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I conclude, then, that these passages also present a genuine issue whether the absolute privilege for opinion has been forfeited by culpable omissions or errors in the supporting facts which the article offered its readers.

WALD, Circuit Judge, with whom Circuit Judges EDWARDS and SCALIA join, dissenting in part:

I basically agree with the plurality's outline of the appropriate strategy for identifying absolutely privileged opinion and its judgment that most of the statements made by Evans and Novak about the plaintiff are non-actionable statements of opinion. However, in my mind the columnists' statement that "Ollman has no status within the profession, but is a pure and simple activist" is an assertion of fact for which its authors can be made to answer, consistent with the requirements of the first amendment, in a suit for libel.

In many areas of the law, the factual nature of statements about reputation is recognized and indeed taken for granted. Lay witnesses are generally allowed to testify as to someone's reputation in the community for veracity or violence, for example, although they cannot give their personal opinion as to those matters. *See* McCormick on Evidence § 44 (Cleary ed. 1984). Expert witnesses are often asked in the course of their testimony whether other authors, scholars or practitioners are generally regarded as authorities in the field, *see* 7 Wigmore on Evidence § 1984 (Chadbourne rev. 1974), and their own qualifications may be established or attacked on the basis of professional reputation, *see* 5 *id.* § 1621.

Similarly, as the plurality concedes, the law of libel has long recognized the basically factual nature of attacks on reputation. I do not dispute the plurality's assertion that the first amendment often demands modifications of the common law of libel so as to limit the chilling effect of potential civil liability on an "uninhibited, robust, and wide-open debate on public issues." *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). In particular, the first amendment demands that we evaluate the allegedly libelous statement in the context in which it appeared to determine whether it can claim the constitutional privilege for statements of opinion. Yet I find that a fair application of both the plurality's test and the approach suggested by Judge Bork in his concurrence indicates that the statement before us is more a statement of fact than of opinion.

The plurality would ask four questions about the particular statement at issue: (1) do the words have a "precise core of meaning"; (2) is the statement verifiable; (3) how do the immediate context—in this case the article—and (4) the broader context affect the likelihood that the statement will be read as an assertion of fact? Although Judge Bork calls for a more flexible, ad hoc balancing approach to the fact-opinion distinction, his analysis of this case strikes me as conceptually indistinguishable from the plurality's approach. I fully agree that the distinction between fact and opinion is rarely self-evident or exact and that we should not attempt to impose any mechanical set of categories on the complexities of libel litigation. Although the task may not always be an easy one, however, we are surely obliged to articulate some set of principles to guide the district court in determining which types of statements can give rise to a libel action.

Indeed, despite the plea for a case-by-case consideration of the "totality of cir-

of any body of scientific truths) leads automatically to its acceptance. I hasten to add that this is not reflected in my grading practices; non-Marxist students (i.e., students who do not yet understand Marxism) do at least as well as the rest of the class given by bourgeois professors. [*sic*] Furthermore, I do not consider that I introduce more "politics" into my course than do other social science professors, or that I am any more interested than they are in convincing students of the correctness of my interpretations.

Ollman, *On Teaching Marxism and Building the Movement*, New Political Science (Winter 1983) Supplemental Appendix at 5.

cumstances," Judge Bork apparently recognizes precisely this obligation. After purporting to engage in an open-textured balancing of first amendment values, Judge Bork relies on three factors of his own in order to immunize libel defendants from suit. He reasons that (1) Ollman should be expected to endure the challenged statement because he placed himself in a public, political debate, (2) the factual nature of the "no status" statement is inherently unsuitable for jury determination, and (3) the functional meaning and general context of the statement indicate its rhetorical purpose. The first of these factors represents an unprecedented extension into the fact-opinion doctrine of the distinction between public and private officials for the purposes of defamation suits. The second two considerations merely restate the plurality's test. The challenged statement is surely capable of adjudication if it admits of a stable core of meaning and if Ollman's professional reputation is in fact verifiable. Similarly, the functional meaning or practical impact of the "no status" assertion can only be determined in light of the factual and social context surrounding the appellees' column.

In any event, I believe that the challenged statement is properly characterized as a factual assertion rather than a rhetorical hyperbole under either the plurality's or Judge Bork's approach. The statement that Ollman has no status within his profession undoubtedly admits of a sufficiently ascertainable and stable core of meaning: a decisive majority of his fellow political scientists do not regard him as a good scholar. That one might find a wide diversity of views among political scientists about Ollman's work and about what constitutes scholarly excellence in no way undermines the commonly understood meaning of a statement like this about reputation. The statement says to the ordinary reader that, however each individual scholar evaluates excellence, there is an overwhelming consensus that Ollman does not have it.

Furthermore, Ollman's scholarly reputation is adequately verifiable. One could, for instance, devise a poll of American Political Science Association members as to their opinion, on a scale of one to ten, of the scholarly value of Ollman's work. Testimony of prominent political scientists or other measures of reputation would also serve to verify or refute the statement about Ollman's reputation without sending the jury into a sea of speculation.

As both Judge Bork and Judge MacKinnon point out, neither a poll nor the testimony of his peers will, in all likelihood, *conclusively* establish Ollman's professional reputation in the eyes of the jury. Nonetheless, juries traditionally are called on to resolve conflicting opinions in libel cases, and the uncertainties endemic to determining a person's reputation do not, in themselves, render the issue "inherently unsusceptible to accurate resolution by a jury." Op. of Bork, J., at p. 1005. Whatever their limits as truth finding devices, expert testimony or a poll could surely establish whether Ollman enjoys some reputation as an *academic scholar* as opposed to a mere activist—whether that scholarly reputation is supported by consensus or sharp disagreement among his colleagues. Given appropriate instruction by the trial judge, a jury is as well equipped to determine whether an individual has or has not established professional reputation in this context as it is in a host of others. Although I share Judge Bork's concern that juries may, in some defamation cases, tend to underemphasize the limits imposed by the first amendment, I cannot subscribe to his astonishing view that "[t]he *only* solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about the types of speech and writing essential to a vigorous first amendment *do not reach the jury.*" *Id.* at p. 997 (emphasis added). Instead, I believe that any such problems should be remedied through careful supervision by the trial judge and vigorous appellate review, not through stripping the jury of its historic function merely because qualities

such as "professional reputation" are difficult to adjudicate.[1]

The plurality cites the statement that "[o]ur academic culture does not permit the raising of such questions" as a concession of non-verifiability by Evans and Novak and their source that should warn the reader not to accept the foregoing statement about reputation as one of fact. Op. of Starr, J., at p. 991. But to me—and I believe to the ordinary reader as well—the liberal professor's refusal to be cited publicly means simply that Ollman's writings are not *openly* attacked in the academic community as mere polemics. Moreover, the majority's implication that Ollman has no verifiable reputation—that there is no way of evaluating the conglomeration of his colleagues' opinions, public or private, of his work—is belied by the characterization of the political scientist quoted as one "whose scholarship and reputation as a liberal are well known," as well as by the complex procedures for hiring, evaluation and tenure decisions set up by academic institutions throughout the nation. As judges we are familiar as well with how prominently academic reputation and stature figures in judicial nominations, evaluations and confirmation proceedings.

The plurality readily concedes that a statement about one's professional reputation, even the very statement before us, might be deemed a factual assertion in a different context. Yet the majority concludes that the facts, noted in the article, that Ollman was at the time a professor at New York University and was the top candidate for the position of chairman of the political science department at the University of Maryland would undermine a reader's belief in the factual accuracy of the statement. *See* Op. of Starr, J., at p. 990 & n. 42. But as I read the article, these "facts" could as well be understood as an assertion that Ollman's prominence is due solely to his vociferousness and is entirely out of proportion to his poor reputation as a scholar among his peers. Indeed, the article as a whole, while it purports merely to raise questions about Ollman's qualifications, promotes itself as a call to sanity and objectivity and away from mere polemics. Thus, the immediate context in which this statement was made does little to warn a reader to regard with skepticism what might otherwise appear to be an assertion of fact.

In his concurrence, Judge Bork advances the further argument that the "no status" statement is, in its "practical impact," in the nature of opinion or rhetorical hyperbole because it is attributed to an anonymous source who is reporting the opinions of others. In the context of Evans' and Novak's column, however, the attribution of Ollman's utter lack of professional status to a political scientist "whose scholarship and reputation as a liberal are well known" gives the statement more rather than less of a factual and verifiable quality.

Under either the plurality's or Judge Bork's analysis, then, we are left with the bareboned fact that this article was written by Evans and Novak, well known political columnists, and appeared on the op-ed page. I agree wholeheartedly with both the plurality and Judge Bork that editorial pieces such as this one are commonly filled with "rhetorical hyperbole" and are often

1. After the war of words has ended, I am left with the simple fact that, in assessing or mitigating damages, juries have historically been required to determine what a plaintiff's reputation was before the libel in order to determine how much the plaintiff has been injured by the libel. *See* Prosser and Keeton on the Law of Torts § 116A at 847–48 (W. Keeton 5th ed. 1984); L. Elderedge, The Law of Defamation § 97 at 564–66 (1978); M. Newell, The Law of Libel and Slander § 730 (4th ed. 1924). Indeed, the Supreme Court clearly stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), that defamation plaintiffs are entitled to damages, including jury awarded damages, for "*actual injury* ... includ[ing] impairment of reputation and standing in the community." *Id.*, 418 U.S. at 349–50, 94 S.Ct. at 3012 (emphasis added). The determination of actual injury ordinarily turns on an assessment of the status quo ante, and courts have routinely upheld jury awards predicated on a libel plaintiff's prelibel reputation. *See, e.g., Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir.1982); *Dixon v. Newsweek, Inc.*, 562 F.2d 626, 631–32 (10th Cir.1977). It is therefore incomprehensible to me how both the plurality and the concurrences can so glibly conclude that juries are inherently incapable of making such a determination.

read with a degree of skepticism as to their factual content. The first amendment demands extraordinary caution in subjecting to the burdens of a lawsuit isolated statements in this kind of writing. The very statement before us, if adjudged to be a factual assertion, would have to cross numerous sturdily-constructed constitutional hurdles. In particular, Ollman would have to persuade a jury that the statement was false—that he indeed enjoyed a reputation as an academic scholar—and, if he were ruled a public figure subject to the standards of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), that Evans and Novak made the statement with malice or reckless disregard for its truth or falsity.[2] Furthermore, a jury verdict on these issues is subject to more searching appellate review than under the "clearly erroneous" standard. *Bose Corp. v. Consumers Union*, — U.S. —, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Our decision today, however, means that, even assuming that the statement was utterly false, that it was made with knowledge of its falsity, and that it precipitated Ollman's loss of an important academic position and a decline in his professional standing, the statement's authors cannot be made to answer in a suit for libel. I do not believe that the first amendment requires this result, and I therefore respectfully dissent.

HARRY T. EDWARDS, Circuit Judge, concurring in part and dissenting in part:

For the most part, I thoroughly agree with and I am happy to concur in Judge Starr's thoughtful and well-reasoned opinion. Unfortunately, I cannot fully subscribe to the result reached.

After agonizing over this case, I have finally concluded that it is untenable even to suggest that the statement "*Ollman*

2. Judge Bork's concurrence would apply the fact-opinion distinction differently to statements made in the context of public political controversy than to those made in other contexts. He argues that "we ought to accept the proposition that those who place themselves in a political arena must accept a degree of derogation that others need not." Op. of Bork, J. at p. 1002. To be sure, public debate lies at the very core of the values protected by the first amendment. Yet it is precisely this idea that underscores the current distinction between public and private figures and the rigorous *New York Times* standards governing defamation suits against the former. *See Gertz*, 418 U.S. at 342–45, 94 S.Ct. at 3008–09. By transforming arguably factual assertions into privileged statements of opinion or rhetorical hyperbole merely because they appear in a charged political context, Judge Bork's wholly novel approach would deprive the plaintiff of an opportunity even to prove that Evans and Novak acted with actual malice or reckless disregard of the truth. In my view, the first amendment does not require such an egregious result, and *New York Times*, by giving quite a different effect to the "political context" factor, implicitly forbids it.

At stake in Judge Bork's new political rhetoric doctrine is the extent to which libel plaintiffs will ever be able to bring their claims to trial. In the context of the present dispute, for example, Judge Bork concedes that a cloistered scholar who "confined himself to academic pursuits and eschewed political proselytizing" could legitimately expect any criticism to concern his work and could bring a libel action over false statements about his reputation. Op. of Bork, J., at pp. 1002–03. Yet because Ollman is a "proponent not just of Marxist scholarship but of Marxist politics," Judge Bork reasons, he should be deprived of the opportunity to bring the same legal action. *Id.* at p. 1003. Not only does this approach overlook the fact that cloistered scholarship can often function as a form of political advocacy, but it also creates a special set of libel laws for academics. Under Judge Bork's approach, if an editorialist makes identical, maliciously false statements concerning the professional reputation of a retiring scholar and that of an activist academic, only the former could bring a defamation action. In effect, trial judges would be required to distinguish politics from scholarship as a condition of allowing a defamation suit to proceed at all. Of course, trial courts currently face a similar task when they determine whether the plaintiff is a public or private figure under *New York Times*. They do so, however, only for the purpose of determining the plaintiff's burden of proof at trial. Judge Bork's application of *New York Times*' public-private distinction—political activism is "public" under his view while scholarship is "private"—to the fact-opinion doctrine would create an absolute and, needless to say, unprecedented threshold requirement for access to the jury at all. In view of the protections already afforded public debate by the "actual malice" standard, I can see no reason other than a vague, but obviously overpowering, distrust of juries for holding the entire law of libel hostage to this quite subtle distinction.

has no status within the profession, but is a pure and simple activist" is an absolutely privileged "opinion." Indeed, as a former member of the academic community, I am somewhat taken aback by the notion that one's reputation within the profession (which is *easily* verifiable) may be so freely and glibly libelled. I can find no meaningful case authority to convince me that the First Amendment is designed to condone such loose muckraking.

Had Evans and Novak said that, *in their view*, Ollman "appeared to be a person without real status within the profession," this might be a different case. But they went much further and cited another "well known" scholar to support a verifiable claim that Ollman *in fact* had "no status within the profession." I agree with Judge Wald that "the statement says to the ordinary reader [and to the sophisticated reader as well] that, however each individual scholar evaluates excellence, there is an overwhelming consensus that Ollman does not have it." This is not a privileged opinion.

Having reached this conclusion, I concur in part in Judge Starr's opinion and concur in full in Judge Wald's and Judge Scalia's partial dissents.

SCALIA, Circuit Judge, with whom Circuit Judges WALD and HARRY T. EDWARDS, join, dissenting in part.

More plaintiffs should bear in mind that it is a normal human reaction, after painstakingly examining and rejecting thirty invalid and almost absurd contentions, to reject the thirty-first contention as well, and make a clean sweep of the matter. I have no other explanation for the majority's affirmance of summary judgment dismissing what seems to me a classic and cooly crafted libel, Evans and Novak's disparagement of Ollman's professional reputation. Judge Wald's opinion has fully responded to the straightforward contention of the majority opinion that this disparagement should be regarded as a mere nonactionable statement of opinion. I write separately to survey in somewhat greater detail the concurrence's more scenic route to what turns out to be the same destination.

It seems to me that the concurrence embarks upon an exercise of, as it puts it, constitutional "evolution," with very little reason and with very uncertain effect upon the species. Existing doctrine provides ample protection against the entire list of horribles supposedly confronting the defenseless modern publicist:

—The need to give special scope to political rhetoric is already met by recognition that hyperbole is an expected form of expression in that context. If Evans and Novak had chosen to call Ollman a traitor to our nation, fair enough. No reasonable person would believe, in that context, that they really *meant* a violation of 18 U.S.C. § 2381 (1982). *See Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 285–86, 94 S.Ct. 2770, 2781–82, 41 L.Ed.2d 745 (1974). The concurrence correctly claims the defense of this doctrine for the "no status" assertion. Surely it did not mean that Ollman had *no* status—only that his regard in the profession was not high. But to say, as the concurrence does, that hyperbole excuses not merely the exaggeration but *the fact sought to be vividly conveyed by the exaggeration* is to mistake a freedom to enliven discourse for a freedom to destroy reputation. The libel that "Smith is an incompetent carpenter" is not converted into harmless and nonactionable wordplay by merely embellishing it into the statement that "Smith is the worst carpenter this side of the Mississippi."

—The expectation that one who enters the "public, political arena," Bork op. at 1004, must be prepared to take a certain amount of "public bumping," *id.*, is already fulsomely assured by the *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), requirement of actual malice in the defamation of public figures. One would think, from the concurrence's lugubrious description of the plight of the modern political publicist, that Evans and Novak were to be held to the *truth* of what they said—whereas in fact, in order

to find them liable a public-figure plaintiff (such as the concurrence's argument assumes Ollman to be, *see Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C.Cir.), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980)), must establish not only that their allegation was false, but also that they *knew* it to be so, or acted with reckless disregard of its falsity, *and must establish that by "clear and convincing proof."* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974) (emphasis added). This is a formidable task, and in the present case it is likely that the defendants would have to do no more to defeat it than to establish that a "political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known" did indeed tell them what they printed. *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968).

—The difficulty of proving academic reputation, which the concurrence dwells upon at some length, Bork op. at 1005–08, is fully accounted for under current law by the fact that any failure of proof harms the *plaintiff's* rather than the *defendant's* case—and harms it in particularly devastating fashion when the "clear and convincing evidence" standard applicable to public figures governs. If the statistical evidence were indeed as inconclusive as the concurrence portrays, the result would be precisely what the concurrence desires, a dismissal of the suit.

—The problem that "juries ... are much more likely than judges to find for the plaintiff in a defamation case," *id.* at 1006, surely a reprehensible failing, has been met by the Supreme Court's holding that "[j]udges ... must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose Corp. v. Consumers Union, Inc.*, — U.S. —, 104 S.Ct. 1949, 1965, 80 L.Ed.2d 502 (1984).

It is difficult to see what valid concern remains that has not already been addressed by first amendment doctrine and that therefore requires some constitutional evolving—unless it be, quite plainly, the concern that political publicists, even with full knowledge of the falsity or recklessness of what they say, should be able to destroy private reputations at will.

When its lengthy "balancing" of the "totality of the circumstances" is complete, the concurrence ends up straddling two propositions: First, that the reasonable meaning of this statement is *not* that Ollman is poorly regarded within his profession. Second, that such an unquestionable libel is permitted in the course of political polemics. The first of these propositions distorts reality. I do not contest the principle that a politically disputatious context, like any element of context, can have some effect upon the properly understood meaning of a statement. If, for example, in the course of a diatribe against Marxist political thought Evans and Novak had written that "Ollman is an incompetent political scientist," the reader might understand that this was merely a corollary of their *opinion* that Marxism is spinach. But here they did *not* say he was incompetent. They said that his *professional peers* regarded him as incompetent—and there is no way *that* conclusion can be understood to be a product of their econo-political opinions. In fact, they went even further out of their way to dissociate this factual statement from their opinions: they put it in the mouth of one whom they describe as (1) an expert on the subject of status in the political science profession, and (2) a political *liberal*, *i.e.*, one whose view of Ollman would *not* be distorted on the basis of greatly differing political opinion. They were saying, in effect, "This is not merely our prejudiced view; it is the conclusion of an impartial and indeed sympathetic expert." Try as they may, however, to convey to the world the *fact* that Ollman is poorly regarded in his profession, the concurrence insists upon calling it an opinion. It will not do.

Hence the second thread of argument which is subtly woven through the concur-

ring opinion: In the field of political polemics, even statements that *are* fact rather than opinion must be excused because the reader "is most unlikely to regard [them] as to be *trusted* automatically." Bork op. at 1010 (emphasis added). Once the reader is "alert[ed] ... that he is in the context of controversy and politics, and that what he reads does not even purport to be as balanced, objective, and fair-minded as ... what is contained in ... news columns," *id.*, he can expect libelous factual statements to be "more of the same," *id.* And since he would be a fool to *believe* them, they are not actionable. I am not prepared to accept this novel view that since political debate is always discounted, a decent amount of defamation in that context is protected by the first amendment. Besides the fact that it is unprecedented,[1] it is impracticable. Whereas there are some rational limits (if only vague ones) upon what sorts of statements can be considered opinion and hence nondefamatory—limits which are plainly exceeded here—there is really no mechanism to gauge how much defamation is a decent amount.

It is *this* "risk of judicial subjectivity," *id.* at 997, rather than that which inheres in the unavoidable need in all libel cases to balance the "totality of the circumstances," *id.* which troubles me. Beyond that, I may add, I distrust the more general risk of judicial subjectivity presented by the concurrence's creative approach to first amendment jurisprudence. It is an approach which embraces "a continuing evolution of doctrine," *id.* at 995, not merely as a consequence of thoughtful perception that old cases were decided wrongly at the time they were rendered (*see, e.g., Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)); and not even in response to a demonstrable, authoritatively expressed development of public values (*see, e.g., Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion)); but rather in reaction to judicially perceived "modern problems," Bork op. at 995, which require "evolution of the law in accordance with the deepest rationale of the first amendment," *id.* at 998.[2] It seems to me that the identification of "modern problems" to be remedied is quintessentially legislative rather than judicial business—largely because it is such a subjective judgment; and that the remedies are to be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before. The concurrence perceives a "modern problem" consisting of "a freshening stream of libel actions,

1. The concurrence asserts that it is "doing no more than following Supreme Court precedent" in the cases which protect opinion (*Gertz*) and hyperbole (*Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), and *Letter Carriers*), since "part of the context here is the existence of a vigorous political controversy ... which conditions the way a reader understands the kind of charge that Evans and Novak related." Bork op. at 1005. That is indeed part of the context; more important, it is only part of the concurrence's *point*, and not the part to which my present remarks are addressed. If alteration of the reader's *understanding* were the only point, the concurrence would be following traditional defamation analysis (as *Gertz*, *Bresler* and *Letter Carriers* did), as well as duplicating the majority opinion. However, the additional, "evolutionary" point has to do not with the reader's *understanding* but with his *expectations*. He should, presumably, expect a reasonable amount of defamation in political controversy, and therefore it is nonactionable.

2. In opposing such unguided "evolution" I am not in need of the concurrence's reminder that the fourth amendment must be applied to modern electronic surveillance, the commerce clause to trucks and the first amendment to broadcasting. Bork op. at 996. The application of existing principles to new phenomena—either new because they have not existed before or new because they have never been presented to a court before, *see New York Times Co. v. Sullivan*, 376 U.S. at 268, 84 S.Ct. at 719—is what I would call not "evolution" but merely routine elaboration of the law. What is under discussion here is not application of preexisting principles to new phenomena, but rather *alteration* of preexisting principles in their application to preexisting phenomena on the basis of judicial perception of changed social circumstances. The principle that the first amendment does not protect the deliberate impugning of character or reputation, in its application to the preexisting phenomenon of political controversy, is to be revised to permit "bumping" of some imprecisable degree because we perceive that libel suits are now too common and too successful.

which ... may threaten the public and constitutional interest in free, and frequently rough, discussion," *id.* at 93, and of claims for damages that are quite capable of silencing political commentators forever," *id.* at 995. Perhaps that perception is correct, though it is hard to square with the explosion of communications in general, and political commentary in particular, in this "Media Age." But then again, perhaps those are right who discern a distressing tendency for our political commentary to descend from discussion of public issues to destruction of private reputations; who believe that, by putting some brake upon that tendency, defamation liability under existing standards not only does not impair but fosters the type of discussion the first amendment is most concerned to protect; and who view high libel judgments as no more than an accurate reflection of the vastly expanded damage that can be caused by media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards commensurate with that power. I do not know the answers to these questions, but I do know that it is frightening to think that the existence or nonexistence of a *constitutional* rule (the willfully false disparagement of professional reputation in the context of political commentary cannot be actionable) is to depend upon our ongoing personal assessments of such sociological factors. And not only is our cloistered capacity to identify "modern problems" suspect, but our ability to provide condign solutions through the rude means of constitutional prohibition is nonexistent. What a strange notion that the problem of excessive libel awards should be solved by permitting, in political debate, intentional destruction of reputation—rather than by placing a legislative limit upon the amount of libel recovery. It has not often been thought, by the way, that the press is among the least effective of legislative lobbyists.

In recent years, the Supreme Court confronted a similar assertion of a "modern problem" that required a new first amendment mutant. The omnipresence of the modern press, the popularity of "investigative reportage," and the eagerness of many dissident groups actively to seek out press coverage, have with increasing frequency caused members of the press to be in possession of information regarding unlawful activity, necessary for the detection or prevention of crime. The Court was asked, as the concurrence asks us here, not to take a "wooden" or "mechanical" view of the first amendment, and to proclaim that in modern circumstances it prevents the subpoena of such information. Of course the Court declined. *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). And of course the problem has not gone unaddressed. Many states have enacted "press shield" laws, *see In re Roche*, 381 Mass. 624, 411 N.E.2d 466, 474 n. 13 (1980), and the federal Justice Department has promulgated regulations, 28 C.F.R. § 50.10 (1983), which approach the issue in a much more calibrated fashion than judicial prohibition could achieve.

For the foregoing reasons, I join Judge Wald's dissent on the professional status point.

Melvin D. REUBER, Appellant

v.

UNITED STATES of America, et al. (Two cases.)

Melvin D. REUBER, Appellant

v.

FOOD CHEMICAL NEWS, et al. (Two cases.)

Nos. 82-2376, 82-2414, 83-1536 and 83-1537.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 3, 1984.

Decided Dec. 7, 1984.

As Amended Jan. 23, 1985.

Physician brought suit on ground of issuance and dissemination of a letter of

clear to the lower court that it lacked jurisdiction over the remaining defendants it was well within its discretion to act with dispatch to end the litigation. Had the court ordered yet another round of hearings and briefs it would have succeeded only in enlarging the already considerable expenditure of resources generated by this litigation.

Finally, Mr. Wagshal argues that the District Court's dismissal resulted in a forfeiture of an already entered default against Crozer. *See* Brief for Wagshal at 38–39. Once it became aware of its lack of jurisdiction in the matter, the District Court was correct in ignoring the default. That action was taken under the false impression of an adequate jurisdictional basis for the suit. When that basis was revealed as non-existent, the default itself was void as an action taken in excess of the District Court's power over those parties.

IV

[5] Mr. Wagshal's long quest for fees from the previously unnamed but alleged beneficiaries of his efforts appears to have now come to an unsuccessful end. Throughout his papers and arguments there runs the theme that the courts must have some way of getting to him his just due. With this we cannot agree. As we have many times pointed out to him, it is within the attorney's power, at the start of a case, to settle the terms under which the litigation will be pursued. The courts are not empowered to enforce that which was never agreed to among the parties. Mr. Wagshal failed at the beginning of his efforts to attend to arrangements regarding his fees. We cannot alter that fact. The judgment of the District Court is accordingly affirmed.

It is so ordered.

William C. McBRIDE, Appellant,

v.

MERRELL DOW AND PHARMACEUTICALS INC., an Ohio Corporation, et al.

No. 82-1786.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 8, 1983.

Decided Sept. 27, 1983.

In libel action brought by expert witness alleging defamation in magazine article reporting Food and Drug Administration hearings concerning drug taken for morning sickness during pregnancy, publisher, author, drug manufacturer and two public relations officers for manufacturer moved for dismissal on several grounds, including failure to state a claim on which relief could be granted. The United States District Court for the District of Columbia, Barrington D. Parker, J., 540 F.Supp. 1252, dismissed action, and appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) neither portion of article linking witness with an attorney nor publication of remarks made by panel member at panel hearing could be considered actionable, and (2) it was not possible to conclude that published statement that witness was paid $5,000 a day to testify at trial, particularly when directly compared with amounts manufacturer paid its expert witnesses, was incapable of bearing a defamatory meaning.

Affirmed in part and reversed in part.

1. Libel and Slander ⇐6(1)

Portions of magazine article reporting on Food and Drug Administration hearings concerning drug taken for morning sickness during pregnancy linking expert witness with attorney could not be construed as defaming expert witness, in that, though article described attorney as "flamboyant," that did not make being identified as a witness for one of attorney's clients a defamatory statement.

2. Libel and Slander ⇐6(1)

Publication of remarks made by panel member at Food and Drug Administration panel hearing concerning drug taken for morning sickness during pregnancy could not be considered defamatory, in that most that could be said of those remarks was that a reader might conclude that panel member thought expert witness was spending an unnecessary amount of time recounting dangers of another drug, hardly a conclusion likely to bring expert witness into contempt, and, in any case, comments themselves would seem to be protected as report of official proceedings and public meetings.

3. Libel and Slander ⇐6(1)

A suggestion of long-windedness or irrelevance is not defamatory.

4. Libel and Slander ⇐6(1)

In libel action brought by expert witness alleging defamation in magazine article reporting Food and Drug Administration hearings concerning drug taken for morning sickness during pregnancy, it could not be said that published statement that expert witness was paid $5,000 a day to testify in Florida trial, particularly when directly compared with amounts manufacturer paid its expert witnesses, was incapable of bearing a defamatory meaning, since it was possible that reader could conclude that plaintiffs' case was so weak they had to pay that much to get any expert to testify, and hence that witness' testimony was for sale, thereby preventing dismissal of complaint.

5. Libel and Slander ⇐101(4)

To prevail in a libel action against media, a public figure must prove knowledge of falsity or reckless disregard for the truth.

6. Federal Civil Procedure ⇐1272

Since libel suits, particularly those bordering on the frivolous, should be controlled so as to minimize their adverse impact upon press freedom, discovery should be limited initially to extent feasible to those questions that may sustain summary judgment.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 81–02639).

W. David Allen, Greenbelt, Md., for appellant.

Robert X. Perry, Jr., Washington, D.C., for appellee American Association for the Advancement of Science and Gina Bari Kolata.

H. Thomas Howell, Baltimore, Md., with whom Sidney G. Leech, Baltimore, Md., was on the brief, for appellees Merrell Dow Pharmaceuticals Inc., et al.

Before WRIGHT and BORK, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

Appellant William G. McBride, an Australian expert in the field of teratology—the study of agents that can cause developmental abnormalities in embryos—challenges the dismissal of his defamation action for failure to state a claim on which relief can be granted. The alleged defamation was contained in a magazine article. Our jurisdiction rests entirely upon the parties' diverse citizenship and we must apply District of Columbia defamation law. That law suggests that the complaint states one claim upon which relief can be granted. Moreover, *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), indicates that, despite first amendment concerns, the burdens of discovery do not justify reading stricter pleading requirements into the law of defamation. It follows that, though we affirm most of the district court's judgment, we must reverse in part. We are troubled by litigation such as this, however. The ability to frame a pleading that defeats, however narrowly, a motion to dismiss ought not to be converted into a license to harass. We suggest, therefore,

that the district court proceed upon remand in a manner that will minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism.

I.

This defamation action arises from the publication of an article entitled "How Safe Is Bendectin?" that appeared in the October 31, 1980, issue of *Science* magazine. Bendectin is a prescription drug taken for nausea and vomiting during pregnancy. It has generated controversy in recent years because of its alleged capacity to cause birth defects similar to those attributed to thalidomide. Merrell Dow and Pharmaceuticals, Inc.[1] ("Merrell Dow"), which manufactured and marketed the drug for about 25 years, recently discontinued manufacture of the drug, due, it has been said, to the burden of litigating suits that challenged its safety. N.Y. Times, June 10, 1983, at A16, col. 1.[2]

Dr. McBride, who filed the complaint for defamation, is a citizen of Australia and a research physician well-known for his work in the field of teratology. Among other accomplishments, he played a role in showing that thalidomide could cause birth defects. The article in *Science*, which was written by defendant Gina Bari Kolata, made the following statements about Dr. McBride:

> The FDA panel had an opportunity to hear four of the expert witnesses who testified for the plaintiffs in the Florida trial. Their data, said scientists who attended the meeting, were hardly convincing. FDA panel member Gordon Avery, of the Children's Hospital in Washington, D.C., said that "As far as I'm concerned, the purpose of the hearing was to objectively view the scientific data. None of these people brought anything other than special pleading."

These expert witnesses included William McBride of the Women's Hospital in Sydney, Australia, who was paid $5,000 a day to testify in Orlando. In contrast, Richardson-Merrell pays witnesses $250 to $500 a day, and the most it has ever paid is $1,000 a day. McBride was one of the first to suspect that thalidomide caused birth defects. He contends that Bendectin, too, causes deformed arms and legs, and he said at the trial that, in his opinion, Bendectin caused David Mekdeci's malformations. For much of his talk at the FDA meeting, McBride dwelt on the effects of thalidomide, leading Avery to say, "Dr. McBride, you have convinced me that thalidomide is a teratogen but I must in my own mind focus on the drugs that are in Bendectin."

Another of Belli's witnesses was Beverly Paigen of Roswall Park Memorial Institute.[3]

The complaint alleges that the article injures Dr. McBride's personal reputation (Complaint ¶ 16) and his standing as a medical scientist (Complaint ¶ 14). In particular, the complaint identifies as false and defamatory three kinds of statements: (1) statements linking Dr. McBride with attorney Melvin Belli (Complaint ¶ 13(a)); (2) statements juxtaposing the assertion that Dr. McBride was paid $5,000 a day to testify with the assertion that Richardson-Merrell pays its expert witnesses only $250 to $500 a day, and at most $1,000 (Complaint ¶ 13(b)); and (3) statements "indicating to the general public that Dr. McBride did not know what he was talking about" when he testified before a Food and Drug Administration panel (Complaint ¶ 13(c)). The complaint further claims that defendant Irvine "was a paid 'public relations' agent or employee of [Merrell Dow]" who "spread lies and deceit" at the instigation of Merrell Dow to the author of the article (Complaint ¶ 8), and that Merrell Dow widely disseminated the articles or portions thereof "as part of its scheme to silence plaintiff, indoctrinate the scientific community and avoid or stall access to the courts for maimed babies" (Complaint ¶ 12). The complaint alleges that all the defendants engaged in their actions "with actual malice" and without "a good faith belief in the truth of their publication" (Complaint ¶ 22).

The complaint also notes that *Science* magazine published a correction in its July 24, 1981 issue, in response to a request from the plaintiff identifying the allegedly libelous statements, but the complaint claims that the correction is "inadequate" and "does not amount to a retraction as demanded."[4] Complaint ¶¶ 19, 20. The complaint seeks general damages, special damages, and punitive and exemplary damages of many millions of dollars (Complaint ¶¶ 26–28, 32). Exhibits detailing Merrell Dow's distribution of the article accompany the complaint.

1. The complaint names a number of corporate and individual defendants affiliated with Merrell Dow and Pharmaceuticals, Inc. For the sake of convenience, we refer to all of them as "Merrell Dow."

2. *In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation*, 533 F.Supp. 489, 490 n. 1 (Jud.Pan.Mult.Lit.1982), indicates that at least 52 actions challenging the safety of the drug had at that time been filed in federal courts.

3. For the text of the entire article, see Appendix A *infra*, pp. 1467–1470

II.

The district court in a Memorandum Opinion and Order dismissed the complaint with prejudice, holding that "nothing in the article is found capable of bearing a defamatory meaning." 540 F.Supp. 1252, 1255 (D.D.C.1982). In construing the allegedly defamatory nature of the article, the court relied on the standard that a publication is defamatory "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community" and if it is "more than merely unpleasant or offensive" but "make[s] the plaintiff appear 'odious, infamous, or ridiculous.'" *Id.* at 1254 (citations omitted). Whether a publication is capable of being interpreted as defamatory under such a standard, the court held, is a legal issue to be decided by the court, *id.* at 1254–55, citing *Harrison v. Washington Post Co.*, 391 A.2d 781 (D.C.1978), and *Restatement (Second) of Torts* § 614 (1977).

An identical lawsuit against the same parties was filed in the Superior Court for the District of Columbia on August 28, 1981, some two months before the present action was filed in the district court. On August 10, 1982, while the present appeal was pending, the Honorable Carlisle E. Pratt filed an order dismissing that case with prejudice and stating that "but for Judge Parker's opinion having issued first, this Court would have dismissed Plaintiff's claim on the merits." *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, Civ. Action No. 12664–81 (Aug. 10, 1982).

The district court analyzed separately each of the three ways in which the article was allegedly defamatory. It accepted as true, as it had to under Fed.R.Civ.P. 12(c), Dr. McBride's contention that he does not know and had never met Melvin Belli (Complaint ¶ 13(a)), and it agreed that the article contained the "erroneous implication that Dr. McBride was called as a witness for Belli in the Florida trial." 540 F.Supp. at 1255.[5] The article called Belli "flamboyant" and the court noted that Belli "is a controversial figure in the legal profession." *Id.* It concluded, however, that there was no suggestion in the article that Belli had engaged in any improper conduct and that "an expert witness' mere association with such a person cannot be construed as defamatory." *Id.*

The district court provided a lengthier analysis of the complaint's claim that the article's treatment of the $5,000 a day paid to Dr. McBride for his testimony implied that Dr. McBride "is willing to prostitute his professional expertise and testify on behalf of the highest bidder." (Complaint ¶ 21). It reasoned that the $5,000 figure standing alone was not defamatory and observed that "[a] high level of remuneration suggests, if anything, a high degree of pro-

4. *See* Appendix B *infra*, p. 1471.

5. It appears that Melvin Belli was the attorney of record in the *Mekdeci* litigation in Florida, but that the case was tried by his co-counsel and that Dr. McBride's contacts were limited to the latter.

onal accomplishment." 540 F.Supp. at . Suggesting that if the discussion of the fees were defamatory, it had to be because of the inference of the lack of professional integrity to be drawn from the juxtaposition of McBride's higher fees with the lower fees paid by Merrell Dow, the district court concluded:

> The inference is improbable. The article clearly indicates that Dr. McBride is an expert in this area and not a "prostitute." The article recognizes that McBride made an important scientific contribution as "one of the first to suspect that thalidomide caused birth defects." Moreover, the innuendo drawn by the plaintiff is undermined by his own admission that although he was not paid $5,000 per day, he was, in fact, paid $1,116 per day. No other expert witness, according to the article, was paid more than $1,000 per day. Thus, even the plaintiff concedes that he received a higher rate of remuneration than any other expert witness in the Orlando trial.[6]

Id.

With respect to the third allegation—that the article gave the impression that "Dr. McBride did not know what he was talking about"—the district court relied on two alternate grounds to reach its conclusion. First, it noted that Avery's comments, which seem to form the principal basis for this claim, must be read as meaning that "McBride's scientific analysis was unconvincing" and not that "Dr. McBride is 'ignorant' of his subject matter." 540 F.Supp. at 1255. So interpreted, the assertion could not be considered defamatory. Secondly, the court noted that "even if Avery had directly stated that the plaintiff is ignorant of his subject matter, such a statem would properly be considered a non-defamatory statement of opinion." *Id.*, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997, 3006–07, 41 L.Ed.2d 789 (1974), and *Ollman v. Evans*, 479 F.Supp. 292, 293 (D.D.C.1979).[7]

The court concluded that none of the allegedly defamatory elements of the article involved "disgrace" or could subject Dr. McBride to "public ridicule and contempt." 540 F.Supp. at 1255–56.

III.

We agree with the district court that two of McBride's three instances of alleged defamation do not rise to the level of defamation.

[1] First, the portions of the article that link Dr. McBride with Melvin Belli cannot be construed as defamatory. Though the article describes Belli as "flamboyant," that does not make being identified as a witness for one of his clients a defamatory statement. This claim is frivolous and verges on the preposterous. In any event, since Dr. McBride was a witness for litigants represented by Belli, though Belli himself did not appear at the trial, and since Belli referred to McBride as one of his witnesses, it is true, in a literal sense, that McBride was one of Belli's witnesses even though the two never met. But, as we have said, even if the statement were wholly inaccurate, it would not be defamatory.

[2, 3] Second, publication of the remarks made by Dr. Avery at the FDA panel hearing cannot be considered actionable. There is no suggestion by Dr. McBride that Dr.

6. It was indicated at oral argument that Dr. McBride was paid 1,000 Australian dollars a day both for his testimony and for his travel time from Australia and that his total reimbursement, including airfare, amounted to approximately 5,000 American dollars for the single day he testified at the Orlando trial. The record also includes excerpts from talks delivered by Belli where he is quoted as saying: "It cost me $5,000 a day to bring [Dr. McBride] to the Mekdeci case." Record Excerpt 75, and "[w]e've got a guy, McBride, here from Australia, $5,000 a day. Hell, when he crossed the international dateline he charged us twice." *Id.* at 72. *See also* Belli, *Demonstrative Evidence*, 3 Trial Dipl. J. 26, 26-27 (1980), and Belli, *The State of the Law in the 80's*, 9 San Fern.V.L.Rev. 1, 5 (1981).

7. We have recently reversed the district court decision in *Ollman v. Evans*, 713 F.2d 838 (D.C. Cir.1983), but we do not read the three opinions in that case as casting doubt on the fact/opinion distinction as it applies to Avery's comments.

Avery's comments were not reported accurately. The most that can be said of those remarks is that a reader might conclude that Avery thought McBride was spending an unnecessary amount of time recounting the dangers of thalidomide, hardly a conclusion likely to bring McBride into contempt. A suggestion of long-windedness or irrelevance is not defamatory. In any case, the comments themselves would seem to be protected under District of Columbia law as a report "of official proceedings and public meetings." *See Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 87–88 (D.C. 1980).

[4] It is not possible for us to conclude, however, that the published statement that McBride was paid $5,000 a day to testify in the Florida trial, particularly when directly compared with the amounts Merrell Dow paid its expert witnesses, is incapable of bearing a defamatory meaning. It is possible that a reader might conclude that plaintiffs' case was so weak they had to pay that much to get any expert to testify, and hence that Dr. McBride's testimony was for sale. The standard to be applied in evaluating the dismissal of a complaint under Fed. R.Civ.P. 12(b)(6) is a stringent one. The Supreme Court has set the example:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (emphasis added). *See also Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). McBride argues that the district court failed to comply with this standard and instead implicitly and improperly reasoned that since the article *could* be read as *non*-defamatory, it could *not* be read as defamatory. He notes that the District of Columbia is not a jurisdiction that has adopted this "innocent construction rule," and he contends that when a statement is capable of two or more interpretations, one of them defamatory, it is for the jury to decide whether the defamatory meaning was the one communicated. Under District of Columbia defamation law, a court's power to hold as a matter of law that a statement is not defamatory is very limited. "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." *Levy v. American Mutual Ins. Co.*, 196 A.2d 475, 476 (D.C.1964). *See also Curtis Publishing Co. v. Vaughan*, 278 F.2d 23, 26 (D.C.Cir.), *cert. denied*, 364 U.S. 822, 81 S.Ct. 57, 5 L.Ed.2d 51 (1960). First amendment considerations, insofar as they might create a presumption in favor of dismissal, do not affect this determination at the pleading stage. *Nader v. de Toledano*, 408 A.2d 31, 49-50 (D.C.1979).

Since it is not beyond doubt that a reasonable person might read the article as conveying defamatory falsehoods, we reverse. As this court has previously noted,

> plaintiff need not show tendency to prejudice him in the eyes of everyone in the community or all his associates. It suffices to establish defamation that the publication tends to lower plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community of plaintiff's associates.

Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 n. 10 (D.C.Cir.1966) (citations omitted).

We do not, of course, suggest that Dr. McBride has actually been defamed. There is a sense in which the fee statement is correct since the attorneys paid McBride $5,000 and received one day of testimony in return, although McBride is said to have regarded the sum as reimbursement for five days away from his practice. Nor do we indicate any view whether other parts of the articles or the retraction made sufficiently remove any defamatory implication from the statement about fees, or whether appellees properly relied upon Belli's statement that he had paid Dr. McBride $5,000 per day. See note 6 *supra*.

[5] Even if it is acknowledged that this portion of the article can bear a defamatory meaning, McBride's complaint would probably still fail to state a claim on which relief could be granted if McBride had not pleaded actual malice. To prevail in a libel action against the media, a public figure must prove knowledge of falsity or reckless disregard for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1963).

Though the district court did not rule upon the point and we do not foreclose any decision that court may make after briefing and argument, we think it highly likely, in the context in which this case arises, at least, that Dr. McBride is a public figure. His complaint states that he "has gained international respect and renown for his research in the field of teratogenics" (Complaint ¶ 1) and that defendants attacked his "worldwide reputation in the specialized field of teratology" (Complaint ¶ 13). International fame as a researcher might or might not make McBride a public figure for purposes of libel law; we do not address that question, for it seems quite probable that the doctor's additional activities bring him within the definition that the Supreme Court gave in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974): "commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.... [T]hey invite attention and comment." *See Hoffman v. Washington Post Co.*, 433 F.Supp. 600 (D.D.C.1977), *aff'd mem.* 578 F.2d 442 (D.C.Cir.1978). Besides his earlier participation in the thalidomide controversy, Dr. McBride thrust himself to the forefront of the public debate concerning Bendectin when he traveled from Australia to the United States to testify both before an FDA panel and for the plaintiffs in a damage action in Florida. The great interest generated by the arguments about Bendectin is indicated by the article that prompted this lawsuit, including the article's account of the turmoil at the FDA panel's public hearing. Dr. McBride, who had been active in the thalidomide dispute, certainly understood that the Bendectin debate would probably not consist of a quiet exchange of views among scholars. In coming forward to play a prominent role in a heated public controversy he rendered himself a public figure—someone who might expect public commentary both admiring and, as is not uncommon when passions run high and substantial interests are at stake, of a hurtful and perhaps unfair nature.

Bendectin has been a widely used drug for which there appears to be no adequate substitute. Thousands of people are acutely concerned about its safety. Because it was a matter of intense public debate whether the FDA should take action, and, if so, what kind of action, the controversy about Bendectin had a pronounced political component. Inevitably, partisan advocacy characterized the discussion. Robust, wide-open debate requires that one who chooses to join in have a thicker skin than has been displayed here. Only the allegation that the statement about Dr. McBride's fees was a deliberate falsehood which was intended to, and had the effect of, damaging his reputation saves the complaint from dismissal. Given the tenor of the total article and other facts of which we are aware, the allegation may seem improbable, but we cannot deny Dr. McBride any opportunity to back it up with evidence.

[6] This case highlights the problems posed by contemporary libel law. *See* Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 Mont.L.Rev. 71 (1983); Garbus, *The Limits for Libel*, N.Y. Times, July 29, 1983, at A23. Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits—particularly those bordering on the frivolous—should be controlled so as to minimize their adverse impact upon press freedom.

It is, therefore, appropriate that discovery be limited initially to the extent feasible to those questions that may sustain summary judgment. As Justice Powell noted in his concurrence in *Herbert v. Lando*, 441 U.S. 153, 178, 99 S.Ct. 1635, 1650, 60 L.Ed.2d 115 (1979)—a concurrence that the Justice observed was not inconsistent with the opinion of the Court—a district court "in supervising discovery in a libel suit by a public figure, ... has a duty to consider First Amendment interests as well as the private interests of the plaintiff." *See also* 441 U.S. at 177, 99 S.Ct. at 1649 (Majority Opinion) ("reliance must be had on what in fact and in law are ample powers of the district court to prevent abuse").

District of Columbia law also endorses the use, where possible, of summary procedures in handling libel actions. In *Nader v. de Toledano*, 408 A.2d 31, 42-43 (1979), the District of Columbia Court of Appeals described the virtues of summary judgment as follows: "[I]t ... avoids needless expenditure, both by the courts and by the parties, of valuable resources in unnecessary trials, and mitigates the potential for misuse of the legal process by a party to harass adverse parties or to coerce them into settlement." The court found that these considerations take on a greater significance where a public official or public figure is involved in a libel action because of the potential threat to first amendment freedoms. *Id.* at 43. The court went on to quote with approval and at some length from the opinion by this court in *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (1966), *cert. denied*, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967). We find part of the language quoted especially apposite here:

> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate.... Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered." *Smith v. People of State of California*, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (1959).

365 F.2d at 968. The *Keogh* decision provides a model for the use of summary procedures in a case such as this. The disposition of this case may also be affected, of course, by the status of the identical lawsuit Dr. McBride filed in the Superior Court.

The decision of the district court is affirmed in part and reversed in part, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

APPENDIX A

HOW SAFE IS BENDECTIN?

An FDA panel sees no evidence that it causes birth defects. Lawyers say they will sue anyway.

The safety of Bendectin, a drug taken for morning sickness in pregnancy, has become the subject of an emotional and intense debate among parents, lawyers, and medical scientists. Lawyers claim Bendectin is a new thalidomide and are seeking women who took the drug and bore deformed children to join in lawsuits against Richardson-Merrell Inc., the drug's manufacturer. A number of scientists are saying that the drug has never been shown to be dangerous to fetuses and, in the absence of any such evidence, the lawsuits are unwarranted.

What is really at issue is the more subtle question of how safe is safe. Does lack of evidence that a drug is harmful mean that it is not? Can a manufacturer be held liable for damages when scientists say they have a "residual uncertainty" about a product's safety? These questions go far beyond the specifics of the Bendectin case and extend to virtually every drug and possibly toxic substance to which people are exposed. For this reason, the Bendectin story has become a symbol of the quandaries that

APPENDIX A—Continued

arise when science is unable to provide definitive answers to questions of public health.

Bendectin is one of the more commonly used drugs during pregnancy. Richardson-Merrell estimates that 25 percent of pregnant women in the United States take the drug, and it is popular in other countries including Germany, Canada, and Great Britain. Some doctors, in fact, are said to hand out prescriptions for Bendectin along with prescriptions for prenatal vitamins.

Although Bendectin has been on the market for 23 years, doubts about its safety were voiced only in the past 2 years. They began in the medical community when Kenneth Rothman of the Harvard School of Public Health found a weak association between Bendectin and congenital heart defects. Last winter, the doubts about Bendectin reached the general public as a result of a highly publicized trial in Florida in which the flamboyant lawyer Melvin Belli represented the parents of a deformed boy whose mother had taken the drug.

In response to intense public interest in Bendectin, the Food and Drug Administration (FDA) moved up its scheduled hearings on the drug's safety from October to September. On 15 and 16 September, an FDA panel met in a hot, stuffy room crowded with lawyers to review animal data and 13 epidemiologic studies. It unanimously concluded that there is no demonstrated association between Bendectin and birth defects. However, the panel noted that because there is no way to prove absolute safety, there is a "residual uncertainty" about the drug's effects on fetuses.

The 13 studies reviewed by the FDA panel varied enormously in design and reliability, and most had an unresolvable limitation. Women were asked, usually after their babies were born, whether they had taken Bendectin. Hershel Jick of the Boston Collaborative Drug Surveillance Program observes that the "recall" method introduces an enormous problem of bias. Women with normal babies may forget they took the drug and those with malformed babies may be more likely to remember—or vice versa. The bias is essentially unmeasurable.

Only two studies circumvented this problem. One was done by Jick himself, who examined computerized medical records at the Group Health Cooperative at Puget Sound for nearly 6000 pregnant women, 40 percent of whom were recorded as filling Bendectin prescriptions. He saw no indication that the drug caused an increase in any particular birth defect, including those that have been suspected of being caused by Bendectin, such as limb deformities and cleft lips or cleft palates.

The other study that is free of recall bias is one by Richard W. Smithells of the University of Leeds in England. Smithells also gauged Bendectin use on the basis of filled prescriptions. He reports no evidence of an increase in birth defects in general or in any specific type of birth defect in 2,000 women who took the drug as compared to 11,000 women who did not.

Ralph D'Agostino, a statistician at Boston University and an FDA panel member, argues, however, that from a statistical point of view it is more valuable to look at data from studies that focus on specific defects and then see if women who gave birth to children with these defects are more likely to have taken Bendectin. The method of looking at a whole spectrum of birth defects usually yields small numbers of babies with particular defects. For example, Jick found only 12 babies with limb deformities in his sample.

Most of the studies that focused on particular birth defects showed no relation between the defects and Bendectin. Two teams of researchers looked at specific defects, however, and found a slight association with Bendectin use. In one study, led by Rothman, there were weak associations between heart defects and aspirin, antibiotics, and Bendectin. He describes his results as at best "exploratory," not to be taken as indicating that Bendectin causes heart defects. He mentions particularly the problem of recall bias, since women were given an open-ended questionnaire about drug use.

APPENDIX A—Continued

Jean Golding of the University of Bristol in England asked doctors what they had prescribed for mothers of babies with cleft lips or palates and for mothers of normal babies, and found that the number of reported Bendectin prescriptions was slightly higher for mothers of babies with these birth defects. But Golding is ambivalent about her results because of the bias introduced by her method of ascertaining Bendectin use.

In the end, the discussion of Bendectin's safety came down to reasoning that more studies have been done on Bendectin than on any other prescription or non-prescription drug taken by pregnant women and nothing has shown that the drug is dangerous. Scientists at the FDA meeting also said that every agent that is known to cause birth defects causes a recognizable syndrome. No such syndrome has been associated with Bendectin. Since 30 million pregnant women have taken the drug, Jick says, he "would find it a shocking fluke if something were going on with the drug that we have missed."

The FDA panel did express concern, however, that the drug was associated with birth defects in the studies of Golding and Rothman, even though these findings were not confirmed by other studies. The panel noted that Bendectin is probably overprescribed. Certainly, scientists at the meeting argued, if the drug is to be used only for intractable nausea and vomiting, 25 percent of the pregnant women in this country (and 40 percent in Puget Sound) should not be taking it. Panel member Brian Little, a professor of obstetrics and gynecology at Case Western Reserve University, estimated that fewer than 10 percent of pregnant women should require Bendectin.

Belli says the FDA panel's decisions will not deter the lawsuits pending against Richardson-Merrell. "We will not rely on the FDA at all. We're going ahead with our own proof [that Bendectin causes birth defects]," he declared. His proof consists of a list of women who took the drug during pregnancy and bore children with limb defects. In addition, Belli has his own expert witnesses. But epidemiologists say a list of deformed children is not proof. Every year, about 90,000 babies are born with serious birth defects, and 3,000 of them have limb defects. By chance alone, then, if 25 percent of pregnant women take Bendectin, 750 babies with limb defects should be born each year to women who took the drug.

To find such babies, Belli has placed ads in U.S. newspapers and has traveled to England and Germany. He says he is thus far suing Richardson-Merrell on behalf of 75 women and knows of at least 125 Bendectin lawsuits, in addition to his own, that are going to trial. A Richardson-Merrell spokesman says, however, that only 36 lawsuits have been filed.

The hundreds of millions of dollars riding on the Bendectin suits drew a crowd of lawyers to the FDA meeting. Their vociferous questioning of the scientists who testified at the meeting so antagonized Robert Irvine, director of communications for Richardson-Merrell, that every time a lawyer was recognized, Irvine jumped up and pointed out that the questioner was an attorney who was engaged in litigation with his company. "I don't think this FDA hearing should be used for the process of discovery," Irvine kept saying. Finally, FDA panel chairman David Archer, of the University of Pittsburgh School of Medicine, declared that all further questions must be submitted to him in writing and he would then determine whether they would be answered.

One thing Belli and the other lawyers involved in litigation with Richardson-Merrell believe they have going for them is the company's past reputation. In the early 1960's the company tried to introduce thalidomide into the United States and marketed the drug in Canada. It was successfully sued on behalf of a number of U.S. children whose mothers were given thalidomide by doctors who received the drug as free samples, and on behalf of Canadian thalidomide children. The settlements ranged from $100,000 to $999,000.

APPENDIX A—Continued

Just before thalidomide, in 1960, Richardson-Merrell marketed Mer-29, a cholesterol-lowering drug that it envisioned millions of Americans taking each day like a vitamin pill. But Mer-29 turned out to cause cataracts and was withdrawn from the market in 1962. Richardson-Merrell was indicted for making false, fictitious, and fraudulent statements to the FDA about Mer-29 and was fined $80,000. Following the criminal indictment, 500 civil suits were filed by injured persons and Richardson-Merrell ended up paying $200 million in damages.

Public agitation about Bendectin began last October with an article in the *National Enquirer* that also compared the drug to thalidomide and included pictures of babies with deformed arms or legs. Prominently featured in the article was David Mekdeci, the Orlando, Florida, boy who was to be the subject of the first Bendectin lawsuit.

In January 1980 the trial involving David Mekdeci took place. The boy's parents, Michael and Elizabeth Mekdeci, sued Richardson-Merrell for $12 million. The Florida jury concluded that nothing should be awarded to the boy and denied any money to his parents for damages. It did, however, award the parents $20,000 for medical expenses. In May, Federal Judge Walter E. Hoffman ordered a new trial because, he said, the jury's verdict was "inconsistent." He argued that if the child was not damaged by Bendectin, the parents should not be awarded anything. A retrial is scheduled for January 1981, but Belli, "for reasons of honor and self-respect," asked not to represent the family the second time around. Belli calls Mrs. Mekdeci "a very difficult woman to work with. Besides, we've got much better cases."

The FDA panel had an opportunity to hear four of the expert witnesses who testified for the plaintiffs in the Florida trial. Their data, said scientists who attended the meeting, were hardly convincing. FDA panel member Gordon Avery, of the Children's Hospital in Washington, D.C., said that "As far as I'm concerned, the purpose of the hearing was to objectively view the scientific data. None of these people brought anything other than special pleading."

These expert witnesses included William McBride of the Women's Hospital in Sydney, Australia, who was paid $5,000 a day to testify in Orlando. In contrast, Richardson-Merrell, pays witnesses $250 to $500 a day, and the most it has ever paid is $1,000 a day. McBride was one of the first to suspect that thalidomide caused birth defects. He contends that Bendectin, too, causes deformed arms and legs, and he said at the trial that, in his opinion, Bendectin caused David Mekdeci's malformations. For much of his talk at the FDA meeting, McBride dwelt on the effects of thalidomide, leading Avery to say, "Dr. McBride, you have convinced me that thalidomide is a teratogen but I must in my own mind focus on the drugs that are in Bendectin."

Another of Belli's witnesses was Beverly Paigen of Roswell Park Memorial Institute. Paigen stressed that she is a cancer researcher, not a teratologist. Nonetheless, she concluded that Bendectin caused birth defects in 5 of 1000 babies whose mothers took the drug. D'Agostino commented to *Science* that "Her [Paigen's] interpretation of the data just is not warranted." He remarked, "The committee as a whole took them [Belli's four witnesses] as a set of presentations that didn't necessarily appear to contribute anything to the real discussion."

Despite the FDA panel's cautions and carefully worded conclusions, the forthcoming court cases will probably convince many women that Bendectin may cause birth defects. As a result of fear of Bendectin, Little predicts, doctors may start prescribing different drugs to combat nausea and vomiting, even though extremely little is known about alternative drugs. Despite the FDA panel's residual uncertainty about Bendectin's safety, it remains the best-studied drug taken by pregnant women. "I wish we knew as much about aspirin," said one scientist at the meeting.

—Gina Bari Kolata

APPENDIX B

Correction

In an article titled "How Safe is Bendectin?" (31 Oct. 1980, p. 518), it was incorrectly reported that William McBride of Sydney, Australia, was paid $5000 a day to testify as an expert witness in a court case involving allegations that Bendectin caused birth defects in a Florida child named David Mekdeci. McBride was not paid for certain testimony. Rather, he was compensated for time away from his Australian practice at a rate of approximately $1116 a day so that he could appear as an expert witness on behalf of the Mekdeci family. He was also reimbursed for his travel expenses to and from Australia. *Science* regrets the error.

[*Science*, July 24, 1981, at 395]

DEMOCRATIC NATIONAL COMMITTEE, Democratic Congressional Campaign Committee, and Democratic Senatorial Campaign Committee, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

CBS, Inc. and National Broadcasting Company, Inc., Intervenors.

No. 82-1872.

United States Court of Appeals, District of Columbia Circuit.

Argued March 18, 1983.

Decided September 27, 1983.

National committee of opposition political party appealed from the Federal Communications Commission, which denied its fairness doctrine complaint filed against two television networks. The Court of Appeals held that fact that national committee of opposition political party failed to present evidence suggesting that sizes of audiences viewing pro-administration programming versus anti-administration programming were not comparable reasonably supported Commission's conclusion.

Affirmed.

1. **Telecommunications** ⇨435

Under fairness doctrine, broadcaster must devote a reasonable percentage of broadcast time to coverage of controversial issues of public importance and provide a reasonable opportunity for presentation of conflicting views regarding such issues.

2. **Telecommunications** ⇨437

A viewer or listener who believes that a broadcaster is not meeting its fairness doctrine obligations must first complain to the broadcaster, and if viewer or listener remains dissatisfied in light of broadcaster's response, complaint may then be filed with the Federal Communications Commission.

3. **Telecommunications** ⇨437

A complaint must present prima facie evidence of fairness doctrine violation before the Federal Communications Commission will request a response to complaint from a broadcaster.

4. **Telecommunications** ⇨437

To successfully make out a prima facie case of fairness doctrine violation a complainant must submit factual information that, in absence of rebuttal, is sufficient to make out a fairness doctrine violation.

5. **Telecommunications** ⇨437

Complaint alleging fairness doctrine violation must indicate particular station involved, particular issue of a controversial nature discussed over air, date and time when program was carried, the basis for claim that station has presented only one side of question, and whether station had afforded, or has plans to afford, an opportunity for presentation of contrasting viewpoints.

Ultimately, however, the integrity of the process is of supreme importance. Legislative compromise (which is to say most intelligent legislation) becomes impossible when there is no assurance that the statutory words in which it is contained will be honored. Those members of Congress who unsuccessfully oppose a legislative initiative favored by the Executive have every reason to fear that any ambiguity they leave in the statute will be interpreted against their interests by the implementing agency. But they also have every reason to trust that the clear limitations they succeed in imposing will be faithfully observed. Those are the rules of the game, and I think they have been violated here. I respectfully dissent.

Michael A. LEBRON, Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, et al.

No. 84-5189.

United States Court of Appeals, District of Columbia Circuit.

Argued May 29, 1984.

Decided Dec. 14, 1984.

Artist whose political poster was denied display space in subway stations by transit authority sued to compel the transit authority to display his poster. The United States District Court for the District of Columbia, Stanley S. Harris, J., 585 F.Supp. 1461, entered order denying artist relief, and an appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) transit authority's refusal to accept poster critical of Reagan administration for display in its subway stations because of its content was a clear-cut and impermissible prior restraint, violating artist's First Amendment right of free speech, and (2) prior administrative restraint of distinctively political messages on basis of their alleged deceptiveness is unconstitutionally overbroad.

Reversed.

1. Constitutional Law ⇐90.3

Transit authority's refusal to accept poster critical of Reagan administration for display in its subway stations because of its content was a clear-cut and impermissible prior restraint, violating artist's First Amendment right of free speech. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐90.1(1)

Speakers are not required to indulge lowest common denominator of populace; First Amendment protection is not limited only to messages which every reader, no matter how ill-informed or inattentive, can comprehend. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐90.1(1)

In light of profound national commitment to principle that debate on public issues should be uninhibited, robust, and wide-open, courts ought not to restrain speech where message sought to be communicated is political and is sufficiently ambiguous to allow a discerning viewer or reader to recognize it as something other than a reproduction of an actual event.

4. Constitutional Law ⇐90.1(1)

Prior administrative restraint of distinctively political messages on basis of their alleged deceptiveness is unconstitutionally overbroad. U.S.C.A. Const.Amend. 1.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 84-00078).

Donald Weightman, Washington, D.C., with whom Alan J. Roth, Washington, D.C., was on brief, for appellant. Nancy E.

Wiegers, Washington, D.C., also entered an appearance for appellant.

Thomas Fortune Fay, Olney, Md., with whom John C. Swanson, Washington, D.C., was on brief, for appellee.

Arthur B. Spitzer, Washington, D.C., was on brief for amicus curiae, American Civil Liberties Union of the Nat. Capital Area, urging reversal.

Before BORK, SCALIA, and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge.

This case arose when the Washington Metropolitan Area Transit Authority ("WMATA" or "Authority") refused to lease display space in its subway stations to Michael A. Lebron, who sought to display a poster critical of the Reagan administration. WMATA refused because in its judgment Mr. Lebron's poster is "deceptive." Mr. Lebron then sued to enjoin WMATA from violating the rights guaranteed him by the first and fourteenth amendments to the Constitution and to compel the Authority to let him display his poster. He also sought damages. The district court denied Mr. Lebron relief, agreeing with WMATA that the poster is "deceptive and distorted" and therefore not protected by the first amendment. A motions panel of this Court ordered WMATA to show the poster pending this appeal. We reverse the judgment for WMATA.

I.

WMATA was established through a congressionally approved interstate compact to improve public transportation in the Washington, D.C. metropolitan area. One way in which the Authority raises revenue is by leasing the free-standing dioramas inside subway stations for use as advertising space. WMATA accepts both public service and commercial advertisements, although there is a fee difference based upon the type of advertisement.[1] Submitted advertisements are evaluated by WMATA's Director of Marketing, John E. Warrington, based upon guidelines set by the Authority's Board of Directors. Guideline No. 2 states, in part, that "[a]ll copy and artwork should avoid conveying derisive, exaggerated, distorted, deceptive or offensive impressions." Plaintiff's Exh. 3, included in Record Excerpts ("R.E."), as Exhibit A. WMATA has in the past rented display space to groups seeking to convey messages of public interest and about candidates for local political office.[2] *Lebron v. Washington Metropolitan Area Transit Authority*, 585 F.Supp. 1461 at 1465 (D.D.C.1984) ("Mem. op.").

In October of 1983, Mr. Lebron, an artist from New York City, asked to rent diorama space to display a political poster. The poster contains text transposed over and below a photomontage. The left side of the photomontage depicts President Reagan and a number of administration officials seated at a table laden with food and drink. All the men are smiling or laughing and President Reagan is pointing to the right side of the poster. Standing on the right side, looking towards the President with expressions of hostility or sullenness, are a number of casually dressed men and women, some of whom are members of racial minorities. Were the photomontage taken to be a single photograph, the President and his men would appear to be laughing at those on the opposite side of the

1. Mr. Lebron has at all times offered to pay the higher, commercial rates to display his advertisement. Complaint ¶ 17.

2. The district court found that WMATA has "rented subway advertising space for political and social commentary advertisements covering a broad spectrum of political views and ideas." *Lebron v. Washington Metropolitan Area Transit Authority*, 585 F.Supp. 1461 at 1464 (D.D.C. Mar. 21, 1984). For example, WMATA has accepted for display advertisements for the pro-nuclear power positions of the Edison Electric Institute, for an anti-abortion group called Birthright of Northern Virginia, for the Rape Crisis Center, and for many religious groups, including the Unification Church and the Founding Church of Scientology. Gay Activists Alliance v. WMATA, 5 Media L.Rep. (BNA) 1404, 1405 (D.D.C.1979).

poster. At the top of the poster, emblazoned in yellow (in contrast to the black and white of the photomontage), is the caption "Tired of the JELLYBEAN REPUBLIC?" The bottom of the poster presents text critical of the Reagan administration's policies. The poster is plainly political and was "intended to convey Mr. Lebron's belief about the manner in which certain segments of the American population have reacted to the effects of the Reagan administration's policies on them." Mem. op. at 1463. Mr. Lebron offered to place on the poster the following disclaimer:

> The photographic montage appearing here is a composite, and does not represent an actual encounter between or among the persons depicted. The views expressed are solely those of the author and artist, Michael Lebron, and are not to be attributed to any of the persons depicted hereon, Metro, its employees, TDI, or its employees.

Complaint ¶ 24. He proposed to place this disclaimer in small print in the lower right hand corner of the photomontage.

The preproduction version of the poster Mr. Lebron sent to WMATA's subcontractor for marketing, TDI-Winston Network, Inc.,[3] was forwarded to Mr. Warrington, who rejected the poster on the ground that it did not satisfy WMATA's guidelines. R.E. at Exh. A. Mr. Lebron's counsel requested reconsideration and, after consultation with WMATA's counsel, Mr. Warrington reversed his earlier decision and approved the advertisement.[4]

Concerned about his change of position, Mr. Warrington told WMATA's General Manager about the poster. The General Manager convened a meeting of selected WMATA personnel to discuss the issue, and this group unanimously found the picture deceptive. After this meeting Mr. Warrington informed Mr. Lebron's counsel that "a broader representative group" had determined that the poster "so clearly violate[s] the guidelines ... that the request must be turned down." Letter from John E. Warrington to Donald Weightman (Jan. 3, 1984); R.E. at Exh. E. This decision, according to the trial court, was not based upon the poster's political message but on the group's judgment that the photomontage was distorted and deceptive. Mem. op. at 1464, 1465.

Mr. Lebron sought preliminary relief on the grounds that WMATA's actions violated 42 U.S.C. § 1983 (1982) and the first amendment. The district court denied a temporary restraining order on the following day, finding no irreparable injury. The parties agreed to consolidate the motion for a preliminary injunction with trial on the merits. Mem. op. at 1462.

After trial the court held that Mr. Lebron's constitutional rights had not been violated and that the regulation was valid. Specifically, the court found that WMATA had not evaluated the content of the photomontage and rejected it because of its political message. Rather, "WMATA permissibly concluded that the photomontage is deceptive and distorted since it depicts an apparent event which actually did not occur." Mem. op. at 1464 (footnote omitted).[5]

3. TDI-Winston Network Inc. was originally a named defendant in this action. The suit against it was dropped after it filed a stipulation with the district court agreeing to comply with the court's decision. Stipulation of Dismissal (Jan. 25, 1984).

4. WMATA conceded to the district court that Mr. Lebron relied to his detriment on WMATA's acceptance of the poster and incurred certain expenses in producing the poster. Based upon that reliance, WMATA has agreed that Mr. Lebron is entitled to reimbursement. Mem. op. at 1468.

5. The lower court found that the proffered disclaimer would not

> effectively prevent passersby from being deceived into believing that the portrayed derisive confrontation actually did occur. The disclaimer could be read only if a subway passenger took the time to stop and study the entire advertisement at close range. The print size and placement of the disclaimer would not provide adequate notice that the event supposedly being depicted in fact had not occurred.

Mem. op. at 1464 (citations and footnotes omitted).

The district court also upheld the guideline that prohibited deceptive advertising as a reasonable time, place and manner regulation. Mem. op. at 1467. The court found that WMATA's interest in preventing purposeful deception and its proprietary interest in raising revenue from its advertising space justified the imposition of the restraint.

II.

[1] There is no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising. Mem. op. at 1465; *see Gay Activists Alliance v. WMATA*, 5 Media L.Rep. (BNA) 1404, 1406–09 (D.D.C.1979). *See also Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).[6] Because WMATA, a government agency, tried to prevent Mr. Lebron from exhibiting his poster "in advance of actual expression," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 1243, 43 L.Ed.2d 448 (1975), WMATA's action can be characterized as a "prior restraint," *id.*, which comes before us bearing a presumption of unconstitutionality. *E.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963) (citing cases). Subject to a limited number of exceptions—most notably, reasonable time, place and manner regulations—political speech may not constitutionally be restricted in a public forum. This case does not come within those exceptions and accordingly we reverse the district court and hold that WMATA violated the plaintiff's first amendment right of free speech.

A.

WMATA's refusal to accept this poster for display because of its content is a clear-cut prior restraint. Here, WMATA has by official action prevented Mr. Lebron from using a public forum to say what he wants to say. *Southeastern Promotions*, 420 U.S. at 553, 95 S.Ct. at 1243. As such, WMATA "carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971). *See New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1971) (per curiam). We impose this burden on public officials because of "[o]ur distaste for censorship—reflecting the natural distaste of a free people—[which] is deep-written in our law." *Southeastern Promotions*, 420 U.S. at 553, 95 S.Ct. at 1243. As Chief Justice Burger has recently reminded us, however, "to say the [guideline] presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 561, 101 S.Ct. 2882, 2920, 69 L.Ed.2d 800 (1981) (Burger, C.J., dissenting). All prior restraints are not *per se* unconstitutional, *Southeastern Promotions*, 420 U.S. at 558, 95 S.Ct. at 1246, for "[i]t has been clear since [the Supreme] Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, — U.S. —, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) (citation omitted).

The asserted governmental interests served by Guideline No. 2 are "WMATA's responsibility to the public in preventing purposeful deceptions" and its "proprietary

6. Unlike *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), where the Supreme Court sustained a ban on all political advertising inside a city transit system, the Authority here, by accepting political advertising, has made its subway stations into public fora. *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. at 45, 103 S.Ct. at 954 (once "the state has opened [public property] for use by the public as a place for expressive activity," certain exclusions are constitutionally forbidden, even if the state "was not required to create the forum in the first place").

interest in raising revenue from its advertising space." Mem. op. at 1467. The second is subsumed by the first: WMATA's fear is of a "'considerable loss of advertisement revenue from those advertisers who will not become associated with untruthful, distorted or deceptive displays.'" *Id.*, *quoting* Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction at 10. We find that the asserted interest in preventing deception is not served here because, simply put, this poster is not deceptive.

[2] In making this determination, we are guided by the Supreme Court's recent decision in *Bose Corp. v. Consumers Union of United States, Inc.*, — U.S. —, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984). In *Bose*, the Court set out the responsibility of an appellate court in cases raising first amendment issues: "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (citations and quotation marks omitted). *See National Association of Letter Carriers v. Austin*, 418 U.S. 264, 282, 94 S.Ct. 2770, 2780, 41 L.Ed.2d 745 (1974); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed.2d 6 (1970). This injunction is particularly easy for us to obey in this case for we have the poster in hand, and there are no questions of credibility.[7] The issue is one of judgment only—namely, would a reasonable man believe that this poster depicts an event that actually took place.[8] Carefully inspecting the poster for ourselves, we are "left with the definite and firm conviction that a mistake has been committed" by the district court. *United States v. Gypsum*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed.2d 746 (1948).[9] The poster's text, the utter implausibility of the scene portrayed, the difference in lighting between the two halves of the photomontage, the awkward relation of the two groups of figures to one another, the difference in the sizes of the figures in the two groups, and the proffered disclaimer make inevitable this conclusion. No reasonable person could think this a photograph of an actual meeting. In looking at this poster, moreover, the observer's eye is immediately drawn to the bold-faced, bright yellow text reading, "Tired of the JELLYBEAN REPUBLIC?" The message is that of an advocate; it sets the poster's tone and alerts the reader that the message disparages the Reagan administration. There is no pretext of objectivity. Given the context, the reasonable reader will subject the poster's entire content, including the photomontage, to a level and kind of scrutiny different from the scrutiny generally given to messages pretending to be dispassionately informative. *Cf. Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26

7. We do not defer to the agency in cases such as these. "When the executive or the administrative process abridges constitutional rights, it is subject to closer scrutiny than otherwise, and ultimately it is the court rather than the agency that must balance the competing interests." *A Quaker Action Group v. Morton*, 516 F.2d 717, 723 (D.C.Cir.1975).

8. That some small number of careless readers might be misled by this poster changes neither our inquiry nor our conclusion. Speakers are not required to indulge the lowest common denominator of the populace; first amendment protection is not limited only to messages which every reader, no matter how ill-informed or inattentive, can comprehend. *Cf. Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 525, 1 L.Ed.2d 412 (1957) (striking down a statute "quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence" because its effect was "to reduce the adult population ... to reading only what is fit for children").

9. In *Bose*, the Supreme Court discussed those types of facts appellate courts may review in the course of their independent review of the record. 104 S.Ct. at 1959–60 nn. 16–17. The finding of fact at issue here is the kind that is "inseparable from the principles from which it was deduced." *Id.* at 1960 n. 17. The "stakes ... are too great" in cases implicating the freedom of speech to entrust determinations of falsity in advance of actual expression "finally to the judgment of the trier of fact," and thus to preclude reviewing courts from exercising their own independent judgment. *Id.*

L.Ed.2d 6 (1970). Finally, the proffered disclaimer, while perhaps not quite large enough to be immediately noticeable or effective on its own, when combined with the other factors reveals to the observer that the photomontage does not depict an actual event. It is apparent at once that the poster does not purport to show an actual scene but to make a metaphorical political statement.

[3] In fact, the district judge stated that "the photomontage is sufficiently ambiguous to allow a discerning viewer to recognize it as a composite." Mem. op. at 1464 n. 4. Although we think the photomontage recognizable as a composite by persons considerably less acute than a "discerning viewer," the ambiguity specified by the district court is enough to support a finding that WMATA acted unconstitutionally. To assess speech in a public forum some balancing may be necessary, but "the thumb of the [c]ourt [should] be on the speech side of the scales." Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 Sup.Ct.Rev. 1, 28. *See Cox v. Louisiana*, 379 U.S. 536, 578, 85 S.Ct. 453, 465, 13 L.Ed.2d 471 (1965) ("[T]his Court does, and I agree that it should, 'weigh the circumstances' in order to protect, not to destroy, freedom of speech, press and religion.") (Black, J.). In light of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964), courts ought not to restrain speech where the message sought to be communicated is political and is "sufficiently ambiguous to allow a discerning viewer" (or reader) to recognize it as something other than a reproduction of an actual event.

B.

Judge Scalia is of the view that, while it is a sound judicial practice to avoid passing upon constitutional issues, it is also a sound judicial practice, of even more venerable antiquity, to avoid passing upon the truth or falsity of political pamphleteering or advertising, particularly in the context of prior restraint. He would give the latter policy preference here, and would decline to judge whether Mr. Lebron seeks to publish a political message that is false. He would reverse the district court because a scheme that empowers agencies of a political branch of government to impose prior restraint upon a political message because of its falsity is unconstitutional.

Although Judge Starr would not reach the issue, I agree with this basis of reversal as well. I know of no case that supports an attempt at censorship equivalent to that which has occurred here. Prior administrative restraint of political messages on a content-related basis other than substantive falsity—notably, obscenity—is permissible.[10] *Cf. Freedman v. Maryland*, 380 U.S. 51, 58–59, 85 S.Ct. 734, 738–39, 13 L.Ed.2d 649 (1965) (outlining elements that would validate film censorship scheme). And in extreme situations prior *judicial* restraint on the basis of falsity may be appropriate. *See, e.g., Tomei v. Finley*, 512 F.Supp. 695 (N.D.Ill.1981) (granting preliminary injunction prohibiting use in political advertising of the acronym "REP" [Representation for Every Person party] on grounds that it falsely implied affiliation with Republican party). But prior administrative restraint of distinctively political messages on the basis of their alleged deceptiveness is unheard-of—and deservedly

10. Even then, however—and even when distinctively political speech is *not* involved—the Supreme Court has said that the administrative restraint can only be temporary, for a specified period pending the administrative agency's seeking of a judicial restraint. *Southeastern Promotions*, 420 U.S. at 560, 95 S.Ct. at 1247. Such a requirement seems inconvenient if not unworkable in the context of managing the advertising business of a state-run commercial enterprise such as a bus or subway. As does the principle generally applicable elsewhere that political speech cannot be required to conform to even rudimentary canons of good taste. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). These are valid reasons to doubt whether such enterprises should be considered mandatory public forums that cannot generically reject political speech.

so. In *Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y.1975), a three-judge court struck down as unconstitutional on its face New York's "Fair Campaign Code," which prohibited, *inter alia*, "misrepresentation" of any candidate's qualifications or positions, in part because of lack of judicial involvement in the determination. The Supreme Court summarily affirmed without opinion. 423 U.S. 1041, 96 S.Ct. 763, 46 L.Ed.2d 630 (1976).

[4] WMATA argues, and the district court agreed, that it is not engaged in unlawful censorship but is administering a permissible and reasonable time, place and manner regulation. But, since WMATA is judging the truth of a political statement, to accept its argument is to destroy the distinction between content-neutral and content-based regulations. Even if WMATA "do[es] not differentiate among political viewpoints in political and social advertisements," mem. op. at 1467, an assessment of the deceptiveness of a message necessarily involves a judgment about the substance and content of that message. Although Guideline No. 2 does not, on its face, favor one viewpoint or idea at the expense of another, *see DeJonge v. Oregon*, 299 U.S. 353, 356, 57 S.Ct. 255, 256, 81 L.Ed. 278 (1937) (state statute prohibited advocacy of doctrine of "criminal syndicalism"), and does not discriminate on the basis of the subject matter of the speech, *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 767, 98 S.Ct. 1407, 1411, 55 L.Ed.2d 707 (1978) (state statute barred banks from spending money to influence voting on referendum proposals), it is simply not content-neutral. Applying this guideline involves an exercise of discretion and subjective judgment on the part of WMATA officials. It is not a time, place and manner restriction. Even if applied pursuant to procedural safeguards, the guideline would be unconstitutionally overbroad as applied to political speech.

I note that this conclusion does not necessarily place WMATA in the position of having to accept and display before its riders deceptive political advertising. If that prospect is repugnant it can possibly be avoided by declining to accept political advertising in general.[11] The availability of that recourse, at least as far as this court is concerned, depends upon whether subway stations are more akin to airports, *see Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C.Cir.1983), or to public buses, *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). *See also Members of the City Council of Los Angeles v. Taxpayers for Vincent*, — U.S. —, 104 S.Ct. 2118, 2134 n. 32, 80 L.Ed.2d 772 (1984). We need not reach that issue here.

For the reasons set forth above, the judgment of the district court is

Reversed.

11. WMATA is apparently concerned that its inability to control the messages displayed in its subway stations would leave it open to defamation actions based upon those messages. Although we need not decide this question to resolve the present case, we note that to the extent that WMATA is duty-bound to carry these messages, exposure to defamation liability is unlikely. In *Farmers Educational & Cooperative Union of America v. WDAY*, 360 U.S. 525, 533–35, 79 S.Ct. 1302, 1307–08, 3 L.Ed.2d 1407 (1959), the Supreme Court held that a radio station was immune from a defamation action where it was forbidden to censor libelous material it was under a statutory obligation to broadcast. That the station could avoid that obligation by refusing to sell time to any candidates did not vitiate the station's immunity. Similarly, here WMATA made an initial decision to accept political advertising. We express no opinion as to whether WMATA was obliged to make that decision—but, having made it, WMATA's power to reject political advertisements is subject to the strict protections the first amendment extends to political speech in a public forum. Where WMATA has no power to reject a particular advertisement, defamation liability should not follow.

has become a tidal wave,[99] and the Commission has become one of the foremost advocates of across-the-board deregulation for the entire broadcast industry.[100]

In these proceedings the Commission has on its own undertaken to enact a significant deregulation of the radio industry. In so doing it has pushed hard against the inherent limitations and natural reading of the Communications Act. For the reasons stated above, we affirm most of the Commission's orders, remanding only those portions relating to program logs with instructions that the Commission undertake further inquiry in accordance with this opinion. However, we take this opportunity to note that Congress, and not the Commission, may be the more appropriate source of such significant deregulation. It was Congress, after all, that created and oversaw the evolution of the original regulatory scheme for radio and television licensees. It should thus be Congress, and not the unrepresentative bureaucracy and judiciary, that takes the lead in grossly amending that system, thereby providing the public with a greater voice in this important process.[101] And yet, in the absence of more specific congressional direction, we cannot say that the Commission has overstepped either the bounds of its statutory authority or its administrative discretion in undertaking most of the deregulatory actions under review.

Affirmed in part and remanded in part.

BORK, Circuit Judge, concurring:

I write in concurrence to address two points. First, I wish to clarify my understanding of a portion of Judge Wright's excellent opinion for the court. We remand on the issue of program logs so that the Commission may reexamine the matter and provide a more thoughtful and detailed justification of whatever decision it may reach. Judge Wright's discussion forcefully raises several questions for the Commission on remand. I do not read the opinion as intimating any preconceptions as to the Commission's new decision, nor do I take it to suggest a disposition of any other pending case. Second, I express no view either way concerning the opinion's last paragraph, which speaks to the limits of the Commission's powers and the desirability of congressional action.

99. *See generally* Gellhorn, *Deregulation: Delight or Delusion?*, 24 St. Louis U.L.J. 469 (1980); Note, *The Proposed Communications Act Rewrite: Potomac Deregulatory Fever v. The Public Interest*, 45 Cincinnati L.Rev. 467 (1979).

100. *See generally* Fowles & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex.L.Rev. 207 (1982).

101. *Cf. Citizens Communications Center v. FCC*, 447 F.2d 1201, 1209-1210 (D.C.Cir.1971).

Paul LOVEDAY and Californians for Smoking and No Smoking Sections, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 81-2061.

United States Court of Appeals, District of Columbia Circuit.

Argued May 19, 1982.

Decided May 10, 1983.

Petition was brought for review of decision of Federal Communications Commission that California radio and television stations adequately discharged obligation to investigate and identify true sponsor of political advertisements opposing state initiative. The Court of Appeals, Bork, Circuit Judge, held that: (1) relative to requirement of Communications Act and regulations of Federal Communications Commission requiring licensed broadcast stations to

identify sponsors of paid political advertisements at time those advertisements are broadcast, a licensee confronted with undocumented allegations and undocumented rebuttal may safely accept apparent sponsor's representations that he is real party in interest, and (2) FCC did not abuse its discretion or act arbitrarily or capriciously in deciding that California radio and television stations adequately discharged obligation to investigate and identify true sponsor of political advertisements.

Affirmed.

1. Telecommunications ⇐437

Standard of review of whether decision of Federal Communications Commission that California radio and television stations adequately discharged obligation to investigate and identify true sponsor of political advertisement opposing referendum was whether Commission's action was arbitrary, capricious, an abuse of discretion or contrary to law; Broadcast Bureau and Commission rendered their decisions under authority given by statute to "issue a declaratory ruling to terminate a controversy or remove uncertainty," and ruling challenged was issued in specific factual context and resolved only issues presented by petitioner's application. 5 U.S.C.A. § 554(e); Communications Act of 1934, §§ 317, 317(c), 47 U.S.C.A. §§ 317, 317(c).

2. Telecommunications ⇐436

Relative to requirement of Communications Act and regulations of Federal Communications Commission requiring licensed broadcast stations to identify sponsors of paid political advertisements at time those advertisements are broadcast, a licensee confronted with undocumented allegations and an undocumented rebuttal may safely accept apparent sponsor's representations that he is real party in interest. Communications Act of 1934, §§ 317, 317(c), 47 U.S.C.A. §§ 317, 317(c).

3. Telecommunications ⇐436

Federal Communications Commission did not abuse its discretion or act arbitrarily or capriciously in deciding that California radio and television stations adequately discharged obligation, pursuant to FCC regulations and Communications Act, to investigate and identify true sponsor of political advertisements opposing initiative before California voters, where committee, as apparent sponsor, represented that it was not an agent for tobacco industry, but was real party in interest, and where allegations by petitioners to contrary were undocumented. Communications Act of 1934, §§ 317, 317(c), 47 U.S.C.A. §§ 317, 317(c).

Petition for Review of an Order of the Federal Communications Commission.

Paul Loveday (pro se), for petitioners.

Cal P. Saunders, Atty., F.C.C., Washington, D.C., with whom Stephen A. Sharp, Gen. Counsel, Daniel M. Armstrong, Associate Gen. Counsel, F.C.C., David Silberman, Atty., F.C.C., Robert B. Nicholson and Neil R. Ellis, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents. Mark C. Del Bianco, Atty., Dept. of Justice, Washington, D.C., also entered an appearance for respondents.

Before MacKINNON, GINSBURG and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

The Communications Act of 1934, 47 U.S.C. § 317 (1976 & Supp. V 1981), and the regulations of the Federal Communications Commission, 47 C.F.R. § 73.1212 (1981), require licensed broadcast stations to identify the sponsors of paid political advertisements at the time those advertisements are broadcast. The licensee is under a duty, moreover, to make a reasonably diligent inquiry to learn, in order to identify, the true sponsor of the advertisements when the licensee has reason to think that it is someone other than the apparent sponsor. 47 U.S.C. § 317(c) (1976). This case concerns the scope of the licensees' duty to investigate.

Petitioners challenge the Commission's conclusion that California radio and television stations adequately discharged their obligation to investigate and to identify the true sponsor of political advertisements opposing an initiative before the voters of California on a 1980 referendum. Had the electorate approved that initiative, Proposition 10, the resulting law would have required separate smoking and no smoking areas in most enclosed public places, places of employment, and educational or health facilities. California voters rejected the proposition.

The advertisements in question were paid for by a political action committee called Californians Against Regulatory Excess ("Regulatory Excess" or "CARE"). Stations broadcasting the advertisements identified that committee as the sponsor. Petitioners, Paul Loveday and a political action committee that supported the initiative, Californians for Smoking and No Smoking Sections (or "Yes on 10"), claim that they furnished the stations with sufficient information to require them either to identify the tobacco industry as the true sponsor or, at a minimum, to investigate more diligently. This court has jurisdiction to review the Commission's contrary decision under 47 U.S.C. § 402(a) (1976) and 28 U.S.C. §§ 2342, 2344 (1976).

We affirm because we conclude that, on these facts, the licensees were not required to inquire further into the actual sponsorship of the political advertisements. Indeed, we have substantial doubt that the Commission could require licensees to do more.

I.

A.

On September 26, 1980, Richard Kalish, a representative of Yes on 10 and an associate of petitioner Loveday, wrote to all California radio and television stations asserting that the tobacco industry was sponsoring Regulatory Excess' advertising campaign and was supplying Regulatory Excess with almost all of its funds. He pointed out that Regulatory Excess had, according to its recent campaign finance disclosure statement, been purchasing more radio and television time than its stated resources would permit. He also stated that the tobacco industry had provided almost all of the $6.5 million expended to defeat a similar proposition in 1978. These considerations, Kalish wrote, made it "apparent" that the tobacco industry was virtually the sole source of funds for Regulatory Excess' efforts. The letter directed the licensees' attention to Commission sponsorship identification provisions, which, according to Kalish, required the California licensees "both to discover and to disclose the fact of the Tobacco Industry's sponsorship of the advertising so the public can know 'by whom it is being persuaded.'" Kalish argued that there was "affirmative deception" involved in identifying Regulatory Excess as a California entity when it received virtually all its funds from sources outside California. Kalish expressed the hope that the licensees would satisfy their sponsorship identification obligations without further prodding, but he also threatened to file a complaint with the Federal Communications Commission or to take other action should the stations fail to satisfy their sponsorship identification obligations. The letter did not document Kalish's allegations.

Receiving no response from any of the California stations, Kalish wrote to them again on October 3. His three-page letter reiterated and amplified both his claim that Regulatory Excess was an agent for the tobacco industry and his analysis of the sponsorship identification requirements.[1]

1. The new allegations Kalish offered were: (1) a pollster had concluded that, since tobacco industry spending for ads had become an issue in 1978 and had caused a backlash, the tobacco industry might have lost the Proposition 5 campaign if it had spent more money; (2) the tobacco industry had hired an advertising firm for Regulatory Excess; (3) the tobacco industry as part of its campaign had caused to be propagated "numerous public and private statements" to the effect that tobacco industry funding was not necessary for Regulatory Excess' operations and was probably not present; (4) the tobacco industry waited until the state

These additional allegations were also undocumented. Kalish asked the stations to identify Regulatory Excess' advertisements as "Paid for by the Tobacco Industry" and warned that Yes on 10 would bring legal action against any stations that did not comply by October 8.

Regulatory Excess responded to Kalish's first letter by sending each licensee a letter from its chairman, David Bergland, outlining the committee's purpose, structure, and campaign efforts to date, as well as a legal memorandum concerning the sponsorship identification rules. In addition, some stations specifically requested an answer to Kalish's allegations from Regulatory Excess. Vigo Nielsen, counsel for Regulatory Excess, replied to at least some of these requests. Nielsen indicated that Regulatory Excess was not an agent for the tobacco industry. He declined to comment upon the tobacco industry's political motives or policies but acknowledged that various tobacco companies, after concluding that a "hands-off" approach might be interpreted as support for Proposition 10, had contributed to Regulatory Excess' campaign. Nielsen also noted that Regulatory Excess was just beginning the process of soliciting contributions from California voters. He dismissed Kalish's threatened legal actions as "diversionary tactics." Finally, he referred to the previously-provided memorandum giving his interpretation of the sponsorship identification requirements, and he appended a copy of the contribution section of Regulatory Excess' state campaign finance report.

According to petitioners, 58 of the 155 California stations that had broadcast commercials for Regulatory Excess replied to Kalish's letters, though only 11 of these stations addressed the sponsorship identification question. No licensee, apparently, stopped identifying the advertisements as paid for by Californians Against Regulatory Excess.

B.

On October 16, 1980, Loveday and Yes on 10 requested a declaratory ruling from the Federal Communications Commission. They alleged that the tobacco industry was the principal behind Regulatory Excess' campaign against Proposition 10 and claimed that the California licensees had failed to satisfy their sponsorship identification obligations. They asked the Commission to declare that the tagline "Paid for by Californians Against Regulatory Excess" violated these obligations and must be replaced by the words, "Paid for by the Tobacco Industry." Because the California vote was to occur only several weeks later, petitioners asked the Commission to give their petition expedited consideration.

Petitioners presented to the Commission, as they have presented to this court, an extensive recital of the factual basis for their charges. They also submitted a wide variety of exhibits, ranging from newspaper and trade journal articles to affidavits signed by Loveday. These submissions were designed to prove that the tobacco industry was the real sponsor of Regulatory Excess' advertisements. Whether that is true, however, is beside the point. The issue before the Commission was whether the licensees were put to a duty to identify the tobacco industry as the sponsor or to inquire further about possible parties behind Regulatory Excess. Petitioners' elaborate case before the Commission was not presented to the licensees. Any duty they may have had could arise only from Kalish's two letters and Regulatory Excess' reply.

The Commission asked Regulatory Excess for a response, and that committee replied

campaign finance reporting deadline, September 23, had passed before financing any advertising for Regulatory Excess; (5) 98% of the $389,099 received by Regulatory Excess and reported in that September 23 statement came from the tobacco industry; (6) the small sum Regulatory Excess received from nonindustry sources resulting from its mail solicitation, which was financed by the tobacco industry, was, according to direct-mail fundraising experts, outweighed by the cost of the mailing; (7) Regulatory Excess had purchased approximately $1 million of broadcast time since September 23; and (8) all but $3,000 of the money provided to Regulatory Excess by tobacco companies had come from non-California sources.

to petitioners' application, in accordance with the Commission's request for expedition, on October 24, two days after receiving it. Regulatory Excess described its efforts to reply to the inquiries it had received from the California broadcasters regarding its relationship with the tobacco companies. We need not detail that response, much of which went to the issue of the tobacco industry's control of Regulatory Excess, for the same reason that we do not set out petitioners' evidence.

C.

The Broadcast Bureau, acting under authority delegated by the Commission, 47 C.F.R. §§ 0.71, 0.281 (1980), denied petitioners' application on October 30. Letter from the Broadcast Bureau to Paul Loveday, JA at 2, *reported at In re Request for Declaratory Ruling of Paul Loveday and Californians for Smoking and No Smoking Sections,* 87 F.C.C.2d 492, 493 (1981). Identifying the issue as "whether the California broadcast station licensees have failed to exercise reasonable diligence to identify the sponsor of the CARE advertisements," *id.* at 496, the Bureau concluded that the stations had met their obligations. The Bureau further observed that the sponsorship identification requirements obligated a licensee to make a reasonably diligent effort to identify the sponsor of broadcast material but did not make a broadcaster an insurer of a sponsor's representations. *Id.* at 496–97. Relying upon an earlier decision, *VOTER,* 46 Rad.Reg.2d (P & F) 350 (1979), a case similar to this one, the Bureau held that the California stations had acted reasonably. 87 F.C.C.2d at 497. The Bureau added, however, that a decision to attribute Regulatory Excess' commercials to the tobacco industry would have been equally reasonable. *Id.* Turning to the question of editorial control, the Bureau concluded that, despite petitioners' allegation, admitted by Regulatory Excess, that the tobacco companies had provided Regulatory Excess with virtually 100% of its funds, there was no "conclusive evidence" that the tobacco industry exercised editorial control over Regulatory Excess' advertising campaign. *Id.* Finally, the Bureau concluded that there was no evidence that the California licensees had dismissed this matter without exercising reasonable diligence to learn whether the tobacco companies were exercising editorial control over Regulatory Excess. *Id.* at 497–98.

D.

Upon petitioners' application for review, the Commission affirmed the Bureau's decision. 87 F.C.C.2d at 492 (Order). The Commission noted that the Bureau's decision "was based primarily on a finding that the licensees did not act unreasonably," and it agreed with the Bureau that the information submitted by the parties did not demonstrate that the tobacco companies exercised editorial control over Regulatory Excess' advertisements. *Id.* The Commission modified the Bureau's ruling in only one respect; it struck the word "conclusive" from the Bureau's ruling in order to avoid the implication that the FCC would require a complainant conclusively to establish editorial control in cases like this. *Id.* The Commission accepted the Bureau's decision in all other respects and denied petitioners' application for review.

This petition followed.

II.

[1] Though petitioners suggest a number of standards of review, the law on this subject is clear. The Broadcast Bureau and the Commission rendered their decisions under the authority given by 5 U.S.C. § 554(e) (1976) and 47 C.F.R. § 1.2 (1981) to "issue a declaratory ruling to terminate a controversy or remove uncertainty." The ruling challenged here was issued in a specific factual context and resolved only the issues presented by petitioners' application. This declaratory ruling therefore "belongs to the genre of adjudicatory rulings." *Chisholm v. FCC,* 538 F.2d 349, 364 n. 30 (D.C.Cir.), *cert. denied,* 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976). *See FCC v. Pacifica Foundation,* 438 U.S. 726, 734, 98 S.Ct. 3026, 3032, 57 L.Ed.2d 1073 (1978). Petitioners have made no attempt to distinguish *Chisholm.* As a consequence, in reviewing the FCC decision, this court must ask, as we did

in *Chisholm*, whether the Commission's action was arbitrary, capricious, an abuse of discretion, or contrary to law.[2]

III.

[2, 3] Both the Communications Act and the Commission's regulations require that a broadcast licensee identify the sponsor of any paid matter transmitted and that the licensee "exercise reasonable diligence" to learn who the sponsor is.[3] This standard, according to petitioners, "requires the exertion of every effort" by licensees to identify the real sponsors of paid material that is

2. In *Chisholm*, the FCC had issued a declaratory ruling, reversing a long-standing interpretation, that press conferences and debates between federal candidates were exempt from the equal time requirements of 47 U.S.C. § 315 (1976) in certain circumstances. We upheld that action by a 2–1 vote. The majority applied the "arbitrary and capricious" standard, 538 F.2d at 364, and the dissent did not take issue with the majority on this point. *Id.* at 366–96 (Wright, J., dissenting).

3. Section 317 of the Communications Act, 47 U.S.C. § 317, provides in pertinent part:

> (a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.
>
> (2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.
>
> . . . .
>
> (c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.
>
> . . . .
>
> (e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

The applicable regulation is 47 C.F.R. § 73.1212 (1980), which provides in pertinent part:

> (a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce (1) that such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied: . . . .
>
> (b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.
>
> . . . .
>
> (e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made

broadcast. Petitioners' Opening Brief at 24c. The Commission interprets the statute and its own regulations to impose a much less stringent obligation: a licensee confronted with undocumented allegations and an undocumented rebuttal may safely accept the apparent sponsor's representations that he is the real party in interest.

We agree with the Commission's interpretation of its statutory authorization and of its own regulations. We agree not merely because the Commission's interpretation is entitled to deference but also because we have grave doubts that the Commission could, in circumstances like these, require more of the licensees than it did in this case. A duty to undertake an arduous investigation ought not casually be assigned to broadcasters. A variety of considerations, ranging from practical ones of administrative feasibility to legal ones involving constitutional difficulties, support that view. We would be reluctant, therefore, to find a power in the Commission to require more of licensees than it has required here unless there existed rather clear evidence that Congress intended to vest such a power. But an examination of the Communications Act, its legislative history, and the evils that Congress addressed does not reveal an intention to require more of licensees than the Commission required here.

A.

The Commission's authority in this area is conferred by section 317 of the Communications Act, 47 U.S.C. § 317 (1976 & Supp. V 1981).[4] Section 317 contains three subsections of particular relevance.

Subsection (a)(1) provides that if a licensee broadcasts any "matter" for which "any money, service or other valuable consideration" has been "directly or indirectly" given or promised to the licensee by "any person," the licensee must announce that its broadcast has been "paid for or furnished, as the case may be, by such person" at the time the broadcast is presented.

A proviso to subsection (a)(1) states that the announcement need not be made for services or property donated without charge or at a nominal charge. The proviso's exemption is narrowed by subsection (a)(2) which states that nothing in the section shall preclude the Commission from requiring "an appropriate announcement" when a licensee broadcasts any political program or program discussing a controversial issue for which the licensee has received any type of broadcast material, even if no monetary consideration is involved.

Subsection (c) requires a station to "exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable [it] to make the announcement required by this section." In contrast to subsection (a)(1), subsection (c) refers only to persons with whom a station deals directly and thus indicates that the station may rely on the data provided by such a person to determine whether the party paying is the real party in interest. In its terms, then, the "reasonable diligence" required by subsection (c) does not mandate a full-scale investigation by a broadcaster and is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast.

B.

Legislative history tends to confirm the understanding of the licensee's duty indicated by the statute's text. Section 317 traces its lineage to section 19 of the Radio Act of 1927, ch. 169, 44 Stat. 1162, 1170.

1. The Radio Act of 1927, the first comprehensive federal regulation of broadcasting, was primarily a "traffic control" meas-

available for public inspection at the location specified by the licensee under § 73.3526 of this chapter. If the broadcast is originated by a network, the list may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file under § 73.3526 of this chapter. Such lists shall be kept and made available for a period of two years.

4. See note 3 *supra*.

ure authorizing the newly created Federal Radio Commission to eliminate the chaos created by the rapidly increasing number of private broadcasters who often used the same wavelengths in the same vicinities. *National Broadcasting Co. v. United States*, 319 U.S. 190, 210–13, 63 S.Ct. 997, 1006–08, 87 L.Ed. 1344 (1943); *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–77 & nn. 4–5, 89 S.Ct. 1794, 1798–99, 23 L.Ed.2d 371 (1969). The sponsorship identification provision of the Act occupied a humble position in the regulatory design and went virtually unnoticed.

As originally proposed, the predecessor to the 1927 bill, H.R. 7357, did not contain such a provision. *To Regulate Radio Communication: Hearings on H.R. 7357 Before the House Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 1–7 (1924) (reprinting bill (hereinafter *House Hearings on H.R. 7357*). During the hearings, however, Representative Ewin Davis recommended a provision requiring broadcasters to identify paid advertisements as such. He suggested that the requirement should be similar to an existing postal law that required all mailed, second-class material such as newspapers or magazines clearly to identify all paid advertisements.[5] *House Hearings on H.R. 7357* at 60. Insofar as this suggestion was subsequently addressed in the hearing, the attention devoted to it was cursory. *See, e.g., id.* at 84–85. Section 6 of the bill reported out of the committee required, in the words of the House Merchant Marine and Fisheries Committee, that "all matters broadcasted for which any money or other valuable consideration is paid shall be announced as advertising at the time the same is broadcasted." H.R. Rep. No. 719, 68th Cong., 1st Sess. 6 (1924). The House of Representatives never voted on the bill. H. Warner, *Radio and Television Law* § 92, at 769 & n. 38 (1948).

During the next Congress, Representative Wallace White introduced H.R. 5589, which, in section 5, contained a sponsorship identification provision based on section 6 of H.R. 7357. *To Regulate Radio Communication: Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine and Fisheries*, 69th Cong., 1st Sess. 5 (1926) (reprinting H.R. 5589) (hereinafter *House Hearings on H.R. 5589*).[6] Like its predecessor, section 5 of H.R. 5589 was the subject of limited discussion.[7] The Committee Report accompanying H.R. 5589 referred to section 5 only briefly and stated simply that the purpose of this provision was "to make sure that advertising shall not be hidden from the listener." H.R.Rep. No. 404, 69th Cong., 1st Sess. 3 (1926).

5. Act of Aug. 24, 1912, ch. 389, 37 Stat. 539, 553, *amended*, Act of Mar. 3, 1933, ch. 207, 47 Stat. 1486 (codified at 39 U.S.C. § 234 (1952)), *readopted as amended*, Act of Sept. 2, 1960, Pub.L. No. 86–682, 74 Stat. 578, 671 (codified at 39 U.S.C. § 4367 (1970)), *repealed*, Postal Reorganization Act of 1970, Pub.L. No. 91–375, § 2, 84 Stat. 719.

6. Section 5 provided:

> All matters broadcasted by any radio station for which service[,] money or any other valuable consideration is directly or indirectly paid or promised to or charged or accepted by, the station so broadcasting, shall be announced as "advertising" at the time the same is so broadcasted: *Provided*, That when the advertisement or publicity sought consists solely of the announcement of the name, business, and address of the person, firm, company, or corporation paying for the feature broadcasted it shall be sufficient to announce that such feature is "paid for or furnished by" such person, firm, company, or corporation.

7. Again, only two witnesses addressed section 5 in their testimony. One, Commerce Department Solicitor Stephen Davis, stated that the Department, the executive department then responsible for regulating radio, was "complete[ly] indifferen[t]" towards section 5. *House Hearings on H.R. 5589* at 133. The other witness, Herbert Smith, a representative of the National Carbon Company, which sponsored an entertainment program known as the "Ever-Ready Hour," recommended an amendment to section 5 to eliminate any confusion about what it required when a firm sponsored an entire entertainment program rather than a commercial. *Id.* at 82–85. Representative Davis reiterated his concern that radio stations should be required to identify advertisements, lest the audience be deceived into believing that the station itself sponsored the broadcast, *id.* at 83–87, but disagreed with Mr. Smith's amendment solely on questions of language. *Id.* With only minor changes in language, the committee adopted the amendment.

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On the House floor, another bill, H.R. 9971, which also contained a sponsorship identification provision, was substituted for H.R. 5589. 67 Cong.Rec. 5473–78 (1926). The House engaged in a lengthy debate over H.R. 9971, but section 5 was rarely addressed. There was no discussion of the proposed sponsorship identification section, and the only amendment offered to this provision, one which would have eliminated the committee's proposal to permit alternative forms of announcements, was defeated. *Compare* 67 Cong.Rec. 5488 (1926) (proposed amendment by Rep. Cellar) *with id.* at 5574 (vote on amendment). The House passed H.R. 9971 with section 5 unchanged.

The Senate referred H.R. 9971 to the Committee on Interstate Commerce, which had already held its own hearings on two Senate bills to regulate radio communications. *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. (1926). Neither of these proposals contained a sponsorship identification section, *id.* at 1 (reprinting S. 1), 1–8 (reprinting S. 1754), and neither the witnesses who testified at these hearings nor the Senators who were present proposed that one should be added. Ultimately, the Committee substituted a greatly revised bill for H.R. 9971, *see* S.Rep. No. 772, 69th Cong., 1st Sess. 1 (1926), in which section 5 was nonetheless incorporated in the same form that the House had passed. *See* 67 Cong.Rec. 12,502 (1926) (remarks of Senator Dill). The only reference to the sponsorship identification requirement in the Senate Committee's Report was the statement that "[a]ll matter broadcast for hire shall be announced as paid material . . . ." S.Rep. No. 772, *supra*, at 4.

In the Senate debate on its version of H.R. 9971, there was no substantial discussion of the sponsorship identification provision. Section 5 of the House proposal, as approved by the Senate Interstate Commerce Committee, was left unchanged in the final modified version of H.R. 9971 that was passed by the Senate and referred to a Conference Committee. 67 Cong.Rec. 12,618 (1926). The compromise reached by the Conference Committee in turn adopted section 5, renumbered as section 19 of the Conference Committee bill, without substantial change. H.R.Conf.Rep. No. 1886, 69th Cong., 2d Sess. 18 (1927). After some debate, both chambers accepted the Conference proposal, including section 19. 68 Cong.Rec. 2580 (1927) (House vote); 68 Cong.Rec. 4155 (1927) (Senate vote). The President later signed the Radio Act of 1927 into law.[8]

The legislative history of the Radio Act of 1927 shows that the sponsorship identification provision imposed only a very limited obligation upon broadcasters: to announce that a program had been paid for or furnished to the station by a third-party and to identify that party. We have neither found nor been pointed to any indication that Congress contemplated that section 19 might require broadcasters to investigate whether a party purchasing commercial time was acting on his own behalf or as an agent for someone else.

Similarly, we have not discovered any evidence outside the formal legislative history that suggests that Congress or the legal community believed that section 19 required broadcasters to undertake investigations. The contemporary literature thoroughly canvassed what were then thought to be the major provisions and purposes of the Act,[9] and the sponsorship identification

8. As enacted this section read as follows:

SEC. 19. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.

Ch. 169, 44 Stat. 1162, 1170.

9. *See* Ashby, *Legal Aspects of Radio Broadcasting*, 1 Air L.Rev. 331 (1930); Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 Air L.Rev. 295 (1930); Caldwell, *Censorship of Radio Programs*, 1 J.Radio L. 441 (1931); Chamberlain, *The Radio Act of 1927* (pts. 1–2), 13 A.B.A.J. 343, 368 (1927); Chapman, *The Power of the Federal Radio Commission to*

provision was hardly noticed. The commentators who made reference to section 19 limited their discussion to a restatement of its language.

2. In the years immediately following the passage of the 1927 Act, section 19 provoked no controversy whatever. Congress returned to the subject of communications in 1934 not to redress major perceived inadequacies in the existing legislation but simply to refine the system it had already established. As stated in section 151 of the Communications Act of 1934,[10] its purpose was to promote the effective and efficient use of communications for the public and private weal by augmenting existing regulatory authority and centralizing that authority in the hands of one agency, the newly created Federal Communications Commission.[11] The legislative history of the 1934 Act reveals no dissatisfaction with the existing sponsorship identification requirement. Section 19, renumbered as section 317, was neither amended nor debated.[12]

3. After 1934, Congress devoted little if any attention to section 317 until scandals in the broadcast industry surfaced in the late 1950s. It was learned at that time that record companies made secret payments to disc jockeys to play certain records (a practice known within the industry as "payola") and that game show contestants had been provided with answers to questions beforehand in order to enhance the dramatic quality of the programs. Both the Attorney General[13] and congressional committees[14]

Regulate or Censor Radio Broadcasts, 1 Geo. Wash.L.Rev. 380 (1933); Davis, *The Radio Act of 1927*, 13 Va.L.Rev. 611 (1927); Davis, *International Radio Relations*, 16 Geo.L.J. 400 (1928); Donovan, *Origin and Development of Radio Law* (pts. 1–3), 2 Air L.Rev. 107, 349, 468 (1931); Nordhaus, *Judicial Control of the Federal Radio Commission*, 2 J.Radio L. 447 (1932); Rowley, *Problems in the Law of Radio Communication*, 1 U.Cinn.L.Rev. 1 (1927); Webster, *Our Stake in the Ether*, 17 A.B.A.J. 369 (1931); Webster, *Notes on the Policy of the Administration with Reference to the Control of Communications*, 5 Air L.Rev. 107 (1934); White, *History of Radio Legislation in the United States*, 2 J.Radio L. 179 (1932); Note, *The Constitutionality of the 1927 Radio Act and Amendments*, 1 Air L.Rev. 127 (1930); Note, *Radio Act of 1927—Constitutionality of Davis Amendment*, 4 Air L.Rev. 182 (1933); Note, *The Radio Act of 1927*, 27 Colum.L.Rev. 726 (1927).

10. The Communications Act of 1934, ch. 652, § 151, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.* (1976)).

11. See *National Broadcasting Co. v. United States*, 319 U.S. at 214, 63 S.Ct. at 1008; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 60 S.Ct. 437, 438, 84 L.Ed. 656 (1940); 1 A. Socolow, *The Law of Radio Broadcasting* § 47, at 54; § 48, at 55 (1939); H. Warner, *Radio and Television Law* § 102, at 795–96 (1948); McManus, *Federal Legislation Regulating Radio*, 20 S.Cal.L.Rev. 146, 154 (1947).

12. The Senate, House, and Conference Committee Reports each indicated that section 317 of the new Act readopted section 19 of the 1927 Act. S.Rep. No. 781, 73d Cong., 2d Sess. 8 (1934); H.R.Rep. No. 1850, 73d Cong., 2d Sess. 2, 7 (1934); H.R.Conf.Rep. No. 1918, 73d Cong., 2d Sess. 47 (1934). The only difference between section 19 and section 317 was that section 317 omitted the reference to "firm, company, or corporation" after the reference to "person" in section 19.

Like its predecessor, section 317 of the 1934 Communications Act did not receive any special attention by the legal community. Commentary on section 317 was, again, typically limited to a restatement of the terms of the statute. *See, e.g.*, Note, *Communications Act of 1934*, 21 Va.L.Rev. 318, 322 & n. 31 (1935).

13. Report to the President by the Attorney General on Deceptive Practices in Broadcasting Media (1959), *reprinted in Investigation of Regulatory Commissions and Agencies, Interim Report of the Subcomm. on Legislative Oversight*, H.R.Rep. No. 1258, 86th Cong., 2d Sess. (1960).

14. *Investigation of Television Quiz Shows: Hearings Before the Legislative Oversight Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1959); *Investigation of Regulatory Commissions and Agencies, Interim Report of the Subcomm. on Legislative Oversight*, H.R.Rep. No. 1258, 86th Cong., 2d Sess. (1960); *Responsibilities of Broadcasting Licensees and Station Personnel: Hearings on Payola and Other Deceptive Practices in the Broadcasting Field Before the Legislative Oversight Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960); *Communications Act Amendments: Hearings on Conditional Grants, Pregnant Procedure, Local Notice, Local Hearings, Payoffs, Suspension of Licenses, and Deceptive Practices in Broadcasting Before the Communications and Power Subcomm. of the House Comm. on Interstate*

investigated. The practices disclosed led Congress to amend section 317 in 1960. The most important feature of the amendments, for present purposes, was the addition of subsection (a)(2).

As noted above, the language of subsection (a)(2) authorized the FCC to require licensees to make "an appropriate announcement" if the licensee broadcast political or controversial material, even if it had received that material free of charge. The legislative history pertinent to that subsection is sparse but indicates that Congress adopted it in order to ratify regulations adopted by the Commission in 1944,[15] which had expanded a licensee's obligations in several ways. *See* H.R.Rep. No. 1800, 86th Cong., 2d Sess. 24–25 (1960); S.Rep. No. 1857, 86th Cong., 2d Sess. 5 (1960).[16] In

and Foreign Commerce, 86th Cong., 2d Sess. (1960). *See also Proposed Amendments to FCC Act of 1934: Hearing on S. 1898 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960).

15. These regulations provided in pertinent part:

Section 3.409 *Sponsored programs, announcement of.*

(a) In the case of each program for the broadcasting of which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, any radio broadcast station, the station broadcasting such program shall make, or cause to be made, an appropriate announcement that the program is sponsored, paid for, or furnished, either in whole or in part.

(b) In the case of any political program or any program involving the discussion of public controversial issues for which any records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be made both at the beginning and conclusion of such program on which such material or services are used that such records, transcriptions, talent, scripts, or other material or services have been furnished to such a station in connection with the broadcasting of such program: *Provided, however,* That only one such announcement need be made in the case of any such program of five minutes' duration or less, which announcement may be made either at the beginning or the conclusion of the program.

(c) The announcement required by this section shall fully and fairly disclose the true identity of the person or persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (b) hereof are furnished. Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

(d) In the case of any program, other than a program advertising commercial products or services, which is sponsored, paid for or furnished, either in whole or in part, or for which material or services referred to in paragraph (b) hereof are furnished, by a corporation, committee, association or other unincorporated group, the announcement required by this section, shall disclose the name of such corporation, committee, association or other unincorporated group. In each such case the station shall require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group shall be made available for public inspection at one of the radio stations carrying the program.

9 Fed.Reg. 14,734 (1944) (codified at 47 C.F.R. § 3.409 (Supp.1944)).

16. The House Report stated:

Proposed section 317(a)(2)

This subsection makes it clear that the instant legislation is not intended to change the Commission's present requirement that an announcement be made in the case of any political program or any program involving the discussion of any controversial issue even where the program matter is furnished without charge or at a nominal charge as an inducement to the broadcast of the program. Thus, an announcement in these circumstances may be required even though, in fact, the matter broadcast is not "paid" matter. However, the Commission in 1944, with the concurrence of the broadcast industry, promulgated a rule to this effect. The broadcast industry at no time has raised objection to the announcement requirement in these situations. In order to provide specific statutory authority for the requirement of an announcement here, the substance of the Commission rule has been included as subsection (a)(2) of the amended section 317.

H.R.Rep. No. 1800, *supra*, at 24–25. The Senate Report only stated that "Subsection (a)(2) of proposed section 317 would permit the Commission to continue in existence its rule regard-

particular, subsection (c) of these regulations required that a licensee "fully and fairly disclose the true identity of the person or persons by whom or in whose behalf" the licensee was paid or from whom the licensee received political or controversial program material. 9 Fed.Reg. 14,724 (1944) (codified at 47 C.F.R. § 3.409(c) (Supp. 1944)). In addition, "[w]here an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station," the station was required to identify the principal rather than the agent when it made the sponsorship announcement. *Id.*

Congress' ratification of these Commission regulations did not impose any burden of independent investigation upon licensees. We have seen that the language of section 317, of itself, does not do so, and it is equally plain that the regulations do not. Subsection (c) of the regulations requires disclosure by the licensee but does not require investigation. The inference that the licensee is required to disclose only what he knows without investigation is fortified by the further statement in subsection (c) that where an agency relationship exists "and such fact is known to the station," the licensee must identify the principal rather than the agent. The regulation did not say, as it easily could have done, that such identification must be made when the licensee could learn of the agency or that the licensee must inquire if circumstances give reason to suspect an undisclosed principal. The regulations Congress ratified imposed an extremely limited duty upon licensees.

Nothing in the legislative history suggests that Congress was aware of any "payola"-like scandals or problems akin to "payola" in the realm of political programming. Nor was Congress acting against a background of significant Commission interpretation of its own regulations that Congress may be presumed to have adopted. The one significant Commission action prior to Congress' 1960 amendment of section 317 came in *Albuquerque Broadcasting Co.*, 40 F.C.C. 1 (1946). The licensee there had written to the Commission for clarification of its responsibilities with respect to the identification of sponsors of political broadcasts. The Commission's reply stated, somewhat unhelpfully, that a licensee's compliance would be judged on a case-by-case basis. *Id.* The Commission gave only one illustration:

> For example, if a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of the funds to be used for payment. This is particularly true in a case where the speaker has previously appeared on similar broadcasts sponsored by others, and announces the fact that he is resuming his broadcasts.

Id. The principle being applied by the Commission was, apparently, that a licensee had not merely a duty to announce the true sponsor when that sponsor's identity was known to the licensee, but that circumstances might raise such a suspicion in the mind of a reasonable man that the licensee was placed under a duty to take affirmative action to learn the identity of the true sponsor. The Commission took no position, however, on how extensive the required investigation must be. For example, if the speaker insisted that he was the real principal, must the licensee demand to know the source of his funds, require an affidavit of him, and interview persons who might know the situation? Does the extent of the licensee's obligation vary according to the remoteness of the witnesses and evidence and the licensee's resources? The singularly unhelpful nature of the Commission's advice was highlighted by its further observation: "Nor would the fact that an independent investigation is necessary in a particular case, automatically relieve a station from its responsibility to make its facilities available to the person in question." *Id.*[17]

ing political programs or controversial issues." S.Rep. No. 1857, *supra*, at 5.

17. In a series of opinions rendered between 1958 and 1960, which coincided with the period during which the Attorney General and Con-

Had Congress known of *Albuquerque Broadcasting*, and had it intended to ratify that letter of advice in amending section 317, the result would be merely that a licensee was put upon some undefined duty of inquiry when rather obtrusive facts suggested that the purported sponsor of a political broadcast was not the actual sponsor. There is, however, no indication that Congress even knew of the Commission's interpretation. *Albuquerque Broadcasting* was not explicitly referred to in the House Report, the Senate Report, or the floor debates in either chamber. *See* H.R.Rep. No. 1800, *supra*; S.Rep. No. 1857, *supra*. Thus, the Commission regulations as they existed and were interpreted at the time Congress ratified them by enacting subsection (a)(2) of section 317 give no reason to impute to Congress any desire to impose upon licensees a duty of wide-ranging investigation. Certainly, Congress expressed no such intention.[18]

The only remaining question then is whether subsequent actions by the Commission have expanded, and can legitimately expand, a licensee's duty to investigate.

C.

Following the 1960 statutory amendments, the Commission in 1963 issued new regulations that consolidated the existing regulations and the 1960 amendments. *In re Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141, 143–44 (1963) (codified at 47 C.F.R. § 73.119 (1964)). The Commission did not decide another case involving political broadcasts until *WHAS, Inc.*, 40 F.C.C. 190 (1964).

That case arose when an advertising agency purchased air time from WHAS to present "The Chandler Years in Review," a disparaging commentary on Albert Benjamin Chandler's tenure as Governor of Kentucky. Two days later, an agency employee told WHAS that the broadcast would be paid for by "The Business Friends for Breathitt," Breathitt being Chandler's opponent in a gubernatorial campaign. Other facts known to the station also gave it reason to know that the Breathitt campaign was paying for the telecast. Within a week, the advertising agency "corrected" its phone call to say that "The Committee for Good Government" would sponsor the telecast instead, and the program was broadcast under that name. 40 F.C.C. at 191–92.

The FCC held that WHAS violated its sponsorship identification obligation because the station was required to notify the public of the principal's identity, where it

gress were conducting their investigations, the Commission held that several licensee stations had violated their section 317 obligations by failing to disclose that they had received free summaries of certain Senate hearings from the National Association of Manufacturers. 40 F.C.C. at 12–65. Although the Commission noted in some of these cases that material of a politically controversial nature should alert licensees to be especially diligent about the obligations imposed by section 317, the Commission's pronouncement was made in the context of licensee failure to make any announcement at all and thus does not indicate the extent of licensee responsibility to reject an identification provided by the party who supplied the material. The Commission also ordered all licensees to inform the Commission of all broadcasts they had made for compensation in the past year and any internal controls they had established. *In re Sponsorship Identification Compliance*, 40 F.C.C. 66 (1959). The Commission also issued a discussion of its policies and practices, *In re Sponsorship Identification of Broadcast Material*, 40 F.C.C. 69 (1960), among other rulings. None of these rulings shed significant light on the extent of any duty to investigate in circumstances such as those here where an identification has been made and the purported sponsor has submitted facially plausible information to support that identification.

18. The Senate Report describes the reasonable diligence requirement of subsection (c) as follows:

> The term "reasonable diligence" would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part.

S.Rep. No. 1857, *supra*, at 6. This explanation, while it establishes that a licensee cannot discharge its duty by passively ignoring sponsorship information it might easily obtain, nonetheless indicates that a licensee need not go behind the information it receives to guarantee its accuracy.

was known to the licensee, rather than simply identify the agent purchasing the air time.

The Commission sued to recover the forfeiture it had imposed. The district court, however, held that WHAS had not violated the sponsorship identification rules, *United States v. WHAS, Inc.*, 253 F.Supp. 603 (W.D.Ky.1966). The Sixth Circuit affirmed, holding that subsection (d) of the regulations [19] gave the station the right to identify the payer as the sponsor even though subsection (c) might have been read to require that the actual sponsor be named when known to the station. *United States v. WHAS, Inc.*, 385 F.2d 784 (6th Cir.1967). The court remarked that it was "by no means precluding the FCC from adopting a Regulation calculated to require a station to make reasonable efforts to go beyond a named 'sponsor' for a political program in order to ascertain the real party in interest for purposes of announcement." *Id.* at 788.

The Commission did not respond to the *WHAS* decision by amending its regulations until 1975. The new regulations provided that where an agent makes arrangements with a station on behalf of another "and such fact is known or by the exercise of reasonable diligence . . . could be known to the station," the sponsorship announcement must disclose the name of the principal rather than the agent. 52 F.C.C.2d 701, 714 (1975). The Commission dismissed the argument of the National Broadcasting Company that it did not have the statutory authority to require a licensee to search for the true identity of a sponsor by relying upon the Sixth Circuit's *dictum* in *United States v. WHAS, Inc.*, 385 F.2d at 788. 52 F.C.C.2d at 708–09.

Prior to Loveday's petition, only the Commission has had occasion to interpret the 1975 regulations, as it did in *VOTER*, 46 Rad.Reg.2d (P & F) 350 (1979). Westchester County, New York, had on its ballot a proposition to establish a county utility agency and to explore the development of a public power authority for the county. VOTER, a citizens committee that supported the proposition, complained that stations in the New York City area had broadcast paid advertisements in opposition to the proposition and had identified the advertisements as paid for by Westchester Citizens Against Government Takeover. In fact, VOTER alleged, the true sponsor was Consolidated Edison Company of New York, from which Westchester Citizens derived all or a very substantial part of its funds. Westchester Citizens replied that it had accepted substantial funds from Consolidated Edison but that no officer or employee of the utility was a member or eligible for membership in Westchester Citizens and that the latter paid for and controlled the content of the advertisements. The Broadcast Bureau ruled:

> Under the [Commission's] policies . . . , we cannot prohibit any licensee who chooses to do so from *adding* the identification you urge. However, we cannot conclude [that] any licensee, in evaluating the facts before it regarding the advertisement, failed to exercise reasonable diligence by accepting the representations of Westchester Citizens. The substantial proportion of Con Edison's role in Westchester Citizens funding might suggest a basis for further inquiry to some licensees. On the other hand the Westchester Citizens by-laws, represented assertion of editorial control over these advertisements, and the weight of precedent suggest that those licensees who accepted Westchester Citizens' advertisements as offered did so in good faith and without closing their eyes to any attempted misrepresentation. Indeed, some licensees may conclude, either on the facts thus far provided by the Westchester Citizens, or additional information not now before us, that, in its view, "Con Edison" alone is the appropriate identification. In such a case, we would have no basis for finding that the licensee has acted unreasonably.

46 Rad.Reg.2d (P & F) at 352.

As the excerpt above suggests, the Commission has never indicated in enforcement

19. The relevant regulations were identical to those cited in note 15 *supra*.

proceedings that section 317 or its own regulations require a station to conduct any investigation or to look behind the plausible representations of a sponsor that it is the true party in interest.

D.

In light of our examination, we must reject petitioners' contention that the legislative history of the Communications Act requires the Commission to impose upon licensees a duty to investigate when they receive conflicting representations of the type involved here. If Congress intended to impose a duty of licensee investigation in a case of this sort, that intention was never made explicit in the statute or its history.

There are, moreover, good reasons why this court should not read into the statute or regulations the licensee duty petitioners seek to establish. The result, if we agreed with petitioners' argument, would be to create an administrative quagmire, to establish standards so variable as to invite abuse, and to raise possible constitutional questions. These are not merely reasons for a court to stay its hand, they are also reasons to doubt that Congress could have intended what petitioners argue.

Petitioners have been rather indefinite about what the California broadcasters were required to do when confronted by Kalish's allegations and Bergland's counter-allegations. The reasons for that vagueness may be suggested by an attempt to imagine the details of any process of further investigation. Broadcast companies are not grand juries. They have no power to subpoena documents or to compel the attendance of witnesses. They could, of course, refuse to broadcast unless all relevant documents and witnesses were produced for examination. If we make the rather implausible assumption that executives of the apparent sponsor, the advertising agency, and the alleged real sponsor would all cooperate, the result would be to judicialize the process of being allowed to utter a political statement. Having provided no clear indication that it contemplated such results, Congress cannot be presumed to have intended to place that burden, expense, and delay upon political speech. In the absence of such cooperation by the parties with whom stations deal, the alternative would be a field investigation by agents of the stations, involving requests for documents and interviews and, perhaps, observation of suspected persons. Again, the burden, expense, and delay would be considerable and in many cases possibly prohibitive. Section 317 can hardly have been designed to turn broadcasters into private detectives.

Even supposing a searching investigation to be a realistic possibility, the result of requiring it would be an administrative quagmire. Broadcasters differ greatly in their resources and personnel, ranging from large stations in urban areas to small stations that often have no more than one person on the premises.[20] Similarly, the "sponsors" whom they would have to investigate may be large or small, nearby or geographically remote, cooperative or recalcitrant. The intensity of the investigation that will be practicable will vary according to the combination in a particular case of these and other factors. In the present case, for example, a spectrum of different duties of investigation would have to be applied to the radio and television licensees in California. The administrative burden such a system would impose on the Commission would surely strain, and might well be beyond, its powers. The series of hearings involved would probably require years to complete. Equally problematic is the question of fairness to the licensees, who would have to guess in every situation what the Commission would later find to be "reasonable diligence." Indeed, we cannot completely overlook the opportunities for abuse that such a variable and unknown standard would present should some future Commission use its powers for political purposes.[21]

20. *See* 106 Cong.Rec. 14,310–11 (1960) (remarks of Rep. Avery).

21. It has been said that the fairness doctrine lends itself to use for partisan political pur-

This constitutes an additional reason to insist that the regulatory rules to which licensees are subject be clear and not susceptible to manipulation.

Were we to approve a stringent obligation to investigate, one along the lines petitioners seek, the most likely result would be that many stations, in lieu of incurring the expense of the investigation and the risk that the Commission would later assess their duties differently, would try, possibly by imposing burdensome disclosure requirements on advertisers, to avoid carrying advertisements of the type involved here. If so, opponents of groups sponsoring political messages would have a ready means of harassing and perhaps silencing their adversaries by making charges, however baseless, that the true sponsor of a political advertisement was someone other than the named sponsor. The rule petitioners seek might, therefore, have the effect of choking off many political messages. Quite aside from any First Amendment difficulties that such a rule might implicate, we are certainly not prepared to say that the public would be benefited from a decline in the number and variety of political messages it receives.[22] Even more certainly, any such decision concerning the public benefits of such a rule should come from Congress and not this court.

Finally, it may not be amiss to note that reading into the silences of the legislative history the duties that petitioners advocate would create a situation that is not entirely free of First Amendment concerns. Supreme Court decisions compel us to recognize that the First Amendment's protections of speech and the press are less strong where the broadcast media are concerned than they are with respect to the print media.[23] "[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC v. Pacifica Foundation*, 438 U.S. at 748, 98 S.Ct. at 3039. Given the differences in the availability of access to the various types of media and their differences in impact, various rationales have been offered by the Supreme Court for the differences in constitutional protection. The rationale that applies most forcefully in the present context would seem to be the scarcity of available frequencies on the broadcast spectrum.

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.

poses. *See* F. Friendly, *The Good Guys, the Bad Guys and the First Amendment* (1976).

22. Only last year the Supreme Court wrote that "[i]n a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent." *Brown v. Hartlage*, 456 U.S. 45, 61, 102 S.Ct. 1523, 1533, 71 L.Ed.2d 732 (1982). We believe the same can be said for ballot initiatives like the ones here, even when it is the identity of the speaker that is in issue rather than the content of his speech. Indeed, petitioners themselves admit that, despite the tobacco industry's alleged efforts to cover its trail during the Proposition 5 campaign, the California voters were well aware of the industry's involvement. JA at 22, 55; Petitioners' Opening Brief at 5, 12.

23. *Compare Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (ban on anonymous leaflets invalid), *and Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (state law providing right of reply to political candidate attacked by newspaper invalid), *with Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1981) (FCC fairness doctrine and implementing rules valid), *and CBS, Inc. v. FCC*, 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981) (statute providing political candidates right of access to broadcast stations and FCC's implementation of statute valid). *Compare Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (ban on residential "For Sale" signs violates First Amendment). *with Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C.1971) (three-judge court), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972) (mem.) (upholding ban on broadcast advertising of cigarettes over First Amendment challenge). *See also Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190 (1913) (upholding, over First Amendment challenge, the postal law requiring second-class mail to identify advertisements that was the basis for section 317).

National Broadcasting Co. v. United States, 319 U.S. at 226, 63 S.Ct. at 1014. Today when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted and the number when the *National Broadcasting Co.* case was decided but rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried, it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand. As matters now stand, the protections accorded printed messages are not wholly irrelevant to broadcast freedoms. Thus, while it has been held unconstitutional for a city ordinance to require disclosure of the author of a printed statement, *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), such disclosure may apparently be required where the statement is broadcast. Nonetheless, even in broadcasting, where the law's attempt to discover the true utterers of political messages becomes so intrusive and burdensome that it threatens to silence or make ineffective the speech in question, the law presses into areas which the guarantee of free speech makes at least problematic. Before we would construe a statute or a regulation to have that effect, we would require a far clearer congressional directive that stations affirmatively seek out true sponsors than we have here.[24] The failure of Congress to address these questions thus provides an additional reason for doubting that Congress intended any rule such as petitioners urge. Had Congress so intended, there surely would have been some discussion of the practicalities of investigation, the difficulties of administration, the potential unfairness, and the constitutional questions that would follow from such a rule. The legislative history is bare of any such concerns.

These observations, which we note again are mentioned not to raise constitutional doubts but to discern legislative intent, determine the outcome of this case. The licensees had before them two short letters from Kalish containing unsupported allegations that the tobacco industry rather than Regulatory Excess was the true sponsor of the advertisements opposing Proposition 10 and demanding that the stations identify the industry as the sponsor. The licensees also had before them Regulatory Excess' replies stating that it was the real sponsor. In these circumstances, we find that the Commission could properly conclude that the stations were not required to investigate further. Indeed, given what we have said, it seems at least doubtful that the Commission was free to decide otherwise.[25] There may be cases where a challenger makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor that licensees, in the exercise of reasonable diligence, would have to inform the named sponsor that they could not broadcast the message without naming another party. But that case is not before us today.

The Commission's decision that the California licensees satisfied their sponsorship identification obligation is not arbitrary, capricious, or an abuse of discretion. The Commission's interpretation of its own regulations as applied in this case is reasonable and consistent with section 317 of the Communications Act.

24. In construing the statute and regulations, we thus follow the tradition of adopting the reading that will avoid rather than implicate constitutional questions, *see United States v. Security Industrial Bank*, ——— U.S. ———, 103 S.Ct. 407, 412–14, 74 L.Ed.2d 235 (1982); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 509, 99 S.Ct. 1313, 1323, 59 L.Ed.2d 533 (1979) (Brennan, J., dissenting); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38, 81 S.Ct. 523, 529–530, 5 L.Ed.2d 464 (1961); *International Association of Machinists v. Street*, 367 U.S. 740, 749, 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–48, 56 S.Ct. 466, 482–83, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

25. We have no occasion to address the Broadcast Bureau's dictum that, given the conflicting statements before them, the licensees were free to choose to comply with petitioners' request by simply substituting the tagline suggested by petitioners for that supplied by the party with whom they dealt.

The decision of the Commission is therefore

Affirmed.

UNITED STATES of America, Appellant,

v.

Richard KELLY.

No. 82-1660.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 11, 1983.

Decided May 10, 1983.

As Amended July 6, 1983.

Following defendant's conviction in Abscam prosecutions, United States District Court for the District of Columbia, William B. Bryant, Senior District Judge, 539 F.Supp. 363, granted defendant congressman's motion to dismiss, and Government appealed. The Court of Appeals held that Government's conduct in Abscam undercover operation did not reach that demonstrable level of outrageousness which would bar prosecution of defendant congressman on charges of conspiracy to commit bribery, bribery, and interstate travel to commit bribery, despite fact that the investigation was steered in large part by a convicted swindler, it relied upon con men to identify and attract targets to whom legitimate as well as illegitimate inducements were offered, and it proceeded without close supervision by responsible official.

Reversed and remanded.

MacKinnon, Circuit Judge, filed separate opinion in which Spottswood W. Robinson, III, Chief Judge, concurred in part.

Ginsburg, Circuit Judge, filed separate opinion in which Spottswood W. Robinson, III, Chief Judge, joined.

1. Criminal Law ⇐31

Government's conduct in Abscam undercover operation did not reach that demonstrable level of outrageousness which would bar prosecution of defendant congressman on charges of conspiracy to commit bribery, bribery, and interstate travel to commit bribery, despite fact that the investigation was steered in large part by a convicted swindler, it relied upon con men to identify and attract targets to whom legitimate as well as illegitimate inducements were offered, and it proceeded without close supervision by responsible official. 18 U.S.C.A. §§ 201(c), 1952; U.S.C.A. Const.Amends. 5, 14.

2. Criminal Law ⇐37(4)

In contrast to the objective test of entrapment that measured the methods used to induce the criminal act against the standards of acceptable police behavior, the current "subjective" test looks to the propensity or predisposition of induced defendant to engage in the proscribed conduct.

3. Constitutional Law ⇐257.5
Indictment and Information ⇐144.1(1)

Courts may not alter the contours of entrapment defense under a due process cloak, and court lacks authority, where no specific constitutional right of defendant has been violated, to dismiss indictments as an exercise of supervisory power over the conduct of federal law enforcement agents.

4. Constitutional Law ⇐257.5

Courts must refrain from applying general due process constraint to bar a conviction except in the rare instance of police overinvolvement in crime that reaches a demonstrable level of outrageousness. U.S.C.A. Const.Amend. 5.

Appeal from the United States District Court for the District of Columbia. (D.C. Criminal No. 80-00340).

Michael W. Farrell, Asst. U.S. Atty., with whom Stanley S. Harris, U.S. Atty., Roger

Secretary nor the BCNR even purported to render a decision on the merits of Miller's petition to expunge the letter of censure, it is unnecessary for us to pursue the District Court's analysis of alleged "legal error." In other words, this court should not consider any arguments regarding alleged limitations on the Secretary's authority to issue letters of censure until after there has been a final judgment on Miller's claims on the merits. Accordingly, I cannot join in any of the views set forth in part III–B ("legal error") of the majority opinion.

I join only in the result requiring a remand of this case for a consideration of the merits of Colonel Miller's claims.

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER and Media Access Project, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the United States of America, Respondents.

National Association of Broadcasters, Public Broadcasting Service, American Newspaper Publishers Association, Intervenors.

No. 85–1160.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 20, 1986.

Decided Sept. 19, 1986.

As Amended Sept. 19, 1986.
Rehearing En Banc Denied Dec. 16, 1986.

Petitions which were filed seeking review of an order of the Federal Communication Commission which refused to apply three forms of political broadcast regulation to a new technology, teletext. The Court of Appeals, Bork, Circuit Judge, held that: (1) FCC's decision not to apply section of the Communications Act, which requires broadcast licensees to allow reasonable access for use of a broadcasting station by legally qualified candidate for Federal elective office to teletext was reasonable; (2) FCC erred in concluding that teletext did not constitute "traditional broadcast services" within contemplation of section of Communications Act requiring licensee to provide "equal opportunities" to competing candidates, and also erred in concluding that teletext was incapable of a "use" as that statutory term has evolved; and (3) FCC acted rationally in concluding that the public interest was better served by not subjecting teletext to fairness doctrine obligations.

Affirmed in part and reversed in part and remanded.

1. Constitutional Law ⇐90.1(9)

Federal Communications Commission cannot, on First Amendment grounds, refuse to apply to teletext such regulation as is constitutionally permissible when applied to other, more traditional, broadcast media. U.S.C.A. Const.Amend. 1.

2. Telecommunications ⇐476

Federal Communications Commission's decision not to apply section of the Communications Act which requires broadcast licensees to allow reasonable access for use of a broadcasting station by legally qualified candidate for federal elective office to teletext was reasonable. Communications Act of 1934, § 312(a)(7), 47 U.S.C.A. § 312(a)(7).

3. Telecommunications ⇐476

Federal Communications Commission erred in concluding that teletext did not constitute "traditional broadcast services" within contemplation of section of Communications Act requiring licensee to provide "equal opportunities" to competing candidates and also erred in concluding that teletext was incapable of a "use" as that

statutory term has evolved. Communications Act of 1934, § 315, 47 U.S.C.A. § 315.

4. Telecommunications ⇐430

Fairness doctrine arose under the Federal Communications Commission's power to issue regulations consistent with the public interest and imposes two affirmative obligations on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing view points.

5. Telecommunications ⇐476

Federal Communications Commission acted rationally in concluding that the public interest was better served by not subjecting teletext to fairness doctrine obligations.

Petition for Review of an Order of the Federal Communications Commission.

Robert M. Gurss, with whom Andrew Jay Schwartzman and Henry Geller, Washington, D.C., were on brief, for petitioners.

C. Grey Pash, Jr., Counsel, F.C.C., with whom Jack D. Smith, Gen. Counsel, Daniel M. Armstrong, Associate Gen. Counsel, F.C.C., John J. Powers, III and Margaret G. Halpern, Attys., Dept. of Justice, Washington, D.C., were on brief, for respondents.

Richard E. Wiley, Michael Yourshaw, William B. Baker and W. Terry Maguire, Washington, D.C., were on brief, for intervenor, American Newspaper Publishers Assn.

Henry L. Baumann, Michael D. Berg and Steven A. Bookshester, Washington, D.C., entered appearances for intervenor, National Ass'n of Broadcasters.

Peter Tannenwald, Lawrence A. Horn and Barbara S. Wellbery, Washington, D.C., entered appearances for intervenor, Public Broadcasting Service.

Before BORK and SCALIA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge BORK.

Opinion concurring in part and dissenting in part filed by Senior Circuit Judge MacKINNON.

BORK, Circuit Judge:

Petitioners challenge the Federal Communications Commission's decision not to apply three forms of political broadcast regulation to a new technology, teletext. Teletext provides a means of transmitting textual and graphic material to the television screens of home viewers.

The Communications Act of 1934, 47 U.S.C. § 312(a)(7) (1982), requires broadcast licensees to "allow reasonable access ... for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." In addition, under 47 U.S.C. § 315(a) (1982), if the licensee "permit[s] any person who is a legally qualified candidate for any public office to use a broadcasting station," he or she incurs the additional obligation of "afford[ing] equal opportunities to all other such candidates for that office." Complementing these statutory provisions, there exists a form of political broadcast regulation that the Commission created early in its history in the name of its mandate to ensure the use of the airwaves in the "public 'convenience, interest, or necessity.'" *See Red Lion Broadcasting v. FCC*, 395 U.S. 367, 376–77, 89 S.Ct. 1794, 1799, 23 L.Ed.2d 371 (1969). The "fairness doctrine," as this policy is known, "provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 C.F.R. § 73.1910 (1985).

The case before us presents the question whether the Commission erred in determining that these three political broadcast provisions do not apply to teletext. Because we find that the Commission acted reasonably with respect to section 312(a)(7) and the fairness doctrine, but erroneously held section 315 not to apply to teletext, we affirm in part and reverse in part, and

remand to the Commission for further proceedings.

I.

The technologically novel element of teletext service is its utilization of an otherwise unused portion of the television broadcast signal. Television signals are not continuous but are sent in pulses. The human eye retains the image from one pulse to the next so that the picture is perceived as uninterrupted. The time between the pulses of regular television broadcasting ("main signal" transmission) is known as the "vertical blanking interval," and can be used for pulses that constitute teletext transmission. As treated by the Commission in the docket now before us, "teletext" refers exclusively to such over-the-air transmissions, and not to transmission of text and graphics by way of cable or telephone. Main signal operators now control and operate teletext, though the FCC has authorized the operation of teletext "on a franchise basis" or through the "leas[ing] of space to multiple users." *See Report and Order*, 53 Rad.Reg.2d (P & F) 1309, 1321 (1983). The Commission, however, admonished licensees "that they remain responsible for all broadcast related teletext provided via the station's facilities, whether produced in-house or obtained from outside sources." *Id.*

To receive teletext, the viewer must have a device to decode the signal carrying the textual information and graphics. Currently, viewers may purchase teletext decoders in retail stores selling television sets. In the future, at least some television manufacturers will build decoding equipment into selected television models. Broadcasters of teletext thus have no control over who obtains the ability to decode teletext signals.

The teletext viewer begins typically by watching the display of a table of contents, which indicates what information is available and at which pages it appears. A "page" is a screen of information. Viewers may then view the information they want by flipping to the page where the desired material appears. Present teletext programming includes data of general interest such as news, sports, weather, community events, and advertising, though nothing precludes broadcasters from displaying information that appeals to audiences with special interests. Main channel broadcasting may notify viewers of material available on teletext. While teletext can display text and high-resolution graphics, no sound accompanies the visual transmissions under teletext technology. Teletext is supported by advertiser fees and involves no charge to the public.

On November 27, 1981, the FCC released a Notice of Proposed Rulemaking to explore possible authorization for television stations to operate teletext systems. *See* 46 Fed.Reg. 60,851 (1981). The Commission announced its goal "to provide a regulatory environment that is conducive to the emergence and implementation of new technology and new uses of the [broadcast] spectrum." *Id.* The Commission added that "[i]n the case of teletext, the available evidence appears to indicate that the forces of competition and the open market are well suited to obtaining the kinds and amounts of service that are most desirable in terms of the public interest." *Id.* at 60,852. The Notice therefore proposed that "teletext ... be treated as an ancillary [sic] service" and that "[s]tations ... not be required to observe service guidelines or other performance standards." *Id.* at 60,853.

In its *Report and Order*, 53 Rad.Reg.2d (P & F) 1309 (1983), the Commission addressed the applicability of political broadcast requirements to teletext and concluded that "as a matter of law, ... sections [312(a)(7) and 315] need not be applied to teletext service," and that applying these provisions would be "both unnecessary and unwise as a matter of policy." *Id.* at 1322. Moreover, the Commission "conclude[d] that the Fairness Doctrine should not be applied to teletext services." *Id.* at 1324. Thus, the *Report and Order* sought to adopt an approach of non-regulation of tel-

etext under any of the political broadcasting provisions administered by the FCC.

The Commission noted that section 312(a)(7) guarantees federal candidates only "'reasonable access'" to "a broadcasting station" and considered what access would be "reasonable" when dealing with "variant broadcast services" such as teletext. *See* 53 Rad.Reg.2d (P & F) at 1322. Relying on *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act of 1934*, 68 F.C.C.2d 1079, 1093 (1983), the FCC suggested that by providing a candidate access to the broad television audience attracted to the station's regular broadcast operation a licensee satisfied its section 312(a)(7) duties even if the broadcaster at the same time denied access to the more limited audience viewing the "ancillary or subsidiary" teletext service. *See* 53 Rad.Reg.2d (P & F) at 1322–23.

In contrast, the Commission found section 315 wholly inapposite to teletext. Noting that a broadcast "use" triggered section 315's substantive obligations, that a "use" required "a personal appearance by a legally qualified candidate by voice or picture," and that the textual and graphics nature of teletext made it "inherently not a medium by which a candidate [could] make a personal appearance," the Commission held that teletext could not trigger the requirements of section 315. *See* 53 Rad. Reg.2d (P & F) at 1323. The Commission also reasoned that teletext differed from "traditional broadcast programming" because it does not have the powerful audio-visual capabilities of main-channel broadcasting, and, therefore, does not pose the danger of "abuse" of these powerful sound and image "uses" that Congress envisioned in enacting section 315. *See id.*

The Commission reserved its most elaborate analysis for the fairness doctrine. It began with the contention that the fairness doctrine is a Commission-made policy, and that Congress did not codify the fairness doctrine when it added language recognizing that policy in the course of a 1959 amendment to section 315. 53 Rad.Reg.2d (P & F) at 1323. Thus, the 1959 amendment does not compel extension of the fairness doctrine to "new services ... which did not even exist" at the time, and applications of the doctrine to serve the public interest rests in the Commission's "sound judgment and discretion." *See id.*

The Commission then determined that it should not apply the fairness doctrine to teletext, "primarily [because of] a recognition that teletext's unique blending of the print medium with radio technology fundamentally distinguishes it from traditional broadcast programming." 53 Rad.Reg.2d (P & F) at 1324. Noting that "scarcity" of broadcast frequencies provided the first amendment justification of the fairness doctrine's application to traditional broadcast media, the Commission posited an "[i]mplicit ... assumption that ... power to communicate ideas through sound and visual images ... is significantly different from traditional avenues of communication because of the immediacy of the medium." *Id.* In other words, because scarcity inheres in all provisions of goods and services, including the provision of information through print media, the lessened first amendment protection of broadcast regulation must also rely upon the powerful character of traditional broadcast[illegible]. Because teletext "more closely [illegible] print communication media such as newspapers and magazines," the Commission found the "scarcity" rationale, as reinterpreted, insufficient to justify regulating teletext.

The Commission also reasoned that teletext, as a print medium in an "arena of competition ... includ[ing] all other sources of print material," would not encounter the same degree of scarcity, in the usual sense, as the sound and visual images of regular programming. *See* 53 Rad. Reg.2d (P & F) at 1324. Thus, the Commission felt it constitutionally suspect to apply the fairness doctrine to teletext. And, in light of its obligation to "encourage, not frustrate, the[ ] development" of new services like teletext, the FCC decided, therefore, to heed concerns of commenters that

teletext services might not prove "viable if ... burdened by Fairness Doctrine obligations" and to exempt teletext from the fairness doctrine. *See id.*

Two motions for reconsideration of the decision not to apply content regulation to teletext were filed. Media Access Project ("MAP"), a petitioner in this appeal, argued that "[t]eletext ... is intended for the general public," and, therefore, falls within the definition of "broadcasting" in the Communications Act of 1934 and triggers broadcast regulation. *See* J.A. at 111–12. MAP argued that section 312(a)(7) required a licensee " 'to tailor [its] responses [to requests for air time] to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time,' " an individualized approach inconsistent with the sweeping holding of the *Report and Order*. *See* J.A. at 112 (citing *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 387, 101 S.Ct. 2813, 2825, 69 L.Ed.2d 706 (1981)). MAP generally contended that teletext had broad audience potential, a good capacity to convey political information, and that the Commission must ensure access to teletext service. *See id.* at 113.

With respect to section 315, MAP took issue with the FCC's view that teletext does not meet the standards for a "use." First, MAP argued that teletext could "produce graphic images, including ... perfectly recognizable portraits of ... candidates," and, therefore, met the Commission's prior definition of a "use" as " 'any broadcast or cablecast of a candidate's voice or picture.' " *See* J.A. at 116, 117. But even if teletext had not possessed such visual capabilities, MAP urged that the Commission would have a duty to redefine "use" to account for this new form of broadcasting technology. *See* J.A. at 117.

As for the fairness doctrine, MAP contended that "[t]he standard of fairness ... inheres in the public interest standard" the FCC is charged with enforcing, and that by the 1959 amendments "Congress did not merely 'ratify' the Commission's fairness doctrine ... [but] clearly made [it] a binding part of the statute." J.A. at 118, 119. MAP argued, therefore, that the FCC lacked the discretion to refuse to apply the fairness doctrine to teletext broadcast operations.

The other Petition for Reconsideration, filed by Henry Geller, Donna N. Lampert, and Philip A. Rubin, made many of the same legal arguments put forward by MAP. Their petition added that the characterization of "teletext as 'ancillary,' 'novel,' or 'a print medium' " could not avoid the requirements of political broadcast regulation, and that the scarcity doctrine had nothing to do with the "immediacy" of traditional broadcasting's sounds and images. J.A. at 126–27 & n. 6. This petition also urged that the full panoply of political broadcasting regulation be applied to teletext.

On November 8, 1984, the Commission rejected these petitions in a *Memorandum Opinion and Order*, 101 F.C.C.2d 827 (1985). While the *Memorandum Opinion and Order* largely rehearsed the points made in the Commission's earlier decision, the Commission elaborated upon the legal relevance of the differences between teletext and traditional broadcasting:

> We consider teletext clearly as an ancillary service not strictly related to the traditional broadcast mode of mass communication. First, the very definition of teletext confined the service to traditional print and textual data transmission. Thus, although these data will be transmitted at some point throug.. the use of the electromagnetic spectrum, its primary and overriding feature will be its historical and cultural connection to the print media, especially books, magazines and newspapers. Users of this medium will not be listening or viewing teletext in any traditional broadcasting sense, but instead will be *reading* it, and thus be able to skip, scan and select the desired material in ways that are incomparable to anything in the history of broadcasting and broadcast regulation. In this light, we believe that the content regulations created for traditional broadcast op-

> erations are simply out of place in this new print-related textual data transmission medium. We decline to attribute to Congress an intent to extend broadcast content regulation ... to this new medium.

Id. at 833 (citations and footnote omitted; emphasis in original).

The Commission also provided further explanation of its first amendment theory and made clear that it meant this theory to cover the applicability of all forms of political broadcasting regulation to teletext. Relying upon *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (striking down a state's newspaper right-of-reply statute as running afoul of the first amendment's protection of editorial judgment and control), and asserting that it considered teletext a "print medium" for first amendment purposes, *see* 101 F.C.C.2d at 834 & n. 16, the Commission found that "neither the letter nor the purposes of the First Amendment would be served by ... a ruling" that would "require[ ] [the Commission] to intrude into the editorial judgments of teletext editors." *Id.* at 834. Given *Tornillo's* clear refusal to allow interference with editorial judgments in the print media and "the historical sensitivity of Congress to these [first amendment] issues," the Commission would not "construe the intent of Congress to apply Section 315 and similar statutory provisions, and ... associated rules and policies, to the teletext medium." *Id.* (footnote omitted). Accordingly, the Commission adhered to the results of its earlier *Report and Order*.

On June 3, 1985, the Telecommunications Research and Action Center and the Media Access Project ("TRAC/MAP") filed a petition for review in this court, largely renewing the substantive legal arguments asserted in the petitions for reconsideration below. Because the Commission's interpretation of the first amendment affects its analysis of political broadcasting regulation and teletext at several points, we discuss that interpretation first. We then address the petitioners' contentions with respect to section 312(a)(7), section 315, and the fairness doctrine in that order.

II.

In the Commission's view the regulation of teletext's "unique blend of the print medium with radio technology" raises first amendment problems not associated with the regulation of traditional broadcasting. Thus, the argument goes, existing Supreme Court precedent upholding political content regulation of traditional broadcasting does not necessarily justify the application of such regulation to the new medium of teletext. While not concluding that this application to a "print medium" like teletext would violate the first amendment, the Commission suggested that its application of that regulation would be sufficiently suspect to justify not imputing to Congress an intent to apply "section 315 and similar statutory provisions, and ... associated rules and policies, to the teletext medium." 101 F.C.C.2d at 834. To appreciate the Commission's argument, a brief discussion of the case law will be useful.

In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), the Supreme Court rejected a first amendment challenge to the fairness doctrine and related rules governing personal attacks and political editorials by licensees. In reasoning that applies generally to political broadcasting regulation,[1] the Court found justification for limiting first amendment protection of broadcasting in the "scarcity doctrine."[2] Given the fact of a

1. *Red Lion* expressly noted that the equal-time provision of § 315 was "indistinguishable" "[i]n terms of constitutional principle" from the implementing regulations of the fairness doctrine before the Court. 395 U.S. at 391, 89 S.Ct. at 1807. While § 312(a)(7) had not yet been enacted at the time of *Red Lion*, it seems clear that the opinion's rationale applies with equal force to that provision, which affects broadcasters in a very similar manner to the fairness doctrine requirement that a broadcaster provide adequate aid time to the discussion of public issues.

2. The notion that scarcity of broadcast frequencies could provide constitutional justification for broadcast regulation first arose in *National*

limited number of broadcast frequencies and the "massive" problem of broadcast interference, the Court remarked that "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology." *Id.* at 388, 89 S.Ct. at 1805. The Court observed that this necessitated the division of the radio spectrum into usable portions, the assignment of subdivisions of the frequency to individual users, and regulation under which the "Government ... tell[s] some applicants that they [cannot] ... broadcast at all because there [is] room for only a few." *Id.* Therefore, the Court asserted, because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Id.*

Observing that licensees and those who can obtain no license have identical first amendment rights, the Court in *Red Lion* further concluded that

> [t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

395 U.S. at 389, 89 S.Ct. at 1806. The Court then enunciated the classic formulation of the scarcity doctrine:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

Id. at 390, 89 S.Ct. at 1806. It was on this principle that the Court found no first amendment infirmity in political broadcast regulation.

The Commission believes, however, that the regulation of teletext falls not within the permissive approach of *Red Lion*, but rather within the strict first amendment rule applied to content regulation of the print media. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Court struck down an editorial right-of-reply statute that applied to newspapers. The content regulation in *Tornillo* bore a strong resemblance to that upheld in *Red Lion*. In *Tornillo* the Court held that such regulation impermissibly interfered with the newspapers' "editorial control and judgment." *Id.* at 258, 94 S.Ct. at 2840. The Court made the broad assertion that "[i]t has yet to be demonstrated how governmental regulation of this crucial [editorial] process can be exercised consistent with the First Amendment guarantees of a free press." *Id.* If the Commission's view is correct, and *Tornillo* rather than *Red Lion* applies to teletext, that service is entitled to greater first amendment protections than ordinary broadcasting and it would be proper, at a minimum, to construe political broadcasting provisions narrowly to avoid constitutionally suspect results.

The Commission has offered two grounds for its view that *Tornillo* rather than *Red Lion* is pertinent. Both reasons relate to the textual nature of teletext service. First, the Commission read an "im-

Broadcasting Co. v. United States, 319 U.S. 190, 226–27, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943). In his opinion for the majority, Justice Frankfurter enunciated the scarcity rationale to turn back a first amendment challenge to the FCC's chain broadcasting regulations, which governed the affiliation of stations with networks. *Id.* Until *Red Lion*, however, the Court had never addressed the question whether the scarcity doctrine could justify regulation of the content of broadcasts.

mediacy" component into the scarcity doctrine:

> Implicit in the "scarcity" rationale ... is an assumption that broadcasters, through their access to the radio spectrum, possess a power to communicate ideas through sound and visual images in a manner that is significantly different from traditional avenues of communication because of the immediacy of the medium.

53 Rad.Reg.2d (P & F) at 1324. Second, the Commission held that the print nature of teletext "more closely resembles, and will largely compete with, other print communication media such as newspapers and magazines." *Id.* Under this analysis, scarcity of alternative first amendment resources does not exist with respect to teletext. We address these points in turn.

[1] With respect to the first argument, the deficiencies of the scarcity rationale as a basis for depriving broadcasting of full first amendment protection, have led some to think that it is the immediacy and the power of broadcasting that causes its differential treatment. Whether or not that is true, we are unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less first amendment protection. More important, the Supreme Court's articulation of the scarcity doctrine contains no hint of any immediacy rationale. The Court based its reasoning entirely on the physical scarcity of broadcasting frequencies, which, it thought, permitted attaching fiduciary duties to the receipt of a license to use a frequency. This "immediacy" distinction cannot, therefore, be employed to affect the ability of the Commission to regulate public affairs broadcasting on teletext to ensure "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion*, 395 U.S. at 390, 89 S.Ct. at 1807.

The Commission's second distinction—that a textual medium is not scarce insofar as it competes with other "print media"—also fails to dislodge the hold of *Red Lion*. The dispositive fact is that teletext is transmitted over broadcast frequencies that the Supreme Court has ruled scarce and this makes teletext's content regulable. We can understand, however, why the Commission thought it could reason in this fashion. The basic difficulty in this entire area is that the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.[3] The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[4]

3. As Professor Ronald Coase has observed,

> it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 14 (1959).

4. One might attempt to resolve the tension between *Tornillo* and *Red Lion* on the ground that, while scarcity characterizes both print and broadcast media, the latter must be operating under conditions of greater "scarcity" than the

Neither is content regulation explained by the fact that broadcasters face the problem of interference, so that the government must define useable frequencies and protect those frequencies from encroachment. This governmental definition of frequencies is another instance of a universal fact that does not offer an explanatory principle for differing treatment. A publisher can deliver his newspapers only because government provides streets and regulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government's function in allocating broadcast frequencies, could justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

There may be ways to reconcile *Red Lion* and *Tornillo* but the "scarcity" of broadcast frequencies does not appear capable of doing so. Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, surely by pronouncing *Tornillo* applicable to both, or announce a constitutional distinction that is more usable than the present one. In the meantime, neither we nor the Commission are free to seek new rationales to remedy the inadequacy of the doctrine in this area. The attempt to do that has led the Commission to find "implicit" considerations in the law that are not really there. The Supreme Court has drawn a first amendment distinction between broadcast and print media on a premise of the physical scarcity of broadcast frequencies. Teletext, whatever its similarities to print media, uses broadcast frequencies, and that, given *Red Lion*, would seem to be that.[5]

The Commission, therefore, cannot on first amendment grounds refuse to apply to teletext such regulation as is constitutionally permissible when applied to other, more traditional, broadcast media. We now turn to the consideration of the particular regulation at issue in this case.

III.

[2] Section 312(a)(7) states that "[t]he Commission may revoke any station license or construction permit ... for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable

former. This, however, is unpersuasive. There is nothing uniquely scarce about the broadcast spectrum. Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), and it appears that currently "the number of broadcast stations ... rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried." *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C.Cir.), *cert. denied*, 464 U.S. 1008, 104 S.Ct. 525, 78 L.Ed.2d 709 (1983). Indeed, many markets have a far greater number of broadcasting stations than newspapers.

5. We do not mean to suggest here that *Red Lion* poses a permanent bar to the dismantling of political broadcast regulation, the soundness of which has come under much well-placed criticism for some time and from many quarters. *See, e.g.*, Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex.L.Rev. 207 (1982); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213. The Supreme Court has suggested avenues of constitutional attack on political broadcast regulation that remain open to exploration. For example, in *Red Lion* itself, the Court stated that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be adequate time to reconsider the constitutional implications." 395 U.S. at 393, 89 S.Ct. at 1808. Moreover, the Court has recently suggested that the advent of cable and satellite technologies may soon render the scarcity doctrine obsolete, but declined to "reconsider [its] long-standing approach [to political broadcast regulation] without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters of California*, 468 U.S. 364, 376–77 n. 11, 104 S.Ct. 3106, 3116 n. 11, 82 L.Ed.2d 278 (1984).

In a recent study of the fairness doctrine, the FCC has attempted to get the Court to reevaluate political broadcast regulation along these lines by undertaking to show both the negative practical impact of the fairness doctrine and the technological erosion of scarcity. *See* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985).

amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7) (1982). The question here is the rationality of the Commission's decision about the applicability of this provision to teletext.

At the outset, we state what we understand the Commission's decision to be. In introducing its legal analysis, the Commission stated: "As discussed below, we have concluded that, as a matter of law, ... sections [312(a)(7) and 315] need not be applied to teletext service." 53 Rad.Reg.2d (P & F) at 1322. The Commission stated that "the statutory requirement of affording reasonable access is adequately satisfied by permitting federal candidates access to a licensee's regular broadcast operation; it does not require access to ancillary or subsidiary service offerings like teletext." *Id.* The *Report and Order*'s analysis of section 312(a)(7) concluded by stating that the Commission "perceive[d] no legal requirement that licensees grant federal candidates access to their teletext offerings." *Id.* at 1323. Finally, in rejecting reconsideration of this issue in its *Memorandum Opinion and Order*, the FCC asserted: "Guided as we are in such matters by a reasonableness standard, we find that a broadcaster could satisfy the 'reasonable access' rights of a candidate without use of teletext." 101 F.C.C.2d at 834. We find it clear, therefore, that the Commission believes that a broadcaster cannot be deemed to have acted unreasonably under the statute on the ground that he or she adopts a policy refusing to permit any access to teletext. We now turn to our analysis of the Commission's conclusion on this point.

The scope of review in this case is quite narrow. In *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 386, 101 S.Ct. 2813, 2825, 69 L.Ed.2d 706 (1981) ("CBS"), the Supreme Court stated that, in enacting section 312(a)(7), Congress "[e]ssentially ... adopted a 'rule of reason' and charged the Commission with its enforcement." The Court also asserted that Congress "did not give guidance on how the Commission should implement the statute's access requirement." *Id.* In such a case, where Congress has left a gap in the statutory scheme, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–44, 104 S.Ct. 2778, 2782–83, 81 L.Ed. 694 (1984) (footnote omitted). In the determination of whether the agency's decision has run afoul of these standards, the parties challenging the agency action bear the burden of proof. *See San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission*, 789 F.2d 26, 37 (D.C.Cir.1986) (en banc). Thus, we approach the question of the agency's construction of section 312(a)(7) with significant "judicial deference," CBS, 453 U.S. at 390, 101 S.Ct. at 2827, and we must uphold that construction if it is a "reasonable" one. *Chevron*, 467 U.S. at 844, 104 S.Ct. 2783. We now examine whether the "Commission's action represents a reasoned attempt to effectuate the statute's access requirement." CBS, 453 U.S. at 390, 101 S.Ct. at 2827.

Petitioners argue that section 312(a)(7), as interpreted by the Commission and the Supreme Court, "prohibit[s] ... blanket bans on candidate advertising and require[s] broadcasters to accommodate the reasonable needs of candidates." Brief for TRAC/MAP at 49. These standards, they contend, foreclose the Commission's adopting a general rule allowing a broadcaster to bar candidates from access to teletext without running afoul of section 312(a)(7). If we agree with petitioners that the Commission's decision in the teletext docket was inconsistent with the approach previously adopted by the Commission and approved by the Supreme Court, we must reverse and remand unless the agency has supplied "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ig-

nored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

Petitioners rely heavily upon *CBS*. The Supreme Court in *CBS* reviewed the FCC's construction of section 312(a)(7) in connection with a determination that the television networks had failed to give President Carter reasonable access in order to announce his bid for reelection. In upholding the Commission's finding of a violation, the Court also upheld the individualized, case-by-case approach that the Commission had adopted in enforcing section 312(a)(7), *see, e.g., Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079 (1978) ("*1978 Policy Statement*"). The Court described the Commission's policy as follows:

> [Section 312(a)(7)] requests must be considered on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time.... If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance. But if broadcasters adopt "across-the-board policies" and do not attempt to respond to the individualized situation of a particular candidate, the Commission is not compelled to sustain their denial of access.

CBS, 453 U.S. at 387–88, 101 S.Ct. at 2825–26 (citations omitted). The Court approved the rationality of the Commission's standards proscribing the use of "blanket rules" to govern access and requiring that "each request ... be examined on its own merits." *See id.* at 389, 101 S.Ct. at 2826. Acknowledging that "the adoption of uniform policies might well prove more convenient for broadcasters," the Court nonetheless accepted the Commission's view that "such an approach would allow personal campaign strategies and exigencies of the political process to be ignored." *Id.* Because "§ 312(a)(7) assures a right of reasonable access to *individual* candidates for federal elective office, and the Commission's requirement that their requests be considered on an *individualized* basis is consistent with that guarantee," the Court upheld the Commission's approach. *Id.* (emphasis in original).

Contrary to petitioners' assertions, there is, we believe, no conflict between the Commission's section 312(a)(7) policy, as approved by the Supreme Court in *CBS*, and the decision made in the teletext docket. When the Supreme Court approved the Commission's policy of proscribing "blanket rules" or "uniform policies" concerning access, this meant only that broadcasters could not adopt policies that would effectively nullify the statute's rule of reason approach to granting access to federal candidates. This does not, and could not, suggest, however, that no rules may be applied in the determination of what access is reasonable under the statute. Reasonableness does not mean that an impressionistic judgment must be made in every case.[6] It would be impossible to follow a consistent policy with respect to reasonableness with-

6. The Commission has historically resorted to explicitly enunciated general principles in administering § 312(a)(7). The general principles have in some instances provided only factors to consider in determining reasonableness, such as "the amount of time previously sold to a candidate, the disruptive impact on regular programming, and the likelihood of requests for equal time by rival candidates under the equal opportunities provision of section 315(a)." *See CBS*, 453 U.S. at 387, 101 S.Ct. at 2825. Other principles utilized by the Commission have taken the form of presumptions, for example, that "[n]oncommercial educational stations generally need not provide Federal candidates with lengths of program time which are not a normal component of the station's broadcast day" or that "[l]icensees must provide prime-time program time absent unusual circumstances as part of their 'reasonable access' requirements." *1978 Policy Statement*, 68 F.C.C.2d at 1094. The Commission has also applied absolute decisional criteria, such as the unqualified rule that "[c]ommercial stations must make prime-time spot announcements available to Federal candidates." *See* The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2239 (1978).

out framing some rules to guide the decisions in particular cases. A rule of reason, as the course of antitrust law shows, implies a middle range of cases which require the individualized judgment and a nice balancing of competing factors. Within a rule of reason, however, there are also cases at the extremities of the spectrum where reasonableness or unreasonableness is clear. Thus, there are areas of per se legality and illegality within any rule of reason. In the context of section 312(a)(7), Congress has empowered the Commission to establish rules and regulations to guide broadcasters in their determination of what access is reasonable, *see CBS*, 453 U.S. at 386, 101 S.Ct. at 2825 (citing 47 U.S.C. § 303(r)), and, while the Commission has principally developed standards on a case-by-case basis, it has also identified some of the extreme cases in which the reasonableness or unreasonableness of a practice is clear.

The Court in fact approved the use of per se rules by assenting to the Commission's policy limiting the applicability of section 312(a)(7) to the period after a campaign commences, a limitation nowhere found in the statute. In this respect, the Court explained: "By confining the applicability of the statute to the period after the campaign begins, the Commission has limited its impact on broadcasters and given substance to its command of *reasonable* access." *CBS*, 453 U.S. at 388, 101 S.Ct. at 2826 (emphasis in original). This amounts to a rule of per se reasonableness: refusing access to a qualified federal candidate before the beginning of a campaign will never be held unreasonable under section 312(a)(7). Thus, when the Court stated that "the Commission's standards proscribe blanket rules concerning access," *see* 453 U.S. at 389, 101 S.Ct. at 2826, it was necessarily referring to rules whose effect would be to eliminate the case-by-case approach in the vast middle ground where reasonableness or unreasonableness is not clear. It did not mean that the Commission had foreclosed itself from adopting any rules defining the clear cases under the statute. In the teletext decision, that is all the Commission did; it merely adopted a rule of per se reasonableness as to a minor portion of the station's operations because it believed the reasonableness of that exclusion to be clear.

The acceptability of this approach is also shown by the Commission's treatment of subscription television ("STV") under section 312(a)(7) in its *1978 Policy Statement*, 68 F.C.C.2d at 1093. In that decision, the Commission accepted the argument that an STV station should not have to provide access for political broadcasting during the prime time hours that it is broadcasting because that would destroy one of the major incentives for such a service, "uninterrupted entertainment programming." *Id.* The Commission reasoned that

> [t]he purpose of giving to Federal candidates the right to prime time spots and programming is based upon the fact that prime time generally is the period of maximum audience potential. Since subscription television programming is generally geared to selective audiences it would appear that those stations engaged in STV have their maximum audience potential outside of normal prime time viewing periods. Therefore, we do not believe that reasonable access requires STV stations to make available to Federal candidates those periods of time in which they are engaged in STV programming.

Id. The Commission's reasoning clearly supports the general principle that the Commission can permit licensees to block out periods of time in which it would not be unreasonable to deny all access. Moreover, it appears that limited audience potential in the period of time foreclosed and the interest of preserving the vitality of the service are permissible factors in the determination of such general rules. Thus, in light of the Commission's approach to section 312(a)(7) in general and its holding in the STV decision in particular, we find that the general approach taken in the teletext docket is consistent with existing Commission precedent and the case-by-case approach utilized under section 312(a)(7).