

2009

“I’m a Politician, But I Don’t Play One on TV”: Applying the “Equal Time” Rule (Equally) to Actors-Turned- Candidates

Kimberlianne Podlas

University of North Carolina at Greensboro, kimberpodlas@gmail.com

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

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 (2009).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol20/iss1/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

“I’m a Politician, But I Don’t Play One on TV”: Applying the “Equal Time” Rule (Equally) to Actors-Turned- Candidates

Cover Page Footnote

I’d like to thank the journal staff, and Regina Schaffer-Goldman, for improving the article and being great to work with.

“I’m a Politician, But I Don’t Play One on TV”: Applying the “Equal Time” Rule (Equally) to Actors-Turned-Candidates

Kimberlianne Podlas*

INTRODUCTION	166
I. AN OVERVIEW OF REGULATION OF CANDIDATE BROADCASTING.....	171
<i>Television’s Importance to the Electoral Process</i>	171
<i>Political Broadcasting</i>	175
<i>Congress’s Authority to Regulate the Broadcast Airwaves</i> .	176
<i>Congress’s Interest in Equal Opportunity</i>	177
<i>Section 315</i>	179
Time Slots	181
Access to Time.....	182
Calculating Time.....	183
The Price of Time	185
Free Time.....	186
<i>The “Use” of a Broadcast Station</i>	188
Exempt Appearances	189
A Candidate “Appearance”.....	192
The Nature of the Broadcast	196
<i>Television Rebroadcasts of Films and Television Series</i>	199

A PDF version of this Article is available online at <http://iplj.net/blog/archives/volumexx/book1>. Visit <http://iplj.net/blog/archives> for access to the IPLJ archive.

* Assistant Professor of Media Law, Department of Media Studies, University of North Carolina at Greensboro; J.D., *cum laude*, SUNY at Buffalo, School of Law; B.A., *magna cum laude*, SUNY Buffalo. Please send correspondence regarding this article to kpodlas@buffalo.com. I’d like to thank the journal staff, and Regina Schaffer-Goldman, for improving the article and being great to work with.

166	<i>FORDHAM INTELL. PROP. MEDIA & ENT. L.J.</i>	[Vol. 20:165
II.	BROADCAST CONFUSION OVER FCC STANDARDS	203
A.	“Appearances Thereafter”	205
B.	<i>Characters vs. Candidates</i>	207
C.	<i>The “Positive Appearance” Standard</i>	209
D.	<i>Continuing Problems for Broadcasters</i>	212
	1. The FCC’s Uncertainty and 1991–1994 Rule Change	214
	2. Inequity In Pursuit of “Equality”	215
III.	REMEDIES: ACHIEVING CLARITY AND EQUALITY	217
A.	<i>Distinguish Pre-Declaration Appearances from Post-Declaration “Appearances”</i>	217
B.	<i>Distinguish Character Roles from Candidate Appearances</i>	218
C.	<i>Apply a Modified “Positive Appearance” Standard to Character Portrayals</i>	219
D.	<i>Require “Appearances” to Be Voluntary</i>	220
	CONCLUSION	223

INTRODUCTION

In July 2009, actor-entertainer Al Franken became the nation’s newest Senator.¹ Forty years ago, the idea of an actor’s running for office, let alone being elected to it, would have been the punchline of a joke or a plot point in a movie. Today, however, it is a political reality.² Franken is the most recent addition to a growing list of entertainers entering politics: In 2007, *Law &*

¹ Seung Min Kim, *Franken Sworn in as Senator; Republicans Warn of Dems’ ‘Total Control,’* USA TODAY, July 8, 2009, at A4. Franken was a writer for and played both Stuart Smally and Liam the Loose-Boweled Leprechaun on *Saturday Night Live*. Ana Marie Cox, *Don’t Laugh at Al Franken*, TIME, Apr. 16, 2007, at 42. In 1996, he also penned the *New York Times* number one Best Seller *Rush Limbaugh Is a Big Fat Idiot. Id.*

² See Cox, *supra* note 1, at 42; Andrew Serros, *All Things Not-So Equal, Entertainers Turned-Politicians Are Bringing Problems with the FCC’s Equal Time Rule into the Spotlight*, NEWS MEDIA & L., Fall 2003, at 42, available at <http://www.rcfp.org/newsitems/index.php?i=6073>.

Order's Fred Thompson launched a presidential bid.³ In 2006, Arnold Schwarzenegger began his second term as "The Governor" of California.⁴ In the 1990s, pro-wrestler Jesse Ventura was Governor of Minnesota⁵ and Sonny Bono was a U.S. Congressman.⁶ And of course, from 1980–88, Ronald Reagan was President.⁷

Meanwhile, television has established itself as more than just an electronic soapbox from which to communicate with voters: Since Bill Clinton parlayed a sax performance on "Arsenio Hall" into valuable political capital,⁸ television has emerged as a tool for establishing a tangible political image.⁹ Indeed, research demonstrates that television can set the agenda for what viewers think is important in society and help set the standards by which voters judge candidates.¹⁰

For seventy-five years, the federal government has regulated television campaigning through The Equal Opportunity for Political Broadcasts provision of the Communications Act of 1934, as amended, better known as the Equal Time Rule.¹¹ The Equal Time Rule ensures that broadcasters do not discriminate against

³ Michael D. Shear, *Fred Thompson's Presidential Hopes Could Put 'Law' Reruns in Lockup*, WASH. POST, Mar. 30, 2007, at C7, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/03/28/AR2007032802174.html>.

⁴ Brian Lowry, *There's No Reason or Rhyme to This Equal Time*, VARIETY, Apr. 16, 2007, at 26, available at <http://www.variety.com/article/VR1117963059.html?categoryid=1682&cs=1>; see also Aaron Barnhart, *NBC Stations Tune Out Al Sharpton*, KAN. CITY STAR, Dec. 9, 2003, at A1 (commenting on Equal Time problems during Schwarzenegger's 2003 gubernatorial recall election).

⁵ Cox, *supra* note 1, at 42.

⁶ Jennifer Babson & Rhodes Cook, *Longtime 'Second' Party Scores a Long List of GOP Firsts*, 52 CONG. Q. WKLY. REP. 3201, 3237 (1994) (introducing Bono as Republican Congressman from California).

⁷ Whitehouse.gov, Biography of Ronald Reagan, <http://www.whitehouse.gov/about/presidents/ronaldreagan/> (last visited Oct. 12, 2009).

⁸ Scott Collins, *A Tight Race for Media Celebs*, L.A. TIMES, Nov. 3, 2008, at E1, available at <http://8.12.42.31/2008/nov/03/entertainment/et-channel3>; see also Matea Gold & Jim Puzanghera, *This Run Could Ruin the Reruns; If 'Law & Order' Star Fred Thompson Opts to Campaign for President, Equal-Time Laws Could Affect His TV Presence*, L.A. TIMES, May 4, 2007, at E1.

⁹ See Michael A. Baum, *Talking the Vote: Why Presidential Candidates Hit the Talk Show Circuit*, 49 AM. J. POL. SCI. 213, 213–14 (2005).

¹⁰ See *infra* notes 51–56 and accompanying text.

¹¹ 47 U.S.C. § 315 (2006).

candidates with regard to providing or selling airtime and that candidates have access to the television medium.¹² For most of its existence, this law and the Federal Communications Commission (“FCC”) rules enforcing it have achieved their goals, and done so without undue interference into broadcaster programming.¹³ These rules, however, hail from a different era of campaigning,¹⁴ in a different era of television, and when cable was in its infancy.¹⁵ While still pertinent to traditional campaigning and candidates, Equal Time has not kept pace with new political and broadcasting realities: cable has matured into a set of networks offering original programs;¹⁶ previously-released films, rebroadcasts of television series, and syndication have become mainstays of modern programming;¹⁷ media-crossover candidates are becoming more and more common.

A problem arising with increasing frequency, and as a result of these converging realities, involves films and television shows featuring actors-turned-candidates that are broadcast during election season. Do these trigger Equal Time, even though the candidate does not control the program’s airing? Is playing a character role equivalent to a traditional candidate appearance? To what extent does Equal Time apply to cable networks televising the same programs?¹⁸

¹² See *infra* notes 141–45 and accompanying text.

¹³ See generally Anne Kramer Ricchiuto, Note, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 285–86 (2005) (discussing the FCC’s trend of deferring to broadcaster judgment regarding programming decisions and categorizing programs).

¹⁴ See *id.* at 292.

¹⁵ See David Bauder, *TNT Says It Will Air Fred Thompson’s Law & Order Episodes*, USA TODAY, Sept. 1, 2007, http://www.usatoday.com/life/television/2007-08-31-2263622619_x.htm [hereinafter Bauder, *TNT Says*].

¹⁶ See Gold & Puzanghera, *supra* note 8.

¹⁷ See Bauder, *TNT Says*, *supra* note 15.

¹⁸ Indeed, the Supreme Court is grappling with the extent to which the federal government can regulate the television broadcast of films featuring candidates in *Citizens United v. Federal Election Commission*, which involves the anti-Hillary Clinton film *Hillary: The Movie*. *Citizen United v. Fed. Election Comm’n*, No. 08-205 (U.S. argued Sept. 9, 2009). The case was argued before the Supreme Court in March 2009, and was re-argued on September 9, 2009, at a special September session. Tony Mauro, *Will Finance Case Impact Vote on Sotomayor?*, LAW.COM, July 1, 2009, <http://www.law.com/jsp/article.jsp?id=1202431898939&rss=newswire>. On September 9,

Broadcasters and legal experts complain that this area runs the gamut from confusing¹⁹ to unfair.²⁰ For instance, when actor-politician Fred Thompson ran for the presidential nomination in 2007, NBC feared that airing *Law & Order* episodes that included him might require the network to provide Equal Time to his opponents.²¹ Moreover, because Thompson did not pay for the broadcast, but was a paid actor on it, NBC would have had to provide any time free of charge.²² A few years earlier, when Arnold Schwarzenegger ran in the California gubernatorial recall election, some broadcasters believed that televising an Arnold movie could trigger the Equal Time rights of hundreds of other candidates, so they pre-empted his films.²³ Other stations pulled the syndicated program *Diff'rent Strokes* because Gary Coleman was also a candidate.²⁴

The issue is even more complicated when it comes to cable television.²⁵ While some legal experts believe that Equal Time does not apply to cable networks,²⁶ others claim "It isn't so much that Equal Time doesn't apply to cable. It's more like it has never

2009, Solicitor General Elena Kagan argued before the Supreme Court that "the court has never before questioned 100 years of congressional efforts to limit corporate spending in elections." Dahlia Lithwick, *Unprecedented: Watching the Supreme Court Make Its Campaign Finance Jurisprudence Disappear*, SLATE, Sept. 9, 2009, <http://slate.com/id/2227798/pagenum/all/#p2>.

¹⁹ John Eggerton, *Equal Opportunities for Confusion*, BROADCASTING & CABLE, Sep. 10, 2007, http://www.broadcastingcable.com/blog/BC_DC_Eggerton_on_Washington/8004-Equal_Opportunities_For_Confusion.php; see also Barnhart, *supra* note 4; Gold & Puzzaghera, *supra* note 8.

²⁰ See Lowry, *supra* note 4.

²¹ Shear, *supra* note 3.

²² *Id.*

²³ David Bauder, *When Campaigns and Comedy Mix, the Nervous Laugh Is from Lawyers*, SAN DIEGO UNION-TRIB., Oct. 7, 2003, at E5 [hereinafter Bauder, *When Campaigns and Comedy Mix*]; see also Barnhart, *supra* note 4.

²⁴ Stephen M. Silverman, *No Reruns for Arnold, Gary Coleman: Because of Equal Time Rules, Schwarzenegger's Old Movies and Coleman's Old Show Can't Be Shown on California TV During the Campaign*, PEOPLE, Aug. 13, 2003, <http://www.people.com/people/article/0,,626633,00.html>.

²⁵ See Eggerton, *supra* note 19.

²⁶ Michael C. Dorf, *Why U.S. Law May Keep the Terminator Off the Air Until After Election*, FINDLAW, Aug. 22, 2003, <http://writ.news.findlaw.com/dorf/20030820.html>; see also Barnhart, *supra* note 4; Bauder, *TNT Says*, *supra* note 15; Lowry, *supra* note 4.

been applied.”²⁷ Thus, “some cable operators have played it safe and acted as though it does apply,”²⁸ such as when SyFy and FX cancelled scheduled airings of Schwarzenegger films.²⁹

Not surprisingly, television stations feel compelled to pre-empt television episodes³⁰ and movies after having paid their licensing fees, lest they be required to provide free advertising time to every candidate in the race.³¹ Not only does this deter media cross-over candidates from entering the race³² and hold them responsible for broadcasts they do not control, but it also imposes on broadcasters significant economic liability.³³ As a result, the Equal Time Rule produces anything but equality.

This article considers whether, and if so how, Equal Time applies to televising an actor-turned-politician’s movies and TV programs made prior to his declaring candidacy. After providing an overview of the regulation of candidate broadcasting, Part I details the provisions of the Equal Time Rule as well as the FCC’s application of it. In doing so, the article focuses on two concepts central to the rule: “candidate appearances,” and the “use of a broadcast station.” In order to establish the contours of the issue, the article then describes the recent problems broadcasters have faced in attempting to uphold their Equal Time obligations, where media cross-over candidates are involved. Next, Part II analyzes how confusion about and the unequal application of the rule to such candidates has led to inequity among both candidates and broadcasters. Accordingly, Part III concludes by suggesting how Equal Time can be applied in a way that is clear and concrete, fair

²⁷ Eggerton, *supra* note 19.

²⁸ *Id.*

²⁹ Dorf, *supra* note 26; see Bauder, *TNT Says*, *supra* note 15.

³⁰ Barnhart, *supra* note 4; see also Shear, *supra* note 3.

³¹ Gary Gentile, *Schwarzenegger Films Would Trigger FCC Equal Time Rule*, SAN DIEGO TRIB., Aug. 12, 2003, <http://www.signonsandiego.com/news/politics/recall/20030812-1109-ca-recall-equaltime.html>; see also Barnhart, *supra* note 4; Shear, *supra* note 3.

³² See Gold & Puzanghera, *supra* note 8 (noting that, for instance, George Takei, *Star Trek*’s Mr. Sulu, complained that when he ran for Los Angeles City council, a local station pulled repeats of *Star Trek*, causing him to lose residuals).

³³ See Shear, *supra* note 3.

to both candidates and broadcasters, and is consistent with the doctrine’s goals.

I. AN OVERVIEW OF REGULATION OF CANDIDATE BROADCASTING

Television’s Importance to the Electoral Process

Television’s impact on American society is inestimable.³⁴ Except for working and sleeping, Americans spend more time watching television than doing anything else.³⁵ Consequently, much of what people know comes from television.³⁶ It provides factual information,³⁷ focuses viewers on issues,³⁸ and even

³⁴ See MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 44 (Jennings Bryant & Dolf Zillmann eds., 2d ed. 1994) [hereinafter MEDIA EFFECTS].

³⁵ See Cary W. Horvath, *Measuring Television Addiction*, 48 J. BROADCASTING & ELECTRONIC MEDIA 378, 380 (2004) (noting that television viewing led to less interaction with friends and family, and less time pursuing other interests); see also L.J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers’ Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUD. F. 257, 257 (1998) (noting that television is central to American life).

³⁶ See Sonia Livingstone, *Mediated Knowledge*, in TELEVISION AND COMMON KNOWLEDGE 97 (Jostein Gripsrud ed., 1999); Kimberlianne Podlas, *Guilty On All Accounts: Law & Order’s Impact on Public Perceptions of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 11–14 (2008) [hereinafter Podlas, *Guilty On All Accounts*] (describing television’s impact on public’s perception of and knowledge about facts and values).

³⁷ See Livingstone, *supra* note 36, at 97; Podlas, *Guilty On All Accounts*, *supra* note 36, at 9–10 (noting that television is a primary source of cultural information); Nancy Signorielli, *Aging on Television: Messages Relating to Gender, Race, and Occupation in Prime Time*, 48 J. BROADCASTING & ELECTRONIC MEDIA 279, 279–80 (2004) (noting that television provides most people with most of what they know).

³⁸ See R. Lance Holbert et al., *Political Implications of Prime-Time Drama and Sitcom Use: Genres of Representation and Opinions Concerning Women’s Rights*, 53 J. COMM. 45, 57 (2003). Television does so through “agenda-setting.” Yariv Tsfati, *Does Audience Skepticism of the Media Matter in Agenda Setting?*, 47 J. BROADCASTING & ELECTRONIC MEDIA 157, 158–59 (2003). When television devotes a great deal of attention to an issue, viewers will come to judge that issue as salient. MELVIN L. DEFLEUR & SANDRA J. BALL-ROKEACH, *THEORIES OF MASS COMMUNICATION* 264–65 (5th ed. 1989); see also R. Lance Holbert et al., *Environmental Concern, Patterns of Television Viewing, and Pro-Environmental Behaviors: Integrating Models of Media Consumption and Effects*, 47 J. BROADCASTING & ELECTRONIC MEDIA 177, 179–80 (2003) (citing studies that found that news attention to an issue influenced whether the public believed issue was salient).

influences how they think through them.³⁹ In fact, the amount of attention that television devotes to a political issue is a key factor in whether the public thinks the issue is important.⁴⁰ Moreover, research has shown that the framework television uses in presenting an issue is often adopted by viewers to understand that issue.⁴¹ In this way, television can affect public opinion.

Television's impact on the political process is no less significant.⁴² Television is the primary means through which many Americans learn about politics,⁴³ and is the predominant mechanism by which young voters first encounter political information.⁴⁴ Moreover, politics are no longer restricted to traditional news and political programming, but are now the purview of entertainment television.⁴⁵ Shows like *Saturday Night*

³⁹ Mira Sotirovic, *How Individuals Explain Social Problems: The Influences of Media Use*, 53 J. COMM. 122, 132 (2003); see Tsftati, *supra* note 38, at 158–59.

⁴⁰ See Tsftati, *supra* note 38, at 158–59; see also Dennis T. Lowry et al., *Setting the Public Fear Agenda: A Longitudinal Analysis of Network TV Crime Reporting, Public Perceptions of Crime, and FBI Crime Statistics*, 53 J. COMM. 61, 72 (2003) (emphasizing that airtime alone accounts for almost four times more variance in public perception of America's "most important" issue); William J. Schenck-Hamlin et al., *The Influence of Negative Advertising Frames on Political Cynicism and Political Accountability*, 25 HUM. COMM. RES. 53, 53 (2000).

⁴¹ See MEDIA EFFECTS, *supra* note 34, at 10–12; Sotirovic, *supra* note 39, at 132.

⁴² See *CBS, Inc. v. FCC*, 629 F.2d 1, 10 (D.C. Cir. 1980) ("[I]t would be hard to overestimate the importance of television to our political processes.").

⁴³ See Lindsay H. Hoffman & Tiffany L. Thompson, *The Effect of Television Viewing on Adolescents' Civic Participation: Political Efficacy as a Mediating Mechanism*, 53 J. BROADCASTING & ELECTRONIC MEDIA 3, 5 (2009) (noting that because most people do not have first-hand experiences with politics, much of what they know about it comes from television).

⁴⁴ *Id.* at 6; see also Barry A. Hollander, *Late-Night Learning: Do Entertainment Programs Increase Political Campaign Knowledge for Young Viewers?*, 49 J. BROADCASTING & ELECTRONIC MEDIA 402, 404–05 (2005).

⁴⁵ Young Mie Kim & John Vishak, *Just Laugh! You Don't Need To Remember: The Effects of Entertainment Media on Political Information Acquisition and Information Processing in Political Judgment*, 58 J. COMM. 338, 338–39 (2008); cf. Michael X. Delli Carpini & Bruce A. Williams, *Let Us Infotain You: Politics in the New Media Environment*, in *MEDIATED POLITICS: COMMUNICATION IN THE FUTURE OF DEMOCRACY* 160, 161 (W. Lance Bennett & Robert M. Entman eds., 2001); R. Lance Holbert et al., *Primacy Effects of the Daily Show and National TV News Viewing: Young Viewers, Political Gratifications, and Internal Political Self-Efficacy*, 51 J. BROADCASTING & ELECTRONIC MEDIA 20, 22 (2007) [hereinafter Holbert et al., *Primacy Effects*].

Live (“*SNL*”),⁴⁶ *The Daily Show*,⁴⁷ and *South Park*⁴⁸ have emerged as significant sources of political information, especially for young adults⁴⁹ and people who do not watch network news.⁵⁰

Indeed, the way that television programs frame candidates can influence the impressions viewers form about⁵¹ and the way they judge those candidates.⁵² Indeed, television’s imagery frequently speaks “where words . . . or reporting do not.”⁵³ As a result, a *Saturday Night Live* satire of a vice-presidential candidate can be as politically relevant as the nightly news.⁵⁴ It is no secret that Tina Fey’s lampooning of Sarah Palin⁵⁵ highlighted aspects of Palin’s candidacy that informed the public dialogue.⁵⁶

⁴⁶ See Kevin Coe et al., *Hostile News: Partisan Use and Perceptions of Cable News Programming*, 58 J. COMM. 201, 201–02 (2008) (discussing “soft news” and infotainment as sources of information).

⁴⁷ See Hollander, *supra* note 44, at 411.

⁴⁸ Kimberlianne Podlas, *Respect My Authority!: South Park’s Expression of Legal Ideology and Contribution to Legal Culture*, 11 VAND. J. ENT. & TECH. L. 101 passim (2009) [hereinafter Podlas, *South Park*].

⁴⁹ Carpini & Williams, *supra* note 45, at 161; Kim & Vishak, *supra* note 45, at 338–39.

⁵⁰ See, e.g., Baum, *supra* note 9, at 213–14.

⁵¹ See Jodi Baumgartner, *The Daily Show Effect: Candidate Evaluations, Efficacy, and American Youth*, 34 AM. POL. RES. 341, 341–43 (2006); Kim & Vishak, *supra* note 45, at 340–42; see also Stuart Levine, *PBS Leads Peabodys*, DAILY VARIETY, Apr. 2, 2009, at 4 (noting that *Saturday Night Live*’s parodies of the presidential and vice-presidential candidates “may have swayed the race”).

⁵² See Baumgartner, *supra* note 51, at 341.

⁵³ Louis Klarevas, *Media Impact in Media Power*, in MEDIA POLITICS 281, 281–82 (Mark J. Rozell ed., 2003).

⁵⁴ Podlas, *South Park*, *supra* note 48, at 498; see also Holbert et al., *Primacy Effects*, *supra* note 45, at 22.

⁵⁵ Tina Fey was nominated for a 2009 Emmy as Outstanding Guest Star (Comedy) for her performances as Palin. 61st Primetime Emmys, <http://www.emmys.com/nominations?tid=140> (last visited Sept. 16, 2009); see also Allison Waldman, *Tina Fey Wins Emmy for Her Sarah Palin*, IMDB, Sept. 13, 2009, <http://www.imdb.com/news/ni0986731/>.

⁵⁶ See Collins, *supra* note 8; see also Levine, *supra* note 51, at 4 (describing the impact of *SNL* on the election). These political parodies also earned *Saturday Night Live* a 2009 Peabody Award. Levine, *supra* note 51, at 4.

Television's ability to convey messages and shape images,⁵⁷ combined with its cultural and technological proliferation, make it an important tool in political campaigning.⁵⁸ Not only does television enable candidates to reach a broad demographic of voters⁵⁹ and gain name recognition,⁶⁰ but it provides an opportunity for the public to become acquainted with candidates on a more personal level.⁶¹ Consequently, a candidate's ability to obtain television access is crucial to a campaign.⁶² Even the Supreme Court has recognized that the electorate's dependence on television is an indispensable instrument of "effective political speech."⁶³ In fact, during the 2008 presidential election, Barack Obama and John McCain combined spent over \$360 million on television advertising.⁶⁴

⁵⁷ See LaVonda N. Reed-Huff, *Offensive Political Speech from the 1970s to 2008: A Broadcaster's Moral Choice*, 8 MD. J. RACE, RELIGION, GENDER & CLASS 241, 244 (2008); see also Fuyan Shen, *Chronic Accessibility and Individual Cognitions: Examining the Effects of Message Frames in Political Advertisements*, 54 J. COMM. 123, 123 (2004).

⁵⁸ See Kari Garcia, Comment, *Broadcasting Democracy: Why America's Political Candidates Need Free Airtime*, 17 COMMLAW CONSPECTUS 267, 289–90 (2008) (noting that since its invention, candidates have recognized its potential); see also *CBS v. FCC*, 629 F.2d 1, 10 (D.C. Cir. 1980) ("Today, there can be no doubt that we are in the era of television campaigning." (internal quotations omitted)); Reed-Huff, *supra* note 57, at 244 ("Broadcasters play an important role in shaping the messages and images conveyed to the general electorate in any given political campaign season.").

⁵⁹ See *CBS & NBC*, 26 F.C.C. 715, 726 (1959) (emphasizing television affords candidates the potential to reach wide audiences); see also Garcia, *supra* note 58, at 268, 289 (discussing the ability of campaigning on television to broadcast directly to the public).

⁶⁰ Garcia, *supra* note 58, at 268.

⁶¹ See Baum, *supra* note 9, at 213–14; see also *CBS*, 26 F.C.C. at 726 (explaining that television can create a sense of viewer intimacy and show the candidate in ways that other media cannot).

⁶² See Matthew W. Daus, *Are Politicians a Protected Class?: The Constitutionality of 'Reasonable Access' Media Rights Under the Communications Act*, 6 COMMLAW CONSPECTUS 173, 173 (1998).

⁶³ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976); see also *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (maintaining that speech concerning public affairs is the essence of self-government); *CBS*, 629 F.2d at 10.

⁶⁴ See Andrei Scheinkman, Xaquín G.V. & Stephan Weitberg, *The Ad Wars*, N.Y. TIMES, <http://elections.nytimes.com/2008/president/advertising/index.html> (last visited Oct. 12, 2009). In the weeks immediately preceding the general election, now-President Obama spent over \$80 million on media purchases and John McCain spent over \$19.3 million. Federal Election Commission, Disbursements by Purpose for Obama for

Political Broadcasting

Aware of the broadcast media’s potential to shape public opinion,⁶⁵ and thereby the electoral process, the federal government regulates campaign broadcasting.⁶⁶ This began in the 1920’s, when Congress became concerned that radio networks might have too much influence over elections.⁶⁷ In response, it enacted section 18 The Equal Opportunity Provision as part of The Radio Act of 1927.⁶⁸ This mandated that broadcasters afford candidates for federal office equal broadcast opportunities.⁶⁹

Section 18 established the philosophy of regulating campaigning communications in terms of the mechanism by which those messages are delivered (via the broadcast airwaves),⁷⁰ rather than in terms of Congress’s constitutional authority over elections.⁷¹ Additionally, the Radio Act established a regulatory model founded on the theory that broadcasters were “public

America (Feb. 27, 2009), http://query.nictusa.com/pres/2008/12G/C00431445/B_PURPOSE_C00431445.html; Federal Election Commission, Disbursements by Purpose for McCain-Palin 2008 Inc. (Feb. 23, 2009), http://query.nictusa.com/pres/2008/12G/C00453928/B_PURPOSE_C00453928.html.

⁶⁵ Chisholm v. FCC, 538 F.2d 349, 367 (D.C. Cir. 1976) (Wright, J., dissenting).

⁶⁶ See Branch v. FCC, 824 F.2d 37, 42 (D.C. Cir. 1987).

⁶⁷ Colin Vandell, *Words Signifying Nothing? The Evolution of 315(a) in an Age of Deregulation and Its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT. L.J. 443, 446 (2005).

⁶⁸ Radio Act of 1927, Pub. L. No. 69-632, § 18, 44 Stat. 1162, 1170 (1927).

⁶⁹ *Id.*

⁷⁰ See *id.*

⁷¹ Article I, Section 4 awards Congress the constitutional authority to regulate federal elections. U.S. CONST. art. I, § 4, cl. 1. It states: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” *Id.* Congress’s power under this section is extensive. Thus, as evidenced by the Federal Election Campaign Act, Congress might have addressed campaigning via the broadcast airwaves in terms of the above authority. See Radio Act of 1927, Pub. L. No. 69-632, § 18, 44 Stat. 1162, 1170 (1927). Many years later, Congress extended its regulation of political broadcasts and election campaigning through the Federal Election Campaign Act (“FECA”), Federal Election Campaign Act of 1971, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431 (2006)), and the Bipartisan Campaign Reform Act (“BCRA”), Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 305(a)(3), 116 Stat. 81, 101.

trustees who were privileged to use a scarce public resource”⁷² and therefore must operate in the public’s interest.⁷³

Congress’s Authority to Regulate the Broadcast Airwaves

The aforementioned scarcity rationale is the basis of Congress’s authority to regulate the broadcast airwaves, and hence political broadcasting.⁷⁴ In 1934, Congress enacted The Communications Act,⁷⁵ the foundation of all modern broadcast regulation. The Communications Act deems the airwaves a limited public resource,⁷⁶ rather than private property owned by broadcasters.⁷⁷ Therefore, Congress regulates broadcasting⁷⁸ to ensure that licensee-broadcasters expose the public to a diversity of ideas.⁷⁹

⁷² Kennedy for President Comm. v. FCC, 636 F.2d 417, 431 (D.C. Cir. 1980); *see also* Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 610 (1998).

⁷³ *See* Krasnow & Goodman, *supra* note 72, at 610.

⁷⁴ *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–90 (1969). “Scarcity” was defined as the demand for broadcast frequencies exceeding the supply. *Id.* at 388–89.

⁷⁵ The Communications Act of June 19, 1934, ch. 652, §§ 1–609, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–61 (2006)). Though the Wireless Ship Act of 1910, 36 Stat. 629, required passenger transport ships to be equipped with radios for emergency communication, Congress did not begin regulating the broadcast spectrum (at that time, radio) until after and as a result of the 1912 Titanic disaster. *See* DWIGHT L. TEETER, JR. & BILL LOVING, *LAW OF MASS COMMUNICATIONS* 712–13 (12th ed. 2008); Garcia, *supra* note 58, at 270–71. Because amateur radio operators monopolized so much of the spectrum, their transmissions significantly interfered with public radio communication. *See* Garcia, *supra* note 58, at 270; *see also* Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 57 (1994). After the Titanic disaster exposed the potential impact of this interference with radio communication, TEETER & LOVING, *supra*, at 712–13; Garcia, *supra* note 58, at 271, Congress passed the Radio Act of 1912. Pub. L. No. 62-264, 37 Stat. 302 (repealed 1927). The Radio Act attempted to regulate access to the airwaves, through licensing broadcasters. *See* Cronauer, *supra*, at 57. When this proved unsuccessful, Congress replaced this with the 1927 Radio Act, ch. 169, 44 Stat. 1162 (1927), which created the Federal Radio Commission to implement policy and award broadcast licenses consistent with “the public interest.” *See* Cronauer, *supra*, at 58–59.

⁷⁶ *See* TEETER & LOVING, *supra* note 75, at 723–24.

⁷⁷ *Id.* at 722–23; *see also* RICHARD CAMPBELL, CHRISTOPHER R. MARTIN & BETTINA FABOS, *MEDIA AND CULTURE* 131 (7th ed. 2010).

⁷⁸ *See* TEETER & LOVING, *supra* note 75, at 711–12.

⁷⁹ The Supreme Court has held that the physical limitations inherent in the broadcast spectrum, and the need to prevent domination of the medium by licensees permits government regulation of speech. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–

In addition, the Communications Act created the FCC and endowed it with the authority to enforce federal policy in and regulate broadcasting.⁸⁰ The FCC exercises this power through the licensing of broadcast stations⁸¹ and promulgating rules for broadcasting.⁸² With regard to the former, a broadcaster cannot use the airwaves, unless it first obtains a license from the FCC.⁸³ In exchange for the license, broadcasters are subject to various conditions.⁸⁴ Among those are that they act in the public interest⁸⁵ and comply with the laws and FCC rules pertaining to political broadcasting.⁸⁶

Congress’s Interest in Equal Opportunity

Because Congress was uniquely sensitive to the potential power that broadcasters have over elections,⁸⁷ it wanted to ensure that broadcasters did not impede the free flow of information to the public⁸⁸ or censor opposing views.⁸⁹ Of course, as politicians dependent on the public to elect them, Congress also had a

90 (1969); *cf.* *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (illustrating how regulation enables the public to listen to broadcasts unhindered).

⁸⁰ *Garcia*, *supra* note 58, at 273 (describing the creation of the FCC). The statutory basis for all substantive FCC regulation pertaining to the broadcast industry is codified in Title III of the Communications Act. 47 U.S.C. §§ 301–326, 331.

⁸¹ *See* *FCC v. FOX*, No. 07-582, slip op. at 1 (U.S. Apr. 28, 2009).

⁸² *See id.*; *see also* *Garcia*, *supra* note 58, at 271.

⁸³ *KVUE, Inc. v. Moore*, 709 F.2d 922, 932 (5th Cir. 1983), *aff’d*, 465 U.S. 1092 (1984).

⁸⁴ *See, e.g., FOX*, No. 07-582, slip op. at 1; *see also* *CBS v. FCC*, 453 U.S. 367, 386 (1981) (stating that the FCC is empowered to “[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of [the Communications Act]”).

⁸⁵ *See* 47 U.S.C. § 307(c)(1) (requiring that public interest be served in granting and renewing licenses). The 1927 Act also established a regulatory model founded on the theory that broadcasters were “public trustees who were privileged to use a scarce public resource.” *Krasnow & Goodman*, *supra* note 72, at 610. The FRC described the public trustee model, noting that even though broadcast stations were privately owned they must operate in the public’s interest. *Id.*

⁸⁶ *See KVUE, Inc.*, 709 F.2d at 932.

⁸⁷ *Cf. Chisholm v. FCC*, 538 F.2d 349, 369 (D.C. Cir. 1976) (Wright, J., dissenting) (“We must remember that we are not dealing with ordinary legislation: members of Congress are also candidates for political office.”).

⁸⁸ *See, e.g., THE MEDIA BUREAU, FCC, THE PUBLIC AND BROADCASTING* 14 (revised July 2008).

⁸⁹ *See Ricchiuto*, *supra* note 13, at 270.

personal interest in ensuring that electoral candidates had access to broadcast media.⁹⁰ Indeed, politics help explain several aspects of broadcast regulation⁹¹ and this is no different.

Accordingly, in 1934 Congress included in the Communications Act Section 315, the Equal Opportunity provision⁹² for political broadcasts,⁹³ colloquially known as the Equal Time Rule.⁹⁴ The Equal Time Rule is identical to Section 18's Equal Opportunity provision.⁹⁵ Its primary goals⁹⁶ were to: (1) encourage political debate⁹⁷ among candidates⁹⁸ and (2) prevent broadcasters from discriminating against candidates,⁹⁹ such as in selling campaign advertising time.¹⁰⁰ Though now 75 years old, the Equal Opportunity rule remains the pillar of electoral broadcast regulation. It was later enhanced with § 315 (b), which

⁹⁰ See Daus, *supra* note 62, at 173 (emphasizing that access to broadcast media is considered crucial for any campaign).

⁹¹ Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233, 234–35 (2004) (explaining that politics better explain broadcasting regulations than economics); Christopher S. Yoo, *On Television Regulation: The Role of Politics and Policy in Television Regulation*, 53 EMORY L.J. 255, 255–56, 259 (2004) (maintaining that politics are an important piece of the puzzle that help explain FCC decision-making).

⁹² Act of June 19, 1934, ch. 652, § 315, 48 Stat. 1064, 1088.

⁹³ 47 U.S.C. § 315 (2006); see Garcia, *supra* note 58, at 274.

⁹⁴ *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 437 (D.C. Cir. 1980). The statutory term “equal opportunities” and the colloquial term “Equal Time” are used interchangeably. *Id.* at 437. The law never uses the term “equal time,” but uses the broader term, “equal opportunities.” FCC, RELEASE NO. 78-523, PUBLIC NOTICE: THE LAW OF POLITICAL BROADCASTING & CABLECASTING 2209 (1978) [hereinafter 1978 FCC PRIMER].

⁹⁵ Compare Act of June 19, 1934, ch. 652, § 315, 48 Stat. 1064, 1088 (stating the Equal Time Rule), with Act of Feb. 23, 1927, ch. 169, § 18, 44 Stat. 1162, 1170 (stating the Equal Opportunity provision).

⁹⁶ Vandell, *supra* note 67, at 444.

⁹⁷ The purpose is to facilitate political debate over radio and television. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 534 (1959).

⁹⁸ *Paulsen v. FCC*, 491 F.2d 887, 889 (9th Cir. 1974). Congress enacted § 315 “to encourage full and unrestricted discussion of political issues by legally qualified candidates.” *Id.*

⁹⁹ *Kay v. FCC*, 443 F.2d 638, 643 (D.C. Cir. 1970).

¹⁰⁰ See 1978 FCC PRIMER, *supra* note 94, at 2216.

regulates charges for airtime,¹⁰¹ and § 312, which ensures access to broadcast media.¹⁰²

Section 315

Section 315(a) provides that: “If any licensee shall permit any person who is a legally qualified candidate for any public office¹⁰³ 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. . . .”¹⁰⁴ This creates both a contingent duty on behalf of broadcasters and a contingent right to candidates, that if a broadcaster allows one candidate to use the public airwaves, it must allow opposing candidates an equal opportunity to do the same.¹⁰⁵ Therefore, if a broadcaster sells airtime to one candidate, it must sell “equal” airtime to opposing candidates.¹⁰⁶ If a broadcaster charges a certain price to one candidate, it must charge the same price to opposing candidates.¹⁰⁷ If a broadcaster gives free airtime to one candidate, it must give free airtime to opposing candidates.¹⁰⁸ The Supreme Court has upheld the constitutionality of this rule.¹⁰⁹

Importantly, a broadcaster’s duty “is . . . no more or less than” to treat candidates for the same public office equally.¹¹⁰ A

¹⁰¹ 47 U.S.C. § 315(b)(1) (2006). This was added by an amending provision of FECA. Federal Election Campaign Act, tit. 3, § 305, Pub. L. No. 107-155, 116 Stat. 100 (2002).

¹⁰² See 47 U.S.C. § 312 (denoting the administrative sanctions imposed on broadcasters not providing reasonable access).

¹⁰³ The office may be at the federal, state, or local level. THE MEDIA BUREAU, *supra* note 88, at 14. Title 47 C.F.R. § 73.1940 provides that a person is a legally qualified candidate if he: (1) has publicly announced his candidacy, (2) meets the qualifications prescribed by applicable law to hold office, and (3) has qualified for a place on the ballot. FCC Broadcast Radio Services, 47 C.F.R. § 73.1940 (2009).

¹⁰⁴ 47 U.S.C. § 315(a).

¹⁰⁵ Garcia, *supra* note 58, at 274; Chisholm v. FCC, 538 F.2d 349, 378 (D.C. Cir. 1976) (Wright, J., dissenting).

¹⁰⁶ See Kennedy for President Comm. v. FCC, 636 F.2d 432, 437–38 (D.C. Cir. 1980); see also John M. Sylvester, Note, *Equalizing Candidates’ Opportunities for Expression*, 51 GEO. WASH. L. REV. 113, 119 (1982).

¹⁰⁷ See *infra* notes 160–61 and accompanying text.

¹⁰⁸ See *infra* notes 171–78 and accompanying text.

¹⁰⁹ See Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 529–30 (1959).

¹¹⁰ Kennedy, 636 F.2d at 438; see also FCC v. Summa Corp., 447 F. Supp. 923, 926–27 (D. Nev. 1978) (holding that a broadcaster who allows candidate to make an appearance,

broadcaster is not obligated to provide free airtime or alert candidates when their opponents appear on air.¹¹¹ In fact, a broadcaster could implement a policy of not selling a particular time period to any candidate, and as long as the policy were applied uniformly and equally, it would be permissible.¹¹² For example, in one case, a candidate wanted to purchase half-hour segments of time.¹¹³ The television station refused to sell him, or any other candidate, half-hour segments, instead offering all candidates shorter segments.¹¹⁴ The FCC declared that, because this policy was applied uniformly, it was permissible.¹¹⁵

If, however, a broadcaster allows one candidate to use a broadcasting station for a certain amount of time for at a certain price, but withholds from opposing candidates similar opportunities, it has breached its duty under § 315.¹¹⁶ For example, WBBM-TV sold one candidate fifteen spot announcements to air during the two weeks before an election.¹¹⁷ An equal opportunity would require giving his opponents something approaching the same amount of time and number of spots.¹¹⁸ WBBM, however, limited the other candidates to three spots per week.¹¹⁹ The FCC held that this did not afford those candidates an equal opportunity.¹²⁰

even if brief or perfunctory, violates equal opportunity if similar opportunity is denied to opponent).

¹¹¹ See, e.g., Miller, 53 F.C.C.2d 1203, 1203 (1975); Rowley, 39 F.C.C.2d 437, 444 (1973); FCC, PUBLIC NOTICE NO. 70-871, USE OF BROADCAST FACILITIES BY CANDIDATES FOR PUBLIC OFFICE 832, 865 (1970) [hereinafter 1970 PUBLIC NOTICE].

¹¹² See Weissman, 23 F.C.C.2d 778, 778 (1966); 1970 PUBLIC NOTICE, *supra* note 111, at 872.

¹¹³ See Smith, 18 F.C.C.2d 747, 747 (1969).

¹¹⁴ *Id.*

¹¹⁵ *Id.*; see also Martin-Trigona, 64 F.C.C.2d 1087, 1090-91 (1977) (maintaining that § 315 does not entitle a candidate to any particular unit of time).

¹¹⁶ See 1970 PUBLIC NOTICE, *supra* note 111, at 865. If the station fails to uphold its Equal Time obligations, the candidate, herself, has no private cause of action against the broadcaster. *Daly v. CBS, Inc.*, 309 F.2d 83, 86 (7th Cir. 1962). Rather, having failed to meet its duty as a licensee, the broadcaster is subject to license revocation. See generally ANDREW O. SHAPIRO, MEDIA ACCESS: YOUR RIGHTS TO EXPRESS YOUR VIEWS ON RADIO AND TELEVISION 18 (1976).

¹¹⁷ Singer, 51 F.C.C.2d 766, 767 (1975).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 766.

¹²⁰ *Id.* at 767.

Whenever a candidate obtains airtime, she may use it however she wishes¹²¹ to broadcast whatever she chooses.¹²² In fact, the candidate does not even have to discuss politics.¹²³ A broadcaster may not censor a candidate’s advertisements¹²⁴ or deny time on the ground that it is not sufficiently related to one’s candidacy.¹²⁵ Allowing a broadcaster to pass judgment on the political merit of a spot would frustrate § 315’s purpose¹²⁶ of enabling candidates to present their views to the electorate “wholly unfettered by licensee judgment as to propriety of presenting them.”¹²⁷ Furthermore, requiring an arbiter to judge the political content of candidate broadcasts would not only inhibit political debate,¹²⁸ but also necessitate day-to-day review.¹²⁹

Time Slots

The statutory parity demands that a broadcaster provide the same amount of time at the same rate.¹³⁰ But in some respects, it requires more, and in some respects less, than merely allotting the

¹²¹ See *Radio Station WITL*, 54 F.C.C.2d 650, 650 (1975).

¹²² 47 U.S.C. § 315(a) (2006).

¹²³ *Radio Station WITL*, 54 F.C.C.2d at 651 (“[T]he entire broadcast [need not] be devoted to ‘[the] candidate himself. . . advocating his candidacy, position on the issues or attacking his opponent’s candidacy or position’ for an appearance to be considered a ‘use.’”).

¹²⁴ 47 U.S.C. § 315(a) (“[L]icensee shall have no power of censorship over the material broadcast under the provision of this section.”); see also *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 529 (1959) (allowing broadcasters to censor political remarks “would undermine the basic purpose for which [§] 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates”).

¹²⁵ See FCC, CONTROL OF CONTENT OF BROADCASTS UNDER THE “EQUAL TIME” REQUIREMENTS OF SECTION 315 OF THE COMMUNICATIONS ACT OF 1934, at 251 (1952); see also *Hefstel*, 32 F.C.C.2d 263, 266 (1971); 1970 PUBLIC NOTICE, *supra* note 111, at 874.

¹²⁶ *Farmers Educ. & Coop. Union*, 360 U.S. at 529.

¹²⁷ *Capitol Broad. Co.*, 8 F.C.C.2d 975, 976 (1967); see also *Hefstel*, 32 F.C.C.2d at 266.

¹²⁸ See *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 437 (D.C. Cir. 1980); *Wolterman*, 49 F.C.C.2d 567, 568 (1974).

¹²⁹ See *Wolterman*, 49 F.C.C.2d at 567.

¹³⁰ *Vote Choice, Inc. v. Stefano*, 814 F. Supp. 195, 207 (D.R.I. 1993) (citing *Kennedy*, 636 F.2d at 438) (discussing price and duration of “appearance”); see also 1978 FCC PRIMER, *supra* note 94, at 2216; *Sylvester*, *supra* note 106, at 119.

same number of seconds.¹³¹ The time,¹³² day,¹³³ size of audience,¹³⁴ and presentation format¹³⁵ of the triggering broadcast are also relevant. Therefore, a station that allows one candidate to run ads throughout the day, and gives the opposing candidate the same amount of time, but limits his advertisements to the early morning and noon periods is not providing an equal opportunity.¹³⁶

Nevertheless, while a broadcaster must offer time periods of “comparable . . . desirability,”¹³⁷ it need not make available the exact same time periods, let alone the periods requested by the candidate.¹³⁸ Neither the Communications Act nor the FCC rules require stations to sell candidates specific time slots.¹³⁹

Access to Time

To enhance Equal Time rights, the Federal Election Campaign Act (“FECA”)¹⁴⁰ amended the Communications Act to ensure that

¹³¹ See *Kennedy*, 636 F.2d at 437–38; see also *Vote Choice, Inc.*, 814 F. Supp. at 207 (examining duration of appearance).

¹³² FCC, RELEASE NO. 62-1031, INQUIRY CONCERNING “EQUAL TIME” REQUIREMENTS 357, 360 (1962) [hereinafter INQUIRY CONCERNING “EQUAL TIME” REQUIREMENTS]; see also *FCC v. Summa Corp.*, 447 F. Supp. 923, 928 (D. Nev. 1978).

¹³³ See *Kennedy*, 636 F.2d at 437 n.33 (“[R]equired parity demands more than allotment of the same amount of time. The broadcaster must also provide the candidate with time . . . at a comparable hour of the day . . .”).

¹³⁴ 1978 FCC PRIMER, *supra* note 94, at 2216; see also INQUIRY CONCERNING “EQUAL TIME” REQUIREMENTS, *supra* note 132, at 360 (noting that the spot offered must be “comparable as to desirability”).

¹³⁵ See *Sylvester*, *supra* note 106, at 119.

¹³⁶ Complaint Under Section 315, 40 F.C.C. 297, 297 (1958).

¹³⁷ INQUIRY CONCERNING “EQUAL TIME” REQUIREMENTS, *supra* note 132, at 360; *Summa Corp.*, 447 F. Supp. at 928.

¹³⁸ See Use of Broadcast Facilities by Candidates for Public Office, 35 Fed. Reg. 13,048, 13,061–62 (Apr. 27, 1970); see also *Summa Corp.*, 447 F. Supp. at 927. Section 315 does not require an exact division of time between candidates. *Lamb v. Sutton*, 164 F. Supp. 928, 936 (M.D. Tenn. 1958), *aff’d*, 274 F.2d 705 (6th Cir. 1960). *But see Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 46 (D.C. Cir. 1972) (noting that the FCC has held that clock-time opportunities must be extended with “virtually mathematical precision”).

¹³⁹ *Smith*, 18 F.C.C.2d 747, 747 (1969). Accordingly, an opposing candidate might not necessarily receive the exact same broadcast slots as the triggering candidate, but rather an equivalence of total time. *Complaint Under Section 315*, 40 F.C.C. at 298; Use of Broadcast Facilities by Candidates for Public Office, 35 Fed. Reg. at 13,061–62.

¹⁴⁰ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

candidates can access broadcast facilities.¹⁴¹ With regard to the former, § 312(a)(7), the Reasonable Access Rule, requires broadcasters to make reasonable amounts of time available to federal candidates.¹⁴² As implemented by the FCC, this gives a candidate an affirmative right of reasonable access,¹⁴³ whereas § 315 creates a “contingent” right of equal access.¹⁴⁴ Consequently, a broadcaster who attempts to escape § 315(a) by “equally” denying air time to any and every candidate would run afoul of § 312(a)(7).¹⁴⁵

Calculating Time

When a candidate appears in an ad or political program, an opponent is entitled to the same amount of time as the ad or program.¹⁴⁶ This is true even if a candidate briefly appears in an ad just to identify the sponsor of the spot.¹⁴⁷

¹⁴¹ *Id.* § 103(2)(A) (codified as amended at 47 U.S.C. § 312(a) (2006)); *see also* Daus, *supra* note 62, at 178.

¹⁴² Section 312(a)(7) provides that the Commission may revoke any station license “for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy.” 47 U.S.C. § 312(a)(7).

¹⁴³ The Supreme Court has upheld the constitutionality of § 312 as an acceptable accommodation between the public’s right to be informed about elections and the editorial rights of broadcasters. *See CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (holding that the FCC did not abuse its discretion in finding that the major television networks, which refused to provide a presidential campaign committee with requested air time for a 30-minute program to be aired in conjunction with a formal announcement of candidacy, failed to grant “reasonable access” pursuant to § 312(a)(7)).

¹⁴⁴ *See* Sylvester, *supra* note 106, at 119 (“Once a station provides air time to its favored candidate, Section 315(a) requires it to provide access to that candidate’s opponents under the same terms.”).

¹⁴⁵ *Id.* Once a broadcaster sells time to Candidate A, the Equal Time Rule requires it to make equivalent amounts of time available to A’s opponents. Therefore, the Reasonable Access Rule can trigger the Equal Time Rule. *See CBS*, 453 U.S. at 387.

¹⁴⁶ *See, e.g., Gray Communications Systems, Inc.*, 14 F.C.C.2d 766, 767 (1968) (concluding that a candidate is entitled to all of the time an opponent appeared on a station); *see also* 1978 FCC PRIMER, *supra* note 94, at 2219 (emphasizing that if the candidate’s appearance on a program is lengthy, or he is integrally involved in the program, an essential part of it, or exercises some control over it, the entire program is a “use”).

¹⁴⁷ *See Dykas*, 35 F.C.C.2d 937, 937 (1972) (holding that any appearance on a political spot announcement in which a candidate is identified or identifiable is a use).

Brevity, however, can sometimes impact the amount of time to which an opponent is entitled. If the candidate appears briefly on an entertainment program, the amount of broadcasting time “used” by him is not the length of the entire program (such as a half-hour for an “appearance” on a half-hour sitcom), but only the amount of time during which the candidate was seen or heard.¹⁴⁸ For obvious reasons, this does not apply to political advertisements:¹⁴⁹ the time limitation inherent in a spot announcement makes it impractical to fractionate just how much of an advertisement must contain the candidate’s image or voice in order for the entire spot announcement to be a “use.”¹⁵⁰

In one instance, the host of a television dance show became a candidate for public office.¹⁵¹ Although his hosting constituted an “appearance,” opposing candidates were not entitled to time equal to the length of the entire show, but only to the number of minutes during which the host was on camera.¹⁵² In another instance, a disc jockey became a candidate.¹⁵³ His opponent was not entitled to receive time equal to the entire length of the program, music and all, but only to the amount of time during which the disc jockey was heard.¹⁵⁴ This also applies to § 315 exemptions;¹⁵⁵ although a program may not be classified as exempt, a portion of it might be.¹⁵⁶ For instance, *The 700 Club* does not qualify as an exempt bona fide newscast, but some of its segments do.¹⁵⁷ Accordingly,

¹⁴⁸ See, e.g., *WNEP-TV*, 40 F.C.C. 431, 431 (1965) (explaining that for a candidate who appears on part of a show, the use includes only the time he appeared and not the total length of the program).

¹⁴⁹ See *Radio Station WITL*, 54 F.C.C.2d 650, 651 (1975).

¹⁵⁰ *Id.*

¹⁵¹ *WNEP-TV*, 40 F.C.C. at 431.

¹⁵² *Id.*

¹⁵³ *Station WBAX*, 17 F.C.C.2d 316, 316 (1969).

¹⁵⁴ *Id.* at 316–17 (ruling that because announcer-turned-candidate for prior eight months on Monday through Friday all-night music and news radio show was recognizable to listeners, this constitutes use); cf. *KYSN Broad. Co.*, 17 F.C.C.2d 164, 164 (1969) (ruling that the broadcast of commercials containing a prospective candidate’s voice without identification by name and whose voice was not recognizable to listeners does not constitute use).

¹⁵⁵ See *infra* notes 195–221 and accompanying text.

¹⁵⁶ See, e.g., *Christian Broad. Network*, 23 F.C.C.R. 7165, 7167 (2008) (holding that the newscast portions and news interview portions of a program qualify for exemptions).

¹⁵⁷ *Id.* at 7165.

candidate “appearances” on those segments are exempt from § 315.¹⁵⁸ Similarly, some segments of the independently-produced The McLaughlin Group qualify as exempt “bona fide newscasts.”¹⁵⁹

The Price of Time

For a broadcast opportunity to be equal, the price charged for it must also be equal.¹⁶⁰ As a complement to § 315(a), § 315(b)(1)(A) limits the price a broadcaster can charge candidates.¹⁶¹

Section 315(b)(1)(A) was not part of the original statute, but was added by FECA.¹⁶² Section 315(b)(1)(A)¹⁶³ is known as “the lowest unit charge” (“LUC”) provision.¹⁶⁴ It prohibits broadcasters from charging candidates more than the “lowest unit charge of the station for the same class and amount of time for the same period.”¹⁶⁵ Hence, a federal candidate is entitled to the lowest advertising rate offered to other advertisers “for the same class and

¹⁵⁸ *Id.*

¹⁵⁹ *Court Upholds FCC’s Orders Granting Exemptions from Equal Time Rules for Segments of The McLaughlin Report and for Independently Produced News Interviews*, 16 ENT. L. REP. 7, ¶ 2 (Dec. 1994).

¹⁶⁰ *See* Sylvester, *supra* note 106, at 119 (noting that broadcasters must “make the same time available for each candidate at the same price his competitors paid”).

¹⁶¹ Thus, § 315(b) reinforces the equal opportunity and reasonable access provisions. Garcia, *supra* note 58, at 281.

¹⁶² In the wake of Watergate, Congress enacted the 1974 amendments to the Federal Election Campaign Act as a means to control the financing of federal elections. *Id.* at 278.

¹⁶³ 47 U.S.C. § 315(b) (2006) charges:

(1) In general. The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(A) subject to paragraph (2), during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(B) at any other time, the charges made for comparable use of such station by other users thereof.

¹⁶⁴ *Id.* § 315(b)(1).

¹⁶⁵ *Id.*

amount of time for the same period.”¹⁶⁶ Broadcasters, however, can still charge candidates premium prices for “non-preemptible time,”¹⁶⁷ i.e., that which “is not subject to preemption during any particular daypart, program or time period.”¹⁶⁸

The Bipartisan Campaign Act further amended § 315 so that a candidate cannot receive the LUC¹⁶⁹ if her advertisements directly refer to an opponent “but fail[] to contain a statement both identifying the candidate and stating that the candidate has approved the communication.”¹⁷⁰

Free Time

Although the FCC regulations focus primarily on situations where a candidate purchases airtime or receives free airtime to discuss politics,¹⁷¹ they also apply to candidate guest appearances on entertainment programs.¹⁷² Since then-candidate Bill Clinton visited Arsenio Hall’s late-night talk show, this has become an increasingly common means for candidates to humanize

¹⁶⁶ *Id.*; see also Martin-Trigona, 64 F.C.C.2d 1087, 1088 (1977) (provision regulates pricing of periods of time). The effect of this rule is to reduce campaign costs at the expense of the broadcast industry. TEETER & LOVING, *supra* note 75, at 776.

¹⁶⁷ Garcia, *supra* note 58, at 281–82.

¹⁶⁸ WOMBLE CARLYLE SANDRIDGE & RICE, PLLC, POLITICAL BROADCAST MANUAL 14 (2007), available at <http://www.wcsr.com/resources/pdfs/politicalbroadcastmanual.pdf>. Thus, non-preemptible time is guaranteed to run at a certain time, whereas “run-of-schedule” spots “may be preempted without prior notice to the advertiser.” Garcia, *supra* note 58, at 282. The Senate attempted to require broadcasters to charge only the lowest unit charge for non-preemptible spots, but the bill failed. John S. McCain, *Free Air Time: The Continuing Reform Battle*, 2 ELECTION L.J. 171, 175 (2003).

¹⁶⁹ The lowest unit charge provision only applies to candidate advertisements that occur in the forty-five days preceding a primary election and in the sixty days preceding a general election. 47 U.S.C. § 315(b)(1)(A).

¹⁷⁰ Vice Chairman Robert D. Lenhard, Comm’r Steven T. Walter & Comm’r Ellen L. Weintraub, Fed. Election Comm’n, Advisory Opinion 2006-31, Statement for the Record (Oct. 25, 2006), <http://www.fec.gov/members/weintraub/aos/sorao2005-31.pdf>; see also 47 U.S.C. § 315(b)(2)(A); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 305, 116 Stat. 81, 101. With respect to a broadcast authorized and financed by a candidate or committee, the sponsorship acknowledgement requirement is satisfied by the statement “paid for by.” See 47 U.S.C. § 315(b)(2)(C)(ii).

¹⁷¹ See *Rosenberg v. Everett*, 328 F.3d 12, 16 (1st Cir. 2002) (“The purpose of the equal time doctrine is to facilitate political debate by qualified candidates.”).

¹⁷² See generally Lowry, *supra* note 4 (listing examples of candidates’ appearances on television and various FCC rulings).

themselves.¹⁷³ Indeed, during the 2007–08 election season, Hillary Clinton, Barack Obama, Sarah Palin, and John McCain all made guest appearances on NBC’s *SNL*.¹⁷⁴

An equal opportunity in such an instance does not mean that an opposing candidate is entitled to appear on the same program.¹⁷⁵ This would give candidates control of programming, thereby eviscerating a broadcaster’s First Amendment rights.¹⁷⁶ Rather, the FCC has determined that an opposing candidate is entitled to an equal amount of time for the same price.¹⁷⁷ Since the triggering candidate did not pay for his time, the opponent receives free time.¹⁷⁸ This is exemplified by Al Sharpton’s guest-hosting *SNL*.¹⁷⁹ In 2003, the political icon and Democratic primary candidate appeared on *SNL*. In response, opposing candidate Joseph Lieberman requested—and was granted—twenty-eight minutes of free air time.¹⁸⁰ As an unintended result, thirty NBC

¹⁷³ See *id.* (discussing how Barack Obama’s “appearance” on *Late Show With David Letterman* humanized him).

¹⁷⁴ See Julie Bosman, *On SNL, Fey as Palin, and Palin as Palin*, N.Y. TIMES, Oct. 19, 2008, at A25, available at <http://www.nytimes.com/2008/10/19/us/politics/19snl.html?r=1>; Political Radar, <http://blogs.abcnews.com/politicalradar/> (Oct. 16, 2008, 21:24 EST).

¹⁷⁵ See Socialist Workers 1970 N.Y. State Campaign Comm., 26 F.C.C.2d 38, 38–39 (1970) (maintaining that § 315 does not give candidates a right to appear on the same television program); see also Socialist Workers Party, 40 F.C.C. 256, 256 (1952) (holding that the “equal opportunities” obligation refers to the same class of time but programming should be resolved by the parties); 1970 PUBLIC NOTICE, *supra* note 111, at 870.

¹⁷⁶ See, e.g., Dennis J. Kucinich, F.C.C. DA 08-136, 1–2 (2008), <http://fcc.gov/mb/080136.pdf> (“The First Amendment . . . generally prohibit[s] the [FCC] from involving itself in the content of specific broadcast or cable television programs or otherwise engaging in activities that might be regarded as censorship of programming content.”).

¹⁷⁷ See, e.g., PUBLIC NOTICE 1970, *supra* note 111, at 869 (“If candidates are permitted to appear without cost to themselves, on programs sponsored by commercial advertisers, opposing candidates are entitled to receive comparable time also at no cost.”); see also WAKR, 23 F.C.C.2d 759, 759 (1970); FCC, POLITICAL PRIMER 1476, 1507–08 (1984) [hereinafter 1984 FCC PRIMER] (discussing paid and free time); 1978 FCC PRIMER, *supra* note 94, at 2242.

¹⁷⁸ See 1984 FCC PRIMER, *supra* note 177, at 1507–08; 1978 FCC PRIMER, *supra* note 94, at 2242.

¹⁷⁹ Barnhart, *supra* note 4.

¹⁸⁰ This airtime extended only to states in which both men were on the ballot. Ricchiuto, *supra* note 13, at 285 n.116. In states where only Lieberman was on the ballot,

affiliates across Missouri and Kansas chose not to air the Sharpton episode, so as to prevent the Sharpton “appearance” which would have otherwise triggered Lieberman’s right to free time.¹⁸¹

Opposing candidates are also entitled to free time when a candidate is on a program sponsored by a commercial advertiser.¹⁸² For example, Reverend Billy Ray Robinson appeared on a church-sponsored religious program.¹⁸³ Once Robinson became a candidate for public office, his appearances triggered the Equal Time rights of his opponents.¹⁸⁴ Moreover, because Robinson did not pay for his airtime, the broadcaster was obligated to provide opponents with time at no cost.¹⁸⁵ Similarly, the D.C. District Court held that a weather forecaster’s “appearance” on the weather segment of the local news entitled his opponent to thirty-three hours of free airtime.¹⁸⁶

The “Use” of a Broadcast Station

Equal opportunity duties and rights are triggered by a candidate’s “use” of a broadcast station.¹⁸⁷ Until such a use occurs, no candidate can request an equal opportunity¹⁸⁸ as there is

Sharpton was not a legally qualified candidate, and, therefore, his appearance could not trigger § 315. See Mark H. Rodeffer, *NBC Affiliates May Not Show Sharpton on SNL*, CNN.COM, Dec. 5, 2003, <http://cnn.com/2003/ALLPOLITICS/12/04/elec04.prez.sharpton.snl>.

¹⁸¹ See Barnhart, *supra* note 4. Ironically, some viewers interpreted this as NBC’s censoring of Sharpton, evidencing a bias against him. *Id.*

¹⁸² See, e.g., *WAKR*, 23 F.C.C.2d at 759; *WWIN*, 40 F.C.C. 338, 338 (1962); *Monroney*, 40 F.C.C. 251, 251 (1952); *PUBLIC NOTICE 1970*, *supra* note 111, at 869.

¹⁸³ See *WAKR*, 23 F.C.C.2d at 759.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*; see also *WWIN*, 40 F.C.C. at 338 (holding that minister-candidate on church-sponsored program is an “appearance” entitling opponents to free time).

¹⁸⁶ *Branch v. FCC*, 824 F.2d 37, 39 (D.C. Cir. 1987).

¹⁸⁷ See *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 425 (D.C. Cir. 1980) (explaining that the statute provides a contingent right of access); see also FCC, *RELEASE NO. 91-403, CODIFICATION OF THE COMMISSION’S POLITICAL PROGRAMMING POLICIES 678, 679* (1991) [hereinafter 1991 FCC PRIMER].

¹⁸⁸ *Inch*, 46 F.C.C.2d 501, 501 (1974); see also *Kay*, 24 F.C.C.2d 426, 427 (1970) (holding that § 315 is inapplicable where candidate’s opponent has not used broadcast facilities); see also 1991 FCC PRIMER, *supra* note 187, at 681.

no triggering “use” to equalize.¹⁸⁹ Indeed, if a broadcaster did not permit any candidate to use the station, then Equal Time would never be triggered.¹⁹⁰ The broadcaster might run afoul of § 312’s Reasonable Access provisions,¹⁹¹ but would be in full compliance with § 315.¹⁹²

“Use” is not defined by statute but by the FCC regulations codified in Title 47 of the Code of Federal Regulations.¹⁹³ Title 47 defines “Use” as “a candidate appearance (including by voice or picture)” not otherwise exempt under the statute.¹⁹⁴ It is, therefore, critical to understand what constitutes a “candidate “appearance” and which “appearances” are exempt.

Exempt Appearances

Because of their centrality to newsgathering, § 315 exempts from Equal Opportunity four types of candidate “appearances,”¹⁹⁵ those in: (1) regularly scheduled newscasts;¹⁹⁶ (2) news interview

¹⁸⁹ In order to obtain her “equal opportunity” as a result of the “appearance” by an opposing candidate, a candidate must make a specific request for such equal opportunities within seven days of the opponent’s “appearance.” Miller, 53 F.C.C.2d 1203, 1203 (1975).

¹⁹⁰ See *Kennedy for President Comm.*, 636 F.2d at 438 (explaining § 315 does not impose on broadcasters an unconditional obligation to allow candidates to use of their station facilities).

¹⁹¹ See *supra* notes 140–45 and accompanying text.

¹⁹² See Sylvester, *supra* note 106, at 119.

¹⁹³ See FCC Broadcast Radio Services, 47 C.F.R. § 73.1941(b) (2009). An agency is authorized by statute to “prescribe regulations for . . . the distribution and performance of its business” to help discharge and perform the duties designated by Congress. 5 U.S.C. § 301 (2006) (giving departments authority to make regulations). Moreover, 47 U.S.C. § 315(g) gives the FCC greater authority to make regulations implementing § 315 than exists under the general rule-making authority under 47 U.S.C. § 303(r). *Flory v. FCC*, 528 F.2d 124, 128 (7th Cir. 1975) (citing *Kay v. FCC*, 443 F.2d 638, 643 (1970)). In fact, the Supreme Court has explained that the FCC’s “construction of the statute is entitled to judicial deference unless there are compelling indications that it is wrong.” *CBS, Inc. v. FCC*, 453 U.S. 367, 390 (1981) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969)). Consequently, agency regulations are typically effectuated as law. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Georgia v. United States*, 411 U.S. 526, 536 (1973).

¹⁹⁴ 47 C.F.R. § 73.1941(b).

¹⁹⁵ *Chisholm v. FCC*, 538 F.2d 349, 356–57 (D.C. Cir. 1976).

¹⁹⁶ Determinations of newsworthiness are left to the broadcaster: Provided “broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions [regarding candidate access] will be entitled to deference even if the

shows;¹⁹⁷ (3) news documentaries;¹⁹⁸ and (4) on-the-spot coverage of news events.¹⁹⁹ Accordingly, a candidate “appearance” in one of these capacities does not constitute a “use” of broadcast facilities, and does not trigger an opponent’s Equal Time rights.²⁰⁰

Congress added these exemptions in 1959.²⁰¹ Prior to this amendment, the FCC had held that § 315 was not triggered when a candidate appeared on or was the subject of “a routine news broadcast.”²⁰² Then, in the 1959 “Lar Daly” case,²⁰³ the FCC departed from its long-standing interpretation.²⁰⁴ Lar Daly, a “perennial [fringe] candidate” for mayor of Chicago, complained that several TV stations had broadcast a news story that showed

Commission’s analysis would have differed in the first instance.” *CBS*, 453 U.S. at 387. The FCC’s review of a broadcaster’s decision is confined “to the conditions of the broadcast and whether the station operator made a good faith estimate that the event was newsworthy before airing it.” *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 426 (D.C. Cir. 1980). Absent evidence that the broadcaster intended to advance a particular candidacy, its judgment as to newsworthiness should not be disturbed. *Chisholm*, 538 F.2d at 359 (holding that judgment as to newsworthiness “is left to the reasonable news judgment” of broadcaster); *cf.* *Complaint of Nat’l Unity Campaign for John Anderson*, 88 F.C.C.2d 467, 472 (1980) (maintaining that petitioner must claim that broadcaster was motivated by desire to advance particular candidacy).

¹⁹⁷ Where selection and compilation of questions, production, supervision, control, and editing of a program are not exercised exclusively by stations, the program is not a bona fide news interview program. *Di Salle*, 40 F.C.C. 348, 348 (1962).

¹⁹⁸ The news documentary exception is limited to situations where “the ‘appearance’ of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary.” *Fulani v. FCC*, 49 F.3d 904, 908 (2d Cir. 1995).

¹⁹⁹ Under the “on-the-spot” news event exemption, the broadcaster has discretion to determine whether a particular “appearance” by candidates is newsworthy, and thus exempt. *See Kennedy for President Comm.*, 636 F.2d at 427–29 (holding that FCC properly relied on broadcaster’s good faith judgment that live conference was newsworthy).

²⁰⁰ *See Telecom. Research & Action Ctr. v. FCC*, 26 F.3d 185, 191 (D.C. Cir. 1994); *Chisholm*, 538 F.2d at 356–57.

²⁰¹ *See Communications Act Amendments of 1959*, Pub. L. No. 86-274, § 1, 73 Stat. 557, 557.

²⁰² *See Blondy*, 40 F.C.C. 284, 284 (1957); *see also Use of Broadcast Facilities by Candidates for Public Office*, 23 Fed. Reg. 7817, 7817–18 (Oct. 9, 1958) (codifying FCC’s determinations regarding “uses”). This interpretation was included in the Commission’s official release of October 6, 1958, entitled “Use of Broadcast Facilities by Candidates for Public Office.” 23 Fed. Reg. at 7817; *see also* 105 Cong. Rec. 14458-62 (1959).

²⁰³ *CBS, Inc.*, 26 F.C.C. 715 (1959).

²⁰⁴ *See Chisholm*, 538 F.2d at 352.

film of Mayor Richard Daley greeting the President of Argentina.²⁰⁵ Lar Daly insisted that this entitled him to Equal Time. Ignoring twenty-five years of precedent, the FCC agreed that this constituted a “use” of the broadcast facility.²⁰⁶ In response, Congress immediately “wrote back into” § 315 the traditional exemption of appearances on news broadcasts²⁰⁷ and clarified which other appearances were not subject to Equal Time.²⁰⁸ Seven months later,²⁰⁹ § 315(a) was amended to exempt the above-noted “appearances.”²¹⁰

The FCC has applied these exemptions to a wide range of news-oriented broadcasts²¹¹ including a *Nightline* documentary on

²⁰⁵ *Id.* at 352 n.4.

²⁰⁶ *Id.* at 352. This created “national [or at least congressional] furor.” *Id.* at 352. Congress feared that the interpretation would deter radio and television coverage of political campaigns. *See* S. REP. NO. 86-562 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2564, 2572.

²⁰⁷ *See* 105 CONG. REC. 14,440 (1959) (statement of Sen. Pastore) (“We are merely writing into Section 315 an exemption which will take care of the very ridiculous situation which is presented because of the Lar Daly decision.”); *see also id.* at 14,454–55 (“Generally all we are doing is restoring the situation insofar as news is concerned to that which existed for 32 years, before the Lar Daly decision.”).

²⁰⁸ Congress’s central concern in taking action was to overrule the Commission’s Lar Daly decision. *See, e.g.,* S. REP. NO. 86-562; Vandell, *supra* note 67, at 451–52.

²⁰⁹ *See* Communications Act Amendments of 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, 557.

²¹⁰ *See, e.g.,* Kennedy for President Comm. v. FCC, 636 F.2d 417, 423 (D.C. Cir. 1980); *Chisholm*, 538 F.2d at 356–57. Section 315(a) reads, in relevant part:

“appearance” by a legally qualified candidate on any –

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

47 U.S.C. § 315(a) (2006).

²¹¹ The following factors are considered when determining whether a given program, such as a newscast [(a)(1)] or a news interview show [(a)(2)], is exempt:

- (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

Ross Perot²¹² and a nightly newscast's series of interviews with Gerald Ford.²¹³ The former was exempt because Perot appeared on a "bona fide news interview" program.²¹⁴ The latter was exempt because it was part of a regularly scheduled newscast.²¹⁵ Moreover, the FCC has kept pace with changing news formats by expanding the categories of news and interview programs to encompass shows such as *Entertainment Tonight*,²¹⁶ *TMZ*,²¹⁷ *Jerry Springer*,²¹⁸ *Politically Incorrect with Bill Maher*,²¹⁹ and *The Howard Stern Show*.²²⁰ This expansion is consistent with recent empirical research on the impact of "new news," particularly entertainment-oriented talk radio, on political perceptions and knowledge.²²¹

A Candidate "Appearance"

In general, any broadcast of a candidate's recognizable voice or image is deemed a "candidate appearance," and thus a "use" of the broadcast station.²²² The most common types of candidate "appearances" are traditional 30- to 60-second campaign ads²²³ or

was initiated; (6) whether the program is regularly scheduled; and (7) if the program is regularly scheduled, the time and day of the week when it is broadcast.

Ricchiuto, *supra* note 13, at 273.

²¹² See *Fulani v. FCC*, 49 F.3d 904, 907–08 (2d Cir. 1995).

²¹³ See *Citizens for Reagan*, 58 F.C.C.2d 925, 927 (1976).

²¹⁴ *Fulani*, 49 F.3d at 914. The documentary exemption could not apply because Perot was not incidental to the film, but the focus of it. *Id.* at 907–08. When Perot appeared in June of 1992, however, he had not yet declared his candidacy for President. Therefore, § 315 should not have been at issue.

²¹⁵ See *Citizens for Reagan*, 58 F.C.C.2d at 926–27. Also, there was no evidence that the interviews were aired for any reason other than their newsworthiness. See *id.* at 927.

²¹⁶ See *Paramount Pictures Corp.*, 3 F.C.C.R. 245, 246 (1988).

²¹⁷ See *Telepictures Prods., Inc.*, 23 F.C.C.R. 7168, 7169 (2008).

²¹⁸ Andrew Serros, *FCC Says Shock-Jock Stern Is a Newsmen*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Sept. 11, 2003, <http://www.rcfp.org/newsitems/index.php?i=3623>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See Hollander, *supra* note 44, at 402 (and studies cited therein).

²²² 1984 FCC PRIMER, *supra* note 177, at 1489; see also 1978 FCC PRIMER, *supra* note 94, at 2218.

²²³ See *McConnell v. FEC*, 540 U.S. 93, 260 (2003) (Scalia, J.) (describing Congress's motivation in regulating political ads).

sponsored political programs.²²⁴ When an ad shows film of or a photograph of a candidate, the candidate has appeared visually.²²⁵ When an ad includes audio of the candidate (such as part of a speech or the sponsorship identification when the candidate says “I am _____ and I approve this message”²²⁶), the candidate has appeared vocally.²²⁷

Though “appearances” often combine both visual and aural elements, either one will suffice.²²⁸ An ad might show film of the candidate while a third party narrates the spot;²²⁹ it might insert a photo of the candidate at its conclusion;²³⁰ or the candidate might simply provide voice-over identifying the sponsor.²³¹ Nonetheless, each qualifies as a candidate “appearance.” For example, in *Radio*

²²⁴ See generally *id.* (Scalia, J.) (describing negative ads supported by outside interest groups).

²²⁵ 1984 FCC PRIMER, *supra* note 177, at 1492; see also 1978 FCC PRIMER, *supra* note 94, at 2218.

²²⁶ Section 317(a)(1) of the Communications Act requires broadcasters to disclose the identity of any sponsor or person purchasing time “for which any money, service or other valuable consideration is directly or indirectly paid, or promised to . . . the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.” 47 U.S.C. § 317(a)(1) (2006). Congress left to the FCC the ultimate decision whether this would apply to political broadcasts. *Id.* § 317(a)(2) (“Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program.”). Concerned about unacknowledged broadcaster use of furnished political programming, the FCC promulgated rules requiring broadcasters to include sponsorship identifications in “any political broadcast matter” that is furnished as an inducement to broadcast. FCC, RELEASE NO. 75-417, AMENDMENT OF THE COMMISSION’S “SPONSORSHIP IDENTIFICATION” RULES 701, 710 (1975). The requirement is satisfied by the statement “paid for by.” *KVUE, Inc. v. Moore*, 709 F.2d 922, 934 n.50 (5th Cir. 1983), *aff’d*, 465 U.S. 1092 (1984).

²²⁷ See 1984 FCC PRIMER, *supra* note 177, at 1489.

²²⁸ See *id.* at 1492 (describing situations where the candidate appears visually while non-candidates provide vocal support as uses).

²²⁹ E.g., *id.* (non-candidate reads a political spot while a clip from a movie of candidate plays is a “use” (citing *KWWL-TV*, 23 F.C.C.2d 758 (1966)); see also *id.* (stating that a camera panning a group of candidates seated in a studio while a non-candidate reads a political spot is a “use”).

²³⁰ *Id.* (“[A] photograph of a candidate [that] appears on the screen while a non-candidate reads a political spot . . . is a use.”); *KWWL-TV*, 23 F.C.C.2d at 758.

²³¹ 1978 FCC PRIMER, *supra* note 94, at 2245; 1984 FCC PRIMER, *supra* note 177, at 1493; see also *Dykas*, 35 F.C.C.2d 937, 937 (1972) (ruling that if a voice is identifiable, political spot constitutes “use”).

Station WITL,²³² the candidate was not shown in the ad, but he read the statutorily-required sponsorship identification at its conclusion.²³³ He argued that, because he had “little or no control” over the “stereotyped language” and was “not advocating his candidacy, position on the issues or attacking his opponent’s candidacy or position,” it did not amount to an “appearance.”²³⁴ The FCC disagreed: the dispositive fact was that the candidate’s voice was heard; the content and length of his audio were irrelevant.²³⁵

In fact, even a pictorial likeness of the candidate constitutes an “appearance,”²³⁶ such as showing a drawing of the candidate during the sponsorship identification.²³⁷ This situation arose during the last presidential election. Graffiti artist Shephard Fairey created the now-iconic “Progress” portrait of Barack Obama, which was used on posters, ads, and tee-shirts.²³⁸ One evening, a member of the band “No Age” planned to wear a tee-shirt emblazoned with the “Progress” portrait during his performance on CBS’s *Late Late Show*.²³⁹ The network, however, realized that the shirt would constitute an Obama “appearance,” thus entitling opponent John McCain to Equal Time.²⁴⁰ Moreover, since

²³² 54 F.C.C.2d 650 (1975).

²³³ *See id.* at 650.

²³⁴ *Id.* (internal quotation marks omitted).

²³⁵ *See id.*

²³⁶ *See Carter/Mondale Reelection Comm., Inc.*, 80 F.C.C.2d 285, 285 (1980); *Dykas*, 35 F.C.C.2d at 937 (maintaining that an “appearance” by picture is use). The 1984 PRIMER explained this with a hypothetical:

(k) Drawings of Candidate. A campaign committee prepares 60-second spot announcements in which a drawing of the face of a candidate appears during the sponsorship identification section of the ad. Will the entire spot be a use? Yes. The use of a drawing or other pictorial representation of the candidate will be a use if it is identified or identifiable as that candidate, and will make the whole commercial a use.

1984 FCC PRIMER, *supra* note 177, at 1492.

²³⁷ *Carter/Mondale Reelection Comm.*, 80 F.C.C.2d at 286; *see also* 1984 FCC PRIMER, *supra* note 177, at 1492. Additionally, it will render the entire commercial a use. *WITL*, 54 F.C.C.2d at 650.

²³⁸ *See* Wikipedia, Barack Obama “Hope” Poster, http://en.wikipedia.org/wiki/Barack_Obama_%22Hope%22_poster (last visited Oct. 12, 2009).

²³⁹ Collins, *supra* note 8.

²⁴⁰ *Id.*

Obama’s “appearance”-by-shirt would have been at no cost to Obama, McCain would have been entitled to free time.²⁴¹ Ultimately, CBS prohibited the musician from wearing the shirt.²⁴²

By contrast, a broadcast in which the candidate’s voice or visage is not reasonably identifiable,²⁴³ or that discusses him but does not include his voice or image, is not an “appearance.”²⁴⁴ In one case, a candidate was a play-by-play commentator for high school sporting events.²⁴⁵ Though the broadcasts obviously included the candidate’s voice, because he was not well-known enough for the audience to recognize him, the broadcast did not include his *recognizable* voice.²⁴⁶ Consequently, the FCC held that this was not an “appearance.”²⁴⁷ Similarly, the FCC held that the off-camera voice of an unidentified television announcer was not an “appearance.”²⁴⁸ In another case, a candidate was in a public service announcement among a crowd of celebrities, but only a portion of his face could be seen, and then, for only a few

²⁴¹ See 1984 FCC PRIMER, *supra* note 177, at 1490 (“Examples in which the Commission has ruled an appearance to be a use, even though the appearance was in some other capacity than that of candidate, include the following, in some of which the candidate’s opponent would be entitled to free time, since the candidate himself did not pay for his time.”).

²⁴² See Collins, *supra* note 8.

²⁴³ See Station WBAX, 17 F.C.C.2d 316, 316 (1969) (stating that if in the licensee’s good faith judgment the candidate is not readily identifiable, there is no “appearance”); KYSN Broad. Co., 17 F.C.C.2d 164, 164 (1969) (maintaining that broadcasting commercials containing prospective candidate’s voice without identification by name does not constitute use); see also Radio Station WITL, 54 F.C.C.2d 650, 651 n.1 (1975) (same); Ricchiuto, *supra* note 13, at 272–73. Thus, “fleeting” appearances “have been dismissed as inconsequential.” Ricchiuto, *supra* note 13, at 273; see also 1978 FCC PRIMER, *supra* note 94, at 2244–45 (“Use” of a Station by a Candidate). They are inconsequential because the candidate cannot be adequately identified, and therefore has not appeared, not because the “appearance” is not long enough. See 1978 FCC PRIMER, *supra* note 94, at 2245.

²⁴⁴ Station WENR, 17 F.C.C.2d 613, 613 (1969).

²⁴⁵ *Id.*

²⁴⁶ See *id.*

²⁴⁷ *Id.* Compare *id.*, with WBAX, 17 F.C.C.2d at 316–17 (stating that an announcer’s voice made him “identifiable to a substantial degree,” and therefore was an “appearance”).

²⁴⁸ See WNEP-TV, 40 F.C.C. 431, 431 (1965).

seconds.²⁴⁹ Because he was virtually unrecognizable, the FCC determined this was not an “appearance.”²⁵⁰

Equal Time applies when a candidate uses a broadcast station, but when a third party discusses²⁵¹ or advocates on behalf of a candidate.²⁵² Provided the candidate is neither seen nor heard, a third party can spend an infinite amount of time campaigning on the candidate’s behalf without triggering Equal Time.²⁵³ For example, the designated spokesman for both the Republican Party and Ronald Reagan appeared in several political advertisements on behalf of Reagan. Even though the ads were about Reagan, because they did not include his image or voice, they did not constitute “appearances” by Reagan.²⁵⁴

The Nature of the Broadcast

A candidate’s “appearance” need not be political in nature or on a politically-oriented broadcast to qualify as a “use.”²⁵⁵ Rather,

²⁴⁹ See Nat’l Urban Coal., 23 F.C.C.2d 123, 123 (1970).

²⁵⁰ *Id.* at 124 (ruling that duration of film shot of candidate was so brief that candidate could not be identified, therefore it did not amount to an “appearance”).

²⁵¹ See 1984 FCC PRIMER, *supra* note 177, at 1489 (“If a supporter of a candidate appears on the air to urge his election, is it a use? No. Only a personal appearance by a legally qualified candidate for public office, by voice or picture, is a use.”).

²⁵² Provided neither the candidate’s voice nor visage appear, a political committee or labor union’s purchase of airtime to advocate for candidate is not a use. See 1970 PUBLIC NOTICE, *supra* note 111, at 869–70; see also WAKR, 23 F.C.C.2d 759, 759 (1970).

²⁵³ See Use of Broadcast Facilities by Candidates for Public Office, 31 Fed. Reg. 6660, 6662 (May 4, 1966) (stating that the Equal Time provision applies only to legally qualified “candidates,” not to “spokesmen” for or “supporters” of candidates); *cf.* Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1, 5 (3d Cir. 1950) (“Since Section 315 applies only to the use of a radio station by a candidate himself and not to such use by his supporters it follows that the section did not prohibit the defendants from censoring [a supporter’s] speeches.”).

²⁵⁴ 1984 FCC PRIMER, *supra* note 177, at 1493; see also Vandell, *supra* note 67, at 447 (stating that the word “use” includes “any presentation or appearance that features a candidate’s voice or image”). Of course, had Regan’s photo been shown or his voice heard (as in a sponsorship announcement), it would have converted the spot to a candidate use.

²⁵⁵ See 1978 FCC PRIMER, *supra* note 94, at 2218; *cf.* Paulsen v. FCC, 491 F.2d 887, 891 (9th Cir. 1974) (noting that connection with or benefit to a candidacy is irrelevant in the application of § 315 and consistent with congressional intent).

any type of program will suffice.²⁵⁶ The FCC has held that a candidate delivering a nonpolitical lecture on a television lecture series;²⁵⁷ a weather forecaster on the news;²⁵⁸ a preacher on a weekend religious program;²⁵⁹ and a disc jockey on a music program²⁶⁰ are all uses of a broadcast station. Just as a broadcaster may not deny Equal Time on the basis that a candidate’s appearance is non-political,²⁶¹ a candidate cannot negate her appearance on the basis that the program or her appearance on it is not sufficiently political.²⁶²

For instance, Bob Yeakel’s Wilshire Oldsmobile Company was a frequent advertiser on television station KTTV.²⁶³ It sponsored both a Sunday morning talent show and Friday night film, and ran ads throughout the week.²⁶⁴ Yeakel was the master of ceremonies of the talent show and in many of the commercials.²⁶⁵ Once he became a mayoral candidate, though, all of those constituted candidate “appearances” and uses of the broadcast station.²⁶⁶

The seminal case in this area is *Paulsen v. FCC*²⁶⁷ In 1972, actor/comedian Pat Paulsen declared his candidacy for

²⁵⁶ See KUGN, 40 F.C.C. 293, 293 (1958); see also 1984 FCC PRIMER, *supra* note 177, at 1489–90 (“Even if a candidate does not discuss his candidacy during a broadcast, his opponent is entitled to equal opportunities. . . . [A]nd licensees of stations are not authorized to base their grant or denial of time to candidates on their judgment of whether the use of the time will aid or even be connected with their candidacies.”).

²⁵⁷ See Fordham Univ., 40 F.C.C. 321, 321 (1961); 1970 PUBLIC NOTICE, *supra* note 111, at 840.

²⁵⁸ Branch v. FCC, 824 F.2d 37, 46–47 (D.C. Cir. 1987). The Fifth Circuit, however, employing common-sense interpretation, came to a different conclusion. Brigham v. FCC, 276 F.2d 828, 829, 830 (5th Cir. 1960). The court reasoned that a weathercaster’s appearing on the news was an “appearance” on a “bona fide newscast.” *Id.* at 830. Although it was an “appearance,” since newscasts are exempt under § 315(a)(1), the weathercaster’s “appearance” was not a “use.” *Id.*

²⁵⁹ See WWIN, 40 F.C.C. 338, 338 (1962).

²⁶⁰ See WENR, 17 F.C.C.2d 613, 613 (1969) (stating that an announcer on a daily all-night music, news radio show constitutes use); see also Ga. Ass’n of Broadcasters, 40 F.C.C. 343, 343 (1962) (announcer).

²⁶¹ See KUGN, 40 F.C.C. at 293.

²⁶² See *id.*

²⁶³ Lovett, 40 F.C.C. 282, 282 (1957).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Paulsen v. F.C.C., 491 F.2d 887 (9th Cir. 1974).

President.²⁶⁸ *The Mouse Factory* then hired him to perform on their TV show. Although Paulsen asserted that his appearing on the TV show would not constitute a use, because it was “non-political,” the Ninth Circuit disagreed.²⁶⁹ In a decision that remains central to the FCC’s policy regarding candidate “appearances” on non-political television programs, the court explained that neither § 315’s wording, legislative history, nor subsequent amendments indicated that Congress distinguished between political and non-political uses.²⁷⁰

In addition, the court opined that “[a] candidate who becomes well-known to the public as a personable and popular individual through ‘non-political’ appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media.”²⁷¹ Treating only “political” appearances as possessing political capital fails to recognize this advantage.²⁷² In any event, if § 315 could be invoked only when political issues were discussed, a station could support a candidate by having him or her on various programs so as to increase her exposure and name recognition, as long as the programs steered clear of politics.²⁷³

In any event, requiring courts, the FCC, or broadcasters to assess the political efficacy of an “appearance” is problematic at best. The FCC would be forced to make “highly subjective judgments concerning the content, context, and potential impact of a candidate’s ‘appearance.’”²⁷⁴ By contrast, treating appearances

²⁶⁸ *Id.* at 888.

²⁶⁹ *Id.* at 889.

²⁷⁰ *Id.* at 891.

²⁷¹ *Id.*; see also 1984 FCC PRIMER, *supra* note 177, at 1489–90 (explaining and citing *Paulsen*).

²⁷² *Paulsen*, 491 F.2d at 891.

²⁷³ *Id.* During the Senate hearings on the 1959 Amendments to § 315, the Dean of the Columbia Journalism School emphasized that even with Equal Time a broadcaster “intent upon distortion” “could so select his quotations, his comments, and his television film shots to lionize the one and slaughter the other.” *Political Broadcasting: Hearings Before the Communications Subcomm. of the S. Comm. on Interstate and Foreign Commerce*, 86th Cong. 242 (1959).

²⁷⁴ *Paulsen*, 491 F.2d at 890.

on all types of programs alike eliminates the burden of review and the danger of subjective judgment.²⁷⁵

Television Rebroadcasts of Films and Television Series

With regard to most broadcast situations and candidates, the doctrine and rules of Equal Time are straightforward, objective, and avoid unnecessary interference into broadcaster programming. With regard to actors-turned-candidates and films and televisions shows that include them, it is anything but. It is unclear whether or how Equal Time applies to these situations.

This once arcane topic has become a salient issue. Although actors in politics were aberrational in 1965, as evidenced by Al Franken,²⁷⁶ Fred Thompson,²⁷⁷ Clint Eastwood,²⁷⁸ Fred Grandy,²⁷⁹ and Arnold Schwarzenegger,²⁸⁰ they are no longer footnotes in political history, but an emerging breed.²⁸¹ In some ways, it is not surprising that actors are finding their second acts in politics, since

²⁷⁵ In his comments to the Wisconsin Broadcast Association, FCC Commissioner Harold Furchtgott-Roth explained that the role of the FCC is not to closely review the content of broadcast material, but to enforce the law. Harold Furchtgott-Roth, Comm'r, Fed. Comm'n Comm'n, Address Before the Wis. Broadcast Ass. (Jan. 18, 2000). The former can border on censorship. *Id.* Turning to whether "free time" should be provided to candidates, and calling it misguided, he cautioned that it "creates a dangerous opportunity for government to control and approve certain media messages." *Id.* In a rather prescient remark, he queried, "would guest appearances by John McCain or Bill Bradley on *Saturday Night Live* be screened by the FCC in order to award NBC credit under such a free time obligation?" *Id.*

²⁷⁶ See Cox, *supra* note 2, at 42.

²⁷⁷ See Shear, *supra* note 3.

²⁷⁸ See *Clint Eastwood to Give Local Politics a Shot*, CHI. TRIB., Jan. 31, 1986, at 10.

²⁷⁹ Grandy was elected an Iowa congressman, Ben Jones, "Cooter" from the *Dukes of Hazard*, was elected a Georgia congressman, Ralph Waite, "Pa" from *The Waltons*, unsuccessfully ran in California. Lowry, *supra* note 4. Don Novello ("Father Guido Sarducci") and Gary Coleman ("Arnold" on *Diff'rent Strokes*) unsuccessfully contested for California governor in the Gray Davis recall election. Silverman, *supra* note 24. Noble Willingham of *Walker, Texas Ranger* ran for Congress in 2000. Joel Roberts, *Arnold's Movies Face TV Blackout: Equal Time Laws May Keep Schwarzenegger Films Off Air in California*, CBSNEWS.com, Aug. 13, 2003, <http://www.cbsnews.com/stories/2003/08/13/entertainment/main568073.shtml>. Watermelon-smashing comic Gallagher ran for governor. Silverman, *supra* note 24.

²⁸⁰ Roberts, *supra* note 279; Silverman, *supra* note 24.

²⁸¹ See Roberts, *supra* note 279 (listing notable actors who have recently thrown their hats into the political ring); see also Gentile, *supra* note 31.

they already have a rapport with the public and can use the spring board of pop culture from which to launch a campaign.

Nonetheless, their pre-candidacy body of work creates a number of problems that revolve around two broadcast situations unique to these media cross-over candidates: (1) playing the role of a character on a television show or in a film, rather than appearing as oneself, and (2) televising programs or films that were made prior to declaring candidacy [hereinafter, “pre-declaration”] being broadcast as repeats or in syndication after declaring candidacy [hereinafter, “post-declaration”].²⁸² Because programming today relies on repeats, syndication, cable rebroadcasts of films, and cross-network repurposing, it is more common to see cancelled TV series and decades-old movies that include media cross-over candidates.²⁸³

The issue most famously reared its head during the 2004 California gubernatorial recall election that included actors Arnold Schwarzenegger,²⁸⁴ Gary Coleman,²⁸⁵ and “Father Guido Sarducci.”²⁸⁶ Broadcast stations pulled Coleman’s syndicated sitcom *Diff’rent Strokes* from air,²⁸⁷ and stopped airing *The Terminator* and other Arnold films²⁸⁸ for fear that such broadcasts would trigger the Equal Time rights of the other 240 gubernatorial candidates.²⁸⁹ A few years earlier, CBS affiliates in Texas opted to pre-empt episodes of *Walker, Texas Ranger* when Noble Willingham, the bartender on the show, ran for Congress.²⁹⁰

It again arose during the 2008 presidential primary, when Fred Thompson sought the Republican Party nomination.²⁹¹ Although Thompson is known to politicians as a conservative former senator

²⁸² 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, 1078 n.34 (2008).

²⁸³ See generally Lowry, *supra* note 4; Bauder, *TNT Says*, *supra* note 15.

²⁸⁴ Dorf, *supra* note 26; Roberts, *supra* note 279; Silverman, *supra* note 24.

²⁸⁵ Roberts, *supra* note 279; Silverman, *supra* note 24; Vandell, *supra* note 67, at 460.

²⁸⁶ Roberts, *supra* note 279; Silverman, *supra* note 24.

²⁸⁷ Roberts, *supra* note 279; Silverman, *supra* note 24.

²⁸⁸ Dorf, *supra* note 26; Roberts, *supra* note 279; Silverman, *supra* note 24.

²⁸⁹ Gentile, *supra* note 31; Silverman, *supra* note 24.

²⁹⁰ Roberts, *supra* note 279.

²⁹¹ Gold & Puzanghera, *supra* note 8; Bauder, *TNT Says*, *supra* note 15.

from Tennessee,²⁹² he is known to TV viewers as District Attorney Arthur Branch on television’s most ubiquitous series, *Law & Order*.²⁹³ *Law & Order* is broadcast on both NBC and cable network TNT.²⁹⁴ The question thus became whether Thompson’s pre-candidacy appearances on *Law & Order*—if re-broadcast *after* he declared candidacy—constituted uses of a broadcast station.²⁹⁵ If they did, then NBC’s airing episodes including District Attorney Branch would implicate Equal Time and obligate stations to provide time to every other Republican candidate—for free.²⁹⁶ NBC chose to play it safe, and pull every episode that included Thompson.²⁹⁷

The dilemma was somewhat different for TNT. Because the cable network builds much of its schedule around *Law & Order* repeats,²⁹⁸ eliminating 100 episodes would have serious economic ramifications.²⁹⁹ Yet, because the FCC’s Equal Time rules were codified when “cable was in its infancy,”³⁰⁰ it is unclear whether the doctrine applies to a cable network like TNT that rebroadcasts content.³⁰¹ According to some experts, Equal Time does not apply; according to others, it does, but the FCC has not yet addressed the issue in a case.³⁰² Ultimately, TNT decided that it was not subject to Equal Time, and continued airing the program.³⁰³

²⁹² See Shear, *supra* note 3.

²⁹³ Gold & Puzanghera, *supra* note 8. Thompson is in more than 100 episodes over five seasons. Bauder, *TNT Says*, *supra* note 15.

²⁹⁴ Gold & Puzanghera, *supra* note 8; Bauder, *TNT Says*, *supra* note 15.

²⁹⁵ See Janow, *supra* note 282, at 1078 (citation omitted).

²⁹⁶ See Lowry, *supra* note 4; Shear, *supra* note 3.

²⁹⁷ See Gold & Puzanghera, *supra* note 8.

²⁹⁸ *Id.*; see Bauder, *TNT Says*, *supra* note 15.

²⁹⁹ Bauder, *TNT Says*, *supra* note 15 (noting that, of course, because TNT airs more episodes per week, its risk was potentially greater than NBC’s).

³⁰⁰ *Id.*

³⁰¹ See Janow, *supra* note 282, at 1081; Gold & Puzanghera, *supra* note 8.

³⁰² See Gold & Puzanghera, *supra* note 8. See generally Bauder, *TNT Says*, *supra* note 15 (explaining that TNT’s decision that Equal Time rules do not apply to them could lead to a dispute in court or before the FCC).

³⁰³ Bauder, *TNT Says*, *supra* note 15.

In fact, various cable networks have come to various conclusions regarding their Equal Time responsibilities.³⁰⁴ Whereas some assert that Equal Time does not apply to cable networks,³⁰⁵ others deem it a gray area.³⁰⁶ Consequently, when Arnold Schwarzenegger first ran for governor, there was debate about which media outlets were allowed to air his films. Several cable operators believed that the FCC's Equal Time rules did not apply to them,³⁰⁷ while others like Syfy and FX ultimately chose not to air his films.³⁰⁸

According to a literal reading of the FCC rules, Equal Time does not apply to what is colloquially thought of as "cable television."³⁰⁹ Rather, it applies to "cable television system[s]"³¹⁰ and direct broadcast satellite service providers,³¹¹ and, then, only if the program is "subject to the exclusive control" of the cable or DBS provider.³¹² This rule does not mention cable networks.³¹³

³⁰⁴ See Ricchiuto, *supra* note 13, at 283–84; see also Janow, *supra* note 282, at 1082 nn.67 & 68 (noting uncertainty among various stations over Equal Time rule's application).

³⁰⁵ See Janow, *supra* note 282, at 1082.

³⁰⁶ See *id.* at 1083; see also Gold & Puzanghera, *supra* note 8.

³⁰⁷ Ricchiuto, *supra* note 13, at 283–84; see Janow, *supra* note 282, at 1082.

³⁰⁸ Ricchiuto, *supra* note 13, at 284; Gold & Puzanghera, *supra* note 8; Sallie Hofmeister, *FX Takes Hero Out of Action: Network Pulls Schwarzenegger Films*, L.A. TIMES, Aug. 14, 2003, at C1 (noting that these networks changed their minds).

³⁰⁹ See Janow, *supra* note 282, at 1081–82; Eggerton, *supra* note 19. "The FCC has interpreted [a 'cable operator'] to mean only local cable origination, which apparently has never happened in terms of a show that would trigger the obligation since I'm told no cable operator has ever been required to provide equal time." Eggerton, *supra* note 19.

³¹⁰ FCC Broadcast Radio Services, 47 C.F.R. § 76.205 (2009). The Rules define a "cable television system" as "[a] facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 C.F.R. § 76.5(a). This does not include "[a] facility that services only to retransmit the television signals of one or more television broadcast stations." *Id.* § 76.5(a)(1). As a result, the rule would apply to a cable system provider such as Cox Cable or Time Warner. See Ricchiuto, *supra* note 13, at 283.

³¹¹ See 47 C.F.R. § 25.701(b)(4)(ii) (applying equal opportunity provisions to DBS providers).

³¹² 47 C.F.R. § 76.5(p) (defining "origination cablecasting"); 47 C.F.R. § 25.701(b)(2) (defining "DBS origination programming").

³¹³ See Janow, *supra* note 282, at 1082; Ricchiuto, *supra* note 13, at 283–84; Eggerton, *supra* note 19. Although the rule does not mention cable networks, it also does not

This rule also creates either a loophole³¹⁴ or an incongruity: “[I]f Fred Thompson appears on a *Law & Order* episode on the TNT cable network, it does not trigger equal time, but if he appears in an episode on a TV station carried on the same cable system . . . or a repeat airing in syndication, [it does].”³¹⁵ Thus, what may at first seem like a safe harbor for cable networks, ultimately leaves them adrift in a sea of uncertainty.

II. BROADCAST CONFUSION OVER FCC STANDARDS

The FCC’s pronouncement regarding this situation is reflected in its Primers.³¹⁶ The 1984 and 1978 Primers provide that examples of uses include: “(d) *Movie Actor*. If an actor becomes a legally qualified candidate for public office, his appearances on telecasts of his movies thereafter will be uses, entitling his opponents to equal time, if the actor is identifiable in the movies.”³¹⁷ Applying this policy, in the 1970s, when Ronald Reagan was running for the Republican Party nomination, the FCC held that televising his movies would constitute a use entitling opponents to Equal Time.³¹⁸

contemplate that a cable network would ever broadcast original programming, over which it would have “exclusive control.” See *supra* notes 26–29 and accompanying text.

³¹⁴ The scarcity rationale underpinning Congress’s authority to regulate political broadcasting on the airwaves does not apply to cable. See Janow, *supra* note 282, at 1090–92. This has led to broadcaster confusion. See *id.*; cf. Bauder, *TNT Says*, *supra* note 15 (noting that cable’s growth makes it hard to argue that cable should receive different treatment than broadcasters). The widespread subscription to “[c]able technology has essentially transformed the nature and culture of television viewing” in America. Erica Hepp, Note, *Barking Up the Wrong Channel: An Analysis of Communication Law Problems Through the Lens of Media Concentration Rules*, 85 B.U. L. REV. 553, 581 (2005). If the concern is to equalize television exposure, then cable should be subject to the rule.

³¹⁵ Eggerton, *supra* note 19.

³¹⁶ To help broadcasters and others understand and apply the FCC’s rules, the FCC periodically publishes “Primers” or “guidance documents.”

³¹⁷ 1984 FCC PRIMER, *supra* note 177, at 1490–91; 1978 FCC PRIMER, *supra* note 94, at 2243–44.

³¹⁸ See Adri[a]n Weiss, 58 F.C.C.2d 342, 343–44 (1976). This decision relied on Paulsen’s conclusions that there was no basis to distinguish between political and non-political uses. See *id.* at 343. As discussed below, however, soon after Reagan’s 1980 election, the FCC announced that only “positive” “appearances” would be attributed to a candidate. See discussion *infra* Part II.D.1.

At first blush, this language seems straightforward, but on closer inspection, it raises more questions than it answers. The term “thereafter” seems to designate that only film “appearances” that are made after a declaration of candidacy are “uses.” Indeed, several FCC holdings discuss “appearances” that are made post-declaration.³¹⁹ The Reagan films, however, were not made during Reagan’s candidacy, but prior to it.³²⁰ This language is ambiguous as to whether: (a) the appearance needs to be made “thereafter” the declaration of candidacy or (b) only the television broadcast needs to be “thereafter” the declaration of candidacy. Although Paulsen and its progeny involve media personalities, they do not speak to the timing of the broadcast (pre-declaration or post-declaration) in relation to the declaration of candidacy.

The term “appearance” adds further confusion, as an “appearance” could be either the act of appearing, i.e., “making an ‘appearance’ on a TV show,” or the visual image, “one’s ‘appearance.’”³²¹ The former focuses on whether the candidate made an “appearance” post-declaration, whereas the latter is not concerned with the candidate’s action, but rather focuses on whether his visage was televised post-declaration. This latter construction of “appearance,” however, charges a candidate with using a broadcast station, even if he had no control over the broadcast.

Additionally, since the 1980s, the FCC has held that only “positive” candidate appearances trigger Equal Time.³²² This positive appearance standard, however, has not been applied to character appearances of media cross-over candidates.³²³ Yet, it is

³¹⁹ See, e.g., *Branch v. FCC*, 824 F.2d 37, 39 (D.C. Cir. 1987); *Chisholm v. FCC*, 538 F.2d 349, 353–54 (D.C. Cir. 1976); *Paulsen v. FCC*, 491 F.2d 887, 888 (9th Cir. 1974).

³²⁰ Ronald Reagan first became a candidate for the Republican Party’s presidential nomination in 1967. His film career spanned roughly from 1937 until 1965. See Ronald Reagan—Filmography, <http://www.imdb.com/name/nm0001654/> (last visited Oct. 12, 2009).

³²¹ See Definition of “appearance,” <http://dictionary.reference.com/browse/appearance> (last visited Oct. 12, 2009).

³²² See discussion *infra* Part II.C.

³²³ See discussion *infra* Part II.C. See generally *Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974) (holding that Equal Time rules would apply to nonpolitical appearances by an actor/comedian seeking public office, without evaluating whether such appearances would constitute “positive appearances”).

uncertain whether the concept does not apply to character appearances or whether no such cases have made their way to the FCC for it to apply the standard because broadcasters err on the side of pre-empting programs to avoid Equal Time obligations. Indeed, if the standard is applicable, then some character appearances would not trigger Equal Time. These varied positions cannot be reconciled and create a set of interrelated issues detailed below.

A. “*Appearances Thereafter*”

The FCC Primers explain that “appearances on telecasts of [a candidate’s] movies thereafter will be uses.”³²⁴ This can be interpreted in one of two ways. An “appearance” “thereafter” might refer to the candidate’s being in a film or on a television show (hence, making an “appearance” in it) post-declaration. Therefore, if the candidate makes the “appearance” *after* he becomes a candidate, he is using the broadcast station, but if he makes it before becoming a candidate (regardless of when it is broadcast), he would not be.

This relatively straightforward interpretation is supported by other FCC holdings.³²⁵ In discussing the exemption for documentary films, an FCC report (in conjunction with a prior opinion) explained that there is “an exemption for film materials showing appearances of persons *before* they became candidates.”³²⁶ The key was not when the film aired (before or after a declaration of candidacy), but whether it was made before or after becoming a candidate.³²⁷ This suggests that with regard to “appearances” in other types of films, the determinative factor is when the film was made. This interpretation is also consistent with the DC Circuit’s opinion in *Branch v. FCC*.³²⁸ In explaining that a

³²⁴ 1984 FCC PRIMER, *supra* note 177, at 1491; 1978 FCC PRIMER, *supra* note 94, at 2244 (emphasis added).

³²⁵ *See, e.g.*, Honorable Magnuson, 23 F.C.C.2d 775, 775 (1967) (holding that equal time requirements would not apply where a candidate appeared in a film prepared before declaring candidacy, but which aired after candidacy was announced).

³²⁶ *Id.* (emphasis added).

³²⁷ *See generally id.*

³²⁸ 824 F.2d 37, 52 (D.C. Cir. 1987) (upholding the FCC’s determination that a television news station that employs a news reporter who wishes to run for public office

weather forecaster's appearance on the news amounted to a "use" of the broadcast station, Judge Bork referenced FCC holdings that "appearance[s] of a person regularly employed as a station announcer *after having qualified as a candidate for public office* were 'uses.'"³²⁹ Judge Bork's opinion thus also focuses on whether the individual was a candidate at the time he was filmed.

Alternatively, an "appearance" "thereafter" might refer to the film or television program's broadcast after a declaration of candidacy, regardless of whether the actor had declared at the time the film was made. Accordingly, if the film were televised post-declaration, it would be a "use" of the broadcast station. In the context of Equal Time, however, this interpretation does not necessarily make sense. The obligations and rights of Equal Time arise only once a candidate declares his or her candidacy.³³⁰ Before that point, broadcasts including him are irrelevant and would never constitute an "appearance" or "use." Thus, to read the phrase in this way amounts to saying that films broadcast pre-declaration, which would never amount to § 315 "appearances" in any event, still do not amount to "appearances." Additionally, there are simpler ways to convey that once a candidate declares, any broadcast including him, regardless of when it was made, is a use.³³¹

This reading also holds actors-turned-candidates and broadcasters responsible for things that neither could have foreseen or are out of their control. With regard to the former, it imputes the acts of a third party, such as the television program's owner or film's producer, who sold it for broadcast at this particular point in

would be required to provide "equal time" for the news reporter's opponents for any broadcasts made by the news reporter after the news reporter's declaration of candidacy).

³²⁹ *Id.* at 42 (emphasis added) (quoting Station WMAY, 40 F.C.C. 433, 433 (1965)).

³³⁰ Equal Time rules apply to "any person who is a legally qualified candidate for any public office." 47 U.S.C. § 315(a) (2006). "A legally qualified candidate for public office is any person who . . . [h]as publicly announced his or her intention to run for nomination or office . . ." FCC Broadcast Radio Services, 47 C.F.R. § 73.1940 (2009).

³³¹ Indeed, "if" and "thereafter" could be eliminated: "[Once] an actor becomes a legally qualified candidate for public office, his appearances on telecasts of his movies . . . will be uses, entitling his opponents to equal time. . . ." 1984 FCC PRIMER, *supra* note 177, at 1491; 1978 FCC PRIMER, *supra* note 94, at 2244.

time, to a media cross-over candidate.³³² With regard to the latter, it forces a broadcaster to reschedule programming, pre-empt films, and provide free time.³³³

B. Characters vs. Candidates

Aside from the meaning of an “appearance thereafter,” only appearances by a candidate trigger Equal Time. It is questionable, however, whether an actor playing a character role is equivalent to a candidate appearing as him or herself.³³⁴

The FCC rules refer to a candidate appearing,³³⁵ not to a character appearing. When an actor plays a role on a television, he is pretending to be the character. He is not appearing as himself. Furthermore, to constitute an “appearance,” a candidate must be recognizable.³³⁶ Indeed, the FCC’s phrase “if the actor is identifiable in the movie[]”³³⁷ contemplates that an actor may be unrecognizable in a role, so as not to amount to an appearance. When an actor plays a character, whose dialogue is written by

³³² Equal Time applies only to the candidate. *See Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1, 3 (3d Cir. 1950). Though the Senate had proposed that § 315 also cover supporters and opponents of candidates, the House of Representatives struck this language. *See id.* at 5. In fact, the previous year, before introducing the bill that would become the Communications Act of 1934, the Senate proposed amending section 18 of the Radio Act to extend the requirement of equality of treatment of political candidates to the supporters and opponents of candidates. *Id.* at 5 (citing S. REP. No. 564, at 10 (1932)). Ultimately, the two bodies agreed that § 315 of the bill that became the Communications Act would conform exactly to section 18 of the Radio Act. *Id.* “‘Section 315 on facilities for candidates for public office is the same as Section 18 of the Radio Act. The Senate provisions, which would have modified and extended the present law, is [sic] not included in the substitute.’” *Id.* (quoting 78 Cong. Rec. 10,988 (1934)). Thus, § 315 applies only to the use of broadcast facilities by candidates themselves. *Id.* at 3.

³³³ *See, e.g., Eggerton, supra* note 19; Hofmeister, *supra* note 308. It is one thing to tell a child that she might one day grow up to be President. It is quite another to require a broadcaster to presume that every actor who ever graces the television screen might be.

³³⁴ This is even more problematic where the actor played the role prior to declaring candidacy. *See discussion supra* Part II.A.

³³⁵ 47 U.S.C. § 315.

³³⁶ 1984 FCC PRIMER, *supra* note 177, at 1489; 1978 FCC PRIMER, *supra* note 94, at 2240 (“In general, any broadcast or cablecast of a candidate’s voice or picture is a ‘use’ of a station or cable system by the candidate if the candidate’s participation in the program or announcement is such that he will be identified by members of the audience.”).

³³⁷ 1984 FCC PRIMER, *supra* note 177, at 1481.

others and whose actions are determined and edited by others, it is the character that is recognizable, not necessarily the candidate. For example, when Don Novello was on *Saturday Night Live*, he was not Don Novello; he was Father Guido Sarducci.³³⁸ When viewers watch repeats of *The Love Boat*, they do not see Fred Grandy; rather, they see Gopher.³³⁹ And when Texas viewers watch *Walker, Texas Ranger*, they see the “bartender guy,” not Noble Willingham.³⁴⁰ To some degree, the character masks the person who is the actor. Thus, like the unrecognizable disembodied voice of the off-camera announcer or the candidate lost in a crowd scene, the character limits the candidate’s recognizability.

Additionally, as a practical matter, it is difficult to apply the “recognizable” standard to a character role. If the actor cannot be recognized by the average person, due to make-up, prosthetics, costuming, or the use of an accent does this mean that he has not “appeared”? Is recognizability related to acting ability, so that a good method actor would “disappear” in the role and cease to be recognizable, whereas a less-talented actor would not? Are “famous” actors presumably recognizable whereas character actors or voice actors are not?

Conversely, taking a few logical steps, if a character is equated with a candidate appearance, then an impersonation of a candidate might also constitute a candidate appearance. Indeed, Darrell Hammond’s vocal impersonation of Bill Clinton and Tina Fey’s Sarah Palin illustrate this point.³⁴¹ Recall that a pictorial depiction of a candidate, as in a drawing or cartoon, constitutes a candidate

³³⁸ See Roberts, *supra* note 279.

³³⁹ See Lowry, *supra* note 4.

³⁴⁰ See Roberts, *supra* note 279. Though this is not a *Paulsen* situation, even Paulsen, weathermen, preachers, and the others to whom that rule applies appeared on air as themselves. For example, when John McCain appeared on *Saturday Night Live*, he did not appear as “Penelope”—he appeared as John McCain. See Leslie Hoffecker, *A Final Campaign Swing for John McCain on ‘Saturday Night Live,’* L.A. TIMES, Nov. 1, 2008, <http://latimesblogs.latimes.com/washington/2008/11/mccain-saturday.html>.

³⁴¹ See generally Collins, *supra* note 8; John Crook, *TV Comics Mining Laughter from 2000 Presidential Race*, ROME NEWS-TRIB., Mar. 10, 2000, at 3, available at <http://news.google.com/newspapers?nid=348&dat=20000310&id=xhsIAAAAIBAJ&sjid=YUUDAAAIAIAJ&pg=3240,3433961>.

appearance.³⁴² Hence, Shephard Fairey’s Obama portrait constituted an appearance by President Obama—even though it was not actually Obama; even though Obama himself was never on air; and even though Obama’s face is not actually slabs of white, red, light blue, and dark blue.³⁴³ Notwithstanding, it was an “appearance,” because a representation of Obama was to be broadcast. By the same logic, if characters and candidates are conflated, an impersonation of a candidate could constitute a candidate appearance. After all, in some instances, the impersonation would look more like and better evoke the real candidate, than would an actor-candidate made up and playing the role of someone else.

C. The “Positive Appearance” Standard

Further complicating matters is the FCC’s substantive interpretation that only a “positive” appearance triggers Equal Time. If the FCC treats character appearances the same as candidate “appearances,” then presumably it also treats them the same with regard to positivity.

Since approximately 1980, the FCC has interpreted “appearance” to mean a “positive appearance.”³⁴⁴ This can be traced to a 1981³⁴⁵ FCC report submitted to Barry Goldwater.³⁴⁶ In

³⁴² See 1984 FCC PRIMER, *supra* note 177, at 1492.

³⁴³ See Barack Obama “Hope” Poster, *supra* note 238.

³⁴⁴ 1991 FCC PRIMER, *supra* note 187, at 684 (stating that use by a legally qualified candidate is “any ‘positive’ appearance” and excludes disparaging uses by an opponent); see also FCC, RELEASE NO. 94-1, CODIFICATION OF THE COMMISSION’S PROGRAMMING POLICIES 651, 651 (1994) [hereinafter 1994 FCC PRIMER] (maintaining use by a legally qualified candidate is any “positive appearance” and excludes disparaging uses by an opponent). The 1991 FCC PRIMER states that “positive” has been, and will remain, part of the definition. 1991 FCC PRIMER, *supra* note 187, at 684. The 1994 FCC PRIMER, advising broadcasters that the FCC will return to the 1991 definition, specifies that the definition returned to is any positive appearance. See 1994 FCC PRIMER, *supra*, at 651. It goes on to distinguish the difference between a derogatory “appearance” (that is not use) and an unapproved “appearance” (that is use). *Id.*

³⁴⁵ Ironically, in light of the topic of this article, this coincided with Ronald Reagan’s inauguration as President. John F. Sopko, *Will Obama Take Page from the Gipper’s Playbook?*, WASH. TIMES, June 7, 2009, at A4.

³⁴⁶ See 1991 FCC PRIMER, *supra* note 187, at 684 n.47 (indicating a report of the staff of the FCC on the operation and application of the political broadcasting laws during the 1980 political campaign).

that report, the FCC explained that if a candidate's "picture is used by opponents in an advertisement in a disparaging manner, such 'appearance' of the candidate is not a 'use.'"³⁴⁷ In 1994, the FCC reiterated that a "use" is "any 'positive' appearance of a candidate," but that a disparaging use of a candidate's voice or picture (such as by her opponents) is not.³⁴⁸ Thus, showing a candidate's photo in an endorsement ad, regardless of the endorser,³⁴⁹ is a use; showing the candidate's photo in an attack ad would not be.³⁵⁰

This interpretation makes sense, for otherwise an attack ad denigrating a candidate would constitute a "use" by the disparaged candidate.³⁵¹ In fact, such situations arose during the 2004 and 2008 presidential elections, in connection with the anti-candidate documentary films,³⁵² to wit: George W. Bush (*Fahrenheit*

³⁴⁷ *Id.* If, however, the candidate's depiction is used in an endorsement—"even if the candidate considers such an endorsement to be harmful because of the identity of the advertiser, such appearance is still considered a 'use' that would trigger the equal opportunity provision." *Id.*

³⁴⁸ 1994 FCC PRIMER, *supra* note 344, at 651.

³⁴⁹ See Codification of Political Programming Policies, 59 Fed. Reg. 60 (Mar. 29, 1994) (amending 47 C.F.R. pt. 73 & 76) (stating that an unauthorized endorsement, deemed harmful by the candidate because of the nature of the endorsers, is a use).

³⁵⁰ *Id.* (citing Donna R. Searcy, FCC, In the Matter of Codification of the Commission's Political Programming Policies: Notice of Proposed Rule Making, 6 F.C.C.R. 5707, 5717 & 5722-23 (1991); 1991 FCC PRIMER, *supra* note 187, at 684). Other FCC materials do not reference an appearance being "positive." See, e.g., 1984 FCC PRIMER, *supra* note 163, at 1489 ("[A]ll appearances on the air by candidates are considered to be uses, and licensees of stations are not authorized to base their grant or denial of time to candidates on their judgment of whether the use of the time will aid or even be connected with their candidacies."); see also 47 C.F.R. § 73.1941(b) (2009) ("As used in this section and section 76.206, the term 'use' means a candidate appearance (including by voice or picture) that is not exempt . . .").

³⁵¹ Negative ads may denigrate discourse and impose on candidates a financial burden to respond, Peter F. May, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 188-89 (1992), but they "may also convey substantive political information to the electorate, and they serve an informational function." Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 LOY. L.A. L. REV. 1539, 1542-43 (1997). For a discussion of (and examples of) the various definitions of a "negative campaign ad" see May, *supra*, at 182-85.

³⁵² See Brief for Reporters Committee for Freedom of the Press as Amicus Curiae Supporting Appellant, *Citizens United v. Fed. Election Comm'n*, (U.S.) (No. 08-205), 2009 WL 2832084, available at www.rcfp.org/news/documents/20090115-amicusbrie.pdf.

2009] *APPLYING THE “EQUAL TIME” RULE (EQUALLY)* 211

9/11),³⁵³ Hillary Clinton (*Hillary: the Movie*)³⁵⁴, and John Kerry (*Stolen Honor: Wounds That Never Heal*).³⁵⁵ In each instance, the television broadcast of or ads for these films raised issues of whether these constituted candidate “appearances” under either Equal Time³⁵⁶ or campaign expenditures or electioneering communications under the Bipartisan Campaign Act (“BCRA”).³⁵⁷

The most convoluted situation involved *Stolen Honor*. In the fall of the 2004,³⁵⁸ Broadcast Group ordered its sixty-plus stations to pre-empt regularly scheduled programming and broadcast *Stolen Honor*.³⁵⁹ This anti-John Kerry film featured Vietnam veterans criticizing Kerry’s anti-war activities upon returning from Vietnam. Kerry insisted that the film amounted to a free political advertisement for George Bush, but Sinclair categorized the film as “news,” thereby exempting it from both the BCRA and Equal

³⁵³ Under the FEC’s rules, Michael Moore’s film may have constituted banned “express advocacy.” *See id.* at 11.

³⁵⁴ *Hillary* was produced by Citizens United. *Id.* at 3. David Bossie, President of Citizens United, says that *Fahrenheit 9/11* inspired him to make the film: “I saw the enormous impact a documentary film could have on political discourse, conservative or liberal. . . .” Joan Biskupic, *At the Movies: Documentary or Campaign Ad? Supreme Court Justices Take on Role as Film Critics for Hillary Case*, USA TODAY, Mar. 20, 2009, at A2.

³⁵⁵ *See* Jim Rutenberg, *Broadcast Group to Pre-empt Programs for Anti-Kerry Film*, N.Y. TIMES, Oct. 11, 2004, at A19.

³⁵⁶ Congress’s 1959 amendments exempted documentaries that did not include the candidate as a focus or in which the candidate was incidental to the subject. *Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong. 242 (1959). Therefore, Congress obviously intended candidate-focused documentaries to be subject to Equal Time. Congress may not have foreseen, however, negative, anti-candidate documentaries produced by political opponents.

³⁵⁷ As in the case involving the anti-Hillary Clinton film, it might be deemed an ad or “electioneering” communication. *See* Biskupic, *supra* note 354; Tony Mauro, *Top Court Reviews ‘Hillary, the Movie,’* USA TODAY, Mar. 26, 2009, at A13. The BCRA amended the FECA to require disclaimers in, and disclosures of funding of, “electioneering communications.” Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88 (amending 2 U.S.C. § 441d). An electioneering communication is a broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate; and (2) is made within 60 days before a general election, or within 30 days before a presidential primary election or nominating convention. *See* 2 U.S.C. § 434(f)(3)(A)(i) (2006).

³⁵⁸ This was the final stretch of the 2004 Bush-Kerry Presidential election.

³⁵⁹ *See* Rutenberg, *supra* note 355.

Opportunity rule.³⁶⁰ One commentator, however, asserted that if the film was not “news” but instead an extended political ad (as Kerry claimed), its inclusion of Kerry’s image and voice would render it a “use” by Kerry.³⁶¹ This would trigger the equal opportunity rights of George Bush and Ralph Nader.³⁶²

Presumably, the role a media cross-over candidate plays in a television show or movie would need to be evaluated “positive,” before it could be deemed a “use.” Movies are populated by villains, drug addicts, megalomaniacs, idiots, and monsters, and actor-candidates have played all of those roles. A film or TV episode can frame an actor in terms of the character he plays or the message of the film, as well as underscoring that he is merely an actor, not a political mind. The comedic or villainous roles of an actor might not be positive portrayals, but damaging ones. It is hard to imagine that the characters of a creepy child molester, Liam the Loose-Boweled Leprechaun,³⁶³ or Archie Bunker would be considered “positive,” by any stretch of the imagination. Of course, the right Fred Thompson or Schwarzenegger role could inure to a candidate’s benefit by providing a positive candidate template.³⁶⁴ Furthermore, unlike any other candidate, an actor has little control over how a character is edited. He cannot re-edit his character any more than he can rewrite the character or give himself more screen time. By contrast, when a candidate makes an “appearance” as himself, he controls whether he will appear on air, and controls what he will say and how he will act.

D. Continuing Problems for Broadcasters

Besides triggering an opponent’s right to free airtime, determining that a candidate has made an “appearance” implicates

³⁶⁰ *See id.*

³⁶¹ *Id.*

³⁶² *See id.*

³⁶³ *See Cox, supra* note 1, at 42.

³⁶⁴ Gold & Puzanghera, *supra* note 8 (referencing Fred Thompson’s DA Branch character, one commentator noted “You couldn’t ask for a better character as a template for a presidential candidate.” (quoting Dan Schnur, former Communications Director for John McCain’s 2000 campaign)).

the obligations of the broadcaster that must provide free time and reschedule programming to account for it.³⁶⁵

The failure to distinguish an actor-turned-politician’s pre-declaration from post-declaration “appearances,” as well as to distinguish a candidate from a character he plays, is particularly problematic and unfair for a broadcaster. When an actor runs for office, the broadcaster—after having purchased the rights to or paid for the production of a program or movie, sold advertising time, and developed its own publicity strategy—must either remove the program from the air and alter their schedule, or air it while preparing to provide opposing candidates with equal amounts of free airtime, just in case. Whichever path it chooses, the broadcaster suffers an economic loss that it could not reasonably have foreseen.³⁶⁶ This essentially faults a broadcaster for not being prescient enough to foresee that one day some actor might grow up to be President (or Governor or Senator).

Because the rules were written before cable networks had proliferated and rebroadcasts and repeats³⁶⁷ were a necessity of programming, the issues are exacerbated. Of course, the need for programming (and increased broadcasting of an actor’s film or television work) does not trump Equal Time, any more than running twice as many campaign advertisements would. Nevertheless, it underscores that because the television landscape was different, this situation was not contemplated. It also raises the question of whether, in light of the number of television channels and repeats, audiences perceive rebroadcasts of candidates playing roles the same as candidate appearances: In other words, whether applying Equal Time to the previously-mentioned situations advance the goals of the rule.³⁶⁸

³⁶⁵ See 1984 FCC PRIMER, *supra* note 177, at 1490.

³⁶⁶ See Shear, *supra* note 3.

³⁶⁷ Shows were live, or if taped, were rebroadcast as reruns during a limited time-frame, and then retired. See CAMPBELL, MARTIN & FABOS, *supra* note 77, at 185–89. When feature films found their way onto television, it was either on premium cable (for a limited run) or a single network broadcast occurring within a year or two of the film’s release. See *id.* at 205–19.

³⁶⁸ Janow, *supra* note 282, at 1082–83 (asserting that Equal Time does not achieve its goals in the new media climate).

1. The FCC's Uncertainty and 1991–1994 Rule Change

The FCC, itself, has struggled with both the application and logic of the “use” rule. From 1934 until 1991, and from 1994 to present, the FCC has defined “use” as any “appearance” in which the candidate was identifiable.³⁶⁹ In 1991, however, the FCC revised its definition to require some intent on the part of the candidate to use the broadcast medium:³⁷⁰ “We have decided to narrow our interpretation of ‘use’ under § 315(a) to include only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate.”³⁷¹

The FCC believed that narrowing the definition would give candidates greater control over their campaigns,³⁷² simplify the administration of § 315,³⁷³ and better reflect congressional intent.³⁷⁴ Therefore, from 1991–94, only voluntary “appearances” that were “controlled, approved, or sponsored” by the candidate were considered “uses.”³⁷⁵ This overruled *In re Adri[a]n Weiss*,³⁷⁶ which had held that broadcasting Ronald Reagan films would constitute a use.³⁷⁷ Now, because Reagan’s “appearance” was not “controlled, sponsored, or approved” by him, it was not a use.³⁷⁸

³⁶⁹ See Ricchiuto, *supra* note 13, at 272–73; see also Codification of Political Programming Policies, 59 Fed. Reg. 60 (Mar. 29, 1994).

³⁷⁰ “The Commission revises its existing rules regarding political broadcasting . . . [to] (ii) Narrow the definition of a ‘use’ by a ‘candidate’ to include only uses of a licensee’s facilities that are controlled, approved or sponsored by a candidate after becoming legally qualified.” 1991 FCC PRIMER, *supra* note 187, at 678.

³⁷¹ 1991 FCC PRIMER, *supra* note 187, at 685. The Commission reaffirmed this definition in FCC, RELEASE NO. 94-1, CODIFICATION OF THE COMMISSION’S PROGRAMMING POLICIES 4611, 4613 (1992) [hereinafter 1992 FCC PRIMER].

³⁷² See 1991 FCC PRIMER, *supra* note 187, at 686.

³⁷³ See *id.* at 707.

³⁷⁴ See *id.* at 678. The FCC understood Congress to have intended to deny exemptions to candidate-produced programming, see *id.* at 684, and some Senators believed “use” applied only to candidate-initiated appearances, see *id.* at 685. A similar philosophy was reflected in the FCC’s historical exclusion of “appearances” in news coverage as use. Because the candidate did not control the filming or presentation of the news event, the FCC did not consider the “appearance” a “use” of the broadcast facility. See *Chisholm v. FCC*, 538 F.2d 349, 351–52 (D.C. Cir. 1976); *Blondy*, 40 F.C.C. 284, 284 (1957).

³⁷⁵ See Letter to Senator John F. Kelly, 7 F.C.C.R. 5216, 5216 (1992).

³⁷⁶ 58 F.C.C.2d 342 (1976).

³⁷⁷ See *id.* at 343.

³⁷⁸ See 1991 FCC PRIMER, *supra* note 187, at 685.

(Of course, Reagan knew that he appeared in the film, and did so voluntarily. He just did not control the broadcast of the film and thus the present broadcast of his "appearance.")³⁷⁹ Hence the key was the candidate's control over the re-broadcast. By contrast, had Reagan voluntarily appeared in a film or television program after declaring candidacy, it would have been a use.³⁸⁰

Three years later, the FCC rescinded the "controlled, approved, or sponsored" rule, and returned to the previous (and present) definition.³⁸¹ Interestingly, it introduced the rule re-revision by noting that a petition was pending before the Ninth Circuit challenging the 1991 definition of "use."³⁸² Ironically, the voluntariness standard that the FCC rescinded is the standard presently employed by the FEC to assess whether a candidate has "appeared" or "used" broadcast media.³⁸³

2. Inequity In Pursuit of "Equality"

Equal Time's application to actors-turned-candidates ranges from unclear to ironic or unfair. Equating repeats of pre-declaration TV roles and movies with candidate "appearances" made post-declaration, does not advance broadcast equity. Instead, treating these very different things as though they are the same leads to unfair outcomes. Such treatment attributes to media cross-over candidates airings they do not control and confuses the candidates with the characters they play, while denying them the protection of the "positive appearance" standard that every other

³⁷⁹ See 1991 FCC PRIMER, *supra* note 187, at 685.

³⁸⁰ See *id.*

³⁸¹ "[W]e now believe that the two policy justifications that supported our redefinition may not have been adequate in the circumstances. . . . Until we have had an opportunity to give further consideration to this issue, and to seek further comment, we believe that the better course is to return to our previous interpretation." Codification of Political Programming Policies, 59 Fed. Reg. 60 ¶ 1, ¶ 6 (Mar. 29, 1994) (to be codified at 47 C.F.R. pt. 73, 76).

³⁸² *Id.* ¶ 1 (citing *Western v. FCC*, No. 93-700041 (9th Cir. filed Jan. 22, 1993)).

³⁸³ See 1991 FCC PRIMER, *supra* note 187, at 685 (stating that for purposes of FEC regulations pertaining to campaign contributions, expenditures, and funding, where a candidate's "appearance" was involuntary, "such as in unauthorized, independently sponsored advertisements or rebroadcasts of appearances that were made prior to his attaining the status of a legally qualified candidate, [that] appearance would not constitute a use.").

candidate receives. Giving traditional candidates free airtime and the protection of the “positive” standard advantages them over media cross-over candidates and broadcasters. Far from serving the goals of Equal Time, this application of the rule perverts them.

In fact, equating both candidates with characters and pre-declaration with post-declaration “appearances” provides a means for a broadcaster to favor one candidate and award her free airtime without having any obligation to provide airtime to the other candidate. Suppose Broadcaster favors Candidate A. Broadcaster might avoid giving Candidate A free airtime or inviting her to cameo, because doing so would trigger opposing Candidate B’s § 315 rights (as with Al Sharpton’s *SNL* “appearance”). Suppose also that Candidate B is an actor. Broadcaster could show a movie in which Candidate B has a role, perhaps in which Candidate B plays a crazy or dim-witted character. This broadcast is unlikely to help Candidate B, but, by associating him with the character or by underscoring his lack of serious political pedigree—he’s only an actor—it could harm him.³⁸⁴ Nonetheless, because Candidate B was on air, it would entitle favored Candidate A to Equal Time. Moreover, because Candidate B did not pay to put himself on television, Candidate A would receive a comparable amount of airtime free of charge. Hence, the broadcaster would be able to affect the result of giving free time to favored Candidate A.

Nevertheless, there are ways to better ensure that the Equal Time rule is equal in both application and result, as well as clear to both the candidates who are awarded rights by it and the broadcasters who are obligated by it. Suggestions to rationalize the application of the doctrine are proposed below.

³⁸⁴ Indeed, Al Franken, Ronald Reagan, and Arnold Schwarzenegger all suffered from the disability of hailing from Hollywood rather than from the Beltway.

III. REMEDIES: ACHIEVING CLARITY AND EQUALITY

A. *Distinguish Pre-Declaration Appearances from Post-Declaration “Appearances”*

Equal Time should distinguish pre-declaration candidate appearances from post-declaration candidate appearances.³⁸⁵ Pre-declaration appearances (regardless of when broadcast) would not constitute a “use” of the broadcast station, because the individual had not yet attained candidate status; post-declaration appearances would constitute a “use,” because the individual had already attained candidate status when he chose to appear. With regard to media cross-over candidates, films and television programs made pre-declaration would not be “uses,” whereas those made post-declaration would be. Nonetheless, this is a concrete rule applicable to any candidate in any situation.

This interpretation is consistent with the FCC’s “thereafter” language, previous rulings,³⁸⁶ and logic, and it is fair to the actor-turned-candidate and the broadcaster, because both can make choices regarding the Equal Time ramifications of their actions. A candidate, having declared candidacy, knows that he is appearing on television, is doing so voluntarily, and is aware that his “appearance” will trigger the Equal Time rights of his opponents. Although he may not control the specifics of editing and airing, he does control whether he is going to put his face, body, and voice on television, and controls what he says, and how he acts.³⁸⁷ The actor in a pre-declaration film does not.

At the time he is filming a television program or movie, the pre-declaration actor would not know that his work would be rebroadcast during election season. He could not control the timing of that broadcast, and could not fairly be said to have been

³⁸⁵ This would be measured by the date that the candidate formally declared candidacy.

³⁸⁶ A pre-declaration/ post-declaration rule is also consistent with *Paulsen*. Paulsen planned on making a post-declaration “appearance,” that is, he declared candidacy and was now going to appear on a television show. *Paulsen v. FCC*, 491 F.2d 887, 889 (9th Cir. 1974). This is also true of a media personality or actor who first declares and then goes on *Late Night*, *Saturday Night Live*, or a weather forecast.

³⁸⁷ If he is given direction to do something with which he disagrees, the candidate can simply decline to appear.

aware (while filming his scenes) that this could trigger the Equal Time rights of future political opponents, who had yet to campaign in an electoral race that he had yet to enter. It is hard to imagine that when Arnold Schwarzenegger was in *Conan: The Barbarian*³⁸⁸ 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. It is inconceivable that Gopher from *The Love Boat*, while filming on the Lido Deck and working under the terms of the Screen Actor's Guild contract,³⁸⁹ was weighing how this would trigger the television airtime of a future politician in Iowa. By distinguishing non-triggering pre-declaration appearances from triggering post-declaration appearances this fundamental unfairness is avoided.

Furthermore, this avoids imposing on a broadcaster the financial burden of either being unable to run repeats of its television shows or films it has already licensed, or airing those products, but potentially being required to provide free time to opposing candidates. With a pre-declaration/ post-declaration rule, the broadcaster is on notice that if it puts the candidate on air, it will trigger Equal Time. Armed with this knowledge, the broadcaster can make an intelligent decision whether to do so.

B. Distinguish Character Roles from Candidate Appearances

If the goal of Equal Time is to ensure that candidates get equal treatment in terms of broadcast time and price, then character portrayals are irrelevant. First, as explained above, the rules and statute refer to *candidates*, not characters.³⁹⁰ When an actor plays a role, he is pretending to be the character, and is not appearing as himself. Failing to distinguish a candidate from a character he portrays wrongly conflates the two. Although we forgive rabid fans for confusing actors with the characters they play, it is not something we expect the FCC to do.

Second, an opposing candidate is not running against Conan the Barbarian, Manhattan DA Branch, or Stuart Smalley (who's

³⁸⁸ CONAN: THE BARBARIAN (Dino De Laurentiis Company, Universal Pictures 1982).

³⁸⁹ Lowry, *supra* note 4.

³⁹⁰ See *supra* notes 323, 335 and accompanying text.

good enough, smart enough, and gosh darnit people like him enough to be a Senator). Rather, they are running against Arnold Schwarzenegger, Fred Thompson, and Al Franken. Awarding free airtime due to an opponent’s playing a character role³⁹¹ does not provide parity. It is questionable how giving John McCain fifteen minutes of free airtime, because Fred Thompson played a disgruntled university president in a sixteen-year-old movie,³⁹² protects McCain from broadcast discrimination, let alone increases the quality of political coverage or voter knowledge. In fact, a true equal opportunity would be allowing the opposing candidate to appear on air pretending to be someone other than himself.

C. Apply a Modified “Positive Appearance” Standard to Character Portrayals

If the FCC treats a character appearance the same as a “candidate appearance,” then it must also treat a character appearance the same with regard to the positive “appearance” standard. Indeed, because the FCC applies a “positive” standard to television appearances and films including other candidates (such as *Hillary* and *Stolen Honor*), it should also apply it to media cross-over candidates. Specifically, before charging an actor-turned-candidate with a “use” due to the broadcast of a television program or movie, the positive or denigrating nature of his role must be evaluated. If only “positive” “appearances” trigger Equal Time, or if denigrating ones do not, then some film portrayals would trigger § 315 appearances whereas others would not. To employ this standard in every other situation, but deny it to an actor-turned-candidate, is at best inconsistent and at worst discriminatory.

Notwithstanding the fairness in subjecting character roles to the same standard as any other candidate appearance,³⁹³ however, it is difficult to assess whether or not a character role is positive. To the extent that it is difficult to determine whether a traditional “appearance” is positive or denigrating, it is even more difficult to

³⁹¹ This is even more so when the actor played the role long before contemplating running for office.

³⁹² See *NECESSARY ROUGHNESS* (Paramount Pictures 1991).

³⁹³ Indeed, rather than treating all broadcasts of a candidate alike, it treats all broadcasts that are deemed “appearances” alike.

do so with a character role. An accurate assessment of a role's positive/negative quality can depend on context or information outside of the content of the portrayal. For example, *Hillary: The Movie* disparaged Clinton, but the ten second ad for the video-on-demand run of the film did not. It said only: "First a kind word about Hillary Clinton: [Ann Coulter speaking and visual] 'She looks good in a pantsuit.' [Narrator] Now, a movie about everything else."³⁹⁴ Just as Citizens United has argued that this is not the functional equivalent of express advocacy to vote against Clinton,³⁹⁵ it is not clear that the ad and appearance by Clinton is denigrating.

Additionally, despite its honorable intention, the "positive appearance" standard deviates from FCC policy that the nature of an appearance is irrelevant and that subjective judgment should be avoided. It is hard to reconcile a rule that an "appearance" must be positive to "count" with a rule that an "appearance" need not be "beneficial" or related to one's candidacy to count.³⁹⁶ Of course, the same result could be achieved by simply excluding disparaging "appearances."³⁹⁷ This standard can also be applied to character roles, wherein a disparaging character "appearance" or one that is not positive would not amount to an "appearance" under § 315.

D. Require "Appearances" to Be Voluntary

The FCC could interpret "appearance" to mean a "voluntary" appearance,³⁹⁸ rather than a "positive" appearance. Therefore, rather than a candidate's "positive appearance" triggering Equal Time (or designating a use of a broadcast station), a candidate's

³⁹⁴ Brief for Appellant at 8, fn. 1, *Citizens United v. Fed. Election Comm'n.*, 78 U.S. 3097 (2009) (No. 08-205).

³⁹⁵ *Id.* at 21, 34–35, 40–41. Express advocacy would be equivalent to a campaign contribution.

³⁹⁶ Presumably, if a broadcaster judged the "appearance" negative, or not wholly positive, and thus not a "use," the broadcaster could avoid its Equal Time obligations. See 1991 FCC PRIMER, *supra* note 187, at 684.

³⁹⁷ It is not necessary that an "appearance" be affirmatively positive to count. Appearances do not all fit into the category of positive or negative. An appearance could be neutral, questionable, dependent on the circumstances, or ill-advised.

³⁹⁸ This would also be consistent with interpreting "appearance" to mean "making an appearance."

“voluntary appearance” would trigger Equal Time. In large part, this would return to the FCC’s 1991–94 rule, which focused on whether an “appearance” or use was voluntary, i.e., “controlled, approved, or sponsored” by the candidate. The BCRA reporting requirements³⁹⁹ and § 312 amendments⁴⁰⁰ provide tools for identifying voluntary campaigning actions. Although these did not exist during the 1991–94 rule, they can now help clarify the concept of “voluntary.”⁴⁰¹ This is the simplest, most comprehensive approach to the Equal Time issues discussed.

Interpreting “appearance” to mean “voluntary appearance” has several benefits. While it would address most problems associated with media cross-over candidates,⁴⁰² it could be uniformly applied to all candidates, thus ensuring that every candidate receives the same benefits and is subject to the same burdens of the same rule, applied the same way. This best achieves the goal of equality of broadcasting opportunities. It also enables candidates to make choices about appearing—such as whether to continue acting on a television series or to begin shooting a film with an impending campaign—while at the same time holding them responsible for their actions, and for their actions alone.

Designating that only voluntary appearances trigger § 315 would effectively eliminate the problems associated with negative

³⁹⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 305(a)(3), 116 Stat. 81, 101.

⁴⁰⁰ 47 U.S.C. § 312 (2006).

⁴⁰¹ The sponsorship identification required by FECA differs from that required by the FCC under § 317. FECA requires that persons buying time state whether a paid message supporting one candidate or opposing another has been authorized by the candidate. 2 U.S.C. § 441d. Section 318 of FECA, amended by Bipartisan Campaign Reform Act of 2002, requires that electioneering communications authorized by a candidate clearly identify the candidate or committee or, if it not so authorized, identify payor and announce lack of authorization. *See id.*; *see also* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81, 105–06. With regard to the proposed “voluntariness” standard, an authorized advertisement would be equated with a voluntary action and/or appearance. *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 206 (2003) (“[A]ds broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy.”). Identifying the sponsor helps determine whether the candidate’s appearance in an advertisement was voluntary.

⁴⁰² It would also clarify the meaning of “appearance,” i.e., whether it is the act of appearing (and thus a voluntary action) or simply a visage.

or uncontrolled appearances, including a third party's election season broadcast of a candidate's pre-candidacy films. Because the candidate did not voluntarily air the films, they would not be appearances or uses of the broadcast station. It would also cover unauthorized, anti-candidate documentaries, ads for those documentaries, and attack ads. Because the candidate could not be said to have appeared voluntarily in any of them, none of them would be "appearances." Furthermore, substituting the concept of "voluntary" for "positive/ not denigrating" avoids the difficulty in determining whether an appearance, be it as a candidate, television character, or the subject of a documentary, is sufficiently positive to amount to a "use."⁴⁰³ Instead of relying on subjective broadcaster judgment, one would simply ask whether the appearance was voluntary.

This would also provide greater consistency between the FEC rules regarding candidate "appearances" and the FCC rules. The FEC⁴⁰⁴ uses a voluntariness standard for assessing "appearances" and "uses" when examining campaign contributions, expenditures, and funding.⁴⁰⁵ FEC rules provide that where a candidate's "appearance" was involuntary, "such as in unauthorized, independently sponsored advertisements or rebroadcasts of appearances that were made prior to his attaining the status of a legally qualified candidate, [that] appearance would not constitute a use."⁴⁰⁶

Furthermore, recent amendments in FECA and provisions of the BCRA help guard against candidates conspiring with broadcasters and third parties to air "unauthorized" ads, so as to use the airwaves without triggering their opponent's Equal Time rights. Consequently, although the broadcast of a media cross-over candidate's television program or film would probably not trigger Equal Time, under the right circumstances, it might be deemed a campaign contribution, ad, or (as in the case of *Hillary: The*

⁴⁰³ See *supra* Part III.C.

⁴⁰⁴ The FEC is vested with statutory authority to administer, interpret, and enforce FECA. 2 U.S.C. §§ 437c(b)(1), 437d(a)(8), 438(a)(8).

⁴⁰⁵ See *supra* note 383 and accompanying text.

⁴⁰⁶ 1991 FCC PRIMER, *supra* note 187, at 685.

2009] *APPLYING THE “EQUAL TIME” RULE (EQUALLY)* 223

Movie),⁴⁰⁷ “electioneering” regulated by the BCRA.⁴⁰⁸ Indeed, in 2004, FEC held that television ads for the political documentary *Rights of the People* were “electioneering communications,”⁴⁰⁹ and prevented them from airing.⁴¹⁰ It also requires any electioneering communication to include an identification that “_____ is responsible for the content of this advertising.”⁴¹¹ Therefore, candidate-oriented broadcasting would still be subject to regulation, but rather than treat everything that involves televising a candidate as though it is the same (and, therefore, an Equal Time issue), this approach would more accurately categorize situations into the appropriate regulatory systems that would best address the underlying issue.

CONCLUSION

Confusion regarding Equal Time’s applicability to media cross-over candidates and the election season broadcasts of their films and TV shows has led to unfair, incongruous results among

⁴⁰⁷ In 2004, Citizens United (who produced *Hillary: The Movie*) complained to the FEC that television advertisements for Fahrenheit 9/11 violated FECA. Reporter’s Committee for Freedom of the Press, *Group Alleges ‘Fahrenheit 9/11’ Ads Flout Election Laws*, NEWS MEDIA UPDATE, June 25, 2004, <http://www.rcfp.org/newsitems/index.php?i=3945> [hereinafter Reporter’s Committee, *Group Alleges*]. A few months later, the FEC dismissed the complaint, due to some ads airing outside of the BCRA window, and other ads excluding clearly identified presidential and vice-presidential candidates. Reporter’s Committee for Freedom of the Press, *FEC Dismisses ‘Fahrenheit 9/11’ Complaint*, NEWS MEDIA UPDATE, Aug. 10, 2004, <http://www.rcfp.org/newsitems/index.php?i=3978>.

⁴⁰⁸ See Biskupic, *supra* note 354; Mauro, *supra* note 357. The Bipartisan Campaign Reform Act amended FECA to require that “electioneering communications” include disclaimers, 2 U.S.C. § 441d; 11 C.F.R. § 110.11 (2009), and disclosures of funding, 2 U.S.C. §§ 441d(a)(3), 441d(d)(2); 11 C.F.R. §§ 110.11(b)(3), 110.11(c)(4). An “electioneering communication” is a “broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate . . . [and] (2) is made within 60 days before a general election, or within 30 days before a presidential primary election or nominating convention. 2 U.S.C. § 434(f)(3)(A)(i).

⁴⁰⁹ Reporter’s Committee, *Group Alleges*, *supra* note 407. BCRA § 203 prohibits corporations from using general treasury funds for “electioneering communications.” 2 U.S.C. § 441b(b)(2).

⁴¹⁰ Reporter’s Committee, *Group Alleges*, *supra* note 407.

⁴¹¹ 2 U.S.C. § 441d(d)(2). The “blank [is] to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor[.]” *Id.*

both candidates and broadcasters. Not only is this ironic, but it is unequal. This does not mean that Equal Time's time is up; in many ways, the rule still serves its purpose. Conflicting applications of the rule, however, expose the fault lines of regulations made in a different broadcasting environment, for a different group of candidates. Consequently, this article does not advocate eliminating the doctrine, but, instead, fine-tuning it to these modern realities. Thus, the proposals here endeavor to better ensure that the Equal Time rule is equitable as well as equal (to both candidates and broadcasters) in its application and results.