



The Fourth Branch of Government: The Role of Interest Groups, the Media, and Political Advertisements in Contemporary Health Policy Debates

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Dissertation Advisor: Professor Robert Blendon

Aaron Joseph Rabinowitz

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Abstract

The first part of this dissertation explores whether interest group-sponsored political advertising campaigns influence how journalists frame health policy debates. The paper employs propensity score matching techniques, media content analysis and a modified version of the Herfindahl-Hirschman Index to discern whether a prodigious and concentrated advertising campaign that aired during the health care reform debate under President Obama influenced newspaper coverage of the Affordable Care Act in markets that were exposed to the advertisements.

The second part of the dissertation investigates public attitudes toward the various groups in the health care industry. It leverages data from an extensive public opinion survey conducted during the health care reform debate under President Obama, and employs survey weighted ordinal logistic regression models to understand public trust and confidence in a broad spectrum of interest groups, ranging from the American Medical Association to Blue Cross/Blue Shield to the U.S. Chamber of Commerce. The findings are particularly important and timely as the implementation battles surrounding the Affordable Care Act begin because citizens frequently take cues from interest group leaders to make sense of the political world, and public opinion frequently depends on how elites frame a particular issue.

The final portion of the dissertation compares and evaluates several competing policy options designed to promote viewpoint diversity in extant policy debates. Several evaluative criteria are developed and applied to existing regulatory approaches to improving viewpoint diversity, and a novel approach is offered to better serve this ideal. Specifically, I propose a

"marketplace of ideas tax" that would be levied on all political advertisements to endow a "marketplace of ideas trust fund," which would then be used to subsidize speech from underrepresented viewpoints. This approach leverages insights garnered from models of political learning and social science research concerning the role of political advertisements in contemporary health policy debates.

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Dedication

This dissertation is dedicated to my wife, Karen.

Chapter 1. Media Framing, Political Advertising, and the Affordable Care Act

Research on framing, priming and agenda setting has established that the nature of media coverage and the framing of issues in the news can powerfully shape policy debates and public opinion formation. Previous research has generally provided much less insight, however, into the ability of organized interests and political actors to successfully promote their preferred issue frames in a dynamic political environment. Moreover, the proliferation of interest groups, the prevalence of multimillion-dollar political advertising campaigns, and the current battles concerning implementation of the Patient Protection and Affordable Care Act make this a particularly topical and relevant avenue of research.

The political advertising campaigns that were sponsored to influence the outcome of the debate surrounding the Affordable Care Act provide a useful natural experiment to discern whether interest groups are able to affect the tenor and framing of health policy debates. In December of 2009, a coalition of national medical societies launched a multi-state advertising campaign in opposition to the Affordable Care Act (PR Newswire 2009). The advertisements aired in Arkansas, Connecticut, the District of Columbia, Maine, and Nebraska, and were designed to convince voters that the legislation would inappropriately expand the role of the federal government and jeopardize patient access to the physician of their choice. Consequently, a content analysis of newspaper coverage in these markets can be compared to coverage in a comparison group of markets that were not directly exposed to the advocacy campaigns to determine whether interest groups can influence journalistic framing through political advertisements.

Literature Review

The Role of the Media

Public opinion research and analyses of the political behavior of the American voter frequently depict the electorate as disinterested and uninformed. Consequently, some worry that such an electorate will be more susceptible to manipulation and demagoguery, producing a political climate in which elite cunning predominates and public opinion is rendered a dependent variable in the political process. Writing over fifty years ago, Joseph Schumpeter argued against the relative autonomy of public opinion and decried that organized and financially advantaged interests would capture the public will such that it had “little, if any, independent basis” (1950, 263-264). Writing thirty years ago, MJ Edelman (1977) asserted that interest groups use their influence and the mass media to shape opinions and establish specific frames of reference in public debates. The proliferation of interest groups and the advent of expert political advertising campaigns, such as the campaigns that surrounded the Clinton health care reform debate, the Patients’ Bill of Rights legislation, and the Patient Protection and Affordable Care Act, certainly make these concerns highly relevant to contemporary political discourse. In a political landscape that is increasingly characterized by prodigious advertising expenditures, it is important to understand how and when political advertisements can shape the contours of political debates.

Modern political communication research has discarded the early hypodermic model of public opinion formation and it is generally accepted that political elites cannot manufacture public attitudes in accordance with their preferences. Nonetheless, the public may be susceptible to more subtle processes of influence due to its significant dependence on the media for information. The substantial literature on agenda setting and the role of the media suggests that although the media rarely tell the public what to think, they do tell the public what to think *about* (Cohen 1963). There is a strong correlation, for example, between

the significance the media place on specific issues and the importance the public attributes to them (McCombs and Shaw 1972; Iyengar and Kinder 1987).

In addition, the nature of media coverage and the framing of issues in the news can powerfully shape policy debates (Price, Tewksbury, and Powers 1995). The standards, terms, perspectives, metaphors and visual images used by the media – in short, how an issue is framed in the news – “determine what the public thinks it is becoming informed about, which in turn often determines how people take sides on political issues” (Zaller 1992, 8). Moreover, by highlighting “some aspects of a perceived reality” at the expense of others, a frame can “promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation” (Entman 1993, 52). The framing process is undoubtedly important to both public opinion formation and the outcome of policy debates.

Interest Group Influence

Interest groups engage in face-to-face lobbying and organize public relations, advertising, and grassroots campaigns to frame policy debates and promote their own interests. These groups face important constraints, however, when attempting to frame debates and influence public opinion. For example, the public is frequently exposed to multiple issue frames and problem definitions during political debates, and these competing frames will tend to counteract one another and preclude elites from manipulating citizens through framing (Druckman 2001a). Perhaps more important, “perceived source credibility is a prerequisite for successful framing” (Druckman 2001b, 1054) and the public tends to be uninfluenced by the positions of groups that are deemed to be self-interested. In fact, interest groups often appear to antagonize the public and elicit an unintended backlash against their positions (Page, Shapiro and Dempsey, in Graber 2000). Consequently, interest groups will frequently benefit from trying to influence *media coverage* of policy debates rather than elites or

the public directly because source credibility and news coverage are integral to political learning (Iyengar and Simon 2000; Krosnick and Kinder 1990).

Interest groups can act proactively and strategically to maximize the media's responsiveness to their interpretations and frames by promoting frames that adhere to established media norms, values, and constraints as well as the conventional criteria of newsworthiness (Terkildson et al. 2000). Indeed, previous research indicates that interest group efforts to influence media agendas and frames can affect both the volume and tone of news coverage for a given issue (Scheufele and Tewksbury 2007). In addition, interest groups can sponsor political advertising campaigns, which can themselves become the focal point of policy discussions and can affect the terms that journalists use to discuss policy proposals, the questions journalists ask, and the perspectives they choose to emphasize (Brodie 2001; Rabinowitz 2010). Some estimates suggest that more than \$200 million was spent on political advertising during the health care reform debate under President Barack Obama (Alonso-Zaldivar 2010), and influential groups are also beginning to use paid advertising to shape the major implementation battles surrounding the Affordable Care Act (Sparer 2010).

Despite the volume of interest group activity dedicated to promoting preferred issue definitions and shaping policy debates, interest groups are largely reliant on the media to have their versions of reality inserted into the public discourse (Terkildson et al. 2000). Consequently, the relative autonomy of the media, its own particular biases or framing slants, and the ability of interest groups and political actors to influence the framing process have important implications for the nature of policy debates and political discourse. Previous research has generally provided much less insight into the ability of organized interests and political actors to successfully promote their preferred issue frames than it has on how frames influence public opinion (Callaghan and Schnell 2001). Numerous scholars have asserted that

future research must address this issue systematically to improve our understanding of which factors influence the frames the media apply (Scheufele 1999; Entman 2007).

There is some evidence to suggest that political advertising campaigns can influence how the media frame policy debates. In a content analysis of the Patients' Bill of Rights Debate, Rabinowitz determined that political advertising campaigns can affect the tenor and framing of newspaper coverage of health policy debates (Rabinowitz 2010). Specifically, newspaper coverage was 17 percent less likely to be supportive of managed care reform in states subject to advertising campaigns designed to foment opposition to the Patients' Bill of Rights.¹ Additional research suggests that framing may be a dynamic process with a temporal component (Terkildson et al. 2000; Chong and Druckman 2007). In a content analysis of the abortion debate, for example, Terkildson and her colleagues concluded that the media readily adopted the frames promoted by interest groups in the early years of the abortion debate, but began to increasingly incorporate their own "spin" as the conflict evolved (Terkildson et al. 2000).

Research Questions and Hypotheses

When studying media frames as a dependent variable, a key research question is whether interest group advertising influences journalistic framing of issues. Previous research has suggested that political advertisements can affect the standards, terms and language journalists use to discuss policy proposals as well as the perspectives they choose to emphasize (Rabinowitz 2010; Brodie 2001). Thus, this study tests the following hypothesis:

¹ The study of media framing surrounding the Patients' Bill of Rights debate is different from the current analysis in two important respects. First, the prior study examined media framing in a vastly different public opinion context, and left unanswered the question of whether political advertisements can influence media framing in a more balanced (as opposed to one-sided) political debate. Second, the prior study examined the effect of political advertisements that were aired relatively early in the debate, and left unanswered the question of whether there is a temporal dynamic to media framing. Since intensive media content analysis is necessarily case specific, the current analysis will enrich our understanding of these processes.

Hypothesis: Political advertisements will affect the frames employed in media coverage. Specifically, media coverage in markets exposed to the critical advertising campaign will be less favorable toward the Affordable Care Act.

One of the key contributions that this study makes to the literature is testing this hypothesis in a real world political environment. Previous studies touting the effect of political advertisements have generally focused on whether the ads influenced public opinion (Brodie 2001; Jamieson and Cappella, in Graber, McQuail and Norris 1998). In contrast, this study examines the antecedent question of whether advertising campaigns influence media framing of health policy debates.

Methodology

There are four distinct methodological components to this paper. First, I outline the research design. Second, I explain the data selection methodology. Third, I discuss how media framing is operationalized in this study. Finally, I detail the analytical methods that are used to compare media coverage of the policy debate in the treatment and comparison groups.

Research Design

Media coverage of the Affordable Care Act was compared in a treatment and comparison group to determine whether interest group sponsored advertising campaigns influenced the way journalists framed the issue. A key problem of causal inference is how to estimate treatment effects in observational studies because the estimate obtained by comparing a treatment group with a nonexperimental comparison group could be biased (Dehejia and Wahba 2002). In this study, the treatment group consists of the five states in which the ad campaigns aired in December of 2009. It is possible that the treatment group will differ significantly from the comparison group, however, because the advertising campaigns strategically targeted specific states.

Propensity score matching methods can be used to correct for bias that stems from observable differences between the treatment and comparison groups. In short, propensity score matching entails matching treatment states with the comparison states that are most similar in terms of their observable characteristics.

Three key issues arise when implementing propensity score matching procedures: whether to match with or without replacement, how many comparison units to match to each treated unit, and which matching method to choose. First, this study implements matching with replacement. Under this approach, each treatment state is matched to the nearest comparison state, regardless of whether that state has been previously selected. This approach minimizes the propensity score distance between each comparison state and treatment state, and reduces bias (Dehejia and Wahba 2002). Matching without replacement, moreover, makes the results sensitive to the order in which the treatment states are matched (Rosenbaum 1995). Second, this study matches each treatment state with one comparison state to minimize the propensity score distance between each treatment and comparison pair and to decrease the bias of the estimates (Dehejia and Wahba 2002). Finally, implementing propensity score matching can pose difficulties due to the numerous methods available. To ensure that the results of this study are robust, three matching algorithms are employed.

First, a comparison group is selected using a mahalanobis distance metric. This approach seeks to minimize the statistical distance between the treated state and its comparison state. Statistical distance is measured by

$$d(i,j) = (u - v)^T C^{-1} (u - v)$$

where u and v are values of the matching variables for treatment state i and potential comparator j , and C is the sample covariance matrix of the matching variables from the full set of potential comparison states. Next, nearest neighbor matching is implemented to select the

comparison group a second time. Under this approach, each treatment state is paired with its closest comparison state as measured by the absolute value of the difference between the propensity score of the treatment and comparison state. Finally, caliper matching is used to select the comparison group as well. This approach is similar to nearest neighbor matching, except that it adds a further restriction: each treatment state is still paired with its closest comparison state on the basis of propensity scores, but the propensity score for the comparison state must be within a predefined radius, or caliper. The objective of caliper matching is to avoid poor matches.

The following statewide demographic, health sector, and political variables were used to select the comparison group when implementing the mahalanobis, nearest-neighbor, and caliper matching algorithms.

State Political Ideology: Many conservatives opposed the Affordable Care Act on the grounds that it would expand the role of government and create a new, expensive mandate. In contrast, many liberals favored the legislation as a needed safeguard against rising costs and inequitable insurer activities. Barack Obama's share of the 2008 presidential vote was used as a proxy for state political ideology. *Ceteris paribus*, liberal states should cover the Patients' Bill of Rights debate more favorably than conservative states.

Political Competitiveness: The advertising campaigns were not aired haphazardly. Instead, they targeted key states. While it is unclear whether politically competitive states should cover the legislation more or less favorably, this variable was included as a necessary matching variable. It is operationalized as the differential between Barack Obama and John McCain's share of the 2008 presidential vote.

Physicians Per Capita: The number of doctors per capita is intended to measure the relative strength of physicians in each state. In light of the vacillating position of physicians during the debate, it is unclear whether states with more doctors per capita are expected to cover the legislation more favorably.

Percentage of the Population Over 65: Seniors evinced mixed attitudes toward health care reform. The AARP, for example, steadily supported the reform process. Many public opinion polls, in contrast, revealed that most seniors feared that the legislation would weaken Medicare. Because seniors are generally more politically active and vote more reliably than other segments of the population, the percentage of the population over 65 is included as a useful matching variable.

HMO Penetration: Managed care organizations roundly criticized the Affordable Care Act and several interest groups lobbied extensively against the legislation. *Ceteris paribus*, states with more substantial HMO penetration should provide more negative coverage of the debate.

Infant Mortality Rate: This variable is a crude proxy for the overall quality of health care delivery in each state. States with a significantly higher infant mortality rate might be more amenable to government intervention to improve health care quality. *Ceteris paribus*, media coverage of the bill should be more favorable in states with higher infant mortality rates.

Per Capita Income; Percentage of the Population with a College Degree or More: While it is unclear how per capita income or educational attainment in a particular state might affect media coverage of the debate (e.g., higher incomes and education levels do not obviously dictate more or less favorable coverage of the legislation), these demographic variables are included as controls.

Percentage of the Population Without Health Insurance: One of the key aims of health care reform was to provide health insurance to uninsured individuals. Although the uninsured are an archetypal group that suffers from collective action problems, states with a higher percentage of uninsured individuals should cover the legislation more favorably, *ceteris paribus*.

Data

Media coverage of the Affordable Care Act in the treatment and comparison groups was obtained from LexisNexis Academic and the LexisNexis newspaper archives. The media corpus was selected in three stages. First, the newspaper search was restricted to each of the treatment and comparison markets by selecting statewide news sources such as “Arkansas News Sources” or “Connecticut News Sources” to obtain stories on the Affordable Care Act in specific markets. Second, the query was limited to the period between December 15, 2009 and January 1, 2010. This time frame encompasses a period of intense media attention and interest group activity, including the previously mentioned advertising campaign sponsored by the medical societies.

Finally, because the Affordable Care Act was designed to regulate numerous aspects of the health care landscape, stories that do not explicitly mention the legislation but discuss health care reform are also expected to influence public attitudes toward the bill. Thus, each

newspaper in the five treatment and five comparison states was culled for any stories that contained the search terms “Affordable Care Act,” “health care reform,” or “Obamacare.” This search yielded 349 stories in the treatment group and 184 stories in the comparison group.

Operational Definition of Framing

Despite the abundance of research on agenda and frame setting, previous studies have lacked clear operationalizations of framing (Scheufele 1999). To develop an operational definition, an inventory of frames was developed inductively from media content, public discourse, and a review of the literature (Van Gorp 2007). The author and a research assistant developed the inventory of frames collaboratively to ensure that the coding scheme was robust. An extensive review of media coverage and academic commentary surrounding the Affordable Care Act yielded six predominant frames: (1) partisanship, pork barrel politics and conflict, (2) social justice, (3) the role of the government, (4) mandates, (5) protecting individuals and families, and (6) public opinion.

Analytical Methods

After the framing devices (e.g., word choices, metaphors and visual images - see Gamson and Lasch 1983) that reflected the organizing and overarching media frames were identified, each article was coded by the author. In addition, a research assistant who was blind to the treatment and comparison group assignments read and coded 150 articles at random from the media corpus (the specific coding categories are indicated in Table 4).² To analyze the differences in media coverage across the treatment and comparison groups, a *t*-test was used to test for the significance of the difference between the means of the matched pairs.

² The alpha coefficient for intercoder reliability averaged 0.85.

This study also explores differences in media coverage across the treatment and comparison groups in a second way. Following a recent recommendation by Entman (2007), the national media can be analogized to a marketplace of ideas. This comparison facilitates the use of the Hirschman-Herfindahl Index (HHI), a measure of market concentration used in industrial economics, as a way to capture the aggregate slant or bias in media coverage of a policy debate. The HHI is calculated by summing the squared market share of each firm that competes in the market. For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2,600 ($30^2 + 30^2 + 20^2 + 20^2$). If a market is highly concentrated, the HHI value will be higher. The HHI has a value of 10,000 in the case of a pure monopoly, while it approaches zero in the case of an atomistic market.

The HHI does not permit the analyst to draw conclusions about statistical significance. Thus, it is impossible to say that there is a statistically significant difference between an HHI of 2,000 and an HHI of 1,000. However, the Department of Justice and Federal Trade Commission have developed useful guidelines about how to interpret the HHI.³ A market with an HHI value below 1,000 is generally regarded as unconcentrated. Markets that exhibit an HHI between 1,000 and 1,800 are said to be moderately concentrated. Finally, a market with an HHI exceeding 1,800 is highly concentrated. While the HHI is limited insofar as it does not permit conclusions about statistical significance, distinguishing between markets as unconcentrated, moderately concentrated, and highly concentrated can be quite elucidating.

The application of the HHI to measuring media bias is imperfect, however, because the HHI assumes that each firm produces the same product. News stories and issue frames, in

³ See, for example, <http://www.justice.gov/atr/public/guidelines/hmg.htm>.

contrast, are likely to be quite heterogeneous. Thus, a modified version of the HHI must be used to examine media markets and media bias. If we assume that the “firms” in this market are *advocates for the legislation* (e.g., the White House), *an opposition party* (e.g., conservative legislators or certain medical societies), and a *neutral informer* (by balancing frames favoring each side), an Aggregate News Slant Index (ANSI) can be defined as follows:⁴

$$\text{ANSI} = \{ (\% \text{ share of side with highest share of framing paragraphs})^{2.5} + (\% \text{ share of side with second highest share of framing paragraphs})^2 + (\% \text{ share of side with lowest share of framing paragraphs})^{1.5} \} \times 1/10$$

A higher ANSI score indicates that media coverage is more heavily slanted toward the dominant supplier of information or frames. In the case of a pure monopoly, where all frames support the same side of the political debate, the ANSI will assume a value of 10,000. In contrast, a market that balances frames perfectly between advocates for the legislation, opponents of the legislation, and a neutral informer would assume an ANSI value of 772. Consistent with the interpretation of the HHI, ANSI values below 1,000 reflect an unconcentrated market, values between 1,000 and 1,800 reflect moderate concentration, and values above 1,800 reflect a high degree of concentration.

Results

The results of the various matching procedures used are presented in Table 1.1

Table 1.1: Selection of Comparison Group

Treatment State	Mahalanobis Matching	Nearest-Neighbor Matching	Caliper Matching
Arkansas	Kentucky	Kentucky	Kentucky
Connecticut	New Jersey	New Jersey	New Jersey
DC	Maryland	Maryland	
Maine	Rhode Island	Rhode Island	Rhode Island
Nebraska	North Dakota	North Dakota	North Dakota

⁴ See Entman (2007) pages 167-169 for a more detailed discussion.

These results warrant two important observations. First, the nearest-neighbor and mahalanobis algorithms yielded identical comparison groups. Consequently, we should be very confident that this group represents a valid counterfactual for how media coverage would look in the treatment states absent the political advertising campaign. Second, the caliper algorithm did not identify a suitable comparison state for the District of Columbia. Recall that the objective of caliper matching is to avoid poor matches: each treatment state is paired with its closest comparison state on the basis of propensity scores, but the propensity score for the comparison state must be within a predefined caliper. The caliper algorithm revealed that the propensity scores for Maryland and the District of Columbia were too divergent to satisfy this criterion. In order to preserve the integrity of the study and the validity of the statistical estimators (Dehejia and Wahba 2002), the District of Columbia will be omitted from the treatment group. The comparison group used throughout the remainder of the study is reported in Table 1.2.

Table 1.2: Treatment and Comparison Groups

Treatment State	Comparison State
Arkansas	Kentucky
Connecticut	New Jersey
Maine	Rhode Island
Nebraska	North Dakota

The key assumption underlying natural experiments is that assignment to the treatment and comparison groups is “as-if” random (Dunning 2008), and balance on the observable covariates enables us to attribute differences in newspaper coverage of the political debate in the treatment and comparison group to the presence of interest group advertising. As Table 1.3 demonstrates, each state in the comparison group is comparable to its

counterpart in the treatment group on the basis of income, education, political ideology, and health sector profile. Consequently, coverage of health care reform should be homogeneous in the treatment and comparison groups to the extent that demographic, political, and industry profiles account for content variation.

Table 1.3: Balance on Observable Covariates

Matching Variable	Treatment Group Mean	Comparison Group Mean	<i>P</i> value
Political Ideology ^c	49.7	51.4	0.77
Political Competitiveness ^c	18.6	17.1	0.56
Physicians Per Capita ^a	276	292	0.70
Percent of the Population Over 65 ^a	14.3	13.9	0.50
HMO Penetration ^b	15.3	14.6	0.93
Infant Mortality Rate ^a	6.6	6.1	0.45
Per Capita Income ^a	36,955	37,313	0.94
Percent with a College Degree ^a	26.7	27.8	0.78
Percent Uninsured ^a	12.5	13.4	0.65

Sources: Author's calculations based on data derived from sources as noted

^a U.S. Bureau of the Census 2010

^b Interstudy 2010

^c U.S. Election Atlas, available online at <http://www.uselectionatlas.org/RESULTS/national.php>

As Table 1.4 reveals, newspaper coverage of the Affordable Care Act did not differ significantly across the treatment and comparison groups. Recall that the advertisements sponsored by the specialty medical societies were designed to foment opposition to the Affordable Care Act, and suggested that the legislation would inappropriately expand the role of the federal government.

Table 1.4: Characteristics of Newspaper Coverage in Markets with Differential Coverage to Advertising Campaigns

Coverage Characteristics (by percent)	Comparison Group: No Paid Advertising	Treatment Group: Paid Advertising	Average Treatment Effect
1. Stories that are predominantly supportive of reform	58%	51%	-6.9
2. Stories that are predominantly against reform	42%	49%	6.9
3. Anticipated positive impact of reform			
Extending insurance coverage to the uninsured	34%	35%	0.5
Reducing premiums and/or costs to individuals	26%	34%	7.9*
Providing needed regulation of insurance industry	26%	16%	-10.2
4. Anticipated negative impacts of reform			
Increasing the federal deficit	12%	14%	2.4
Increasing government involvement in health care	16%	16%	0.1
Welfare for insurers and drug companies	21%	13%	-7.4
Providing funding for abortions	5%	5%	-0.4
5. Frames			
Partisanship, pork barrel politics, and conflict	48%	39%	-9.7
Social justice	17%	11%	-6.4
Role of government	19%	20%	1.5
Mandates	7%	4%	-3.3
Protecting individuals and families	41%	46%	4.4*
Public opinion	5%	7%	2.1
<i>Source:</i> Author's calculations			
Notes: Columns may sum to more than 100% because each story may contain multiple frames and mention multiple implications. The Average Treatment Effect represents a percentage point difference.			
*Significant at $p=0.10$; **Significant at $p=0.05$; ***Significant at $p=0.01$			

Although newspaper coverage in the treatment group was 7 percent less likely to be supportive of health care reform than coverage in the comparison group, the difference failed to achieve statistical significance. Moreover, newspaper coverage in the treatment and comparison groups was equally likely to suggest that the legislation would inappropriately expand the role of the federal government. Consequently, it appears that these particular advertisements failed to influence newspaper coverage of the health care reform debate.

Newspapers in the treatment and comparison groups also framed the debate very similarly. The two predominant frames in each market were protecting individuals and families

and partisanship, pork barrel politics, and conflict. Interestingly, newspapers in the treatment group were significantly more likely than their counterparts in the comparison group to employ the frame emphasizing the need to protect individuals and families from escalating costs and shameful insurance practices, which might suggest a media backlash against the ads in the form of a counter-narrative. Stories in the treatment group were also significantly more likely than stories in the comparison group to mention that reform could reduce health insurance premiums and costs for individuals and families. Frames highlighting social justice, the role of government, mandates, and public opinion were employed equally across the treatment and comparison groups.

The ANSI also demonstrates that newspaper coverage of the Affordable Care Act was not markedly different across the treatment and comparison groups. In each case, the plurality of all newspaper paragraphs was supportive of health care reform, and coverage was moderately concentrated in each group. In fact, Table 1.5 reveals that coverage of the debate in the treatment and comparison groups was distributed approximately evenly across supportive, opposed and neutral paragraphs.

Table 1.5: Aggregate News Slant Index

	Comparison Group	Treatment Group
Supportive Paragraphs	38%	42%
Opposed Paragraphs	31%	35%
Neutral Paragraphs	31%	23%
ANSI	1,004	1,277
Degree of Concentration	Moderate	Moderate

Source: Author's calculations

Note: ANSI = Aggregate News Slant Index

Discussion

In a political landscape that is increasingly characterized by prodigious advertising expenditures, it is important to understand how and when interest groups are able to shape the contours of political debates. Previous research has suggested that political advertising campaigns can affect the tenor and framing of newspaper coverage of health policy debates (Rabinowitz 2010), as well as the terms that journalists use to discuss policy proposals, the questions journalists ask, and the perspectives they choose to emphasize (Brodie 2001). The results of this study suggest that not all political debates and advertising campaigns are created equal. Although some campaigns may indeed influence journalistic framing of health policy debates, others might exert little or no influence at all. The obvious question presented, therefore, is why some advertising campaigns influence media framing while others do not. Although it is not possible to posit concrete causal explanations due to the quasi-experimental nature of this study, several important observations can be made.

Perhaps the most likely reason that the advertising campaign sponsored by the national medical societies failed to influence journalistic framing of the health care reform debate was that the ads were aired too late in the debate. Previous research has suggested that framing effects are less likely for established issues that already have clear terms of debate (Chong and Druckman 2007; Terkildson et. al 2000). Health care reform was a major issue during the 2008 presidential campaign (Blendon and Benson 2009), and it seems very plausible that the terms of debate were already firmly established in the 14 months before the advertisements sponsored by the medical specialty societies were disseminated.

The next most plausible explanation for why this advertising campaign failed to influence media framing of the policy debate is that public opinion was relatively evenly divided and newspaper coverage of the debate was already extremely balanced when the advertisements were aired. During the Patients Bill of Rights debate in 1998 and 1999, for

example, newspaper coverage was 17 percent less likely to be supportive of managed care reform in states subject to advertising campaigns designed to foment opposition to the legislation (Rabinowitz 2010). It may have been relatively easy for those opposition advertisements to influence media framing, however, because 87 percent of all stories and 55 percent of all paragraphs in the comparison group were supportive of managed care reform (Rabinowitz 2010). Consequently, the advertisements may have presented an opportunity for journalists to discuss an underrepresented perspective, thereby promoting journalistic norms like fairness, accuracy and balance (Bennett 1996). In contrast, as Tables 1.4 and 1.5 reveal, only 58 percent of all stories and 38 percent of all paragraphs in the comparison group were supportive of the Affordable Care Act. The ads sponsored by the medical specialty societies might not have exerted a framing effect, therefore, because coverage already adhered to journalistic norms regarding fairness and balance.

In addition to the two explanations offered above, there are also two alternative hypotheses that might explain why the ads sponsored by the medical societies failed to affect media framing. First, the campaign may have failed to influence media framing of the health care reform debate because the debate was simply too prolific. The public is often exposed to multiple issue frames and problem definitions during political debates, and these competing frames can counteract one another and preclude elites from manipulating citizens through framing (Druckman 2001a). If a sufficient number of interest groups, politicians and other elites promote a myriad of issue frames during a particular debate, it seems plausible that these frames will counteract one another and prevent any given frame from exerting a strong influence on journalistic framing of the debate.

It may have been relatively easy for the ads sponsored during the Patients' Bill of Rights debate to influence media framing, for example, because the advertising campaigns

surrounding that debate were one-sided. The Clinton Administration was the only group actively lobbying in support of the legislation. In contrast, myriad groups sponsored advertisements both for and against the Affordable Care Act. Whereas the national coalition of medical societies opposed the legislation, a coalition consisting of the AMA, Families USA, the Federation of American Hospitals, PhRMA, and the SEIU sponsored prodigious advertisements in support of reform (to cite just one example). It would be unsurprising that the campaign sponsored by the medical societies failed to influence media framing if media coverage is a function of the balance between favorable and unfavorable campaigns.

One reason to be suspicious of this explanation, however, is that some advertisements manage to shape even the most prolific political debates. During the health care reform debate in 1993 and 1994, for example, 650 interest groups and organizations spent in excess of \$100 million to influence the policy debate and its outcome (West, Heath, and Goodwin 1996). Despite the prodigious advertising expenditures that surrounded that debate, the fabled Harry and Louise advertisements still managed to permeate the public consciousness and shape the contours of debate (Brodie 2001; Jamieson and Cappella 1998).

Another unconvincing explanation for the ineffectiveness of the advertising campaign is that it simply may have been subpar. If the media are more likely to incorporate frames that conform to established media norms, values and constraints as well as the conventional criteria of newsworthiness (Terkildson et al. 2000), then an advertisement that neglects these norms and values might fail to influence journalistic framing of the policy debate. In the case of the advertisements sponsored by the medical specialty societies during the Affordable Care Act, however, the advertisements did not ignore conventional norms and values. On the contrary, the advertisements invoked many of the themes and styles that have been successful in previous advertising campaigns.

Future research should attempt to further disentangle the relative merit of these explanations for why some advertising campaigns influence journalistic framing while others do not. Specifically, future research should incorporate a temporal element into the analysis. Studying media framing at various points in the same policy debate would permit the author to more definitively test the proposition that framing effects are less likely for established issues. In addition, future research should begin to explore the effect of political advertisements on media framing in different public opinion contexts. Is it indeed the case that framing effects are less likely for issues on which the public is relatively evenly divided?

Although this article provides important empirical support for the proposition that interest groups are not always able to influence media framing of health policy debates through the use of political advertising, there are several important limitations to this study. First, I examine only newspaper coverage of the Affordable Care Act. However, television is the primary source of political information for most Americans (Franklin-Fowler et. al 2007), and the average American watches over 5 hours of television per day (Nielsen 2009). To gain a more complete understanding of how political advertisements affect media coverage, the framing of policy debates and public opinion formation, it is important for future research to address television coverage as well as newspaper coverage.

Another key limitation of this study is that interest group influence likely varies depending on the scope, campaign visibility, and ideological cast of the issue involved (Kingdon 1995). Thus the (in)ability of interest groups to influence the framing of the Affordable Care Act might not be generalizable to policy debates that do not involve highly visible campaign issues, a strong ideological component, and the particular constellation of organizations mobilized during this debate. Because every contentious political debate is unique, it is difficult to recommend anything beyond a careful and deliberate case-by-case

analysis of health policy debates to improve our understanding of when interest groups can and cannot influence media framing.

Despite these limitations, the results of this study still appear to be important because political advertising has become a mainstay in contemporary political debates. Consequently, it is important to understand how and when interest groups are able to shape the contours of policy debates through the use of political advertising campaigns. It is equally vital, however, for students of political behavior and politics to understand when interest groups are not able to influence the tenor of extant political debates.

Chapter 2. Public Attitudes Toward Interest Groups in the Health Care Industry

What does the American public think about the various stakeholders and interest groups in the health care industry? This question is particularly important as the implementation battles surrounding the Affordable Care Act begin because citizens frequently take cues from interest group leaders to make sense of the political world (Lau and Redlawsk 2001), and public opinion frequently depends on how elites frame a particular issue (Druckman 2001). Unfortunately, previous research has generally treated interest groups as a homogenous morass, and scholars frequently make broad generalizations about interest group activities (see, e.g., Page, Shapiro and Dempsey 2000). The little that we do know about public attitudes toward interest groups in the health care sector is focused almost exclusively on physician groups, and was distilled in a markedly different sociopolitical and health care environment (see, e.g., Pescosolido, Tuch and Martin 2001). This article empirically investigates public attitudes toward the various groups in the health care industry. It leverages data from an extensive public opinion survey conducted during the health care reform debate under President Obama. The results provide insight into levels of trust and confidence in a broad spectrum of interest groups, ranging from the American Medical Association (AMA) to Blue Cross/Blue Shield (BCBS) to the U.S. Chamber of Commerce.

Literature Review

Research on the use of cognitive heuristics in political decision-making suggests that humans are “cognitive misers” who employ informational shortcuts to make reasonable decisions without expending too much cognitive effort (Lau and Redlawsk 2001). An individual might rely on endorsements from trusted political elites, for example, to evaluate a candidate or policy (Brady and Sniderman 1985). However, citizens often lack the contextual knowledge needed to use heuristics intelligently (Kuklinski and Hurley 1994, 1996; Delli

Carpini and Keeter 1996). Consequently, some worry that voters will resort to “simple-minded and sometimes misguided considerations of self-interest” to make sense of complex public policy issues (Bartels 2005, 21).

The potential for members of the public to misperceive their own self-interest in a public policy debate was evident in low-income seniors’ opposition to the Medicare Catastrophic Coverage Act of 1988. The Act was designed to protect seniors against the economic consequences of catastrophic illness. Congress imposed higher premiums on seniors – particularly the affluent - to finance the benefits expansion. Objective self-interest notwithstanding, low-income seniors agitated against the law (Campbell 2003). One explanation for this surprising opposition was that low-income seniors did not understand the law’s provisions, and thus misjudged their self-interest (Campbell 2003). The chasm between objective and subjective self-interest surrounding the Medicare Catastrophic Coverage Act illustrates the immense potential that interest groups have to frame health policy debates and shape public perceptions. The chasm also reveals the need for the proponents of a policy or program to clearly communicate the nature of the program and its benefits to potential constituencies (Campbell 2003).

Despite the need and opportunity for interest groups to play an information-brokering role in our political system, not all groups can promote novel frames in health policy debates. Elites face important constraints when trying to frame public policy debates. Perceived source credibility is a key prerequisite for successful issue framing, and the public tends to be uninfluenced by the positions of groups that are deemed to be self-interested (Druckman 2001). The question presented, therefore, is which interest groups and stakeholders in the health care landscape possess the necessary credibility to engage in issue framing, shape public

perceptions, and communicate important political information to voters. What factors influence public attitudes toward interest groups in the health care sector?

It is commonly assumed that self-interest is an important determinant of political attitudes and preferences (Feldman 1982). In fact, the belief that self-interest is a key motivator of human behavior has occupied a central place in Western thought for centuries (Mansbridge 1990). In the context of American politics, the self-interest thesis has taken several forms. In *The American Voter*, for example, Campbell *et al.* (1960) concluded that Americans typically respond to domestic issues on the basis of “primitive self-interest” and “fairly concrete and short-term group interest” (205, 233). Another incarnation of the thesis posits that people “vote their pocketbooks” (Tufté 1978), which meshes with definitions of self-interest that emphasize the individual’s material welfare in the short to medium-term (Sears and Funk 1990). Other scholars have suggested that egoistically-based group interest – interdependence between self and group outcomes – is a potent determinant of political attitudes and preferences because interest groups respond intensely to the interests of their organizations (Sears and Funk 1990).

Previous studies of public attitudes toward physicians bolster the validity of the self-interest thesis. Pescosolido, Tuch and Martin (2001), for example, found that while levels of public confidence in physicians are relatively high overall, several subgroups of the population are significantly more negative in their assessment of physicians. Specifically, younger respondents, respondents with lower levels of education, and respondents who report poorer health or a lack of health insurance all report more negative attitudes toward physicians (Pescosolido, Tuch and Martin 2001). In short, those without institutional access to the health care system express more negative attitudes toward physicians, which tends to corroborate the

self-interest hypothesis because these disenfranchised groups may view their interests as adverse to those of the medico-industrial complex.

A prodigious body of research also suggests that “symbolic politics” or “symbolic predispositions” exert a strong effect on sociopolitical attitudes (Sears and Funk 1990). Symbolic predispositions, including party identification and political ideology, are generally described as stable affective preferences acquired through conditioning in early life (Sears, Hensler, and Speer 1979). These learned responses subsequently influence adult attitudes toward extant political stimuli (Sears and Funk 1990). Symbolic predispositions will likely affect how the public perceives the stakeholders in the health care industry because many of these groups have been politicized and identified with particular parties. Consequently, partisanship and political ideology will likely shape attitudes toward these groups.

Research into the dimensions, levels, and determinants of trust in various institutions also provides insight into how the public might perceive key stakeholders in the health care industry. If trust is defined as the expectation of beneficence from another party (Gambetta 1998), then certain intrinsic aspects of the clinician-patient relationship suggest that the public will trust health care providers (Goold 2001). For example, nurses and physicians are expected to be patient advocates, and trust is essential for a patient to divulge personal information or submit to examination and treatment (Goold 2001). Moreover, the medical profession has been extraordinarily successful in cultivating the belief that doctors writ large are competent and trustworthy (Mechanic 1998). In contrast, many health care institutions operate as businesses in a market-based system, characterizing their relationships as contractual obligations rather than ethical or fiduciary ones (Goold 2001). The focus on profitability and marketplace concerns likely detract from public trust in these institutions. Consequently, for-

profit groups may enjoy lower levels of trust than health care professionals or non-profit organizations.

Finally, research on the determinants of trust has suggested that a sense of shared values can inculcate identification-based trust (Lewicki and Bunker 1996). Specifically, the perception that a trustee has internalized the truster's preferences due to a sense of shared values can produce trust in that individual or institution. The trust relationship can also be affected by perceived sameness or difference (Goold 2001). Thus, women may distrust an organization dominated by men, or the elderly may trust a group comprised entirely of other elderly individuals.

Research Questions and Hypotheses

Despite the importance of understanding public perceptions of different interest groups, previous studies have not empirically investigated public attitudes toward the myriad groups in the health care landscape. The obvious question presented, therefore, is how does the public feel about the key stakeholders and groups in the health care sector. Does the public trust certain health care interest groups more than others? For example, are professional groups more trusted than commercial or for-profit organizations? Do levels of trust in different groups vary based on partisan and demographic variables? Finally, do personal experiences with the health care system – whether due to employment in the industry or negative experiences associated with not having insurance – influence public perceptions of key interest groups?

This article tests four key hypotheses. First, the literature on the determinants of institutional trust suggests that the public should exhibit higher levels of trust and confidence in health care providers than other institutional actors. Specifically, the public will likely display lower levels of trust and confidence in actors with a commercial or marketplace focus,

such as health insurers, large corporations, and pharmaceutical companies. The commercial orientation hypothesis thus suggests that health care professionals and non-profit organizations should enjoy the highest levels of support in the health care sector.

Second, the symbolic politics thesis suggests that party identification and political ideology will affect how the public perceives the stakeholders and interest groups in the health care industry. Prevailing wisdom suggests, for example, that Republicans will likely exhibit higher levels of trust in business groups than Democrats. To move beyond casual suppositions and formally operationalize the symbolic politics thesis, however, I examined publicly available campaign finance data from the past 6 election cycles to determine which interest groups in the health care sector have an overriding partisan affiliation.

Two groups exhibit a strong affiliation with the Republican Party. The U.S. Chamber of Commerce and National Federation of Independent Businesses (NFIB) each contributed overwhelmingly to Republican candidates for federal office during the past 6 election cycles. To the extent that Republican voters are aware of these groups' partisan predispositions – and the prevailing political climate suggests that they are – we would expect them to view the groups more favorably than Democratic voters. Similarly, the American Nurses Association (ANA), AFL-CIO, Service Employees International Union (SEIU), and AARP each contributed disproportionately to Democratic candidates for federal office. To the extent that Democratic voters are aware of these groups' partisan predispositions, we would expect them to view the groups more favorably than Republican voters.

Third, research on the importance of self-interest in attitude formation and the study conducted by Pescosolido, Tuch and Martin (2001) suggests that youth, lower levels of education, poorer health status and a lack of insurance will be associated with more negative assessments of physicians. Although data constraints precluded these authors from examining

public attitudes toward other health care providers, it seems reasonable to expect that those without institutional access to the health care system might feel similarly disenchanting with other providers, including nurses, hospitals, and health insurance companies. In each case, those without institutional access to the health care system might project feelings of anger, bewilderment, fear and confusion onto the various points of contact they do have with the medico-industrial complex.

Fourth, theories of attitude formation that emphasize the importance of egoistically-based group interest and identification-based trust suggest several hypotheses about how various subgroups of the public might perceive key health care stakeholders. For example, we might expect union members to exhibit higher levels of trust and confidence in the AFL-CIO, SEIU and labor unions than other segments of the public. Similarly, the elderly should exhibit more trust and confidence in the AARP and groups representing the elderly than other segments of the population. Finally, individuals who work in the health care field – e.g., as a physician, nurse, pharmacist, or hospital worker – should have higher levels of trust and confidence in health care providers than other segments of the public.

Table 2.1 summarizes the hypotheses that are tested in this study. Beyond these basic intuitions, however, it is very difficult to hazard a guess about which factors will predict support for other stakeholders in the health care industry. The difficulty of formulating hypotheses about public attitudes toward specific interest groups highlights the paucity of existing research.

Table 2.1. Summary of Hypotheses
1. Commercial Orientation: The public will exhibit higher levels of trust and confidence in groups representing professionals or non-profit organizations than their commercial counterparts.
2. Partisanship: Partisanship will influence levels of trust and confidence in groups that have been politicized, including the American Nurses Association, AFL-CIO, Service Members International Union, AARP, Chamber of Commerce, and National Federation of Independent Businesses.
3. Self-Interest: Self-interest will influence public attitudes toward interest groups. Individuals without institutional access to health care - respondents who are younger, have lower levels of education, report poorer health or a lack of health insurance - will exhibit lower levels of trust and confidence in all sectors of the medico-industrial complex.
4. Group Identification: Identification-based trust and egoistically-based group interest will influence levels of trust and confidence in various groups. For example, health care workers will exhibit higher levels of trust in the AAP, AMA, ANA, doctors groups, and nurses groups than other members of the public.
5. Group Name: Public attitudes toward interest groups in the health care industry will not change when these groups are identified by a generic label as opposed to a particular name (e.g., groups representing seniors versus AARP).

The dearth of existing research on public attitudes toward health care interest groups raises an ancillary question as well: do public attitudes toward interest groups in the health care industry change when these groups are identified by a generic label as opposed to a particular name? For example, is support for doctor groups synonymous with support for the AMA? Is support for health insurance companies synonymous with support for America’s Health Insurance Plans (AHIP)? This question is particularly timely and important in light of the Supreme Court’s decision in *Citizens United v. Federal Election Commission*, which upheld the disclaimer and disclosure requirements of the Bipartisan Campaign Reform Act governing electioneering communications.⁵ Absent any strong empirical or theoretical expectations to the contrary, this paper tests the null hypothesis that attitudes toward interest groups are identical irrespective of the label used to describe the group.

Survey Data and Methods

⁵ An electioneering communication is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election. 2 U.S.C. § 434(f)(3)(A) (2006 ed.).

Survey Data

The data used in this article are from a survey of a nationally representative sample of 1,278 adults age eighteen and older, conducted in the middle of the health care reform debate under President Obama between August 27 and September 13, 2009. The survey was designed jointly by National Public Radio, the Kaiser Family Foundation, and the Harvard School of Public Health. It examines the public's opinions about the role of different health care interest groups in the federal health care reform debate. Specifically, respondents were asked how much confidence they have in different stakeholders and interest groups to recommend the right thing for the country when it comes to health care. A random half of the sample was asked about specific interest groups (e.g., the AMA or the AFL-CIO) while the other half was asked about generic groups (e.g., doctors groups or labor unions).

Methods

This study employs survey weighted ordinal logistic regression models to regress confidence in each interest group on several covariates. Specifically, I examine the effect of demographic, symbolic and self-interest variables on public attitudes toward the myriad stakeholders and interest groups in the health care sector.

Several key covariates have been included in every regression model. Specifically, the following demographic and symbolic variables were included in every model: age, education, income, gender, party identification, political ideology, and race.⁶ Health status⁷ and insurance status were also included in every regression model because the thesis advanced by Pescosolido, Tuch and Martin (2001) – that those without institutional access to the health

⁶ These variables have been operationalized as follows: age is a categorical variable that includes 18-29, 30-49, 50-64, and 65+; education is a categorical variable that includes some high school or less, graduated high school, some college, graduated college or more; income is a categorical variable that includes <\$20,000, \$20,000-40,000, \$40,000-75,000, \$75,000-100,000; and \$100,000+; party identification is a categorical variable that includes Democrat, Republican, and Independent; political ideology is a categorical variable that includes liberal, moderate and conservative.

⁷ Health status is a categorical variable that includes fair or poor, good, and very good or excellent.

care system report more negative sentiments about physicians than those with access – has not previously been tested on a robust and diverse dataset. Including health status and insurance status in every regression model will facilitate the extension of the institutional access hypothesis to other stakeholders in the health care industry.

Several additional self-interest variables were also included in a more limited set of regression models as appropriate. For example, union membership was included in the models measuring attitudes toward the AFL-CIO, SEIU, and labor unions to capture the potential effect of egoistically-based group interest on political attitudes. Union membership was also included in the regression models measuring attitudes toward large and small businesses since egoistically-based group interest might influence political attitudes in a negative or adversarial way as well. Similarly, employment as a health worker was included in the models for the AAP, AHA, AHIP, AMA, ANA, BCBS, doctors groups, nurses groups, health insurance companies, and hospitals.

Interaction terms were also included in several regression models when appropriate. Recall, for example, that the ANA, AFL-CIO, SEIU, and AARP each contributed overwhelmingly to Democratic candidates for federal office during the past six election cycles. I hypothesized that Democratic voters who are aware of these groups' partisan predispositions should view the groups more favorably than Republican voters. To test this hypothesis, I included an interaction term for party identification and political awareness in the models for these interest groups. The interaction terms tests the hypothesis that politically aware respondents may better notice the partisan linkage required to translate preexisting symbolic predispositions into political attitudes. I included a similar interaction term in the models for the U.S. Chamber of Commerce, NFIB, and groups representing small and large corporations for the same reason. Political awareness has been operationalized as how closely

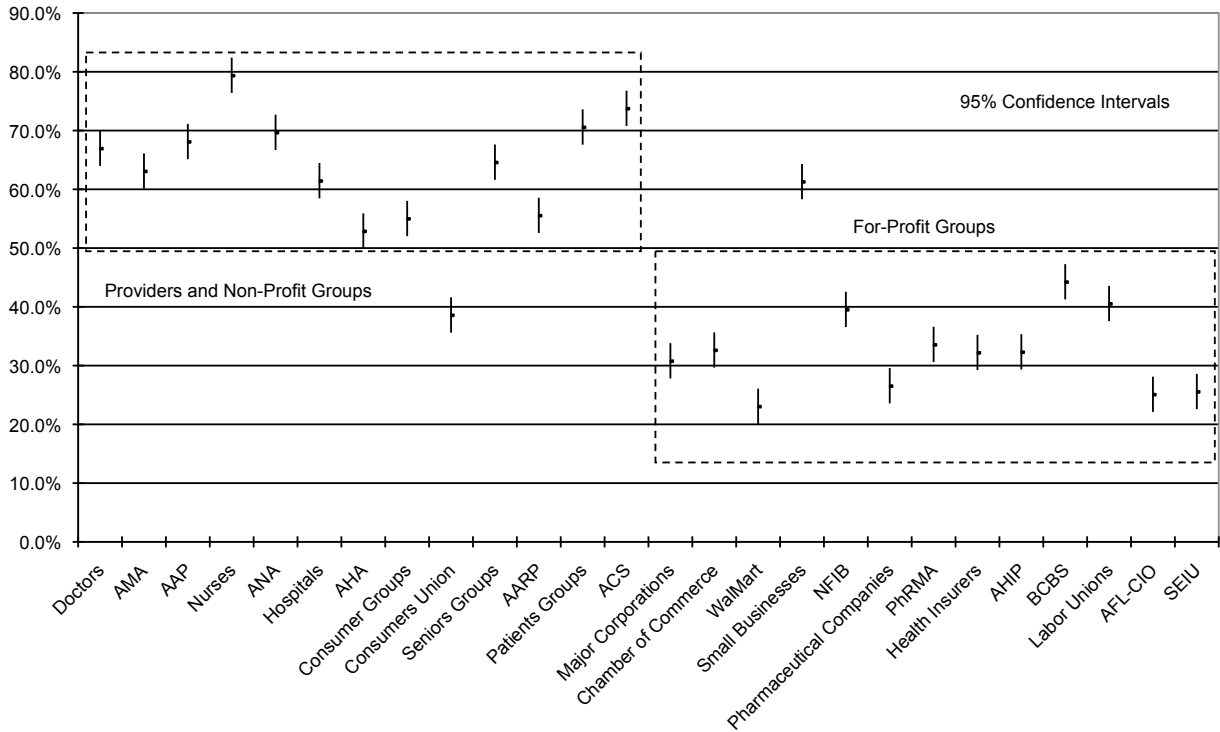
the respondent followed the discussion in Washington about proposed changes to the health care system.

Finally, I ran a series of parsimonious regressions to test the hypothesis that public attitudes will not be affected by the use of a generic label to describe the stakeholder as opposed to a specific interest group name. In these models, I merged the split sample responses for each stakeholder and regressed attitudes on a dichotomous treatment measure that indicates whether the respondent was asked about the generic group or not. For example, attitudes toward groups representing seniors and the AARP were merged into one regression model, and a dichotomous variable captures whether the respondent was asked about seniors groups.

Results

As Chart 2.1 reveals, the myriad stakeholders and interest groups in the health care sector enjoy widely disparate levels of public support. At one extreme, nurses groups enjoy the highest level of public support among the 26 groups included in the survey. Specifically, 79.4 percent of the public expressed either a great deal or a fair amount of confidence in nurses groups to recommend the right thing for the country when it comes to health care. At the other extreme, only 23.1 percent of the public expressed confidence in Wal-Mart to recommend the right thing for the country when it comes to health care.

Chart 2.1. Respondents Expressing a Great Deal or Fair Amount of Confidence in Health Care Stakeholders



In total, 10 groups enjoyed support from at least 60 percent of the public. Groups representing health care professionals and patients enjoyed the highest levels of public trust and confidence. The most trusted groups in the survey were nurses groups, the American Cancer Society (“ACS”), groups representing patients, the American Nurses Association (“ANA”), the American Academy of Pediatrics (“AAP”), doctors groups, groups representing senior citizens, and the American Medical Association (“AMA”). At the other extreme, 8 groups enjoyed support from less than one-third of the public. The groups enjoying the lowest levels of public trust and confidence were large corporations, insurers, and unions. Specifically, the least trusted groups in the survey were Wal-Mart, the AFL-CIO, the Service Employees International Union (“SEIU”), pharmaceutical companies, groups representing major corporations, health insurance companies, America’s Health Insurance Plans (“AHIP”), and the Chamber of Commerce.

Chart 2.1 provides strong support for the commercial orientation hypothesis, which postulated that the public would exhibit higher levels of trust and confidence in groups representing professionals or non-profit organizations than their commercial counterparts. With the exception of two outliers – the Consumers Union and small businesses – provider groups and non-profit organizations enjoy uniformly higher levels of public support than commercial groups. These differences are statistically significant at the 95 percent confidence level.

Chart 2.1 also provides insight into whether levels of public support for interest groups change when asked about a specific interest group versus a generic group. In the case of more prominent groups, the public appears to maintain similar levels of support for specific groups and their generic counterparts. For example, the AMA and AAP enjoy comparable levels of support to doctors groups. In the case of lesser-known groups, however, the public tends to express higher levels of confidence in the generic group. Whereas 40.6 percent of the public expressed either a great deal or a fair amount of confidence in labor unions to recommend the right thing for the country when it comes to health care, only 25.6 percent expressed similar levels of support for the SEIU.⁸ As subsequent tables will reveal, however, the equivalence of specific and generic groups only holds in the aggregate, if at all: patterns of support for specific groups and their generic counterparts vary a great deal across segments of the population.

Consistent with the symbolic politics thesis, Table 2.2 reveals that partisanship influences public attitudes toward groups that have been politicized and have developed partisan affiliations. I hypothesized that the ANA, AFL-CIO, SEIU, and AARP would enjoy higher levels of support from Democrats than Republicans. By extension, I also expected the

⁸ 23.7 percent of the respondents in the survey indicated that they had either never heard of the SEIU or were not familiar with the group. In contrast, only 1.1 percent of all respondents were unfamiliar with labor unions.

same pattern to hold for nurses groups, labor unions, and groups representing senior citizens. Similarly, I expected the Chamber of Commerce, NFIB, and groups representing major corporations to enjoy more support from Republicans than Democrats.

Table 2.2. Partisanship Hypothesis: Public Attitudes Toward Key Interest Groups

	ANA	AFL-CIO	SEIU	AARP	Nurses Groups	Labor Unions	Seniors Groups	Chamber of Commerce	NFIB	Major Corporations
Age	-0.14	0.32***	0.05	-0.13	0.02	0.06	-0.10	0.13	-0.04	-0.02
Education	0.06	0.12	0.02	0.03	0.00	0.31***	0.11	-0.03	-.06	0.15*
Income	0.00	0.00	0.01**	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Male	-0.49**	0.15	-0.10	-0.11	-0.04	0.22	0.17	0.02	0.22	0.16
Caucasian	0.00	0.01	0.01*	0.00	0.00	-0.01	-0.01**	0.00	0.00	-0.01**
Democrat	0.00	0.01	0.00	0.01**	0.00	-0.01	0.00	0.00	0.00	0.01
Ideology	-0.02	0.04	-0.05	0.24***	0.22**	0.28***	0.11	-0.08	-0.12	0.09
Health Status	0.18**	-0.12	0.09	0.01	-0.05	-0.05	0.06	0.09	0.14	0.20**
Uninsured	-0.03	-0.15	0.28	0.18	0.33**	0.48**	0.85***	-0.10	-0.14	-0.10
Health Worker	0.61**				0.37***					
Union Member		0.01	0.00			0.46		-0.03	-0.13**	-0.33
Political Awareness	0.04	0.18	0.07	0.02	-0.11	-0.06	-0.177	-0.14	0.21*	-0.01
Awareness * Party	-0.21**	-0.35***	-0.27***	-0.2*	0.04	-0.41***	-0.16*	-0.19**	-0.02	0.04

*Significant at $p=0.10$; **Significant at $p=0.05$; ***Significant at $p=0.01$.

Democrats, at least politically aware Democrats, express higher levels of confidence than Republicans in the groups that were hypothesized to have Democratic leanings. The coefficient on the political awareness-party identification interaction term reveals that politically aware Democrats are significantly more likely than Republicans to express confidence in the ANA, AFL-CIO, SEIU, AARP, labor unions and seniors groups to recommend the right thing for the country when it comes to health care. By exponentiating the coefficient in the labor union model, for example, we can see that a politically aware Democrat is 1.51 times more likely than a Republican to have confidence in labor unions, ceteris paribus. Similarly, politically aware Democrats are 1.22 times more likely than Republicans to express confidence in the AARP. In fact, 72 percent of Democrats expressed a great deal or fair amount of confidence in the AARP to recommend the right thing for the

country when it comes to health care. By comparison, only 45 percent of Republicans expressed a similar level of support. These results tend to corroborate the partisanship hypothesis.

Table 2.2 also illustrates how different segments of the public view several groups with Republican leanings. Contrary to expectations, Republicans do not exhibit higher levels of trust in these groups than Democrats. In fact, politically aware Democrats are actually 1.21 times more likely than Republicans to have confidence in the Chamber of Commerce to recommend the right thing for the country when it comes to health care, despite the fact that this group contributes overwhelmingly to Republican candidates for federal office. Whatever patterns of support emerge for these business-oriented groups, it is clear that self-identified Republicans are not a statistically significant basis of support. In short, Table 2.2 corroborates the partisanship hypothesis when it comes to groups with Democratic leanings, but not when it comes to groups with Republican leanings.

Several other interesting patterns of support also emerge in Table 2.2. First, the uninsured were significantly more likely to express confidence in nurses groups, labor unions and seniors groups to recommend the right thing for the country when it comes to health care than other segments of the public. In fact, exponentiating the logit coefficient in Table 2.2 reveals that the uninsured are 2.34 times more likely than the rest of the public to express confidence in seniors groups, holding all other covariates at their means. Second, individuals who reported poorer health status expressed significantly less confidence in major corporations to recommend the right thing for the country when it comes to health care. Third, the politically aware have distinct views about the NFIB when compared to other members of the public. Specifically, the politically aware are 1.23 times more likely than others to have confidence in the NFIB to recommend the right thing for the country when it comes

to health care. This is notable because the NFIB is a relatively unknown group: 10.4 percent of respondents had either not heard of or were not familiar with the NFIB. Finally, racial minorities expressed distinct views about the SEIU, seniors groups and major corporations. Specifically, racial minorities expressed significantly higher levels of support for seniors groups and major corporations, and significantly lower levels of support for the SEIU.

The study also yields interesting insights into the validity of the self-interest hypothesis, which postulated that individuals without institutional access to health care – those who are younger, have lower levels of education, report poorer health, or a lack of health insurance – will exhibit lower levels of trust in all sectors of the medico-industrial complex. As Table 2.3 reveals, the patterns of support that emerge are complex, and generally discredit the self-interest hypothesis in the realm of health care.

Table 2.3. Self-Interest Hypothesis: Public Attitudes Toward the Medico-Industrial Complex

	AAP	AMA	ANA	AHA	Doctors Groups	Nurses Groups	Hospitals	AHIP	BCBS	Health Insurers
Age	0.06	0.07	-0.11	0.10	-0.17	0.04	0.07	0.08	0.22**	-0.21*
Education	0.21**	0.05	0.08	0.2**	-0.01	0.01	0.07	0.14*	0.21**	0.26***
Income	0.01**	0.01**	0.00	0.01*	0.00	0.00	0.00	0.00	0.00	0.00
Male	-0.36*	-0.67***	-0.52***	-0.18	-0.03	-0.04	-0.09	0.08	0.07	0.29
Caucasian	0.00	0.00	0.00	0.00	-0.01**	0.00	0.00	0.00	0.00	-0.01**
Democrat	0.00	0.00	0.00	-0.01	0.00	0.00	0.01	0.00	0.00	0.00
Ideology	0.03	0.00	0.01	0.03	0.04	0.22**	0.08	-0.2**	-0.10	-0.16**
Health Status	0.07	0.15*	0.17**	0.09	0.04	-0.06	0.22**	0.16**	0.04	0.21**
Uninsured	0.14	-0.08	-0.01	-0.13	0.39*	0.35**	0.14	-0.54	-0.77**	-0.09
Health Care Worker	0.15	0.42	0.56**	0.00	0.43**	0.38***	0.06	0.33	0.32	0.32

*Significant at $p=0.10$; **Significant at $p=0.05$; ***Significant at $p=0.01$.

Age is not a significant determinant of public attitudes toward most groups in the health care sector. Contrary to the self-interest hypothesis, younger individuals actually display higher levels of trust in BCBS than older individuals. Exponentiating the coefficient on age in the model for BCBS reveals that younger individuals are 24.6 percent more likely to express trust in BCBS than older individuals. Interestingly, younger individuals are also significantly less likely to express trust in health insurers as a group.

Table 2.3 also reveals that those with lower levels of education do not display less trust in the medico-industrial complex. On the contrary, those with more education are a particularly distrusting group, exhibiting significantly lower levels of trust in the AAP, AHA, AHIP, BCBS, and health insurers. Exponentiating the ordered logit coefficient in the table reveals, for example, that those with more education are 1.30 times more likely to express diminished confidence in health insurers than those with less education, *ceteris paribus*. The survey results indicate that 55.5 percent of college graduates express little or no confidence in BCBS to recommend the right thing for the country when it comes to health care. By comparison, only 43.7 percent of those with a high school education expressed such levels of distrust.

The attitudes of the uninsured are also complex, and fail to square neatly with the self-interest hypothesis. Individuals who lacked health insurance at some time in the previous 12 months actually expressed higher levels of confidence in doctors groups and nurses groups to recommend the right thing for the country when it comes to health care than those with health insurance. The uninsured are 1.48 times more likely than the insured to express a higher level of confidence in doctors groups, holding all other variables constant. Similarly, the uninsured are 1.42 times more likely than the insured to express a higher level of confidence in nurses groups. Interestingly, this pattern of support did not extend to specific named provider groups, such as the AAP, AMA, or ANA.

Somewhat surprisingly, a lack of health insurance was not a significant determinant of attitudes toward AHIP or health insurers in general. However, the uninsured were 2.16 times more likely to express lower levels of trust in BCBS. Whereas 38.0 percent of those who lacked health insurance during the previous 12 months expressed a great deal or fair amount of confidence in BCBS to recommend the right thing for the country when it comes to health

care, 45.5 percent of those with insurance expressed similar levels of support. This finding is particularly interesting, moreover, because those without insurance actually expressed heightened levels of support for doctors groups and nurses groups. Thus, the uninsured do not appear to harbor a widespread distrust of the health care industry.

The lone area in which the results in Table 2.3 corroborate the self-interest hypothesis is the attitudes of those in poorer health. Consistent with expectations, the sick evince lower levels of confidence in myriad providers to recommend the right thing for the country when it comes to health care. Specifically, individuals in poorer health expressed lower levels of confidence in the AMA, ANA, and hospitals than other members of the public. Whereas 65.4 percent of those in excellent or very good health expressed a great deal or fair amount of confidence in the AMA, for example, only 56.8 percent of those in fair or poor health expressed similar levels of support. The pattern was even more pronounced with respect to public attitudes toward hospitals: while only 8.6 percent of those in excellent or very good health expressed little or no confidence in hospitals, 46.5 percent of those in fair or poor health expressed little or no confidence in them.

Individuals in poorer health also express lower levels of confidence in health insurance companies than healthier individuals. Whereas 34.4 percent of those in excellent health expressed a great deal or fair amount of confidence in health insurers to recommend the right thing for the country when it comes to health care, only 25.0 percent of those in poor health felt similarly. In short, it appears that those in poorer health express lower levels of confidence in all of the relevant points of contact with the medico-industrial complex, including insurers, providers, and hospitals.

To test the robustness of the conclusion that the models do not generally support the self-interest hypothesis, each model was repeated with interaction terms for political

awareness and age, education, health status, and insurance status. These models assess whether politically aware respondents were better able to translate their perceived self-interest into meaningful political attitudes toward disparate health care interest groups and stakeholders. Consistent with the conclusion that these data do not generally support the self-interest hypothesis, the results in Table 2.3 were not sensitive to the inclusion of the interaction terms, each of which failed to achieve statistical significance in every model.

Two other interesting patterns emerge when examining Table 2.3, although neither is related to the self-interest hypothesis. First, income was an important and consistent determinant of support for several provider groups. Specifically, those with higher levels of income express consistently lower levels of trust and confidence in the AAP, AMA, and AHA to recommend the right thing for the country when it comes to health care. For example, 49.1 percent of families earning \$100,000 or more per year expressed little or no confidence in the AHA. In contrast, only 34.2 percent of families earning less than \$50,000 per year expressed a similar level of dissatisfaction with the AHA. Moreover, it does not appear that the wealthy express greater levels of distrust across the board – the coefficient on income was only significant in the models for the three aforementioned provider groups and the SEIU.

The second interesting pattern apparent in Table 2.3 is that women exhibit significantly higher levels of trust in the AAP, AMA and ANA than men. Holding all other variables constant, women are 1.43 times more likely than men to express confidence in the AAP, 1.95 times more likely to express confidence in the AMA, and 1.68 times more likely to express confidence in the ANA. In fact, these were the only three groups that obtained statistically significantly higher levels of support from either gender. In short, women tend to display higher levels of trust and confidence in health care providers than men.

The results of this study also provide insight into the validity of the group-identification hypothesis, which postulated that identification-based trust and egoistically-based group interest will influence levels of trust in various groups. Referring back to Table 2.2, it is apparent that the attitudes of unions members and the elderly do not substantiate the group-identification hypothesis. Union members do not express higher levels of support for labor unions than the general public, and the elderly are not more supportive of groups representing the elderly than others. To confirm that these results are robust, the regression analyses were repeated using different specifications, including repeating the regressions with a dummy variable for the elderly. The relevant coefficients failed to achieve statistical significance in every specification.

However, the results in Table 2.3 do provide qualified support for the group-identification hypothesis. Consistent with expectations, health care workers exhibited higher levels of confidence in the ANA, doctors groups and nurses groups. In fact, health care workers are 1.75 times more likely to express confidence in the ANA than other members of the public, 1.54 times more likely to express confidence in doctors groups, and 1.46 times more likely to express confidence in nurses groups. However, employment as a health care worker was not a significant predictor of support for the other health care provider groups, including the AAP, AMA, AHA, and hospitals.

Finally, the results of this study provide insight into whether levels of public support for interest groups change when asked about a specific interest group versus a generic group. In short, do names matter? This study investigated attitudes toward 11 stakeholders in the health care sector. As Table 2.4 reveals, attitudes were affected by the label used to describe five interest groups: small businesses, pharmaceutical companies, health insurers, consumer groups, and seniors groups.

Table 2.4. Group Name Hypothesis: Public Attitudes Toward Health Care Interests

	Doctors Groups	Nurses Groups	Major Corporations	Small Businesses	Drug Companies	Health Insurers	Hospital Groups	Labor Unions	Consumers Groups	Seniors Groups	Patients Groups
Age	-0.04	-0.04	0.12	-0.19**	0.02	0.04	0.10	0.24***	-0.02	-0.04	0.19**
Education	0.03	0.05	0.08	-0.07	0.20***	0.23***	0.14**	0.20***	0.04	0.08	-0.04
Income	0.01**	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Male	-0.32**	-0.30**	0.09	0.33**	-0.02	0.19	-0.12	0.10	-0.02	-0.03	-0.12
Caucasian	0.00	0.00	0.00	0.00	-0.01	0.00	0.00	0.00	0.00	0.00	0.00
Democrat	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.01	0.00	0.01***	0.00
Ideology	0.03	0.13*	0.03	-0.03	-0.08	-0.12**	0.06	0.21**	0.17**	0.18**	0.07
Health Status	0.09	0.07	0.116*	0.13*	-0.01	0.10	0.16**	-0.14**	-0.02	0.00	-0.03
Uninsured	0.15	0.16	-0.13	-0.05	-0.03	-0.37	0.00	0.17	0.06	0.53***	0.05
Health Care Worker	0.45***	0.42***					0.06				
Union Member			-0.14	-0.10				0.05			
Generic Label	-0.07	-0.16	0.02	-0.62***	0.26*	0.56***	-0.10	0.04	-0.28**	-0.49***	0.04

*Significant at $p=0.10$; **Significant at $p=0.05$; ***Significant at $p=0.01$.

The coefficients on the generic label variable indicate that small businesses, consumer groups, and seniors groups were more popular than their named counterparts, the NFIB, Consumers Union, and AARP, respectively. For example, the survey results indicate that 61.3 percent of the public expressed a great deal or fair amount of confidence in small businesses to recommend the right thing for the country when it comes to health care. In contrast, only 39.6 percent expressed a similar level of trust in the NFIB. A *t*-test statistic for the difference in means reveals that these patterns do not depend on political awareness: public attitudes toward these groups were not significantly different among the politically aware and unaware. It is not the case that there was no effect among the politically aware.

Although several of the generic stakeholder groups were more popular than their named counterparts, this pattern did not hold for every group. As Table 2.4 reveals, health insurers and pharmaceutical companies were both less popular than the specific interest groups that represent these industries. For the remaining stakeholders – doctors groups, nurses groups, major corporations, hospital groups, labor unions and patients groups – attitudes were unaffected by the label used to describe the stakeholder. Again, a *t*-test statistic

for the difference in means reveals that these patterns do not depend on political awareness: public attitudes toward these groups were not significantly different among the politically aware and unaware.

Discussion

In a political landscape that is increasingly characterized by prodigious advertising expenditures, it is important to understand which interest groups and stakeholders in the health care landscape possess the necessary credibility to engage in issue framing, shape public perceptions, and communicate political information to voters. The importance of how the public perceives the interest groups in the health care sector is magnified, moreover, because the Supreme Court upheld the disclaimer and disclosure requirements of the Bipartisan Campaign Reform Act in *Citizens United v. Federal Election Commission*. Every time that an interest group attempts to persuade the electorate or shape the contours of debate through a political advertisement, the public will be able to discern which group or coalition sponsored the message.

As this study reveals, the myriad interests in the health care arena enjoy widely disparate levels of public support. Health care professionals and non-profit organizations enjoy substantially higher levels of trust than the for-profit interests in the health care sector. Groups such as the AMA, AAP, ANA, and ACS enjoy sufficiently high levels of public support to credibly disseminate their message to the public. In contrast, groups like the Chamber of Commerce, PhRMA, AHIP, the AFL-CIO, and SEIU enjoy such low levels of trust that they cannot effectively communicate their messages to the public directly. One of the key takeaways from this study is the singular importance of coalition politics in the health care sector. If the for-profit groups in the health care sector hope to shape public perceptions as the implementation battles surrounding the Affordable Care Act begin, they will be

required to leverage the existing bastions of trust in the industry by creating coalitions with provider groups and non-profit interests.

The opportunity for coalition politics in the health care arena is amplified by the fact that names can and do matter. Attitudes and bases of support change when the public is asked about the AHA as opposed to hospital groups, for example, or the NFIB instead of small businesses. Moreover, names can affect the attitudes of both the politically aware and the politically unaware alike. Consequently, coalitions sponsoring political advertisements may be able to circumvent or mitigate credibility problems by adopting a name that instills more trust. While this conclusion may be old hand in the world of coalition politics or political communication, this study reveals some of the limits on how much credence the public will give to a name. Disseminating a message under the aegis of a hypothetical Coalition To Protect America's Seniors may garner higher levels of trust among the politically unaware, but the politically attentive simply do not put much stock in a name when it comes to groups representing seniors.

Understanding public attitudes toward key players in the health care arena is also a valuable tool for policymakers. To cite just one example, a recent analysis of national opinion polls reveals that a majority of Americans support increased federal spending on public health, though many do not favor increased spending in areas that public health officials deem essential (Blendon et. al 2010). In order to sustain public support for increased public health spending, therefore, government officials will be required to give examples of cost savings emanating from public health programs (Blendon et. al 2010). To do so, it would be extremely useful for government officials to know which messengers can credibly deliver such a message to key segments of the voting public. If women are a key demographic group, for example, then it would be sensible to leverage the AAP, AMA or ANA to deliver the message. Those

targeting younger voters, on the other hand, would be wise to create a coalition with BCBS or the AFL-CIO because young people express higher levels of confidence in these groups to recommend the right thing for the country when it comes to health care.

This study also provides useful insights into the political attitudes of the uninsured. As Douglas Arnold (1990) observed in his classic study of congressional action, legislators can generally ignore the perspective of groups that are beleaguered by collective action problems. At present, the uninsured are the prototypical group suffering from a collective action problem. However, an “instigator” can change legislators’ voting calculus by revealing citizens’ stakes in political outcomes and affecting the probability that an individual will notice a particular cost or benefit (Arnold 1990, 30). With the constitutionality and fate of the individual mandate unclear at this time, it is worthwhile to consider how an instigator could credibly reach and mobilize the uninsured in future health policy debates. The results of this study provide useful and unexpected results: contrary to the institutional access hypothesis, the uninsured actually expressed higher levels of confidence in doctors groups and nurses groups than those with insurance. Thus, a political activist, legislator or instigator would be wise to leverage these bastions of trust. However, doctors groups and nurses groups are more trusted than their named counterparts – thus, it would be wise to leverage individual health care providers as opposed to the AMA or ANA.

While it is important to understand which groups the public perceives to be credible and trustworthy, it is also important to understand why. Symbolic politics and self-interest have both been hypothesized to influence political attitudes and preferences. In the realm of health care, neither hypothesis appears to predominate. For example, symbolic politics and partisanship fail to explain public attitudes toward groups that are traditionally aligned with the Republican party. Similarly, self-interest fails to explain attitudes toward the medico-industrial

complex.⁹ However, both hypotheses do appear to retain important, if somewhat circumscribed, explanatory power. Partisanship is a significant predictor of support for groups with Democratic leanings. Self-interest may be a powerful explanation for why those in poorer health express distrust for virtually every sector of the medico-industrial complex: providers, hospitals, insurers and large corporations. While it is impossible to posit concrete causal explanations from the results of this study, the findings certainly have implications for the plausibility of the symbolic politics and self-interest hypotheses in the health care arena.

Although this study yields important insights into public attitudes toward stakeholders in the health care arena, the findings have an important limitation. It is difficult to extrapolate the public sentiments expressed herein to dramatically different contexts because this study employs cross-sectional survey data. In short, this study offers a snapshot of public attitudes toward key interests and stakeholders in the health care industry at the pinnacle of the health care reform debate under President Obama. It seems unlikely that public sentiments are completely static. Instead, they are likely to fluctuate with the sociopolitical environment and constellation of interest groups mobilized during a particular debate.

Conclusion

A substantial body of evidence from experiments, surveys and political campaigns suggests that public opinion frequently depends on how elites frame a particular issue (Druckman 2001). Some estimates suggest that more than \$200 million was spent on political advertising during the health care reform debate under President Obama (Alonso-Zaldivar 2010), and influential groups are also beginning to use paid advertising to shape the major implementation battles surrounding the Affordable Care Act (Sparer 2010). Consequently, it is

⁹ Although this finding may be an artifact of how self-interest has been operationalized in this study, it is clear that individuals who are younger, less educated and without health insurance do not exhibit lower levels of trust in health care providers and institutions.

important for policymakers, politicians and scholars alike to understand public attitudes toward the various groups and stakeholders in the health care arena. Hopefully this study yields useful insights into some of the processes that undergird public opinion formation in contemporary health policy debates.

Chapter 3. Media Regulation and Viewpoint Diversity in Health Policy Debates

Since its inception, commercial broadcasting has been heralded as a mechanism to foster the broad democratic goals of deliberation, accountability and an informed citizenry. In the Communications Act of 1934, Congress charged the Federal Communications Commission (FCC) with the duty to regulate broadcasting in the furtherance of “the public interest, convenience, and necessity.”¹⁰ To that end, Congress and the FCC developed a regulatory regime that appealed to a communitarian and instrumentalist understanding of the First Amendment and valued public deliberation as the pinnacle of democratic engagement.¹¹ Early regulations promulgated by the FCC set rules for the presentation of controversial issues of public importance in an effort to promote viewpoints that might otherwise be excluded from public debate.¹² The FCC’s overarching regulatory objective was to “meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide,” in order to “cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.”¹³

Despite early optimism about the potential for broadcasting to promote a healthy, functioning democracy, commentators have frequently decried that private broadcasting has

¹⁰ Communications Act of 1934, Pub. L. No. 73-416, § 312(b), 48 Stat. 1064, 1087 (codified as amended at 47 U.S.C. §§ 151-613 (2000)).

¹¹ Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 *Berkeley Tech. L.J.* 1389, 1394-95 (2004).

¹² Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1258 (1949)(requiring that “programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community”).

¹³ Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters 21 (1998); see also Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 *Am. U. L. Rev.* 613, 619 (2004) (noting that the broadcast public interest standard “has been used to serve the needs of American citizens and to cultivate many localized public forums with diverse viewpoints facilitating citizen participation in our democracy”).

failed to “realize the vast potentialities” of the medium.¹⁴ Moreover, there is a general consensus that traditional approaches to media regulation have not fully effectuated the early aspirations of the broadcast medium.¹⁵ In this article, I evaluate several competing policy options designed to promote viewpoint diversity in extant political debates and improve political discourse. In addition, I also propose a novel regulatory approach that is consciously designed to improve viewpoint diversity in political debates. Specifically, I propose a “marketplace of ideas tax” that would be levied on all political advertisements to endow a “marketplace of ideas trust fund,” which would then be used to subsidize speech from underrepresented viewpoints. This approach leverages insights garnered from models of political learning and social science research concerning the role of political advertisements in contemporary policy debates. In short, this article seeks to reinvigorate the agenda for regulating to promote viewpoint diversity in political debates.

Background

The Content of Commercial Broadcasting

Numerous commentators have lamented that commercial broadcasting has failed to “realize the vast potentialities” of the medium.¹⁶ Indeed, it would be difficult to contend that broadcasting has cultivated a more informed citizenry, more inclusive democratic dialogue, and improved diversity of expression. On the contrary, modern public opinion research reveals that the general public is politically uninformed¹⁷ and inattentive.¹⁸ While commercial

¹⁴ NBC, Inc. v. United States, 319 U.S. 190, 217 (1943).

¹⁵ See, e.g., Anthony E. Varona, Toward a Broadband Public Interest Standard, 61 Admin. L. Rev. 1, 5-7 (2009).

¹⁶ See, e.g., NBC, Inc. v. United States, 319 U.S. 190, 217 (1943).

¹⁷ See, e.g., Steven Chafee and Stacey Frank, How Americans Get Political Information: Print Versus Broadcast News, 546 Annals Am. Acad. Pol. & Soc. Sci. 48, 49 (1996).

broadcasting is not solely responsible for the dire portrait of the American electorate, two factors suggest that it plays a central role in the problem. First, the average American watches over 5 hours of television per day,¹⁹ and television remains the primary source of news²⁰ and political information for most Americans.²¹ Despite the increasing abundance of political information available via new media, the majority of broadcast news viewers do not seek out alternative sources of information.²² Thus, commercial broadcasting certainly has the potential to foster democratic deliberation and contribute to voter knowledge. Second, the content of commercial broadcast programming is often inadequate to promote the democratic ideals of deliberation, accountability and an informed citizenry. In an effort to attract the largest audience possible, media conglomerates design programming that is aimed at the lowest common denominator.²³ Consequently, the political information environment has deteriorated, and the amount of policy-oriented information in news coverage has declined.²⁴ The lack of news coverage of substantive political issues has contributed to the existence of a

¹⁸ See, e.g., Markus Prior, *Post-Broadcast Democracy: How Media Choice Increases Inequality in Political Involvement and Polarizes Elections* 151 (2007) (“As a result of greater media choice, fewer Americans watch the news and learn about politics than in the past.”).

¹⁹ Nielsen Company, *Anywhere Anytime Media Measurement Three Screen Report: Television, Internet and Mobile Usage in the U.S.* (2009).

²⁰ The Pew Research Center for People and the Press, *Ideological News Sources: Who Watches and Why* (2010), available at <http://people-press.org/reports/pdf/652.pdf>.

²¹ Erika Franklin Fowler et al., *Does Local News Measure Up?*, 18 *STAN. L. & POL'Y REV.* 410, 410 (2007).

²² Markus Prior, *Post-Broadcast Democracy: How Media Choice Increases Inequality in Political Involvement and Polarizes Elections* 155 (2007).

²³ See Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 *Ariz. L. Rev.* 1125, 1166 (1996).

²⁴ Martin Gilens, Lynn Vavreck and Martin Cohen, *Mass Media and the Public's Assessments of Presidential Candidates, 1952-2000*, *Journal of Politics* 60 (November): 1160-1175, 1160 (2007).

largely politically uninformed public.²⁵ Moreover, due to the antipathy of corporate media to unpopular and unorthodox ideas,²⁶ commercial broadcasting tends to preserve and promote the status quo by airing content that is aimed at “reinforcing people’s existing attitudes [rather than] changing them.”²⁷

Inequalities in Political Voice

To fill the void left by commercial broadcasting, political candidates and issue advocates have increasingly financed political advertising campaigns in an effort to reach and inform the public.²⁸ While political advertisements can contribute to political learning by exposing otherwise inattentive individuals to political information,²⁹ their increasing predominance as a medium of communication is not an unmitigated good. Due to their expense, political advertisements are a form of political voice that is available to only a small minority of all interests and groups.³⁰ This “inequality in the power to communicate ideas”³¹ may be particularly problematic, moreover, because advertising campaigns are a very potent

²⁵ See Steven Chafee & Stacey Frank, How Americans Get Political Information: Print Versus Broadcast News, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 49 (1996)(noting that television watchers are “less able to answer factual questions about politics than are those who say they rely more on print.”).

²⁶ Jerome A. Barron, Access to the Press--A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641-43 (1967).

²⁷ Jonathan Weinberg, Broadcasting and Speech, 81 Cal. L. Rev. 1101, 1157-64 (1993).

²⁸ Geoffrey Cowan, Whatever Happened to Local News?: The “Vast Wasteland” Reconsidered, 55 FED. COMM. L.J. 493, 497 (2003).

²⁹ Martin Gilens, Lynn Vavreck and Martin Cohen, Mass Media and the Public’s Assessments of Presidential Candidates, 1952-2000, Journal of Politics 60 (November): 1160-1175, 1160 (2007); Cf. Matthew A. Baum, Sex, Lies and War: How Soft News Brings Foreign Policy to the Inattentive Public, American Political Science Review 96: 1-19, 1 (2002)(arguing that “due to selective political coverage by the entertainment-oriented, soft news media, many otherwise politically inattentive individuals are exposed to information about high-profile political issues...as an incidental by-product of seeking entertainment.”)

³⁰ Aaron Rabinowitz, Media Framing and Political Advertising in the Patients’ Bill of Rights Debate, Journal of Health Politics, Policy and Law, Vol. 35(5): 771-95, 788 (2010); Jonathan Weinberg, Broadcasting and Speech, 81 Cal. L. Rev. 1101, 1204-06 (1993).

³¹ Jerome A. Barron, Access to the Press--A New First Amendment Right, 80 Harv. L. Rev. 1641, 1647 (1967).

mode of political speech. Political advertisements can affect the tenor and framing of media coverage of policy debates,³² which is extremely important to both public opinion formation³³ and the outcome of these debates. Specifically, the standards, terms, perspectives, metaphors and visual images used by the media – in short, how an issue is framed in the news – can “promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation.”³⁴ Indeed, issue frames “determine what the public thinks it is becoming informed about, which in turn often determines how people take sides on political issues.”³⁵ Thus, the public may unconsciously internalize political messages that are disseminated primarily by moneyed interests and groups, undermining the democratic goals of deliberation and accountability.

The inequality in access to political voice is exacerbated by the propensity of courts to “treat the free speech rights of private actors as fungible with no regard to differentials in communicating power.”³⁶ As Professor Jerome Barron has observed,³⁷ the Supreme Court espoused this perspective in the 1976 campaign finance case of *Buckley v. Valeo*.³⁸ In *Buckley*, the Court endorsed the idea that the First Amendment protects the free speech rights of each individual equally, but dismissed the argument that limitations on expenditures are justifiable because differentials in financial resources can influence the outcome of elections: “the

³² Aaron Rabinowitz, *Media Framing and Political Advertising in the Patients’ Bill of Rights Debate*, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 771 (2010).

³³ See Shanto Iyengar & Donald R. Kinder, *News that Matters* 112 (1987); John R. Zaller, *The Nature and Origins of Mass Opinion* 50 (1992).

³⁴ Robert Entman, *Framing: Toward Clarification of a Fractured Paradigm*, *Journal of Communication* 43: 51-58, 52 (1993).

³⁵ John R. Zaller, *The Nature and Origins of Mass Opinion* 8 (1992).

³⁶ Jerome A. Barron, *Access Reconsidered*, 76 *Geo. Wash. L. Rev.* 826, 835 (2008).

³⁷ Jerome A. Barron, *Access Reconsidered*, 76 *Geo. Wash. L. Rev.* 826, 835 (2008).

³⁸ 424 U.S. 1 (1976).

concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”³⁹ In short, the Court will protect speech once it comes to the fore, but it is indifferent to creating opportunities for expression.⁴⁰

John Rawls warned that “[t]he liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantage to control the course of public debate.”⁴¹ Indeed, this concern seems to be particularly relevant and consequential in our modern political discourse. During the Clinton health care reform debate in 1993 and 1994, for example, 650 interest groups and organizations spent in excess of \$100 million to influence the policy debate and its outcome.⁴² In a survey of members of the House and Senate, interest group advertising was cited as the most significant influence on the outcome of the reform debate.⁴³ More recently, over \$200 million was spent on political advertising during the health care reform debate under President Obama.⁴⁴ If our First Amendment jurisprudence and democratic aspirations counsel a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,⁴⁵ the foregoing discussion should be cause for concern.

³⁹ *Buckley v. Valeo*, 424 U.S. at 48-49 (1976).

⁴⁰ Jerome A. Barron, *Access to the Press--A New First Amendment Right*, 80 *Harv. L. Rev.* 1641, 1641 (1967).

⁴¹ John Rawls, *A Theory of Justice* 225 (rev. ed. 1999).

⁴² Darrell M. West, Diane Heith and Chris Goodwin, *Harry and Louise Go to Washington: Political Advertising and Health Care Reform*, *Journal of Health Politics, Policy and Law*, Vol. 21(1): 35-68, 42 (1996).

⁴³ Orval Hanson et. al, *Lawmakers' Views on the Failure of Health Reform: A Survey of Members of Congress and Staff*, *Journal of Health Policy, Politics and Law*, Vol. 21(1): 137-151, 143 (1996).

⁴⁴ See, e.g., Ricardo Alonso-Zaldivar, *Unions, Businesses Draw Line in Health Sand*, Grand Rapids Press, March 17, 2010.

⁴⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

A Functioning Marketplace of Ideas

In order to formulate a coherent approach to media regulation, it is first necessary to imagine what the ideal broadcast marketplace of ideas would look like. It is possible to articulate at least two divergent visions of the ideal marketplace of ideas: a consumer sovereignty ideal and a civic republican ideal. The former ideal trumpets the virtues of consumer sovereignty and emphasizes the reactive media policy goal of satisfying existing consumer demand.⁴⁶ The latter ideal suggests that broadcast policy should strive to cultivate public tastes, build social solidarity and improve democratic debate.⁴⁷ This ideal requires that broadcast policy be both proactive and reactive.

The deregulatory agenda that has dominated media regulation since the 1980s represents the triumph of the consumer sovereignty ideal and laissez-faire principles. For nearly the past three decades, media regulation has frequently been viewed as either inefficient or unnecessary because the market was thought to be sufficiently competitive to satisfy consumer demands.⁴⁸ However, two salient critiques of the consumer sovereignty ideal warrant consideration. On an empirical level, it is not clear that the laissez-faire broadcast marketplace actually satisfies consumer demands. For example, there is evidence that broadcasters may undervalue viewers' desire for substantive political news and diverse political programming.⁴⁹ On a normative level, it seems problematic to label the broadcast marketplace a success even if it does satisfy existing consumer preferences. First, there is evidence that

⁴⁶ Ellen P. Goodman, Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets, 19 Berkeley Tech. L.J. 1389, 1392 (2004).

⁴⁷ Ellen P. Goodman, Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets, 19 Berkeley Tech. L.J. 1389, 1392 (2004).

⁴⁸ See, e.g., Christopher S. Yoo, Rethinking the Commitment to Free, Local Television, 52 Emory L.J. 1579 (2003).

⁴⁹ Kari Garcia, Broadcasting Democracy: Why America's Political Candidates Need Free Air Time, 17 CommLaw Conspectus 267, 287 (2008).

consumer preferences may be endogenous to market dynamics: commercial markets may generate and manipulate public preferences rather than ascertain and satisfy them.⁵⁰ Consequently, it would be circular to label the broadcast marketplace a success if it merely satisfied the consumer preferences that it generated in the first place. Second, there is evidence that the laissez-faire broadcast marketplace actually contributes to the deterioration of the political information environment⁵¹ and the homogenization of political debate within mainstream parameters.⁵² To anyone who once heralded the potential of commercial broadcasting to foster the democratic goals of deliberation, accountability, and an informed citizenry, the consumer sovereignty ideal seems a woefully unsatisfying objective.

If the civic republican vision of the marketplace of ideas – and its attendant commitment to proactive media policy – is used as a point of departure, it is still essential to identify the precise goals that media policy should strive to accomplish. What would a functioning marketplace of ideas look like? In this article, I endorse Jürgen Habermas' depiction of the public sphere⁵³ as a model for the ideal broadcast marketplace of ideas. In this model, different viewpoints would jostle for public consumption in the broadcast marketplace on the basis of their public appeal.⁵⁴ At the same time, however, the broadcast marketplace

⁵⁰ See, e.g., C. Edwin Baker, *Media, Markets and Democracy* 87-95 (2d ed. 2004).

⁵¹ Martin Gilens, Lynn Vavreck and Martin Cohen, *Mass Media and the Public's Assessments of Presidential Candidates, 1952-2000*, *Journal of Politics* 60 (November): 1160-1175, 1160 (2007).

⁵² See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 *S. Cal. L. Rev.* 1923, 1943 (1996); Mara Einstein, *The Program Selection Process*, in *Program Diversity and the Program Selection Process on Broadcast Network Television* 45-49 (FCC Media Ownership Working Group Study No. 5, Sept. 2002) (discussing how advertiser pressure contributes to bland and homogeneous programming), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf.

⁵³ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger trans., MIT Press 1989) (1962).

⁵⁴ Cf. Ellen P. Goodman, *Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 *Berkeley Tech. L.J.* 1389, 1408-09 (2004).

would also be aspirational, cultivating shared norms and exposing citizens to ideas that they might not otherwise seek.⁵⁵ In short, the ideal broadcast marketplace of ideas would serve as a forum for intellectual exchange that satisfies an existing diversity of tastes, fosters more robust and inclusive democratic dialogue, and helps produce a more informed citizenry.

The Objectives of media Regulation

How can media policy better realize the vast potentialities of the broadcast medium and the aspirational vision of the marketplace of ideas? This article starts from the premise that the central goal of media policy should be to improve viewpoint diversity in extant political debates. The FCC defines viewpoint diversity as the “availability of media content reflecting a variety of perspectives.”⁵⁶ In a world in which political debate is homogenized within mainstream parameters,⁵⁷ broadcasters eschew coverage of controversial issues,⁵⁸ and moneyed interests expend millions of dollars trying to define the contours of public debates,⁵⁹ media policy should consciously promote diverse and underrepresented viewpoints in an effort to improve the political information environment. Whereas the homogenization of political debate necessarily simplifies issues and blunts discussion, promoting viewpoint

⁵⁵ Cf. R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1957-62 (1996).

⁵⁶ *In re 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rec. 13620, 13627 (2003).

⁵⁷ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1943 (1996); Mara Einstein, *The Program Selection Process*, in *Program Diversity and the Program Selection Process on Broadcast Network Television* 45-49 (FCC Media Ownership Working Group Study No. 5, Sept. 2002) (discussing how advertiser pressure contributes to bland and homogeneous programming), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf.

⁵⁸ See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1157-64 (1993); Jerome A. Barron, *Access to the Press--A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1641-43 (1967).

⁵⁹ See, e.g., Ricardo Alonso-Zaldivar, *Unions, Businesses Draw Line in Health Sand*, *Grand Rapids Press*, March 17, 2010.

diversity enriches debate, permits meaningful deliberation, and produces a more informed citizenry. Trying to enable diverse and discordant viewpoints to achieve a toehold in contemporary debates implicitly endorses the counterspeech principle, which promotes additional speech as the prescribed solution when forms of expression carry detrimental effects for democracy: “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.”⁶⁰ In short, promoting diverse and underrepresented viewpoints may be a necessary antidote to the influence of money in broadcasting and politics today.

Targeting viewpoint diversity as the focal point of media policy has its drawbacks, however. First, some critics have argued that leveraging the counterspeech principle to improve democratic discourse is inapposite in an age of abundant media speech. Studies show that the public has a limited attention span for speech on political and social issues,⁶¹ and flooding individuals with more speech may counterproductively dull their senses and diminish their ability to discern quality or truth in political debates.⁶² Consequently, simply adding underrepresented viewpoints to the panoply of voices in a debate may not effectively enrich public discourse.⁶³ Second, if individuals still obtain news from a single source – Fox News, for example – then promoting additional viewpoints on PBS will not expose citizens to new ideas or diverse perspectives. In short, efforts to promote viewpoint diversity in political debates must be able to overcome obstacles such as attention spectrum scarcity and audience

⁶⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁶¹ Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 *San Diego L. Rev.* 129, 136 (2005).

⁶² Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 *San Diego L. Rev.* 129, 136 (2005).

⁶³ Lili Levi, *Reclaiming the First Amendment: Constitutional Theories of Media Reform*, 35 *Hofstra L. Rev.* 1321, 1335 (2007).

fragmentation if they are to improve the political information environment and contribute to political learning.

The idea that government has an affirmative obligation to facilitate opportunities for speech has a long and celebrated history. The framers of the Constitution, for example, advocated government subsidization of journalism and the democratization of “political intelligence and information.”⁶⁴ Zachariah Chafee, Jr. similarly argued that “affirmative action by the government” is necessary to ensure that the marketplace of ideas functions properly.⁶⁵ The Supreme Court evinced this understanding of the First Amendment in *Red Lion Broadcasting Co. v. FCC*, stating that “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”⁶⁶ Indeed, when critics of media regulation disparage the government’s capacity to regulate in the public interest, they enable nongovernmental constraints on democratic discourse to operate unchecked.⁶⁷ However, government has the unique potential to act as a “countervailing power” to promote the public interest against the tide of market forces.⁶⁸ In that vein, Cass Sunstein has argued that there is an affirmative government obligation to provide opportunities and subsidies for speech.⁶⁹

⁶⁴ C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57, 99-101 (1994)(quoting President George Washington).

⁶⁵ Zechariah Chafee, Jr., *Government and Mass Communications* 471-77 (1947).

⁶⁶ 395 U.S. 367, 390 (1969).

⁶⁷ Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 788-89 (1987).

⁶⁸ Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 788-89 (1987).

⁶⁹ Cass R. Sunstein, *Democracy and the Problem of Free Speech* 258 (1995).

This article will proceed as follows. I evaluate several policy alternatives designed to improve political discourse and promote viewpoint diversity in extant political debates. I then describe and examine my proposed marketplace of ideas trust fund. Next, I assess the constitutionality of the proposed regulation.

Alternative Approaches to Improving Viewpoint Diversity in Political Debates

If the central goal of media policy is to improve viewpoint diversity in extant political debates, any program designed to achieve this end should be judged – somewhat tautologically – by whether it effectively disseminates a diverse range of viewpoints. This overarching criterion can be meaningfully disaggregated into two distinct subparts based on the discussion above. First, does the program promote a diverse spectrum of viewpoints? Recall the argument that media conglomerates eschew unpopular and unorthodox ideas due to their desire to attract and retain the largest commercial audience possible.⁷⁰ Consequently, a media policy that relies of the laissez-faire marketplace to promote viewpoint diversity might generate a very limited spectrum of viewpoints. Second, does the program enable a diverse range of viewpoints to actually reach the public? There is an old adage that a message delivered is not necessarily a message received. Obstacles such as attention spectrum scarcity, audience fragmentation or regulatory unenforceability can undermine an ostensibly worthwhile program. Using these criteria, I will evaluate competing policy options designed to promote viewpoint diversity and improve the quality of political debates.

Substantive Media Regulation: The Fairness Doctrine

In the Communications Act of 1934, Congress charged the Federal Communications Commission (FCC) with the duty to regulate broadcasting in the furtherance of “the public

⁷⁰ Jerome A. Barron, Access to the Press--A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641-43 (1967).

interest, convenience, and necessity.”⁷¹ The Supreme Court characterized these terms as a delegation of “expansive powers” by means of a “comprehensive mandate” to make the best use of the public airwaves.⁷² This mandate came to be known as the broadcast public interest standard. The FCC embraced this comprehensive mandate in its early years, stating in 1949 that the goal of broadcast regulation “is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day.”⁷³ To that end, the FCC of the 1940s and 1950s promulgated substantive media regulations – legal guidelines about the substance of broadcast programming – to democratize information and facilitate the exchange of ideas in a competitive broadcast marketplace of ideas.⁷⁴ The FCC’s most prominent initiative was the promulgation of the fairness doctrine, which required broadcasters to devote a reasonable percentage of airtime to covering controversial issues of public importance and to provide a reasonable opportunity for the expression of opposing views on those issues.⁷⁵ Thus, the fairness doctrine consciously tried to promote viewpoint diversity by giving voice to viewpoints that might otherwise be excluded from public debate.

⁷¹ Communications Act of 1934, Pub. L. No. 73-416, § 312(b), 48 Stat. 1064, 1087 (codified as amended at 47 U.S.C. §§ 151-613 (2000)).

⁷² *NBC, Inc. v. United States*, 319 U.S. 190, 219 (1943); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969) (characterizing Congress’s “mandate to the FCC to assure that broadcasters operate in the public interest” as “a broad one”).

⁷³ Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

⁷⁴ *Great Lakes Broad. Co.*, F.R.C. No. 4900 (1928), reprinted in 3 FRC Ann. Rep. 32, 33 (1929), *aff’d in part and rev’d in part*, *Great Lakes Broad. Co. v. Fed. Radio Comm’n*, 37 F.2d 993 (D.C. Cir. 1930).

⁷⁵ Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

The FCC did not formally abolish the fairness doctrine until 1987.⁷⁶ When it did, the agency observed that the doctrine chilled coverage of controversial issues of public importance because broadcasters did not want to trigger the doctrine's balancing requirements.⁷⁷ Indeed, despite the fairness doctrine's longevity, commentators have observed that this era of substantive media regulation failed to promote a competitive broadcast marketplace of ideas.⁷⁸ Its checkered history notwithstanding, numerous politicians and pundits have called for the renewed application of the fairness doctrine as a way to improve the quality of contemporary political discourse.⁷⁹ To understand why substantive media regulation failed to improve viewpoint diversity in the broadcast marketplace, and would likely fail to do so if promulgated and enforced anew today, it will be useful to consider the criteria enumerated at the beginning of this section.

As a threshold matter, the fairness doctrine is unlikely to promote a diverse spectrum of viewpoints because it is exceedingly vague.⁸⁰ Consider, for example, the myriad conceptual and definitional ambiguities that beleaguer this approach. What constitutes a controversial issue of public importance? When has a broadcaster raised such an issue? When has a broadcaster afforded a reasonable opportunity for the presentation of opposing viewpoints on

⁷⁶ See *Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5049-52 (1987), *aff'd* *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

⁷⁷ See *Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5049-52 (1987), *aff'd* *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

⁷⁸ See, e.g., Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 *Admin. L. Rev.* 1, 26-28 (2009).

⁷⁹ See, e.g., Brian Jennings, *Censorship: The Threat To Silence Talk Radio 6* (2009); Alison Dagnes, *Politics on Demand: The Effects of 24-Hour News on American Politics* 52 (2010).

⁸⁰ See, e.g., C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* 196 (2007).

the issue?⁸¹ Most importantly, given that important public issues are complex and multidimensional, which competing viewpoints must be presented?⁸² If a broadcast licensee aired content suggesting that the Patient Protection and Affordable Care Act will dramatically increase health insurance premiums, for example, is the relevant opposing viewpoint that it will not? What about an argument that insurance premiums should be a secondary or tertiary consideration, and that the real issue is federalism? Social justice? Pharmaceutical research and development incentives? Perhaps more than any other feature, the fairness doctrine's two-dimensional preoccupation with "opposing viewpoints" precludes it from ever promoting a truly diverse spectrum of perspectives on complex and controversial issues of public importance.

The significance of these conceptual ambiguities is exacerbated by the fact that the fairness doctrine vests the locus of responsibility with the broadcast licensees themselves.⁸³ Specifically, the doctrine charges each broadcast licensee with the duty to provide a reasonable opportunity for the expression of opposing views on controversial issues of public importance.⁸⁴ Moreover, the doctrine operates reactively, requiring some action or willful inaction by a broadcaster to trigger liability.⁸⁵ Hopefully the preceding discussion makes clear, however, that broadcast licensees are the wrong gatekeepers to promote civic republican

⁸¹ See generally, Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 *Geo. Wash. L. Rev.* 845, 867-68 (2008).

⁸² See Steven J. Simmons, *The Fairness Doctrine and the Media 190-92* (1978) (discussing the conceptual difficulty of identifying contrasting viewpoints on public issues).

⁸³ Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 *Geo. Wash. L. Rev.* 845, 853-54 (2008).

⁸⁴ Report on Editorializing by Broadcast Licensees, 13 *F.C.C.* 1246, 1249 (1949).

⁸⁵ See, e.g., *Straus Commc'ns, Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976) (stating that FCC finds violations of fairness doctrine only where broadcasters' actions are unreasonable or in bad faith); Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 *Geo. Wash. L. Rev.* 845, 853-54 (2008).

ideals. To appreciate why broadcasters should not be entrusted with the task of determining which competing viewpoints should be presented in contemporary public debates, one need only consider the disparate incentives facing broadcasters and the FCC: viewers and advertisers are the commodities that are traded on the commercial broadcast airwaves, not public interest programming.⁸⁶ Consequently, broadcast licensees have an incentive to design programming that appeals to mainstream tastes and attitudes⁸⁷ rather than foster viewpoint diversity and cultivate communitarian ideals.⁸⁸ In short, the fairness doctrine is a suboptimal way to disseminate a diverse spectrum of viewpoints because it is too vague, vests responsibility with the wrong parties, and operates reactively.

The same features that preclude the fairness doctrine from promoting a diverse range of viewpoints also preclude it from ensuring that a diverse range of viewpoints actually reaches the public. Due in part to the conceptual and definitional ambiguities that plague the fairness doctrine, for example, the FCC developed a lax enforcement regime in which it rarely required broadcasters to cover issues of public importance.⁸⁹ Moreover, the powerful broadcasting lobby vehemently opposed the fairness doctrine, asserting that the programming requirements were too cumbersome and abridged their First Amendment rights.⁹⁰ In response, the FCC generally ignored the programming requirements and rarely referred to them in

⁸⁶ C. Edwin Baker, *Advertising and a Democratic Press* 25-82 (1994) (arguing that the media's dependence on advertising revenues affects the content of programming and leads to a less democratic press).

⁸⁷ Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1157-64 (1993).

⁸⁸ C. Edwin Baker, *Advertising and a Democratic Press* 25-82 (1994) (arguing that the media's dependence on advertising revenues affects the content of programming and leads to a less democratic press).

⁸⁹ See Jerome A. Barron, *Freedom of the Press for Whom?: The Right of Access to Mass Media* 133-35 (1973).

⁹⁰ See Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. Mich. J.L. Reform 149, 156 (2006).

subsequent enforcement and rulemaking proceedings.⁹¹ In 1950, for example, one station received a license renewal despite the station management's express refusal to air any public interest programming required by the FCC.⁹² As a result, broadcasters sidestepped the requirement that they present diverse viewpoints on issues of public importance by not covering the issues in the first place.⁹³ In short, the fairness doctrine simultaneously chilled discussion of controversial public issues and failed to improve viewpoint diversity in the marketplace of ideas.⁹⁴

The fairness doctrine is the archetypal regulation that failed to deliver on its promise. The approach is ostensibly promising because it consciously attempts to promote viewpoint diversity by giving a platform to viewpoints that might otherwise be excluded from public debate. The mechanisms that the doctrine leverages to do so, however, are inefficient: the regulation is malleable and ambiguous and it entrusts broadcast licensees with the task of disseminating diverse viewpoints on controversial issues of public importance. As a result, the fairness doctrine failed to promote a diverse spectrum of viewpoints and failed to ensure that a diverse spectrum of viewpoints actually reached the public.

The Laissez-Faire Approach: An Unfettered Marketplace of Ideas

Although the FCC did not formally abolish the fairness doctrine until 1987, the regulatory paradigm at the FCC began to change in the 1970s. In the wake of the Vietnam

⁹¹ See Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. Mich. J.L. Reform 149, 156 (2006).

⁹² See Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. Mich. J.L. Reform 149, 156 (2006).

⁹³ Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 Geo. Wash. L. Rev. 845, 867-68 (2008).

⁹⁴ See C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* 196 (2007); Thomas W. Hazlett & David W. Sosa, "Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting, 4 Mich. Telecomm. & Tech. L. Rev. 35, 62-63 (1997-98) (discussing a study of radio programming which revealed that the percentage of AM stations with news or talk formats increased dramatically after the fairness doctrine was repealed).

War, the Pentagon Papers controversy, Watergate, and President Nixon's efforts to penalize broadcasters that aired programming critical of his Administration, the public became increasingly skeptical of government's ability to promote the public interest through regulation.⁹⁵ In 1982, FCC Chairman Mark Fowler proposed that governmental oversight of broadcasting should jettison substantive media regulations and instead rely on "broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace."⁹⁶ This approach was premised on rational-choice theories and Chicago School models of competition, which proffered that an unregulated telecommunications market would ascertain and respond most effectively to the public's desire for public affairs information and debate.⁹⁷ Furthermore, unfettered discussion would best promote the discovery of truth by keeping the marketplace of ideas free from government intrusion.⁹⁸ Adhering to this logic, the FCC subsequently eliminated many radio programming guidelines, community programming requirements, and public affairs programming requirements.⁹⁹

As I suggested earlier, the laissez-faire approach to broadcast regulation is a suboptimal way to promote a diverse spectrum of viewpoints. The foundational assumption of the deregulatory approach to broadcasting is that the marketplace of ideas is readily

⁹⁵ See, e.g., Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 *Admin. L. Rev.* 1, 20 (2009).

⁹⁶ See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207, 209-10 (1982).

⁹⁷ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 *S. Cal. L. Rev.* 1923, 1937 (1996); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 *Admin. L. Rev.* 1, 20-21 (2009).

⁹⁸ Jonathan Weinberg, *Broadcasting and Speech*, 81 *Cal. L. Rev.* 1101, 1138-39 (1993).

⁹⁹ Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 *Minn. J. L. Sci. & Tech.* 1, 27-28 (2004).

accessible to proponents of diverse viewpoints on controversial issues of public importance.¹⁰⁰ This proposition is highly suspect, however, and the analogy between the marketplace of ideas and laissez-faire economic markets has been criticized as inapposite.¹⁰¹ Indeed, the unregulated broadcast marketplace is not equally accessible to all viewpoints because commercial market forces are not prepolitical or ideologically neutral.¹⁰² Broadcasting is a commercial enterprise, and market forces are not hospitable to public affairs programming because these programs attract smaller audiences and generate less profit than other programming alternatives.¹⁰³ Moreover, media conglomerates are averse to unpopular and unorthodox ideas due to their desire to attract and retain the largest commercial audience possible.¹⁰⁴ If Justice Holmes was correct when he observed that “the best test of truth is the power of the thought to get itself accepted in the competition of the market,”¹⁰⁵ then the unregulated broadcast marketplace will necessarily fail to promote truth or a diverse spectrum of viewpoints because not every viewpoint has an equal chance *ex ante* to compete and prevail in the market.

The laissez-faire broadcast marketplace similarly precludes a diverse range of viewpoints from actually reaching the public because not all speakers enjoy equal access to the marketplace. In lieu of equality of access to the marketplace of ideas, “those with extensive

¹⁰⁰ See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1149 (1993); R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1937 (1996).

¹⁰¹ See, e.g., Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 Admin. L. Rev. 1, 28 (2009).

¹⁰² See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1937-42 (1996).

¹⁰³ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1942 (1996).

¹⁰⁴ Jerome A. Barron, *Access to the Press--A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1641-43 (1967).

¹⁰⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

institutional or financial resources” have greater access to “effective mass communication.”¹⁰⁶ Indeed, high barriers to entry in the telecommunications market, monopolies on the medium of transmission, high costs of production, and wealth disparities among citizens all “impede access to mass audiences and skew public discussion in favor of the interests of those who possess power and wealth in an open society.”¹⁰⁷ This inequality in access to the marketplace of ideas thus performs a mainstreaming function by constraining viewpoint diversity within the confines of established parameters.¹⁰⁸ In short, the deregulatory approach to the marketplace of ideas allows nongovernmental constraints on public discourse to operate unchecked.¹⁰⁹

Candidate-Centered Approaches: Vouchers and Free Airtime

More recent attempts to improve viewpoint diversity in political debates have tended to focus on providing free access to broadcasting for qualifying political candidates. In 2002 and 2003, for example, Senators John McCain, Russ Feingold, and Richard Durbin sponsored the Political Campaign Broadcast Activity Improvements Act and the Our Democracy, Our Airwaves Act.¹¹⁰ These bills would have required broadcast licensees to air at least two hours of candidate-centered or issue-centered programming per week leading up to elections,¹¹¹ and

¹⁰⁶ Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1149 (1993).

¹⁰⁷ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1943 (1996).

¹⁰⁸ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1943 (1996).

¹⁰⁹ Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 788-89 (1987).

¹¹⁰ *Our Democracy, Our Airwaves Act*, S. 1497, 108th Cong. § 3(a)(1)(A) (2003); *Political Campaign Broadcast Activity Improvements Act*, S. 3124, 107th Cong. § 3(a)(1)(A) (2002).

¹¹¹ *Our Democracy, Our Airwaves Act*, S. 1497, 108th Cong. § 3(a)(1)(A) (2003); *Political Campaign Broadcast Activity Improvements Act*, S. 3124, 107th Cong. § 3(a)(1)(A) (2002).

would have provided qualifying political candidates with broadcast vouchers to be used for political advertisements on television and radio.¹¹² Candidates would have qualified for the vouchers after achieving a predetermined fundraising target, and the vouchers would have been funded by a spectrum use fee levied on no more than one percent of the gross annual revenues of broadcast license holders.¹¹³ While the programming requirements were a familiar form of substantive media regulation designed to improve the public affairs content of broadcasting, the voucher systems were designed to provide all political candidates with access to advertising, thereby increasing political speech and diversity of expression.¹¹⁴

These proposals predictably encountered stiff opposition from the broadcasting industry. Critics argued that the bills interfered with the editorial discretion of broadcasters by dictating the programming content and format required during the public affairs broadcasts.¹¹⁵ They also argued that the free airtime requirement and spectrum use fee constituted a tax on broadcasters.¹¹⁶ Although both bills failed to become law, Senators Richard Durbin, Arlen Specter, Russ Feingold and Barack Obama introduced similar legislation in 2007.¹¹⁷ The Fair Elections Now Act eliminated the candidate-centered and issue-centered programming requirements included in the previous bills, but retained the broadcast voucher proposal.¹¹⁸ To

¹¹² See, e.g., S. 1497, Sec. 4(a), §§ 315A(a), (b)(1), (d)(1) (2003).

¹¹³ S. 1497, sec. 4(a), § 315A(h) (2003).

¹¹⁴ See *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (Public funding does not “abridge, restrict, or censor speech, but rather ... facilitate[s] and enlarge[s] public discussion.”)

¹¹⁵ John Samples and Adam D. Thierer, Cato Inst., Policy Analysis No. 480, *Why Subsidize the Soapbox The McCain Free Airtime Proposal and the Future of Broadcasting 2* (2003).

¹¹⁶ John Samples and Adam D. Thierer, Cato Inst., Policy Analysis No. 480, *Why Subsidize the Soapbox The McCain Free Airtime Proposal and the Future of Broadcasting 2* (2003).

¹¹⁷ S. 1285, 110th Cong. § 1 (2007).

¹¹⁸ See S. 1285, sec. 202(a), § 315A.

be eligible for a voluntary system of public financing, each Senate candidate was first required to raise qualifying contributions of \$2,000 plus \$500 for each congressional district in his state.¹¹⁹ Qualifying contributions were defined as contributions from individual donors that did not exceed five dollars. Once a candidate demonstrated his viability, he was eligible to receive broadcast vouchers in the amount of \$100,000 multiplied by the number of congressional districts in his state.¹²⁰ The vouchers would have been funded through a spectrum use fee equal to two percent of broadcasters' gross annual revenues, providing roughly \$1.3 billion in vouchers.¹²¹

From the perspective of promoting viewpoint diversity, the key criticism of voucher and/or free airtime proposals is that they will inevitably fail to promote a diverse spectrum of viewpoints because they entrust politicians with the task of improving the diversity of expression in political debates. Indeed, I contend that any candidate-centered approach to promoting viewpoint diversity is doomed to failure due to the incentives and constraints facing political candidates. Rational choice theorists posit that politicians are primarily interested in winning election and reelection.¹²² Some scholars suggest that this office-seeking behavior leads politicians to “choose policy positions and utter policy-related statements with an eye to voter preferences and the likely aggregate of voter choices.”¹²³ Others suggest that

¹¹⁹ S. 1285, sec. 102, § 505(a).

¹²⁰ See S. 1285, sec. 202(a), § 315A(c).

¹²¹ Fair Elections Now Act, To Reform the Finance of Senate Elections and on the High Cost of Broadcasting Campaign Advertisements: Hearing on S. 1285 Before the S. Comm. on Rules and Administration, 110th Cong. (2007) (prepared statement of Scott E. Thomas, Attorney, Dickstein Shapiro LLP).

¹²² See, e.g., David R. Mayhew, Congress: The Electoral Connection 13-78 (2004); Kenneth A. Shepsle, The Strategy of Ambiguity: Uncertainty and Electoral Competition, *The American Political Science Review*, 66(2): 555-568, 557 (1972).

¹²³ Kenneth A. Shepsle, The Strategy of Ambiguity: Uncertainty and Electoral Competition, *The American Political Science Review*, 66(2): 555-568, 557 (1972).

“politicians prefer to be sure that if they act they will not find themselves out on a limb,”¹²⁴ and that they become “addicted to equivocation and ambiguity” due to the unpredictability of how the electorate will respond to public statements on salient issues.¹²⁵ Whatever perspective one ascribes to, it seems clear that relying on candidates for public office to promote diverse viewpoints will necessarily be suboptimal: these actors will be susceptible to a mainstreaming effect because voicing unpopular ideas and promoting minority viewpoints is unlikely to lead to electoral success.

Candidate-centered approaches to promoting viewpoint diversity also appear unlikely to enable a diverse range of viewpoints to actually reach the public. Specifically, providing free airtime or broadcasting vouchers to political candidates will not enable diverse viewpoints to reach the public because these proposals inevitably face a tension between rationing a scarce resource and encouraging a multiplicity of voices. The Fair Elections Now Act, for example, required each Senate candidates to raise qualifying contributions of \$2,000 plus \$500 for each congressional district in his state to be eligible for the advertising vouchers. This provision was a rationing mechanism designed to ensure that only viable political candidates were eligible for a limited pool of voucher money. As a consequence, however, a Senate candidate would be required to obtain contributions from between 500 (Alaska) and 5,700 (California) different donors to be eligible for the public financing system. It seems unlikely that candidates outside of the established two-party system will regularly be able to surmount that hurdle. While these proposals may introduce more speech from Democrats and Republicans, they are not likely to promote a real multiplicity of voices that will espouse underrepresented viewpoints. If we are taking viewpoint diversity seriously, it seems impolitic to vest candidates for public office with

¹²⁴ V.O. Key, Jr., *Public Opinion and American Democracy* 424 (1961).

¹²⁵ V.O. Key, Jr., *Politics, Parties and Pressure Groups* 241 (1958).

the responsibility of disseminating diverse viewpoints to the public and improving democratic discourse.

The Marketplace of Ideas Trust Fund

Issue advertisements have been unexamined in previous debates about how to promote viewpoint diversity and democratic deliberation through media regulation. Previous discourse has generally focused on substantive media regulation (i.e., legal guidelines about the substance of programming)¹²⁶ or structural regulation of media ownership (e.g., rules limiting the aggregate television audience that any single entity may reach).¹²⁷ In contrast, the marketplace of ideas trust fund leverages insights garnered from models of political learning and research concerning the role of political advertisements in contemporary policy debates to promote viewpoints that might otherwise be excluded from public debate. Under this approach, a “marketplace of ideas tax” would be levied on all political advertisements to endow a “marketplace of ideas trust fund,” which would then be used to subsidize political advertisements sponsored by underrepresented viewpoints.

Admittedly, the proposed marketplace of ideas regulation is imperfect. At times, it can be criticized as either too incipient or too vague. Nonetheless, the problems that plague our democratic discourse are very real, and have been largely resistant to previous policy prescriptions. Thus, my hope is that the marketplace of ideas regulation will revive discussion and creative thinking about how to regulate to improve viewpoint diversity in extant political debates. Even incrementally improving the diversity and multiplicity of voices in

¹²⁶ Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 *Geo. Wash. L. Rev.* 845, 845 (2008).

¹²⁷ Daniel E. Ho and Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 *Stan. L. Rev.* 781, 788-89 (2009).

contemporary debates should strengthen the political information environment and foster the broad democratic goals of deliberation, accountability and a more informed citizenry.

In this portion of the chapter, I first discuss the empirical and theoretical underpinnings of the marketplace of ideas trust fund. I will then describe the mechanics of the proposal in more detail. Next, I will evaluate the likely efficacy of the proposed regulation using the criteria enumerated earlier. Finally, I will consider potential criticisms that could be lodged against the trust fund. A discussion of key constitutional concerns will be reserved until the following section.

How Political Advertisements Can Improve Viewpoint Diversity

The empirical foundation for my proposal is a growing body of social science literature which suggests that political advertising campaigns can affect how journalists frame policy debates and enable minority viewpoints to achieve greater salience in the news.¹²⁸ In short, this research suggests that policies designed to increase the number and variety of issue advertisements could dramatically improve the political information environment. A study that I conducted to examine media coverage of the Patients' Bill of Rights debate in 1998 and 1999 highlights how political advertising campaigns can contribute to viewpoint diversity.¹²⁹

In 1998, Congress proposed a Patients' Bill of Rights that would have imposed new regulations on the managed care industry in response to perceived quality of care shortfalls. During the debate, a coalition of business interests and managed care companies sponsored extensive political advertising campaigns in five key states to foment opposition to the pending legislation. I compared newspaper coverage of the debate in these states with

¹²⁸ Aaron Rabinowitz, Media Framing and Political Advertising in the Patients' Bill of Rights Debate, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 787-88 (2010).

¹²⁹ Aaron Rabinowitz, Media Framing and Political Advertising in the Patients' Bill of Rights Debate, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95 (2010).

coverage in five comparison states that were not directly exposed to the advocacy campaigns.¹³⁰ Although media coverage and public opinion overwhelmingly supported managed care regulation at the time of the Patients' Bill of Rights debate, newspaper coverage was 17 percent less likely to be supportive of managed care reform in states subject to the critical advertising campaigns.¹³¹ Moreover, the criticisms that were mentioned in the critical newspaper coverage were precisely those considerations mentioned in the negative advertising campaigns.¹³² Political advertisements may therefore contribute to viewpoint diversity and political learning by enabling minority viewpoints to achieve greater salience in the news.¹³³ The marketplace of ideas trust fund seeks to leverage these findings to ensure that a more diverse spectrum of viewpoints enter political discourse.

The theoretical foundation for my proposal is social science research on political learning and the role of the interest groups, issue advertisements and the media in contemporary political debates. Matthew Baum, for example, has developed a byproduct model of political learning: due to selective political coverage by the entertainment-oriented, soft news media, otherwise politically inattentive individuals are exposed to political information as an incidental byproduct of seeking entertainment.¹³⁴ If political learning can occur as a byproduct of entertainment-seeking behavior, then incidental exposure to political

¹³⁰ Aaron Rabinowitz, Media Framing and Political Advertising in the Patients' Bill of Rights Debate, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95 (2010).

¹³¹ Aaron Rabinowitz, Media Framing and Political Advertising in the Patients' Bill of Rights Debate, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 784-86 (2010).

¹³² Aaron Rabinowitz, Media Framing and Political Advertising in the Patients' Bill of Rights Debate, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 787 (2010).

¹³³ Aaron Rabinowitz, Media Framing and Political Advertising in the Patients' Bill of Rights Debate, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 788 (2010).

¹³⁴ Matthew A. Baum, Sex, Lies and War: How Soft News Brings Foreign Policy to the Inattentive Public, *American Political Science Review* 96: 1-19, 1 (2002).

advertisements in the course of normal television consumption could lead to increased levels of political awareness. Indeed, several studies suggest that political advertising campaigns can contribute to political learning.¹³⁵ Moreover, there is ample opportunity for this byproduct learning to occur: the average American consumes over 5 hours of television per day.¹³⁶ The marketplace of ideas trust fund seeks to leverage these insights to ensure that a diverse spectrum of viewpoints actually reaches the public.

The Mechanics of the Proposal

Which Political Advertisements Will Trigger the Marketplace of Ideas Tax?

An obvious threshold question that must be addressed is how to determine which political advertisements will trigger the marketplace of ideas tax. The Supreme Court has disaggregated political advertisements into two functional categories: express advocacy and its functional equivalent, and genuine issue advocacy.¹³⁷ The Court has characterized express advocacy as “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”¹³⁸ Express words of election or defeat include words such as vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, or reject.¹³⁹ Advertisements are the functional equivalent of express advocacy “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a

¹³⁵ Martin Gilens, Lynn Vavreck and Martin Cohen, Mass Media and the Public’s Assessments of Presidential Candidates, 1952-2000, *Journal of Politics* 60 (November): 1160-1175, 1160 (2007).

¹³⁶ Nielsen Company, *Anywhere Anytime Media Measurement Three Screen Report: Television, Internet and Mobile Usage in the U.S.* (2009).

¹³⁷ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007).

¹³⁸ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

¹³⁹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 44 fn 52 (1976).

specific candidate.”¹⁴⁰ Genuine issue advertisements, on the other hand, “focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.”¹⁴¹

While the Court has treated these categories of advertising differently in its First Amendment jurisprudence, I will sidestep questions of constitutionality for now. Here, I weigh normative and pragmatic considerations to determine which advertisements should trigger the marketplace of ideas tax. Normatively, all political advertisements – express advocacy, its functional equivalent, and genuine issue ads – should be subject to the marketplace of ideas tax. To start, the contemporary media landscape has produced an attention spectrum scarcity problem: the public has a limited attention span for speech on political and social issues.¹⁴² Consequently, all political advertisements compete for limited public attention to public affairs messages,¹⁴³ and the viewpoints that surface through the laissez-faire marketplace consume this scarce attention spectrum and contribute to the homogenization of political debate within mainstream parameters.¹⁴⁴ If the homogenization of political discourse is conceptualized as a negative externality, then taxing all political advertisements alike is appealing because it forces each speaker to internalize a fair share of the negative externalities created by his speech. Much like the federal government prohibits monopolization to promote better functioning economic markets – which constrains the

¹⁴⁰ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007).

¹⁴¹ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007).

¹⁴² Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 *San Diego L. Rev.* 129, 136 (2005).

¹⁴³ Cf. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *Duke L.J.* 375, 409.

¹⁴⁴ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 *S. Cal. L. Rev.* 1923, 1943 (1996).

activities of market participants – it may be necessary to regulate the participants in the marketplace of ideas to promote a better functioning democracy.¹⁴⁵ Indeed, it may be fair to distribute the cost of improving viewpoint diversity to each speaker in direct proportion to how loudly he is speaking.

Pragmatism and concerns with regulatory efficiency also counsel in favor of subjecting all political advertisements to the marketplace of ideas tax. As a threshold matter, subjecting more advertisements to the tax will generate a larger pool of subsidies to sponsor speech by underrepresented viewpoints. Moreover, taxing every political advertisement that surfaces through the laissez-faire marketplace should improve the efficiency of the marketplace subsidy when compared to alternative approaches: it might incrementally suppress the loudest voices in public debates while simultaneously expanding the subsidy pool for underrepresented viewpoints, thereby promoting viewpoint diversity from both the top and bottom.

Which Political Advertisements Are Eligible For the Marketplace of Ideas Subsidy?

The next conceptual hurdle that must be addressed is determining which speakers and/or viewpoints are eligible to receive the subsidy. To reiterate, the marketplace of ideas subsidy would be used to promote viewpoints that are underrepresented in extant political debates. Consequently, only express advocacy, its functional equivalent, and genuine issue advertisements would be eligible for the subsidy. Two tasks remain, however. First, how can we determine which viewpoints qualify as underrepresented in an extant political debate? Second, should every political advertisement that promotes a qualifiedly underrepresented viewpoint be eligible for the subsidy? I will explore each question in turn.

In his seminal article proposing a judicially enforceable First Amendment right of access to the press, Jerome Barron noted that considerations of administrative feasibility

¹⁴⁵ Zechariah Chafee, Jr., 2 *Government and Mass Communications* 471-77 (1947).

would dictate that limitations on a right of access be carefully defined.¹⁴⁶ Barron advocated the use of a contextual approach in which the degree to which an idea is suppressed or underrepresented by the local media is crucial to determining whether a right of access should be enforced.¹⁴⁷ A contextual approach is particularly apropos to determine whether a particular viewpoint should be eligible for the marketplace of ideas subsidy. After all, how better to determine an effective way to improve the political information environment than by examining the environment itself?

Determining when a particular viewpoint is underrepresented in an extant political debate can be disaggregated into two constituent inquiries, one definitional and one methodological. First, what does it mean for an idea to be underrepresented? Underrepresented relative to what? Second, how does one determine when an idea is in fact underrepresented? These are intractable problems, and it is perhaps unsurprising that previous commentators, including Barron, have dedicated scant attention to how one might determine when the media suppress or fail to represent particular viewpoints.¹⁴⁸ Nonetheless, a few preliminary observations will be useful.

One can posit several plausible definitions for what it means for a viewpoint to be underrepresented in political debate. For example, a viewpoint could be underrepresented if it appears in less than half of all media coverage of the debate. In the context of the health care reform debate under President Obama, for example, concerns about individual mandates or the role of the federal government would qualify as underrepresented viewpoints, while a

¹⁴⁶ Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1676-78 (1967).

¹⁴⁷ Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1677 (1967).

¹⁴⁸ Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1676-78 (1967).

focus on partisanship and pork barrel politics would not.¹⁴⁹ Critics would likely argue that this definition is too expansive, however, because too many mainstream viewpoints would qualify as underrepresented. During the Patients Bill of Rights debate in 1998 and 1999, for example, eight out of ten salient viewpoints identified in the debate would have qualified as underrepresented using this definition.¹⁵⁰ Alternatively, a viewpoint could be underrepresented if it fails to meet some lower threshold of representation in media coverage of the debate. If the threshold were set at ten percent, for example, only three out of the ten viewpoints mentioned during the Patients Bill of Rights debate would have qualified for the subsidy.¹⁵¹ Alternatively, if only those viewpoints that achieved the bottom decile of media coverage in the debate were eligible, then by definition only ten percent of all viewpoints would qualify for the subsidy.

The definitions mentioned above all leverage how pervasive a viewpoint is in media coverage of the debate to determine whether it is in fact underrepresented. One could also imagine using vastly different criteria to define what it means for a viewpoint to be underrepresented in a debate. For example, one could rely on public opinion polling to gauge which viewpoints have permeated the public consciousness in a particular debate. A viewpoint could qualify as underrepresented if some predefined threshold of the public does not reference it when asked about the subject in a survey. If an animating principle behind the marketplace of ideas tax is that a diverse spectrum of viewpoints should reach the public, then a key benefit of using public opinion polling to determine what it means for a viewpoint to be

¹⁴⁹ See, e.g., Aaron Rabinowitz, *Media Framing and Political Advertising Surrounding the Affordable Care Act*, Working Paper, available from the author upon request.

¹⁵⁰ Aaron Rabinowitz, *Media Framing and Political Advertising in the Patients' Bill of Rights Debate*, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 785 (2010).

¹⁵¹ Aaron Rabinowitz, *Media Framing and Political Advertising in the Patients' Bill of Rights Debate*, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 785 (2010).

underrepresented is that it exploits the relevant endpoint – whether the public has internalized a particular message.

Two salient critiques arise when contemplating the use of public opinion polling to determine which viewpoints should qualify as underrepresented. First, critics could argue that public opinion is not synonymous with the results of public opinion polls,¹⁵² and that polling is beleaguered by problems such as non-attitudes or the susceptibility of respondents to question wording or placement.¹⁵³ While this position is not without merit, skillful survey research routinely produces results that are extremely accurate, credible and replicable.¹⁵⁴ Indeed, as the prominent pollster George Gallup once wrote, “polls are the chief hope of lifting government to a higher level...by providing a *modus operandi* for testing new ideas.”¹⁵⁵ Second, using the results of public opinion polls to determine when a viewpoint is underrepresented produces a circularity problem: if a significant percentage of the public does not reference a particular viewpoint when asked about a subject in a survey, then how can we discern which viewpoints are being omitted from the debate? One possible solution would be to convene a nonpartisan panel of experts – something akin to the National Academy of Sciences – to develop an inventory of relevant viewpoints inductively from media content, public discourse, and a review of the literature.¹⁵⁶ Viewpoints that this panel determines are relevant for a particular debate, but that fail to achieve a predefined level of salience in subsequent public opinion polling, would then qualify as underrepresented. While this is

¹⁵² See, e.g., Herbert Asher, *Polling and the Public* 23 (2004).

¹⁵³ See, e.g., Herbert Asher, *Polling and the Public* 50-67 (2004).

¹⁵⁴ See, e.g., Floyd J. Fowler, Jr., *Survey Research Methods* 1-10 (2002).

¹⁵⁵ George Gallup, *Polls and the Political Process – Past, Present, and Future*, 29 *Public Opinion Quarterly* 544, 549 (1965-66).

¹⁵⁶ Cf. Baldwin Van Gorp, *The Constructionist Approach to Framing: Bringing Culture Back In*, 57 *Journal of Communication* 60 (2007) (discussing how to develop an operational definition of media frames in a debate).

hardly a comprehensive discussion of what it means for an idea to be underrepresented in a political debate, hopefully it offers some useful insights.

Once we have identified what it means for a viewpoint to be underrepresented in a political debate, how can we determine whether a particular viewpoint is actually underrepresented? As the preceding paragraph suggests, public opinion polling provides one plausible answer. Fortunately, there are other sound methodological approaches that can also be used to gauge how pervasive a particular viewpoint is in political debate. The most prevalent approach to measuring viewpoints in media coverage is manual content analysis.¹⁵⁷ Using this approach, individuals read, view or listen to large quantities of media coverage and code it for a predefined set of characteristics.¹⁵⁸ In the case of the marketplace of ideas trust fund, coders would be searching for the frequency with which a particular viewpoint is present in coverage of a political debate.

Critics of manual content analysis will assert that coding determinations are subjective and unreliable.¹⁵⁹ Moreover, detractors might suggest that a viewpoint is a very subtle and nuanced concept that is not readily susceptible to large-scale coding. For example, a viewpoint could be disaggregated into informational, positional and tonal elements. These concerns certainly warrant careful consideration. As a preliminary rebuttal, however, it is worth reflecting on the fact that coding determinations can be subjected to scientific review, and

¹⁵⁷ See, e.g., Daniel E. Ho and Kevin M. Quinn, Viewpoint Diversity and Media Consolidation: An Empirical Study, 61 *Stan. L. Rev.* 781, 803 (2009), Robert M. Entman, *Democracy Without Citizens: Media and the Decay of American Politics* (1989), Robert M. Entman, How the Media Affect What People Think: An Information Processing Approach, 51 *J. Pol.* 347 (1989); William T. Gormley, Jr., An Evaluation of the FCC's Cross-Ownership Policy, 6 *Pol'y Analysis* 61 (1980).

¹⁵⁸ See, e.g., Daniel E. Ho and Kevin M. Quinn, Viewpoint Diversity and Media Consolidation: An Empirical Study, 61 *Stan. L. Rev.* 781, 803 (2009), Robert M. Entman, *Democracy Without Citizens: Media and the Decay of American Politics* (1989), Robert M. Entman, How the Media Affect What People Think: An Information Processing Approach, 51 *J. Pol.* 347 (1989); William T. Gormley, Jr., An Evaluation of the FCC's Cross-Ownership Policy, 6 *Pol'y Analysis* 61 (1980).

¹⁵⁹ See, e.g., Daniel E. Ho and Kevin M. Quinn, Viewpoint Diversity and Media Consolidation: An Empirical Study, 61 *Stan. L. Rev.* 781, 803-05 (2009).

many statistical measures have been developed to assess the reliability of coding classifications.¹⁶⁰ In addition, the potential subjectivity of manual coding determinations also permits this approach to be uniquely sensitive to the context in which a viewpoint appears – manual coders can potentially parse the informational, positional and tonal elements of a particular viewpoint. Indeed, even critics concede that manual content analysis can be extremely useful when done well,¹⁶¹ and it has a long history in social science research.¹⁶²

More recently, developments in computer science and linguistics have enabled scholars to use automated computational language processing to analyze large quantities of news coverage.¹⁶³ This approach has several advantages over manual content analysis. First, it eschews the potential subjectivity of manual coding determinations. Second, it leverages the computing power of automation, which may be necessary for an endeavor as intensive as scouring prodigious amounts of media coverage of manifold political debates. A key weakness of this approach, however, is that computational language processing is not as sensitive to context as manual content analysis. It is very difficult, for example, for a language-processing program to detect sarcasm. While each approach has its own strengths and limitations, public opinion polling, manual content analysis and automated computational language processing provide three tested and plausible ways to measure the degree to which an idea is underrepresented in public debate.

¹⁶⁰ See, e.g., H.E.A. Tinsley & D.J. Weiss, Interrater reliability and agreement of subjective judgements, *Journal of Counseling Psychology*, 22: 358-376 (1975), H.E.A. Tinsley & D.J. Weiss, Interrater reliability and agreement, In H. E. A. Tinsley & S. D. Brown, Eds., *Handbook of Applied Multivariate Statistics and Mathematical Modeling*, pp. 95-124. San Diego, CA: Academic Press. (2000).

¹⁶¹ See, e.g., Daniel E. Ho and Kevin M. Quinn, Viewpoint Diversity and Media Consolidation: An Empirical Study, 61 *Stan. L. Rev.* 781, 803-05 (2009).

¹⁶² See, e.g., Bernard Berelson, *Content Analysis in Communication Research* (1952); Ole R. Holsti, *Content Analysis for the Social Sciences and Humanities* (1969); Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (1980).

¹⁶³ See Steven Bird et al., *Introduction to Natural Language Processing* (2005).

How Will the Marketplace of Ideas Subsidy Be Rationed?

While the normative and theoretical foundations for the marketplace of ideas trust fund counsel that every underrepresented viewpoint should be eligible to receive the subsidy, it seems likely that innumerable viewpoints could legitimately claim to be underrepresented in countless political debates throughout the country. Consequently, some sort of a rationing mechanism may be necessary to determine which qualifiedly underrepresented viewpoints receive the trust fund subsidy. Several potential rationing mechanisms are readily apparent, each of which has different strengths and weaknesses.

First, the marketplace of ideas subsidy could be rationed on a first come first served basis. One advantage of this approach is that it is objective and does not discriminate against divergent or unpopular viewpoints. Indeed, courts have previously held that a first come first served system is a reasonable way to ration scarce resources precisely because it does not allow for discrimination based on the content of an applicant's speech.¹⁶⁴ That said, a first come first served system might be an unacceptably blunt instrument to ration the trust fund. If the objective of the marketplace of ideas subsidy is to improve viewpoint diversity in extant political debates, then the subsidized speech must enter political debates in a timely manner. Timeliness may be even more important, moreover, because the Downsian issue-attention cycle suggests that public attention is unlikely to remain fixed on a particular issue for a prolonged period of time.¹⁶⁵ Consequently, advertisements that are not aired contemporaneously with a heated political debate can hardly be expected to change the

¹⁶⁴ *Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshipers*, 735 F. Supp. 745, 751 (M.D. Tenn. 1990) ([I]t is perfectly reasonable and constitutional for a small city...to limit public demonstrations on its streets to once per day and deny subsequent applications for the same day on the basis of conflict. . . . Furthermore, it is proper to grant the permit to the first group that applies for it, as this practice does not allow for discrimination on the basis of the content of an applicant's speech.").

¹⁶⁵ Anthony Downs, *Up and Down with Ecology: The Issue-Attention Cycle*, *The Public Interest*, 28:38-50 (1972).

contours of the debate or the process of public opinion formation on the issue. A first come first served system may be unacceptable, therefore, because proponents of underrepresented viewpoints could be waiting in the subsidy queue while the key phases of the debate transpire.

A lottery system could also be employed to ration the marketplace of ideas subsidy. Like the first come first served approach, a lottery system would be objective and would not disqualify any idea because it is too divergent or unpopular. Each potential recipient of the subsidy would have an equal chance to obtain funding. Like the first come first served approach, however, a lottery system also seems to be an unacceptably blunt instrument. It seems implausible to suggest that *every* underrepresented viewpoint will contribute equally to the democratic ideals of deliberation, accountability and an informed citizenry. Some viewpoints might address issues that affect an extremely circumscribed set of individuals, while others may be underrepresented precisely because the majority wisely rejected them as imprudent and impracticable. Consequently, the ideal rationing mechanism should be able to distinguish between competing viewpoints in order to promote “more valuable” underrepresented viewpoints.

If we accept the premise that not every underrepresented viewpoint is created equal, it becomes important to consider how a rationing mechanism can differentiate among competing viewpoints in an equitable and efficient manner. Accepting this premise should not, for example, lead to the conclusion that a cadre of “enlightened” individuals should somehow adjudge the relative merits of different viewpoints. Such a proposal recalls a classic dilemma of democratic politics: who will guard the guardians? Indeed, it is essential that the rationing mechanism not delegate exceedingly broad discretion to any actor or group of

actors.¹⁶⁶ Consequently, it is important to enumerate a set of equitable and enforceable criteria that could be used to ascertain which viewpoints are most deserving of subsidization. While I do not purport to develop a comprehensive list of possible criteria, an exploratory discussion should provide a useful point of departure for future thought and analysis.

I previously argued that promoting diverse and underrepresented viewpoints might be a necessary antidote to the influence of money in broadcasting and politics today. One possible criterion that could be used to ration the marketplace of ideas subsidy, therefore, is the amount of money that has been spent on countervailing advertisements. If \$200 million has been spent on political advertising to influence the health care reform debate, for example, an advertisement trumpeting a viewpoint that has been underrepresented in that debate would receive priority over an advertisement addressing an aspect of a less prominent debate. This criterion would thus prioritize counterspeech that responds to more prolific and prodigious advertising campaigns. A key benefit of this criterion is that it would target issues that are presumably higher on the political and/or public agenda. An obvious downside of this criterion, however, is that speech targeting such prolific issues could be plagued by diminishing returns: adding one voice to an already potent constellation of voices might have a *de minimis* impact on the debate. On the other hand, one voice can literally change the contours of an important political debate. Consider the fabled Harry and Louise advertisement that aired during the Clinton health care reform debate, for example.¹⁶⁷

A second criterion that could be used to ration the marketplace of ideas subsidy is requiring each eligible advertisement to reach some predefined viability threshold, where a

¹⁶⁶ Cf. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992), (when discussing the constitutional validity of permit systems, the Court announced that a permit system “may not delegate overly broad licensing discretion to a government official”).

¹⁶⁷ Kathleen Hall Jamieson and Joseph N. Cappella, *The Role of the Press in the Health Care Reform Debate of 1993-1994*, in Doris A. Graber, ed., *Media Power in Politics* 327-336 (2000).

viable perspective is defined as one that would potentially be accepted by the public. Recall that the Fair Elections Now Act required political candidates to raise small contributions from hundreds or thousands of individual donors to qualify for a public financing scheme.¹⁶⁸ Similarly, every potential recipient of the marketplace of ideas subsidy could be required to meet some viability threshold – for example, by obtaining 500 small financial contributions in support of the proposed advertisement. Like the criticisms that I lodged against the Fair Elections Now Act, however, this criterion could perform an undesirable mainstreaming function and constrain the spectrum of ideas that are eligible for subsidization. Nonetheless, it may not be wholly undesirable to incrementally constrain the spectrum of viewpoints that are eligible for subsidization. As I stated earlier, some viewpoints may be underrepresented in extant debates precisely because they have already been considered and rejected by the majority. Perhaps requiring the proponent of an underrepresented viewpoint to obtain 500 contributions in order to be eligible for the trust fund subsidy is an effective way to limit the trust fund to ideas that the public might conceivably consider. Alternatively, potential recipients of the subsidy could be required to obtain the endorsement of a responsible elected official to signify that the majority of concerned citizens have not rejected the viewpoint as impolitic or parochial.

If we can enumerate an acceptable set of objective and enforceable criteria to ascertain which viewpoints are most deserving of subsidization, it might then be possible to charge a governmental agency – perhaps the FCC or a newly created Viewpoint Diversity Commission (“VDC”) – with the task of overseeing the marketplace of ideas subsidy. The governmental agency would thus be charged with determining which advertisements trigger the marketplace of ideas tax and which advertisements are eligible for the subsidy. Of course, it would be

¹⁶⁸ S. 1285, sec. 102, § 505(a).

essential that the agency not be delegated broad discretion to allocate the subsidy. Instead, the agency would function primarily as a legal public accountability regime.¹⁶⁹ The discretion of these agency officials would be highly circumscribed, and they would more or less mechanically apply the eligibility criteria. If the trust fund were insufficient to subsidize every advertisement that is eligible, for example, a lottery could then be used to ration the subsidy among the eligible and deserving viewpoints. Moreover, the judgments of the agency could be challenged by aggrieved parties and subjected to administrative and judicial review.

What Restrictions Will Be Imposed on the Use of the Subsidy?

Finally, to ensure the efficacy of the marketplace of ideas trust fund, it is necessary to specify restrictions on how the advertising subsidy can be used. One obvious concern that must be addressed whenever a public subsidy program coexists alongside a traditional marketplace is the potential for crowd out, which is a reduction in private investment due to increased government spending.¹⁷⁰ As eligibility for the marketplace of ideas subsidy expands, groups that already planned to sponsor political advertisements may opt for financing from the trust fund in lieu of paying for the advertisement through traditional market mechanisms. This would result in deadweight loss and significantly reduce the efficacy of the trust fund: the costs of the program will rise without a commensurate increase in viewpoint diversity. While some crowd out is likely unavoidable, imposing restrictions on recipients of the subsidy

¹⁶⁹ For a discussion of accountability regimes, see, e.g., Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in Michael W. Dowdle, ed., *Public Accountability: Designs, Dilemma and Experiences* 115-156 (2006) (“For example, in a legal public accountability regime, public officials are responsible to individuals and firms, about their respect or lack of respect for legal requirements or legal rights through process of administrative and judicial review, judged in accordance with law, resulting in either validation or nullification of official acts... This legal regime is structured by a host of doctrines, rules and norms that define who has ‘standing’ to complain (to whom), who is a public authority subject to public law norms (who), what sorts of claims qualify as ‘legal’ claims and are thus ‘justiciable’ (about what), through what procedures administrative or judicial consideration can be obtained (what process), and the limits on the reviewing body’s competence.”).

¹⁷⁰ See, e.g., David M. Cutler and Jonathan Gruber, *Does Public Insurance Crowd Out Private Insurance*, *The Quarterly Journal of Economics*, Vol. 111(2): 391-430, 391 (1996).

should ameliorate the size of the deadweight loss. In the campaign finance context, for example, the government is permitted to impose restrictions on campaign spending when a candidate voluntarily accepts public funding.¹⁷¹ These campaign finance laws do not unlawfully suppress speech because the candidates opt into the spending limits voluntarily.¹⁷² By analogy, imposing spending restrictions on political advertisements when a sponsor voluntarily accepts public funding should also survive a First Amendment challenge.

Evaluating the Proposal: Will It Improve Viewpoint Diversity?

Does the Proposal Promote a Diverse Spectrum of Viewpoints?

Recall that I dismissed substantive media regulation, laissez-faire policies, and candidate-centered approaches to promoting viewpoint diversity as suboptimal. In each case, I argued that the parties charged with promoting viewpoint diversity – broadcast licensees, media conglomerates, and political candidates – were inherently incapable of promoting a truly diverse spectrum of viewpoints in extant political debates. Perhaps the greatest strength of the marketplace of ideas trust fund, therefore, is that it entrusts the goal of promoting viewpoint diversity directly to the public.

There are several reasons that the general public should be entrusted with the task of improving viewpoint diversity in political debates. First, adherents of a viewpoint that is underrepresented in a debate will have the most concrete and particularized interest in disseminating that viewpoint to the broader public. Existing social science research suggests that individuals with a personal agenda or stake in an issue can raise citizens' consciousness on

¹⁷¹ Buckley v. Valeo, 424 U.S. 1, 108 (1976) (allowing the government to limit campaign spending as part of a candidate's voluntary acceptance of public funds).

¹⁷² Gable v. Patton, 142 F.3d 940 (6th Cir. 1998); Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996).

social and political issues,¹⁷³ thereby adding richness and diversity to extant political debates. Second, agency officials, politicians or a similarly circumscribed set of individuals may be unable to anticipate the full panoply of potential viewpoints in a particular debate. Alternatively, these individuals might conclude that certain underrepresented viewpoints do not merit an increased share of the public attention spectrum. But surely democratic theory and the belief that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”¹⁷⁴ militate against any viewpoint or content-based restrictions in political debates. On the contrary, the free and full discussion of competing perspectives is the best way to foster debate and improve the quality of political discourse.¹⁷⁵

In short, the marketplace of ideas subsidy is a mechanism to correct for the market imperfections that have precluded the laissez-faire broadcast marketplace from realizing the vast potentialities of the medium. For “truth” or more nuanced political discussion to emerge from the broadcast marketplace, every idea or viewpoint must have at least a chance to compete and prevail in the market. At present, those with extensive institutional and financial resources have greater access to the tools of mass communication,¹⁷⁶ and are able to “skew public discussion” in favor of their interests.¹⁷⁷ Rather than allow nongovernmental constraints on public discourse to operate unchecked, the marketplace of ideas subsidy will empower the broader public to engage in political debates in a more meaningful way.

Does the Proposal Enable a Diverse Range of Viewpoints to Actually Reach the Public?

¹⁷³ See, e.g., R. Douglas Arnold, *The Logic of Congressional Action* 30, 68-69 (1992).

¹⁷⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁷⁵ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

¹⁷⁶ Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1149 (1993).

¹⁷⁷ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1943 (1996).

Recall that I questioned whether substantive media regulation, laissez-faire policies, or candidate-centered approaches to promoting viewpoint diversity can ever ensure that a diverse spectrum of viewpoints actually reach the public. Key obstacles included regulatory vagueness, audience fragmentation, attention spectrum scarcity, high barriers to market entry and unduly restrictive rationing mechanisms. The marketplace of ideas trust fund, in contrast, leverages insights from the social sciences to help ensure that a message delivered to the public is in fact a message received. To that end, the trust fund proposal alters the political information environment so that both active and passive consumers of political information should be exposed to an improved multiplicity and diversity of voices.

The marketplace of ideas trust fund should expose active consumers of political information to a more diverse spectrum of viewpoints due to the effect of political advertisements on journalistic framing of policy debates.¹⁷⁸ If political advertisements can affect the terms that journalists use to discuss policy proposals, the questions journalists ask, and the perspectives they choose to emphasize,¹⁷⁹ then policies designed to increase the multiplicity and diversity of political advertisements should enrich the political information environment by changing the constellation of terms, questions and perspectives that journalists highlight in extant political debates. One of the great virtues of this approach, therefore, is that it can overcome problems associated with audience fragmentation because political advertisements can enable minority viewpoints to achieve greater salience in the news.¹⁸⁰ Consequently, these advertisements can improve the political information environment even for those individuals who do not view the message directly. Returning to

¹⁷⁸ See Part IV.A, *supra*.

¹⁷⁹ Mollyann Brodie, *Impact of Issue Advertisements and the Legacy of Harry and Louise*, 26 *Journal of Health Politics, Policy and Law* 1353 (2001).

¹⁸⁰ See Part IV.A, *supra*.

the Clinton health care reform debate in 1993 and 1994, for example, the Harry and Louise advertisements changed the terms of the debate for everyone, not only for those individuals who viewed the ads.¹⁸¹

The marketplace of ideas trust fund should also expose politically inattentive individuals and passive consumers of political information to a more diverse spectrum of viewpoints. Based on byproduct models of political learning, incidental exposure to political advertisements can improve levels of political knowledge,¹⁸² circumvent the public's limited attention span for speech on political and social issues,¹⁸³ and overcome audience fragmentation because advertisements can be aired on Fox News and PBS alike. In short, the trust fund should be able to promote political learning and improved diversity of expression in a way that resonates with a heterogeneous population.

Potential Objections

Perhaps the most salient objection that can be lodged against the regulatory framework advanced in this article is that a political advertising subsidy is simply inapposite in the contemporary media landscape. In an age of abundant media speech, for example, flooding individuals with more speech may counterproductively dull their senses and diminish their ability to discern quality or truth in political debates.¹⁸⁴ Alternatively, individuals may simply avoid the newly subsidized speech altogether. Ellen Goodman, for example, has modeled a “digital mediascape” in which audience control and content abundance have

¹⁸¹ Mollyann Brodie, *Impact of Issue Advertisements and the Legacy of Harry and Louise*, 26 *Journal of Health Politics, Policy and Law* 1353 (2001).

¹⁸² Cf. Matthew A. Baum, *Sex, Lies and War: How Soft News Brings Foreign Policy to the Inattentive Public*, *American Political Science Review* 96: 1-19, 1 (2002).

¹⁸³ Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 *San Diego L. Rev.* 129, 136 (2005).

¹⁸⁴ Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 *San Diego L. Rev.* 129, 136 (2005).

replaced the previous conditions of audience passivity and content scarcity.¹⁸⁵ Consequently, media regulations designed to improve the information environment might be futile if audiences do not consume the information that the regulation elicits. Finally, the multiplicity of forums for novel and unpopular ideas – the Internet, blogs, and e-mail – may have relieved some of the distortions in our political discourse¹⁸⁶ and rendered a marketplace of ideas subsidy superfluous.

Although political advertisements may seem like an antiquated way to improve viewpoint diversity in light of content abundance and the Internet, there are convincing reasons to believe that the marketplace of ideas subsidy will improve the political information environment in meaningful ways. First, the average American watches over 5 hours of television per day.¹⁸⁷ Thus, most individuals will be exposed to myriad advertisements on a daily basis, and political advertisements can contribute to political learning by exposing otherwise inattentive individuals to political information.¹⁸⁸ Second, television remains the primary source of news¹⁸⁹ and political information for most Americans,¹⁹⁰ and broadcast news viewers generally do not seek out alternative sources of information despite the

¹⁸⁵ Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 *Berkeley Tech. L.J.* 1390, 1392-93, 1457 (2004).

¹⁸⁶ See, e.g., Jerome A. Barron, *Access Reconsidered*, 76 *Geo. Wash. L. Rev.* 826, 828 (2008).

¹⁸⁷ Nielsen Company, *Anywhere Anytime Media Measurement Three Screen Report: Television, Internet and Mobile Usage in the U.S.* (2009).

¹⁸⁸ Martin Gilens, Lynn Vavreck and Martin Cohen, *Mass Media and the Public's Assessments of Presidential Candidates, 1952-2000*, *Journal of Politics* 60 (November): 1160-1175, 1160 (2007); Cf. Matthew A. Baum, *Sex, Lies and War: How Soft News Brings Foreign Policy to the Inattentive Public*, *American Political Science Review* 96: 1-19, 1 (2002)(arguing that “due to selective political coverage by the entertainment-oriented, soft news media, many otherwise politically inattentive individuals are exposed to information about high-profile political issues...as an incidental by-product of seeking entertainment.”)

¹⁸⁹ The Pew Research Center for People and the Press, *Ideological News Sources: Who Watches and Why* (2010), available at <http://people-press.org/reports/pdf/652.pdf>.

¹⁹⁰ Erika Franklin Fowler et al., *Does Local News Measure Up?*, 18 *STAN. L. & POL'Y REV.* 410, 410 (2007).

increasing abundance of political information available via new media.¹⁹¹ Thus, politically attentive individuals will also likely be exposed to new information from diverse and underrepresented viewpoints while watching the news. Finally, political advertising campaigns may influence journalistic framing of policy debates and enable minority viewpoints to achieve greater salience in newspaper coverage.¹⁹² Thus, even if individuals are able to avoid direct exposure to unwanted political advertisements, they may internalize the messages conveyed in the ads when reading other media coverage of ongoing political debates.

A second possible critique is that the marketplace of ideas subsidy will be ineffective because self-financed corporations and political action committees can still set the parameters of extant political debates by flooding the market with their own advertisements. Admittedly, the constellation of voices that dominate political debates today will likely still dominate political debates tomorrow even if something resembling the marketplace of ideas trust fund were enacted. Moreover, groups that are reliant on the marketplace of ideas subsidy may suffer discredit before they can respond with a counter-advertisement.¹⁹³ While there is some validity to these criticisms, it is worth noting that the marketplace of ideas subsidy does not seek absolute equality in political voice. Instead, it merely seeks to improve political discourse incrementally by enabling diverse and underrepresented viewpoints to achieve a foothold in contemporary debates. Although the marketplace of ideas subsidy is not a panacea, it is still worthwhile for government to promote the public interest in robust political debates against the tide of market forces.

¹⁹¹ Markus Prior, *Post-Broadcast Democracy: How Media Choice Increases Inequality in Political Involvement and Polarizes Elections* 155 (2007).

¹⁹² Aaron Rabinowitz, *Media Framing and Political Advertising in the Patients' Bill of Rights Debate*, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-95, 788-89 (2010).

¹⁹³ See Owen M. Fiss, *The Irony of Free Speech* 16 (1996) (“[T]he fear is that the speech will make it impossible for ... disadvantaged groups even to participate in the discussion. In this context, the classic remedy of more speech rings hollow.”).

Finally, the regulatory framework advanced in this article could also be criticized as either being too incipient or simply impolitic. One could imagine various and sundry objections. If advertisements sponsored by political candidates are subjected to the marketplace of ideas tax, for example, then candidates will be forced to raise even more prodigious amounts of money to run for office, thereby exacerbating the undue influence of money in politics.¹⁹⁴ Others might argue that the incidence of the tax will enable broadcasters to capture the subsidy and/or raise advertising prices. Still others might contend that political advertisements will exert a less robust influence on journalistic framing of political debates if the market is saturated with competing ad campaigns. Indeed, these objections are not without merit. However, the primary aim of this proposal is to reinvigorate the agenda for regulating to promote viewpoint diversity. Hopefully it has provided innovative ideas, answered some important questions and flagged key issues for further consideration.

Constitutional Concerns

When describing the mechanics of the marketplace of ideas tax above, I noted that all political advertisements – express advocacy, its functional equivalent, and genuine issue ads – should be subject to the tax. However, this funding scheme undoubtedly raises First Amendment concerns. Regulations that burden political speech are subjected to strict scrutiny, which requires a showing that the regulation furthers a compelling governmental interest and is narrowly tailored to achieve that interest.¹⁹⁵ Moreover, the Supreme Court has invalidated

¹⁹⁴ See, e.g., Fred Wertheimer and Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Columbia Law Review 1126, 1126 (1994).

¹⁹⁵ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007). See also *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (“Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, ... ‘the burden is on the government to show the existence of [a compelling] interest’ ” (footnote omitted)).

myriad regulations that burden political speech under this exacting standard.¹⁹⁶ In fact, two recent Supreme Court cases – *Citizens United v. Federal Election Commission*¹⁹⁷ and *Federal Election Commission v. Wisconsin Right to Life*¹⁹⁸ – will likely pose an insuperable constitutional barrier to the regulatory scheme developed in this article.

Two obvious alternatives present themselves in the likely event that the marketplace of ideas tax cannot survive a constitutional challenge while Justices Roberts, Scalia, Kennedy, Thomas, and Alito remain on the Court. First, there are favorable Supreme Court precedents which suggest that the regulation could survive strict scrutiny in a different jurisprudential environment. This alternative essentially constitutes a wait-and-see approach, and I will explore these precedents while discussing *Citizens United* and *Wisconsin Right to Life*. Second, the marketplace of ideas subsidy could be endowed through a funding mechanism that does not burden political speech, thereby avoiding strict scrutiny. I will discuss this alternative after examining the constitutional barriers imposed by *Citizens United* and *Wisconsin Right to Life*.

Citizens United v. Federal Election Commission

In *Citizens United v. Federal Election Commission*, the Supreme Court invalidated provisions of a federal statute that barred corporations and unions from using their general treasury funds to expressly advocate the election or defeat of a political candidate or to

¹⁹⁶ See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 776-77 (1978); *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for s 608(a)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights.).

¹⁹⁷ 130 S.Ct. 876 (2010).

¹⁹⁸ 551 U.S. 449 (2007).

broadcast an electioneering communication¹⁹⁹ within 30 days of a primary election and 60 days of a general election.²⁰⁰ In reaching its decision, the Court evinced a marked hostility toward any regulation that reduces the overall quantity of political speech.²⁰¹ The Court explained that a restriction on the amount of money a person or group can spend on political communication during a campaign “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”²⁰² In contrast, the Court upheld the statute’s disclaimer and disclosure requirements, observing that these requirements “impose no ceiling on campaign-related activities”²⁰³ and “do not prevent anyone from speaking.”²⁰⁴ In short, Citizens United endorses a robust vision of free speech as serving political liberty, and manifests skepticism of any governmental efforts to suppress speech or skew the private ordering of ideas.²⁰⁵

If Justice Marshall was correct when he asserted that the power to tax involves the power to destroy,²⁰⁶ then Citizens United ostensibly erects a formidable barrier to levying a ten percent marketplace of ideas tax on all political advertisements. Indeed, the quantity of

¹⁹⁹ An electioneering communication is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election. 2 U.S.C. § 434(f)(3)(A) (2006 ed.).

²⁰⁰ Citizens United v. FEC, 130 S.Ct. 876, 911 (2010).

²⁰¹ Citizens United v. FEC, 130 S.Ct. 876, 911 (2010) (noting that “it is our law and our tradition that more speech, not less, is the governing rule.”).

²⁰² Citizens United v. FEC, 130 S.Ct. 876, 898 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)).

²⁰³ Citizens United v. FEC, 130 S.Ct. 876, 914 (2010) (citing Buckley v. Valeo, 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)).

²⁰⁴ Citizens United v. FEC, 130 S.Ct. 876, 914 (2010) (citing McConnell v. FEC, 540 U.S. 93, 201, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003)).

²⁰⁵ Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 145 (2010).

²⁰⁶ *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819) (“An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.”).

political advertising purchased in the economic marketplace can be expected to decrease after the imposition of a unit tax,²⁰⁷ raising the specter that the regulation would be unconstitutional following *Citizens United*. However, there are two reasons to believe that this thorny precedent may not pose an insurmountable constitutional barrier for the proposed regulation. First, the marketplace of ideas tax will not necessarily cause political advertising to decrease in the aggregate. Second, the regulation should improve the quality of political debate. Each of these justifications will be explored in more detail below.

Although the Roberts Court is skeptical of regulations that might reduce the quantity of political speech, it is unclear whether the marketplace of ideas tax would reduce political advertising in the aggregate. This ambiguity stems from the fact that although the imposition of the tax will likely reduce the quantity of political advertising purchased in the economic marketplace, the revenues generated by the tax will be used to create and subsidize a secondary marketplace for advertisements sponsored by underrepresented viewpoints. The number of political advertisements that are subsidized by the marketplace of ideas tax (but were unable to surface in the unfettered *laissez-faire* marketplace) could offset the number of advertisements that disappear from the economic marketplace as a result of the tax. Whether the regulation will produce a net gain or a net loss in the aggregate quantity of political advertising will depend on the elasticity of demand for advertisements in both the *laissez-faire* market and the secondary market created by the regulation.²⁰⁸ In short, it is unclear what effect the imposition of the marketplace of ideas tax would have on political advertising in the aggregate.

²⁰⁷ See, e.g., Walter Nicholson, *Microeconomic Theory* 407 (2002).

²⁰⁸ Cf., Walter Nicholson, *Microeconomic Theory* 407-410 (2002).

The marketplace of ideas tax could also retain its vitality after *Citizens United* if it improves the quality of political debate. Recall the Court’s threefold concern that the statute at issue would (1) restrict the number of issues discussed, (2) reduce the depth of their exploration, and (3) reduce the size of the audience reached.²⁰⁹ Notably, the marketplace of ideas tax was consciously designed to address the Court’s first two concerns: the marketplace of ideas subsidy will increase the number of issues discussed and improve the depth of their exploration by promoting viewpoints that are currently underrepresented in public debates. Significantly, the Court has previously upheld regulations that burden speech if the presumed effect of the regulation is one of “enhancing the volume and quality of coverage” of public issues.²¹⁰ Since political advertising campaigns can influence journalistic framing of policy debates and enable minority viewpoints to achieve greater salience in the news,²¹¹ it is at least plausible that the marketplace of ideas tax could survive a constitutional challenge.

Hopefully the two preceding paragraphs suggest that *Citizens United* need not inexorably be viewed as a barrier to the constitutionality of the marketplace of ideas tax. Nonetheless, it seems unlikely that the proposed regulatory framework could survive a constitutional challenge while Justices Roberts, Scalia, Kennedy, Thomas, and Alito remain on the Court. While cases like *Austin v. Michigan Chamber of Commerce*²¹² and *McConnell v.*

²⁰⁹ *Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)).

²¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (discussing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, which upheld the constitutionality of the fairness doctrine).

²¹¹ Aaron Rabinowitz, *Media Framing and Political Advertising in the Patients’ Bill of Rights Debate*, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-795, 787-88 (2010).

²¹² 494 U.S. 652, 660 (1990) (upholding a law that prohibited corporate independent expenditures that supported or opposed any candidate for state office due to the compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”).

FEC²¹³ articulated an egalitarian vision of free speech to sustain regulations that burdened political speech, Citizens United represents “a triumph of the libertarian over the egalitarian vision of free speech.”²¹⁴ Although the statute at issue in Citizens United²¹⁵ could have reasonably been characterized as a viewpoint-neutral time, place and manner restriction,²¹⁶ the majority repeatedly attacked it as an outright ban on speech.²¹⁷ The vision of free-speech-as-liberty articulated in Citizens United suggests that the Roberts Court will reject governmental efforts to equalize speaking power and treat redistributive limits on speech as a cardinal First Amendment sin.²¹⁸ Consequently, it seems clear that the marketplace of ideas tax would fare better in a different jurisprudential environment.

Federal Election Commission v. Wisconsin Right to Life

The Supreme Court has recognized myriad governmental interests as sufficient to justify the regulation of campaign speech. For example, the Court has previously recognized compelling governmental interests in preserving the integrity of the electoral process, preventing corruption, sustaining the active responsibility of the individual citizen for the wise

²¹³ 540 U.S. 93, 137 (2003) (upholding a law regulating corporate campaign speech and its functional equivalent; observing that measures aimed at protecting the integrity of the electoral process tangibly benefit public participation in political debates because the electoral process is the very means through which a free society democratically translates political speech into concrete governmental action).

²¹⁴ Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 145 (2010).

²¹⁵ The federal law prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an “electioneering communication” or for speech expressly advocating the election or defeat of a candidate within 30 days of a primary election and 60 days of a general election. See Citizens United v. FEC, 130 S.Ct. 876, 886 (2010).

²¹⁶ Citizens United v. FEC, 130 S.Ct. 876, 944 (2010) (Stevens, J., dissenting) (“In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels.”).

²¹⁷ Citizens United v. FEC, 130 S.Ct. 876, 897-98 (2010) (“The law before us is an outright ban, backed by criminal sanctions...Section 441b's prohibition on corporate independent expenditures is thus a ban on speech.”).

²¹⁸ Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 158 (2010).

conduct of the government, and maintaining the individual citizen's confidence in government.²¹⁹ In *Federal Election Commission v. Wisconsin Right to Life*, however, the Court held that the interests which justify restricting campaign speech and its functional equivalent do not justify restricting genuine issue advocacy.²²⁰ In fact, the Court stated that it has never recognized a compelling interest in regulating ads that are neither express advocacy nor its functional equivalent.²²¹ This expansive statement raises serious questions about whether the marketplace of ideas tax – which would tax express advocacy, its functional equivalent, and genuine issue ads – could survive strict scrutiny.

Although the Court has not previously identified a compelling governmental interest that would justify regulating genuine issue advocacy, it has suggested some conditions under which it might do so. In *First National Bank of Boston v. Bellotti*, the Court invalidated a state statute that barred corporate expenditures on some referenda but not others because no compelling governmental interest was served by the law.²²² However, the Court acknowledged that it might uphold restrictions on genuine issue advocacy by corporations if there were evidence that “corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests.”²²³ The Court invalidated the statute in *Bellotti*, however, because neither the record nor legislative findings indicated that “the relative voice of corporations [had] been overwhelming or even significant in

²¹⁹ *McConnell v. FEC*, 540 U.S. 93, 206-207, n. 88, 124 S.Ct. 619 (2003) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978)).

²²⁰ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007).

²²¹ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476 (2007).

²²² *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 787-90 (1978).

²²³ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

influencing” referenda in the state.²²⁴ Nonetheless, Bellotti creates a toehold for articulating a compelling governmental interest that could be sufficient to justify the regulation of genuine issue advocacy. The obvious question presented, therefore, is whether the conditions identified in Bellotti might be extended to bolster the constitutionality of the marketplace of ideas tax.

The two primary governmental interests served by the proposed marketplace of ideas regulation are cultivating a more informed citizenry and improving the depth and diversity of democratic dialogue. One of the evils that the regulation is designed to address, moreover, is that corporate advocacy may threaten to undermine democratic processes. Numerous scholars have suggested that corporate advocacy can affect how the media frame public debates,²²⁵ while others have suggested that pressure from corporate advertisers contributes to the homogenization of broadcast programming.²²⁶ Consequently, the marketplace of ideas regulation seeks to promote underrepresented viewpoints as a way to enrich democratic discourse. While these interests are certainly within the ambit of Bellotti, and thus might serve as the basis for regulating genuine issue advocacy, two hurdles remain. First, recall that the Court struck down the statute in Bellotti due to a dearth of evidence that corporate advocacy

²²⁴ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978) (“According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee’s arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts...”).

²²⁵ See generally, Dietram A. Scheufele and David Tewksbury, *Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models*, 57 *Journal of Communication* 9 (2007).

²²⁶ See, e.g., Mara Einstein, *The Program Selection Process*, in *Program Diversity and the Program Selection Process on Broadcast Network Television 45-49* (FCC Media Ownership Working Group Study No. 5, Sept. 2002) (discussing how advertiser pressure contributes to bland and homogeneous programming), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf.

was actually denigrating First Amendment values.²²⁷ Thus, it is important to consider what evidence can be marshaled to bolster the constitutionality of the marketplace of ideas regulation. Second, the astute observer will ask whether the proffered governmental interests can withstand the Court's holding in *Buckley v. Valeo*.²²⁸ These obstacles will be considered in more detail below.

The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of a legislative judgment varies with the novelty or plausibility of the justification offered.²²⁹ As a threshold matter, therefore, it is worth noting that the concern that corporate advocacy threatens to undermine democratic processes is hardly novel. Justice Stevens, for example, evinced this precise concern in his *Citizens United* dissent, stating that “corporate domination” of the airwaves prior to elections will drown out non-corporate voices,²³⁰ thereby impeding a necessary precondition for democratic self-government.²³¹ Moreover, a substantial corpus of academic research suggests that corporate advocacy may impair the political information environment and threaten democratic values. For example, corporate advocacy can affect how the media frame public debates and how much news coverage a particular issue receives,²³² and pressure from corporate advertisers may contribute to bland and

²²⁷ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978).

²²⁸ *Buckley v. Valeo*, 424 U.S. 1, 54 (1976).

²²⁹ *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391, 120 S.Ct. 897, 145 L.Ed.2d 886.

²³⁰ *Citizens United*, 130 S. Ct. 876, 974 (2010) (Stevens, J., concurring in part and dissenting in part).

²³¹ *Citizens United*, 130 S. Ct. 876, 977 (2010) (Stevens, J., concurring in part and dissenting in part) (“[The ruling] will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.”).

²³² See generally, Dietram A. Scheufele and David Tewksbury, Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models, 57 *Journal of Communication* 9 (2007); see also Mollyann Brodie, Impact of Issue Advertisements and the Legacy of Harry and Louise, 26 *Journal of Health Politics, Policy and Law* 1353 (2001) (arguing that political advertising campaigns sponsored by interest groups can affect the terms

homogenous broadcast programming.²³³ In short, the Court should not demand a prodigious body of empirical evidence to sustain the legislative judgment that regulating issue advertising may improve democratic discourse and the information environment. To that end, advocates of the marketplace of ideas regulation might point to a nascent but growing body of empirical evidence which suggests that political advertising campaigns affect how newspapers frame coverage of political debates, contribute to political learning, and enable minority viewpoints to achieve greater salience in the news.²³⁴

Even if proponents of the marketplace of ideas regulation can articulate a compelling governmental interest and generate a legislative record to support the constitutionality of the proposal, the Supreme Court's holding in *Buckley v. Valeo* may still pose a formidable obstacle. In *Buckley*, the Court stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."²³⁵ Consequently, the Court could invalidate the marketplace of ideas tax and subsidy scheme as an impermissible attempt to equalize the relative voice of different segments of society. *Buckley's* pronouncement against equalization

that journalists use to discuss policy proposals, the questions journalists ask, and the perspectives they choose to emphasize.).

²³³ See, e.g., R. Randall Rainey, and William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. Cal. L. Rev. 1923, 1943 (1996); Mara Einstein, *The Program Selection Process*, in *Program Diversity and the Program Selection Process on Broadcast Network Television* 45-49 (FCC Media Ownership Working Group Study No. 5, Sept. 2002) (discussing how advertiser pressure contributes to bland and homogeneous programming), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf.

²³⁴ Aaron Rabinowitz, *Media Framing and Political Advertising in the Patients' Bill of Rights Debate*, *Journal of Health Politics, Policy and Law*, Vol. 35(5): 771-795, 787-88 (2010).

²³⁵ *Buckley v. Valeo*, 424 U.S. at 48-49 (1976).

of voice may be a uniquely salient obstacle, moreover, due to its centrality to the majority's analysis in *Citizens United*.²³⁶

It is not clear, however, that the Court majority will adhere to this viewpoint in perpetuity. In *McConnell*, for example, the Court upheld restrictions on corporate campaign speech and its functional equivalent in order to protect the integrity of the electoral process.²³⁷ In doing so, the Court permitted the legislature to restrict the speech of some elements of our society in order to enhance the relative voice of others, backtracking from *Buckley*'s pronouncement that speech equalization is an impermissible legislative goal.²³⁸ Similarly, Justice Stevens argued in *Citizens United* that "the Constitution does, in fact, permit numerous restrictions on the speech of some in order to prevent a few from drowning out the many: for example, restrictions on ballot access and on legislators' floor time."²³⁹ Indeed, the egalitarian vision of the First Amendment has an older pedigree in the Court's free speech jurisprudence than the libertarian view adopted in *Citizens United*.²⁴⁰ Consequently, the belief that political equality is prior to speech may predominate again. If and when it does, regulations designed to enhance political equality could prevail over freedom of speech

²³⁶ *Citizens United v. FEC*, 130 S.Ct. 876, 904, 921, (2010).

²³⁷ 540 U.S. 93, 137 (2003) (measures aimed at protecting the integrity of the electoral process tangibly benefit public participation in political debates because the electoral process is the very means through which a free society democratically translates political speech into concrete governmental action).

²³⁸ Lillian R. BeVier, *McConnell v. FCC: Not Senator Buckley's First Amendment*, 3 *Election L.J.* 127, 140 (2004) ("[I]n sustaining BCRA's restrictions with regard to electioneering communications, *McConnell* reneges on two of *Buckley*'s underlying commitments. It declines to give strict scrutiny to regulation of what *Buckley* treated as core political speech. And it permits the legislature to 'restrict the speech of some elements of our society in order to enhance the relative voice of others,' which *Buckley* held was 'wholly foreign to the First Amendment.'").

²³⁹ *Citizens United v. FEC*, 130 S.Ct. 876, 957-58 (2010) (Stevens, J., dissenting) (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)) (internal quotation marks omitted).

²⁴⁰ Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 *Harv. L. Rev.* 143, 146 (2010).

concerns.²⁴¹ Nonetheless, it is important to remember that the Roberts Court has interpreted the First Amendment as a negative check on government tyranny. As a result, Wisconsin Right to Life and Buckley will continue to constitute an insuperable obstacle for the marketplace of ideas regulation until the composition of the Court changes.

Alternative Funding Mechanisms

It seems clear that the marketplace of ideas tax cannot survive a constitutional challenge while Justices Roberts, Scalia, Kennedy, Thomas, and Alito remain on the Court. Although I have outlined several precedents which suggest that the regulation could survive strict scrutiny in a different jurisprudential environment, it is also worth considering whether the marketplace of ideas subsidy could be endowed through a funding mechanism that does not burden political speech, thereby avoiding strict scrutiny. Although there are numerous funding schemes that would satisfy this criterion, I will proceed by examining the constitutionality of the proposed regulation if it were formulated as a subsidy funded through general revenues. A parsimonious treatment of the possible funding mechanisms will allow for a fuller exploration of the key constitutional elements.

Public Forum Doctrine

Public forum doctrine dictates that the government can sometimes be required to permit the use of its property for communicative purposes without engaging in content discrimination. Public forum doctrine also recognizes, however, that the use of government property for communicative purposes can at times be restricted to certain speakers or for talk

²⁴¹ Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 148 (2010) (“Justice Stevens's dissent thus embodies one deep strand of free speech jurisprudence that might be called free speech as equality...On this view, political equality is prior to speech: when freedom of speech enhances political equality, speech prevails; when speech is regulated to enhance political equality, however, regulation prevails.”).

about certain subjects.²⁴² In fact, content distinctions are the norm when government speaks or otherwise subsidizes speech.²⁴³ Thus, public forum doctrine may permit the government to create a limited public forum that is restricted to speech on issues that are underrepresented in contemporary political debates. The question presented, therefore, is whether the Court's public forum jurisprudence would permit something akin to the marketplace of ideas subsidy to promote underrepresented viewpoints.

In *Rosenberger v. University of Virginia*, the Supreme Court stated that the necessities of confining a forum to the limited and legitimate purposes for which it was created may justify reserving it for certain groups or for the discussion of certain topics.²⁴⁴ Applied to the marketplace of ideas subsidy, the limited purpose of the forum is to enrich democratic debate by promoting underrepresented viewpoints. Consequently, the forum would exclude speech that is already adequately represented in public debates. To determine if the exclusion of a class of speech from a limited public forum is legitimate, however, the Court must distinguish between content discrimination and viewpoint discrimination. Content discrimination may be permissible if it preserves the purposes of the limited public forum, while viewpoint discrimination is presumed impermissible when directed against speech otherwise within the forum's limitations.²⁴⁵

Reserving the marketplace of ideas subsidy for certain groups or for the discussion of certain topics should be permissible under *Rosenberger* because it preserves the purpose of

²⁴² Steven H. Shiffrin and Jesse H. Choper, *The First Amendment: Cases, Comments and Questions* 390 (2006).

²⁴³ Steven H. Shiffrin and Jesse H. Choper, *The First Amendment: Cases, Comments and Questions* 390 (2006).

²⁴⁴ *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829-30 (1995) (necessity of confining limited public forum to limited and legitimate purpose for which it was created may justify state in reserving it for certain groups or discussion of certain topics but, once it has opened limited forum, state must respect lawful boundaries it has itself set and may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of viewpoint).

²⁴⁵ *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 830 (1995).

the limited forum – enriching democratic debate. Current law affords the government substantial leeway to engage in content discrimination when creating a special forum,²⁴⁶ and promoting content that is already salient in extant political debates would frustrate the stated goal of improving the depth and diversity of democratic discourse. Moreover, limiting the forum to only underrepresented viewpoints should not be characterized as impermissible viewpoint discrimination. The government frequently eschews viewpoint-neutral standards when administering public programs,²⁴⁷ and speech by “majority” or “mainstream” viewpoints is not speech that is otherwise within the forum’s limitations.

Government Speech

To assess the constitutionality of a marketplace of ideas subsidy program, it is important to ascertain whether the government is engaging in its own expressive conduct or providing a forum for private speech.²⁴⁸ The distinction is important because the Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.²⁴⁹ In *Pleasant Grove City v. Summum*, the Court held that permitting privately donated monuments to be erected in a public park is a form of government speech and is

²⁴⁶ John Fee, *Speech Discrimination*, 85 B.U. L. Rev. 1103, 1166 (2005).

²⁴⁷ See, e.g., John Fee, *Speech Discrimination*, 85 B.U. L. Rev. 1103, 1123 (2005) (evaluations of scholarly and scientific merit, for example, necessarily include some consideration of whether the speaker's viewpoint is reasonable); *United States v. Am. Library Ass'n*, 539 U.S. 194, 206-08 (2003) (recognizing that public libraries enjoy substantial discretion when selecting materials on the basis of quality and appropriateness, and are not held to viewpoint-neutral standards); *Ark. Educ. Television Comm'n v. Forbes* 523 U.S. 666, 673-75 (1998) (recognizing that public television stations are required to make viewpoint-based decisions when selecting programming, and that these programming decisions do not typically violate the First Amendment).

²⁴⁸ Cf. *Pleasant Grove City v. Summum*, 29 S.Ct. 1125, 1131 (2009) (discussing whether the city was engaging in its own expressive conduct or providing a forum for the expression of private speech when it permitted privately donated monuments to be erected in a municipal park).

²⁴⁹ *Pleasant Grove City v. Summum*, 29 S.Ct. 1125, 1131 (2009) (citing *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) (“[T]he Government's own speech ... is exempt from First Amendment scrutiny”).

therefore not subject to scrutiny under the Free Speech Clause.²⁵⁰ The Court reasoned that public forum principles are inapplicable when a government property or program is incapable of accommodating a large number of public speakers without defeating the essential function of the land or program.²⁵¹ If governments were forced to maintain viewpoint neutrality in selecting donated monuments – which would be required by the public forum doctrine – then they would have little choice but to face cluttered parks or refuse all such donations. The Court concluded, therefore, that public forum analysis was inapplicable because it would lead almost inexorably to the closing of the forum.²⁵²

The marketplace of ideas subsidy program might similarly be characterized as government speech and therefore immune from scrutiny under the Free Speech Clause. Like a public park, a government program designed to improve the political information environment by trumpeting underrepresented viewpoints cannot accommodate a large number of speakers without defeating the essential function of the program. Indeed, a strict requirement of viewpoint neutrality would force the government to either accept political advertisements aplenty – thereby rendering the program ineffectual and undermining its stated goal of enriching debate by promoting only underrepresented viewpoints – or otherwise refuse all such advertisements. Pleasant Grove dictates, however, that public forum doctrine does not present the government with such a Hobson’s choice.

Government Subsidy of Speech

The government may engage in viewpoint discrimination when providing subsidies for speech if it makes clear that the purpose of the subsidy is to promote a particular point of

²⁵⁰ Pleasant Grove City v. Summum, 29 S.Ct. 1125, 1138 (2009).

²⁵¹ Pleasant Grove City v. Summum, 29 S.Ct. 1125, 1136-38 (2009).

²⁵² Pleasant Grove City v. Summum, 29 S.Ct. 1125, 1136-38 (2009).

view or if the discrimination occurs in the context of a government program that inherently involves viewpoint discrimination.²⁵³ Indeed, a line of cases beginning with *National Endowment for the Arts v. Finley*²⁵⁴ strongly suggests that the marketplace of ideas program should survive First Amendment scrutiny if formulated as a subsidy funded through general revenues. In *Finley*, the Court upheld a statute requiring the National Endowment for the Arts to evaluate grant applications according to artistic excellence and artistic merit, taking into account general standards of decency and respect for the diverse beliefs and values of the public.²⁵⁵ The Court's holding hinged on two key findings. First, the Court found that the government does not indiscriminately encourage a diversity of views from private speakers in the context of arts funding.²⁵⁶ On the contrary, the excellence threshold for artistic grants is inherently content-based. Second, the Court stated that the First Amendment has limited application in the subsidy context, observing that "government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."²⁵⁷ Justices Scalia and Thomas adopted an even more extreme position in concurrence, stating that the First Amendment is inapplicable when government subsidizes speech.²⁵⁸

The two key rationales that undergird the Court's holding in *Finley* provide a strong argument in favor of the constitutionality of the marketplace of ideas regulation when

²⁵³ See, e.g., John Fee, *Speech Discrimination*, 85 B.U. L. Rev. 1103, 1123 (2005).

²⁵⁴ 524 U.S. 569 (1998).

²⁵⁵ *National Endowment for the Arts v. Finley*, 524 U.S. 569, 581-82 (1998).

²⁵⁶ *National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998).

²⁵⁷ *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998).

²⁵⁸ *National Endowment for the Arts v. Finley*, 524 U.S. 569, 599 (1998) (Scalia, J., concurring) ("The nub of the difference between me and the Court is that I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable.").

formulated as a subsidy. First, the marketplace of ideas subsidy program can be analogized to arts funding insofar as the government does not indiscriminately encourage a diversity of views from private speakers in either setting. On the contrary, the marketplace of ideas subsidy would encourage speech from underrepresented viewpoints in order to improve the depth and diversity of democratic discourse. Moreover, the Court has endorsed this legislative goal elsewhere, stating that “the government may subsidize speakers that it thinks provide novel points of view.”²⁵⁹ Second, the Court observed that the First Amendment has limited application in the subsidy context, which suggests that subsidizing only underrepresented viewpoints may not raise constitutional concerns. Furthermore, the position adopted by Justices Scalia and Thomas indicates that two members of the Citizens United majority would presumably support the marketplace of ideas program if designed as a straightforward subsidy.

Conclusion

It is time for students of media regulation to revisit the FCC’s historical commitment to meeting the basic needs of American politics and culture, over and above what the marketplace may or may not provide. If our democratic aspirations counsel a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, the current state of broadcast programming and political debate should be disconcerting. In a world in which political debate is homogenized within mainstream parameters, broadcasters eschew coverage of controversial issues, and moneyed interests expend millions of dollars trying to define the contours of public debates, media policy should consciously promote diverse and underrepresented viewpoints in an effort to improve the political information environment and produce a more informed citizenry. To do so, media

²⁵⁹ *Turner Broadcasting v. FCC*, 512 U.S. 622, 680 (1994) (O’Connor, J., concurring in part and dissenting in part) (distinguishing speech subsidies from speech restrictions while discussing the compelling state interests that can be used to justify a content-based speech restriction).

policy must simultaneously promote a diverse spectrum of viewpoints that are underrepresented in political debates and ensure that these viewpoints actually reach the public. A reasoned analysis suggests that extant approaches to promoting viewpoint diversity – including substantive media regulation, laissez-faire policies, and candidate-centered approaches – will not meet these goals. Hopefully this article suggests that policies designed to increase the number and variety of political advertisements could dramatically improve the political information environment. While the marketplace of ideas trust fund proposal may be imperfect and in need of further refinement, it is my hope that this article helps reinvigorate the agenda for regulating to promote viewpoint diversity in contemporary political debates.

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