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DEMOCRACY IN THE DIGITAL AGE: WHY THE EQUAL TIME RULE SHOULD BE ABANDONED

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INTRODUCTION

On October 13, 2015, the National Broadcasting Company (NBC)[1] announced that Donald Trump would host the Saturday Night Live (SNL) episode scheduled for November 7, 2015,[2] raising the hotly debated election topic of equal time for political candidates on broadcast television and radio. After the episode aired—during which Trump appeared for a total of twelve minutes and five seconds—NBC filed a notice with the Federal Communications Commission (FCC) that the equal time rule had been triggered. Shortly thereafter, several Republican candidates filed requests for similar free airtime[3] under the equal time provision of the Communications Act of 1934.[4] The rule provides that candidates are entitled to equal opportunities to airtime on broadcast networks as their opponents, subject to several exceptions. In response to these requests, NBC came to seven separate agreements to provide a twelve-minute slot to each candidate during primetime on November 27 and 28, 2015 in the three markets where significant presidential campaigning had so far taken place—Iowa, New Hampshire, and South Carolina.[5] Any speculation that less recognizable Republican candidates than Trump would be afforded the opportunity to host SNL was thus never realistic, though it was discussed as a potential outcome by the media at the time.[6]

Speculation of this sort is commonplace with respect to the equal time rule, as it is widely misunderstood, often misapplied, and exceedingly complex. NBC took a calculated risk by asking Trump to host its iconic weekly comedy show, namely the risk of

1. For purposes of this paper, the term NBC will refer to both NBC and its parent company NBCUniversal.

2. Mollie Reilly, *Donald Trump to Host 'Saturday Night Live'*, HUFFINGTON POST (Oct. 13, 2015, 1:22 PM), http://www.huffingtonpost.com/entry/donald-trump-hosting-snl_us_561d3a8fe4b0c5a1ce60ab38 [https://perma.cc/4JXB-P3W6].

3. Daniel White, *Republicans Ask NBC for Equal Airtime After Trump Hosts SNL*, TIME (Nov. 17, 2015), http://time.com/4116676/gop-equal-time-nbc/ [https://perma.cc/DC83-7LVC].

4. 47 U.S.C. § 315(a) (2012).

5. Ted Johnson, *NBC Reaches Agreement on Equal Time After Trump's 'SNL' Gig*, VARIETY (Nov. 23, 2015), http://variety.com/2015/tv/news/nbc-equal-time-agreement-donald-trump-snl-1201647112/ [https://perma.cc/AG8N-L3VR]. The four candidates were John Kasich, Mike Huckabee, James Gilmore, and Lindsey Graham, and they were given time on eighteen NBC affiliate stations in the markets mentioned above.

6. *See, e.g.*, Katie Sanders, *Does Donald Trump's Appearance Trigger Equal Time for the Republican Field?*, PUNDITFACT (Oct. 21, 2015, 10:37 AM), http://www.politifact.com/punditfact/article/2015/oct/21/does-donald-trumps-snl-appearance-trigger-equal-ti/ [https://perma.cc/5N73-J6TH].

being required to dole out free broadcast time to other candidates who would not bring in the same ratings as Trump on SNL.[7] Ratings may be important to Trump, but do they actually translate into votes,[8] such that election fairness mandates regulation of broadcast content? The equal time rule[9] is not concerned with ratings. Rather, it is intended to function as a leveler in election coverage of candidates in order to prevent one candidate from hijacking network time and leaving the others without media recourse.

The equal time provision is premised on the concept that the major broadcast TV and radio stations are the most important outlets for the electorate to receive information about candidates during a local or federal U.S. election. At the time of the creation of the FCC, Congress considered the power of these outlets to be so great as to provide a justification for limiting the First Amendment rights of networks in making choices about time allocation. However, it is manifestly obvious that the media landscape has changed drastically since 1927, both in scope and in content.

Politicians appear on television today more than they ever did in the past, and those appearances have become increasingly less political in nature—entertainment showcasing a candidate's humor

7. James Hibbard, *Donald Trump Gives SNL Biggest Rating in Years*, ENTM'T WEEKLY (Nov. 8, 2015), http://www.ew.com/article/2015/11/08/donald-trump-snl-ratings [https://perma.cc/2TEU-ZUKH]. In fact, the show had its highest ratings since a 2012 episode featuring Charles Barkley and Kelly Clarkson. NBC also risked negative press because of statements on immigration. *See, e.g.*, Brian Lowry, *By Booking Donald Trump, SNL Looks Like the Biggest Loser*, BOSTON HERALD (Nov. 5, 2015), http://www.bostonherald.com/opinion/op_ed/2015/11/brian_lowry_by_booking_donald_trump_snl_looks_like_the_biggest_loser [https://perma.cc/WHW8-J7TF]. The program's producers were naturally concerned with its ratings and audience metrics and not with getting Trump elected. This is especially likely considering NBC's decision to invite Trump to host came only a few short months after the company publicly cut ties with the candidate. *See* Brian Stelter & Frank Pallotta, *NBCUniversal Cuts Ties with Donald Trump*, CNN MONEY (June 30, 2015), http://money.cnn.com/2015/06/29/media/donald-trump-nbc-ends-relationship/ [https://perma.cc/XMC9-GD3F] (NBCUniversal ended the relationship as a result of the derogatory comments made by Trump regarding immigration). For NBC, asking Trump to host was a risk worth taking to increase its viewership of SNL, which has faced a downturn in ratings for several years. *See* Hibbard, *supra*.

8. *See* Mary McNamara, *Why Huge 'SNL' Ratings Won't Help Donald Trump Become President*, L.A. TIMES (Nov. 7, 2015), http://www.latimes.com/entertainment/tv/la-et-st-critics-notebook-donald-trump-snl-ratings-20151107-column.html [https://perma.cc/XJX8-2ATR] ("Once an easy and instant predictor of success, the television numbers game has become if not outdated then extremely complicated.").

9. The equal time rule is often referred to by scholars as the equal opportunity rule. This Note will use the term "equal time," as it is the popular nomenclature.

or human side.[10] After all, we live in a country where voters are inclined to choose a candidate based on whether or not he or she would make a good drinking buddy.[11] Therefore, today's broadcast networks contend with an equal time rule that does not seem to address the reality of the political landscape it is meant to monitor. Over time, the rule has expanded in some directions that render it almost meaningless (such as the broad exemptions for news interview programs), while remaining a barrier in less meaningful areas of broadcast time (such as TV programs where actors-turned-candidates previously appeared).

Not only has the rule lost practical meaning, but its theoretical underpinnings have also been called into question. The equal time rule is premised on the flawed concept of spectrum scarcity—the idea that the broadcast spectrum is limited and thus must be regulated—and the idea that the role of the government in regulating TV and radio should be paramount. It has become outdated in the age of cable TV, Internet, and the digital age in general. Furthermore, the trend toward deregulation of campaign finance hints at the demise of the equal time rule, which has lost most of its teeth over the years. The time has come to leave the equal time rule where it belongs: in the past.

Part II of this Note will discuss the evolution of the equal time rule, the enactment of its exceptions, and interpretation of the rule by courts and the FCC.

Part III will delve into the problems with the rule as it stands. These problems include the breadth of the statutory exemptions to the rule as well as other ways around the rule, such as determining who constitutes a "legally qualified candidate."[12] Another problem is the fact that equal time represents only an equivalent time slot and not necessarily the same format. Furthermore, there are broad

10. A breakthrough example of this was Bill Clinton playing the saxophone on *The Arsenio Hall Show*. Though mocked by political commentators at the time, it resonated deeply with the public. *See* David Zurawik, *Bill Clinton's Sax Solo on 'Arsenio' Still Resonates*, Baltimore Sun (Dec. 27, 1992), http://articles.baltimoresun.com/1992-12-27/features/1992362178_1_clinton-arsenio-hall-hall-show [https://perma.cc/84BF-4FVQ].

11. *See, e.g.*, Kurt A. Gardinier, *The Beer President*, The Huffington Post (Oct. 30, 2012, 5:03 PM), http://www.huffingtonpost.com/kurt-a-gardinier/the-beer-president_b_2043196.html [https://perma.cc/Q93M-V2JQ] ("Bush, who admits he used to drink too much, arguably became our 43rd president because, as polls showed, he was the candidate people would rather have a beer with, because apparently the Commander-in-Chief should be a regular beer-drinking guy just like you and your friends.").

12. 47 U.S.C. § 315(a) (2012).

categories of individuals who do not count under the rule, which raises questions of fairness of restricting some while not restricting others. Finally, the lack of enforcement of the rule creates an unstable landscape. This section will show that the rule is both over- and under-inclusive and is not in good working condition.

Part IV will discuss the underlying rationales that have been advanced to justify the equal time rule and why they no longer (if they ever did) hold true. Theoretical changes since the inception of the equal time rule include the invalidation of the spectrum scarcity argument, based both on scientific and economic realities, which led to the eventual demise of the fairness doctrine. Other policy rationales that have never been proven relevant are the "diversity of opinions rationale"[13] and the "dangerous power rationale."[14] When the underlying rationales that led to the imposition of a regulation do not play out in over 80 years, there are serious reasons to doubt the continued existence of the regulation. Furthermore, the changes that have occurred in the media since the equal time rule was instituted have in no small part contributed to its lack of applicability theoretically—particularly the advent of the Internet, to which the equal time rule does not apply.

Part V will examine the future for equal time. I will suggest that the First Amendment considerations and deregulation of campaign finance underway since 2010 forecast a future where disclosure and transparency replace the attempts of government to regulate the way the electorate receives information about candidates running for office. I conclude that the equal time rule should be abandoned in favor of a safety net regimen for regulatory oversight.

I.
THE EQUAL TIME RULE

Every few years, usually sparked by a celebrity running in an election, the equal time rule is critically examined for its complexities, and its continued viability is brought into question. However, no meaningful changes have been incorporated into the rule in over fifty years. The rule was enacted in 1927 and went through a major overhaul in 1959 with the addition of the statutory exemp-

13. Also known as the "People's Airwaves Rationale." *See* John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FCC Media Bureau Research Paper Series 18–20 (March 2005), https://transition.fcc.gov/ownership/materials/already-released/scarcity030005.pdf [https://perma.cc/2PN4-T6LT].

14. *Id.* at 20–24.

tions.[15] Except for a minor semantic change in 1972, the rule has remained unchanged.[16]

A. 47 U.S.C. § 315: Statute and Legislative History

The equal time rule was introduced as a part of the Radio Act of 1927.[17] It was incorporated into the broader Communications Act of 1934, the organic statute of the FCC.[18] The rule states:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.[19]

The original rule specified no limitations on the type of programs that qualified for equal time, which left the door wide open for candidates to request equal time in response to any opposing candidate's appearance whatsoever.[20] In 1959, the FCC issued a controversial ruling stating that the equal time rule had been triggered after a news event covering the elections for Chicago mayor.[21] Congress swiftly responded, amending the equal time rule by adding four exemptions: (1) bona fide newscasts; (2) bona fide news interviews; (3) bona fide news documentaries (where the appearance of the candidate is incidental, i.e. she is not the subject of the documentary); and (4) on-the-spot coverage of bona fide news events (including coverage of political conventions).[22] Congressional intent in enacting these exemptions was to promote election

15. Pub. L. 86-274, § 1, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a) (2012)).

16. *See* Anne Kramer Ricchiuto, Note, *The End of Time for Equal Time? Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 286 (2005).

17. Radio Act, ch. 169, 44 Stat. 1162, 1170 (1927).

18. 47 U.S.C. § 315(a) (2012).

19. *Id.*

20. Federal Communications Act of 1934, ch. 652, title III, § 315, 48 Stat. 1088 (1934) (current version at 47 U.S.C. § 315(a) (2012)).

21. CBS, Inc., 26 F.C.C. 715, 742–43 (1959). The challenge came from a fringe candidate, Lar Daly, after the longtime mayor of Chicago, Richard Daley, was shown in a news segment greeting an Argentine diplomat at the airport. *See* Ethan Trex, *What Does the FCC's Equal Time Rule Actually Say?*, MENTAL FLOSS (May 27, 2011), http://mentalfloss.com/article/27751/what-does-fccs-equal-time-rule-actually-say [https://perma.cc/DQP6-N7RF].

22. 47 U.S.C. § 315(a) (2012).

coverage and "maximize information received by the public."[23] Congress recognized the potential chilling effect of an inflexible equal time rule and wanted the rule to capture the original intent not to interfere with normal news coverage.[24] The legislative record indicates that Congress was aware of the dangers that the exemptions presented but believed that the alternative of stations choosing not to air any programming involving political candidates to avoid triggering the rule was unacceptable.[25]

For historical purposes, it is important to note that the equal time rule evolved side-by-side with two other widely-debated election broadcasting rules: the fairness doctrine and the reasonable access provision. The fairness doctrine required broadcasters to dedicate airtime to both sides of a controversial issue.[26] Reasonable access requires broadcasters to permit candidates for federal office reasonable access to purchase time on their airwaves.[27] The FCC abandoned the fairness doctrine in 1987, but reasonable access is still in place.[28] The fairness doctrine and equal time rule share many underlying justifications, and the former's demise will be discussed further in Part IV regarding the continuing rationales for equal time.

B. Practical Application—Section 315's Procedure

In practical terms, the equal time rule's procedure is relatively straightforward albeit quite administratively burdensome. As a recent example of how the rule plays out, shortly before Donald Trump made his infamous SNL appearance, NBC handled a typical equal time situation when Hillary Clinton appeared on the same show.[29] To comply with the rule, after the broadcast NBC notified

23. Ricchiuto, *supra* note 16, at 270.

24. Michael Damien Holcomb, *Congressional Intent Rebuffed: The Federal Communications Commission's New Perspective on 47 U.S.C. §315(a)(2)*, 34 Sw. U. L. Rev. 87, 90–91 (2004).

25. *Id.* at 92.

26. 47 U.S.C. § 315(a) (2012), *abandoned by* Syracuse Peace Council, 2 F.C.C.R. 5043, para. 98 (1987).

27. 47 U.S.C. § 312(a)(7) (2012).

28. For purposes of this paper, the reasonable access provision will not be discussed or analyzed, despite the fact that it is often discussed in conjunction with equal time. For a discussion on the merits of the reasonable access and equal time rules in a post-fairness doctrine world, see Thomas Blaisdell Smith, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand If the Fairness Doctrine Falls?*, 74 Geo. L.J. 1491 (1985–1986).

29. *See* Andrew Jay Schwartzman, *Will Rick Santorum Be the Next Host of Saturday Night Live?*, Benton Found., https://www.benton.org/blog/will-rick-santorum-be-next-host-saturday-night-live [https://perma.cc/L37C-D4VX].

all of its affiliated stations that Clinton was on the air for three minutes and twelve seconds.[30] The local stations placed notices in their public files which stated that the time was given without charge.[31] The FCC rules specify that a request for equal time must be made within seven days of the appearance, and in Clinton's case, Larry Lessig was the only other Democratic candidate to file a request.[32] The requests have to be addressed to the local stations (which are licensed by the FCC and thus subject to the regulations), but often the network will handle the requests as a group.[33]

In the instance of Clinton's appearance, forty-seven stations received requests and NBC responded on their behalf, asking Lessig to prove that both he (and Clinton) were legally qualified candidates.[34] In his letter to NBC, Lessig enumerated reasons why he counted as a legally qualified candidate (to be discussed in further detail in Part III, *infra*) by citing his fundraising, media appearances, and speeches.[35] If NBC were to deny the request, Lessig could then file a complaint with the FCC. As such, the process for requesting and receiving equal time is a typical bureaucratic obstacle course.

Appearances triggering equal time are harder to keep track of as presidential elections move from primaries to general elections because fringe candidates count toward equal time, and local stations have to be particularly careful about how they allot time and to whom. Broadcasters also have to be aware of the potential for misinterpreting the equal time rule because the FCC's current leadership tends to avoid written decisions in favor of informal mediation of disputes.[36] Although mediation is often preferred by parties, it leaves a lack of precedent to follow. Usually this results in broadcasters erring on the side of caution, perhaps flagging appearances

30. *Id.*

31. *Id.*

32. *Id.* Until the primaries are over, only candidates from the same party are considered to be in "opposition" and can file for equal time.

33. *Id.*

34. *Id.*

35. Schwartzman, *supra* note 29. In response to NBC's request for Lessig to prove that Clinton is also a legally qualified candidate, Lessig's lawyer wrote "surely, you can't be serious," but followed that statement with examples detailing Clinton's candidacy. *Id.*

36. *See FCC Defends Rules Requiring Equal Broadcast Time for Candidates*, First Amend. Ctr. (July 3, 2000), http://www.firstamendmentcenter.org/fcc-defends-rules-requiring-equal-broadcast-time-for-candidates [https://perma.cc/3Y5L-M8U2].

that would otherwise be exempt from the equal time rule in order to be safe.

C. Court Interpretation

Apart from the confusion it causes broadcasters and candidates, courts have long struggled to make sense of the equal time provision. The cases below trace the general progression of the Supreme Court's and lower courts' interpretations of the equal time rule and justifications therefor. Many of these cases enmesh the equal time rule with the fairness doctrine, usually due to their shared underlying theoretical justifications.

In 1943, the Supreme Court decided *NBC, Inc. v. United States*.[37] This case provided the basis for what became known as the scarcity rationale: the idea that radio (and later television) frequencies were a finite or scarce resource that warranted special regulation.[38] In this case, NBC sued the government in order to enjoin certain restrictive FCC "chain broadcasting regulations."[39] In his majority opinion, Justice Frankfurter referred back to the discussions in Congress that led up to the Radio Act of 1927, where the equal time rule first appeared.[40] In holding that traditional First Amendment concerns were not applicable to radio broadcasters, the Court rejected the idea of the FCC as merely "a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other."[41] Instead, the Court held that the Act affirmatively tasks the FCC with "the burden of determining the composition of that traffic,"[42] constituting a huge expansion of power. However, the Court stated that the FCC would not be unfettered in this decision-making, but rather it was to make determinations with regard to "'public interest, convenience, or necessity', a criterion which 'is as concrete as the complicated factors for judg-

37. 319 U.S. 190 (1943).

38. *Id.* See *infra* Part IV.A. for a discussion of the scarcity rationale.

39. *NBC*, 319 U.S. at 193.

40. *Id.* at 212–13 ("Due to the decisions of the courts, the authority of the department (of Commerce) under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available . . . , and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted.") (quoting H.R. Doc. No. 483, 69th Cong., 2d Sess. 10 (1926)).

41. *Id.* at 215.

42. *Id.* at 216.

ment in such a field of delegated authority permit.'"[43] Perhaps the ruling accomplished the goal of taking power away from the broadcast networks, but it gave that power instead to an agency with only vague and incredibly discretionary guidance as to how it should be used.

In *Farmers Educational and Cooperative Union v. WDAY, Inc.*, the Supreme Court upheld section 315 in its entirety.[44] This case arose in the context of a senatorial race in North Dakota in 1956. WDAY—a radio and television broadcast station—gave equal time to A.C. Townley, a candidate in the race for senator, in response to two other candidates' speeches on its station.[45] As a result of the speech, in which Townley made allegedly defamatory statements accusing his opponents of conspiring to create a communist organization with the help of the Union petitioner, the opposing candidates sued the station.[46] Although the specific issue in front of the Court was whether the provision's prohibition on censorship bars stations from editing out libelous statements, the Court looked at the purpose of section 315 in its entirety in order to arrive at its conclusion. The Court stated that the purpose of section 315 is "full and unrestricted discussion of political issues by legally qualified candidates."[47] Justice Black wrote the majority opinion, and four justices, including Justice Frankfurter, dissented on grounds of federalism.[48]

In 1969, the Supreme Court decided the landmark case *Red Lion Broadcasting Co. v. FCC*,[49] upholding the fairness doctrine and its underlying rationale: scarcity of the spectrum. The Court put both the fairness doctrine and the equal time provision under the same doctrinal umbrella, stating that

> [i]n terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial

43. *Id.* (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)). *But see* Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1, 8 (1959) ("'[P]ublic interest, convenience or necessity' . . . lacks any definite meaning. It 'means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.'" (quoting Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR. L. REV. 295, 296 (1930))).

44. 360 U.S. 525, 535 (1959).

45. *Id.* at 526.

46. *Id.* at 526–27.

47. *Id.* at 529.

48. *Id.* at 536 (Frankfurter, J., dissenting). For purposes of this paper, Frankfurter's discussion of express versus implied preemption of state law is not helpful in arguing that the equal time rule is outdated.

49. 395 U.S. 367 (1969).

> rules [related to the fairness doctrine] are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements.[50]

In *Red Lion*, the radio station WGCB aired a fifteen-minute segment by Reverend Billy James Hargis in which he criticized a book by Fred J. Cook.[51] When Cook asked for free reply time, the station refused.[52] The FCC got involved and determined that the station owed Cook free time under the fairness doctrine, specifically invoking the personal attack aspect of that doctrine.[53] The Supreme Court upheld the FCC's decision "that a broadcaster could legally be forced, under the threat of license nonrenewal or revocation, to provide *free* airtime to a speaker demanding the right to respond to a controversial broadcast."[54] The Court did indicate that conditions might change in the future such that a different outcome would emerge, writing that "[w]e need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable . . . but will deal with those problems if and when they arise."[55] Although *Red Lion* dealt mainly with the fairness doctrine rather than equal time, its endorsement of the scarcity rationale had implications for all broadcast regulations.

At the time the Court decided *Red Lion*, it determined that the scarcity of frequencies was indeed real and required the regulation of broadcast radio and television even at the expense of First Amendment considerations.[56] This expansive view of the fairness doctrine and scarcity rationale seemed to open the door for chal-

50. *Id.* at 391; *see also* Branch v. FCC, 824 F.2d 37, 49 (D.C. Cir. 1987) ("[In *Red Lion*,] the Court held that the statutory 'equal opportunities' rule in section 315 and the Commission's own fairness doctrine rested on the same constitutional basis of the government's power to regulate a 'scarce resource which the Government has denied others the right to use.'").

51. *Red Lion*, 395 U.S. at 371.

52. *Id.* at 372.

53. *Id.*

54. Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEG. STUD. 279, 284 (1997).

55. *Red Lion*, 395 U.S. at 395.

56. *Id.* at 399 ("Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.").

lenges to print media as well, but the Supreme Court shut down any such challenges in *Miami Herald Publishing Co. v. Tornillo* in 1974.[57] This case involved a Florida statute that required newspapers to grant political candidates equal space to respond to their opponents. Here the Court essentially held that newspapers have the complete opposite rights under the First Amendment to broadcasters: "The choice of material to go into a newspaper, and the decisions made as to . . . treatment of public issues and public officials—*whether fair or unfair*—constitute the exercise of editorial control and judgment,"[58] i.e. core First Amendment freedom of the press. The Court made its determination despite the fact that it noted that newspapers have potentially infinitely more space to use for dissemination of ideas than the broadcast spectrum, under the now less relevant spectrum scarcity theory.[59] Such a starkly different position for newspapers than for broadcast media raises questions that only true differences in availability of resources could justify.

The legacy of *Red Lion* carried over into the 1980s, when *FCC v. League of Women Voters of California* was decided.[60] In that case, the Supreme Court upheld core First Amendment freedoms for a publicly-funded broadcaster, including the right to editorialize, but declined to depart from the scarcity rationale until signaled by Congress or the FCC. However, the Court did directly question the continued validity of spectrum scarcity:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years . . . . We are not prepared, however, to reconsider our longstanding approach 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.[61]

League of Women Voters also reiterated the issue articulated in dictum in *Red Lion* that if the fairness doctrine had a chilling effect on speech, the Court would have to reconsider its justifications.[62] As academics and courts have noted, the theoretical underpinnings for the fairness doctrine and equal time provisions are virtually the same.[63]

57. 418 U.S. 241 (1974).
58. *Id.* at 258 (emphasis added).
59. *Id.* at 256–57.
60. 468 U.S. 364 (1984).
61. *Id.* at 376 n.11.
62. *Id.* at 378 n.12.
63. *See Red Lion*, 395 U.S. 367 (1969); Smith, *supra* note 28, at 1493.

D. FCC Interpretation

The 1980s ushered in a period of significant change in FCC policy toward broadcast regulations. The FCC took note of the Court's apparent retreat from reliance on the scarcity rationale and in 1985 published a report, subsequently issuing a decision in 1987, stating that "we no longer believe that there is scarcity in the number of broadcast outlets available to the public."[64] The abandonment of the fairness doctrine correlated with a broad expansion of the 1959 exemptions through FCC rulings. Around the same time as the abandonment of the fairness doctrine, the FCC began to include a wider range of programming outside of traditional newscasts and news interviews under the exemptions. Such programs included *The Howard Stern Show*,[65] *Access Hollywood*,[66] *Politically Incorrect*,[67] *Sally Jessy Raphael*,[68] and *Jerry Springer*.[69]

The FCC has broad authority to interpret the words of the equal time rule. For example, the FCC has shaped the meaning of the word "use" in the statute. In 1976, the FCC determined that a movie in which a candidate plays a role qualifies as a "use" of airtime under the equal time rule, in the context of airing Ronald Reagan's films on television.[70] Under the FCC's approach, the intent of the candidate to appear as a candidate apparently has no bearing on whether or not such appearance is a "use": "if a legally qualified candidate voluntarily appears as a performer, celebrity, or station employee in a non-exempt program, his opponents will continue to be entitled to equal opportunities."[71] To determine whether a program is a "use" the FCC looks to seven factors:

> (1) The format, nature, and content of the program; (2) whether the format, nature, or content of the program has changed since its inception, and, if so, in what respects; (3) who initiates the program; (4) who produces and controls the program; (5) when the program was initiated; (6) whether the

64. *In re* 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 147, 196–221 ¶¶ 81–131 (1985); *In re* Syracuse Peace Council Against TV Station WTVH Syracuse, 2 FCC Rcd. 5043, 5044, 1987 FCC LEXIS 3349, *9, 63 Rad. Reg. 2d (P & F) 541.

65. Infinity Broad. Operations Inc., 18 F.C.C.R. 18,603, 18,604 (2003).

66. Request of Access Hollywood, 1997 WL 358720 (F.C.C. July 1, 1997).

67. ABC, Inc., 15 FCC Rcd. 1355, 1359–60 (1999).

68. Multimedia Entm't Inc., 6 F.C.C.R. 1798 (1991).

69. Multimedia Entm't Inc., 9 F.C.C.R. 2811 (1994).

70. Request by Adrien Weiss, 58 F.C.C.2d 342, 343–44 (1976).

71. Codification of the Comm'n's Political Programming Policies, 7 F.C.C.R. 678, ¶¶ 33–34 (1991).

> program is regularly scheduled; and (7) if the program is regularly scheduled, the time and day of week when it is broadcast.[72]

Thus, it becomes difficult to predict what the FCC would consider a "use" since the factors can be broadly interpreted.

The FCC's interpretive approach has tended to blur the lines of the equal time rule such that it has become difficult for candidates and broadcast stations to determine whether an appearance would or would not fall into its realm. The multi-factor approach illustrated above is a common type of test used by the FCC; each of the exemptions is determined using such an approach, which tends to lead to broad interpretation of statutory terms. These multi-factor analyses focus on form as well as (and sometimes over) content.[73] Often, the FCC will make a decision that makes practical sense but is perhaps not justified by the text of the statute. For example, while the FCC initially suspended the equal time rule to allow for the Kennedy/Nixon debates in 1960, it did not rule political debates exempt until 1975,[74] raising the question of whether such a move was based on pure convenience rather than statutory authority.

The expansion of the section 315(a) exemptions through FCC decisions has been harshly criticized, as has the broad authority of the FCC to make such decisions. One commentator has noted that the FCC's policy of exempting entire programs rather than just the portions dedicated to bona fide news interviews is part of the reason that the equal time rule is in decline.[75] In 1959, the economist Ronald Coase warned of the power of the FCC to give and take airwave time as it pleased: "It is difficult for someone outside the broadcasting industry to assess the extent to which programing [sic] has been affected by the views and actions of the Commis-

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72. Ricchiuto, *supra* note 16, at 273 (citing Use of Broad. Facilities by Candidates for Pub. Office, 24 F.C.C.2d 832, sec. III (1970)).

73. *Id.* at 274; Jonathan D. Janow, Note, *Make Time for Equal Time: Can the Equal Time Rule Survive a Jon Stewart Media Landscape?*, 76 GEO. WASH. L. REV. 1073, 1079 n.38 (2008).

74. Aspen Inst. Program on Commc's and Soc'y, 55 F.C.C.2d 697, ¶¶ 21–29 (1975), *aff'd*, 538 F.2d 349 (D.C. Cir. 1976). This came after the initial suspension of the equal time rule to air the presidential debates in 1960. *See* Trex, *supra* note 21.

75. Ricchiuto, *supra* note 16, at 275 ("Exempting entire programs rather than individual segments from equal time requirements is one of the factors accounting for the deterioration of equal time.").

sion."[76] The addition of the programs listed above to those covered by the news interview exemption leaves the door open to argue that portions of SNL—like its weekly news satire skit "Weekend Update"—could eventually be included under the exemption, possibly leading to the exemption of the entire program. Given the current broad interpretation by the FCC, anything is possible.

The next section of this paper will detail the problems that have arisen as a result of the broad interpretation of the exemptions and core equal time provisions.

II.
PROBLEMS WITH THE RULE

The foregoing sections begin to paint a picture of the over- and under-inclusiveness of the equal time rule, as well as highlighting certain specific areas of weakness, such as the definition of "use" and the broad interpretation of the "bona fide news interview" exemption. These specific examples are indicative of a major problem with the equal time rule: the fact that it lacks clear standards, and the exceptions have overly weakened the substantive rule. This Part will delve deeper into the specific problems with the FCC's statutory interpretation of the exemptions, the definitions of a "legally qualified candidate" and "equal opportunity," and those individuals whose appearances do not count under the rule.

A. The Statutory Exemptions

The 1959 exemptions to the equal time rule were enacted with the idea that a strict interpretation of the equal time rule would lead to a chilling effect on coverage of political elections, as news broadcast providers would feel hesitant to cover politicians if the sword of Damocles were hanging over their heads.[77] Legislative history indicates that Congress was aware of—and nervous about—the potential for the exemptions to swallow the whole of the rule; the Committee which presented the exemptions was "not unmindful that the class of programs being exempted from the equal time requirements would offer a temptation as well as an opportunity for a broadcaster to push his favorite candidate and to exclude

76. Coase, *supra* note 43, at 12. Coase argues this point in the context of the FCC's cautious distribution of radio licenses but his argument is equally applicable (and prescient) to the situation of seemingly overbroad FCC decisions to exempt entire shows that do not fall squarely under the exemptions.

77. *See* Holcomb, *supra* note 24, at 90–93.

other[s]."[78] Those fears have become a reality as the FCC interpretation of the rule and the exemptions thereto have, for practical purposes, swallowed the rule.[79]

Exemption	Short Definition	Example
Bona Fide Newscast	Traditional news program	Nightly news on local station
Bona Fide News Interview Program	Interview shows that discuss newsworthy events	Very broad—from *Meet the Press* to *Howard Stern*
Bona Fide News Documentary	Documentary that discusses news but not centered on a specific candidate	Perhaps *An Inconvenient Truth*
On-the-Spot Coverage of Bona Fide News Events	Most live news coverage	Debates, political conventions

1. Bona Fide Newscast

In determining whether a program qualifies as a bona fide newscast, the FCC considers format over content.[80] Specifically the FCC looks at whether a show "report[s] about some area of current events, in a manner similar to more traditional newscasts."[81] Under this exemption, it appears that if a program looks like a traditional news program, it will be considered a bona fide newscast as long as the network seems to be exercising "good faith news judgment."[82] An example of a bona fide newscast is the nightly news on a local television station.

2. Bona Fide News Interview Program

Many of the programs that the FCC has exempted from equal time requirements, such as *The Howard Stern Show*, fall under the category of bona fide news interview programs. This is easily the broadest exemption category and the one that is criticized above all others. Initially, Congress cited shows such as *Meet the Press* and *Face the Nation* to illustrate what it considered as belonging to this cate-

78. S. Rep. No. 86-562, at 10 (1959).

79. *See* Rex S. Heinke & Heather L. Wayland, *Lessons from the Demise of the FCC Fairness Doctrine*, 3 NEXUS, no. 1, 1998 at 3, 7 (1998) ("This trend toward an increasingly liberal construction of the exemptions has substantially diluted the effect of the Equal Time Rule.").

80. *See* Ricchiuto, *supra* note 16, at 274; Janow, *supra* note 73, at 1079.

81. Paramount Pictures Corp., 3 FCC Rcd. 245, ¶ 7 (1988).

82. Ricchiuto, *supra* note 16, at 274 (citing *In re* Request of Access Hollywood, 1997 WL 358720 (F.C.C. July 1, 1997)).

gory.[83] After 1984, however, the FCC dramatically expanded the realm of this exemption.[84]

To determine whether a program should be exempted as a bona fide news interview program, the FCC looks at the following factors:

> (1) [W]hether the broadcast is regularly scheduled[,] (2) whether the selection of the content, format, and participants of the program is under the exclusive control of the licensee[,] and (3) whether licensee determinations as to format, content, and participants are made in the independent exercise of licensee's news judgment rather than political advantage of any candidate.[85]

Critics of the breadth of this exemption note that one remedy would be to exempt only the segments of programs that are actually interview-based rather than the entire program.[86] While the FCC does follow that protocol at times,[87] it has also been clear in rulings such as the *Howard Stern* decision that even non-traditional interview formats can wholly fall under this exemption so as not to discourage innovation in broadcasting.[88] In one major decision, the FCC specifically opted not to rule on the applicability of equal time to non-interview segments of *The Tonight Show*.[89] Does that mean that Donald Trump could appear in a traditional seated interview under the exemption, but if he entered the show during the opening monologue it would trigger equal time? Thus it becomes very important whether the FCC chooses to exempt a program entirely or only in part. Broadcasters in this legal gray area often choose to err on the side of caution, treating potentially exempt appearances as triggering equal time, in order to avoid sanctioning.

3. Bona Fide News Documentary

Under another factored analysis, to determine if a program qualifies as a bona fide news documentary, the FCC mainly evalu-

83. 105 CONG. REC. 17,779 (1959) (remarks of Rep. Moss); *see also* Holcomb, *supra* note 24, at 93.

84. *See* Angelides for Governor Campaign, F.C.C. DA 06-2098, ¶ 9 (Oct. 26, 2006) [hereinafter The Tonight Show Decision]; *see also* Janow, *supra* note 73, at 1080.

85. Ishmael Flory, 66 F.C.C.2d 1047, 1048 (1976) (denying an equal time request to a member of the Communist Party in a gubernatorial race). *See also* ABC, Inc., 15 FCC Rcd. 1355, 1358 (1999).

86. *See* Ricchiuto, *supra* note 16, at 275.

87. The Tonight Show Decision, *supra* note 84, at ¶ 16.

88. Infinity Broad. Operations Inc., 18 F.C.C.R. 18,603, 18,604 (2003).

89. Angelides for Governor Campaign, F.C.C. DA 06-2098 (Oct. 6, 2006).

ates whether the documentary was created to advance a specific political candidate or rather to highlight an issue.[90] These factors include:

> (1) whether the appearance of the candidate was incidental to the presentation of the subject; (2) whether or not the program was designed to aid or advance the candidate's campaign; (3) whether the appearance of the candidate was initiated by the [station] on the basis of the [station's] bona fide news judgment that the appearance [was] in aid of the coverage of the subject matter; and (4) whether the candidate had any control over the format, production, or subject matter of the broadcast.[91]

A scenario that demonstrates the gray area defined by this exemption would be if a station aired the film *An Inconvenient Truth* in a hypothetical Al Gore candidacy. While it is a movie primarily about a political issue, it also focuses on one candidate and could be seen as advancing that candidate's campaign. The FCC ruled in 2000 that the program *Biography* on A&E does not fall under the news documentary exemption but it does fit into the news interview exemption.[92] This is an example of how the exemptions are treated merely as a formality, requiring stations to find the best fit and perhaps tweak the programming slightly to ensure that they comply.[93]

4. On-the-Spot Coverage of Bona Fide News Events

The FCC included live debates under this exemption in 1975.[94] Most live news coverage is considered an exemption unless it is clear that the broadcaster is showing candidate favoritism.[95] This caveat is particularly designed to allow coverage of Democratic and Republican conventions and other politically significant events.

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90. Janow, *supra* note 73, at 1080.

91. Declaratory Ruling Concerning Whether the Educ. Program "The Advocates" Is an Exempt Program Under Section 315, 23 F.C.C.2d 462, 1114 (1970) (determining that the program—in which attorneys present their sides of a case—does not fall under one of the exemptions to section 315).

92. A&E Television Networks, 15 FCC Rcd. 10796, 10799 (2000) (Declaratory Ruling).

93. *See* FIRST AMEND. CTR., *supra* note 36. In response to ABC calling the FCC's equal time rule an "anachronism," the chief of the FCC's Office of Political Programming responded that "we're trying to go with innovation. I couldn't imagine that they (ABC) couldn't come up with a format that would work. . . . There's a way to make almost any kind of format that you're imagining work as long as there are certain safeguards."

94. *See supra* note 74 and accompanying text.

95. Janow, *supra* note 73, at 1081.

An important issue raised by this exemption, and one that will be discussed further below, is that debates are not required to showcase candidates outside of the major parties.[96] Thus, fringe candidates have no legal recourse for equal time in the context of most televised debates.

B. Who Else Does Not Count

Equal time goes beyond actual seconds on the air (a reason that many scholars prefer to refer to it as the "equal opportunities" rule), but it certainly does not require the exact same opportunity. The broadcaster is required to consider "time, day, size of audience, and presentation format" in allotting equal time, but is not required to give anyone a specific time slot.[97] For example, it would be impossible for a broadcaster to honor an equal time request for a Super Bowl slot—the broadcaster would not be able to provide a comparable audience for a whole year. And beyond "what" a candidate can ask for lies the big question of "who" can actually ask for it.

1. "Legally Qualified Candidates"

The issue of who qualifies as a candidate under the equal time rule is a further problem in the application of the rule. Equal time only applies to "legally qualified candidates," defined by the FCC as anyone who:

> Has publicly announced his or her intention to run for nomination or office;
>
> Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and
>
> Has met the qualifications set forth in [paragraphs below including] mak[ing] a substantial showing that he or she is a bona fide candidate for such nomination. . . .[98]

Thus the rules of the locality of the election apply to determine whether a person is a legally qualified candidate.[99] For presidential

96. *See* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); *see also* Ricchiuto, *supra* note 16, at 276, 280 n.90 (citing Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486, 489–90 (11th Cir. 1990)).

97. Kimberlianne Podlas, *"I'm a Politician, But I Don't Play One on TV": Applying the "Equal Time" Rule (Equally) to Actors-Turned-Candidates*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 165, 182 (2009). *See also* Harry Dermer, 40 F.C.C. 407 (1964).

98. 47 C.F.R. §§ 73.1940 (a), (d) (2012).

99. *Id*; *see also* Ricchiuto, *supra* note 16, at 272. An example of a non-legally qualified candidate under local rules was Howard Stern when he began campaigning to run for governor of New York. He never filed the necessary paperwork to

races, a candidate becomes legally qualified for the national election after qualifying in ten states.[100]

The wording of the FCC's standard for a legally qualified candidate is problematic insofar as the term "substantial showing" leaves significant room for interpretation. In the past, a substantial showing has been proven using actual physical presence, i.e. Larry Lessig insisting on his candidacy because of literature published and distributed in the state, appearances in the state, speeches made, etc. However, with the increasing reliance of candidates on social media, could a candidate claim to be legally qualified by virtue of presence online? If so, the floodgates would open for anyone to request equal time, with vast First Amendment implications if broadcasters were forced to honor the equal time rule based on Internet presence.

Another problem that arises as a result of the "legally qualified candidate" criterion is obvious: those who need equal time the most are often not eligible to request it. For example, the FCC has clearly ruled that "independent political committees" are not eligible for reasonable rights of access.[101] Similarly, the Supreme Court's decision in *Arkansas Educational Television Commission v. Forbes* shows a lack of concern for protecting the voices of the political minority, "who innumerable times have been the vanguard of democratic thought and whose programs were ultimately accepted" and whose absence "would be a symptom of grave illness in our society."[102] Despite the fact that the Court's decision in *Forbes* rested on different statutory grounds than equal time, the plaintiff in that case originally brought claims requesting equal time, and the larger First Amendment implication is that if a candidate is not already "in,"

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become a legally qualified candidate so his "opponents," Mario Cuomo and George Pataki, had no rights to ask for equal time. *See* David Oxenford, *Donald Trump May Declare Presidential Candidacy on the Apprentice—FCC Legal Issues?*, BROADCAST LAW BLOG (April 17, 2011), http://www.broadcastlawblog.com/2011/04/articles/donald-trump-may-declare-presidential-candidacy-on-the-apprentice-fcc-legal-issues/ [https://perma.cc/EK64-U5ED].

100. David Oxenford, *Law and Order: Equal Opportunities—The FCC Implications of Fred Thompson's Possible Presidential Bid*, BROADCAST LAW BLOG (June 3, 2007), http://www.broadcastlawblog.com/2007/06/articles/law-and-order-equal-opportunites-the-fcc-implications-of-fred-thompsons-possible-presidential-bid/ [https://perma.cc/PG6L-VZY5].

101. J. Curtis Herge (NCPAC), 88 F.C.C.2d 626, 628 (1981). Although this decision is with regards to the "reasonable access" provision in 47 U.S.C. § 312(a)(7), the equal time rule shares the "legally qualified candidate" standard.

102. Francis J. Ortman III, *Silencing the Minority: The Practical Effects of* Arkansas Educational Television Commission v. Forbes, 49 CATH. U. L. Rev. 613 (2000) (quoting C.J. Warren in Sweezy v. New Hampshire, 354 U.S. 234 (1957)).

she cannot expect to get equal time. In a more recent FCC case, the Commission ruled that the Cable News Network (CNN) was not required to give equal time to Dennis Kusinich, a Democratic candidate in 2008 who had been denied access to Nevada primary debates.[103] The FCC held that as long as the network was using objective criteria and not excluding the candidate for obvious partisan leanings, it was not a First Amendment violation to deny Kusinich equal time.[104] The FCC applied the equal time rule despite disagreement over whether it had jurisdiction over cable networks, an issue on which it declined to rule.[105] The denial of equal time to fringe candidates may be one of the most fundamental problems with the equal time rule because it utterly contradicts the principle of equality, particularly under a jurisprudence which, at least since the 1960s, purports to support minority viewpoints.

2. Announcement Rule

If the purpose of the equal time rule is to ensure a wide spectrum of political views prior to an election, one of the biggest shortcomings of the rule is that it does not come into effect until a politician announces his or her candidacy, meaning incumbent politicians are free to toe the line on television and radio up until the moment of truth when they announce candidacy. In 1967, several networks aired an hour-long interview with then-President Lyndon Johnson. Eugene McCarthy, who had recently declared his candidacy, filed for equal time and was denied because the President had not yet announced whether he would be running for office again. As such, "candidates time an announcement that they are running for office very carefully, so as not to trigger the Equal Time rule requiring stations to give broadcast time in equal measure to their opponents."[106]

Furthermore, "non-incumbent candidates-to-be who have not yet declared their candidacy can also make appearances of the sort that would trigger equal time if they were officially declared."[107]

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103. David Oxenford, *FCC Rules Against Kusinich Request for Inclusion in CNN Presidential Debate*, Broadcast Law Blog (Jan. 23, 2008), http://www.broadcastlawblog.com/2008/01/articles/fcc-rules-against-kucinich-request-for-inclusion-in-cnn-presidential-debate/ [https://perma.cc/5C22-UVL7].

104. *Id.* The criteria CNN cited was "that a candidate had to have finished in the top 4 in a previous primary and be polling over 5% in an established national Presidential preference poll."

105. *Id.*

106. U.S. Dep't of State, *Issues of Democracy: Guide to Election 2000*, 5 Electronic J. of the U.S. Dep't of State 1, 84 (Oct. 2000).

107. Ricchiuto, *supra* note 16, at 282.

This issue comes into play with actors-turned-candidates (and personalities like Donald Trump). In 2012, Donald Trump was the subject of a prior debate about the equal time rule because of the rumor that he might announce his presidential candidacy on his television show, *The Apprentice*.[108] Thus any of the appearances leading up to that announcement, as long as they were not rebroadcast, would not have triggered equal time (and he would still have had to be considered a legally qualified candidate to be subject to the restrictions).

The example of incumbents and the example of actors pose different problems: incumbents could likely take advantage of the announcement rule by advocating certain positions and appealing to their audience prior to announcing candidacy, whereas actors and newscasters are simply doing their jobs and perhaps not using airtime to their advantage. It would be hard to imagine how a weatherman could use his position to advocate for himself as a candidate while still delivering the forecast (and not getting fired). As such, TV personalities have to make a possibly career-ending choice by running for office.[109] Meanwhile, the "equality" of giving a politician two hours of free airtime to advocate his or her position versus watching a two-hour movie featuring Arnold Schwarzenegger does not seem to add up mathematically or otherwise. One commentator has suggested that, under these circumstances, "a true equal opportunity would be allowing the opposing candidate to appear on air pretending to be someone other than himself."[110] The same commentator proposed that it would be in the interest of fairness to modify the rule to differentiate between pre- and post-announcement performances, which might make sense if the rule is to be kept.

3. Third Parties

A final class of people to whom the rule does not apply is supporters or third parties discussing and/or endorsing a candidate. This aspect of the rule comports well with our First Amendment sensibilities: the law has to delineate how many limits can be imposed on broadcast freedoms in the context of elections and in light of the Constitution. This means that any third party can speak

108. Oxenford, *supra* note 99.

109. Podlas, *supra* note 97, at 218 ("It is hard to imagine that when Arnold Schwarzenegger was in *Conan: The Barbarian* that he was thinking that in twenty-five years he would run for office, and maybe some then-non-existent network would happen to be running his film.").

110. *Id.* at 219.

on the air in support of a candidate as long as the candidate herself is not involved in the broadcast.[111] It is interesting to consider how much influence comedy and satire sketches have over potential voters—when an actor plays a candidate, there is no equal time requirement, but the effect may be much bigger: "Indeed, television's imagery frequently speaks 'where words . . . or reporting do not.' "[112] The influence that can come about through third parties is an example of how the rule does not really reach its intended effect and could not do so without severe and burdensome First Amendment restrictions. No one is arguing that we should impose equal time requirements for the SNL characters, such that every time Alec Baldwin appears as Trump, the other Republican candidates could request equal time (through character portrayal, presumably).

III.
THE RATIONALES FOR EQUAL TIME NO LONGER STAND

The previous sections of this Note detailed the evolution of the equal time rule and highlighted many of its problems. This Part will discuss the rationales formerly advanced for equal time and why they no longer make sense in light of today's technological and political landscapes.[113]

A. Scarcity of Spectrum Rationale

One of the primary justifications for the equal time rule is the notion that the radio and television spectrum is scarce and must therefore be subject to more limitations despite First Amendment freedoms. As early as 1959, Ronald Coase identified the physical and economic weaknesses of this rationale.[114] What has become clear is that traditional broadcast is subject to an inordinately high

111. Ricchiuto, *supra* note 16, at 281 (citing CBS, Inc. v. FCC, 454 F.2d 1018, 1029 (D.C. Cir. 1971)).

112. Podlas, *supra* note 97, at 173 (quoting Louis Klarevas, "Media Impact in Media Power," *in* Media Politics 281, 281–82 (Mark J. Rozell ed., 2003)) ("As a result, a *Saturday Night Live* satire of a vice-presidential candidate can be as politically relevant as the nightly news.").

113. *See* U.S. Dep't of State, *supra* note 106, at 85 ("As new democracies around the world wrestle with issues of regulation in broadcasting to ensure fairness for political candidates in elections, the U.S. experience is an indication that even simple rules are not always easy to implement in practice and must be periodically reevaluated in the light of changing circumstances, both technological as well as political.").

114. Coase, *supra* note 43.

First Amendment limitation with essentially no legs to stand on, and, as a result, "the Scarcity Rationale put[s] traditional broadcasting, and especially its contents, under far more government control than any comparable business in the United States since the end of prior censorship in the colonial era."[115]

1. Abandonment of Fairness Doctrine

As discussed in Part II.B., *supra*, several early court cases interpreting equal time and the fairness doctrine relied on the scarcity rationale, which in turn became the main reason to justify both the fairness doctrine and the equal time rule. This reliance makes sense: why should the FCC have greater regulatory power over forms of media if they do not have a special need for regulation? The special need for regulation of TV and radio broadcast seemed to be that they were a finite resource.

Though both the equal time rule and the fairness doctrine were premised on the spectrum scarcity argument, only the fairness doctrine was formally abandoned. One of the main reasons that the fairness doctrine was abandoned was that the FCC was no longer comfortable relying on the scarcity rationale. It has become abundantly clear that today "[t]here is no longer any realistic spectrum scarcity, and the distinction between physical and economic scarcity is, if anything, perverse."[116] What really happened as a result of the fairness doctrine was not a promotion of equality on the airwaves but rather a chilling effect on speech because broadcasters were paralyzed by concern that they would have to provide all sides of a controversial issue with an opportunity to be heard.

Since the 1987 FCC decision to abandon the fairness doctrine, evidence has shown that the doctrine did indeed have a chilling effect on radio and television programming.[117] One study took into account the decrease of content regulations by the FCC, the increase of licenses granted by the FCC, and the demise of the fairness doctrine to conclude that the latter did contribute to a decrease in informational programming. The conclusion that broadcasters chose to air less informational programming is the corollary to the study's results, which showed an increase in informa-

115. Berresford, *supra* note 13, at 7–8.

116. Heinke & Wayland, *supra* note 79, at 8.

117. *See* Hazlett & Sosa, *supra* note 54, at 299 ("The evidence suggests that the 1987 elimination of the [Fairness Doctrine] had a pronounced effect on radio station formats—in favor of informational programming"); Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 55 (2010).

tional programming after 1987 because it became less risky to air controversial opinions post-fairness doctrine abandonment.[118] Whether the chilling effect extends to the equal time rule as well is a controversial issue in itself: at least one critical examiner has suggested that while any decisions not to air a candidate's speech that result from fear of violating equal time are, collectively, not as profound as those which were caused by the fairness doctrine, equal time nevertheless does not hold up without the scarcity rationale.[119]

2. Scarcity Has Never Applied to Other Media—Print, Cable, and Beyond

After the Supreme Court's endorsement of the scarcity rationale in *Red Lion* in 1969, other attempts were made to extend its use beyond broadcast media to other forms of media, but those attempts failed.[120] A similar argument to extend First Amendment limitations to print media (though based on a different statute) was hypothetically considered in *Citizens United v. Federal Election Commission*[121] and was roundly rejected by the Court.[122] At oral argument for *Citizens United*, the government argued that the FCC had the right to limit the broadcasting of a documentary video in opposition to Hillary Clinton's candidacy which was to air on hotels' On Demand TV, and the Court asked if that type of regulation would apply to books or print media as well.[123] Mistakenly, the government answered that it would, and by reverse extension of that principle, the Court completely overturned the Bipartisan Campaign Reform Act (BCRA) provision allowing the limitation of First Amendment rights in that context.[124] Print media has thus been consistently considered outside of the gambit of FCC regulation

118. Hazlett & Sosa, *supra* note 54, at 299.

119. Smith, *supra* note 28, at 1517 ("It is likely, however, that the need for the equal time provisions by themselves is somewhat less compelling [than reasonable access provisions].").

120. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

121. 558 U.S. 310 (2010).

122. Jeffrey Toobin, *Money Unlimited: How Chief Justice Roberts Orchestrated the Citizens United Decision*, The New Yorker (May 21, 2012), http://www.newyorker.com/magazine/2012/05/21/money-unlimited [https://perma.cc/SBL3-CX7N]. The argument is often considered part of the reason why the Court made such a sweeping holding over a seemingly narrow question in *Citizen's United*—because the regulations suggested by the government seemed to extend too far in the direction of First Amendment infringement.

123. *Id.*

124. *Id*; *see infra* Part V.B.

and equal time, despite arguments about newspapers as an actual scarce, dying industry today.

Cable TV has also traditionally been treated differently from broadcast TV under federal regulations. For example, it is commonly known that the FCC is unable to regulate the decency of cable programs the way that they are entitled with broadcast TV. The Supreme Court has even ruled that cable cannot be treated the same as broadcast TV because "the justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium,"[125] namely, the scarcity doctrine. As such, cable has always lived in a legal gray area with respect to the equal time rule.[126] Much of the confusion results from the turf war between the FCC and cable broadcasters over whether the rules apply to cable or solely to broadcast TV.

Even more confusion derives from the difference between cable providers and cable networks.[127] Though much of cable TV is clearly exempt, networks often decide to comply with equal time as a precautionary measure.[128] For example, when Arnold Schwarzenegger ran for governor of California, several cable broadcasters chose not to air any of his movies out of fear of triggering equal time requirements.[129]

Cable TV's innumerable broadcast offerings intrinsically do not support the scarcity rationale. Likely because of the number of offerings and the lack of censorship, cable has surpassed traditional

125. Turner Broadcasting System, Inc. v. F.C.C. 512 U.S. 622, 637 (1994).

126. Trex, *supra* note 21 ("As Scott Horsley reported on NPR's *Morning Edition* during the discussion of the Thompson/*Law & Order* issue, equal time on national cable networks is a bit of a gray area.").

127. The amended law only covers "local origin cablecasting" which has been taken to exclude cable networks. Since there has been no official FCC ruling on the issue, cable networks often err on the side of caution and remove questionable material. *See* David Oxenford, *Barack Obama and The Daily Show, Hillary Clinton and David Letterman, Fred Thompson and Law and Order—What About Equal Time?*, BROADCAST LAW BLOG (Aug. 30, 2007), http://www.broadcastlawblog.com/2007/08/articles/barack-obama-and-the-daily-show-hillary-clinton-and-david-letterman-fred-thompson-and-law-and-order-what-about-equal-time/ [https://perma.cc/SU6L-2PSP].

128. Ricchiuto, *supra* note 16, at 284. As an example, "both the Sci-Fi channel and FX elected to suspend scheduled airings of Schwarzenegger action films" during his gubernatorial campaign. *Id.*

129. Podlas, *supra* note 97, at 169. This was the case for cable as well as broadcast television because of the confusion over whether equal time applies to cable. *See infra* Part IV.A.2.

broadcast TV in viewership.[130] Even in 2005, "[t]he vast majority of American households [paid] money to avoid traditional TV and get other channels."[131] As such, "[d]ue to the prevalence of cable television in America, much of the programming viewers receive in their homes remains untouched by the requirements of equal time."[132] The sheer number of cable providers that exist is—in and of itself—proof of the inapplicability of the scarcity rationale to cable TV.

Cable has long lived in the space in between unregulated print media and highly-regulated broadcast TV[133]—in a limbo of regulation that provides space to circumvent equal time unjustified by the scarcity rationale—but recent developments in technology have made this zone even more hazy. Nowadays one could argue that newspapers are scarcer than broadcast media. If that rationale were used, however, to justify more print media regulation, the *Citizens United* jurisprudence would completely undercut it.

In general, the distinctions that have long been drawn between print and broadcast media and between cable TV and broadcast TV are being eviscerated by technological advances. The distinction between print media and broadcast media is becoming virtually meaningless in the information age. Take for example the movement toward tablets as a source of reading news today; these inventions, like the iPad and Kindle, have brought print and broadcast much closer together.[134] Even in the 1980s, the question of this distinction was presented to courts in the context of a new form of media called "teletext." One court specifically articulated its hope that the Supreme Court would find another rationale aside from spectrum scarcity to differentiate between print and broadcast media:

> There may be ways to reconcile *Red Lion* [allowing First Amendment limits on broadcast media] and *Tornillo* [rejecting First Amendment limits on print media] 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

130. *Id.* ("[A]lmost ninety percent of television viewers have cable or satellite."); Berresford, *supra* note 13, at 21 ("This year [2005], more Americans watched the Republican National Convention on cable's FoxNews channel than on any traditional TV broadcaster.").

131. Berresford, *supra* note 13, at 22.

132. Janow, *supra* note 73, at 1083.

133. Many people read Turner Broadcasting Systems, Inc. v. F.C.C., 512 U.S. 622 (1994), to create an intermediate scrutiny level for cable. Still, the FCC asserts more jurisdiction and cable asserts less but complies for fear of punishment.

134. Hazlett & Sosa, *supra* note 117, at 64.

> broadcast media, surely by pronouncing *Tornillo* applicable to both, or announce a constitutional distinction that is more usable than the present one.[135]

The argument advanced by the D.C. Court of Appeals was not that print media and broadcast media are legally indistinguishable as sources of information, but rather that there ought to be a better justification for restricting free speech for the latter than the defunct scarcity rationale. The comparison of actual scarcity between print and broadcast media invited by Judge Bork was not new to the academic community. Ronald Coase, ahead of his time, pointed out the disturbing paradox of broadcast scarcity in comparison with print:

> The situation in the American broadcasting industry is not essentially different in character from that which would be found if a commission appointed by the federal government had the task of selecting those who were to be allowed to publish newspapers and periodicals in each city, town, and village of the United States. A proposal to do this would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press.[136]

The use and prevalence of the Internet and digital age technologies present even more challenges for justifying broadcast regulation on the notion of spectrum scarcity.

3. No Economic Scarcity

Perhaps the most important reason that the scarcity doctrine can no longer stand as the predominant justification for the equal time rule is that economic scarcity of the broadcast frequencies no longer exists. Additionally, just because a resource is finite does not mean that it should be regulated in an overly burdensome way.[137] Coase described the situation first and best:

> [I]t 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 many claimants, should be

135. Telecomms. Research & Action Ctr. v. F.C.C., 801 F.2d 501, 509 (D.C Cir. 1986); *see also* Hazlett & Sosa, *supra* note 117, at 62 n.60.

136. Coase, *supra* note 43, at 7.

137. *Id.* at 10.

> 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.[138]

Furthermore, government created "scarcity" caused by limiting the frequencies and determining who can get licenses only creates an artificial supply problem and makes it unclear whether the demand for frequencies actually outperforms the supply.[139]

The foregoing reasons illustrate the inapplicability of the scarcity rationale to the broadcast regulations supervised by the FCC and are just as applicable to the equal time rule as to the fairness doctrine. If the scarcity rationale has been discredited, "the committee [should] have no hesitation in removing completely the present provision regarding equal time and [should] urge the right of each broadcaster to follow his own conscience in the presentation of candidates on the air."[140]

B. Three Other Rationales

Aside from the scarcity rationale, a few other justifications have been advanced in defense of the equal time rule, particularly since spectrum scarcity has lost popularity. These include a policy rationale of "dangerous power" of the broadcast stations; the immediacy rationale, which contends that the effectiveness of broadcast TV makes it inherently subject to regulation; and the diversity rationale, which suggests that broadcast TV is obligated to include a diversity of opinions. Each of the three is explored and rejected as a basis for stricter First Amendment regulation of broadcast TV in this section.

1. Policy Rationale

One of the earliest justifications for the broadcast regulations, including the equal time rule, was the idea that the big three networks would back a political candidate and exert undue influence using the media to sway elections.[141] This policy concern took form in an idea called the "dangerous power rationale." As an example of the use of this rationale to support broadcast regulation, the *Red Lion* Court was clearly worried about the power that the broadcast

138. Coase, *supra* note 43, at 14.
139. *Id.* at 11–12.
140. S. Rep. No. 86-562, at 9 (1959); *see also* Holcomb, *supra* note 24, at 104.
141. Berresford, *supra* note 13, at 20.

networks could exert over voters.[142] The flipside to the idea that the big three networks could co-opt the airwaves in favor of one candidate is that the American public is susceptible to brainwashing by the networks, as Chief Justice Berger pointed out in *CBS v. DNC* in 1973.[143] Not all the justices on the *CBS* Court were convinced of the wisdom of the dangerous power rationale, and Justice Douglas said so in his concurrence:

> The implication that the people of this country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.[144]

There has, by and large, always been some healthy pushback against what the media tells the American public. And if the 2016 election cycle has proven anything, it is that regardless of their political leanings, broadcast networks will cover Trump in the news and beyond because he increases the ratings. It is clear today that the usurpation of the airwaves envisioned under the dangerous power rationale did not occur and that it would be impossible in the current media landscape.

2. Immediacy Rationale

A short word should be noted on the ill-regarded immediacy rationale, which posits that the effectiveness of the communication (here, broadcast television) justifies more intrusive First Amendment regulations. This rationale was advanced by the FCC in *Telecommunications Research and Action Center v. FCC*.[145] Judge Bork of the D.C. Court of Appeals trounced the immediacy rationale when he said "we are unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less First Amendment protection."[146] There is similarity to be drawn with the dangerous power rationale: courts seem to prefer to use what is seemingly an objective scientific standard, which the scarcity rationale was once considered, to intrude on First Amendment

142. *Id.*

143. 412 U.S. 94, 127–28 (1973); Berresford, *supra* note 13, at 20.

144. *CBS*, 412 U.S. at 152 n.3. (Douglas, J., concurring) (quoting Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 786–87 (1972)).

145. 801 F.2d 501, 508 (D.C. Cir. 1986).

146. *Id.*

freedoms, rather than speculations about the potential effectiveness or power that a form of speech can generate. If effectiveness of speech were a legitimate policy rationale for FCC regulation, the Internet would surely have come under tighter governmental control.

3. Diversity Rationale

A final rationale that was formerly advanced as justification for the equal time rule is the idea that a diversity of opinions should be broadcast on the airwaves. The *Red Lion* Court adopted this justification in a footnote,[147] and it has gained some ground since the demise of the scarcity rationale with those who favor continued FCC regulation of the airwaves.[148] Two commentators have, however, argued that the Court's holding in *Tornillo* specifically precludes such a rationale as exceeding the authority of the FCC when seeking to abridge First Amendment rights.[149] Even though it did not reference *Red Lion*, the "*Tornillo* Court implicitly rejected the view that government content regulations could be justified by the need to preserve diversity in the face of economic scarcity—e.g., the limited number of newspapers in most cities. Rather, *Tornillo* suggested that only physical spectrum scarcity would be enough."[150] As argued in Part IV.A., *infra*, that theory no longer carries weight.

IV. RECOMMENDATION—WHY THE EQUAL TIME RULE SHOULD BE ABANDONED

A few years back, one critic stated that "[e]qual time is a doctrine which, despite its well-meaning roots, is currently serving no useful purpose."[151] That critic suggested either the abandonment or a revamping of the rule in order to make it useful. However, at this point, it is clear based on continuing trends in technology and

147. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 n.28 (1969) (suggesting that the FCC regulations would still be acceptable without the scarcity rationale because First Amendment freedoms are not infringed on "by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public"); *see also* Heinke & Wayland, *supra* note 79, at 8.

148. Heinke & Wayland, *supra* note 79, at 8 (finding that the *Red Lion* footnote "is acquiring renewed significance as the empirical assumption of spectrum scarcity has become increasingly unsound").

149. *Id.*

150. *Id.* at 8–9.

151. Ricchiuto, *supra* note 16, at 286.

politics that any such revamping may make the rule more effective (if it were enforced and applied) but would not be justified. I recommend abandoning the rule and putting in place a security regime to assuage the fears that may still exist in the absence of the regulation.

A. Technological Changes

The rationales discussed above—scarcity, dangerous power, immediacy, and diversity—are all undermined by the proliferation of modern technologies that have vastly expanded the ways in which the American public receives information about politics. For example, the expansion of the Internet as a source of political information addresses the scarcity rationale in that the widest range of opinions are reflected on the myriad media available, which are not considered to be scarce.[152] As mentioned already, most Americans pay for cable TV in order to avoid traditional broadcast television. But beyond the declining reliance on broadcast TV to air a variety of opinions, if there ever was such a reliance, studies are now clear that the Internet is eclipsing traditional broadcast television—particularly among younger generations—as a primary source of political information. For example, a 2016 study suggests that digital media is at parity with broadcast TV as a primary information source for both candidates and political issues.[153] An earlier study by the same organization shows the increasing reliance on cable TV and the Internet for political information while local TV mainly de-

152. Berresford, *supra* note 13, at 18 ("In sum, the decades since The Scarcity Rationale took shape have seen an explosion in the number of distribution networks and channels, both via radio and other media—more traditional broadcasters, cable television, DBS, DARS, Internet, WiFi and WiMax—and in the mass of content that fills them. By no rational, objective standard can it be said that, today in the United States, channels for broadcasting are scarce.").

153. For candidate information, 61% of respondents used digital media and 61% used TV; and for information on issues, TV was slightly ahead of digital, at 69% compared to 67%. Interactive Advertising Bureau, *The Race for the White House 2016: Registered Voters and Media and Information During the Primaries* (January 2016), https://www.iab.com/insights/the-race-for-the-white-house-2016-registered-voters-and-media-and-information-during-the-primaries/ [https://perma.cc/LL2U-TABY]. Trends indicate an increase toward digital media as a primary source of information about political issues. *See, e.g.*, Amy Mitchell, Jeffrey Gottfried, & Katerina Eva Matsa, *Millenials and Political News: Social Media – The Local TV for the Next Generation?*, Pew Research Center, Journalism and Media (June 1, 2015), http://www.journalism.org/2015/06/01/millennials-political-news/ [https://perma.cc/3L5X-4J25] (showing that 61% of millennials rely on Facebook for political info where 37% rely on local TV versus baby boomers, where the split is the opposite).

clined.[154] The proliferation of streaming TV also creates a way around the equal time rule: because streaming TV programming does not seem to fall under the equal time rule, NBC could rebroadcast the episode of SNL featuring Donald Trump on its website and not be subject to equal time.[155] This outcome makes sense given the traditional non-regulation of the Internet. Simultaneously it makes equal time on local broadcast channels seem arbitrary and irrelevant.

The increasing reliance on alternate media sources outside of traditional broadcast television undermines all of the rationales that were relied upon in the years prior to the abandonment of the fairness doctrine and creates a huge incentive to eliminate the barrier on First Amendment freedom of the press codified in the equal time rule.

B. Political Changes

One of the major changes in the political landscape in the last two presidential election cycles has been the deregulation of campaign financing through the *Citizens United* decision.[156] In *Citizens United*, a conservative nonprofit corporation wished to air a film criticizing Hillary Clinton in the days leading up to the Democratic Primary.[157] Under the Bipartisan Campaign Reform Act (BCRA) and FCC regulations, such an action would have been a violation of law because corporations were barred from spending from the general treasury for either general advocacy of a political candidate or for "electioneering communications."[158] The Supreme Court overturned two prior decisions and portions of BCRA, finding that corporations are entitled to exercise First Amendment rights. One of the major criticisms of this opinion was that it essentially empow-

154. The percentage of US adults who get their news from the Internet went from 9% in January 2000 to 36% in October 2012, where the percentage of US adults who get their news from the local TV stations went from 48% to 38% in the same time frame. Pew Research Center Staff, *Internet Gains Most as Campaign News Source but Cable TV Still Leads*, Pew Research Center, Journalism and Media (Oct. 25, 2012), http://www.journalism.org/2012/10/25/social-media-doubles-remains-limited/ [https://perma.cc/T4KW-Z6NK].

155. Oxenford, *supra* note 99 ("Thus far, none of the political rules have been officially extended to the Net other than some vague statements that a broadcaster, who sells Internet spots as part of a package with broadcast spots, may need also to sell those spots to candidates—especially if they are sold to one candidate for a particular race.").

156. 558 U.S. 310 (2010).

157. *Id.* at 319–20.

158. *Id.* at 320–21.

ered corporations by ensuring that they are afforded the same First Amendment freedoms as natural beings, which has always been a controversial issue.[159]

Despite the prevailing opinions on the wisdom of that choice, both for and against, for our purposes, the relevant overarching theme emphasized in the *Citizens United* opinion is the idea that it is not the charge of the First Amendment "to equalize the ability [of participants] to impact elections."[160] This outlook reinforces traditional views of the Constitution as a negative-rights-protecting rather than a positive-rights-granting document.[161] It tells us what the government (and other people) cannot do to us rather than what the government should do for us. For example, in the U.S. tort regime, black letter law states that if you walk by a person drowning in a river and do not save her, you are not liable for negligence.[162] This approach certainly has its critics but inheres in all aspects of American law, and election law is no different. If the law is willing to let a person drown, it seems even more probable to allow a candidate to metaphorically drown in an election. Given the current Court's conservative approach, the equal time rule could very well fall if challenged.[163]

A broader implication of *Citizens United*, and one that has firm support in the academic community, is the general deregulation of the campaign space in favor of a disclosure-based regime that encourages transparency.[164] This concept also fits well with the aban-

159. *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003) (deferring to Congress's ability to weigh competing constitutional concerns in enacting contribution limits designed to protect the integrity of the political process because of its interest in preventing the erosion of public confidence in the integrity of the electoral process); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (recognizing that the compelling governmental interest in preventing corruption supports the restrictions on political contributions through the corporate form).

160. Elizabeth Elices, Citizens United *and the Future of FCC Content Regulation*, 33 HASTINGS COMM. & ENT. L.J. 51, 64 (2010). Furthermore, the *Citizens United* decision's "relevance in telecommunications may not be in direct application, but may serve as a guide to how the current Supreme Court may analyze media regulation in the future." *Id.*

161. *See* Definition, *Negative and Positive Rights*, https://en.wikipedia.org/wiki/Negative_and_positive_rights [https://perma.cc/85HV-PRWX].

162. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS' LAW OF TORTS, § 259 (2d ed. 2016).

163. Then again, the recent replacement of Justice Scalia does create a possibility of a shift in this stance. However, given the lack of underlying rationales for the equal time rule, even without the *Citizens United* attitude the Court may see reason for abandonment.

164. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (explaining the emergence of

donment of the equal time rule. To require broadcasters to comply with infringements on First Amendment discretion and not require the same regulations in other media will only—like water moving hydraulically from one space to another—send the coverage into the unregulated spaces, like the Internet. This analogy was first advanced by Samuel Issacharoff and Pamela Karlan in the context of PACs and Super PACs and the world of campaign finance. In the context of political money, the high regulation in one area will force the money elsewhere, such that "the price of apparent containment may be uncontrolled flood damage elsewhere."[165] Furthermore, the anticorruption rationale (which accepted tighter election restrictions in order to prevent the appearance of corruption in elections) that was briefly taken to an extreme in *Austin v. Michigan Chamber of Commerce*[166] has now been roundly rejected in *Citizens United*[167] and *McCutcheon v. FEC*,[168] suggesting that elections should not create special circumstances for tighter First Amendment restrictions.

C. Critiques of Past Suggestions

Over the years, many critics have suggested either abandonment or overhaul of the equal time rule. The analysis above, with a focus on the changes in the technological and political climate of today's election system, advocates a total abandonment of the rule. Advocates of the abandonment of the rule have cited many different reasons. While fairness of election coverage might be a legitimate concern, it is one that is not well addressed by the FCC or any regulatory agency for that matter. "To the contrary, the FCC's experiment with such regulations has demonstrated that such regulatory 'solutions' to the problem of media unfairness serve only to stifle the flow of information to the public, while creating danger-

soft money as a hydraulic outcome of overregulation: "[P]olitical money, like water, has to go somewhere. It never really disappears into thin air."); Samuel Issacharoff, *Market Intermediaries in the Post-*Buckley *World*, 89 N.Y.U. L. REV. ONLINE 105 (2014) (arguing for raising contribution limits to decrease reliance on unregulated independent spending).

165. Issacharoff & Karlan, *supra* note 164, at 1713.

166. 494 U.S. 652 (1990) (holding that the Michigan Campaign Finance Act, which prohibited corporations from using their general treasury funds, was constitutional under the First Amendment).

167. 558 U.S. 310 (2010) (holding that individual contribution caps to parties is unconstitutional).

168. 134 S. Ct. 1434 (2014) (holding that Congress may target only "quid pro quo" corruption).

ous opportunities for government intimidation of the media."[169] Two aspects of that dysfunction are the facts that FCC enforcement is in and of itself problematic, and that it can have a chilling effect on the media rather than encouraging the flow of information. One commentator has noted that "[b]ecause of the non-uniform ways in which the equal time rule has been applied and its extremely lax enforcement by the FCC, critics wonder whether the public would even notice a difference if the rule were abrogated for good."[170]

However, several commentators have argued for an overhaul of the rule to address some of its problems. Arguments for revamping the rule, though well-meaning, do not really fit with either the political trend toward deregulation of the campaign space or the advances in technology that are rendering the equal time rule obsolete. For example, one commentator has suggested the following changes: (1) eliminating the news interview exemption and (2) extending the equal time rule to cable networks.[171] First, this commentator bases his arguments on a flawed understanding of the scarcity rationale. He cites *Red Lion* and inaccurately relies on a journal article citing that decision as standing for the proposition that the broadcast spectrum is a fixed resource.[172] This contention has been refuted by scholars dating back to Coase and all the way up to (and beyond) the 2005 FCC-published report on the scarcity rationale, questioning economic scarcity and even the scientific premise of physical scarcity.[173] He further relies on the dangerous power rationale, discussed *supra* Part IV.B.1, suggesting that it remains a viable interest for the government to regulate broadcast TV because of concerns of media domination.[174] Aside from the fact that this rationale has not come to fruition in the history of broad-

169. Heinke & Wayland, *supra* note 79, at 11.

170. Ricchiuto, *supra* note 16, at 279.

171. Janow, *supra* note 73, at 1087–89; *see also* Holcomb, *supra* note 24, at 105–06 (suggesting the elimination of the "bona fide news interview program" exemption).

172. Janow, *supra* note 73, at 1090 n.113.

173. *See* Coase, *supra* note 43; Berresford, *supra* note 13, at 30 ("The Scarcity Rationale was intellectually questionable from its inception. Moreover, even its proponents knew it might not be needed long. The *Red Lion* Court realized that new technologies may require changes in old ideas. The technologies that have appeared since *Red Lion*, as well as other factors described above, have nullified The Scarcity Rationale. It no longer provides a rational basis for regulating traditional broadcasters . . . .").

174. Janow, *supra* note 73, at 1091.

cast TV, it is less likely to occur in the vast media landscape of today.[175]

Furthermore, the extension of the equal time rule to cable TV would ostensibly mean that the rule would apply to FoxNews or MSNBC. While critics of these stations may disagree with their political standpoints, there is no doubt that a huge number of Americans—often those who identify with one of the two major parties—access the news from these sources and prefer them precisely because they report news in a way that caters to their political leanings. In fact, FoxNews's and MSNBC's viewerships have both been increasing, as opposed to the decreasing viewership of (what some deem) the more politically neutral CNN.[176] If the equal time rule applied to cable television, it would only further limit viewer choices in news sources and stifle journalistic expression, raising more First Amendment concerns.

A further problem with these recommendations is that this article predates the *Citizens United* decision. It would be unlikely in a post-*Citizens United* world for there to be a trend toward more First Amendment regulation of election coverage. Though the article was written in 2008 and thus took into account the technological expansions of the media since the advent of the Internet, the nine years since then have only seen more expansion and data, discussed *supra* in Part IV.A.; and the more technological expansion that occurs, the less the argument for regulating broadcast TV makes sense.

Another commentator suggested revamping the rule so that it would be more fair in the context of actors-turned-candidates by (1) distinguishing pre-declaration appearances from those post-candidacy announcements; (2) distinguishing character roles from

175. *See* Smith, *supra* note 28, at 1511–12 ("Due to the operation of the 'marketplace of ideas,' concern about the influence of any one speaker is ordinarily unfounded because his speech is counterbalanced by speech from other quarters, all of which openly competes for acceptance by the public. This is also true in the context of speech by broadcasters; any favoritism exhibited by one broadcaster toward a particular candidate should be counterbalanced by that of other broadcasters in providing opposing candidates with air time privileges. Even in the unlikely event that all broadcasters in a certain community favored the same candidate with additional programming coverage or broadcast opportunities, the guarantee of reasonable access opportunities would still ensure that the electorate had sufficient exposure to the speech of unfavored candidates to perform comparisons among them.").

176. Jesse Holcomb, Amy Mitchell & Tom Rosenstiel, *Cable: By the Numbers*, The State of the News Media 2012: Pew Research Center, http://www.stateofthemedia.org/2012/cable-cnn-ends-its-ratings-slide-fox-falls-again/cable-by-the-numbers/ [https://perma.cc/XA2N-UAHB].

candidate appearances; (3) applying a modified "positive appearance standard to character portrayals"; and (4) requiring "appearances" to be voluntary.[177] Although this approach addresses some of the minor issues raised so far in this paper and for a small subset of political candidates, it would be like using a Band-Aid to fix a broken leg—the fundamental First Amendment problems and current state of political and technological advances would not be solved or properly addressed by the changes.

CONCLUSION

Instead of attempting to tweak or overhaul a rule whose initial justifications no longer stand, the equal time rule should be abandoned, with a safety net in place consisting of the reasonable access provision codified in section 312(a)(7) and a mechanism to instate an entirely new rule if the need presented itself.[178] The mechanism could be an independent committee that meets every five years to analyze the post-equal time rule regime. This committee could focus primarily on whether the broadcast networks did in fact give more time to one candidate or clearly take on partisan stances. It could also examine new technologies and determine what kind of impact broadcast TV had vis-à-vis other media to see if any new regulations were warranted. Here, the committee could take into account whether politicians outside of news appearances were acting more as entertainers or as campaigners when appearing on shows like SNL. This type of mechanism would ensure that a new rule, if proposed, would address the real problems facing elections in the current political landscape. A published report based on independent sources would fit with the ideals of transparency and disclosure and give a better idea of how to proceed if it seemed necessary for the FCC to intervene again.

This Note details the multitude of reasons why the equal time rule should be abandoned: from the debunking of the rationales underlying the rule, like spectrum scarcity, to the current political and technological world which renders the rule ineffective if not obsolete. This Note agrees with the central philosophy of another commentator on section 315(a) who states that "[i]t is hard to imagine why a doctrine that was created to respond to advancements

177. Podlas, *supra* note 97, at 217–23.

178. *See* Smith, *supra* note 28, at 1511 (suggesting that the reasonable access provisions provide enough protection and that "it appears that there is no similarly compelling governmental interest in ensuring that all candidates receive precisely the same opportunities for air time").

in technology has so clearly failed to keep up with its roots."[179] In rejecting any proposed modifications of the equal time rule, this Note concludes that there does not appear to be a time in the near future where technology will cease to expand and make ever more information regarding political choices available to the public. If such a time were to come, Congress could reevaluate the status of the media and consider new regulations, particularly those proposed by an independent committee. Any such regulations would not be a reinstitution of the old equal time rule but rather a new approach that would address the concerns of subsequent generations and their needs.

179. Ricchiuto, *supra* note 16, at 293.