# Note

## Make Time for Equal Time: Can the Equal Time Rule Survive a Jon Stewart Media Landscape?

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### *Introduction*

In 2003, when Arnold Schwarzenegger announced his candidacy for governor of California on *The Tonight Show with Jay Leno*, he opened the door to a wide-open gubernatorial race consisting of 135 candidates.[1] Most candidates did not receive such welcome treatment by the television media. Mockingly, the other candidates were invited onto Leno's late-night program for the opportunity to have ten seconds of equal time, only to have their responses played simultaneously to the television audience.[2]

Congress enacted the equal time provision of the Communications Act of 1934 ("Communications Act") to provide political candidates equal access to the airwaves.[3] The Act aimed to mitigate

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1 *See* Andrew Serros, *All Things Not So Equal*, 27 NEWS MEDIA & L. 42, 42–43 (2003).

2 Marvin Kitman, *Calif. Debate Cheated Us*, NEWSDAY, Oct. 5, 2003, at D15; Amy Wilentz, *Getting Along Famously: One Candidate's White-Hot Star Power Makes This an Election Campaign Like No Other*, L.A. TIMES, Sept. 28, 2003, at M6; *see also* 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 n.117 (2005) (discussing Leno's effort to "openly taunt equal time requirements" with the segment).

3 Communications Act of 1934, ch. 652, § 315, 48 Stat. 1064, 1088 (codified as amended at 47 U.S.C. § 315(a) (2000)).

potential negative influence of broadcast-media-dominated election coverage.[4] Recent Federal Communications Commission ("FCC") interpretations of the Act's subsequent amendments, which provide exceptions[5] to the equal time rule and uncertainty about the provision's applicability to cable and satellite television broadcasts, have helped erode equal time's effectiveness. Given the wide range of television shows that now feature candidate appearances and the near ubiquity of cable and satellite television in American homes, the time is ripe to reexamine equal time's role, coverage, and effectiveness.

This Note proposes that Congress reinvigorate the role of equal time requirements for political candidate appearances on television[6] by repealing the news interview exemption[7] and statutorily extending the rule's coverage to cable and satellite television networks.[8] Under the proposal, any news interview program that features appearances by qualified political candidates during the limited election season would require networks to provide an opportunity for equal airtime to qualified opposing candidates.[9] Other programs that might feature a candidate appearance, such as bona fide newscasts, on-the-spot news

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4 Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 529 (1959) (noting that the provisions were intended to encourage "full and unrestricted discussion of political issues by legally qualified candidates").

5 The Act's "news interview" exception, 47 U.S.C. § 315(a)(2) (2000), for example, is particularly problematic. *See infra* Part I.C.

6 Because the Communications Act governs both radio and television broadcasts, proposed revisions to its statutory language will impact both television and radio. This Note, however, will primarily focus on the television arena due to television's preeminence as the public's source of news. *See, e.g.*, Press Release, Pew Research Ctr. for the People & the Press, Online News Audience Larger, More Diverse: News Audience Increasingly Politicized 5 (June 8, 2004), http://people-press.org/reports/pdf/215.pdf [hereinafter Pew 2004 Study] (noting that more Americans routinely get their news from television than from radio, newspapers, or the Internet).

7 47 U.S.C. § 315(a)(2).

8 Networks are those entities that create and have editorial control over television content, rather than cable and satellite operators who serve to retransmit the programming. *See* 47 U.S.C. § 315(c); FCC Multichannel Video and Cable Television Service, 48 Fed. Reg. 26,472, 26,481 (May 25, 1983) (codified at 47 C.F.R. pt. 76.205). See *infra* Part III.B for a discussion of the need for a shift from regulation of cable operators to cable networks in the context of political broadcast requirements.

9 Although 47 U.S.C. § 315(a) is commonly known as the "equal time" rule, it requires only the provision of equal opportunities of access to obtain airtime (e.g., through purchase), rather than granting opposing candidates equal time on the air outright. *See* 47 U.S.C. § 315(a); FCC Multichannel Video and Cable Television Service, 48 Fed. Reg. at 26,473 n.1 (discussing this distinction); *see also* Thomas Blaisdell Smith, Note, *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, 1491 n.5 (1986).

coverage, and news documentaries, would remain exempted from any equal time requirements.[10]

This Note first examines the evolution and enforcement of the equal time rule and the shortcomings of the rule as it currently stands, and then proposes a statutory solution. Part I traces the history and development of the equal time rule. Part II discusses the problems with the current formulation and enforcement of the rule. Part III proposes a statutory amendment to the Communications Act to clarify the equal time rule's applicability to candidate interview appearances in any television transmission. Part IV evaluates the proposal in light of the First Amendment, policy issues, and prudential concerns. The Note concludes that without substantial change, the current equal time rule, which lacks teeth, fails to effectuate an important congressional regulatory scheme.

## *I. Evolution and Scope of the Equal Time Rule*

### *A. Rationales for Enactment and Amendment*

Television and radio's uniquely influential role in electoral politics was recognized from the start of the broadcast age.[11] Congress first adopted equal time rules to regulate radio broadcasting in the Radio Act of 1927.[12] Congress sought to prevent radio station owners from using their programming to unfairly influence public political sentiment.[13] The equal time provisions of the Radio Act were subsequently rolled into Congress's comprehensive regulatory scheme for all broadcast communications, the Communications Act.[14]

The Communications Act requires that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities

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10 47 U.S.C. § 315(a)(1), (3)–(4).

11 *See* S. REP. NO. 86-1069, at 3 (1959) (Conf. Rep.), *as reprinted in* 1959 U.S.C.C.A.N 2582, 2583 (noting the concern that network broadcast decisions should not be made "for the political advantage of the candidate for public office").

12 Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162, 1170 (1926), *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102.

13 *See* 67 CONG. REC. 5558 (1926) (statement of Rep. Johnson) (declaring that "[t]he power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. . . . [Broadcasters] can mold and crystallize sentiment as no agency in the past has been able to do. . . . [Without regulation,] American thought and American politics will be largely at the mercy of those who operate these stations."); *see also* Smith, *supra* note 9, at 1497 (noting congressional "concern about the potential of electronic communication to influence the electorate" and allow the broadcast media to manipulate the electoral process).

14 Communications Act of 1934, ch. 652, §§ 1–2, 48 Stat. 1064, 1064–65 (codified as amended at 47 U.S.C. § 315(a) (2000)).

to all other such candidates for that office in the use of such broadcasting station . . . ."[15] The rule's basic purpose was to "require equal treatment by broadcasters of all candidates for a particular public office once the broadcaster made a facility available to any one of the candidates."[16]

In 1959, Congress amended the equal time rule in response to an FCC ruling that an incumbent candidate's appearance on a news program, which resulted from coverage of his activities as the "subject of routine news reporting," would require equal time opportunities for opposing candidates.[17] Congress amended the rule to exclude several situations related to news coverage.[18] The amended Act now contains equal time exemptions for bona fide newscasts, news interviews, news documentaries (if the appearance of the candidate is incidental), and on-the-spot coverage of news events.[19] The change aimed to prevent any possible chilling effects on the news coverage of political events that might occur from a strict interpretation of the equal time rule,[20] thus "mak[ing] it possible to cover the political news to the fullest

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15 47 U.S.C. § 315(a).

16 S. REP. NO. 86-562, at 8 (1954), *as reprinted in* 1959 U.S.C.C.A.N. 2564, 2571.

17 CBS, Inc., 26 F.C.C. 715, 742–43 (1959) (concluding that broadcast of brief news clips of the incumbent mayor of Chicago's activities triggered equal time requirements).

18 47 U.S.C. § 315(a)(1)–(4).

19 *Id.* § 315(a). Section 315(a) currently provides:

> 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 to use a 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. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
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> (2) bona fide news interview,
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> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
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> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
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> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

*Id.*

20 *See* Michael Damien Holcomb, Comment, *Congressional Intent Rebuffed: The Federal Communications Commission's New Perspective on 47 U.S.C. § 315(a)(2)*, 34 SW. U. L. REV. 87, 90–93 (2004).

degree"[21] while still "preserv[ing] . . . licensees' traditional independent journalistic judgment."[22]

Congress cautioned that the amendments should not "be construed as changing the basic intent of Congress with respect to the provisions of this Act, which . . . requires operation in the public interest."[23] Instead, Congress was "[ ]mindful 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 others."[24] Thus Congress did not intend for a wholesale abandonment of the equal time scheme with its 1959 amendments.

### *B. Scope of the Act's Coverage*

The Communications Act's equal time requirements only reach a limited class of political candidates during specified campaign seasons.[25] The Act covers television appearances by "legally qualified candidate[s]," those persons who

> (1) [have] publicly announced an intention to run for office,
> (2) [are] qualified by pertinent law to hold the office being sought, or
> (3) [have] made a substantial showing of being a bona fide candidate by having participated in campaign activities such as speech making, distribution of literature or press releases, operating a campaign committee, or establishing a campaign headquarters.[26]

Such qualifications are based on the particular jurisdiction's requirements for elected office.[27] For example, in the California gubernatorial recall election of 2003, all of the 135 candidates were considered legally qualified candidates.[28] The election season's temporal boundaries are similarly defined by a candidate becoming a legally qualified candidate in a particular jurisdiction.[29] Primary and general elections

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21 105 CONG. REC. 14,451 (1959) (remarks of Sen. Holland), *quoted in* Kennedy for President Comm. v. FCC, 636 F.2d 417, 423 (D.C. Cir. 1980).

22 *Kennedy for President Comm.*, 636 F.2d at 424.

23 S. REP. NO. 86-562, at 19 (1959) (Conf. Rep.), *as reprinted in* 1959 U.S.C.C.A.N. 2564, 2582.

24 *Id.* at 9, *as reprinted in* 1959 U.S.C.C.A.N. at 2572.

25 *See* Ricchiuto, *supra* note 2, at 272 (citation omitted).

26 DONALD E. LIVELY, ESSENTIAL PRINCIPLES OF COMMUNICATIONS LAW 237 (1992).

27 Ricchiuto, *supra* note 2, at 272. Write-in and other candidates may also have to meet additional requirements beyond those required for write-in candidacy by the jurisdiction. *Id.*

28 *Id.*

29 *Id.*

are considered separate elections under the Act, thus limiting the potential field of "opposing candidates" where there are large fields of primary contenders to one's own party.[30]

The Act covers all positive candidate appearances on television, either by voice or picture, regardless of a candidate's consent.[31] In 1994, the Commission returned to its original policy of broadly reading the term "use," reversing an earlier decision that the equal time provisions reach only candidate appearances on television that are initiated, or in some way approved, by the candidate.[32] As such, nonpolitical appearances, such as on a children's show[33] or the rebroadcast of a movie featuring a candidate can be considered a "use" that triggers equal time requirements.[34]

More generally, the FCC considers a broad array of factors about a particular program's form in determining whether a candidate's appearance qualifies as a "use" under the Communications Act, thereby triggering equal time requirements.[35] Such factors include the format and content of the program, changes in programming over time, editorial control over the content, and the regularity of broadcast.[36]

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30 KWFT, Inc., 43 F.C.C.2d 284 (1948) (holding that primary and general elections must be considered independently of one another for the purposes of equal time requirements).

31 *See* Codification of the Comm'n's Political Programming Polices, 9 F.C.C.R. 651, para. 2 (1994).

32 *See id.* para. 3; Codification of the Comm'n's Political Programming Polices, 7 F.C.C.R. 678, para. 33 (1991); *see also* Ricchiuto, *supra* note 2, at 273.

33 Walt Disney Prods., Inc., 33 F.C.C.2d 297, 297 (1972) (stating that a candidate appearance on Walt Disney's "The Mouse Factory" was a "use" under the Act).

34 *See* Codification of the Comm'n's Political Programming Polices, 9 F.C.C.R. 651, para. 2 (1994); *see also* Ricchiuto, *supra* note 2, at 273. This category also includes involuntary appearances on television such as "rebroadcasts of appearances that were made prior to [the candidate's] attaining the status of a legally qualified candidate." Codification of the Comm'n's Political Programming Polices, 7 F.C.C.R. at 678, paras. 33–34. Under the FCC's 1991 codification, the rebroadcast of a celebrity candidate's movies during the election period—that had for a time triggered equal time requirement—no longer constituted a "use" under the Act. *See id.* para. 33. The 1994 codification returned to the pre-1991 regime. *See generally* Adrien Weiss, 58 F.C.C.2d 342 (1976) (determining that televising Ronald Reagan's movies during the Republican primary period would trigger the equal time rule). Confusion, however, continues to remain concerning the applicability of equal time requirements in this circumstance. *See* Sallie Hofmeister, *FX Takes Hero Out of Action: Network Pulls Schwarzenegger Films*, L.A. TIMES, Aug. 14, 2003, at C1 (noting that both the Sci-Fi and FX channels rescinded earlier decisions to air Schwarzenegger films during the California gubernatorial campaign). See *infra* Part II.D for a discussion of the applicability of the equal time provision to cable television.

35 *See* Use of Broad. Facilities By Candidates for Pub. Office, 24 F.C.C.2d 832, 838–57 (1970).

36 *See id.*

### *C. The Statutory Exceptions*

The 1959 amendment to the Communications Act shielded a substantial swath of programming from equal time requirements.[37] Subsequent clarification and extension of the four exemptions by the FCC has further narrowed the scope of the equal time rule.

#### *1. Bona Fide Newscast*

Though the FCC considers both the format and content of programs to determine if they fall within the newscast exception,[38] a greater emphasis is placed on form over substance.[39] Generally, the primary consideration is whether a news program reports in a "manner similar to more traditional newscasts,"[40] that is, whether the format of the program mirrors that of the typical news program. Determinations of newsworthiness are largely left to broadcasters' good-faith discretion.[41] This has resulted in a wide range of programs falling within the newscast exemption, including entertainment news programs such as *Access Hollywood* and *Entertainment Tonight*.[42]

#### *2. Bona Fide News Interview*

The Act's bona fide news interview exception[43] currently applies to a wide range of programming. For the first twenty-five years after the amendment of the Communications Act, the "Commission remained conservative in its analysis of news interview exemption requests . . . essentially limiting the . . . exception to what it viewed as more traditional question and answer formats . . . ."[44] The FCC, therefore, stayed close to those types of programs cited by Congress in the amendment's legislative history, such as *Meet the Press* and *Face the Nation.*[45] Beginning in 1984, the Commission began to expand the ex-

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37 Arguably nearly all news-related programs fall within one of the current exemptions. *See* 47 U.S.C. § 315(a)(1)–(4) (2000). This follows from Congress's intent to promote broadcast news coverage by relying on broadcasters' journalistic judgments concerning candidate appearances. *See* Smith, *supra* note 9, at 1498 (citation omitted).

38 47 U.S.C. § 315(a)(1). This broad inquiry into the form and substance of arguable newscasts largely mirrors the multi-factored analysis of what constitutes a "use." *See* Ricchiuto, *supra* note 2, at 274.

39 *See* Ricchiuto, *supra* note 2, at 274.

40 *See id.*; Paramount Pictures Corp., 3 F.C.C.R. 245, para. 7 (1988).

41 *See* Ricchiuto, *supra* note 2, at 274 (citing Access Hollywood, 1997 WL 358720 (F.C.C. July 1, 1997)).

42 *See* Access Hollywood, 1997 WL 358720, at para. 4.

43 47 U.S.C. § 315(a)(2).

44 ABC, Inc., 15 F.C.C.R. 1355, 1358 (1999).

45 *Id.*

ception to "less conventional interview formats,"[46] such as *The Howard Stern Show*,[47] *Sally Jessy Raphael*,[48] and *Jerry Springer*.[49]

Currently, the FCC uses a three-prong test in its determination of whether a program qualifies under the news interview exception:

> (1) whether the program is regularly scheduled;
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> (2) whether the broadcaster or an independent producer controls the program; and
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> (3) whether the broadcaster's or independent producer's decisions on format, content and participants are based on newsworthiness rather than on an intention to advance or harm an individual's candidacy.[50]

Again, this formulation puts a large emphasis on the program's form, with very little scrutiny of its news content.[51]

### *3. Bona Fide News Documentary*

The news documentary exception analyzes whether the documentary was intended to promote or detract from a politician's candidacy by featuring him significantly in the program.[52] The analysis focuses on a number of factors, including

> (1) whether the appearance of the candidate was incidental to the presentation of the subject;
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> (2) whether or not the program was designed to aid or advance the candidate's campaign;
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> (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
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> (4) whether the candidate had any control over the format, production, or subject matter of the broadcast.[53]

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46 Multimedia Entm't, Inc., 56 Rad. Reg. 2d 143, 146 (1984) (*Donahue*).

47 Infinity Broad. Operations, Inc., 18 F.C.C.R. 18,603, 18,604, para. 5 (2003).

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

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

50 ABC, Inc., 15 F.C.C.R. 1355, 1358, para. 7 (1999).

51 *Id.* para. 9 (concluding that "[t]he Commission . . . should confine its analysis to whether the broadcaster acted reasonably and in good faith" and should "not second-guess broadcasters about the relative newsworthiness of the interviewees or the topics of discussion").

52 *See* Declaratory Ruling Concerning Whether the Educ. Program "The Advocates" Is an Exempt Program Under Section 315, 23 F.C.C.2d 462 (1970).

53 *Id.*; Ricchiuto, *supra* note 2, at 275 (citation omitted).

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

In general, the on-the-spot coverage exemption applies to situations such as press conferences or live coverage of candidate debates.[54] Once again, the FCC broadly analyzes the coverage's format to determine if it is reasonably similar to other exempted programs.[55] This leaves broadcasters a great deal of discretion unless the broadcast is clearly for partisan purposes.[56] Therefore, if there is no evidence of candidate favoritism, "the broadcast of a news conference held by a candidate for public office, including an incumbent, is on-the-spot coverage."[57]

### *D. Applicability to Cable Television*

The extent of the equal time rule's applicability to cable television remains uncertain. The FCC originally asserted jurisdiction over cable systems in the context of political broadcasting rules by regulating cable program origination, which is content produced by the cable systems.[58] The Commission required local cable stations to transmit and make facilities available for the creation of local programs.[59] The Commission also imposed fairness and equal time obligations on any such cable-originated programs.[60] The FCC asserted that it had jurisdiction "reasonably ancillary to . . . television broadcasting," despite the fact that it did not have explicit statutory authority.[61]

Today, cable television systems are included within the Communication Act's definition of "broadcasting stations."[62] The regulations define a "cable television system" as a "facility consisting of a set of closed transmission paths and associated signal generation, reception,

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54 *Id.*

55 A.H. Belo Corp., 11 F.C.C.R. 12,306, 12,308 (1996).

56 *Id.*

57 Ricchiuto, *supra* note 2, at 275–76 (citing Chisholm v. FCC, 538 F.2d 349, 353 (D.C. Cir. 1976)).

58 *See* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. 26,472, 26,474–75 (proposed June 8, 1983).

59 *Id.* The mandatory program origination rule, but not the equal time requirement, was later repealed. *See* Amendment of Part 76, Subpart G, of the Comm'n's Rules and Regulations Relative to Program Origination by Cable Television Sys., 49 F.C.C.2d 1090, 1106 (1974).

60 Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. at 26,475.

61 *See* Amendment of Part 74, Subpart K, of the Comm'n's Rules and Regulations Relative to Cmty. Antenna Television Sys., 20 F.C.C.2d 201, 221–22 (1969) (citing the standard set forth in United States v. Sw. Cable Co., 392 U.S. 157 (1968)).

62 47 U.S.C. § 315(c) (2000).

and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community."[63] Furthermore, FCC regulations specifically extend the equal time rule to cable systems.[64]

Equal time requirements are applied to the cable system operators, rather than to the cable networks, which create television content not available over broadcast television.[65] Despite this distinction, confusion remains in the broadcast industry as to who is responsible for enforcing equal time requirements on cable television.[66] During the California gubernatorial campaign, for example, one cable systems operator declared that his cable system was "not required to block out any signals," because "[c]able and broadcast are not under the same rules."[67] Several other cable networks, however, changed programming schedules to comply with the rule.[68]

## *II. The Need for Change in the Law*

The equal time rule no longer properly effectuates its intended purpose of preventing undue media influence on electoral campaigns. As the rule is presently enforced, a significant swath of programming is exempted from coverage. During a campaign season, nearly all instances in which a candidate is afforded an opportunity to voluntarily appear live[69] on television are exempted by the rule's statutory amendments.[70] This leaves only a narrow spectrum of broadcast programming subject to equal time requirements.[71] Though the require-

63 47 C.F.R. § 76.5(a) (2005). Facilities that serve only to "retransmit the signals of one or more television broadcast stations," however, are exempted from this definition. *Id.* § 76.5(a)(1).

64 47 C.F.R. § 76.205 (2005).

65 *See* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. at 26,480, para. 34.

66 *See* Ricchiuto, *supra* note 2, at 283–84.

67 Kit Bowen, *Networks Hold Off Airing Schwarzenegger Movies*, HOLLYWOOD.COM, Aug. 13, 2003, http://www.hollywood.com/news/Networks_Hold_Off_Airing_Schwarzenegger_Movies/1724895.

68 Hofmeister, *supra* note 34 (noting that both the Sci-Fi and FX channels rescinded earlier decisions to air Schwarzenegger films during the California gubernatorial campaign).

69 This includes taped appearances scheduled for immediate or short-term broadcast.

70 Depending on the nature of the program, a live candidate appearance on television would likely fall under either the news broadcast or news interview exceptions. *See* 47 U.S.C. § 315(a)(1)–(2) (2000). This is perhaps most significant in the context of the broad range of exempt news interview programs. *See supra* Part I.C.2.

71 This category includes rebroadcasts of celebrity candidate television shows or movies and current appearances on programming without any colorable claim of falling within the news interview exception. *See, e.g.*, Walt Disney Prods., Inc., 33 F.C.C.2d 297 (1972) (candidate appearance on children's program).

ments in these limited areas are useful in preventing unfair advantages for celebrity candidates, they fail to reach a desirable appearance format that is ripe for network promotion of a favored candidate: free airtime on news or entertainment interview shows.

The incomplete coverage of the equal time rule is only exacerbated by a lack of certainty over the rule's applicability to cable television. Due 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.[72]

In the current media climate, news and entertainment programs are frequently mixed, and viewers perceive increased bias in political coverage. There is a need for a leveled playing field of election coverage that is largely removed from network influence.

### *A. The Current Media Climate*

Since the creation and amendment of the equal time rules, the world of television has changed dramatically. Television viewers' options have exploded since the era of broadcast network dominance, continuing to expand as the number of cable and satellite channels increases.[73]

Two recent developments in the role of televised media in particular have great implications for the equal time rule. First, there is increasing public sentiment that television networks, particularly with respect to news coverage of politics, are biased in their presentation.[74] The viewing public has grown "increasingly cynical" about the news media, with a majority of viewers surveyed stating that they do not trust what news organizations are saying.[75] Additionally, viewers report an increased perception of partisan bias in the reporting on political campaigns in particular.[76] Viewers also express concern that the

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72 Current estimates are that nearly ninety percent of American households have cable or satellite television. *See* Editorial, *What Is Equal Time?*, WASH. TIMES, Aug. 15, 2003, at A18.

73 *See generally* Massimo Motta & Michele Polo, *Concentration and Public Policies in the Broadcasting Industry: The Future of Television*, 12 ECON. POL'Y 293 (1997) (detailing the rapidly changing environment of television broadcasts and the increase in channel availability).

74 *See* Pew 2004 Study, *supra* note 6, at 33. The Pew Center found that although people's declining evaluations of media credibility largely reflected ideological and partisan lines, those feelings of mistrust were widespread. *Id.* at 1, 33 (finding that fifty-eight percent of Republicans and forty-seven percent of Democrats do not trust news organizations).

75 *Id.*

76 Press Release, Pew Research Ctr. for the People & the Press, Perceptions of Partisan Bias Seen as Growing—Especially by Democrats: Cable and Internet Loom Large in Fragmented Political News Universe 15 (Jan. 11, 2004), http://people-press.org/reports/pdf/200.pdf [hereinafter Pew Perceptions Release].

media increasingly influences the public to a worrisome degree.[77] These attitudes contribute to broader concerns about the potential for media consolidation and domination by relatively few interests to control and manipulate public perceptions of the political process.[78]

Second, television no longer fully separates its news from entertainment. Many television programs now feature a mix of entertainment and soft coverage of the news that blurs the lines between categories of television programming.[79] Whereas "about a decade ago . . . . [p]oliticians went one way, and entertainers another," this is no longer the case.[80] Many entertainment shows, like *The Daily Show*, now regularly feature coverage of political events.[81] This goes beyond using politics as a punch line, fully integrating politicians into a celebrity promotion circuit.[82] Furthermore, daytime entertainment shows that do not regularly feature news stories, such as *The Oprah Winfrey Show*, feature candidates among their guests.[83] This blurring of lines

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77 *See* Press Release, Pew Research Ctr. for the People & the Press, Public Wants Neutrality and Pro-American Point of View: Strong Opposition to Media Cross Ownership Emerges 9 (July 13, 2003), http://people-press.org/reports/pdf/188.pdf [hereinafter Pew Neutrality Release].

78 *See id.* at 1 (noting that a majority of Americans are opposed to, and concerned about, a relaxation of media ownership rules).

79 For example, many entertainment news shows such as *Entertainment Tonight* and *Access Hollywood* blend entertainment with light news coverage. *See* Access Hollywood, 1997 WL 358720 (F.C.C. July 1, 1997) (exempting *Access Hollywood* under the newscast exception). Other programs, such as *The O'Reilly Factor*, seek to mix the entertainment value of shock opinion with opinionated news coverage. *See, e.g.*, *The O'Reilly Factor: The News Wars Continue* (FOX television broadcast Mar. 9, 2007) (transcript), *available at* http://www.foxnews.com/story/0,2933,258060,00.html (Bill O'Reilly opinion segment deriding a New York Times columnist and NBC news).

80 David Bauder, *When Campaigns and Comedy Mix, the Nervous Laugh Is from Lawyers*, San Diego Union-Trib., Oct. 7, 2003, at E5.

81 For example, in the 2004 election, Democratic presidential candidate John Edwards announced his candidacy on the *The Daily Show*. *See* List of the Daily Show Guests, http://en.wikipedia.org/wiki/List_of_The_Daily_Show_guests (last visited Jan. 6, 2008). Candidate appearances on *The Daily Show* have also included 2008 Democratic presidential candidates Joe Biden, John Edwards, Dennis Kucinich, and Tom Vilsack. *See* Blog A-Boo, 2008 Presidential Race: Democratic Candidates on the Daily Show, http://atsquish.blogspot.com/2007/01/2008-presidential-race-democratic.html (last visited Jan. 6, 2008). Comedy Central describes *The Daily Show* as a "reality-based look at news, trends, pop culture, current events, politics, sports and entertainment with an alternative point of view" that is "unburdened by objectivity, journalistic integrity or even accuracy." *See* Comedy Central, Learn About The Daily Show, http://www.thedailyshow.com/about.jhtml (last visited Jan. 6, 2008).

82 Bauder, *supra* note 80 (noting that "[p]oliticians are finding late-night shows a comfortable perch, offering exposure to audiences that don't normally see them, let alone in a setting that makes them appear to be good sports").

83 *See* Serros, *supra* note 1, 42–43 (discussing candidate appearances on *Oprah*). For example, George W. Bush appeared on *Oprah* before the 2000 presidential election. *See* IMDB, "The Oprah Winfrey Show" (1986), http://www.imdb.com/title/tt0090493/epcast.

between entertainment and news comes as an ever-increasing segment of the viewing public turns to entertainment programs, in particular late-night comedy shows, as a source of news information about political candidates.[84] With this synergy, candidates invited onto late-night programs for interviews have a distinct advantage.

### *B. Opportunities for Undue Influence*

#### *1. The Ever-Expanding News Interview Exception*

Over time, the FCC's interpretive and enforcement activities have greatly expanded the scope of the statutory exceptions to the equal time rule, particularly with respect to the bona fide news interview exception. Prior to its reconsideration of a refusal to grant a news interview exemption to the *Donahue* program in 1984, the FCC was quite conservative in its interpretation of the news interview exemption.[85] The Commission generally stayed fairly close to the programs indicated by the legislative history, exempting only traditional question-and-answer news interview shows.[86] Recent FCC interpretive doctrine, however, provides no substantive limit on the news interview exception.

Though the Commission evaluates programs based on whether the program is regularly scheduled, who controls the content, and whether the content appears to be selected to further a particular candidate's campaign, the Commission has largely relied on network assurances that these conditions have been met.[87] Given the wide range of television shows which have sought and received exemptions under the news interview exception,[88] it appears unlikely that any program that has been on the air for a modest amount of time will trigger equal time rules for interviewing a candidate during the election season.[89]

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84 *See* Pew Perceptions Release, *supra* note 76, at 11.

85 *See* Holcomb, *supra* note 20, at 96; Multimedia Entm't, Inc., 56 Rad. Reg. 2d 143, 146–48 (1984) (*Donahue*).

86 ABC, Inc., 15 F.C.C.R. 1355, 1358 (1999).

87 *Id.*

88 Exempted programs include, for example, *The Howard Stern Show*, *Politically Incorrect*, *Jerry Springer*, and *Sally Jessy Raphael*. *See* Infinity Broad. Operations, Inc., 18 F.C.C.R. 18,603 (2003) (*The Howard Stern Show*); ABC, Inc., 15 F.C.C.R. at 1358–59 (1999) (*Politically Incorrect*); Multimedia Entm't, Inc., 9 F.C.C.R. 2811 (1994) (*Jerry Springer*); Multimedia Entm't, Inc., 6 F.C.C.R. 1798 (1991) (*Sally Jessy Raphael*).

89 Several FCC exemption decisions focused largely on whether shows were broadcast on a regularly scheduled basis. *See* Holcomb, *supra* note 20, at 94 n.72 (discussing the FCC's reliance on regularity of programming schedules in its decision to exempt *Jerry Springer*, *Sally Jessy Raphael*, and *Donahue*, under the news interview exception). Holcomb notes that "it makes no difference that the program in general is in no way news-related." *Id.* at 94.

This statutory exception presents an opportunity for abuse, as broadcasters that have interview exceptions can routinely feature favored candidates. While networks' endorsement or support of candidates may not be overt, the grant of unequal airtime for the purpose of engaging the electorate during the campaign season provides a significant advantage to favored candidates. This practice directly contradicts the equal time rule's enduring purpose: preventing undue media influence on elections.

### *2. The Murky Applicability to Cable Television*

Equal time's incomplete and uncertain application to cable television leaves another wide gap in coverage that has the potential for abuse.[90] Because § 315(a) of the Communications Act currently applies to cable systems, but not to cable networks, the equal time requirement has only a minimal impact on nonbroadcast television shown on cable. Cable systems operators remain uncertain regarding their equal time obligations.[91] The FCC has admitted that there is a lack of clarity with respect to whether the application to cable systems only occurs with respect to "origination" broadcasts, programming created by the cable system, or to all programming controlled by the cable system operator.[92] Due to this uncertainty, equal time requirements are not followed by many cable television programs that feature interviews with political candidates.[93] This exempts a tremendous amount of television programming, as nearly ninety percent of American households have either cable or satellite television.[94]

## *III. A Proposal for Statutory Amendment to the Equal Time Rule*

With the efficacy of the equal time rule in doubt, there is a need to reestablish a definite, but narrow, sphere for the equal time rule to promote its original purpose: the preservation of equal access to the

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90 *See supra* Part I.D (discussing current applicability of the equal time rule to cable television).

91 *See supra* notes 58 and 68.

92 *See* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. 26,472, 26,474–75, paras. 32–34 (proposed June 8, 1983) (seeking comments on proposed rulemaking regarding cable television equal time requirements); *see also* Serros, *supra* note 1, at 42–43 (noting that cable operators are only responsible for original, not rebroadcast, programming, but that FCC sources have admitted that applicability of equal time to cable networks is a gray area that may need to be addressed in the future).

93 *See* Bauder, *supra* note 80 (noting that, fortunately for the producers of the *The Daily Show*, cable networks are exempt from equal time provisions).

94 *See* Editorial, *supra* note 72.

broadcast media for all political candidates.[95] In order for the equal time rule to serve as an effective tool, Congress must carve out a distinct field for the rule to combat those contexts which pose the greatest potential threat of network influence and abuse. Additionally, Congress must ensure that all television content that falls within this category, regardless of the broadcast medium, is explicitly covered by the rule. To accomplish this, Congress should amend the Communications Act by eliminating the bona fide news interview exception to the equal time rule[96] and should explicitly extend the coverage of equal time requirements to cable television networks.

### *A. Elimination of the News Interview Exception*

Elimination of the bona fide news interview exception[97] will carve out an appropriate realm for equal time regulation while leaving the bulk of the statutory exemptions intact.[98] This change will focus the enforcement on a context ripe for undue network influence: opportunities for candidates to explain their positions and qualifications in their own voices during interview segments on shows other than bona fide newscasts.[99] Though there may always be some danger that network owners and executives will disguise candidate or party advocacy through their programming, the problem is particularly acute in the case of candidate interview appearances. Although viewers can largely detect bias in a particular network's news coverage,[100] allowing the interview of some candidates without a similar opportunity for air-

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95 *See, e.g.*, S. REP. NO. 86-1069, at 3 (1959) (Conf. Rep.), *as reprinted in* 1959 U.S.C.C.A.N. 2582, 2583 (noting the concern that network broadcast decisions should not be made "for the political advantage of the candidate for public office").

96 Such an amendment has been suggested, without great elaboration, as a potential means of halting arbitrary and capricious FCC interpretations concerning equal time exceptions. *See* Holcomb, *supra* note 20, at 105. This Note proposes the repeal of § 315(a)(2) along with a broad statutory expansion of the equal time rule to television networks, thus covering television programming carried by broadcast, cable, and satellite providers. *See infra* Parts III.A–B. The Note then considers how these revisions serve to reinvigorate the rule in the current media climate rather than providing a solution to arbitrary FCC enforcement. *See infra* Part IV.

97 47 U.S.C. § 315(a)(2) (2000).

98 *See id.* § 315(a)(1), (3)–(4).

99 Though concerns of network favoritism also emerge with respect to all the exempted categories, such concerns do not outweigh those considerations that favor retention. The bona fide newscast exception remains crucial in allowing news broadcasts to cover news to the fullest degree by preserving independent journalistic judgment. *See* Smith, *supra* note 9, at 1498 (citations omitted). Furthermore, the documentary and on-the-spot news coverage exceptions are generally limited in scope and ensure that other areas important to journalistic and public discourse, such as the broadcast of candidate debates, remain fully covered by the news media.

100 *See* Pew Perceptions Release, *supra* note 76, at 15 (describing the viewing public's perceptions of media bias).

time for opposing candidates gives a powerful advantage to those candidates the network wishes to promote. Though a network's promotion of a candidate may stem from a certain candidate's pop culture appeal and its impact on ratings, rather than from ideological support, both circumstances provide unfair advantages to particular classes of candidates.

The Schwarzenegger gubernatorial candidacy provides a poignant example of how both motivations can affect a particular candidate's opportunities for television appearances. Having starred in numerous blockbuster films,[101] Schwarzenegger's candidacy had tremendous pop appeal far apart from the substance of his platform.[102] Beyond star appeal, however, questions arose about whether Leno and Schwarzenegger's "affable and mutually beneficial personal relationship" led to politically favored access to appearances on the *The Tonight Show* unavailable to other candidates.[103] Remarkably, Leno's involvement bookended Schwarzenegger's candidacy: Schwarzenegger announced his candidacy on *The Tonight Show*, and Leno introduced the governor-elect at his victory party.[104] It is this grant of favored access to the airwaves for particular candidates that Congress initially intended to prevent when it passed the equal time rule.

### *B. Extension to Cable Networks*

An extension of the equal time requirements to cable networks will shore up what is currently a gaping hole in the coverage of the rule, and will clarify the Act's applicability to cable networks. Importantly, applying the equal time rule to networks[105] will place the locus of compliance on the most appropriate entities.[106] If the cable net-

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101 The Internet Movie Database credits Schwarzenegger with forty-three actor credits. *See* IMDB, Arnold Schwarzenegger, http://www.imdb.com/name/nm0000216 (last visited Jan. 6, 2008).

102 *See, e.g.*, Wilentz, *supra* note 2 ("Schwarzenegger is such good 'copy' that the media would cover him eating a ham sandwich.").

103 Lynn Smith, *Taking Sides?*, L.A. TIMES, Oct. 20, 2003, at E1.

104 *Id.*

105 Cable system operators that originate programming would also function as a network for purposes of the rule. This would continue the current applicability of the equal time rule to cable systems operators in the context of origination programming. *See* Serros, *supra* note 1, at 42–43 (noting that cable operators are only responsible for original, but not rebroadcast, programming).

106 Because the proposed solution—to require the networks, rather than the cable operators, to meet limited equal time requirements—will impact the creation of content rather than its transmission, satellite television would also be covered under the rule. The applicability of equal time requirements would therefore be divorced from the type of transmission system used by a

works themselves are responsible for meeting the equal time requirements, they will organize programming content to comply with the rule. For example, the networks could invite both candidates in a presidential election, either at once or separately, to do roughly comparable interview segments on a particular program.[107] Additionally, placing responsibility for compliance on networks rather than systems operators avoids the pitfalls of post-creation compliance. With no option to create comparable opportunities for candidate access, cable systems operators might be forced to blackout programming that does not comply with the rule. Furthermore, application to the cable television networks would largely mirror the current applicability of the equal time rule to broadcast networks, rather than just the individual local broadcast stations.[108]

## *IV. Evaluating the Proposal*

### *A. First Amendment Concerns*

Media regulation has generally proven to be ripe ground for First Amendment challenges.[109] In the context of a proposed amendment to the equal time rules, two distinct challenges may emerge. First, the equal time rule itself may be open for renewed attack on First

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particular television network. For a discussion of the distinction between systems operators and networks, see *supra* Part I.D.

107 The Communications Act prohibits licensees from censoring broadcasts under the equal time rule. 47 U.S.C. § 315(a) (2000). In 1952, the FCC interpreted this requirement to prevent stations from having input into how the equal time they provide to candidates is used. *See* Control of Content of Broads. Under "Equal Time" Requirements of Section 315 of the Communications Act of 1934, 40 F.C.C. 241, 242–43 (1952) (prohibiting limitations on subject matter of candidate's appearance). More recently, the no-censorship requirement of § 315(a) was interpreted by the FCC to prohibit interference by an interview program host with the equal time provided to a candidate, where the first candidate was allowed to speak freely on the air. *See* Joseph L. Dorton, 7 F.C.C.R. 6537 (1992). Despite these interpretations, there is room within the equal time regime for broadcasters to be proactive in their equal time responsibilities by interviewing opposing candidates equally on news interview programs. In any event, it is unlikely that a candidate who is provided an equivalent opportunity to appear on a news interview program, without significant interference or mistreatment by the host, would have a viable complaint about unequal access to the airwaves.

108 *See* CBS, Inc. v. FCC, 629 F.2d 1, 25–27 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367, 391 n.14 (1981) (imposing reasonable access requirement on broadcast networks). *But see* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. 26,472, para. 34 (proposed June 8, 1983) (noting that the broadcast network model may not be practically possible with cable networks). For a discussion of these issues, see *infra* Part IV.

109 *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) (finding unconstitutional a state statute requiring newspapers to provide political candidates a "right to reply" to damaging editorials).

Amendment grounds in light of changes in the nature of broadcast media and questions about the validity of the notion of scarcity in the broadcast spectrum. Second, the proposed extension of the equal time rule may present unique challenges concerning whether Congress may regulate the cable television industry to the same degree as broadcast television.

*1. Broad First Amendment Challenges to the Equal Time Rule*

Many of Congress's efforts to regulate the broadcast media industry in the past have withstood constitutional scrutiny on First Amendment challenges due to the unique nature of the broadcast industry.[110] The Supreme Court has recognized the validity of the scarcity rationale for such regulation because the spectrum of broadcast frequencies is a limited public resource.[111]

An effort to increase the equal time rule's coverage may bring renewed attention to this controversy. Though the proposal leaves the equal time rule far narrower in scope than originally enacted, critics will likely argue that the basis for the scarcity rationale has been undercut by developments in the television medium.[112] The continued expansion of cable and satellite television services, with their plethora of available channels, arguably relieves the medium of any true scarcity.

Such a contention, however, can be countered in two ways. First, the scarcity rationale remains viable for broadcast frequencies even though there are alternate modes of television transmission. The broadcast spectrum, consisting of both radio and television frequencies, remains a fixed resource.[113] Given that television and radio sta-

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110 *See, e.g.*, Branch v. FCC, 824 F.2d 37, 49–50 (D.C. Cir. 1987) (upholding equal time rule in the face of First Amendment challenge). *See generally* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding scarcity rationale for regulation of broadcast television).

111 *See Red Lion*, 395 U.S. at 398–400.

112 *See* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. at 26,478, para. 25 (internal quotation omitted) (considering the argument that "scarcity, which in turn, generated a need for government supervision to ensure a robust marketplace of ideas in the broadcast area would seem to have even less relevance that it might ever have had to cable television"); *see also* Smith, *supra* note 9, at 1494–95 (noting that "rapid developments in broadcast technology [including cable television] . . . have permitted a substantial increase in the number of broadcast voices in the communications marketplace"); *id.* at 1517 (contemplating that the "Court [may] conclude[ ] that developments in broadcast technology render obsolete the rationale for . . . content based broadcasting regulation").

113 *See Red Lion*, 395 U.S. at 388–89 (determining that scarcity exists where demand for broadcast frequencies exceeds the supply); *see also* Smith, *supra* note 9, at 1494–95, 1494 n.27 (noting that in *Red Lion* the Supreme Court upheld political broadcasting rules based on scarce

tions continue to broadcast over traditional frequencies, despite the ubiquity of cable, the FCC must retain power to regulate the use of those frequencies so that traditional broadcasting remains an orderly enterprise that uses a public resource in the public interest.[114]

Second, the scarcity rationale has a counterpart which remains remarkably salient today: the dangers of media conglomeration and domination by discrete and powerful interests. Despite the fact that broadcast frequencies may no longer be the only form of television transmission, access to the airwaves remains an activity subject to gatekeeping by the few network owners who can afford the great expense associated with the ownership and operation of large-scale broadcast facilities.[115] The potential for media domination that may result from having but few corporate media owners is reflected in the growing concern over media ownership consolidation.[116] Given the remarkable strength and diversity in groups opposed to media consolidation, concerns of media domination remain a viable alternative rationale for the continued regulation of broadcast television.

### *2. Questioning the Permissible Extent of Regulation over the Cable Industry*

A second First Amendment challenge would likely be directed at equal time provisions as they are applied to cable television. Such a challenge would emphasize the differences between the broad range of channels available on cable as compared to the more limited broad-

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broadcasting frequencies and "the need to prevent domination of the medium by those to whom licenses are granted").

114 In addition to the continued validity of traditional concerns underlying the scarcity rationale, practical considerations also support continued regulation of broadcast frequency usage. For example, a complete lack of governmental regulation of the airwaves might result in stations attempting to broadcast over one another and interfering with other frequencies by broadcasting on frequencies too close to others.

115 *See generally* Mark Crispan Miller, *What's Wrong with This Picture?*, NATION, Jan. 7/14, 2002, at 18 (detailing the remarkably extensive media ownership of ten multinational corporations).

116 *See* Pew Neutrality Release, *supra* note 77, at 1 (finding significant public opposition to the easing of media cross-ownership rules based on concerns of media domination and influence); *see also* Gal Beckerman, *Tripping Up Big Media*, COLUM. JOURNALISM REV., Nov./Dec. 2003, at para. 21, http://www.cjr.org/issues/2003/6/media-beckerman.asp ("What unites [both liberal and conservative groups opposed to media consolidation] is that they all generally believe that the media are limited, and that this limitation comes from the fact that there is too much control in too few hands. This leads to a lack of diversity of voices, to programming that is out of touch with local concerns, to increasingly commercial and homogenized news and entertainment.").

cast television frequencies[117] and would again raise the inapplicability of the scarcity rationale in the context of cable television. Both of the arguments that support continued regulation of broadcast television—scarcity and media consolidation—also apply in the context of cable television.[118]

Though the FCC's ability to regulate the cable industry through the use of political broadcasting regulations such as the equal time rule remains a gray area of the law,[119] the FCC has in certain instances regulated cable television. In the past, the FCC required cable television to comply with equal time regulations in origination programming.[120] In this context, the cable television systems operated in a manner similar to broadcasters, in that the cable operators were serving as the creators of television content.[121] Additionally, the Supreme Court upheld the Commission's regulation of cable systems in the context of "must-carry" regulations, which forced the cable systems to reserve several channels for transmission of local and public interest information.[122]

It seems likely that some of the same rationales that support regulation of cable system operators in these circumstances would also justify the regulation of cable networks with respect to their political broadcasting responsibilities.[123] Furthermore, the argument in favor of upholding the equal time rule's extension to cable under the First Amendment would be bolstered by congressional findings about the dangers of media consolidation.[124]

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117 *See* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. at 26,478, para. 24 (noting that modern cable systems have significant channel capacity).

118 *See supra* Part IV.A.1.

119 *See* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. at 26,480, para. 34 (discussing the uncertainty about whether the FCC has the authority to enforce equal time regulations on cable television).

120 *See id.* at 26,474, para. 7.

121 *Id.*

122 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (directing courts to apply intermediate First Amendment scrutiny to "must-carry" regulation of cable networks); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (upholding "must-carry" regulation of cable networks under First Amendment scrutiny).

123 *See Turner Broad. Sys., Inc.*, 520 U.S. at 189–90 (finding the promotion of "widespread dissemination of information from a multiplicity of sources" an important governmental interest); *see id.* at 226 (Breyer, J., concurring in part) (stating that the purpose of "assur[ing] the over-the-air public access to a multiplicity of information sources . . . provides sufficient basis for rejecting . . . First Amendment claim[s]").

124 *See id.* at 189–216 (emphasizing congressional findings that significant numbers of broadcast stations would be refused carriage on cable systems absent must-carry requirements).

Though the possibility of extending political broadcasting responsibilities, including the equal time rule, to cable networks was at one time considered by the FCC, the FCC has also expressed uncertainty about whether it has the jurisdiction to do so.[125] The Commission's primary issues of concern focused on whether it had the *statutory* jurisdiction to regulate cable networks in the way that it had previously regulated broadcast television networks.[126] The Commission noted that regulation through the networks themselves, rather than through system operators, would have the similar benefit of "substantially reduc[ing] the burden of compliance on individual television licensees and also lessen[ing] the administrative burden of enforcement by the Commission."[127]

By statutorily extending the Commission's jurisdiction over cable television networks in the context of the equal time rule, Congress could provide the statutory basis to extend equal time requirements to the most logical parties and at the same time strengthen the government's interest under the First Amendment analysis.

### *Conclusion*

The equal time requirements of the Communications Act, if amended to form a more robust scheme, can once again fully serve to promote the important goals of an informed citizenry and fair access to the televised media during election campaigns. Despite dramatic changes in the media landscape since the rule's inception, the goals that underlie these early political broadcasting regulations remain important today. The current equal time regime is flawed, as it exempts a far wider range of programming than is prudent and fails to account for the vast amount of programming available on cable television. A focused amendment to the equal time rules, such as that proposed in

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125 *See* Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. at 26,480, para. 34; *id.* at 26,478 para. 24 (citing Cable Television Bureau, FCC, Cable Television and the Political Broadcasting Laws: The 1980 Election Experience and Proposals for Change (Jan. 1981) (unpublished report by FCC staff to Sen. Goldwater)).

126 *See id.* at 26,480, para. 34. The application of political broadcasting rules, like the equal time rule, to broadcast networks was upheld by the Supreme Court in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981). The Court affirmed the D.C. Circuit's holding in the Carter/Mondale Presidential Committee proceeding that the FCC was correct that § 312(a)(7) "impos[es] an obligation to provide access not just upon individual stations but upon those who, by practice and contractual relationship, control the best practical means of efficiently acquiring national access—to wit, the networks." CBS, Inc. v. FCC, 629 F.2d 1, 26 (D.C. Cir. 1980).

127 Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 Fed. Reg. at 26,480, para. 34.

this Note, will reinvigorate the regulatory regime. It will create a distinct and viable realm in television broadcasting for the full and fair treatment of political candidates in access to the airwaves during the election season. As the media's influence continues to grow in the eyes of the electorate, it is vital that Congress maintain this system of equal access for candidates, so they can engage the electorate through the television medium on a level playing field.