

Changing the Rules of the Game: The New FCC Regulations on Political Debates

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I Introduction

Scarcely an election campaign occurs today, at any level of government, in which the candidates do not debate each other. It is immaterial whether debates actually help voters make informed choices among the candidates or whether the skills involved in debates are relevant to effective service in office.¹ The widespread perception that candidates are expected to debate insures that debates will be held and that the contenders will be judged on their performance.² Outstanding perform-

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1. It should be noted that there is substantial disagreement over whether political debates are useful in helping voters make informed judgments. See, e.g., *Presidential Debates: The Gap Between Issues and Answers*, 31 *PSYCHOLOGY TODAY*, Jan. 1980, at 20 (study of debates in 1976 and 1980 found that debate participants only spend five to ten percent of their time on issues of true concern to the voters); Kirkpatrick, *Presidential Candidate Debates: What Can We Learn From 1960?*, in *THE PAST AND FUTURE OF PRESIDENTIAL DEBATES* 46-50 (A. Ranney ed. 1979) (describing criticism of debates as placing inordinate emphasis on appearance and personality); Chaffee, *Presidential Debates: Are They Helpful to Voters?*, 45 *COMM. MONOGRAPHS* 328 (1978) (questioning value of political debates). The issue of whether political debates are useful is especially important because the new FCC policy is based on the assumption that an increase in debates would benefit the public. See *infra* text accompanying note 29.

2. For example, debates between presidential candidates were virtually unknown prior to 1960. The famous Lincoln-Douglas debates were not part of their presidential campaign in 1860, but rather occurred in 1858 during their battle for election to the Senate. See S. SIGELSCHEFFER, *THE AMERICAN CONSCIENCE: THE DRAMA OF THE LINCOLN-DOUGLAS DEBATES* 438 (1973). Debates have occurred between the presidential candidates in the last three elections, between Carter and Ford in 1976, between Carter and Reagan in 1980, and between Mondale and Reagan in 1984. Debates now are an expected part of political campaigns.

ance in political debates can provide a tremendous boost to campaigns, while a gaffe can be a fatal blow to a candidate's election hopes.³

Until recently, Federal Communications Commission (FCC) rules virtually prohibited radio or television stations from sponsoring debates. Under a long-standing policy, a station could broadcast a political debate as a news event, and thereby avoid the costly obligation of providing equal time to every fringe candidate, only if someone else sponsored the debate.⁴ The practical effect of this rule was to make the League of Women Voters the most frequent sponsor of debates, which television and radio stations then broadcast.⁵

In November 1983, the FCC revised its rules to permit stations to sponsor the debates themselves without any obligation to provide equal time to all candidates in an election.⁶ Thus, stations can now arrange and hold debates in their studios, using their personnel, and need not invite all of the candidates in an election to participate. In March 1984, the United States Court of Appeals for the District of Columbia Circuit upheld

3. Professor Austin Ranney, commenting on the 1960 and 1976 debates, observed, "Both debate series had major impacts on the election's outcomes, and some analysts say they were decisive." Ranney, *Preface* to *THE PAST AND FUTURE OF PRESIDENTIAL DEBATES 1* (A. Ranney ed. 1979). Many political scientists have stated that they believe the Kennedy-Nixon debates were decisive in the 1960 election. See, e.g., N. POLSBY & A. WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS* 178 (1976). Similarly, many believe that the debates, and especially President Ford's misstatement that Poland was not under Soviet domination, were decisive in 1976. See, e.g., J. WITCOVER, *MARATHON 644* (1977) (quoting Jimmy Carter: "[I]f it hadn't been for the debates I would have lost.>").

4. See *In re* Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Certain Subsections of the Communications Act, 48 Fed. Reg. 53,166, 53,169 (Nov. 25, 1983) [hereinafter cited as *Petitions of Henry Geller*] ("For purposes of Section 315(a)(4), the Commission currently requires a broadcast debate, among other things, to be sponsored and controlled by a third party not associated with the licensee."). See also M. FRANKLIN, *CASES AND MATERIALS ON MASS MEDIA LAW* 822 (2d ed. 1982) ("Debates are now exempt if they are controlled by someone other than the candidates or the broadcaster.>").

5. For example, the League of Women Voters arranged and sponsored the debates in the 1976 and 1980 political campaigns. M. FRANKLIN, *supra* note 4, at 823; Friedenburg, *Selfish Interests of the Prerequisites for Political Debate: An Analysis of the 1980 Presidential Debate and Its Implications for Future Campaigns*, 18 J. AM. FORENSICS A. 91, 97 (1981) (importance of the League of Women Voters in arranging the 1976 debates).

6. The new rule is that "broadcast of a debate between legally qualified candidates may be within the section 315(a)(4) exemption, even if the debate is sponsored by the broadcaster." *Petitions of Henry Geller*, *supra* note 4, at 53,167.

the legality of the new FCC rules in a short per curiam opinion.⁷

The old policy was repealed in the spirit of deregulation. There is little indication that much thought was given to the practical effects of the revised rules.⁸ The purpose of this article is to consider how the new FCC regulations will affect the conduct of election campaigns. At the outset, it should be noted that these predictions are written from two perspectives. In addition to having taught media law, I served as Harold Washington's Debate Manager in his campaign for mayor of Chicago. In this role, I represented Congressman Washington in negotiations with potential debate sponsors and representatives of the other candidates. In Chicago, three different media organizations were directly involved in arranging and sponsoring the debates, contributing to a highly publicized dispute among the candidates concerning the existence and nature of the debates.⁹ The experiences of this political campaign, although occurring prior to the change in FCC rules, provide evidence of the potential effects of the new regulations.

After describing how the FCC has dramatically changed the law, this article will suggest three major consequences of the new policy. First, allowing broadcast stations to stage debates

7. *League of Women Voters v. FCC*, No. 83-2194 (D.C. Cir. filed Mar. 8, 1984).

8. The FCC's discussion of the new rule contains only one sentence as to its likely effect, an assertion that the rule will cause an increase in the number of political debates. Petitions of Henry Geller, *supra* note 4, at 53,169. See also *infra* text accompanying note 29.

9. Two broadcast stations were involved in sponsoring debates in Chicago in apparent violation of the existing FCC rules. WBMX, a radio station, invited the candidates to appear at a debate it was sponsoring and did, in fact, sponsor a debate. WTTW, a public television station, invited representatives of the candidates and the League of Women Voters to a meeting in its offices to try to arrange debates. The first two negotiation sessions were held in WTTW offices. After that, WTTW's representatives suggested that further meetings be held in the League's offices to avoid the appearance of WTTW sponsorship. Thus, the Chicago experience is indicative of what is likely to occur under the new FCC policy because in the 1983 Chicago primary campaign the old rules were violated and broadcasters sponsored debates.

The third media company to offer to sponsor a debate was the Chicago Sun-Times. Additionally, a number of other civic groups, most notably, the League of Women Voters, the Civic Club, the local chapter of the Urban League, and the Fraternal Order of Police extended invitations for debates. In large part, the large number of invitations to sponsor debates resulted from strong dissatisfaction with the manner in which the League of Women Voters handled the debates in the Illinois gubernatorial election campaign that had just concluded. Potential sponsors repeatedly refused to co-sponsor a debate with the League, pointing to the poor handling of the earlier debates. Thus, the Chicago primary represents a rare instance in which the League's role as sponsor was questioned.

will proliferate the number of sponsors and make negotiations over debate formats a major issue in many political campaigns. Second, the new regulations risk serious conflicts of interest as stations both sponsor debates and report on the events in arranging and conducting them. Third, permitting broadcast licensees to sponsor debates without inviting all of the candidates in an election to participate will perpetuate, and possibly increase, discrimination against third party candidates.

II

The Law Concerning Sponsorship and Broadcast of Political Debates

The Communications Act of 1934 imposed a duty on broadcast licensees to provide equal time to all candidates in an election. Section 315(a) provided:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensees shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.¹⁰

This provision was intended to prevent favoritism by broadcast stations in selling or donating time or in scheduling political broadcasts.¹¹

For almost twenty-five years, the FCC interpreted the equal time requirements as inapplicable to newscasts, concluding that such coverage of a candidate did not constitute "use" of the broadcast facilities.¹² In 1959, however, the FCC reversed itself and held that the equal time requirements of Section 315(a) do apply to news programs and news events broadcast by the sta-

10. 47 U.S.C. § 315(a) (1982).

11. The equal time rules have existed since the very first congressional regulation of broadcasting, the Radio Act of 1927. Section 18 of the Radio Act became, with little modification, Section 315 of the 1934 Communications Act. The Radio Act and the original version of Section 315 "established a principle of absolute equality for competing political candidates in the 'use' of broadcast facilities." *In re* Petitions of the Aspen Institute Program on Communications and Society and CBS, Inc. For Revision or Clarification of Commission Rulings under Section 315(a)(2) and 315(a)(4), 55 F.C.C.2d 697, para. 7 (1975).

12. *Chisholm v. FCC*, 538 F.2d 349, 351-52 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

tion.¹³ This ruling was strongly criticized because it was feared that application of the equal time requirements to newscasts "would tend to dry up meaningful radio and television coverage of political campaigns."¹⁴ If every mention of a candidate in a news program triggered equal time obligations, stations might substantially reduce their coverage of election campaigns.¹⁵

Thus, in 1959, Congress quickly amended Section 315(a) to overturn the FCC's decision. The 1959 amendment provided that the equal time rule did not apply to the:

Appearance of a legally qualified candidate on any:

- 1) bona fide newscast;
- 2) bona fide news interview;
- 3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by news documentary);
- 4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).¹⁶

There is nothing in the legislative history of this revision indicating whether Congress intended political debates to constitute "a bona fide newscast" or "on-the-spot coverage of bona fide news events."¹⁷

The issue of whether campaign debates are exempt from equal time rules did not arise in 1960, the first election after the statutory revision, because Congress enacted legislation suspending Section 315 insofar as it applied to debates between presidential or vice-presidential candidates in that year.¹⁸ Congress enacted this temporary exemption because the FCC had

13. *Columbia Broadcasting Sys. & Nat'l Broadcasting Co.*, 26 F.C.C. 715 (1959). This case also involved a primary election for Mayor of Chicago. Lar Daly, a fringe candidate running in both the Democratic and Republican primaries, claimed that he deserved time in newscasts equal to that provided to the other candidates in both primaries. The FCC agreed.

14. S. REP. NO. 562, 86th Cong., 1st Sess. 10 (1959), *reprinted in* U.S. CODE CONG. AND ADMIN. NEWS 2564, 2572, *quoted in* *Chisholm*, 538 F.2d at 352 (D.C. Cir. 1976).

15. Zapple, *Historic Evolution of Section 315*, in *THE PAST AND FUTURE OF POLITICAL DEBATES* 57 (A. Ranney ed. 1979) ("The ruling had a crippling effect on broadcast journalism. It required a broadcaster who devoted one minute to a legally qualified candidate participating in any program . . . to make available a minute of time to every other legally qualified candidate for the same office.").

16. 47 U.S.C. § 315(a) (1982).

17. *Chisholm*, 538 F.2d at 363 ("We are thus unable to discover from the extensive, if rather ambiguous, legislative history any conclusive indication of a Congressional intent with respect to candidates debates and press conferences.").

18. 86 Stat. 677 (1960).

not yet issued rules interpreting the amended version of Section 315.¹⁹ However, in the next election year, 1962, the FCC ruled in two separate cases that the broadcast of a political debate was not exempt from the equal time rules.²⁰ In other words, if a station broadcast a debate, regardless of the sponsor, the station was then obligated to provide equal time to all of the candidates not invited to participate in the debate. The effect of these rulings was to “effectively exclude all debates from the Section 315(a)(4) exemption.”²¹

This policy continued until 1975, when, in response to petitions from both the Aspen Institute Program on Communication and Society and CBS, Inc., the FCC reversed its two 1962 decisions. In what is known as the *Aspen* decision, the Commission ruled that stations could broadcast debates without incurring equal time obligations provided that they are bona fide news events.²² To qualify as a bona fide news event, the debate must be “sponsored and controlled by a third party not associated with the licensees.”²³ In *Chisholm v. FCC*,²⁴ the United States Court of Appeals for the District of Columbia Circuit upheld these new FCC rules, concluding that in light of the ambiguous legislative history, the court should defer to the agency’s interpretation of congressional intent.

In the years following the *Aspen* rule and the *Chisholm* decision, debates sponsored by the League of Women Voters became common. For example, in both the 1976 and 1980 presidential campaigns, the League sponsored nationally broadcast debates between the candidates.²⁵ Similarly, at the state and local levels, political debates frequently have been spon-

19. S. REP. NO. 1539, 86th Cong., 2d Sess. 2 (1960); 106 CONG. REC. 13,424 (1960) (remarks of Senator Pastore), *quoted in* Aspen Institute Program on Communication, 55 F.C.C.2d 697, para. 26 (1975).

20. National Broadcasting Co. (Wyckoff), 40 F.C.C. 370 (1962) (holding that a debate held at the U.P.I. convention between candidates in California’s gubernatorial election did not qualify as a bona fide news event); The Good Will Station, Inc. (WJR), 40 F.C.C. 362 (1962) (holding that a radio broadcast of a debate between the leading candidates in Michigan’s gubernatorial election, sponsored by the Detroit Economic Club, was not a bona fide news event).

21. *Chisholm*, 538 F.2d at 353.

22. Aspen Institute Program on Communication, 55 F.C.C.2d 697, para. 40 (1975).

23. Petitions of Henry Geller, *supra* note 4, at 53,169.

24. 538 F.2d 349 (D.C. Cir. 1976).

25. In 1976, the League of Women Voters sponsored debates between both the presidential and the vice-presidential candidates. See J. WITCOVER, *supra* note 3, at 612, 613-15. In 1980, the League sponsored a debate between Democratic candidate Jimmy Carter and Republican candidate Ronald Reagan and also a debate between

sored by the League of Women Voters.²⁶

In November 1983, in response to a petition by Henry Geller and the National Association of Broadcasters, the FCC overturned its *Aspen* ruling and held that broadcast stations may sponsor political debates without providing equal time to candidates not included in the debate.²⁷ The FCC's new rule was accompanied by a statement in the *Federal Register* that explained why the Commission believed broadcast station sponsorship of debates to be consistent with the legislative history of Section 315.²⁸ The Commission, however, did not explain why it was reversing itself, stating only that it believed "exempting broadcaster sponsored debates should serve to increase the number of such events, which would ultimately benefit the public."²⁹ No discussion or elaboration followed this assertion.³⁰

In March 1984, the United States Court of Appeals for the District of Columbia Circuit issued a short per curiam opinion upholding the new FCC ruling.³¹ The court explained that it felt obligated to defer to the Commission's expertise in light of its earlier decision in *Chisholm v. FCC*,³² which held that deference in this area is appropriate due to the ambiguous legislative history.³³

Ronald Reagan and John Anderson, a third party candidate. President Carter refused to participate in the latter debate. Friedenborg, *supra* note 5, at 92.

26. For example, in Illinois, the League of Women Voters sponsored a series of debates between the Democratic and Republican candidates for Governor in 1982. In a number of instances, the broadcast of a debate sponsored by the League of Women Voters that excluded certain candidates was challenged before the FCC. See, e.g., *In re Socialist Workers Campaign*, 88 F.C.C.2d 349 (1981) (debate between candidates broadcast from television studio does not lose exemption because of location of debate, if broadcaster has no control over debate); *In re Donato*, 66 F.C.C.2d 599 (1977) (rebroadcast of debate, two and a half days after it occurred, is not exempt from equal time requirements); *In re Delaware Broadcasting*, 60 F.C.C.2d 1030 (1976) (a debate which is taped and rebroadcast more than one day after it is held is not exempt from the equal time rules).

27. Petitions of Henry Geller, *supra* note 4, at 53,167.

28. *Id.* at 53,169-70.

29. *Id.*

30. *Id.*

31. *League of Women Voters v. FCC*, No. 83-2194 (D.C. Cir. filed Mar. 8, 1984).

32. 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

33. The D.C. Circuit's entire ruling consisted of four short paragraphs. The first stated the procedural posture of the case and that "[t]he issues presented have been fully considered by the court; they occasion no need for an opinion." The second simply said, "Disposition of this case is controlled by this court's decision in *Chisholm v. FCC* [citation omitted]. The Commission's action is a legitimate exercise of its discretion." The third and fourth paragraphs of the ruling announced that the court was

Traditionally, broadcasters have refused to sponsor debates in an effort to avoid the costs of providing equal time to every candidate in an election. Now, for the first time, the FCC has exempted all debates from Section 315 and will allow stations to sponsor them without incurring equal time obligations.

III

Analyzing the Effects of the New FCC Policy

Professor Stephen Gottlieb observed that "the legal rules surrounding debate acquire enormous significance involving both how they encourage and how they structure debate."³⁴ Thus, it is useful to consider what will be the likely effects of the new FCC policy. I foresee three major ways in which the new regulations will alter the conduct of political campaigns.

First, allowing broadcast stations to sponsor debates will proliferate the number of sponsors and make negotiations over debate formats a major issue in many political campaigns. Typically, under the old FCC rules, there was no dispute over who would sponsor the debates. In most cases, the League of Women Voters invited the candidates to debate and there was little disagreement as to how the debates would be conducted.³⁵ The candidates met with representatives of the sponsor and the debate was arranged. It was rare for other organizations to try to compete with the League of Women Voters' sponsorship.

The new FCC regulations virtually insure that in every contested election there will be a dramatic increase in the number of potential sponsors. Television and radio stations have many incentives to sponsor debates. A station receives publicity and advertising by holding a debate in its studio. Also, broadcast stations can use their anchorpersons and reporters as moderators and panelists, providing them additional exposure, which might be useful in attracting new viewers and listeners. In the first few months of the campaign for the Democratic presidential nomination, many debates were sponsored by broadcast sta-

affirming the FCC rule and delaying implementation of the rule for seven days to allow for a petition for rehearing. *League of Women Voters v. FCC*, No. 83-2194 (D.C. Cir. filed Mar. 8, 1984).

34. Gottlieb, *The Role of Law in the Broadcast of Political Debates*, 37 *FED. B.J.* 1 (Winter 1978).

35. For example, in 1980, the League of Women Voters invited the presidential candidates to participate in political debates, and the total negotiations to arrange the debates, took only six hours. Friedenburt, *supra* note 5, at 96.

tions and staffed with their personnel. For example, in Illinois, both the local CBS and NBC affiliates offered to sponsor debates, and a debate was held in the CBS studios with panelists drawn entirely from the ranks of local CBS reporters. Likewise, in New York a number of media stations offered to sponsor debates, with the debate ultimately held in the CBS studios and moderated by the network's top anchor, Dan Rather.

What will dramatically increasing the number of potential debate sponsors in an election campaign mean? Although political debate formats seem basically alike, there are an almost endless number of details over which candidates might disagree.³⁶ For example, in the Chicago Democratic mayoral primary, the three candidates disagreed as to the number of debates that should be held, their location, their topics, when they should be held, who should ask the questions, who should moderate, their length and their format. If there is just one potential sponsor, the negotiations are much simpler than if there are many. The greater the number of potential sponsors the more likely it is that each candidate will accept a different invitation and then try to negotiate for the arrangement that will be most favorable. This is exactly what happened in Chicago, where the candidates accepted different invitations and then engaged in protracted, highly publicized negotiations over the arrangements.³⁷

The likely effect of the FCC's new rules, as illustrated in Chicago, is to make negotiations over the debate format an independent controversy in the political campaign. Media coverage of the negotiations makes the debate over the debates a campaign issue and a separate basis for analyzing candidates. For example, each candidate hopes, above all, to convey the impression that he or she has triumphed in the negotiations and has won major concessions from opposing candidates as to the nature of the format. No candidate wants to look like he or she lost the debate over the debates. In part, this reflects a general desire to be perceived as more effective and competent than his or her opponents. Additionally, because negotiations are an im-

36. See Pfau, *Criteria and Format to Optimize Political Debates: An Analysis of South Dakota's 'Election '80' Series*, 19 J. AM. FORENSICS A. 205 (1983) (discussing the importance of decisions over the format); T. WHITE, *THE MAKING OF THE PRESIDENT*, 1960, at 283 (1961) (discussing disagreement over the number of debates to hold; Nixon favored one debate and Kennedy wanted five).

37. *Withdrawal Threats Endanger Debates*, Chi. Tribune, Jan. 11, 1983, § 2, at 1, col. 2.

portant aspect of many public offices, a candidate does not want to appear to lack basic bargaining skills.

Thus, in the Chicago primary campaign, one candidate, State's Attorney Richard Daley, withdrew from the initial agreement over the debates when the media conveyed the sense that he had made concessions to the other candidates, incumbent Jane Byrne and Congressman Harold Washington.³⁸ Similarly, after a new agreement was reached, Congressman Washington's staff decided to pull out of the debates because it felt that the campaign had not appeared sufficiently strong in press coverage of the negotiations, and it seemed that Daley had won major concessions.³⁹ In internal discussions within the campaign, there was continued concern over whether the candidate would "look tough" in press coverage of the bargaining.

I believe that the candidates' desires to win the negotiations will mean not only that behavior in the negotiations will be a campaign issue, but also that some debates will never be held because disagreements over details will remain unresolved. It is easy to imagine situations in which the candidates' public positions as to how the debates should be conducted will place them in situations where compromise is perceived to be impossible. Further, a candidate who really doesn't want to debate can feign a sincere desire to do so, yet blame the absence of debates on a challenger's stubborn refusal to compromise on the format. As political commentator Robert MacNeil has remarked, "[T]he skillful campaign manager needs a technique

38. After the two initial negotiation sessions, representatives of the three candidates had agreed to a series of four debates; three of the debates were to be focused on specific issues, one would allow questions on any topic. All were to be held in prime time. The agreement was reached on December 22, 1982. On December 29, representatives of State's Attorney Daley indicated that they were no longer willing to participate in the agreed upon series of four debates, and had instead accepted three other invitations for debates.

39. The new agreement called for four debates, but only the first two would include all of the candidates. Congressman Washington and Mayor Byrne had decided to go ahead with the last two debates even if State's Attorney Daley did not participate. This agreement was reached on December 30, 1982. On January 10, 1983, representatives of Congressman Washington and Mayor Byrne informed the scheduled sponsor of the first debate (the Chicago Sun-Times) that they would not participate unless State's Attorney Daley adhered to his initial agreement to participate in all four debates. Daley refused and the Sun-Times announced that it was cancelling the debate.

It should be disclosed that I resigned as Washington's Debate Manager when the decision was made to withdraw from the agreement. *Washington Debate Aide Quits*, Chi. Sun-Times, Jan. 12, 1983, at 3. Ultimately three debates were held among the candidates.

for keeping the candidate out of debates that might be harmful and at the same time not lose face."⁴⁰ Disagreements in the negotiations provide precisely the opportunity for candidates to avoid debating, while still appearing willing to participate.

Furthermore, the negotiations over the debates will provide a new tool for communicating with important constituencies. For example, in Chicago, Harold Washington's core constituency was the black community. Thus, his representatives demanded that some of the debates be held in black communities and that a black person moderate at least one of the debates. Likewise, one of Washington's major campaign issues was revitalizing the neighborhoods in Chicago. Hence, he wanted debates to be held in community settings. Although the location of a televised debate is obviously only symbolic, it is a symbol that can be used to transmit a message. For similar reasons, Washington accepted an invitation extended by a radio station that appeals primarily to a black audience.

Other candidates in the Chicago debate negotiations also used the negotiations to communicate messages. For example, State's Attorney Daley's campaign emphasized crime-related issues. Hence, he alone accepted an invitation extended for a debate to be sponsored by the Fraternal Order of Police. The incumbent, Jane Byrne, wanted to demonstrate her commitment to the neighborhoods and therefore initially argued for sixteen debates to be held in communities throughout the city.⁴¹

Obviously, the debate negotiations cannot be used to communicate with constituents if they are conducted in secret. It is probable, however, that most negotiations will be highly publicized. Candidates will likely see the bargaining as an opportunity to obtain free publicity, both of the candidate and of his or her key issues. Also, candidates can use publicity during the negotiations to force opponents to stick to the terms of agreements. If tentative agreements are disclosed to the news media, there will be significant pressure on candidates to adhere to them.⁴²

40. Kirkpatrick, *supra* note 1, at 11 (quoting R. MACNEIL, *THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION ON AMERICAN POLITICS* 174-75 (1968)).

41. *Candidates Haggles over Format Details*, Chi. Tribune, Jan. 12, 1983, § 2, at 1, col. 4.

42. In fact, one lesson candidates might draw from the Chicago experience where agreements were repeatedly broken, is that the media can be used to help insure adherence to tentative agreements. In hindsight, one of the major errors made by the

In short, broadcast stations' sponsorship of debates will greatly increase the number of invitations for debates, insuring that negotiations must occur to decide when, where, and how debates will take place. The result will be to make debate negotiations an issue that clever candidates will manipulate to their advantage.

A second major aspect of the change in the FCC rules will be the difficulties arising from the fact that the same broadcast stations that sponsor the debates will also report on events during the election campaign. There is a clear role conflict when media companies are involved both in trying to arrange debates and in reporting on the progress of the negotiations. Broadcast stations may very well provide—or appear to provide—preferential coverage to those candidates who accept their invitations to debate. Moreover, the station is in a difficult position if its behavior during negotiations becomes a campaign issue. Imagine a situation in which a station's refusal to compromise as to the format prevents a debate from occurring. The station can hardly provide disinterested reporting when its own actions are in question. Similarly, if the station's reporters' conduct during the debate becomes an issue, the station will be in a compromised position in attempting to cover the controversy.

Again, many of these problems arose in the Chicago debate negotiations. Three media outlets were directly involved in the negotiations. Officials at the local public television station, WTTW, organized the initial negotiation sessions and ultimately provided the broadcast transmission to the other stations. A radio station with a predominately black audience, WBMX, extended one of the first invitations to sponsor a debate and sponsored the second debate in a three-debate series. Finally, the Chicago Sun-Times invited the candidates to participate in a debate on the city budget, an invitation that was accepted, then rejected, and finally accepted again.⁴³ Each of these three media companies faced exactly the pressures described above. Most obviously, when the candidates temporarily withdrew from the Sun-Times debate, the Sun-Times wrote

Washington and Byrne representatives was agreeing to the Daley proposal that the agreement that had been reached not be publicized until all of the details were finalized. If the agreement had been publicized, it would have been much more difficult for Daley to back out of it.

43. *Demo Clash over Taxes*, Chi. Tribune, Jan. 19, 1983, at 89; *Withdrawal Threats Endanger Debates*, *supra* note 37.

about what occurred and even editorialized about it. Furthermore, the Sun-Times endorsed a candidate, perhaps coincidentally the only of the candidates not to back out of the debate, State's Attorney Richard Daley.

Similarly, WTTW's leading commentator, John Callaway, was involved in almost all of the debate negotiations from the beginning. In fact, the first two negotiating sessions were held in the WTTW offices. At the end of the first meeting, representatives of the candidates decided to keep their tentative agreements secret. Although there were a number of reporters waiting outside the negotiation room, no information was disclosed. This meant that WTTW alone among all of the media outlets in the city knew the exact status of the talks. Furthermore, there was strong pressure on the representatives of the candidates to agree to use Mr. Callaway as moderator of the debates, a role he had occupied in previous elections. His participation in the negotiations made it difficult to argue for the use of anyone else.

The conflict involving radio station WBMX, however, might have been the most serious. As a black-oriented radio station, everyone perceived that it strongly favored Harold Washington for Mayor. In fact, some of its commentators had long argued that a black candidate should run for Mayor. Yet, it was politically difficult for any candidate to refuse WBMX's invitation to debate without risking offense to the black community. Imagine a situation where a number of different media companies, including many catering to specialized ethnic audiences, extend invitations to debate. How can candidates choose among these offers without jeopardizing support of a crucial constituency? Further, a controversy erupted during the debate sponsored by WBMX when there were a number of audience disruptions.⁴⁴ Many other reporters and commentators criticized the way in which WBMX's moderator handled the situation. Could WBMX be expected to criticize its political editor who had served as moderator?

The point is a simple one. There is an inherent conflict of

44. The debate was disrupted when a candidate not invited to participate began shouting that she was unfairly excluded. Also, the debate was disrupted by the reactions of the strongly pro-Washington audience. *Round 2 for Mayor*, Chi. Tribune, Jan. 24, 1983, at B10. See, e.g., *Candidates Hagggle over Format Details*, *supra* note 41; *Preliminaries Pointing to Fireworks at Debates*, Chi. Tribune, Jan. 12, 1983 § 2, at 2, col. 7.

interest when the media participates in an event and also reports on that event. Isn't it inevitable that reporting, editorializing, and endorsing all will be influenced by the fact that the media was directly involved in the negotiations? I believe that the Chicago experience illustrates that the broadcast and print media should not sponsor debates. Although the print media were able to sponsor debates even before the new FCC rules, the involvement of broadcast stations increases the likelihood that newspapers will now try to sponsor debates. The emergence of radio and television stations as potential sponsors ends the assumption that only organizations such as the League of Women Voters should sponsor debates. It is therefore likely that newspapers will follow the lead of broadcast stations and attempt to gain the additional publicity and exposure that results from sponsoring political debates. Thus, the combination of print and broadcast media outlets insures a dramatic increase in the number of available sponsors for any debate.

A third and final implication of the new FCC rules results from the ability of stations to broadcast debates without inviting all of the candidates. A candidate can no longer use the equal time rules to insist on inclusion. Accordingly, a primary objective of candidates must now be to muster sufficient strength in the early stage of a campaign to insure they will be extended the opportunity to participate in the debates. The exclusion of a candidate would reinforce the perception that his role in the election is insignificant. Thus, the candidate must garner sufficient initial support so that if he or she is not included, the exclusion will appear unfair and may emerge as an independent campaign issue. This could cause a major change in campaign spending if candidates make substantial initial expenditures to gain enough support to justify inclusion in the debates and then use the debates to obtain additional exposure. In Chicago, few believe that Harold Washington could have won the Democratic primary without the debates. The debates permitted Washington's staff to target meager advertising funds to the time period after the debates and prior to the primary election.

It might be argued that the FCC rule will make no difference in this regard because most debates in recent years have involved only the major candidates.⁴⁵ Certainly, the League of

45. For example, in the 1960, 1976, and 1984 presidential debates, no third party

Women Voters does not invite every "third party" candidate in an election to participate in their debates. However, the FCC rule represents a substantial change because for the first time the broadcast outlets will decide who will and who will not be included. Again, this will allow broadcast stations not only to report the news, but to determine it as well. Furthermore, under the old FCC rules, stations often felt it necessary to provide broadcast time to "third party" candidates excluded from the debates. Because of the strong statutory and administrative mandate requiring provision of equal time, stations usually responded favorably to requests for airtime from candidates not included in the debates. The previous FCC rules were unclear as to whether stations had a responsibility to provide such time, and stations erred on the side of insuring equal time. However, because the new rules expressly approve debates that exclude some of the candidates, stations have no reason to perceive an obligation or to provide equal time to candidates not invited to appear in the debates.

In sum, the result of the new regulations may be decreased media coverage of "third parties" and candidates without strong initial support. These are precisely the types of candidates most in need of the free publicity that debates provide.⁴⁶ Exclusion of these candidates perpetuates the perception that they have little chance to win and reinforces the dominance of the two established parties and their front-runners.

IV Conclusion

Ultimately, a final judgment about the new rules must be based upon a careful study of their consequences in coming elections. Nonetheless, at this stage, I find it hard to see much good coming from the new rules. I see little benefit in allowing broadcast stations to sponsor debates. They offer nothing that existing sponsors could not already provide. They do, however, threaten to disrupt campaigns and make media outlets an independent factor in elections.

Therefore, an important question must be answered: why, in

candidates were invited to participate. In 1980, John Anderson, running as a third-party candidate, participated in some of the debates.

46. See *Buckley v. Valeo*, 424 U.S. 1, 96 (1975) (importance of third parties); Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 353-72 (discussing third-party candidates).

light of the significance of political debates and the inevitable effect of any rule change in altering the existing equilibrium, did the FCC adopt the new regulations? In its statement in the *Federal Register*, the FCC devotes only one sentence to describing any benefit expected of the rule change. Virtually the entire document focuses on how the new policy can be reconciled with the legislative history of Section 315. The only justification offered for the new rule is an assertion that "exempting broadcaster sponsored debates should serve to increase the number of such events, which would ultimately benefit the public."⁴⁷ However, there was never a shortage of sponsors prior to the rule change. No one has ever identified a single instance in which a debate did not take place because of the lack of a sponsor. Nor has there been any indication that debate sponsors were obstructing media coverage of their debates. Prime time broadcasts of debates among candidates have been a common part of political campaigns.⁴⁸

Then why were the new rules adopted? Certainly broadcast stations favored them. They saw an opportunity for free publicity and increased exposure. This pressure from broadcast companies, together with the FCC's strong disposition toward deregulation, no doubt combined to produce the new regulations. However, a major change in policy that directly affects the conduct of all political campaigns should be based on careful analysis. In an era in which broadcast companies can so greatly influence the outcome of elections, the FCC should thoroughly consider the effects of its rule changes on the electoral process. What is most remarkable about the new regulations, and perhaps about the FCC's commitment to deregulation generally, is that there is no indication these consequences were ever considered.

Obviously, it is difficult to identify with precision the forces that mold voter behavior. There is no way of determining, for example, whether the controversy over the debates in Chicago influenced the outcome of the election. What the Chicago ex-

47. Petitions of Henry Geller, *supra* note 4, at 53,169.

48. I wrote to the Federal Communications Commission asking them if they had any data supporting their conclusion that the new rules would increase the number of political debates or that debates have not occurred in past elections because of a shortage of sponsors. I received a reply letter from Mr. Sheldon Guttman, Associate General Counsel, dated June 11, 1984, stating that the Commission does not have such data and "also is not aware of any other organization that might be able to provide such documentation." (Letter on file with Comm/Ent.)

perience illustrates, though, is that the availability of many different media outlets as potential debate sponsors significantly alters the election process. This experience should encourage the FCC to carefully monitor the effects of its new rules on campaigns for offices at all levels of government.

