Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-Line Computer Services

Angela J. Campbell

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Computer Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol38/iss2/5

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
POLITICAL CAMPAIGNING IN THE INFORMATION AGE:
A PROPOSAL FOR PROTECTING POLITICAL
CANDIDATES' USE OF ON-LINE
COMPUTER SERVICES

ANGELA J. CAMPBELL*

I. Introduction

As more and more people "sign-on" to computer based communication networks, the networks become an effective means to reach a growing audience. One group that is always interested in reaching larger audiences is political candidates. Consequently, it is likely that candidates will increasingly use this new medium—computer-based communication networks—as a way of communicating with potential voters.¹

While computer-based communication networks have yet to penetrate into every aspect of our lives, as some predict they ultimately will,² political candidates have already begun to come online. During the 1992 presidential election campaign, several candidates used on-line computer information services to communicate with voters. Clinton and Bush addressed Prodigy subscribers;³ the Clinton campaign posted position papers and other materials on CompuServe and GEnie;⁴ Larry Agran, a candidate in the democratic presidential primaries, hosted a live computer

* Associate Professor, Georgetown University Law Center. I wish to thank Roy Schotland for his helpful comments, and Michael Hunseder and Therol Johnson for their research assistance.

1. Computer-based networks, and the information service companies they provide carriage for, have been used for a variety of purposes. Bulletin boards, which are message centers operating on a network, have been used to mount campaigns on proposed legislation. Howard Rheingold, Electronic Democracy: The Great Equalizer, WHOLE EARTH REV., June 22, 1991, at 4. Also, on-line services, those services available to those who are "on-line" with their computer, are used to sell a wide variety of products and services. See, e.g., CompuServe Directory, at 29-31, reprinted in COMPU SERVE MAGAZINE, Mar. 1993 (CompuServe's "Electronic Mall" enables members to order products from over one hundred retailers. Examples of products available include clothing, gourmet food items, flowers, computer software, and woodworking tools).

2. For a discussion of how the transformation from paper and print technology to electronic communication changes not only how we communicate but what we communicate, see M. Ethan Katsh, Law in A Digital World: Computer Networks and Cyberspace, 38 VILL. L. REV. 403 (1993).


conference on CompuServe; and Jerry Brown participated in on-line discussions on GENie and CompuServe.

Increased use of these networks by political candidates has the potential to benefit both the candidates and the voting public. The candidates, ever anxious to reach voters who do not respond to traditional forms of communication, will come to regard these networks as another necessary weapon in their battle for recognition. At the same time, through the use of electronic mail and on-line conferences, the voting public will be able to learn more about candidates. The information available on-line will be more in-depth and diverse than that delivered via traditional media. For example, voters will be able to obtain full texts of speeches and position papers and will also be able to interact with candidates or with their staffs.

As a result of this anticipated integration of computer network communication into the political campaign process, the courts and Congress must resolve a critical issue: Who is entitled to have access to these networks and what are the terms and conditions attached to such access?

The question of access by political candidates is but one of many created by the rapid development of computer networks. Many of the issues were discussed at length during the symposium that prompted this Article. In an effort to address these issues, courts and commentators frequently debate the choice of an appropriate metaphor. Through the use of a properly chosen

metaphor, existing legal principles can be applied to emerging fact patterns. The challenge is to select the appropriate metaphor and then to apply the existing legal principles identified while understanding that they cannot be applied rigidly.

This Article adopts a broadcast metaphor.9 While recognizing that the appropriateness of the broadcast metaphor is open to debate, the Article focuses on a different question: How legal principles developed to ensure access by political candidates to broadcast stations might apply to computer networks.10

As a threshold matter, it is necessary to describe the entities involved in delivering a candidate's message to a remote computer.11 Working backwards from the receiving end, the process
includes the users, or in this case the consumers or voters. These are those people who have access to the hardware and software necessary to allow them to receive and interpret information transmitted in a digital form. Users receive information over the second component, the network. Loosely defined, a network is an entity, or entities, that provides the lines, switches and connec-
tivity in how terms are defined and services are classified. For example, Professor Loftus Becker uses the term "computer bulletin board" to mean systems that store information sent in by users and retransmit that information from other users. These range from large commercial services, such as CompuServe and GEnie, with hundreds of thousands of users, through large linked systems, such as FidoNet, to individual systems which at their smallest may have only a few users.

Becker, supra note 8, at 208.

Pourtenelle and Banks draw a distinction between bulletin board systems (BBSs) and on-line services, which would include such services as CompuServe and GEnie. JERRY POURNELLE & MICHAEL BANKS, PC COMMUNICATIONS BIBLE (1992). This book defines a bulletin board system as a personal computer that's set up to take calls from other computers and is largely unattended. It runs special BBS software that enable message bases, private e-mail, file transfers, and other features for callers. . . . A BBS can be public or private. Public BBSs are open to all callers, are usually — but not always — free, and encourage callers to use other BBSs.

Id. at 235.

Online service is defined as "a commercial enterprise that provides users with computer-based communications, information, entertainment, or education services via modem." Id. at 261. Using the latter terminology, both bulletin boards and on-line services provide similar functions with the same three components: 1) a user; 2) a communications carrier; and 3) a bulletin board system operator.

To obtain access to a bulletin board, a user needs a computer, a modem, communications software and a telephone line. The equipment needed to access bulletin boards costs from $900 to $3,000. Jessica Seigal, Computer Bulletin Boards Touch Base with the New Politics, CHI. TRIBUNE, June 17, 1992, at 1. Users typically find the telephone number for these boards in magazines such as Boardwatch. Nearly 10 million people are estimated to be regular callers to public-access bulletin board systems. Judith Berck, It's No Longer Just Techno-Hob- byists Who Meet by Modem, N.Y. TIMES, July 19, 1992, § 3, at 12.

The communications common carrier—typically a telephone company—provides lines that connect the user to the bulletin board and transmit messages back and forth. If the bulletin board is located in the same service area as the user, only the local exchange carrier will be involved and the user will likely not incur any additional charges beyond his monthly telephone service charge. If the bulletin board is located in a different area, the user may incur long distance charges on his presubscribed long distance carrier, such as AT&T, MCI or Sprint. The larger commercial on-line services utilize the public packet switched networks such as SprintNet and TYMNET. Use of these networks allows subscribers to have access to a distant on-line service while paying only local telephone charges.

A bulletin board system operator, often referred to as a system operator or "sysop," needs a computer, modem and software. The cost of running a bulletin board system varies according to the complexity. It is estimated that a simple bulletin board system can be set up for as little as $3,000. Id.
tions which allow digital signals to be sent from one location to another. The third group of players consists of the information services companies, such as LEXIS or Prodigy. These are the entities which package and deliver information over the networks to the users. The final classification of participants includes the information providers, in this case the candidates. These are individuals or organizations that seek to have their particular information bundled with the information of others and delivered by information services companies over the networks to the users.\(^\text{12}\)

Information service companies are only beginning to build significant user bases. The general public is slowly growing accustomed to looking at a computer as a source of information—rather than calling upon computers solely to perform tasks such as word processing. The assimilation of computer based communications is remarkably similar to the process by which radio became an accepted medium for communication.

In the 1920s, as radio weaved its way into the fabric of society, Congress recognized its value as a means for political candidates to reach the voting public. At that time,

\[\text{recognizing radio's potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to candidates for office without discrimination, and by ensuring that these candidates when broadcasting were not to be hampered by censorship of the issues they could discuss.}\(^\text{13}\)

This Article explores whether the legislation passed by Congress to provide for access to radio by political candidates, the Radio Act of 1927, which was latter incorporated in the Communications Act of 1934, is a useful model for new legislation designed to ensure that the public has access to information about political candidates by means of on-line computer services.

\(^{12}\) In practice, the line between the participants is not nearly as sharp as is assumed. A network owner may also offer information services. It is also likely that a sizeable percentage of the information transmitted by an information services company will be self-generated. The difficulty in distinguishing between the roles played by the various participating entities has been the focus of many recent articles. *See*, e.g., Henry H. Perritt, Jr., *Tort Liability, The First Amendment, and Equal Access to Electronic Networks*, 5 Harv. J.L. Tech. 65 (Spring 1992).

This Article focuses upon the relationship between the information providers—the candidates—and the information services companies. For this relationship to be the correct focus, it must be assumed that candidates will rely upon established information services companies to carry their messages into the homes of the users.

Part I of this Article gives examples of how candidates used on-line services during the 1992 campaign, discusses the benefits of candidates' use of such services and describes the potential for discrimination by on-line services against political candidates. Part II describes the special protections afforded political candidates in their use of the broadcast media and analyzes whether similar protections should be applied to computer bulletin boards. It recommends passage of legislation requiring that large, commercial information services companies afford equal opportunities and reasonable access to political candidates. The legislation would prevent such services from charging political candidates higher rates than other users. The legislation would also clarify the liability of these services arising from the content of information provided by the candidates.

This Article is designed to serve as a catalyst for future discussion and research. It is not meant to be a thorough exploration of the intricacies of each sub-issue identified. Rather, in keeping with the spirit of the symposium panel discussion that spawned the Article, it presents a thesis that can be tested through continued debate.

II. USE OF ON-LINE SERVICES BY POLITICAL CANDIDATES

This Article is concerned with access obligations imposed upon established commercial information services companies. These are the entities that provide services that are similar to broadcast companies. Present day experience indicates that

14. Large commercial information services companies are by no means the sole players in the electronic information market. In addition to well-known commercial services, there are an estimated 60,000 public access bulletin boards in the United States. Berck, supra note 11, at 12. There are also an estimated 120,000 boards operated by private companies. Id. The number of bulletin boards has grown rapidly, up from 3,500 five years ago. Id. Jack Rickard, editor of Boardwatch magazine, estimates the bulletin board industry at nearly $500 million. Id. The majority of these boards are small, non-profit operations. While most bulletin boards are small operations, with one to eight lines, the "largest bulletin boards...offer so many services that they are becoming almost indistinguishable from the giant on-line information businesses like CompuServe and Prodigy." Id. About 80% of bulletin boards are non-profit. One-third charge nothing; some charge annual fees ranging from $15 to $60; some
candidates will turn to these entities when they wish to reach large numbers of people. Virtually all of the publicized examples of political candidates using bulletin boards during the 1992 campaign involved large commercial on-line services, such as CompuServe, Prodigy, GEnie and Online America.15

A. Examples of Political Candidates' Use of On-Line Services

During the 1992 campaign, the candidates used the established commercial services in a variety of ways which can be grouped into four categories.16

1. Public Message Areas

In the public message area, users can read messages previously posted by others or post messages of their own. These message areas are much like the bulletin boards located inside the

offer a mix of free and pay services. Many boards belong to networks, like Internet, which pass messages between bulletin boards in dozens of countries. Id.

As stated above, this Article begins with the assumption that political candidates will, at some point, turn to the large commercial services. Given a candidate's desire to reach the largest number of people, it is unlikely that they will be willing to rely upon a private node on a network. This node, e.g., a single purpose bulletin board established by the candidate, will not be effective unless it is well publicized and easily accessible to the general public. To create the necessary level of awareness, the candidate will have to spend money replicating the efforts already undertaken by the established services. This cost is a "barrier to entry" which, given the relatively short life and high impact requirements of political campaigns, will drive the candidate to piggyback on the established services.

15. CompuServe is the largest with one million subscribers. It charges a monthly fee of about $8 plus hourly charges for connect time. The connect charges vary depending on the service and the speed of the modem. CompuServe charges an additional fee for some services. It offers access to a software library, forums on many different topics, shopping and E-mail. CompuServe is owned by H&R Block, Inc.

Prodigy has 800,000 accounts, but claims a total of 1.5 million users. It costs about $13 per month for basic services, which include 30 messages per month. Prodigy is a joint venture of IBM and Sears Roebuck & Co. It is the only major service to accept on-line advertising.

GEnie has about 550,000 members. It charges about $5 per month for basic services, with extra charges for premium services. GEnie is a division of General Electric Co.

America Online has about 170,000 members. It charges about $6 per month, plus a connect charge of $5 per hour after the first hour.

The descriptions of these four services comes from Mark Potts, Plugged-In Pleasures, WASH. POST, July 27, 1992, at F1.

16. Professor Becker has classified the functions provided by a bulletin board into four groups: 1) public message areas; 2) private mail; 3) conferencing; and 4) file areas. Becker, supra note 8, at 211-13. In addition to these functions, commercial online services typically offer shopping, specialized news and database services, and gateways to specialized services. POURNELLE & BANKS, supra note 11, at 297-99.
front door of many grocery stores. These public message areas are often divided by topic.\textsuperscript{17}

In the months leading up to the November 1992 election, many people used the public message areas of bulletin boards to discuss political candidates and issues. For example, America Online established a special elections forum which included election news, candidates’ position statements and a bulletin board where members could discuss politics with other members.\textsuperscript{18} The Clinton and Brown campaigns had accounts on services such as CompuServe and GEnie, and their staffers frequently took part in electronic discussions.\textsuperscript{19}

2. E-Mail

In contrast to the public message area, where a message posted can be read by anyone else, private mail can be read only by the person to whom it is addressed. This function is also known as “E-mail.”

Electronic mail was used by the Clinton campaign, which established a group of volunteers known as the “Clinton/Gore ’92 E-mail Team.” As described by one of its members, the E-mail Team

help[ed] to distribute primary campaign documents to State and local Clinton/Gore headquarters, . . . passed these materials along to friends and family members, as well as to colleagues and coworkers . . . who assisted in

\textsuperscript{17} For example, some of the topics of Prodigy’s bulletin boards include Arts, Careers, Food and Wine, Genealogy, Pets, Sports and Veterans. CompuServe offers its members the opportunity to participate in various forums including computer programming, woodworking, investing and the outdoors.


\textsuperscript{19} \textit{Comm. Daily}, June 4, 1992, at 3. Political discussions were not limited to the large commercial systems. A computer programmer in Texas operated a bulletin board on the Presidential campaign from his home. Martin Johnson, \textit{Computer Users Have Another Way to Get Political}, Hou. Chron., July 14, 1992, at 11. His board consists of two parts. The files portion contained quotes, speeches and position papers. The message portion allowed users to communicate with others. \textit{Id}. Another bulletin board operator, David Hughes, in Colorado, converted his bulletin board from general discussion to a Perot-for-President board. \textit{Comm. Daily}, June 4, 1992, at 3. Earlier, Hughes invited a candidate for city council to post his views on his bulletin board. After the candidate was elected, he continued to use the board to communicate with constituents. Rheingold, \textit{supra} note 1, at 9; see also Siegal, \textit{supra} note 11, at 1 (describing Superdemocracy bulletin board set up by computer entrepreneur in Florida).
the distribution efforts. ... In addition, professors and librarians at colleges and universities in key electoral states downloaded these files for use in classes and to serve as an important educational resource. Posting of official campaign documents on NETNEWS made it possible to reach upwards of 1,000,000 users of the Internet swiftly and with the impact of a personal message. 20

3. Conferences

Conferencing may take place in real time, allowing messages typed in to be viewed and responded to immediately. 21 Conferencing can also take place not in real time, allowing people to "log onto the system from different places at different times on different dates and participate in ongoing discussions." 22

Real time, or live, conferences were used by two candidates in the Democratic presidential primary. Larry Agran, the former mayor of Irvine, California, held what is believed to be the first live computer conference by a presidential candidate. 23 Jerry Brown also answered questions on-line in sessions during his primary campaign. 24

Prodigy set up a procedure for presidential candidates Bush and Clinton that combined the features of a conference and public message areas. Instead of hosting a conference in real time, Bush and Clinton agreed to post position statements on line during September and October, allowing Prodigy members to respond and ask questions. 25 Each campaign would select

20. Memorandum from Charles Fishman to Al Gore (Nov. 15, 1992) [hereinafter Fishman Memo]. The purpose of Mr. Fishman's memo was to synthesize the views of E-mail team members regarding their contribution to the Clinton/Gore campaign.

21. According to Becker:
Some conferences are entirely unstructured and consist mostly of chatter; others are quite formal, rather like a press conference designed to let users ask questions of a popular or important personality; and still others are quasi-professional meetings for the discussion of common problems or the creation of common standards.

Becker, supra note 8, at 212.

22. Rheingold, supra note 1, at 10. Such conferencing is essentially conducted in the same manner as exchanges in public message areas.

23. Schwartz, supra note 5, at 112. This is how it worked: "CompuServe members were notified to log in at a certain time to send in questions. A speedy typist transmitted Agran's answers back to the voters' PC screens." Id.


25. The Perot campaign was invited to participate as well, but declined. Telephone interview with Brian Ek, Communications Manager, Prodigy, Dec. 1992 (notes on file with the Villanova Law Review) [hereinafter Ek Interview].
questions “representative” of those posted. Campaign staffers would draft the answers to the questions that would be personally approved by the candidates. This conference drew a great deal of interest from Prodigy subscribers.26

4. File Transfer

File areas allow users to send (upload) or receive (download) files. Files may consist of text, software programs, data, or graphics. Some larger on-line services make available newsletters in electronic form and may even “publish” their own newspaper electronically.

The file transfer function was used during the campaign to transmit information about candidates to the public. Prodigy maintained extensive data bases on political topics, including campaign finance, voting records, and biographies of presidential candidates.27 It included full texts of major speeches by the Presidential candidates. Candidates’ statements on key issues could be displayed in a side-by-side format for easy comparison.28

The Clinton campaign regularly posted position papers and speeches on major on-line services so they were available to the public.29 Perot supporters, but not campaign staff, uploaded speeches, texts, and even an animated campaign poster.30

B. Benefits of Candidates’ Use of On-Line Services

On-line services offer a number of attractive features for both the public and candidates. On-line computer services provide a convenient means for members of the public to increase their knowledge about the candidates and the issues, which should lead to more intelligent choices and increased participation in voting. On-line services offer candidates the opportunity to go directly to

Bush posted position statements on four issues. Clinton’s staff agreed to field 10 questions per day for one week and to draft responses to be approved by Clinton. COMM. DAILY, Aug. 31, 1992, at 6. Prodigy kept the responses throughout the period and organized them according to topic, so that members could easily peruse the responses of interest to them. See Ek Interview, supra.

26. Prodigy’s Communications Manager Brian Ek told me that they received tens of thousands of responses. Ek Interview, supra note 25. Bush’s first position statement went on-line August 26, 1992, and received more than 600 replies in the first 24 hours. COMM. DAILY, Aug. 31, 1992, at 5-6. Prodigy recorded 3,000 responses to Bush’s position papers in 5 days. COMM. DAILY, Sept. 4, 1992, at 3-4.

27. COMM. DAILY, June 4, 1992, at 3.
28. Ek Interview, supra note 25.
30. COMM. DAILY, June 4, 1992, at 3.
voters and to interact with them. On-line services may offer candidates a cost effective means of reaching voters. They could also provide a means for candidates to raise money.

1. Benefits for the Public

The broadcast and print media are frequently criticized for the way they cover campaigns. Charges include that campaigns are treated as "horse races," and little time is devoted to in-depth coverage of issues. One recent study showed that the average "sound bite" on network news in the weeks before the election range from 8 seconds for ABC to 9.3 seconds for NBC.

Through on-line services, citizens have access to the complete text of candidates' speeches and position papers. They are not limited to excerpts selected by reporters and editors. Moreover, they can obtain access to these materials from home at their own convenience and with relatively little effort and expense.

In a live on-line conference, members of the public have the opportunity to question a candidate directly. Other formats—such as the one developed by Prodigy—allow citizens to interact


32. See generally JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 63 (1991) (summarizing studies showing that 60% of media coverage of 1988 campaign was spent on "horse race" issues, and that of total coverage of 450 minutes by CBS during 1980 preconvention period from January to June, only about 142 minutes were devoted to coverage of candidates and issues).

33. B. Drummond Ayres, Jr., The 1992 Campaign Trail, N.Y. TIMES, Oct. 31, 1992, § 1, at 8. These findings are consistent with an earlier study finding that the average sound bite of uninterrupted speech for presidential candidates fell from 42.3 seconds in 1968 to only 9.8 seconds in 1988. FISHKIN, supra note 32, at 62-63 (citing Kiku Adato, The Incredibly Shrinking Sound Bite (Harvard University, John F. Kennedy School of Government, Research Paper No. 2, June 1990)).

34. A Clinton staffer characterized his job as making sure voters have access to the "full text of information rather than relying on micro sound bites and what small snippets pass through the conventional media." COMM. DAILY, Sept. 4, 1992, at 4 (quoting Jock Gill).

35. For example, Jerry Brown's on-line discussions attracted about 200 subscribers on GEnie and 100 on CompuServe. COMM. DAILY, June 4, 1992, at 3.
with campaign staffers and obtain answers to questions.\textsuperscript{36} E-mail provides another way for citizens to get answers to questions.\textsuperscript{37}

Public message services devoted to discussing elections, whether or not the candidates themselves or their staffs participate, may also increase voter knowledge and interest. By facilitating political discussion across time and distance, we can expect that some people will be exposed to new viewpoints, and have a reason to consider issues that they might not otherwise have considered. All of these types of interaction will likely lead to better informed voters. It may also increase interest in voting.\textsuperscript{38}

2. \textit{Benefits for Candidates}

In the 1992 election, candidates attempted to bypass traditional formats and go directly to voters through call-in and other talk shows and infomercials.\textsuperscript{39} Candidates' use of on-line services may be viewed as part of that trend, as on-line services provide a means for candidates to reach voters without the intervention of third parties, especially reporters.\textsuperscript{40}

By being able to go directly to voters, candidates can exercise more control over their campaign and the image they present to the public. The head of the Clinton E-mail Team stated that a key benefit of the team’s effort was “demonstrating that both the filters and interpretations of the media and the organizational hierarchies of a campaign can be removed from the delivery of

\textsuperscript{36} COMM. DAILY, Aug. 31, 1992, at 6.

\textsuperscript{37} For example, a volunteer for the Clinton-Gore ‘92 E-mail Team described how:

Questions from undecided voters—many of them in the important 18-24 age bracket—were rapidly answered and challenges from Bush or Perot partisans effectively countered because volunteers were able to maintain twenty-four-hour-per-day access to official documents that, for the most part, were unavailable through standard media channels. Personal requests for information could be quickly and decisively honored, . . .

Fishman Memo, supra note 20.

\textsuperscript{38} Cf. Gina M. Garramore, et al., \textit{Uses of Computer Bulletin Boards}, 30 J. BROADCASTING & ELEC. MEDIA 325, 337 (1986) (suggesting that interaction with bulletin boards “may decrease alienation and increase feelings of political efficacy”).


\textsuperscript{40} It is likely that candidates will also begin to use the on-line services as fund raising vehicles. This would parallel the continued use of 800 and 900 numbers for fundraising. See, e.g., Richard L. Berke, \textit{Brown Laughs Last on ‘800’ Number}, N.Y. TIMES, Mar. 28, 1992, § 1, at 9; Susan Taylor, \textit{900 Numbers Get You Politicians, Including Duke}, GANNETT NEWS SERVICE, July 18, 1990.
information to the citizens and voters.” 41 Of course, this trend of going directly to voters has been criticized by some. It is argued, for example, that professional journalists can better keep candidates honest by pointing out misstatements and inconsistencies and by asking hard questions.42

Just as on-line services are convenient for citizens to use, they offer certain convenient features for candidates and staff. Candidates and staff can participate from any location where they have access to a computer. The candidate can present material “independent of how his voice sounds or how he looked, and whether the makeup is on straight.”43

On-line services have also provided candidates with a relatively inexpensive or even free way to reach voters.44 CompuServe offered candidates free accounts.45 Similarly, Prodigy did not charge the Bush or Clinton campaigns for their participation in the “Close-Up” conference.46

It is difficult to know whether this free access is likely to continue. It may be that the commercial on-line services were attracted by the novelty of these applications, and their enthusiasm could wear off, especially if more candidates sought to use their services. In addition, providing free accounts and conference services could violate federal election law.47 But even if candidates pay normal charges, bulletin boards may provide a cost-effective means of reaching voters.48

---

41. Fishman Memo, supra note 20 (quoting Jock Gill). The Fishman Memo further noted that “feedback from a wide-ranging geography of voters could be forwarded to Campaign Headquarters in Little Rock for consideration . . . and translation into action.” Id.

42. See, e.g., Chancellor: ‘Too Much Vox Populi,’ BROADCASTING, Feb. 1, 1993, at 8 (NBC journalist gave speech criticizing reduced role of journalists and prevalence of call-in shows in recent election).

43. COMM. DAILY, June 4, 1992, at 4 (quoting James Warren, activist from Woodside, California, who proposed national on-line debate for political candidates).

44. For example, Glenn Tenney, a candidate for Congress, claims to have reached millions of people by posting messages on a succession of bulletin boards, at a cost of about $20. Joshua Quittner, Campaign ’92: Candidates Stump Via Computer, NEWSDAY, Apr. 19, 1992, at 15.

45. COMM. DAILY, June 4, 1992, at 3.

46. Ek Interview, supra note 25.

47. For a discussion of potential election law violations, see infra notes 122-27 and accompanying text.

48. Use of bulletin boards may not be cost effective for candidates, however, if they are treated the same as commercial advertisers. This issue arose in connection with Prodigy, the only major service that accepts advertising. Except for the Bush-Clinton posting, Prodigy rejected attempts by candidates to post position papers and told candidates that they would have to pay regular com-
In sum, the recent campaign suggests that on-line services can provide the public with detailed information about candidates, a means to ask questions, and a forum to exchange their views. For candidates, bulletin boards provide a way to bypass the editing function of the traditional media and to reach voters directly.

C. Potential For Discrimination Against Political Candidates

These benefits for candidates and the public could be lessened if bulletin board operators deny access to, or discriminate against, particular political candidates or political candidates in general.

To assess the likelihood that on-line services might discriminate against political candidates, this Article first examines the reasons why an on-line services operator might choose to discriminate against political candidates. The Article then examines the methods by which an on-line services operator might carry out such discrimination.

1. Incentives to Discriminate

There are several reasons why an information services company would have an incentive to discriminate against political candidates. The on-line services operator may want to: 1) avoid offending its customers; 2) advance its own political or business interests; and 3) avoid potentially costly legal liability.

It is logical that a commercial operation would want to avoid offending its customers. In fact, the major commercial operators have taken steps in this direction. Of the four major providers, Prodigy, which views itself as a consumer and family oriented service, has acted most aggressively to prevent the posting of material that might be considered offensive.49

49. Other bulletin boards also screen messages for "offensive" content, although not as aggressively as Prodigy. Sandra Sugawara, Computer Networks and the First Amendment, Wash. Post, Oct. 26, 1991, at A12. GEnie does not prescreen messages, but does contract with people who work from their homes to review bulletin boards and remove messages which are "obscene, indecent, offensive, defamatory, abusive, harassing, or inconsistent with decorum and good taste." Id. CompuServe has managers who monitor messages and channel messages involving certain subjects to bulletin boards that discuss only those...
POLITICAL CAMPAIGNING

Prodigy requires its members to agree not to transmit "any
defamatory, inaccurate, abusive, obscene, profane, sexually exp-
licit, threatening, ethnically offensive, or illegal material."50 It
reserves the right to refuse or delete material that, among other
things, "is detrimental to other Members or to the business inter-
est of Prodigy, its Merchants or information providers, or is
otherwise objectionable."51

Prodigy's Membership Agreement also prohibits members
from "advertising to, or solicitation of, other Members to buy or
sell any products or services through the Prodigy service without
Prodigy's prior written consent."52 Application of this policy re-
sulted in the deletion of campaign materials posted by Demo-
cratic primary candidate Larry Agran's issues director.53

Some candidates engender so much controversy that it is
easy to see why an on-line service might want to censor their posi-
tions or even keep them off the service altogether. A similar sit-
uation arose when David Duke attempted to use a 900 telephone
number and South Central Bell refused.54

On-line services may also have a specific economic or polit-
ical interest in keeping certain persons or views off the service.
Prodigy, for example, censored messages from users complaining
about Prodigy's price increase.55 It is not hard to imagine that an

topics. Id. America Online, however, almost never deletes messages and com-
pares itself to the quintessential public forum, the town square. Id.

50. Prodigy Service Member Agreement (copy on file with Villanova Law Re-
view) [hereinafter Agreement].

51. This agreement further provides: "Prodigy reserves the right to review
and edit any material submitted for display or placed on the PRODIGY service,
excluding private electronic mail messages, and may refuse to display or may
remove from the service any material that it, in its sole discretion, believes viol-
ates this Agreement, is detrimental to other Members or to the business inter-
est of Prodigy, its Merchants or information providers, or is otherwise objectionable." Agreement, supra note 50.

52. Agreement, supra note 50.

53. A Prodigy spokesperson compared the position papers and solicitations
to join the campaign to advertising, and objected that they were an imposition
on Prodigy members. COMM. DAILY, June 4, 1992, at 3. He compared placing
campaign materials on-line to a "candidate asking for votes while waiting in line
at a restaurant." Id.

54. See Two More Candidates Disconnected in 900 Disputes, COMM. DAILY, Sept.
5, 1990, at 2. On-line services and 900 number services are similar in that both
allow consumers to use the telephone to obtain information from third parties.
The main difference is that on-line services provide that information in the form
of text or computer data, while 900 numbers provide information by live or pre-
recorded voice.

55. COMM. DAILY, Nov. 26, 1990, at 6. One subscriber, for example, stated
that his message asking for comments concerning the merits of Prodigy versus
CompuServe was rejected. Id. In addition, Prodigy terminated usage rights of
on-line services provider might hold strong views for or against a
candidate and would act on those views.\textsuperscript{56}

On-line services operators may also be concerned about liabil-
ity for defamation, obscenity, indecency, copyright or other law
violations.\textsuperscript{57} Similar concerns have arisen in connection with
political broadcasts\textsuperscript{58} and 900 services.\textsuperscript{59}

If candidates were to use an on-line service for fundraising,
the on-line service might also run into problems with the cam-
paign finance laws. Service bureaus offering 900 numbers for
political fundraising have been required to screen callers to in-
sure that only entities who could legally contribute to federal
campaigns were billed for their call.\textsuperscript{60} In addition, telephone
companies providing billing service to service bureaus with poli-
tical committee clients have had to take precautions to ensure that
no unlawful advancement of corporate funds to political commit-
tees occurs.\textsuperscript{61} Similarly, any on-line service allowing political can-

\textsuperscript{56} For example, Democratic candidate Hugh Palmer charged that South-
western Bell was biased because it allowed two Republican candidates, including
his opponent, Phil Gramm, to offer a 900 number for fundraising purposes, but
denied similar services to him. \textit{Southwestern Bell Billing Policy Challenged in Tex.
Election}, \textit{COMM. DAILY}, Aug. 6, 1990, at 2. Many advocacy groups, including the
Libertarian Party, Ku Klux Klan, National Rifle Association and Greenpeace, operate
their own bulletin boards. See John M. Moran, \textit{Computers Growing as Forum
Networks of Hate}, \textit{USA TODAY}, July 1985, at 10. Such bulletin boards in particular
would be likely to discriminate in favor of the candidates they support.

\textsuperscript{57} Professor Perritt discussed this tradeoff between the obligation to pro-
vide access and tort immunity in his article, which served as a foundation for this
symposium issue. See Perritt, supra note 12, at 130-31. Also, the issue of tort
liability cannot be addressed without taking into account the First Amendment
rights of the broadcasters and the candidates. See id. at 113-20.

\textsuperscript{58} For a discussion of liability concerns and political broadcasts, see infra
notes 109-27 and accompanying text.

\textsuperscript{59} For a discussion of liability concerns and 900 services, see infra notes
120 & 122 and accompanying text. MCI refused to provide 900 fax service for
an entrepreneur providing documents relating to Perot, apparently in part due
to its concerns about the private nature of some of the documents. \textit{COMM.

\textsuperscript{60} See \textit{Providing 900 Telephone Service to Committees}, 2 \textit{Fed. Election Camp.
Fin. Guide} (CCH) p. 5980 (Adv. Op. 1990-1). For example, labor unions, corpora-
tions, and foreign nationals may not contribute to federal campaigns. 2
U.S.C. § 441 (1990). A political election committee must also maintain records
of the name, address, occupation, and employer of any person whose contribu-
tion to the campaign exceeds $20. 2 U.S.C. §§ 432(c)(1) & (3), 434(b)(3)(A)

candidates to use their services for fundraising would have to take care to avoid violating federal campaign laws.

Thus, there are at least three reasons why a bulletin board might discriminate against political candidates—avoiding offense to customers, advancing economic or political interests and avoiding legal liability.

2. Methods of Discrimination

Information services companies might discriminate against political candidates (or their campaign staffs) in a number of different ways, including: 1) deleting messages or files; 2) imposing conditions on the content of messages or files that can be transmitted; 3) refusing to allow a candidate to use a particular service or relegating the candidate to a less desirable alternative; and 4) charging candidates discriminatory rates.62

At the time this Article was prepared, there was only one reported instance of a candidate's posted messages being returned or deleted.63 As noted above, when Agran's staffer tried to post Agran campaign material on Prodigy, it was put onto the board, but then returned without explanation.64 This incident could also be viewed as an example of refusing service,65 or charging a discriminatory rate.66

62. This Article is concerned with the manner in which the information services company would discriminate against particular political candidates. The problem of access discrimination is much broader than this narrow focus, however, and the analysis imports principles of antitrust and common carrier law. For a discussion of common carrier issues, see Perritt, supra note 12, at 92-95.

63. In one reported incident, Prodigy deleted messages from a Buchanan volunteer in Michigan, including one discussing ways to overthrow the federal government. Schwartz, supra note 5, at 114. There has not been public discussion of any refusals to post specific messages. This is probably because it is rare for bulletin board systems to pre-screen messages. Becker, supra note 8, at 211 & n.35.

64. Stephen Smith, issues director for Larry Agran, wrote Prodigy in summer 1991 to determine how campaign could participate on-line, but received no response. COMM. DAILY, June 4, 1992, at 3. A Prodigy spokesperson confirmed that the Agran material had been deleted. Id.

65. Specifically, even though the Agran staff person presumably was a Prodigy member, he was not permitted to post messages about Agran in the way that Prodigy members normally do. Instead, he was offered the option of purchasing advertising. There is a big difference: an advertisement consists of a few lines on the bottom of the screen, participating as a member permits posting of longer messages and interaction with other Prodigy members.

66. The rates paid for advertising on Prodigy are significantly higher than the rates paid by members for posting messages. For a discussion of these rates, see supra note 48. However, nothing suggests that Prodigy sought to charge political candidates a higher rate than other advertisers.
In another instance, it appears that Prodigy unsuccessfully attempted to impose certain conditions on the Bush and Clinton campaigns with regard to the use of their service. According to a published report, the Prodigy representative told the campaigns not to select only questions favorable to their agenda and warned that selection of questions would be monitored to be sure they were representative.67

Finally, apart from the Agran incident, there are no reported cases of candidates being asked to pay higher rates. Indeed, candidates were offered accounts for free on CompuServe.68 Because the rates are not regulated, however, there would be no legal bar to discrimination either between candidates, or between candidates and other types of users or advertisers.

In sum, the 1992 campaign season provides some hint that discrimination against or among political candidates could present a problem in the future. Given the existing incentives and abilities to discriminate, it is reasonable to expect more instances of discrimination as these services mature and more candidates seek to use them.

D. Consequences of Discrimination

Even if on-line services discriminate against or among political candidates, there is little reason to be concerned if candidates and the public have comparable means—either using other on-line services or by using other methods of communication—to inform the electorate. Thus, it is important to examine the practical consequences of discrimination against political candidates.

Political candidates clearly have other options for reaching voters. As noted above, there are thousands of publicly accessible bulletin boards.69 However, all bulletin boards are not the same.

67. The Prodigy representative reportedly stated that if she detected a slant, she would tell the campaigns to stop. COMM. DAILY, Aug. 31, 1992, at 6. Brian Ek stated, however, that the campaigns did not agree to these terms. He added that it would have been difficult for the campaigns to avoid the issues, since all of the comments and questions were posted for anyone to see. Ek Interview, supra note 25.

Imposing a condition that the candidates address “representative” questions does not seem inherently troublesome if the goal is to promote a more informed electorate. However, other conditions that an on-line service might impose, such as declaring certain issues off-limits, could undermine that goal.

68. CompuServe actively solicited participation by candidates by offering free accounts, according to David Kischler. Only Clinton and Brown accepted. COMM. DAILY, June 4, 1992, at 3.

69. For a discussion of these bulletin boards, see supra note 14 and accompanying text.
The majority of bulletin boards are small, nonprofit operations. Many are limited to specific topics. They are not as well known to the general public as the major commercial on-line services, nor are they equipped to handle a large number of calls. Posting a position paper on David Hughes' Perot-for-President board in Colorado, for example, would not be a good substitute for posting a position paper on CompuServe, because the number of households reached would be significantly smaller.

Another possibility is for the candidate to set up his or her own bulletin board. But for the same reasons that the smaller, noncommercial bulletin boards are not a good substitute for the major commercial services, a candidate's own board would not provide a satisfactory alternative. Moreover, given the limited time period for campaigning, it would be very difficult for a candidate to set up and advertise his own bulletin board in time for many people to find it.

When a major commercial on-line service rejects a candidate's message because it is potentially offensive or the candidate is considered too controversial (e.g., David Duke), it is not clear that the candidate will be able to get access on another major commercial service. Presumably, none of the commercial services will want to risk offending their subscribers.

Moreover, because the major on-line services charge a monthly subscription fee for essentially similar services, it seems unlikely that many households subscribe to more than one service. As a practical matter, if a candidate is barred from Prodigy, he is effectively denied access to most of the 800,000 Prodigy subscribers. To maximize coverage, candidates are likely to want to post messages on all of the major commercial computer on-line services.

Of course, numerous means other than bulletin boards exist for candidates to communicate with potential voters including newspapers, magazines, pamphlets, mail, rallies, radio and television. However, we need to ask whether the alternative methods of disseminating information are truly comparable. In many cases, these alternatives do not provide the same capabilities (e.g., interaction) or are not as effective, convenient or affordable. Indeed, as discussed above, the attractiveness of bulletin boards stems in part from dissatisfaction with existing media.

70. See supra note 14.
71. For a discussion of the use of bulletin boards as alternatives to traditional media, see supra notes 17-19 and accompanying text.
Assuming that the potential for discrimination by on-line services is real and that the consequence of such discrimination would be to decrease the amount of information available to the public, this Article next considers possible ways to prohibit or lessen discrimination.

III. APPLICABILITY OF POLITICAL BROADCASTING LAW TO BULLETIN BOARDS

Having adopted the broadcast metaphor for guidance, this Article looks to the legal principles derived in the broadcast area as a guide for the proper role of Congress in assuring equal access to networks. One appropriate model for future Congressional action is the Communications Act of 1934, as amended.72

The Communications Act provides candidates for public office with special access to the broadcast media. First, Section 315(a) entitles all candidates for a particular office to "equal opportunities" if a station permits an opponent to "use" the station.73 Because this section prohibits stations from censoring a candidate's use of the station, the Supreme Court has held broadcasters immune from liability for libel that occurs during a candidate's use of the station.74 Second, section 315(b) prohibits broadcast stations from charging candidates more than for other "comparable use[s]" and requires stations to offer its lowest rates to candidates during the period preceding an election.75 Finally, section 312(a)(7) directs broadcast stations to afford "reasonable access" to federal candidates.76

The existing provisions of the Communications Act do not apply to on-line services. Rather, the preexisting legislation is a starting point for proposing the outlines of new legislation to be applicable to on-line services.77

---

75. 47 U.S.C. § 315(b) (1990). Section 315(b)(1) limits the rates broadcasters can charge candidates during the period 45 days before primaries and 60 days before general elections, to "the lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. § 315(b)(1) (1990).
77. Were such legislation to be adopted, it would need to provide for enforcement. The FCC would be a logical choice, given its existing enforcement responsibilities for political broadcasting and its familiarity with on-line services, because of its regulation of common carriers.
POLITICAL CAMPAIGNING

Before discussing specific political broadcasting provisions and how they might translate to on-line services, it is important to identify which entities will be subject to regulation. Applying such regulation to the estimated 60,000 bulletin boards in operation today is not necessary to ensure that political candidates have broad exposure to the public and could be unduly burdensome to enforce. Thus, as discussed above, the application of the model statute should be limited to those service companies that function most like broadcasters: the major commercial on-line services, such as CompuServe and Prodigy.

A. Equal Opportunities

1. Section 315(a)

Section 315(a) does not impose any obligation on a broadcast licensee to permit a candidate to use the station. However, it provides that:

[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. Provided, that such licensee shall

78. Because political candidates are interested in reaching large numbers of voters, they may not bother to post messages on smaller bulletin board systems. Many of the smaller bulletin boards are devoted to specific topics (such as computer programming or games) such that political communications of the type envisioned here would be inappropriate. Even where the board is devoted to political discussion, for example, the Libertarian Bulletin Board, applying equal opportunities may raise constitutional considerations. Cf. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (suggesting First Amendment right not to spread message with which one disagrees).

79. There is considerable potential for line drawing problems, however, I think that a workable definition could be devised and justified. The justification for imposing requirements on the large, commercial on-line services rests in part on the fact that these services generally hold themselves out to the public. The “holding out” concept is generally associated with common carriage. These services seem to meet the common law definition of common carriers, even though they are not communications common carriers for purposes of FCC regulation. See Perritt, supra note 12, at 77-91; Jensen, supra note 8, at 251. Of course, the on-line services do not provide the basic transmission, but they do provide the hardware and software that facilitate communications between and among their customers. The common law definition of common carrier consists of two parts: holding out to the public and carriage of intelligence not of own choosing. By making their service available to the public generally, the holding out prong is clearly met. The second prong may be more problematic, especially in the case of Prodigy. While Prodigy does not determine the content transmitted, it tends to exercise greater editorial control than the other major bulletin board systems operators.
have no power of censorship over the material broadcast under the provision of this section.  

Section 315(a) originated in section 18 of the Radio Act of 1927. The legislative history of section 18 demonstrates that Congress intended to forge a compromise between private control and public use of the broadcast spectrum. Congress recognized that broadcasting served an important role in disseminating political thought. Congress feared that private control of broadcasting would permit owners to censor views that opposed their interests and would fail to fully inform the electorate.

Congress considered requiring broadcasters to serve as common carriers and to allow members of the public access to the airwaves on a nondiscriminatory basis. However, Congress ultimately rejected the common carrier approach as too burdensome. Equal opportunities resulted as a compromise that

81. See CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 104-05 (1973) (noting Secretary of Commerce Herbert Hoover's 1924 House Committee testimony arguing against both public and private broadcast censorship). The Supreme Court recognized "the 'tightrope' aspects of government regulation of the broadcast media" and the Congressional conclusion that, of the choice between private or official media censorship, "government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." Id. at 105.
83. H.R. Rep. No. 404, supra note 82, at 17-18; Hoover Statement, supra note 82, at 8 ("We can not allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.").
84. See CBS, 412 U.S. at 105-09. The version of the bill reported to the Senate by the Committee on Interstate Commerce provided that if any licensee shall permit a broadcasting station to be used . . . by a candidate or candidates for any public office, or for the discussion of any questions affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce . . . ." Id. at 106 (quoting 67 Cong. Rec. 12503 (1926) (emphasis added)).
85. The provision was rejected because Congress believed the definition of public use was too ambiguous and the broadcaster would be overburdened with the responsibility of a common carrier. See 67 Cong. Rec. 12502 (1926); CBS, 412 U.S. at 106-08. Congress rejected similar amendments when the Radio Act
required political candidates be afforded access only when another candidate was permitted to use the station.

Congress amended section 315 in 1959 to exempt four categories of news programming from equal opportunities. Congress acted to overrule an FCC ruling that an appearance by a candidate on a news program controlled by the broadcaster triggered equal opportunities. Congress was concerned that requiring equal opportunities for every appearance by a candidate on news programs "could lead to a virtual blackout in the presentation of candidates on the news-type programs." 88

2. Application to on-line services

Legislation requiring on-line services to afford equal opportunities to candidates for public office should establish the general principle that if an on-line service chooses to provide access to one political candidate, it would have to provide equal access on equal terms to all other candidates for the same office. Several problems could arise in applying that general principle. The case law interpreting equal opportunities in the context of broadcasting would not necessarily apply to on-line services.

One problem in applying the concept of equal opportunities to on-line services is to define what constitute a "use" of an on-line service by a political candidate. The FCC, the agency charged with enforcing section 315, traditionally defined a use as "any broadcast or cablecast of a candidate's voice or picture . . . if the candidate's participation in the program or announcement is such that he will be identified by members of the audience." 89

was re-enacted by the Communications Act of 1934. CBS, 412 U.S. at 107-10 & n.4.

86. Pub. L. No. 86-274, § 9, 73 Stat. 557, 557 (1959) (codified at 47 U.S.C. § 315(a)(1)-(4) (1990)). The provisions exempt "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 of the documentary), or (4) on-the-spot coverage of bona fide news events." Id.


89. The Law of Political Broadcasting and Cablecasting: A Political Primer, 100 F.C.C.2d 1476, 1489 (1984) [hereinafter Primer]. A "use" by a candidate is not limited to situations in which the candidate discusses political issues. In Paulsen v. FCC, the court upheld the FCC's determination that the appearance on an entertainment program of comedian Pat Paulsen, a candidate for the Republican Presidential nomination, would trigger equal opportunities. Paulsen v. FCC, 491 F.2d 887 (9th Cir. 1974). The Ninth Circuit recognized that
Recently, the FCC narrowed the definition of use to consist only of appearances that are controlled, sponsored or approved of by the candidate or his committee. In either case, “use” is limited to personal appearances of the candidate or his likeness. Appearances of a candidate’s supporters or staff do not constitute uses.

With the exception of live on-line conferences, the examples of uses of on-line services during the 1992 campaign did not involve the candidates personally. Rather, in most cases, candidates relied on staff members or volunteers to post messages and respond to messages. In some cases, such as the Perot campaign, messages were posted by supporters who had no official connection with the campaign. Therefore, legislation mandating equal opportunities for candidates using on-line services would need to define whose “use” will trigger the equal opportunities requirement. Probably, it would be best to limit “uses” to the candidate

---

[s]ection 315 is grounded in the recognition that radio and television play important roles in the election process. A candidate who becomes well-known to the public as a personable and popular individual through “non-political” appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media.

Id. at 891.

90. Codification of the Commission’s Political Programming Policies, 7 F.C.C.R. 678, 685 (1991), reconsidered, 7 F.C.C.R. 4611, 4613-14 (1992), appeal pending sub nom. Westen v. FCC, 9th Cir. No. 93-70041 (to be codified at 47 C.F.R. § 73.1940(b)).

91. Primer, 100 F.C.C.2d at 1489. Sections 315 and 312(a)(7) only apply to political candidates themselves. For many years, however, the FCC has applied the so-called “Zapple Doctrine,” to situations in which supporters of a candidate purchase or receive time to support their candidate or criticize his opponent. See Nicholas Zapple, 23 F.C.C.2d 707 (1970); Primer, 100 F.C.C.2d at 1534-35. The Zapple Doctrine constitutes a special application of the Fairness Doctrine, which required broadcasters to cover controversial issues of public importance and to present both sides of such issues. It has “approximately the same result as the equal opportunities requirement for the appearance by candidates themselves.” Primer, 100 F.C.C.2d at 1535.

The continuing viability of the Zapple Doctrine has been called into question by the FCC’s repeal of the fairness doctrine in 1987. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043 (1987), reconsideration denied, 3 F.C.C.2d 2035 (1988), aff’d on other grounds, 867 F.2d 654 (D.C. Cir. 1989). In a letter to Congressman Dingell, former FCC Chairman Dennis Patrick stated that since the Commission had repealed the fairness doctrine in “the context of a particular adjudication,” the Commission had not made any specific decision regarding enforcement of the Zapple Doctrine. Letter from Dennis R. Patrick, Chairman, FCC, to Congressman John D. Dingell, Chairman, Committee on Energy and Commerce, Sept. 22, 1987. Furthermore, in recently denying a Zapple Doctrine claim, citing a failure to make out a prima facie complaint, the Commission nowhere indicated an intent not to enforce the Zapple doctrine. Letter from Milton O. Gross, Chief of FCC’s Political Programming Branch, to Joseph A. Godles, DA 92-1512, Nov. 2, 1992.
1993]  

**Political Campaigning**

541

personally and his or her authorized staff members.  

Another difficulty with applying equal opportunities to online services is defining what equal opportunities would entail in that context. The clearest example of a violation of equal opportunities would be if an on-line service permitted one candidate to post messages, while deleting messages of his opponents.

The FCC has broadly interpreted "equal opportunities" to forbid discrimination of any kind between competing candidates. In assessing whether discrimination has taken place, the FCC takes into account factors such as the amount of airtime, the time of day (which affects the size of the audience), and the conditions under which the time is made available. Except in the case of live on-line conferences, problems concerning equality of time or audience potential would rarely arise in the case of on-line services. Unlike broadcasting where the program can be viewed or heard by the audience only at the time it is being aired, the very nature of computer bulletin boards is that they store information for access at the customer's convenience.

Thus, in some ways the concept of equal opportunities would be even easier to apply to on-line services than to broadcast stations. The principle would be fairly straightforward: If an on-line service chose to provide access to one political candidate, it would have to afford equal access to other candidates for the same office on equal terms and conditions. There would be no need to get into the details of whether the candidates had access to compara-

---

92. Limiting "uses" to the candidate alone would have little effect. Given the limited use by actual candidates to date and their busy schedules, it seems unlikely that candidates would spend time sitting at the computer reading and posting messages personally. This scenario seems more plausible, however, if we think of local school board candidates rather than presidential candidates, although my proposal would apply only to major commercial on-line services, likely to be national in scope.

93. See, e.g., Primer, 100 F.C.C.2d at 1503-04 (stating that "the commissions rules forbid any kind of discrimination by a station between competing candidates").

94. Primer, 100 F.C.C.2d at 1503-04. For example, because of the difference in audience potential, the equal opportunity requirement would not be satisfied if a television station offered one candidate a half-hour in prime time while offering her opponent a half-hour at 6 a.m. Id. at 1503. Similarly, a station could not offer free time to one candidate and require payment from her opponent. Id. at 1504.

95. Real-time conferences, such as the one conducted by Jerry Brown, are similar to call-in shows. In both cases, the amount of time and the time-of-day will affect the size of the audience.
ble audiences. Consequently, it would be fairly easy to determine whether a violation occurred.

3. Constitutionality of Applying Equal Access Requirements to Bulletin Boards

Legislation imposing equal opportunity requirements on online services would likely be challenged as an unconstitutional infringement of the online services operator's right to free speech. And while the outcome of such a challenge is unclear, online service operators have a strong case.

Section 315's equal opportunities requirement was found not to violate the First Amendment rights of broadcasters in Branch v. FCC. In a decision written by Judge Bork, the United States Circuit Court of Appeals for the District of Columbia rejected reliance on Miami Herald Publishing Co. v. Tornillo, and found the first amendment challenge "squarely foreclosed" by Red Lion Broadcasting v. FCC. In Red Lion, the Supreme Court upheld the constitutionality of the FCC personal attack rules. However, in a passage quoted in Branch, the Court observed:

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack rules and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927 [citations omitted], has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.

The Branch court went on to reject the suggestion that Red Lion was no longer good law.

96. 824 F.2d 37, 49-50 (D.C. Cir. 1987).
97. 418 U.S. 241 (1974). In Tornillo, the Supreme Court struck down a state statute requiring newspapers to afford political candidates a right of reply. Id.
100. 824 F.2d 49-50. The court noted the Supreme Court's recent reaffir-
In both the Red Lion and Branch cases, the constitutional analysis turned on the fact that broadcasting was involved. Unlike other media, broadcasters are licensed by the government, and there are not enough licenses available for all who wish to broadcast. Thus, while licensees have first amendment rights, so do members of the public, and the public's right to receive political information is paramount. 101

On-line services operators will argue that they are fundamentally different from broadcasters: they are not required to have licenses, nor do they have exclusive use of a scarce natural resource, the airwaves. Virtually anyone can start an on-line service. Thus, they will argue that the proper analogy is not to the broadcast station in Red Lion, but to the newspaper in Tornillo. 102

In Tornillo, the Court struck down a Florida statute requiring newspapers to afford a right of reply. 103 The Court found that the right of reply operated as a penalty because "the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper would have preferred"

---

101. Red Lion, 395 U.S. at 389-90. Section 315's requirement of equal opportunities is not limited to broadcast stations. In 1972, Congress broadened the scope of § 315 by including cable operators within the definition of "broadcast station." Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, tit. IV, § 402(c), 88 Stat. 1265, 1291 (1974). This law codified earlier FCC action. See First Report and Order, Docket No. 18397, 20 F.C.C.2d 201 (1969) (codified at 47 C.F.R. § 76.205). Neither the Congress, courts, nor the FCC appear to have analyzed the constitutionality of the equal opportunity provisions as applied to cable television. Recently, however, a member of Congress filed a complaint with the FCC alleging that a cable system in Kansas City violated equal opportunities by running numerous spots for his opponent and refusing to afford him equal time. He alleged that the cable operator was getting back at him for his vote on a bill affecting the cable industry. Multimedia Mulls Court Appeal of Political Editorial Rule, COMM. DAILY, Oct. 21, 1992, at 1-2. While that particular complaint has been settled, the cable company said it still planned to challenge the constitutionality of § 315's application to cable. COMM. DAILY, Oct. 29, 1992, at 5.


103. Id. at 241.
to print."\textsuperscript{104} The Court further expressed concern that the right of reply intruded on the editorial function: "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising."\textsuperscript{105}

Neither concern is very compelling in regard to on-line services. Space and cost concerns do not apply with as much force to large commercial on-line services. Moreover, unlike a newspaper, an on-line service is, in many respects, a "passive receptacle for news, comment, and advertising." Certainly, on-line service operators do not, nor could they feasibly exercise the same degree of editorial control over all of the messages and services that newspapers do.\textsuperscript{106}

Assuming that the Court would reject both the \textit{Red Lion} and \textit{Tornillo} analogies, the Court would be likely to apply the traditional two-track analysis.\textsuperscript{107} The Court would first determine whether the restriction was content-neutral or content-based.\textsuperscript{108} Assuming the most difficult case, \textit{i.e.}, that the requirement was content-based, the court would next examine whether the restriction was narrowly tailored to serve a compelling government interest.

The government could argue that the promotion of an informed electorate necessary to a democracy is certainly a compelling interest and that the means of ensuring that the views of opposing candidates are presented to the public are narrowly tailored because no point of view—whether that of a candidate or

\footnotesize
104. \textit{Id.} at 256.
105. \textit{Id.} at 258.
106. To the extent that an on-line service edited the equivalent of a newspaper or contracted with a newspaper to publish its material electronically, and, for example, included a quotation or image of a candidate, the appearance would be exempt from equal opportunities under the news exemption.
108. "Content neutral restrictions limit communication without regard to the message conveyed." Stone, \textit{supra} note 107, at 189. "Content-based restrictions, on the other hand, limit communication because of the message conveyed." \textit{Id.} at 190. The restrictions imposed by equal opportunities appear to fall somewhere in between. The speech right at issue is the on-line service operators ability to refuse access to a political candidate prior to an election. The restriction is content based in that the on-line service is prohibited from discriminating against a category of speech. However, the limitation does not turn on the specific content of the speech.
the on-line services—would be suppressed. It is difficult to predict how a Court would rule in these circumstances.

B. Censorship/Liability Issues

If Congress were to propose legislation requiring on-line services to afford equal opportunities to political candidates, the legislation should also clarify the extent to which the on-line services operator can be held liable for violations of law that might occur during the candidate’s use.

1. Libel or Defamation

Section 315(a) of the Communications Act prohibits licensees from censoring material broadcast by political candidates.\(^{109}\) In Farmers Educational and Cooperative Union v. WDAY, Inc., the Supreme Court has interpreted this provision to relieve a station of liability for defamation that may occur in the course of a candidate’s use of the station.\(^{110}\) The Court found it “obvious that permitting broadcasters to censor allegedly libelous remarks would undermine the basic purpose for which § 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates.”\(^{111}\) And because censorship was not permitted, it would be unfair to hold broadcasters liable for defamation.\(^{112}\)

A similar provision may well make sense for on-line services. The exact contours of an on-line service’s liability for law violations have yet to be established.\(^{113}\) Legislation providing on-line

---

111. Id. at 529. The Court further explained:
[1] If censorship were permissible, a station so inclined could intentionally inhibit a candidate’s legitimate presentation under the guise of lawful censoring of libelous matter. Because of time limits inherent in a political campaign, erroneous decisions by stations could not be corrected promptly enough to permit the candidate to bring improperly excluded matters before the public. It follows from all this that allowing censorship . . . would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent political discussion.

Id. at 530.
112. Id. at 531.
113. Several commentators have discussed what the appropriate test should be for liability where posted material on a bulletin board is defamatory, obscene, indecent, infringes a copyright or violates another law. See Becker, supra note 8, at 227-30 (arguing that bulletin board operators should only be liable for continued dissemination of defamatory content after operator has knowledge of defamatory character); Jensen, Comment, supra note 8; Perritt, supra note 12, at
services with immunity for libelous or defamatory statements made by political candidates or their staffs would provide certainty.\textsuperscript{114} By allaying the concerns of on-line service operators, the use of on-line services by political candidates would be fostered.\textsuperscript{115}

2. \textit{Indecency}

Another issue is whether on-line services should be held responsible for indecent statements made by political candidates using their services. Unlike the question of broadcaster liability for libel, the question of broadcaster liability for indecent programming presented by a political candidate is unsettled.

In general, broadcast stations are prohibited from airing indecent material at times when children are likely to be in the audience.\textsuperscript{116} But it is unclear whether a broadcaster is permitted to censor or channel indecent material contained in a candidate’s “use” of a broadcast station. This issue first arose in 1983, when Larry Flynt, publisher of \textit{Hustler} magazine and an announced candidate for the Republican presidential nomination, threatened to use clips from X-rated films in his campaign commercials.\textsuperscript{117} Flynt never carried through on his threat, so the Commission was able to avoid resolving the apparently conflicting duties of broad-

\textsuperscript{107} (arguing that law should treat computer network as republisher, thus imposing liability only if network knew or should have known of defamatory nature).

\textit{Cubby, Inc. v. CompuServe} is the only case that has addressed the issue of bulletin board liability for a defamatory statement posted on it. See Cubby, Inc. v. CompuServe, 776 F. Supp. 135 (S.D.N.Y. 1991). The Cubby court observed that “[w]hile CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication’s contents.” \textit{Id.} at 140. Thus, the court compared CompuServe to a “public library, book store, or newsstand.” \textit{Id.} Recognizing that imposing the duty of monitoring on such distributors would be an impermissible burden on the First Amendment, the Court found that the appropriate standard of liability was whether CompuServe knew or had reason to know of the allegedly defamatory statements. \textit{Id.} at 140-41.

\textsuperscript{114} At the same time, victims would not be left without a remedy because the political candidate would still be liable.

\textsuperscript{115} For example, even under the Cubby standard, a bulletin board would be liable if it knew or had reason to know that the candidate’s statement was defamatory. See Cubby, 776 F. Supp. at 140-41. An opponent of the candidate might complain to the bulletin board claiming that the statement was defamatory. The bulletin board would be likely to err on the side of safety and delete the statement.


\textsuperscript{117} \textit{Flynt Causer X-Rated Worry}, BROADCASTING, Nov. 21, 1983, at 59. Flynt never carried through with his threat.
casters not to censor candidates and not to air indecent program-
ming when children are likely to be in the audience.

This issue surfaced again during the 1992 campaign. Certain
federal candidates opposed to abortion sought to buy time for
commercial spots or programs depicting aborted fetuses. Several
broadcast stations sought a declaratory ruling from the FCC that
they could, consistent with the "no censorship" provision of sec-
tion 315(a), channel these advertisements to hours when children
were unlikely to be in the audience on the ground that this mate-
rial was indecent.118 The full Commission has not yet ruled on
this request.119

It is unclear whether these broadcast precedents would apply
to on-line services. To date, there are no reported instances of
on-line services operators being fined or otherwise prosecuted for
posting indecent material. However, it appears that on-line serv-
ces could be prosecuted for indecent material under section
223(b) of the Communications Act.120

119. The Commission staff initially denied the request for a declaratory rul-
ing and decided that the material was not indecent. See id. On review, however,
the full Commission decided to seek public comment on whether a broadcast
licensee has a right to channel political advertisements that it reasonably be-
lieves are indecent or otherwise harmful to children. Petition for Declaratory
Rulemaking concerning Section 312(a)(7) of the Communications Act, 1992 F.C.C.
LEXIS 6155 (Oct. 30, 1992). On the same day, at the request of a television
station, a federal district court in Atlanta issued a declaratory judgment allowing
the station to limit broadcast of the program to the hours between midnight and
relied on a 1984 FCC staff memorandum responding to the Flynt incident that
stated that a "broadcast would be justified in refusing access to a candidate
who intended to utter obscene or indecent language." Id. at 762.

120. This section provides that:

Whoever knowingly—
(A) within the United States, by means of a telephone, makes (di-
rectly or by recording device) any indecent communication for
commercial purposes which is available to any person under 18
years of age or to any other person without that person's consent,
regardless of whether the maker of such communication placed
the call. . . . shall be fined not more than $50,000 or imprisoned not
more than six months, or both.


This section, known as the "Helms Amendment" after its sponsor Jesse
Helms, was enacted to prevent minors from obtaining access to "dial-a-porn"
telephone lines. In 1989, the Supreme Court unanimously struck down a com-
plete ban on indecent phone messages in Sable Communications v. FCC, 492
U.S. 115 (1989). The Helms Amendment was passed shortly thereafter as part of
the Department of Labor Appropriations Act of 1989. Pub. L. No. 101-166,
§ 521(i), 103 Stat. 1159, 1192 (1989). The Helms Amendment was subse-
quently upheld in Dial Information Services Corp. v. Thornburgh, 938 F.2d
As with broadcasters, however, imposing liability on on-line services for indecent speech of a political candidate would conflict with the no censorship provision. Legislation could clarify how this conflict should be resolved.

3. Federal Election Campaign Law

It would also be useful to clarify how the federal election campaign laws apply to the use of on-line services by political candidates. For example, if an on-line service permits a federal candidate to use its services at no charge, that use could be considered an unlawful contribution.

The question of compliance with campaign finance law has arisen before in connection with cable television and broadcasting. In a 1982 decision, the Federal Election Commission (FEC) did not include as a contribution free air time allotted for a cable program prepared by the Democratic National Committee. The FEC reasoned that the particular program was similar to a

An on-line service that posts an indecent message appears to fall within the plain meaning of the Helms Amendment because it communicates "by means of telephone," is "for commercial purposes" and is available to minors. 47 U.S.C. § 223(b)(2) (1990).

By regulation, the FCC identified several ways one distributing material can demonstrate that the material is only available to consenting adults: 1) payment by credit card before the message is played; 2) an access code, given to customers only after the service ascertains the customer is an adult; and 3) scrambling of the messages except to those adult customers who purchase a descrambler. 47 C.F.R. § 64.201 (1992). An on-line service may be able to prevent a violation of the law by utilizing one of the identified procedures.

121. The problem can not be resolved by channeling the material to a particular time. The very nature of bulletin boards makes the material available at any time. While the material might be channeled to particular areas identified as containing indecent material (and perhaps with limited access), this would limit the candidates access to subscribers.

122. Federal law prohibits corporations from making a "contribution or expenditure" in connection with a presidential or congressional campaign. 2 U.S.C. § 441b(a) (1990). The terms "contribution or expenditure" include "anything of value." Id. § 441b(b)(2). Federal Election Commission (FEC) regulations define "anything of value" as including all in-kind contributions and the provision of goods and services without charge or at less than the usual and normal charge. 11 C.F.R. § 100.7(a)(1)(iii).

Issues could also arise if an on-line service billed and collected for a campaign engaged in fundraising. Because corporations are forbidden from contributing in any way to federal campaigns, the Commission requires telephone companies offering 900 number service as a fundraising device to monitor their billing to insure that the campaign is charged a normal and usual rate for all costs incurred by the 900 number system. See Providing 900 Telephone Service to Committees, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5980 (Adv. Op. 1990-1); see also Federal Election Commission, Adv. Op. 1990-14.

news broadcast, and Congress had specifically exempted news commentary and coverage by any broadcasting station, newspaper, magazine, or other periodical publication from the definition of contribution.124

More recently, the FEC was asked to rule that a broadcast station’s provision of free or substantially reduced time to candidates would not violate the Federal Election Campaign Act’s (FECA’s) prohibition against corporate contributions to candidates for federal office.125 Although three Commissioners indicated their view that no violation would occur,126 four of the six Commissioners must vote in order for an advisory opinion to be issued.127 Thus, the question remains unresolved.

During the 1992 election, some on-line services let candidates use their services at no charge. In general, letting candidates use on-line services at reduced or no charge would increase the availability of information about candidates to the public. However, on-line services may be reluctant to continue this practice unless legislation clarifies that providing free services to political candidates, on an equal basis, will not violate campaign finance laws.

C. Nondiscriminatory/Favorable Rates for Political Candidates

While free or reduced rates for candidates may be desirable, at the very least, candidates should not have to pay more for access to on-line services than other users. The Communications

125. Section 315(b) of the Communications Act requires broadcast stations to offer political candidates their lowest advertising rates during the period immediately preceding an election. 47 U.S.C. § 315(b) (1990). One broadcaster attempted to avoid the complications of complying with the FCC rules regarding lowest unit charges by simply giving each candidate some free time, and requested an advisory opinion that its plan was legal. Letter from Rainer K. Kraus, counsel to EZ Communications, Inc., to Bradley Litchfield, Assoc. General Counsel, FEC (June 26, 1992) (on file with the Villanova Law Review).
126. See Statement of Commissioner Aikens and Commissioner Elliott to Advisory Opinion Request 1992-26, Sept. 28, 1992 [hereinafter Aikens Statement]; Statement of Commissioner Potter to Advisory Opinion Request 1992-26, Oct. 22, 1992. Commissioners Aikens and Elliott base their decision on the FCC’s conclusion that broadcast stations must provide reasonable access to candidates through the “gift or sale” of time. Aikens Statement, supra, at 2 (citing Codification of the Commission’s Political Programming Policies, 7 F.C.C.R. at 681). Because the FEC’s prohibition against corporate contributions and the lowest unit charge requirement were enacted together in the Federal Election Campaign Act of 1971, Commissioner Aikens and Commissioner Elliott concluded that these two provisions should be interpreted to reach a “harmonious result.” Id. at 3.
Act currently prohibits broadcasters from charging candidates higher rates, and even requires lower rates in some circumstances.

1. Section 315(b) of the Communications Act

As originally enacted in 1952, section 315(b) stated that stations’ charges to political candidates “shall not exceed charges made for comparable use of such station for other purposes.” The purpose of this provision was to protect candidates from discriminatory rates.128

In 1972, section 315(b)(1) was added to require that charges to political candidates for use of a station during the period prior to the election not exceed “the lowest unit charge of the station for the same class and amount of time for the same period.” This provision, which was included in the Federal Election Campaign Act of 1971,129 was intended to “place the candidate on par with a broadcast station’s most favored commercial advertiser” during the pre-election period, while comparable rates would continue to be available during other periods.130 Implementation of the lowest unit charge requirements has engendered a great deal of controversy and confusion, particularly in recent years.131

2. Application to on-line services

The lowest unit charge requirement should not be included in legislation affecting on-line services. First, the practical difficulties involved in applying the lowest unit charge provisions in broadcasting would also arise with on-line services. Second, at this time it is reasonable to assume that payments for use of on-line services constitute only a small fraction of the cost of waging a campaign. Thus, Congress’ concern about the spiralling costs of campaigning would not be implicated.

In contrast, it is appropriate to include in legislation a provi-

---

128. Hernstadt v. FCC, 677 F.2d 893 (D.C. Cir. 1980). The impetus for this amendment was provided by tales of “political” rates for the use of print media at twice the normal rate, and the existence of similar problems with the broadcast media. Id. at n.5.


130. Id. at 27; see also Hernstadt, 677 F.2d at 897-900.

POLITICAL CAMPAIGNING

sion similar to section 315(b)(2)'s requirement of comparable rates. This provision would require that an on-line service's rates, whether they are advertising rates, subscription rates, or rates for the operation of a forum, could not be higher than those charged to other advertisers, subscribers or forum operators.

D. Reasonable Access for Federal Candidates

This section considers the desirability of imposing a reason-
able access requirement similar to that in section 312(a)(7) of the Communications Act to on-line services.

1. Section 312(a)(7)

Like the lowest unit charge provision, section 312(a)(7)'s re-
requirement of reasonable access for federal candidates was added to the Communications Act by the Federal Election Campaign Act of 1971. Section 312(a)(7) permits the FCC to revoke a broadcast license "for willful or repeated failure to allow reasonable access or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Fed-
eral elective office on behalf of his candidacy."132 The primary purpose of this provision was to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely in-
form the voters."133

The constitutionality of section 312(a)(7) was upheld in CBS,
Inc. v. FCC.134 The Supreme Court rejected a claim that the rea-

132. 47 U.S.C. § 312(a)(7) (1990). Unlike § 315(a), which applies to all candidates for political office, section 312(a)(7) applies only to federal candidates.

133. S. REP. No. 92-96, 92nd Cong., 1st Sess. 20 (1971). In 1978, the FCC concluded that it was inappropriate to adopt formal rules to implement this section, but it did promulgate guidelines for assessing the reasonableness of licensees' judgments about whether to afford access. Commission Policy Enforcing § 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079 (1978). The Commission recently clarified its interpretation of reasonable access, but did not change its fundamental approach. Codification of the Commission's Political Programming Policies, 7 F.C.C.R. at 681-82. An issue involving reasonable access that is currently before the FCC is whether a station is required to sell time to a candidate in increments other than those that the station ordinarily sells to commercial advertisers or programmers. In re Request of Declaratory Ruling of National Association of Broadcasters, STAFF RULING AND REQUEST FOR PUBLIC COMMENT, DA 92-1478 (released Oct. 23, 1992).

134. 453 U.S. 367 (1981). The three major broadcast networks refused to sell 30 minutes to the Carter-Mondale Presidential Committee for the purpose of formally announcing President Carter's candidacy. Id. at 372-73. The FCC ruled that the networks refusal to sell the time violated § 312(a)(7). Id. at 374.
sonable access provision violated the First Amendment rights of broadcasters. While recognizing that broadcasters were entitled to exercise the widest journalistic freedom consistent with their pubic duties, the First Amendment interests of candidates and voters were also implicated. The Court noted that it was particularly important that candidates have the opportunity to make their views known so that the electorate may intelligently evaluate the candidates. It concluded that “section 312(a)(7) makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”

2. Application to on-line services

“Reasonable access” questions could arise in connection with on-line services. For example, permitting a candidate to conduct a real time conference displaces other uses. Thus, on-line services might have an incentive to refuse outright a candidate’s request for an on-line conference, or might agree to make time available only at an undesirable time.

Another “reasonable access” problem could arise where a candidate seeks access to a particular forum. For example, Prodigy runs a “Close Up” forum in which Prodigy chooses the topics to be discussed. A candidate might want to participate in a particular forum, while the on-line services operator might want to limit discussion to other topics or channel the candidate’s participation to a different forum. Should the candidate have the right to obtain access to a particular forum?

In general, it is expected that denials of reasonable access would occur with less frequency on on-line services than on the broadcast media. Disputes over “reasonable access” arise in broadcasting because the broadcaster wants to use the finite airtime for a more profitable use. Except in the case of live conferences, the major commercial on-line services do not face the

135. Id. at 396.
136. Id. (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).
137. Id.
138. See, e.g., Carter-Mondale Presidential Comm. v. ABC, CBS and NBC Television Networks, 74 F.C.C.2d 631, 637 (1980) (noting that networks complained that providing Carter with half hour rather than five minute time slot would seriously disrupt program schedules because other candidates would request comparable access); Ed Noble for U.S. Senate Comm. v. KHRH, 79 F.C.C.2d 903, 905-06 (1980) (noting that broadcast station argued that selling five minute slots during periods normally divided into thirty minute segments
same constraints. If an on-line service found that political candidates and their respondents were keeping their lines in constant use, they could make more money by adding more lines. By contrast, the broadcaster cannot add more channels or hours to the broadcast day.

Because the possibility of unreasonable denials of access exists, and because there are likely to be few enforcement problems, on balance, it would be appropriate to include a reasonable access provision in legislation governing use of on-line services by federal political candidates.

IV. Conclusion

The 1992 campaign demonstrated the potential of on-line services to contribute to an informed electorate. Certain incidents from that campaign, as well as the experience with candidates' use of 900 numbers, however, suggests that on-line services operators may have an incentive to discriminate against or among political candidates, thus limiting the amount of information available to the public.

To prevent such discrimination, consideration should be given to passing a new law that would prohibit large, commercial on-line services from discriminating among political candidates. The law would prohibit on-line services from censoring the candidates' use and would provide immunity from liability for defamation or other law violations of the candidate. The law would also prohibit on-line services from charging candidates higher rates than other types of users, but would not require that candidates be offered the absolute lowest rate. Finally, on-line services should also be required to provide "reasonable access" to political candidates for federal office.

would disrupt its regular schedule with program cuts, commercial cuts and requests for access from other candidates).

139. Further thought needs to be given, however, as to the appropriate remedies in the event of repeated refusals to afford reasonable access. The remedy provided in § 312(a)(7)—revocation of license—would not be available because, at present, on-line services are not licensed.