mother of a man's child or children when the couple are not married or involved in a relationship. Amanda Erickson, *Will Michelle Obama Unite Nation's Feminists?*, CHI. TRIB., July 6, 2008, at C1; Ed Brayton, *Liars and Demons and Commies, Oh My*, MICH. MESSENGER, Jun. 18, 2008; David Bauder, *Fox News Graphic Refers to Michelle Obama as 'Baby Mama'*, VIRGINIAN-PILOT (Norfolk, Va.), June 13, 2008, at A9. Discussions of Michelle Obama as a "baby mama" may be contrasted to the tone of the discussion regarding Republican Vice Presidential Nominee Sarah Palin's unwed and pregnant teenage daughter, Bristol. See, e.g., Barry Saunders, *It's Palin, So It's Private*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 4, 2008, at B1; Annette John-Hall, *Pit Bull of a Soccer Mom Leading War on Diversity*, PHIL. INQ., Sept. 5, 2008, at B1 (claiming that Bristol Palin has become the "poster girl" for "family values")

216. See, e.g., Victor Morton, *Inside Blogotics*, WASH. TIMES, Sept. 30, 2008, at B4; Kessinger, *supra* note 215; Smerconish, *supra* note 215. The Web site www.antiobama.net, which contains anti-Obama postings, tracks other such anti-Obama sites on the Internet. <http://www.antiobama.net>.

217. See, e.g. Smerconish, *supra* note 215.

218. See Mitchell, *supra* note 215; see also Foon Rhee, *Nader's Obama Remarks Draw Fire, Says Democrat Panders to Whites*, BOSTON GLOBE, June 26, 2008, at A16. Green Party presidential candidate Ralph Nader implied that Obama was "talking white" to appeal to the white establishment. See Rhee, *supra*. Nader said:

'There's only one thing different about Barack Obama when it comes to being a Democratic presidential candidate. He's half African-American. . .

of these attacks were designed to confuse voters and to place Obama in a no-win situation.

To add to the momentum of this anti-Obama campaign, the crafters of the notorious 1988 “Willie Horton” attack advertisements that sank the presidential bid of Massachusetts Senator Michael Dukakis,²¹⁹ along with others, launched websites and formed various committees determined to play the game of divisive racial politics, particularly in southern states and in areas with a less educated and economically poor white population.²²⁰ Other anti-Obama advertisements surfaced during the 2008 presidential campaign, some of which were variations of the “Extreme” advertisement rejected by the North Carolina broadcasters.²²¹ Some of these advertisements were sponsored by the National Republican Trust and others by Our Country Deserves Better, both political action committees.²²² These

. Whether that will make any difference, I don't know. I haven't heard him have a strong crackdown on economic exploitation in the ghettos. Payday loans, predatory lending, asbestos, lead. What's keeping him from doing that? Is it because he wants to talk white? . . . He wants to show that he is not . . . another politically threatening African-American politician. . . . He wants to appeal to white guilt. You appeal to white guilt not by coming on as, 'black is beautiful, black is powerful.' Basically he's coming on as someone who is not going to threaten the white power structure, whether it's corporate or whether it's simply oligarchic. And they love it. Whites just eat it up.' *Id.*

219. See discussion Part II-B-1 *supra*. See also Scherer, *supra* note 3.

220. Teddy Davis & Rigel Anderson, ‘Too Radical, Too Risky?’, *Group Launches Jeremiah Wright Attack*, Oct. 27, 2008, <http://abcnews.go.com/Politics/TheNote/Story?id=6123921&page=1>; see also Obama and Wright: He Never Complained Once, <http://www.youtube.com/watch?v=I3IAjphw6E&eur/> (featuring advertisement paid for by the National Republican Trust PAC, not any candidate or candidate's committee); see also Anne E. Kornblut, *Issue of Race Creeps Into Campaign*, WASH. POST, Oct. 12, 2008, A1; Kessinger, *supra* note 215; Smerconish, *supra* note 215; <http://www.antiobama.net>. The creators of these advertisements persevered along this path, even though a large percentage of the voting public rejected race-related tactics, preferring instead to focus on the issues that are relevant to daily American life such as the economy, spending, two ongoing wars, the military, health care, and education. See, e.g., CNN: Early Exit Polls Show Voters' Top Concern is the Economy, <http://blogs.wsj.com/washwire/2008/11/04/cnn-early-exit-polls-show-voters-top-concern-is-economy/> (Nov. 4, 2008); Michael Cooper and Dalia Sussman, *Voters in Poll Want Priority to Be Economy, Their Top Issue*, N.Y. TIMES, Aug. 20, 2008; CNNPolitics.com, Exit Polls: Obama Wins Big Among Young, Minority Voters (Nov. 4, 2008) <http://www.cnn.com/2008/POLITICS/11/04/exit.polls/>.

221. See, e.g., Obama and Wright: He Never Complained Once, *supra* note 220; Obama's Plan: Driver's Licenses for Illegals, http://www.youtube.com/watch?v=rbyocX-9_mo; Obama's Ties to Ayers, Rev. Wright, Kilpatrick, <http://www.youtube.com/watch?v=eDcQUcAjoel>; Obama's Wrong Values, <http://www.youtube.com/watch?v=vW2iZ1pD2G4>; Obama's Patriotism Problem, <http://www.youtube.com/watch?v=6E0ycYEGtqU>.

222. See, e.g., Obama and Wright: He Never Complained Once, *supra* note 220.

advertisements echoed the theme of "Extreme" and in some instances were simply a repackaged version of "Extreme." Those negative racially offensive advertisements referring to Obama's pastor Rev. Jeremiah Wright, those attempting to exploit casual associations of other individuals to Obama, and those calling into question Obama's patriotism and values are the type that add little to nothing to the political process and which should be rejected by broadcasters. Unfortunately, they were not rejected.

The offensive comments about Obama were at best thoughtless, disrespectful, reckless, or negligent; at worst, they were hateful, malicious, and intended to incite violence toward him. These offensive comments were uttered by news personalities,²²³ on the campaign trail,²²⁴ and by supporters or surrogates of an opposing candidate.²²⁵ Some were made by a competing candidate.²²⁶ The offenders often apologized for their comments, but by then the seeds of doubt about Obama as the next president had been planted in voters' minds.²²⁷

The illustrative list below includes some examples of racist statements directed to the electorate regarding Obama over the preceding two years. Not all of these examples are race-based negative advertisements sponsored by third parties, but they are offered for the purpose of illustrating the tenor of current political speech and to give a glimpse into the type of offensive speech that may present itself in third party non-candidate television advertisements in the future. The type of speech being uttered in news formats can appear later in

223. On his radio show, Rush Limbaugh played a tune called "Barack the Magic Negro." The song was sung to the tune of "Puff the Magic Dragon." See Rush Limbaugh: "Barack the Magic Negro," <http://www.youtube.com/watch?v=8-Bao4VUQmI>; see also David Ehrenstein, 'Magic Negro' Returns, L.A. TIMES, Mar. 19, 2007, at A13.

224. See Dan Balz, *Biden Stumbles at the Starting Gate: Comments About Obama Overtake Bid for President*, WASH. POST, Feb. 1, 2007, at A6.

225. See, e.g. Associated Press, *Quotes from Palin on Obama's Ties to Wright*, AYERS, BOSTON GLOBE, Oct. 6, 2008.

226. See, e.g., Balz, *supra* note 224; Editorial, *Democratic Race: Clinton's Race Card*, MILWAUKEE J. SENTINEL, May 10, 2008, at A10; Jim Farber, *Geraldine Ferraro Lets Her Emotions Do the Talking*, DAILY BREEZE (Torrance, Calif.), Mar. 7, 2008 (discussing the offensive comments of Geraldine Ferraro, former Democratic vice presidential nominee and staunch Hillary Clinton supporter).

227. See, e.g., Paul Bedard, *Huckabee Apologizes to Obama*, U.S. NEWS & WORLD REPORT, May 20, 2008, available at <http://www.usnews.com/blogs/washington-whispers/2008/5/20/huckabee-apologizes-to-obama.html>; Patrick Crowley, *Will Voters Forgive Davis?*, CINCINNATI ENQUIRER, April 18, 2008, at 1B. Others, however, such as former Democratic Party vice presidential nominee Geraldine Ferraro, refused to apologize for their offensive statements. See *Geraldine Ferraro Defends Her Statements*, <http://www.youtube.com/watch?v=WBIWyRG1rLk&feature=related>

offensive political broadcast advertisements. Broadcasters will therefore undoubtedly have to make tough choices about whether to air negative third party advertisements in future years.

Some notable examples:

- A Kentucky congressman referred to Obama as “boy.”²²⁸
- Georgia Republican Rep. Lynn Westmoreland referred to Obama and his wife as “uppity,” stating, “[j]ust from what little I’ve seen of her [Michelle Obama] and Mr. Obama, Senator Obama, they’re a member [sic] of an elitist-class individual [sic] that thinks that they’re uppity.”²²⁹
- Former Democratic Vice Presidential nominee, Geraldine Ferraro, stated, “If Obama was a white man, he would not be in this position. And if he was a woman (of any color) he would not be in this position. He happens to be very lucky to be who he is. And the country is caught up in the concept.”²³⁰
- Hillary Clinton invoked race when she stated during a news interview that “Senator Obama’s support among working, hard-working Americans, white Americans, is weakening again, and how whites in both states [Ohio and Pennsylvania] who had not completed college were supporting me.”²³¹

228. *Boy, Did This Congressman Misspeak*, CHI. TRIB., April 18, 2008, at C18; Crowley, *supra* note 227. At a Republican Party dinner, referring to a “highly classified, national security simulation” in which he recently participated with Barack Obama, Republican House Representative Geoff Davis of Kentucky was discussing whether Obama has the experience to make decisions about military force, and he said, “I’m going to tell you something: That boy’s finger does not need to be on the button.” Crowley, *supra* note 227. In an apology delivered to Obama, Davis said, “My poor choice of words is regrettable and was in no way meant to impugn you or your integrity.” Letter from Geoff Davis, U.S. House Representative (R-Ky.) to Barack Obama, U.S. Senator (D-Ill.) (Apr. 14, 2008), available at http://www.politico.com/static/PPM43_080414_apology.html.

229. *Congressman Describes Obama as “Uppity,”* United Press International, Sept. 4, 2008, available at http://www.upi.com/Top_News/2008/09/04/Congressman_describes_Obama_as_uppity/UPI-53451220560727. Such a comment was suspected to be coded speech critical of the audacity of an African-American’s upward mobility. See also Staples, *supra* note 213.

230. See Farber, *supra* note 226. In a separate interview on *Good Morning America*, Ferraro said she was not sorry for her comments and felt her words were spun to imply she was a racist. See Geraldine Ferraro Defends Her Statements, *supra* note 227.

231. See Editorial, *Democratic Race; Clinton’s Race Card*, *supra* note 226. In addition, former President Bill Clinton diminished the victory of Obama in the South Carolina primaries by comparing the win to earlier wins in the state by Presidential hopeful Jesse Jackson. Bill Clinton on Barack Obama, <http://www.youtube.com/watch?v=Qqd2dfj12pw>. The African-American electorate appeared to be highly offended by such coded racial remarks, and an overwhelming percentage of the African-American vote went to Obama from that point forward. See E.J. Dionne Jr., Editorial, *Post-Crucible Clinton*, WASH. POST, May 13, 2008, at A15 (citing Pew Research Center poll finding that eighty-six percent of African-Americans viewed Hillary Clinton favorably in August 2007, including forty-four percent who viewed

- Hillary Clinton made a reference to a possible assassination of a presidential candidate. She stated, "My husband did not wrap up the nomination in 1992 until he won the California primary somewhere in the middle of June, right? We all remember Bobby Kennedy was assassinated in June in California."²³²

As illustrations of the negative tone of political speech, these examples are reminders and harbingers of the state of political speech. Each of these examples listed above enjoyed extensive, and possibly excessive, news coverage. The comments, the persons who made them, and what they really meant became stories in and of themselves. The media's excessive coverage of the comments and the reactions to the comments by countless pundits and experts mostly served to keep the comments in the public domain for days, and in some instances, weeks. The comments and the media's extensive coverage of them begs the question of whether broadcasters are making morally responsible choices that serve the public interest when it comes to repeated coverage and replay of offensive political speech. The moral choices they make in the context of news coverage is very much connected to the moral choices they must make to accept or reject

her very favorably, but by early 2008, only fifty-six percent of African-Americans viewed her favorably, including only twenty-two percent who viewed her very favorably). Only history will tell whether Hillary Clinton's negative tactics have caused significant or irreparable harm not only to her political career and the legacy of her husband, but also to the Democratic Party and the country at large. African-American voters, who had been some of the most loyal supporters of her husband during his two-term presidency, effectively cut ties with Hillary Clinton after perceived efforts to play dirty racial politics against Obama. See Richard Cohen, *Words Heard Differently*, Editorial, WASH. POST, Apr. 29, 2008, at A17 (opining on the different impact of Bill Clinton's South Carolina remarks on African-Americans and whites); Colbert I. King, *Truth the Clintons Can't Handle*, Editorial, WASH. POST, Feb. 23, 2008, at A15 ("The Clintons sought to marginalize Obama as a candidate for African Americans. It backfired.").

232. Anne E. Kornblut, *Clinton Sorry for Remark About RFK Assassination*, WASH. POST, May 24, 2008, at A1; see also *What Does RFK's Assassination Have To Do With It?*, <http://www.youtube.com/watch?v=5vyFqmp4wzI>; Yolanda Young, *Why Blacks Worry About Obama's Safety*, USA TODAY, May 30, 2008, at 13A. As further example of innuendos regarding threats of violence to or assassination of Obama, during a speech before several thousand attendees of a National Rifle Association meeting in Louisville, Kentucky, former Republican presidential primary contender Michael Huckabee was interrupted by a loud noise. Elisabeth Bumiller & Sarah Wheaton, *In Huckabee Joke, Gun Aims at Obama*, N.Y. TIMES, May 17, 2008, at A12. He joked, "[T]hat was Barack Obama. He just tripped off a chair. He's getting ready to speak and somebody aimed a gun at him and he—he dove for the floor." *Id.*; see also Young, *supra*; *Huckabee's Gun Joke Backfires*, TAMPA TRIB., May 21, 2008, at 10; Paul Bedard, *Huckabee Apologizes to Obama*, USNEWS.COM, May 20, 2008, available at <http://www.usnews.com/blogs/washington-whispers/2008/5/20/huckabee-apologizes-to-obama.html>. Others have also made comments about violence towards Obama. See Gary Fennelly, *Fox News Pundit Apologizes for Joke About Killing Obama*, BELFAST TELEGRAPH, May 27, 2008.

offensive third party political advertisements when so presented. If broadcasters' handling of these news stories was so sensational and so lacking in sensitivity to the public interest, then it calls into question whether those broadcasters would be willing to reject truly offensive third party advertisements presented for broadcast. Were any of these comments to appear in a political advertisement presented by a third party to a licensee for broadcast, they should be rejected.

III. A BROADCASTER'S MORAL CHOICE

Over the years, segregationists and conservative groups seem to have taken ownership of the term 'moral' and its derivatives, often using the term to refer to white, southern, Christian values.²³³ Its use often is coded and is meant to exclude notions of integration, interracial marriage, and race-mixing in general.²³⁴ When Jesse Helms referred to Americans bearing characteristics of "decency, honor and spiritual and moral cleanliness," all who heard those words knew that he meant to describe and refer to white Christians.²³⁵

In today's political climate, however, political candidates often try to woo voters in demographics that are not traditionally the candidate's strength. For example, staunchly conservative Republicans attempt to woo faith-oriented African-Americans, and Democrats attempt to gain favor with evangelical, working class whites in conservative Midwestern areas. As a result, many modern day candidates will likely be reluctant to invoke race as obviously as did J.B. Stoner and Jesse Helms because doing so would risk alienating certain segments of the electorate. Instead, candidates might prefer to let others do this dirty work for them.

Broadcasters are fiduciaries of the public trust, evidenced by the grant of a broadcast license that allows broadcasters to determine which information will be allowed into individuals' homes. As a fiduciary of the public trust, broadcasters must make decisions about whether the materials they broadcast on their stations further the public interest, necessity, and convenience.²³⁶ Each programming choice a

233. See LINK, *supra* note 148, at 7, 180, 287, 300.

234. See *id.* at 40.

235. Barnes & Schudel, *supra* note 150, at A1; see also LINK, *supra* note 148, at 287.

236. Radio Act of 1927, ch. 169, 44 Stat. 1162; Communications Act of 1934, 47 U.S.C. § 151 (2006); Telecommunications Act of 1996, 47 U.S.C. § 303 (2006); see *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 115 (1973) ("...broadcast licensees are granted use of part of the public domain and are regulated as 'proxies' or 'fiduciaries' of the people.") (citing *Bus. Executives' Move for Vietnam Peace v. Fed. Comm'n's Comm'n*, 450 F.2d 642, 652 (1971)); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567 (1990) ("..."

broadcaster makes involves moral and ethical decisions about what it means for a broadcaster to serve the public and how best to achieve that end.²³⁷

In serving the public, broadcasters must be willing to reject gratuitous, misleading, and offensive advertisements sponsored by non-candidate third parties if, in the broadcaster's opinion, the advertisements do not further the public interest. Because there is no affirmative right to speak on the broadcast airwaves, broadcasters can reject offensive third party advertisements without offending the First Amendment or federal political broadcast statutory or regulatory law.²³⁸ The limited access provisions in Sections 312 and 315 do not extend to the political party, to political action committees, or to other supporters or opponents of a particular candidate.²³⁹ It should be the broadcaster's responsibility to the public, in furtherance of its public interest obligation, to discourage use of the public airwaves to spew speech, unprotected in this context, that offends or belittles minorities, people of color, women, gays and lesbians, and other such groups.²⁴⁰ In the case of the "Extreme" advertisement, two North Carolina broadcasters acted in furtherance of the public interest without offending the letter of the law. When faced with the choice to air

the Communications Act of 1934 has designated broadcasters as 'fiduciaries for the public'") (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 354, 377 (1984)); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969) ("There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.").

237. *See, e.g.*, 47 C.F.R. § 73.670 (2008) (limiting commercials during children's television programming); 47 C.F.R. § 73.671 (2008) (detailing broadcast licensees' obligations to broadcast programming serving the educational and informational needs of children). In the context of third party political advertisements, broadcasters must consider whether to broadcast potentially profane and indecent material. *See* 18 U.S.C. §1464 (2006) (prohibiting the broadcast of indecent, obscene, and profane material). Determinations of whether material is indecent are difficult, and whether fleeting indecency will be punished is unclear. *See Fox Television Stations Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, *FCC v. Fox Television Stations, Inc.* 128 S. Ct. 1647 (2008); *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008).

238. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969) ("[N]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'"); *Nicholas Zapple*, 23 F.C.C. 2d 707 (1970).

239. *See* 47 U.S.C. §§ 312, 315 (2006).

240. Jesse Helms, for example, did not limit his offensive speech to targeting African-Americans. He spoke virulently against gays and atheists as well. LINK, *supra* note 148, at 180-81, 290-92, 375.

offensive third party advertisements, other broadcasters should do the same.

In an election year in which the first African-American headed a major party ticket, and in future years, broadcasters likely will have to make difficult, yet important, choices regarding political speech. In the current political arena, surrogates, political parties, and political action committees figure prominently in shaping public opinion about the candidates and framing political issues.²⁴¹

A. *A Reasonableness Test*

In making these determinations, broadcasters must carefully evaluate what exactly constitutes “the public interest” and who constitutes “the public” to be served.²⁴² In making these determinations of whether to run a negative third party advertisement, broadcasters must employ a balancing test based on principles of reasonableness. This test should balance, on the one hand, the public’s right to know about each of the candidates in a political race, and on the other hand, the public’s interest in freedom from hateful or gratuitously divisive rhetoric that serves no purpose other than to arouse irrational public fear, discontent, and confusion. The test could consider whether a reasonable voter would find that the message unreasonably harms the targeted candidate or unreasonably poisons the electorate. For example, a broadcaster could consider whether a reasonable voter would find the advertisement racially inappropriate or offensive. While this analysis would be inapplicable when broadcasters are presented with requests for advertisements sponsored by federal, state, and local candidates because of the anti-censorship provisions of Section 315, it is quite relevant when broadcasters are confronted with requests for air time by third parties and special interest groups.

Arguably, an uncensored, robust discussion of issues and availability of air time for advertisements by third parties benefits society as a whole because voters are allowed to sift through the various messages—offensive and otherwise—ultimately granting viewers a fuller picture of the candidate’s character and of the candidate’s associates and supporters. In cases like that of J.B.

241. See Ryan, *supra* note 4, at 471.

242. See Radio Act of 1927, ch. 169, 44 Stat. 1162; Communications Act of 1934, 47 U.S.C. § 151 (2006); Telecommunications Act of 1996, 47 U.S.C. § 303 (2006); see, e.g., Metro Broad., Inc. v. FCC, 497 U.S. 547, 567 (1990); FCC v. League of Women Voters of Cal., 468 U.S. 364, 377–78 (1984).

Stoner,²⁴³ it could be said that the voters have the power to decide what type of candidate they are willing to tolerate. It is certainly within the power of the voters to judge the character, judgment, and qualification of the candidate based on his or her uncensored speech. In fact, it could be beneficial overall for democracy and the political process if voters became knowledgeable of the true character of candidates for public office prior to electing them to a position of public trust. However, there is nothing compelling broadcast licensees to air these types of third party advertisements, nor should there be. Although they may add to a robust debate about political issues, unnecessarily divisive and hateful third-party advertisements also harm the collective social psyche as well as that of the individuals in the targeted social groups. Broadcasters should reject these advertisements in the same way that they would reject any other advertisement or opinion piece that does not further the broadcaster's journalistic pursuit or public interest obligations. The potential harm from offensive third party speech is significant and is outweighed by the licensee's public interest obligations if the speech so offends large segments of the public. Nothing in this article suggests that the government itself should prohibit the broadcast of offensive speech, as such a mandate would be vague, unworkable, and difficult to apply. Moreover, such a mandate would likely offend the First Amendment. Of course, not all third party advertisements are direct attacks on any particular candidate; many challenge all candidates in a race to address particular issues. Such advertisements arguably have more political relevance and should be rejected only in extreme situations exceeding the bounds of reasonableness.

Congress correctly recognized the need for candidates to reach the electorate and for members of the electorate to receive political messages from the candidates themselves.²⁴⁴ While third parties in many cases possess significant legitimate substantive concerns and issues, the right to publicize these concerns does not warrant an affirmative right of access to the airwaves. Not even candidates for state and local offices share the same rights of reasonable access to use

243. See discussion *supra* Part II-A.

244. See *In re* Petition for Reconsideration by People for the Am. Way and Media Access Project of Declaratory Ruling Regarding Section 312(a)(7) of the Communications Act, 17 Comm. Reg. (P&F) 186 (1999) (explaining that the legislative history of Section 312(a)(7) states that the purpose of the section is "to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters").

broadcast facilities as federal candidates.²⁴⁵ One could argue that if the message conveyed in the third party supporter's advertisement is of such public importance, then perhaps the candidate, not a third party, should convey the message him or herself. The candidates should not be allowed to hide behind the offensive messages of third parties. Such a distortion does not serve the public good. Broadcasters have an opportunity, and arguably, an obligation, to remedy this potential "loophole" by rejecting offensive third party advertisements.

B. Addressing the Opposition

Some scholars insist that counter speech is a powerful means of addressing this and other types of hate speech.²⁴⁶ Counter speech, they argue, is an effective weapon against hate speech in that it serves the important purpose of opening avenues for public discourse and education about challenging issues.²⁴⁷ While this contention may have validity, it does not adequately account for the significant barriers that most will encounter in accessing the media. One such barrier is the cost of advertising that can easily be driven up to unattainable levels by well-financed political action committees.²⁴⁸ Ironically, even well financed political action committees could not keep pace with Obama's successful fundraising efforts and extraordinary use of e-mail, mobile phone text messaging, and advertising on the Internet and

245. See 47 U.S.C. § 312(a)(7) (2006) (applying reasonable access provisions to federal candidates only).

246. See, e.g., Calvert, *supra* note 81, at 16–19 (discussing the "twin forces" of the power of counter speech and the economic realities of advertising in minimizing hate speech).

247. *Id.* at 16 (citing Justice Louis Brandeis' observation that "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

248. See Peter Overby, *Liberal 527 Groups Target McCain with Ads* (National Public Radio broadcast Sept. 15, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=94640700>. However, it has been suggested that wealthy contributors to PACs did not donate as much money for political advertisements in 2008 due to complex contribution laws and a weakened American economy. Peter Overby, *Money Woes Muzzle Independent Political Groups* (National Public Radio broadcast Oct. 30, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=96294205>. ("In a presidential race that seems to include every possible political strategy, one element has barely been visible. There have been no high-impact independent groups along the lines of the Swift Boat Veterans for Truth, the group that played a prominent role in attacking John Kerry four years ago."). See also Campaigns Spent \$28 Million on TV Ads Last Week, <http://blogs.abcnews.com/politicalradar/2008/10/campaigns-spent.html> (Oct. 8, 2008, 1:34 EST) ("... spending overall by 527s, 501c3s and PACs is down [from what it was in 2004].").

video games to reach voters during the 2008 presidential campaign.²⁴⁹ Another barrier is lack of control and ownership of broadcast outlets by racial minorities.²⁵⁰ Yet another barrier is the lack of a statutorily or constitutionally protected right of access to broadcast outlets, with the exception of federal political candidates, and then only in certain circumstances.²⁵¹

These scholars assert that broadcasters are not motivated by moral and ethical concerns at all, but rather are motivated mostly by economic concerns.²⁵² Professor Clay Calvert, in particular, suggests that in truth, “[m]oney may not be the new morality, but it’s becoming the next best thing. . . .”²⁵³ Calvert and others have suggested that the more constitutionally sound resolution—one less offensive to principles of unrestricted speech—is to let pressure from third parties’ corporate sponsors, rather than the government, act to clean up the airwaves.²⁵⁴ Calvert suggests that in a capitalist society such as our own, money speaks louder, and more effectively impacts human behavior than do direct appeals to the moral conscience.²⁵⁵ He could be right. Perhaps indeed only a few broadcasters feel any ethical or moral obligation to reject certain requests for air time regardless of their potential to offend the public and the public interest. The

249. See, e.g., Jose Antonio Vargas, *Obama Raised Half a Billion Online*, http://voices.washingtonpost.com/the-trail/2008/11/20/obama_raised_half_a_billion_on.html (last visited Dec. 28, 2008).

250. See LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 97, 98–100 (2006); Leonard M. Baynes, *Life After Adarand: What Happened to the Metro Broadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?*, 33 U. MICH. J.L. REFORM 87, 88–89 (1999–2000); Catherine J.K. Sandoval, *Antitrust Law on the Borderland of Language and Market Definition: Is There a Separate Spanish-Language Radio Market? A Case Study of the Merger of Univision and Hispanic Broadcasting Corporation*, 40 U.S.F. L. REV. 381, 412 (2006).

251. See discussion *supra* Parts I-A-D.

252. See Calvert, *supra* note 81, at 17–18.

253. See *id.* at 17 (quoting Kevin Nance, *Imus vs. Free Enterprise*, CHI. SUN-TIMES, Apr. 17, 2007, at 37).

254. See *id.* at 16, 17–18.

255. See *id.* at 17–18. See also BEE MOVIE (DreamWorks SKG 2007) (conversation between Barry Bee Benson and parents):

Parents: . . . [W]hat could one bee do?

Barry: I’m going to sting them where it really hurts.

Parents: In the face?

Barry: No.

Parents: In the eye? That would really hurt.

Barry: No.

Parents: Up the nose? That’s a killer.

Barry: There’s only one place you can sting the humans. One place where it really matters.

remaining broadcasters might argue, alternatively, that it is not ethically, morally, or legally proper for them as participants in a robust and free marketplace of ideas to substitute their notions of morality for those of the public in a way that censors speech. These broadcasters, however, still may justifiably reject the requests, but simply because of the risk of economic retribution from their core audiences or from their advertisers.²⁵⁶ Perhaps those broadcasters simply do not want to lose money. In the end, arguably, the result is the same—the broadcaster does not air the offensive advertisement.

A problem with this analysis, however, is that if the free market of ideas and consumer preferences were to reward, instead of deter, negative speech, then that likely is the direction in which those solely money-motivated broadcasters will go. The end result could reflect more negative speech and a race to the bottom of a bottomless pit of crass and offensive material. With money as a motivator, offensive and shocking speech actually might be encouraged, and the public and the electorate could be harmed.

Critics might suggest that a balancing test based on principles of reasonableness is unworkable. They might ask who exactly is a reasonable voter or how a licensee reliably could determine whether the electorate or a specific candidate would be unreasonably harmed. Additionally, critics could be concerned that the reasonable voter might not find certain material offensive, and that we should not be concerned with ultra-sensitive viewers. Other critics might argue that we should not be concerned with the fictional reasonable voter at all, but rather should concern ourselves the minority of voters or those minority candidates who indeed are offended or harmed by this type of third party political speech. Nevertheless, such a test would be a voluntary means of reaching a moral, ethical, and legal result that serves the interests of the public. This test, at a minimum, would give broadcasters a guide for evaluating and for rejecting the most egregiously offensive, and likely even subtly offensive, requests for air time by third parties.

Critics contending that the rule too liberally favors speech not worthy of protection in this context may argue that the public interest is not served at all when racist material invades the airwaves under the cover of a political campaign to demean, defame, and disenfranchise

256. See EILEEN R. MEEHAN, WHY TV IS NOT OUR FAULT: TELEVISION PROGRAMMING, VIEWERS, AND WHO'S REALLY IN CONTROL 28, 33 (2005) (explicating the role of advertising in broadcasting)

an entire race or other group of people.²⁵⁷ Both blatant and hidden racist messages in advertisements, they might argue, can in fact significantly harm impressionable viewers, particularly children, more than broadcasts of indecency, such as male or female nudity.²⁵⁸ Courts have upheld the FCC's authority to protect children from harmful speech on the broadcast airwaves.²⁵⁹ For this camp, perhaps this problem can be solved only by governmental restrictions on all political hate speech, and particularly that of third party non-candidates. The interests of the victims of hateful speech, they argue, tip the scale in favor of prohibiting, and in fact sanctioning, speech that is potentially much more harmful to society than the indecent speech the FCC is so willing to sanction.²⁶⁰

Such a mandated prohibition, however, might go too far in offending First Amendment free speech protections and the overall political process. At a minimum, broadcasters must take into account these competing societal interests in deciding whether to accept third party political advertisements containing explicit or coded messages

257. See, e.g., *In re Complaint by Julian Bond*, 69 F.C.C.2d 943 (1978); *In re Complaint by Atlanta NAACP*, 36 F.C.C. 2d 635 (1972).

258. For a discussion of the impact of racism on children's self esteem, see K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950) (cited in *Brown v. Bd. of Educ.* 347 U.S. 483, 494 n.11 (1954)). Professor Clark showed sixteen African-American children an African-American doll and a white doll and asked them to select which doll they liked best, which one was "bad," which one was "nice," and which one was like them. Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 9-11 (1995). Overwhelmingly the children selected the white doll for the positive attributes and the African-American doll for negative attributes. *Id.* Teenager Kiri Davis recreated this study in 2005, documenting the study and its conclusions in a seven-minute documentary, *A Girl Like Me*, http://www.kiridavis.com/index.php?option=com_content&task=view&id=17&Itemid=88888938. In Davis' study, 15 out of 21 children preferred the white doll. *Id.*

259. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978).

260. See generally MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993). For examples of the sanctioning of indecent speech, see *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 19 F.C.C.R. 19230 (2004) *aff'd*, *Forfeiture Order*, 21 F.C.C.R. 2760 (2006), *aff'd*, *Order on Reconsideration*, 21 F.C.C.R. 6653 (2006), *vacated*, *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008); *In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, 23 F.C.C.R. 3147, 3168-69 (2008). In the latter case, the FCC imposed a fine only on those ABC affiliates about which the agency had received complaints resulting from the broadcast of the material outside the "safe harbor" of 10:00 p.m. to 6:00 a.m., where indecent programming may be broadcast. *Id.* at 3148, n.8, 3168-69.

which are intended to create racial discord and which seep into the psyche of the electorate, often playing out in predictable ways.²⁶¹

CONCLUSION

Broadcasters face a moral imperative to seriously consider whether negative third party advertisements serve the public interest. In other words, broadcasters will have to answer the question of whether the freedom to convey a racist message—covert or overt—outweighs higher ideals and societal interests. Broadcasters will have a choice to reject third party advertisements deemed offensive, divisive, and generally not in the public interest, and must decide whether they will be the facilitators and distributors of hate speech, particularly when there is nothing in the law compelling them to do so.²⁶²

The two North Carolina broadcasters were correct in their decision to reject “Extreme.” Taking into account their public interest obligations as FCC licensees and the political climate, the scales tip in favor of rejecting such offensive advertisements. Broadcasters are and must be free to reject third party advertisements that distort the political process and speak to the narrow, racially divisive, and incendiary issues of special interest groups if the broadcaster finds them not to be in the public interest. The North Carolina broadcasters’ choice to reject offensive advertisements might embolden other broadcasters to make similar moral choices in favor of civility and ethical behavior for the benefit of the entire public served by broadcast licensees. More broadcasters should follow the lead of these two broadcasters and uphold their moral obligation to protect the public interest. Moreover, even these two broadcasters must make the same choice if and when they are again presented with such political broadcast material.

261. See *supra* Part II (discussing negative campaigns and their effect on elections).

262. See 47 U.S.C. § 312 (2006) (giving a reasonable right of access to federal political candidates only); 47 U.S.C. § 315 (2006) (limiting equal opportunities to air time to political candidates only).