

The Case for Free Air Time
**A BROADCAST SPECTRUM FEE
 FOR CAMPAIGN FINANCE REFORM**

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This issue brief summarizes a longer working paper with the same title. For a copy, please visit the Public Assets Program page at www.newamerica.net or email sherman@newamerica.net.

In our democracy, speech is free but communication is expensive—and never more so than during the campaign season. As the cost of political communication keeps rising, the competitive playing field of campaigns keeps tilting toward candidates who are wealthy or well-financed. In races for the U.S. House of Representatives in 2000, the typical winner outspent the typical loser by nearly three to one during the campaign and won in a landslide.¹ In our gilded age of politics, if you're a challenger who can't write a big check to your local television station to pay for a nightly bombardment of ads, you'll still have your freedom of speech. You just won't have the ability to be heard, much less elected.

The recently enacted Bipartisan Campaign Reform Act of 2002 (BCRA), commonly known as McCain-Feingold, is the most important effort by Congress in a generation to confront this dilemma. But the main focus of BCRA is to reduce the supply of big money; it will do nothing to reduce the skyrocketing demand. Nor will it ensure that adequate resources are available for candidates, including challengers, to get their messages across to voters in competitive elections around the country.

For this, we need a second round of reform. But in seeking to level the playing field, we must be mindful of the U.S. Supreme Court's admonition in its 1976 *Buckley v. Valeo* decision that restricting the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. Rather than restrict speech, we should expand speech. Rather than build ceilings, we should build floors. This approach will not guarantee absolute equality in the volume of speech enjoyed by rival candidates. But it *will* have a powerful leveling effect. For, as political science research makes clear, the most effective way to make campaigns more competitive is to ensure that the less well-financed candidate at least has the seed resources to get a message out.

The best way to build such a floor is to create a system of free air time on broadcast television, as is done in virtually all of the world's other democracies. The broadcast airwaves are not only the most important communications

medium for politics and democracy, they are also a publicly owned asset—like the oceans, the atmosphere and the national forests. Indeed, the airwaves are the most valuable resource of the Information Age, a core ingredient for a variety of emerging, innovative technologies. But broadcasters, who earn huge profits from this public resource, pay the public nothing in return for its use. It is time for the public to reclaim a share of the airwaves we collectively own to strengthen our democracy.

To best achieve this goal, a free air time system should:

1) require television and radio stations to devote a reasonable amount of air time during the campaign season to issue-based candidate forums such as debates, interviews, and town hall meetings, and 2) require stations to pay a small user fee for the airwaves to provide qualifying candidates and parties with vouchers to run a reasonable number of free ads in the period before an election.

These requirements could be imposed on the broadcast industry as a reasonable part of the seven-decade-old public interest obligation broadcasters have pledged to fulfill in return for the free use of the increasingly valuable public airwaves. Or they could emerge as part of a new compact between the public and commercial licensees that better fits a 21st century concept of how best to allocate the airwaves.

BROADCASTERS AND THE PUBLIC INTEREST

For 75 years, radio and then television broadcasters have had a compact with the federal government: They receive scarce and extraordinarily valuable exclusive space on the public asset of the airwaves—more technically described as the electromagnetic spectrum—in return for obligations to act as “public trustees” that use the airwaves to enhance the public interest. However, there are few occasions where civic, educational and other public interest programming on commercial stations is evident.

The financial value of this compact to the industry has grown astronomically. In 2001, a leading Wall Street analyst estimated that if the airwaves used by the

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broadcasters were sold at auction—as other portions of the spectrum have been sold to cellular phone companies and others—it would bring in a staggering \$367 billion to the public treasury.² Not only do broadcasters continue to pay nothing for access to the airwaves, but Congress and the courts have continued to confer new benefits on the industry to ensure that the “public trustee” model remains viable in a world brimming with new technologies.³ In 1992, for example, Congress passed a law requiring that cable operators must carry all the programming of the local broadcast stations in their geographic area.

In 1996, the broadcast lobby convinced Congress to loan all television license holders an additional six megahertz (MHz) of spectrum in order to facilitate the industry’s transition to digital technology. Sen. John McCain (R-AZ) called this new grant “one of the greatest scams in American history”; then-Senate Majority Leader Bob Dole called it a “giant corporate welfare program”; and William Safire of *The New York Times* wrote that it was “a rip-off on a scale vaster than dreamed of by yesteryear’s robber barons.” But Congress went ahead, once again basing the grant on the broadcasters’ public trustee status.

Six years later, most of the additional spectrum space loaned to broadcasters lies fallow because high definition television sets are still priced far beyond the reach of the typical consumer. Meantime, wireless services have paid tens of billions of dollars into the public treasury in return for their airwaves; satellite television providers have had to submit to government regulation and provide space for other public purposes; and a severe spectrum shortage has hobbled the development of the wireless Internet. Now broadcasters are lobbying the federal government for permission to sell to other commercial users—presumably for tens of billions of dollars—those excess spectrum rights the government gave them for free.⁴ It is time to step back from the antiquated broadcast compact and reconsider its terms.

The Bush Administration has taken a step in that direction; its 2003 budget includes several billion dollars in projected rent from broadcasters for continued occupation of both the analog and digital allocations of spectrum after 2006. The Administration’s proposal is a way to encourage the rapid transition of broadcast television to a digital format, and the timely return of the analog spectrum for auction. But the plan might also serve as a precursor of a broader policy change: The government could start charging broadcasters annual rent for the licensed use of spectrum, instead of giving it free in return for vague and diffuse public interest responsibilities.

Broadcasters would continue to have exclusive access to valuable public spectrum, to use as they see fit—but without the artificial constraints of public interest obligations. In return, they would pay a reasonable rent, with the proceeds going to make sure that the public interest is served on television and radio. That rent may come in the form of dollars—or partially in the form of in-kind contributions, including free time for political discourse.

Money and election campaigns appear to be in a perversely symbiotic relationship for broadcasters: The less “free” news coverage of elections they offer, the more money stations make selling political ads to candidates who need to reach the big audience that only broadcast delivers.

Profiteering on Campaigns...

“Today’s political campaigns function as collection agencies for broadcasters,” former Sen. Bill Bradley quipped as he sought his party’s presidential nomination in 2000. “You simply transfer money from contributors to television stations.” During that campaign year, television stations took in an estimated \$1 billion of the estimated \$4 billion in overall campaign spending by candidates, parties and issue groups at all levels of politics—federal, state and local.

Television’s haul from politics has been rising at breakneck pace. Between 1980 and 2000, the amount of money spent on political ads more than quadrupled, even after adjusting for inflation. This arms race of political ad spending has had a predictable impact on the unit cost of air time during the height of the campaign season: It has soared. The Center for the Study of Elections and Democracy at Brigham Young University looked at 17 media markets across the country in 2000 where there were competitive congressional and senatorial races and found that the average cost of a 30-second political spot tripled from the end of August through the end of October. “The rates are becoming extortionist,” James Jordan, director of the Democratic Senatorial Campaign Committee, said during the 2000 campaign. “They can charge the moon and get it,” lamented David Keating, executive director of the Club for Growth, a group that ran political spots.⁵

This gouging by stations occurred despite a law Congress passed in 1971 that was designed to insulate candidates from these classic supply-and-demand pressures. Known as the “lowest unit charge” law, it requires that television stations, as a condition of receiving free licenses to use the public airwaves, must offer candidates the same low rates they give their high volume, year-round commercial advertisers. But the law was poorly drafted and a key loophole has allowed broadcasters to evade its spirit. Even if it were revised, the lowest unit charge law will always be more bandage than cure. It is essentially a system of price controls, and over time, such mechanisms invariably fall prey to evasion. For a more market-friendly and sustainable way to lower the cost of campaign communication on the broadcast airwaves, the system of vouchers for free political ads described later in this paper would work far better.

...While Tuning Out on Coverage

The trouble at the intersection of television, money and politics isn’t limited to the rising cost of ads. The other problem is the declining amount of time that broadcast television devotes to substantive coverage of campaigns.

These two problems feed off one another. The less exposure candidates receive from “free media” coverage, the more they must rely on paid ads to reach the broad audience that only television delivers.

The broadcast industry’s retreat from substantive campaign coverage has affected the national networks as well as local stations, and it has been exhaustively documented over the years by scholars and watchdog groups. For example, the three national network nightly newscasts devoted 28 percent less time to coverage of the 2000 campaign than they did to the 1988 campaign, the last open-seat contest for the presidency.⁶ Nearly three-quarters of the stories that did air focused on the horserace rather than on the issues.⁷ Convention coverage fell by two-thirds from 1988. Debate coverage also fell when – for the first time ever – two of the four national networks (Fox and NBC) aired sports and entertainment instead all of the presidential debates.⁸

In the early decades of television, the national network newscasts provided substantive political coverage not just out of a commitment to public service, but as a badge of journalistic excellence. Since then campaigns have lost both their novelty and lure as television events, and broadcasters have lost substantial slices of their audience to cable and the Internet. Rather than resist these dynamics, broadcasters have given in to them—and in the process made them stronger. They have offered up what amounts to a Let-’Em-Eat-Cable defense for their abandonment of political coverage. Veteran ABC correspondent Sam Donaldson ruefully acknowledged during the 2000 primaries that his network’s nightly newscasts had “simply forfeited the field” of campaign coverage to CNN, MSNBC and the Fox News Channel. “For us to run long programs in prime time as a public service doesn’t make a lot of sense anymore to our bosses,” he said.

Many leading broadcast journalists point an accusatory finger at their industry’s fixation on profits. Network-affiliated local television stations across the country typically run operating profit margins of 30, 40 and even 50 percent annually, yet these high margins have served mainly to whet the appetite for more of the same in the boardrooms of the corporations that own them.⁹ “Ratings are about all that most people in television give a damn about,” CBS anchorman Dan Rather said in 1998. “... [Business pressures] overwhelm journalistic instincts.”

The best remedy is to enact free time legislation that would require broadcasters to air forums that would open up the discourse of campaigns to something more nourishing than attack ads, sound-bites and synthetic spin. Such forums may not transform campaigns overnight, but at least they’d create a healthier set of incentives than now exists. Broadcasters would want to attract viewers and candidates would want to win votes—so they’d both have a stake in finding ways to make good television. It may seem counterintuitive to try to revive campaign discourse on the very medium that’s contributed so much to its demise. But any real hope for reform will have to start there—for that’s where the most important political conversation still takes place.

A FREE AIR TIME PROPOSAL

Any free air time system should have six related—but distinct—objectives. First, it should reduce the cost of candidate communication to voters. Second, it should increase the flow of political information on the broadcast media. Third, it should strengthen, not weaken, political parties. Fourth, it should strengthen, not weaken, political competition—it should not be yet another incumbent protection mechanism. Fifth, it should not be “welfare for politicians,” simple grants of time given to all candidates without any effort in return. Sixth, as important as any other goal, it must be workable—flexible enough to fit in a system where different districts and states have different television markets and costs, and where candidates may have very different communications needs. What works in South Dakota, where there are a few clear media markets and one congressional seat, may not work at all in the New York metropolitan area, covering two or three dozen congressional districts across three states. What follows is an outline of one workable and flexible approach to achieve these goals.

1. A VOUCHER SYSTEM FOR FREE POLITICAL ADS

The free air time system would provide vouchers for a reasonable amount of free advertising time to candidates and to political parties. The only candidates who would receive direct grants of vouchers would be those running for U.S. House and Senate seats who had first raised a threshold amount of contributions in small donations. In addition, each of the two major political parties would receive large block grants of broadcast vouchers in each election cycle—which the parties could use to air their own ads, or pass along for use by any general election candidate the party supported for any local, state or federal office. Minor parties that met qualifying thresholds would receive smaller blocks of free air time vouchers.

The voucher system would be financed by a spectrum usage fee amounting to roughly one half of one percent per year on the gross annual revenues of the nation’s 1,300 local television station licensees and 13,000 local radio station licensees, either as a new form of public interest obligation, or as a portion of a spectrum rental fee in lieu of those obligations. Based on 2001 advertising revenues alone, a 0.5 percent spectrum usage fee could finance broadcast vouchers with a market value of at least \$640 million per two-year election cycle.¹⁰

2. A VOTERS’ TIME REQUIREMENT

All television and radio licensees would be required to air a minimum of two hours a week of candidate discussion of issues in the four to six weeks preceding every election. At least half of these segments would have to be aired in prime time or drive time; no segment that aired between midnight and 7 a.m. would count toward meeting this obligation. The formats would consist of debates, interviews, candidate statements, town hall meetings, mini-debates or any other

similar news or public affairs programming of a broadcaster's choosing. Within these broad guidelines, all decisions about when the segments should air, how long they should be, what races they should focus on and what formats should be used would rest with local stations.

Taken together, these two provisions would make political campaigns more informative and more competitive. They would be especially helpful to challengers, who often struggle to raise money and as a result have difficulty being heard by the broad public. By removing this barrier to entry, these provisions would open political campaigns up to the vitality that comes from fresh ideas, new candidates, and greater competition. But most of all, they would be helpful to the public. During the campaign season, citizens would receive a far richer diet of political information than they now get from television and radio. This would place them in a better position to cast an informed vote.

Such a free air time system would not place limits on how much additional broadcast advertising a candidate could purchase. Some would argue that the absence of such a limit fatally detracts from the ability of the proposal to reduce the role of money in politics. There would be nothing, these critics would point out, to prevent well-financed candidates from airing a barrage of paid ads on top of the free ads they would air with their vouchers. Money would continue to dictate how loudly a candidate could speak.

An alternative view, however, is that by at least providing a floor of communication resources to candidates, this approach would help level the playing field. Research on campaign spending shows that the most important variable in determining whether a race will be competitive is not how much money the better financed candidate spends, but how much money the less well financed candidate spends. If that candidate, typically a challenger, has enough resources to get a hearing, he or she is in a much better position to make a strong race.¹¹ Moreover, the "voters' time" provision of this free air time system would also provide opportunities for many more candidates, regardless of the size of their campaign war chests, to get their message out over the airwaves in debates, issue forums, town hall meetings and other formats.

FREE AIR TIME IS CONSTITUTIONAL

The broadcast industry maintains that such a measure would violate its First Amendment rights to free speech and its Fifth Amendment protections against a "takings" of its property.¹² But more than 70 years of legislation, regulation and court rulings argue strongly against its position. In the *Red Lion* ruling in 1969, the key Court doctrine on broadcasting and the First Amendment, the Supreme Court held that when the government regulates access to the spectrum, it must balance the First Amendment rights of broadcasters against the First Amendment rights of the public, and that when these rights come into conflict, the rights of the public are "paramount." The Court has reinforced that doctrine on several occasions.

Over the years, the broadcast industry has mounted multiple challenges to the "scarcity rationale" for regulation, arguing that in an era of proliferating information technologies, what broadcasters provide is neither scarce nor unique. But the court has taken the view that scarcity persists because there are still many more people who want to broadcast over the airwaves than there are available frequencies. As for the Fifth Amendment "takings" argument, the Communications Act is clear and the courts have long held that broadcasters have no "property interest" as a result of their licenses to use the airwaves, and thus there could be no takings.¹³

Conclusion

In the land of free speech, we have permitted a system of "paid speech" to take hold during political campaigns on the closest thing we have to a public square—our broadcast airwaves. This not only restricts access to our political process, it's also poor stewardship of a precious public asset. For decades we've permitted the broadcast industry to profiteer on our airwaves at the expense of our democracy. It's a wonderful arrangement for the broadcasters, who reap windfall profits from political campaigns. It's a good system for incumbents, who prosper in the big-dollar, high-ante political culture of paid speech. But it's a lousy deal for the rest of us. It is time for the public to reclaim a share of the airwaves we collectively own to strengthen our democracy.

Free air time is not a panacea; it will not drive money out of politics altogether. But by providing all credible candidates access to the broadcast media regardless of their financial circumstances, it would open up the political process to those currently priced out of the market. And by creating forums that allow for a free exchange of ideas among competing candidates, it would reduce the relative importance of moneyed special interests. The plan described here would provide citizens with more choice, more information, and more power.

¹ Center for Voting and Democracy, *Dubious Democracy 2001*, 2001.

² Tom Wolzien, "Whose Bandwidth is it Anyway?" Speech, National Association of Broadcasters Futures Summit, April 2001.

³ See J.H. Snider, "The Myth of 'Free TV'," Working Paper, New America Foundation, June 2002.

⁴ Michael Calabrese, "Battle Over the Airwaves: Principles for Spectrum Policy Reform," Working Paper, New America Foundation, September 2001.

⁵ Dan O'Connor of WSYT-TV, *Electronic Media*, June 14, 1999.

⁶ Center for Media and Public Affairs, "Campaign 2000 Final," *Media Monitor*, November/December 2000.

⁷ *Ibid.*

⁸ Alliance for Better Campaigns, "Networks, Parties Trade Charges Over Plunge in Convention Coverage," *The Political Standard*, August 2000.

⁹ Common Cause, *Channeling Influence: The Broadcast Industry and the \$70 Billion Free Ride*, April 1997.

¹⁰ In 2000, the broadcast industry took in \$64 billion from advertising revenues. BIA Financial Network, Inc., *State of the Television Industry: Television Revenues 2000 & Beyond*, 2001.

¹¹ Committee for Economic Development, *Investing in the People's Business: A Business Proposal for Campaign Finance Reform*, Figure 3, 1999. Most research shows that \$250,000 for a House race is the threshold level at which a challenger starts to become a viable candidate.

¹² To read the constitutional arguments presented by the National Association of Broadcasters, go to http://gulfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrech_v2.htm

¹³ For more on these constitutional issues, see Alliance for Better Campaigns, *The Case for Free Air Time*, 2002.