

A Proposal: Media Access for All Candidates and Ballot Measures

By Tracy Westen

“The sharply rising use of television and radio broadcasting by presidential candidates in the United States poses serious problems that affect politicians, the parties, the voters, and the very fabric of our democratic process. . . .

“It is the task of policy makers to ensure that technology itself does not alter our fundamental political principals, that men remain the masters of technology and not the other way around.”

—*Voters Time*, A Report of the Twentieth Century
Fund Commission on Campaign Costs in the
Electronic Era (1969).

Introduction

This warning by a distinguished panel of Americans has largely gone unheeded. Congress has done virtually nothing in the past 29 years to ameliorate this country’s worsening problems of political broadcasting—other than to hold hearings and decry the status quo (“Something has gone terribly wrong with our political system”—Senator Danforth, 1985). The Federal Communications Commission has even compounded this neglect by *repealing* the fairness doctrine as it applies to ballot measures, thereby depriving voters of the opportunity to hear competing views on the measures on which they are asked to vote.

During this period, the costs of campaign technology have skyrocketed. Politicians continue to pour rapidly increasing sums into paid radio and television advertising. Many candidates spend more time raising funds to purchase media time than they do discussing the relevant issues.

Despite this explosive increase in paid media, it would be difficult to argue that voters are *better informed* about candidates and issues than they were 20 years ago. One reason is that political advertisements are too often shallow, distorted, trivial and mean. Thirty-second negative “hit pieces” typically highlight flaws or omissions (sometimes minor, distorted or even fabricated) in an opponent’s record (a controversial vote, a

personal indiscretion) and then magnify them to monumental proportions. These ads attack, but they rarely propose reforms, and they fail to communicate much significant information.

Responsible elected officials who have taken public stands on controversial issues are discouraged from seeking reelection, fearing that a 30-second political ad will distort their positions out of proportion. Those who do run for office are encouraged to state their views in blandest terms (such candidates are invariably “for education”), hoping to immunize themselves from attack.

Public attitudes toward elected officials continue to worsen. A *Los Angeles Times* poll reported that 53% of Californians believe their legislators are “taking bribes,” two-thirds think “most state legislators are for sale to their largest campaign contributors,” a large percentage believes “state government is pretty much run by a few big interests rather than for the benefit of all the people” and the average respondent thinks that nearly one-third of legislative and executive branch members attained their positions “by using unethical or illegal methods.”

Despite—to a certain extent because of—negative political advertising, voter turnout has now dropped from 63% in 1960 to around 50% in national elections, the lowest average of any industrialized democracy. In some local races, voter turnout has dropped to 10%. Low voter participation effectively turns representative democracy into a *surrogate democracy*, allowing a small percentage of the population to select a government for the rest.

There are, of course, other causes of voter dissatisfaction—most significantly, campaign financing abuses. But the problems of campaign financing and political television are inextricably interrelated. The need of candidates to raise money is often fueled by the more fundamental need to purchase expensive media time.

Digital broadcasting offers new opportunities—if not to start afresh, then at least to rethink older problems in a newer context. If digital television broadcasters are able to transmit up to 10 channels of standard television programming in one new six megahertz channel allotment, then frequency “scarcity” problems are diminished. What is still needed, however, is a comprehensive approach to the problems of political broadcasting, one that applies to both the newer digital channels as well as the older analog ones.

Goals and Objectives of Media Reform

Even piecemeal political media reforms have been difficult to achieve—as the past three decades of inaction demonstrate. Yet there is merit in attempting to consider what a system of comprehensive political media reforms might look like. The following is such an attempt.

Thinking broadly, comprehensive political media reforms, to be successful, should address at least the following goals and objectives:

1. Applicability to All Elections. Inadequate media coverage of political campaigns adversely affects the fabric of democracy at *all* levels of government—in campaigns for federal, state and local office, as well as campaigns around ballot measures. Presidential elections, to be sure, are vitally important to the nation, and improvements in media coverage for these races are highly desirable. But voters are also deeply concerned with state and local issues. Up to 20% of all American political money is spent at the local level, and ballot initiatives in many states have become the principal engine driving policy and political change—in some California elections, for example, one election’s ballot measure campaigns have spent more than all the Presidential candidates combined spent in the general election. True political media reform in this country should thus be applicable to all candidate elections—president, senator, congressman, governor, state legislator, county supervisor, city mayor and city councilman—as well as state and local ballot measure campaigns.

2. Candidate Control Over Messages. News coverage of candidate and ballot measure campaigns on television, radio and in print is clearly important and desirable, as are candidate debates and news interviews. But they cannot substitute for messages directly shaped by the candidates or ballot measure campaigns themselves. Candidate and ballot initiative committees must be able to create, control and deliver their own messages in their own way. This requires some system of candidate and ballot measure committee “access” to the media, either on a paid, reduced cost or free basis.

3. Candidate Choice of Media. Candidates in some races need access to television to be competitive, but in other races they need access to *media other than television*. Because TV is the most desirable medium for political persuasion, and because its costs per voter reached are reasonable where its coverage is coterminous with the electoral district, candidates will always prefer television if they can afford it. In smaller races, however, its high costs make it prohibitively expensive for most candidates. For candidates who run in districted races (Congress, state legislature, county supervisor, city council) and local ballot measure committees, the reach of television or radio is far broader than their district boundaries and thus too costly per actual voter reached. For these candidates, direct mail is the medium of choice.

Reform proposals cannot focus exclusively on television. Media reforms must give candidates and ballot measure committees flexible access to media other than television and radio—such as direct mail and political leaflets. (Newspapers and magazines are generally ineffective in political campaigns.) Television reforms should not be “ghettoized” to the new digital television media. Broadcast reforms should be applicable equally to digital and analog television and radio.

4. Free or Substantially Reduced Media Costs. Media costs are currently so high that many highly qualified potential candidates choose not to participate in electoral politics at all, while others must devote most of their time to fundraising—leaving them little time to discuss substantive issues, forcing them to avoid positions disliked by their contributors and tainting them with the appearance of being unduly or corruptibly subject to influence by their larger contributors. At the same time, even the

most brilliant political ideas cannot be communicated without a substantial media budget. Political success has become dependent on a candidate's fundraising abilities or personal wealth, rather than the power of his or her ideas. Political media reform must therefore provide candidates and ballot measure committees at all levels with some significant ability to reach the voters—either by subsidizing their media purchases or by providing them with no-cost or substantially reduced-cost media access.

5. Limitations on Media Formats. Merely providing free or reduced-cost media to candidates and ballot measure committees will not solve all informational deficiencies. Without additional media reforms, negative advertising may easily continue. New formats for media messages may be needed, not just a new form of paying for them. Reforms should link the provision of free time to appropriate media formats.

6. Integration into Broader Campaign Finance Reforms. Providing candidates and ballot measure committees with free or reduced-cost media should not be considered in isolation. Media coverage and campaign financing problems and solutions are interrelated. Candidates are pressured to raise enormous sums of money in substantial part to pay for increasingly costly media time. Public financing would help defray these costs, but without expenditure ceilings it would simply pour gasoline on a fire that is already raging—allowing candidates to spend even more money on uninformative or negative advertising without diminishing their demand for unlimited private funding. Free media time would help candidates, but it would also allow them to spend the money they saved on negative television ads or other forms of communication. Media reforms must thus be tied to broader campaign finance reforms—most importantly, to expenditure ceilings and public financing.

Some Proposed Reforms

The following proposes a comprehensive system of media reforms for all campaigns. The proposals vary depending on the size and nature of the campaign.

A. U.S. Presidential Candidates

1. Broadcast Time. Major political party presidential candidates (see definition below) who voluntarily agreed to limit their overall campaign expenditures would receive two-and-a-half hours of free time during the 30 day period before the general election on each analog and digital television station, analog and digital radio station and national cable television network in the nation.¹ This time would be split between two distinct uses.

¹ Applying this rule to television *networks* only would not suffice, since it would not reach many independent television stations in the U.S. Applying it to cable television networks instead of individual cable systems, however, should suffice, since few cable systems provide independent programming.

a. Programs. One and a half hours of this time would be available in program lengths of at least a half-hour, and candidates could combine them into longer programs if they wished. These longer segments would be controlled by the candidates and would allow them to explore issues in greater depth. Debates would be handled separately.

b. Spots. The remaining hour of time would be available to candidates in short spot announcement formats 30 to 60 days before the election. Different formats are possible. For example:

(1) Candidate-Controlled Spots. One half (or 15) of the two-minute spots during the 30-day period before the election would be created directly by the candidates themselves, allowing them to reach a wide audience by capturing the attention of viewers watching other programs. These would also allow candidates to respond to each other's positions nightly as the campaigns developed—in effect, a serial debate. A two-minute spot is long enough to discuss a specific issue, yet short enough to avoid losing the majority of viewers to another channel. As an alternative, candidates could be given two one-minute spots per evening for 30 days before the election, or one one-minute spot per evening for 60 days before the election.

(2) Mini-Debate Spots. The other 15 two-minute periods could be devoted to mini-debate formats, in which a citizen, reporter or “celebrity” (e.g., Oprah Winfrey) would ask a question (for 30 seconds) and each candidate would provide back-to-back responses (for 45 seconds each).

Both long and short program formats are necessary. Because most stations are on the air almost 30,000 hours every four-year period, a total of 5 hours of time for the two major party candidates combined would comprise a minute fraction (0.00017) of the station's overall programming time.

2. Carriage. The longer programs would be broadcast simultaneously, and in prime time, on all radio and television stations and national cable networks, creating a programming “roadblock” which viewers and listeners could not avoid. The remaining hour of spots could be broadcast on individual stations at times chosen by the candidates. Carriage of this time would be in addition to carriage of any debates organized by the candidates or other organizations such as the League of Women Voters.

3. Format. Candidates would have to appear personally in at least 80% of each program segment and spot ad. This would allow up to 20% of the remaining time in each program or spot to include “produced” material (films, charts, interviews and other graphic programming). This restriction would require candidates to present their ideas to the public personally, and in their own words, and it would allow the public to judge them directly, without the intermediary of professional announcers. It would also tend to eliminate “negative” advertising messages, since existing research indicates that the public dislikes negative ads (even though they work) and will vent its displeasure against any candidate appearing in his or her own negative ad.

4. Payment. Broadcast stations would be required to make this time available free of charge to all Presidential candidates, in exchange for their free use of public frequencies and in lieu of a spectrum fee. (As additional options, broadcasters could be given a tax deduction for the fair market value of the time they are required to relinquish, or the costs of this time could be offset against the value of their spectrum fee.) A free time requirement would not violate broadcaster First Amendment speech interests under current Supreme Court decisions.²

5. Campaign Financing. The basic existing system of campaign financing for Presidential elections—contribution limits, expenditure ceilings and public matching funds in the primary election, and no private contributions but expenditure ceilings and total public financing in the general election—would remain in place. The provision of free broadcast time would allow candidates to spend public financing funds on other forms of campaign communications. In addition, a number of improvements should be considered.³

6. New Sources of Public Financing for Primary Campaigns. The current primary election contribution limits of \$1,000 for individual contributions (with a cap of \$25,000 in total contributions) and \$5,000 for PAC contributions would also be retained. However, contributors wishing to make contributions *over the lower limits* in the primary election—e.g., to give up to \$5,000 per candidate for individuals and up to \$10,000 per candidate for PACs—would be allowed to do so only pursuant to an important condition: that 50% of the excess amount of their larger contributions over the lower limits would go into a special fund to be divided equally between both candidates to promote candidate dialogue and improved public information.⁴ Candidates could use

² In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), for example, the Supreme Court held that broadcasters can be compelled to share a portion of their channel space with other users if that sharing serves a broader “public interest.” See *CBS v. FCC*, 483 U.S. 367 (1981). *Miami Herald v. Tornillio*, 418 U.S. 241 (1973), applied to newspapers and rested substantially upon the “chilling effect” of a rebuttal requirement, which is absent under this proposal. Conceptually, the broadcaster would be viewed as having been licensed to control the entire broadcast day *except for* a few hours every four years which would be withheld for public use. (See separate paper by Westen, *Thinking About Affirmative Broadcast Regulation and the First Amendment*.)

³ These improvements should include raising the expenditure ceilings by 25%; lowering postal rates for candidates; eliminating “soft money” loopholes; eliminating “bundling” by PACs and other organizations; imposing aggregate contribution limits on all PAC contributions (e.g., a candidate could receive no more than 20% of all his contributions from PACs); limiting spending by wealthy candidates; and restraining independent spending by corporate and labor PACs. The last two would require a modification of the Supreme Court’s overly restrictive doctrines in *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴ Thus, an individual contributor could give a Presidential primary candidate a normal contribution of up to \$1,000, all of which would go directly to the candidate. If the contributor chose to exercise his or her option to give a candidate a special contribution of \$5,000, then the first \$1,000 would go directly to the candidate as before; 50% of the difference between the \$1,000 and \$5,000 would also go to the candidate (\$2,000); and the other 50% of the difference between the \$3,000 and \$5,000 would be placed in a fund to be divided equally between the candidates to finance their debate (\$1,000 each). In effect,

this additional money to pay for direct mail contacts with voters, as well as other informational primary election activities (such as candidate debates, paid political advertising and get-out-the-vote efforts). Because such contributions would be voluntary and deemed an exception to the normal lower contribution limits, they should pass constitutional muster.⁵

7. Restrictions on Purchase of Other Broadcast Time. Candidate purchases of additional television and radio time would be prohibited. (As an alternative, purchases of broadcast time could be limited to no more than a total of one additional hour per station during the month before the election.)

8. Equal Time and Other Political Regulations. The equal opportunities doctrine (Section 315 of the Communications Act) would be suspended for the general election but remain in the primary election. The other provisions of Section 315 (e.g., lowest unit rate, no censorship) would also remain, as would the “reasonable access” provision (Section 312(a)(7)) of the Communications Act. The fairness doctrine with its *Cullman* corollary would be applied to *paid* broadcasting time by Presidential candidates during the primary election, with candidates receiving free time when they were unable to pay for at least one spot for every three of their opponent’s spots.

9. Minority Party Candidates. Minority party candidates receiving between 5% and 20% of the vote in the prior election would receive general election media time and financial support in proportion to their vote received. Candidates receiving over 20% of the vote in the last election would be treated like majority party candidates.

Senate and Congressional Races

1. Broadcast Time. In exchange for Senatorial and Congressional candidates’ voluntary acceptance of expenditure ceilings and public financing (see below), each national political party would receive a total of 100 hours of additional free air time (or an average of two hours on every television and radio station and cable system per state) to use to promote their Senate and Congressional candidacies in the general elections. The political parties would have the discretion to obtain this time in minimum lengths of two minutes and maximum lengths of a half-hour. The national parties could not, however, acquire less than one hour, or more than three hours, from any station per state. This proposal would guarantee all candidates in smaller states, or in states with non-competitive races, at least one hour of time in the aggregate to

therefore, a \$5,000 individual contribution would net the direct recipient \$4,000 and his or her opponent \$1,000.

⁵ Contributors not wishing to give any of their money to opposing candidates would have to keep their contributions under the standard \$1,000 limit. Contributors wishing to give their candidates more under the special higher contribution limit would be deemed voluntarily to have consented to have a portion of their contribution dedicated to a “debate fund” to make possible a dialogue between the candidates.

communicate with voters, but it would still allow the national parties to focus their resources (up to three hours) on the more competitive or important races.

A national party might decide, for example, that races in California and Wyoming were particularly important (or competitive) in one year, but that races in New York and Alaska were less so. It might therefore give its California and Wyoming candidates a total of three hours of time per station and its New York and Alaska candidates only one hour. In addition, the parties could concentrate their time (up to three hours) in communities with more candidates or with important races. This proposal would prevent individual stations from being overwhelmed with requests for time, yet not require candidates to take time who did not need it.

2. Carriage. The national political parties would determine how to use the time allocated to them for each station. Time would only be available to them during the 60 days before the election. An average rate of two hours per station spread over 60 days would provide each party with an average of two minutes per day per station to allocate for all its Senate and Congressional candidates combined. Since Congressional candidates, particularly in larger urban areas with many districts such as Los Angeles, do not usually purchase television time, most of the time acquired in these urban areas would be devoted to senatorial races, party-wide messages (promoting all Republican or Democratic candidates, for example) or, in rare instances, individual but important and closely contested Congressional races. Parties would have the flexibility to acquire, say, only one hour of time in rural areas with fewer candidates, and up to three hours in urban areas with numerous candidates.

3. Format. Candidates would have to appear personally in at least 80% of each program or spot.

4. Payment. Stations would be required to make this time available free of charge to all candidates. (Tax deductions or spectrum fee offsets could be considered.)

5. Campaign Financing. A system of public financing (either total or matching) and expenditure ceilings would be adopted for all Senate and Congressional primary and general election candidates. Improvements to the Presidential system of campaign financing (e.g., limits on “soft money” as suggested above) would be applied to Senate and Congressional races as well. Because candidates would receive free media time, they would not need as much public financing, and the cost of Congressional campaign finance reforms would be mitigated somewhat.

6. New Sources of Public Financing. Current contribution limits should be maintained, but contributors wishing to give more (see above) would have to agree that 50% of the excess amounts over the lower original limits would be divided equally among both candidates. These moneys could be used only for speech-related purposes in the primaries (debates, ads, direct mail, etc.).

7. Restrictions on Purchase of Other Broadcast Time. Purchase of additional radio and television time in the general election would be limited, although not

prohibited (since candidates should have some freedom, in cases of disagreement with their national parties, to acquire supplemental amounts of time). Candidates, for example, might be able to purchase no more than the total amount of time allocated by their national political parties to their state, or no more than a specified amount of time (e.g., a half hour per election) in the primary or general elections.

8. Equal Time and Other Political Regulations. As described above, the equal opportunities portion of Section 315 would be repealed for time acquired through the national political parties but retained for time purchased individually by candidates. The fairness doctrine would be applied to paid political appearances, so that any candidate unable to purchase one spot for every three of his opponent's would receive compensatory free broadcast time.

State and Local Candidates

1. General Approach. Most states have adopted various campaign finance regulations, but they are federally preempted from providing candidates with access to broadcast time. States have thus been unable to create coordinated reform packages that include both campaign financing and media solutions. Congress should provide states with limited exemptions from the federal preemption on their regulation of broadcast time, allowing any state which adopts campaign finance reform packages within certain parameters (including adequate public financing and reasonable expenditure and contribution limits) to qualify their political parties to obtain limited amounts of free airtime for candidates. (Interestingly, states might now be able to require cable television systems within their borders to provide candidates with free time over governmental access channels, although to date they have failed to explore this option.)

2 Broadcast Time. Each political party would receive up to two hours on each television or radio station in the state during the 60 day period before the general election. The time would be available in minimum lengths of two minutes and maximum lengths of a half-hour. The state political parties could allocate this time among statewide, legislative or even local candidates, according to the parties' electoral priorities. (Although many local candidates run in non-partisan elections, they are often informally aligned with specific parties; in any event, parties could support local candidates whose views most closely matched their own.)

3. Carriage. The parties and their candidates would select the desired time periods.

4. Format. Candidates would have to appear personally in at least 80% of each program or spot.

5. Payment. Broadcasters would be required to make this time available free. (Tax deductions for the fair market value of this time of spectrum fee offsets could be considered.)

6. New Sources of Public Financing. States with a basic contribution limit would be allowed to adopt a second, higher contribution limit and provide candidates with half of the difference between the higher contribution and the lower limit (see above). These funds could be used to purchase media including broadcast and direct mail.

7. Equal Time and Other Regulations. The equal opportunities provision of the equal time doctrine would be suspended for time acquired under these new provisions by the state political parties, but the fairness doctrine would be applied to all political “uses” of broadcast time. Candidates would therefore receive free spots if their opponent acquired more than three times the time that they did.

Ballot Initiative Campaigns

1. General Problems. Ballot initiatives are used in about half the states and in the District of Columbia, and their use is increasing.⁶ Yet ballot initiatives must confront a number of informational obstacles. First, the Supreme Court has ruled that limits cannot be placed on either contributions to, or expenditures by, ballot initiative committees. This has allowed large financial interests to swamp some initiative campaigns with one-sided spending (sometimes at a ratio of more than 20-to-1).⁷ Second, the Supreme Court has struck down limits on the use of paid signature gatherers, thus further aggregating the impact of financial disparities. Third, Congress has not required broadcast stations to sell ballot measure campaigns airtime at the “lowest unit rate,” although it has made this rate available to political candidates. Finally, the FCC has repealed the fairness doctrine for ballot measures, thus leaving voters often exposed to one-sided barrages of paid commercials for or against proposed laws which, once approved, may not be amended for decades.

Ballot initiative campaigns are often funded in grossly disproportionate ways, with one side frequently receiving financial support from corporate, labor or business interests and the other side forced to scramble for small individual contributions.⁸ Moreover, ballot initiative committees must pay the highest rates for airtime, and stations are not required to balance one-sided ad campaigns with free response time under the fairness doctrine.

⁶ Between 1900 and 1980, the average number of initiatives reaching the ballot in all the states remained roughly constant. In the 1980s, this number jumped 400%. In many states, with California still in the lead, major state environmental, fiscal and governmental policies are increasingly resolved at the ballot box and not in state legislatures. The growth of the Internet can be expected to accelerate this trend, allowing voters to circulate, quality, debate and ultimately vote upon these measures from their homes or offices via computers and modems.

⁷ In California’s twenty highest spending recent ballot initiative campaigns, two-thirds of all the money raised came in contributions of \$100,000 or more, and one-third of all the money raised came in contributions of \$1 million or more.

⁸ During the 1988 California Proposition 99 campaign for increased cigarette taxes, for example, the cigarette industry contributed \$18 million for the “No” side, while anti-smoking forces raised less than \$2 million for the “Yes” side.)

2. Lowest Unit Rate. Congress should apply the lowest unit rate provision of Section 315 to ballot initiatives as well as candidates. There seems no apparent policy reason why ballot measure committees should be forced to spend many times more on political spots than candidates. Because ballot initiatives, once adopted, immediately become law and frequently cannot be amended even with a unanimous vote of the legislative body, the argument for reduced-rate media time to discuss the pros and cons of such measures seems even stronger than in candidate campaigns.

3. Fairness Doctrine. Congress or the FCC should reinstate the fairness doctrine for all ballot measure campaigns. In the 1988 general election in California, for example, when the FCC still applied the fairness doctrine to ballot measures, insurance companies spent over \$80 million to promote a series of ballot initiatives in their favor. A competing measure (Proposition 103) was qualified by a coalition of public interest organizations. Without the fairness doctrine, Proposition 103 would have been deprived of any semblance of informational balance in the campaign; with it, voters were exposed to all views. As a result, they rejected the four insurance industry sponsored measures (some by close votes) and chose the public measure instead.

Some Concluding Points

The need for an informed electorate applies to all levels of politics—federal, state and local, both candidates and ballot measures. Suggested reforms must be applicable to all campaigns at these levels.

Although these proposed reforms place a financial and programming burden of providing free time on the broadcast media, those burdens are comparatively small. If the proposed reforms are adopted for President, Senate, Congress and state and local offices, broadcast stations will be obliged to provide an average of up to 14 hours of free time to candidates of both parties once every four years during Presidential elections and another nine hours during the off-year Congressional and state elections.⁹ This amounts to a total of 23 hours of time over a four year period—under six hours a year, or 0.0008 of the average broadcaster's time.¹⁰

In a Presidential election year, assuming that the 14 hours of time is allocated during the 60 days before the general election, each station would be required to make available an average of about 14 minutes of time a day for all candidates and ballot measures. In an off-year, they would make available about nine minutes a day.

⁹ This 23 hour total includes, every four years, a total of 5 hours of time for two Presidential candidates, an average of 4 hours for Senate and Congressional candidates (2 hours for each national party). 4 hours for state and local candidates (2 hours for each state party) and perhaps up to 1 hour for ballot measure rebuttals under the fairness doctrine; in addition, the national and state political parties would receive up to 8 hours for off-year elections and, presumably, stations in some states might also incur 1 additional hour of fairness doctrine rebuttal time for off-year ballot measure campaigns.

¹⁰ This assumes the average broadcast station is on the air 20 hours a day, 365 days a year.

Stations pay the government relatively little for the right to operate on scarce public spectrum space. By comparison, anyone cutting timber or drilling for oil on publicly owned lands would pay a significant fee based on the value of that right. To preserve and enhance electoral democracy in this country, and to compensate the public for broadcaster use of valuable spectrum, broadcasters should be asked to do no less.