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# Renewing the Chase: The First Amendment, Campaign Advertisements, and the Goal of an Informed Citizenry

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# Renewing the Chase: The First Amendment, Campaign Advertisements, and the Goal of an Informed Citizenry

JOHN STEWART FLEMING\*

## INTRODUCTION

The Supreme Court has long held that political speech is the most protected form of speech under the First Amendment.<sup>1</sup> The motivation behind this highly protected status is clear: to facilitate a functioning democracy, restrictive government censorship must not hinder free speech.<sup>2</sup> Free expression includes the promotion of competing ideas and, therefore, enhances the democratic electoral process.<sup>3</sup> Also key to a functioning democracy is freedom of the press. Rooted in the reaction to the British Crown's suppression of newspapers and pamphleteers through "prior restraint,"<sup>4</sup> in addition to the role of the printed press in this nation's founding,<sup>5</sup> the Constitution's drafters were keenly aware of the educational power of communications media. Indeed, the Constitution explicitly reflects such a history: "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>6</sup>

Nevertheless, in terms of ensuring the diffusion of ideas, particularly through the media, the government has a long and unfettered history of content-based regulation.<sup>7</sup> While the Court has recognized the government's ability to regulate

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1. *Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that the First Amendment grants the greatest protection to political expression "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

2. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 4 (1998).

3. The Supreme Court sees the discourse between candidates preceding the election to be as critical as the election itself. *See* *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."). Indeed, as noted in *Buckley v. Valeo*, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." 424 U.S. 1, 14–15 (1976).

4. *See* *Near v. Minnesota*, 283 U.S. 697, 712–23 (1931) (declaring invalid prior restraints on speech and offering a summary on the history of prior restraints in Anglo-American law).

5. *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, 6 (1983) (describing "an outpouring of political writings—pamphlets, letters, articles, sermons" in support of the principles of democracy).

6. U.S. CONST. amend. I.

7. *See, e.g.,* *Abrams v. United States*, 250 U.S. 616 (1919) (allowing the regulation of content-specific speech under the guise of incitement); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overruling *Abrams*, but affirming the ability to regulate content-specific speech in

bad content in the media—such as indecency or obscenity<sup>8</sup>—over the past century, the Court has also validated a content-diversity requirement. In particular, the Court acknowledged the government’s need to foster political discourse as equally important to regulating bad content. Throughout this country’s history, the primary burden of informing the voting public has fallen to the press.<sup>9</sup> As the media evolves, so too does the Court’s recognition of the purpose and the extent of government regulation.

As evidenced by the text of the First Amendment, the principal mode of gathering important news first fell to the printed press. This remained true until the advent of broadcast communications in the early twentieth century. Voters learned the important facts of the day by listening to the radio, then by watching broadcast television. Over the past few decades, however, the public has received information from an increasingly diverse array of media: first cable, then satellite, and now the Internet.<sup>10</sup>

The public’s reliance on cable news networks as a source of election coverage has increased exponentially.<sup>11</sup> A 2010 Pew Research Center survey found that nearly 58% of Americans who received news did so via television news programs; the percentage of Americans seeking news through newspapers fell to a record low of 31%.<sup>12</sup> Among those gathering their information on television, “cable news

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cases of incitement).

8. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (permitting government regulation of indecency); *Miller v. California*, 413 U.S. 15, 23 (1973) (permitting the banning of obscenity); *Roth v. United States*, 354 U.S. 476, 476 (1957) (same).

9. The opinion in *CBS, Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff’d*, 453 U.S. 367 (1981), provides a succinct, yet rather comprehensive history of the changing sources of election coverage:

In the early days of this nation, political campaigns . . . were relatively simple affairs. Campaigning took the form of speeches “from stump and pulpit, of debate in the highly partisan press, of private correspondence, and of persuasive activities on election day.” Near the close of the nineteenth century, however, as printing presses became more common and the price of paper decreased, the “era of campaign literature” began. Radio was first used in the 1924 campaign . . . . By 1928, it was the most important campaign medium. Television was a factor in the 1948 election . . . . [and by] the 1952 campaign, presidential candidates were spending millions of dollars on television. Today, there can be no doubt that we are in the “era of television campaigning.” Indeed, since 95 percent of our people operate a television set for an average of over five hours a day, and 60 percent of them rely primarily on televisions for news, it would be hard to overestimate the importance of television to our political processes. It is undisputed that “[f]or presidential and senatorial candidates, the television is a necessity.”

*Id.* at 9–10 (footnotes omitted).

10. See for instance, Stephen J. Shapiro, *One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation*, 8 MEDIA L. & POL’Y 1, 2–13 (1999), for an excellent overview of the emergence of various communications technologies, and government’s Sisyphean attempts to regulate it.

11. Although called *cable* news channels, such channels are usually carried over both cable systems and via satellite transmission.

12. PEW RES. CTR., AMERICANS SPENDING MORE TIME FOLLOWING THE NEWS: IDEOLOGICAL NEWS SOURCES: WHO WATCHES AND WHY? (Sept. 12, 2010),

continues to play a significant role.”<sup>13</sup> Nearly 40% of Americans receive their news from cable television.<sup>14</sup>

What is most striking, however, is that viewing habits are increasingly polarized by viewpoint. Such trends are occurring mostly along party lines. Among Republicans, nearly four-in-ten regularly receive their news from the right-leaning Fox News Network.<sup>15</sup> This figure is up from roughly two-in-ten in 2000.<sup>16</sup> Democrats are not only watching less Fox News (15%) than a decade ago (18%), but over the past four years they have increasingly gathered their news primarily from the left-leaning MSNBC (up 3–5%).<sup>17</sup> Interest in the centrist CNN has fallen among many segments of the political spectrum: Republicans are tuning in at lower numbers than at any point in the past decade (down to 12% from 21% in 2000);<sup>18</sup> Independents are seeking news elsewhere (down 2%);<sup>19</sup> Democrats, however, have maintained consistency (remaining between 24–25%).<sup>20</sup> Overall viewership in CNN has fallen 3% in the past decade; viewership in Fox News, meanwhile, has risen by 6%.<sup>21</sup> Tellingly, during the highly charged 2008 elections, the percentage of people mainly receiving their news from cable sources reached a record high; the number of those receiving such information from the two political sides of the debate on cable increased significantly.<sup>22</sup> Critically, this gravitation toward cable news occurred despite overwhelming agreement that election coverage on cable news channels was inherently biased (82%).<sup>23</sup>

These figures reveal a troubling trend: more people receive news and generate their opinions primarily from narrowly tailored, partisan sources. In addition, many complain that these channels cover aspects of elections that ultimately serve little informative purpose—for instance, covering the daily goings-on of a campaign as opposed to substantive policy differences between candidates.<sup>24</sup> Programs on these

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press.org/report/652/ [hereinafter AMERICANS SPENDING MORE TIME FOLLOWING THE NEWS].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Ratings for the Fox News Network rose 6% while those for MSNBC increased by 4%, respectively, from 2000. *Id.*

23. *Id.*

24. See Jeffrey A. Benjamin, Note, *Pushing Democracy: Content-Based Regulations of the Press in Campaign Finance Law*, 2 N.Y.U. J.L. & LIBERTY 599, 604 (2007) (describing the dismal state of election coverage). Describing the current state of American political discourse, Ian Crouch of the *New Yorker* used the choice term, “sordid ephemera.” Ian Crouch, *Literary Smackdown: Obama, Fox News, and Sitting Bull*, NEW YORKER (Nov. 18, 2010), <http://www.newyorker.com/online/blogs/books/literary-smackd>. Crouch’s description reflects the belief, held by many, that much of the Washington debate little informs the voting public. A recent Pew Research Center survey found that a mere 35% of those voting in the 2010 midterm elections believed that important issues were covered by politicians and the media sufficiently, as compared to previous elections. PEW RES. CTR., MIXED REACTIONS TO REPUBLICAN MIDTERM WIN: PUBLIC LESS HAPPY THAN AFTER 2006 AND 1994 ELECTIONS,

channels, although purporting to carry discussions that are “fair and balanced,”<sup>25</sup> tend to favor one perspective to the exclusion of others. This is done by allowing or denying airtime to certain political candidates;<sup>26</sup> it also takes the form of denying ideologically opposing political groups the ability to air concerns.<sup>27</sup> In addition, the nature of television allows for the voluntary exclusion of diverse viewpoints: by receiving only one channel at any particular time, viewers are able to tailor their viewing habits to their own viewpoints. A viewer must merely turn on her television, already preset to a channel of her choosing, to bypass the myriad other “voices” on cable or satellite. Consequently, the entire “marketplace of ideas”<sup>28</sup> may never enter the homes of a large portion of the voting public. A primary concern of democratic government is the proper fostering of political speech,<sup>29</sup> however, this development, added to a greater reliance on such channels as a primary source of information, ultimately subverts the aggregate efficacy of the democratic process. A poorly informed voting body, therefore, undermines the very principle of democratic government.

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(Nov. 11, 2010), <http://people-press.org/report/675/> [hereinafter MIXED REACTIONS TO REPUBLICAN MIDTERM WIN].

25. Referring to the rather tongue-in-cheek slogan for the Fox News Network—likely created in response to the perceived bias of other news outlets. Nevertheless, both Fox News and MSNBC have had their share of bias allegations levied against them. *See, e.g., Candidates Running Against, and With, Cable News*, N.Y. TIMES, Oct. 24, 2010, at A24 (describing prominent Fox News personalities, such as Rupert Murdoch, Bill O’Reilly, Glenn Beck, and Sean Hannity, as supporting Republicans in the midterm elections); Brian Stelter & Bill Carter, *Political Gifts by Olbermann Bring Suspension by MSNBC*, N.Y. TIMES, Nov. 6, 2010, at A1.

26. *See Fox Donates at Least \$40 Million in Airtime to Potential GOP Presidential Candidates*, MEDIA MATTERS FOR AM. (Nov. 18, 2010, 5:50 PM), <http://mediamatters.org/research/201011180031> (describing the Fox News Network’s decision to provide airtime exclusively to Republican Presidential Candidates).

27. *See* Frank James, *MSNBC Rejects MoveOn.org’s Anti-Target Ad*, NPR.ORG (Aug. 19, 2010, 5:05 PM), <http://www.npr.org/blogs/thetwo-way/2010/08/19/129307994/msnbc-rejects-moveon-org-s-anti-target-ad>; Richard Allen Smith, *Why Fox News Rejected Our Clean Energy Ad*, HUFFINGTON POST (May 5, 2010, 1:59 PM), [http://www.huffingtonpost.com/richard-allen-smith/why-fox-news-rejected-our\\_b\\_564527.html](http://www.huffingtonpost.com/richard-allen-smith/why-fox-news-rejected-our_b_564527.html) (detailing Fox News’s refusal to air an ad generated from a liberal veterans group); Amanda Terkel, *Fox News Rejects Media Matters Ad Highlighting Its \$1 Million GOP Donation, Admits News Corp Opposes “Democratic Candidates,”* HUFFINGTON POST (Aug. 25, 2010, 11:44 AM), [http://www.huffingtonpost.com/2010/08/25/media-matters-fox-ad-reject-republican\\_n\\_693887.html](http://www.huffingtonpost.com/2010/08/25/media-matters-fox-ad-reject-republican_n_693887.html).

28. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]hat the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

29. The Supreme Court in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), found this and substantially more. It ruled that not only does the FCC have a duty to maintain the quality of content on licensed broadcasting for the public’s best interest, but so too does its duty extend to guaranteeing that quality. “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.” *Id.* The justification for this conclusion was the “scarcity” of the broadcast spectrum.

In light of this situation, and especially in response to the diminution of the diversity of viewpoints in the substantive political debate on cable television networks, this Note urges the federal government to implement a set of viewpoint diversity rules for such programmers. The rules perhaps best suited for this are some of the long-established principles of broadcast regulation: specifically the equal opportunity<sup>30</sup> and reasonable access<sup>31</sup> provisions, along with the Zapple doctrine.<sup>32</sup> To effect the change necessary to accurately present candidates' policy views, these rules must conform to the modern cable landscape. The justifications for this are many: not only have the traditional broadcast news stations lost substantial viewership to cable news networks, but independent supporters' group and political action committee advertisements may well increase on these networks in the wake of the Supreme Court's ruling in *Citizens United v. Federal Elections Commission*.<sup>33</sup> As the dependence on these sources for critical election coverage increases, the breadth of regulation by Congress and the Federal Communications Commission (FCC) must increase as well. To ensure that as many perspectives—and indeed, policy stances articulated by the candidates themselves—reach the voters as is possible, and as the primarily market-based approach has proven ineffective, government must fill the void. With such a great reliance on cable news channels as a primary source of information on critical election issues, a properly functioning democracy demands a diversification of ideas from such sources. Accordingly, this Note argues that at no previous time has the voting public been so dependent on so few, pervasive sources. Moreover, as these sources do a wholly inadequate job of fostering the requisite political debate to maintain a healthy democratic system, the broadcast regulation ought to extend to cable television networks.

To illustrate the importance of regulating political speech on cable, this Note is divided into three main sections. Part I discusses the current constitutional framework of modern media regulation. This framework spans from print, as the least regulated form of communication, to broadcast television and radio, which stand at the FCC's regulatory apogee. The limits of cable regulation are also explored. Part II centers on the rules, some created by Congress and others by the

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30. 47 U.S.C. § 315(a) (2006).

31. *Id.* § 312(a)(7).

32. Letter from FCC to Nicholas Zapple, Comm'n Counsel, Comm. on Com., for Interpretive Ruling Concerning Section 315 Fairness Doctrine, 23 F.C.C. 2d 707 (1970).

33. 130 S. Ct. 876 (2010) (holding that corporations are not limited in the amount they may donate to political action committees (PACs)). Indeed, the effect of the ruling is that corporations are now permitted to contribute unlimited amounts to PACs, which, in turn, pay for and support candidates and interest groups. *See, e.g.*, Ashby Jones, *What Will Citizens United Do to the 2010 Election Cycle?*, WSJ L. BLOG (Jan. 21, 2010 2:59 PM), <http://blogs.wsj.com/law/2010/01/21/what-will-citizens-united-do-to-the-2010-election-cycle/>. During the 2010 election cycle, the Republican Party benefitted the most from the expansion of the election financing laws. According to one reporter, "Republican-leaning outside groups spent \$187 million this cycle compared to just \$90 million by Democratic groups, a two-to-one GOP advantage." Jeanne Cummings, *Republican Groups Coordinated Financial Firepower*, POLITICO (Nov. 3, 2010 12:54 PM), [http://www.politico.com/news/stories/1110/44651\\_Page2.html](http://www.politico.com/news/stories/1110/44651_Page2.html). This spending included pointed attacks on the airwaves, including on the cable networks.

FCC, regulating candidate and supporters' political advertising speech. While the theoretical underpinnings of the fairness doctrine serve as the bases for these rules, the three rules discussed at length—equal opportunity, reasonable access, and the Zapple doctrine, which I collectively call the “political advertising rules”—shall be shown to still be in effect, and share none of the fairness doctrine's drawbacks. Part III discusses how and why the political advertising rules should apply to cable. The policy justifications tethering the rules to broadcast regulation apply cleanly and equally to cable regulation. This is all done within the settled constitutional framework for cable regulation.

Indeed, the First Amendment's protections of free speech and freedom of the press were designed to ensure, among other objectives, an informed and educated electorate.<sup>34</sup> The last twenty years have seen an explosion of news sources that one would expect to serve these interests. Consumers of news have numerous sources available, from 24/7 cable news networks to thousands of news blogs and other Internet websites. Paradoxically, however, the dramatic increase in available sources does not necessarily serve the goal of an informed and educated electorate. Many of the new sources promote a partisan political viewpoint, and news consumers select those sources that match their political viewpoints.<sup>35</sup> The effect is that consumers receive an increasingly narrow selection of political messages, leading to a more polarized national debate. Gone are the days when major news outlets attempted to present what they believed to be a balanced and neutral selection of sources. While the media landscape today may more closely resemble the highly polarized pamphleteering that was prevalent at the time of the founding, the current landscape does not promote greater education of the electorate on candidates' views. So what is the solution? Increased regulation to require at least the major cable networks to inform viewers about the candidates' platforms. The best means to accomplish this is by imposing the political advertising rules—equal opportunity, reasonable access, and the Zapple doctrine—to cable. By doing so, a better-informed electorate—at a minimum as to candidates' official stances—should be achieved.<sup>36</sup>

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34. See, e.g., LETTERS OF CENTINEL, NO. 1 (Samuel Bryan), in THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 73 (David Wootton ed., 2003) (categorizing freedom of the press as the “palladium of freedom,” suggesting the liberating effects of the spread of information).

35. See AMERICANS SPENDING MORE TIME FOLLOWING THE NEWS, *supra* note 12.

36. To be sure, this Note shall not seek to reimpose on cable and satellite many of the content-based demands required by the now-defunct fairness doctrine. Rather, only through the narrow confines of equal opportunities for candidates and supporters, and reasonable access for federal campaign advertisements, should FCC regulation apply. Nor shall this Note attempt to impose such rules on the current technological and regulatory jungle that is the Internet. Although the day may soon be upon us where the nexus between all previous forms of media coalesce through the Internet, this Note shall focus primarily on the pre-existing physical and regulatory framework of television communications, delivered by cable service providers via coaxial or fiber optic cables. Furthermore, as much of this debate centers on the content of cable system communications, a specific discussion about the applicability to satellite television shall be reserved for another day. Nevertheless, many of these networks discussed are carried on Direct-Broadcast Satellite (DBS) services, as well as through cable. This Note, therefore, focuses specifically on one of the most-used media

## I. CONSTITUTIONAL GROUNDS FOR MEDIA REGULATION

The First Amendment, although facially supporting the complete and unobstructed freedom of the press, in application, allows a number of opposing ideas. The Court has noted that the amendment compels government to support the principle “that debate on public issues . . . be uninhibited, robust, and wide-open.”<sup>37</sup> A substantial interest also exists in achieving “the widest possible dissemination of information from diverse and antagonistic sources.”<sup>38</sup> Indeed, this commitment to robust speech and wide dissemination of information is the underlying framework for government’s regulation of the media. The result of these priorities is a host of different standards based on the history and physical characteristics of each communication medium, the free speech rights of the press, and the government’s interest in controlling access to certain modes of communication.

As mentioned, the Court’s analysis for determining standards of scrutiny for communicative media—for instance, print, broadcast, cable, or the Internet—depends largely on the unique characteristics of each medium. Included among these characteristics are their physical properties, such as a medium’s scarcity or ubiquity, public accessibility, and the diversity of ideas available on the medium. Further, the Court has “long recognized that each medium of expression presents special First Amendment problems.”<sup>39</sup> These forms of expression shall now be examined.

*A. Printed Communications: A Libertarian Framework*

The first and most historically grounded medium is print. As the traditionally identified lifeblood of a vibrant and functioning democracy,<sup>40</sup> the press has received the greatest First Amendment protection by the Supreme Court. In its interpretation of the First Amendment’s freedom of the press, the Court upheld the printed press’s complete editorial discretion. The Court drew upon the diversity of voices available in print, and the medium’s ease of access at the time of the nation’s founding to determine the founders’ deference:

While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers.<sup>41</sup>

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informing the public today.

37. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

38. *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996) (quoting *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978)).

39. *FCC v. Pacifica*, 438 U.S. 726, 748 (1978) (citation omitted).

40. See WOOD, *supra* note 5, at 540–43 (describing the Federalists’ increasing recognition of the importance of drafting the Bill of Rights, including the freedom of the press, to preserve the essential foundational elements of the republic in the 1780s).

41. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 248 (1974) (footnote omitted).



Although the absolute editorial discretion of the printed press was challenged at the advent of the new media era, the Court in *Miami Herald Publishing v. Tornillo* maintained the First Amendment's deference.<sup>42</sup> Government has felt little compulsion to regulate the press, by virtue of the ubiquity of print, the ease with which it is produced, and its accessibility and diversity in the marketplace.

*B. Broadcast Radio and Television: The Current Zenith of FCC Media Regulation*

In contrast to print, broadcast media—television and radio—are subject to the most extensive regulation by the federal government. With broadcast emerging as a legitimate source of news and entertainment, the federal government was forced to generate entirely new rationales to justify regulation. The Court categorizes broadcast speech as a less-protected form of speech.

Congress first authorized broadcast regulation with the Radio Act of 1927.<sup>43</sup> The Act, though not a mandate, made clear to broadcasters that by using the public airwaves, they agreed to serve the “public interest, convenience, and necessity.”<sup>44</sup> The subsequent Federal Communications Act of 1934 provided a clear mandate to the newly created FCC: ensure that “the public interest, convenience, and necessity [be] served” by the broadcasters.<sup>45</sup>

The Court, in determining the best standard of review for broadcast, looked to other existing media—particularly print—for guidance. The Court found broadcast to be wholly distinct from print in determining a less-scrutinizing standard for reviewing government regulation. In *NBC v. United States*, the Court found the analogy between broadcast media and print apposite, and focused particularly on the nature of the medium.<sup>46</sup> As the broadcast spectrum was not free to all, but rather, was held in the public trust, there existed a parallel duty to maintain a broadcast media in the “public interest.”<sup>47</sup> As all broadcast communication must fit within the narrow confines of the federally determined electromagnetic spectrum, which itself is finite, only so many voices may be broadcast at once. “Unlike other modes of expression, [broadcast speech] inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation.”<sup>48</sup> Congress, with the Court's blessing, could force a sort of diversity of voices on broadcasting.

With the federal government choice to regulate the spectrum, held in trust by broadcasters and for the public benefit, its intervention into the medium—including

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42. *Id.* at 256 (rejecting the notion that government should be able to compel the press to produce content-specific pieces).

43. Radio Act of 1927, Pub L. No. 69-632, § 18, 44 Stat. 1162, 1170 (1927) (repealed 1934). Current regulations pertaining to broadcasting may be found at 47 U.S.C. § 151–621 (2006).

44. *Id.*

45. Communications Act of 1934, Pub. L. No. 73-416, 312(b), 48 Stat. 1064, 1087 (codified as amended at 47 U.S.C. § 157(b) (2006)).

46. 319 U.S. 190, 226 (1943).

47. *Id.* at 227.

48. *Id.* at 226.

for otherwise First Amendment-protected speech—was greatly expanded.<sup>49</sup> In *Red Lion*, the Court determined that as the spectrum was held in trust, access to broadcast airwaves could be congressionally mandated by the FCC.<sup>50</sup> In particular, the Court endorsed the FCC's requirements that broadcasters "give reply time to answer personal attacks and political editorials."<sup>51</sup>

The Court found further justification for the regulation of broadcast media in its pervasiveness. As noted, "broadcast media [had] established a uniquely pervasive presence in the lives of all Americans."<sup>52</sup> This may be attributed to a number of reasons. Of course, the physical attributes of broadcast media allow listeners to be reached in many settings—from work, to their car, and even their home. Also crucial is a broadcaster's "[l]ong experience in [the field], confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement" that especially allow broadcasters to reach and influence their audiences.<sup>53</sup> Finally, broadcast's unique pervasiveness and availability to children rendered it more freely regulable.<sup>54</sup> The Court relied on these considerations in determining a justification for, and the extent of, broadcast regulation.

Therefore, Congress and the FCC may impose regulations on well-established grounds: the scarcity of the medium, justifying the licensing of stations and requiring forced access, and the industry's pervasiveness. Furthermore, broadcast media regulation to this day is governed by an intermediate scrutiny test; under this test, the courts seldom find government restrictions invalid. Simply stated in *FCC v. Pacifica*, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."<sup>55</sup>

### C. Cable: A Nebulous Regulatory Realm

Whether cable television may be subject to such regulation, meanwhile, remains a less contested, but nevertheless highly energized debate. While some issues pertaining to government's oversight of cable have already been answered, quite a few have been resolved only partially or not at all. There are important constitutional questions that must be considered. For instance, is cable to be analogized to other regulated forms of media? Or will a new rationale be formulated to justify cable regulation? The Court has yet to clearly answer such questions. Nevertheless, the extent of and limitations in the Court's current attitude toward the regulation of cable television are explored.

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49. See, e.g., R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 308 (1993) (suggesting that when the electronic media "corrupt[s] or degrade[s] the public good" the government must act to protect the "trust corpus").

50. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391 (1969).

51. *Id.* at 396.

52. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

53. *Red Lion*, 395 U.S. at 400.

54. *Pacifica*, 438 U.S. at 748–49.

55. *Id.* at 748.

First, for purposes of regulation, the FCC and the Court identify cable television systems and cable television networks as separate entities.<sup>56</sup> For both of these, the Court has held that “[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”<sup>57</sup> Nevertheless, as in many First Amendment questions, the extent of one’s free speech and press rights is unclear. The extent of the permitted government regulation of private cable communications is equally unclear. What has been determined, however, is that these two entities—cable television systems and cable television networks—are treated differently in the Court’s First Amendment analysis.<sup>58</sup> This Note addresses the application of federal rules to both cable networks and systems.

As a general principle, the Court has held that content on cable may be regulated to a limited extent. Obviously, the federal government may regulate illegal communications on cable, such as obscene material and child pornography.<sup>59</sup> Depending on the source, the government may reprimand the cable network operator or the cable programmer. However, the FCC’s indecency regulation over broadcast does not extend to cable.<sup>60</sup> In addition, various levels of government may regulate parts of the cable enterprise. The Court has ruled explicitly that federal, state, and local governments may control access to cable systems. For instance, in *Community Communications v. Boulder*,<sup>61</sup> and *Los Angeles v. Preferred Communications*,<sup>62</sup> local governments were held to have the power to grant exclusive franchises to build and maintain cable system infrastructures. While these localities were not permitted to regulate per se the content of the communication delivered by cable, they were allowed to determine which cable systems had access to particular communities.<sup>63</sup>

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56. The “cable system operator” is the organization that retransmits television feeds from television producers, through its coaxial or fiber optic cables, to consumers. Such system operators receive exclusive franchisees from local and state governments to operate their infrastructure in specific regions. Franchisees are those regulated by such state and municipal governments. “Cable television networks” are the originators of programming and content. These two entities can sometimes overlap.

57. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 636 (1994) (citation omitted).

58. *See, e.g., L.A. v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 493–95 (1986) (noting that First Amendment interests are clearly implicated when dealing with cable system operators, yet tempering such rights by recognizing municipalities’ interest in regulating its cable infrastructure).

59. *See Miller v. California* for the Court’s articulation of the proposition that “obscene material is not protected by the First Amendment,” 413 U.S. 15, 36 (1973). Of course, as the government could broadly regulate obscenity, it could do so even in light of the First Amendment protections afforded to speech on cable.

60. *See United States v. Playboy Entm’t Grp.*, 529 U.S. 803 (2000) (holding a component of the Communications Decency Act invalid as not the least restrictive means available to advance the government interest).

61. 455 U.S. 40 (1982).

62. 476 U.S. at 493.

63. *See Turner I*, 512 U.S. at 628 (suggesting that “the cable medium may depend for its very existence upon express permission from local governing authorities,” (quoting Comty.

A part of the Court's reasoning turns on the cable system's reliance on public rights of way. As the cable system operators must excavate city streets and sidewalks and gain access to power lines, the local municipality—with power derived from the state's police powers<sup>64</sup>—may determine who can access such rights of way.<sup>65</sup> Hence, as cable systems may reach consumers only through the assistance and blessing of each locality, regulation is more constitutionally palatable.

The federal government, however, does not possess the police powers of the states to grant or deny cable systems franchises.<sup>66</sup> Accordingly, the Court found other grounds to justify the FCC's minimal regulation of cable systems. In *Turner I*, the Court, although affirming government's right to regulate cable, declined to extend the *Red Lion* reasoning for the regulation of broadcasting to its cable analysis.<sup>67</sup> Justice Kennedy, writing for the Court, noted that “[t]he justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. . . . The scarcity of the broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum.”<sup>68</sup> Further justification came from the “inherent physical limitation on the number of speakers” able to communicate through the broadcast spectrum.<sup>69</sup> The Court, therefore, concluded that such justifications could not apply to cable television:

The [rationale in the] broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium.<sup>70</sup>

Cable, however, could be regulated on the grounds that the government's law was content-neutral and passed intermediate judicial scrutiny.<sup>71</sup> In this instance, as a result of the cable companies' monopoly on the distribution of television channels, they were effectively excluding weak local broadcast networks from their channels. The Court found that by virtue of cable's ownership of the “essential

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*Commc'ns Co. v. Boulder*, 660 F.2d 1370, 1377–78 (10th Cir. 1981)).

64. See *Cnty. Commc'ns Co.*, 455 U.S. at 55 (describing that a municipality has only the power allocated to it by the state and previously held by the state).

65. See *Preferred Commc'ns*, 476 U.S. at 493–94 (acknowledging that physical capacity could be a determining factor in permitting new, competing cable systems).

66. See *Turner I*, 512 U.S. at 640–42 (ascribing the federal government's only ability in regulating cable speech, other than obscenity, to antitrust limitations, which invokes rational basis, and to must-carry rules).

67. *Id.* at 636. The government's regulation of cable was narrowly affirmed by validating “must-carry” provisions. These provisions mandated cable system operators to carry all local broadcast channels. This reflects that cable television systems are not completely exempt from government oversight.

68. *Id.* at 637–38 (citation omitted).

69. *Id.* at 638.

70. *Id.* at 638–39.

71. See *infra* note 76.

pathway for cable speech,” cable system operators could “silence the voice of competing speakers with a mere flick of the switch.”<sup>72</sup> Importantly, the Court found equally crucial the duty to “ensure that private interests not restrict . . . the free flow of information and ideas.”<sup>73</sup> This ability to warp or deny speech over cable—abundantly utilized prior to the Court’s ruling—was a compelling justification for legislative intervention.<sup>74</sup> Furthermore, because it required cable system operators to carry local broadcasters, the Court refused to find that broadcasters’ free speech rights were violated.<sup>75</sup> This regulation specifically added to the diversity of voices on their networks.

However, *Turner I*, while declaring that Congress may regulate access to cable television, is perhaps best a reflection of the Court’s limitations on government cable speech regulation: restrictions must pass the *United States v. O’Brien* intermediate scrutiny test.<sup>76</sup> In light of the Court’s rulings on these three cases, the only legislation that may hope to survive must either relate to a local municipality or the state’s ability to issue local cable franchises or satisfy the *O’Brien* test. The government has not extensively legislated or regulated cable; the ability to do so, however, even considering these cases, is argued by many to still exist.<sup>77</sup>

## II. REGULATING POLITICAL DISCOURSE ON BROADCAST: POLITICAL ADVERTISING RULES

The increasing reliance on new communications technologies in the twentieth century raised concerns about the quality and fairness of the information presented through those communications. While much of this concern centered on the morality or decency of the message expressed,<sup>78</sup> contemporary commentators found

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72. *Turner I*, 512 U.S. at 656 (footnote omitted).

73. *Id.* at 657.

74. *See id.* at 632–33 (“Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues.”).

75. *Id.* at 645.

76. *Id.* at 652 (citing *United States v. O’Brien*, 391 U.S. 367, 383 (1968)). The *O’Brien* test held that when combining speech and nonspeech elements, a sufficiently important government interest in regulating nonspeech may justify incidental First Amendment limitations. Such enacted regulation must (1) be within the government’s constitutional power, (2) further an important or substantial governmental interest, (3) which, itself, must be unrelated to the suppression of speech, and (4) the prohibition must infringe on no more speech than is essential to further that interest. *O’Brien*, 391 U.S. at 376–77.

77. Over the past few decades, calls for the regulation of cable have not subsided. Professor Jerome Barron detailed extensively how the Court has grappled with various calls for cable regulation. Jerome A. Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 GEO. WASH. L. REV. 1495, 1497–99 (1989).

78. *See*, for example, Denise M. Trauth & John L. Huffman, *Obscenity and Cable Television: A Regulatory Approach*, 95 JOURNALISM MONOGRAPHS 1, 13–25 (1986), for a thorough overview of the development of indecency and obscenity laws, and the Court’s treatment of them, throughout this nation’s history.

equally serious, if not more serious, the quality of political speech.<sup>79</sup> As described, the issue of access to modes of communication—especially when such modes act as purveyors of political information for the public—plainly implicates scrupulous First Amendment analysis.<sup>80</sup> Thus, the Court declared: “Political speech, we have often noted, is at the core of the First Amendment.”<sup>81</sup> Furthermore, as recognized by the Court in *Buckley v. Valeo*, “[t]he electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication *indispensable* instruments of effective political speech.”<sup>82</sup> Beginning in the 1920s, therefore, Congress and later the FCC implemented progressive communications regulations in order to foster a healthy political debate.<sup>83</sup> These regulations included, among others, the now-obsolete fairness doctrine, along with the equal opportunities provisions, reasonable access provisions, and the Zapple doctrine.<sup>84</sup>

The history, purpose, and extent of each of these regulations on current broadcast media shall now be explored. With one exception—the fairness doctrine—these regulations achieve the goal of encouraging “the widest possible dissemination of information from diverse and antagonistic sources . . . essential to the welfare of the nation.”<sup>85</sup>

This analysis begins with the defunct fairness doctrine, whose constitutional justification is shared with the political advertising rules. These rules—equal opportunity, reasonable access, and the Zapple doctrine—emanate from that core First Amendment principle, noted in *Turner I*: that private interests not restrict the free flow and reception of ideas.<sup>86</sup>

#### A. The Apex of Broadcast Regulation: The Fairness Doctrine

Although not the first of the broadcast regulations, the fairness doctrine was the most expansive. Consistent with the government’s obligation to regulate and maintain the broadcast spectrum in public trust, the FCC found essential the need to ensure balanced discussion of controversial issues over broadcast media, and the

79. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (expressing fear that those seeking to convey important information may be barred from doing so due to the nature of modern mass media).

80. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969) (ruling that if congressional action chilled rather than furthered broadcast speech, the Court would reconsider such a law); *Turner I*, 512 U.S. at 636 (insisting that the transmission of speech over cable validates First Amendment analysis).

81. *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 483 (1988) (O’Connor, J., dissenting) (citation omitted).

82. 424 U.S. 1, 19 (1975) (emphasis added).

83. See Radio Act of 1927, Pub. L. No. 69-632, § 18, 44 Stat. 1162, 1170 (repealed 1934) (creating the forerunner to the FCC and establishing an early version of the equal opportunities provision).

84. See *infra* Part II.A–D.

85. *Turner I*, 512 U.S. at 663–64 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n.27 (1972) (plurality opinion)).

86. *Id.* at 641.

agency imposed strong content-based regulations.<sup>87</sup> In the wake of *Red Lion*, the FCC clarified its expectations of broadcasters under the fairness doctrine, and touched briefly on its history:

The fairness doctrine was evolved as a policy under the public interest standard [under *NBC v. United States* and *Red Lion*], given its definitive policy statement in the Commission's 1949 *Editorializing Report* . . . . The Commission early determined that if the fairness doctrine were to achieve its most salutary purpose, an affirmative obligation in this respect must be imposed upon the licensee.<sup>88</sup>

Premised on the scarcity of the broadcast medium, the FCC implemented stringent regulations on the broadcast networks and their affiliates.<sup>89</sup> The justification for these regulations, it found, originated in the First Amendment: namely, that “[t]he keystone of the fairness doctrine and of the public interest is the right of the public to be informed—to have presented to it the ‘conflicting views of issues of public importance.’”<sup>90</sup>

The Court in *Red Lion* upheld this interpretation of the First Amendment.<sup>91</sup> Indeed, as the doctrine's effects were to impose limitations on the free speech rights

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87. See *infra* note 89 and accompanying text.

88. *In re* Obligations of Broad. Licensees Under the Fairness Doctrine, 23 F.C.C. 2d 27, 27 (1970) (citation omitted). It is worth noting that Congress never codified the fairness doctrine itself. Telecommunications Res. & Action Ctr. [TRAC] v. FCC, 801 F.2d 501, 516–17 (D.C. Cir. 1986). When the FCC later considered rescinding elements of the fairness doctrine, it was not statutorily mandated to continue enforcing it.

89. A licensee had the duty to ensure the fair presentation of controversial issues to its viewing community. The fairness doctrine first imposed a two-prong obligation on broadcasters: license holders were “required [1] to provide coverage of vitally important controversial issues of interest in the community served by the licensees and [2] to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.” *In re* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the Gen. Fairness Doctrine Obligations on Broad. Licensees, 102 F.C.C. 2d 145, 146 (1985) [hereinafter *1985 Fairness Report*]. Subsequent to these regulations were a number of clarifying, corollary rules. Only the most central need be described here. The first was the “personal attack doctrine,” which required that when a broadcaster airs an attack on the honesty, character, or integrity of an individual, that broadcaster must “notify that person or group of the attack . . . provide a script or tape of the attack and . . . offer reasonable opportunity to respond using their broadcasting facilities.” Gayle S. Ecabert, Comment, *The Demise of the Fairness Doctrine: A Constitutional Reevaluation of Content-Based Broadcasting Regulations*, 56 U. CIN. L. REV. 999, 1001 (1988) (footnotes omitted). The “personal editorial” and “personal attack” rules were formally abandoned by the FCC in 2000 by judicial order. *Radio-Television News Dir. Ass'n v. FCC*, No. 98-1305, (D.C. Cir. Oct. 11, 2000). When a broadcaster endorses a candidate for office, meanwhile, a corollary related rule requires that that broadcaster inform that candidate's opponent and, again, offer reasonable opportunity for response. Ecabert, *supra*, at 1001. This might be described as a broadcasting political editorial rule.

90. *In re* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Pub. Importance, 40 F.C.C. 598, 604 (1964).

91. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969) (validating the First

of broadcasters, it was deemed a content-based restriction under the First Amendment; nevertheless, as broadcast stations communicate over the airwaves—itsself a scarce medium—First Amendment impingement was deemed permissible.<sup>92</sup> Despite the Court’s affirmation of the doctrine in *Red Lion*, many continued to contend that the doctrine chilled speech more than it promoted the judicious presentation of controversial issues.<sup>93</sup>

Meanwhile, accompanying the fairness doctrine, but specifically incorporated into the Communications Act of 1934, was a rule that dealt with the donation of airtime for the purposes of advertisements for political candidates—this, of course, is the equal opportunities provision.<sup>94</sup> If a broadcaster donates airtime to a candidate, that broadcaster must donate equal airtime at the same levels of viewership for the other candidate; if the broadcaster sells airtime to a candidate, the licensee must make similar airtime available to the other candidate at equal price.<sup>95</sup>

In 1985, and after a changing of the guard at the FCC, a report was released detailing the efficacy of the fairness doctrine. The *1985 Fairness Report*, contrary to a decade of FCC reports affirming the benefits of the doctrine,<sup>96</sup> concluded that the doctrine had the overall effect of chilling rather than fostering protected political speech.<sup>97</sup> The FCC, for the first time, suggested that the free market be allowed to generate its own flourishing “marketplace of ideas.”<sup>98</sup>

The fairness doctrine was thereafter abandoned. Nevertheless, the constitutional underpinnings of the doctrine, which persist not only in section 315, but also in the other political advertising rules, remain in effect today.<sup>99</sup> To understand these rules, therefore, which emerged unscathed from the fairness doctrine’s dismantling, is best done after fully recognizing each rule’s intended purpose and theoretical justification—all premised in that public interest standard affirmed in *Red Lion*—and contrasting them with the FCC’s reasoning for ending the fairness doctrine. While the fairness doctrine may have indeed chilled speech, these specific

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Amendment goal of “producing an informed public”).

92. *Id.* at 390 (“Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”).

93. Such calls, of course, culminate in the FCC’s internal document, the *1985 Fairness Report*. See *1985 Fairness Report*, *supra* note 89.

94. See 47 U.S.C. § 315(a) (2006).

95. Ecabert, *supra* note 89, at 1001–02. This provision of the doctrine is known as “equal opportunities.”

96. *Id.* at 1009–10.

97. *1985 Fairness Report*, *supra* note 89, at 156.

98. *Id.* at 196–221. The FCC details in the *1985 Fairness Report* the proliferation of voices in the marketplace, which, without the assistance of the fairness doctrine, effectively supply a diverse array of ideas.

99. Again, the Supreme Court, by affirming in *Red Lion* the public interest standard that formed the backbone of the fairness doctrine, also affirmed the constitutionality of the concurrent but separate political advertising rules. Furthermore, as the FCC abandoned the fairness doctrine without the Supreme Court ever formally declaring unconstitutional its framework in *Red Lion*, the basis for the advertising rules’ enforcement still persists. It is from this essential notion that an extension to cable is possible. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391 (1969).



broadcasting rules shall be shown to continue to do the opposite. Most importantly, the First Amendment foundation of the doctrine affirmed by *Red Lion*—the policy objective to keep the electorate informed by virtue of acting in the public interest—still hold true.<sup>100</sup> Critically, as the FCC abandoned the fairness doctrine narrowly on chilling effect grounds, and the political advertising rules are at most deemed content-neutral regulations, the right to be informed remains a valid and compelling justification for applying these rules to other political speech.<sup>101</sup>

*B. Section 315(a): Equal Opportunities*

Government has long sought to ensure the fair treatment of political candidates on the airwaves. Treatment need not be equal, but it must be “fair” in the sense that all properly recognized candidates have the opportunity to present their campaign platforms to voters. As Congressman Luther Alexander Johnson warned in support of a rule guaranteeing equal airtime for candidates in the Radio Act of 1927:

American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a Republic, and when such a weapon is placed in the hands of one, or a single selfish group . . . , then woe be to those who dare to differ with them.<sup>102</sup>

Consistent with these principles, Congress endeavored to maintain access to and accuracy of candidates’ positions via the airwaves. In particular, a regulatory regime was created requiring “that stations that permit candidates to appear on their airwaves must allow opposing candidates the same privilege.”<sup>103</sup> This rule, later incorporated into the Communications Act of 1934 as section 315(a), now has several specifying conditions.<sup>104</sup> For instance, section 315(a) requires that “[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office.”<sup>105</sup> However, these requirements do not apply to news-related appearances. The statute provides that in the case of a “(1) bona fide newscast, (2) bona fide news interview, (3) bona fide documentary . . . or (4) on-the-spot coverage of bona fide news events . . . [the candidate] shall not be deemed to [have] use of a broadcast station.”<sup>106</sup> The purpose behind this rule is to “encourage the ‘full and unrestricted discussion of political issues by legally qualified candidates.’”<sup>107</sup> But even more importantly, “the purpose of the section is

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100. *Id.* at 367.

101. *Id.*

102. 67 Cong. Rec. 5558 (1926).

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

104. 47 U.S.C. § 315 (2006).

105. *Id.*

106. *Id.*

107. Ricchiuto, *supra* note 103, at 227 (quoting *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 529 (1959)).

to require a broadcaster to treat equally all candidates for a particular office or nomination once the broadcaster has made its facilities available to any one of the candidates.”<sup>108</sup>

Section 315(a) seeks to ensure that if one candidate’s message or campaign is portrayed on a broadcast station, the opposing sides must be shown as well in order to provide as complete a picture as possible for potential voters.<sup>109</sup> Of course, there was much room for interpretation in the language of the statute. For instance, what is a “legally qualified candidate,” or what truly constitutes “use”? These, for the most part, have been resolved by subsequent legislation or FCC reports and orders.<sup>110</sup>

The continuing grounds for the statute’s use lies in the Court’s opinion in *Red Lion*. Again, the Court affirmed that as the government ensures in public trust the broadcast spectrum, it has a special obligation that political discourse be fostered for the public benefit.<sup>111</sup> Also, as section 315(a) was a statutory provision,<sup>112</sup> the *1985 Fairness Report* explicitly suggested exempting it from removal.<sup>113</sup> Furthermore, the specific complaints concerning the fairness doctrine centered on requiring broadcasters to identify and air controversial issues, and to voice both sides of a disputed issue.<sup>114</sup> Broadcasters, as they had difficulty identifying issues

108. *Paulsen v. FCC*, 491 F.2d 887, 889 (9th Cir. 1974).

109. A bevy of cases emerged following the introduction of section 315(a), illustrating the scope and importance of the rule. For example, if a station provides airtime to a candidate for their advertisement, it is compelled to provide airtime to that candidate’s “legally qualified” opponents for the same public office. *See, e.g., Florey v. FCC*, 528 F.2d 124, 131 (7th Cir. 1975) (ruling that a Communist Party member running for United States Senate in Illinois must be legally qualified—that is, on the ballot according to state law or a bona fide write-in candidate—prior to engendering section 315(a)). Moreover, a station is mandated to air advertisements of legally qualified candidates, even when such advertisements contain objectionable or slanderous material. *See, e.g., Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959) (holding that a station is immune from state libel actions when the libelous statements come from a campaign advertisement compelled by section 315(a)). Even when a legally qualified candidate takes airtime for nonpolitical uses, section 315(a) construes such use as falling within its auspices. *See, e.g., Paulsen*, 491 F.2d at 890 (considering an entertainer, who was also running for public office as a legally qualified candidate, to have used airtime according to section 315(a) even when no political issues were discussed).

110. The term “legally qualified candidates” has been clarified as any candidate for public office who “(1) [h]as publicly announced his or her intention to run for nomination or office; (2) [i]s qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and (3) [h]as met the qualifications” if running for president, set forth by the statute. 47 C.F.R. § 73.1940(a)(1)–(3) (2010). The largely more ambiguous “use,” meanwhile, has been narrowed by the above definitions and other legislation. *Id.* In addition, the candidate must thereafter qualify for a place on the ballot or have waged a significant write-in campaign. *See supra* note 109.

111. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969).

112. *See In re Obligations of Broad. Licensees Under the Fairness Doctrine*, 23 F.C.C. 2d 27, 27 (1970).

113. *1985 Fairness Report*, *supra* note 89, at 148 (noting that Congress’s codifying section 315(a) precluded the FCC’s abandonment of the rule).

114. *Id.* at 145. One broadcaster noted, “licensees are ‘conscious of the probability that

critical to particular communities and separating the various sides, declined to air controversial issues at all.<sup>115</sup> Such issue avoidance was precisely what Congress sought to avoid.

Section 315(a) is less ambiguous than the fairness doctrine as to the desired goal. It demands equity when a broadcaster gives publicity—whether positive or negative—to a candidate in a non-news story.<sup>116</sup> As Congress made even more explicit the requirements of the law, broadcasters' confusion and uneasiness seen during the fairness doctrine era is seldom seen today.<sup>117</sup> Simply by covering one candidate, a broadcaster must give the easily identified opposing candidate the same opportunity for airtime.

### C. Section 312(a)(7): Reasonable Access

Section 315(a) of the Communications Act of 1934 guaranteed a candidate that if his opponent received airtime on a broadcast station, he would be offered equal airtime; however, broadcasters could bypass this requirement altogether by refusing to make airtime available to anyone at all. Congress enacted section 312(a)(7) in 1972, known as the reasonable access provision, to close this loophole.<sup>118</sup> Inspired principally “to give candidates for [federal] public office *greater access* to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters,” the provision, although forcing a discussion of important political issues on the air, guaranteed candidates, at the very least, the ability to buy airtime.<sup>119</sup>

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coverage of a highly controversial issue will trigger an avalanche of protests' demanding air time for the presentation of opposing viewpoints.” *Id.* at 164 (footnote omitted).

115. *Id.* at 169.

116. *See* 47 U.S.C. § 315(a) (2006).

117. This is not to say, however, that section 315(a) does not have its detractors. Anne Kramer Ricchiuto has argued that section 315(a) has lost its efficacy in the modern communications era. While not explicitly calling for the provision's removal, she claims that the enforcement of the provision is so lax as to render its purpose ineffective. Ricchiuto, *supra* note 103, at 286–93; *cf.* 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 (2008) (arguing that section 315(a), though widely seen currently as ineffective, would increase in efficacy if Congress were to push for section 315(a)'s increased enforcement and its application to cable).

118. As with section 315(a), a number of cases exemplify the purpose of section 312(a)(7). For example, during the 1980 presidential election, the nation's broadcasters refused to sell airtime to the Carter-Mondale Presidential Committee—or any campaigns—citing the difficulties it would have due to the total number of presidential contenders. *CBS, Inc. v. FCC*, 453 U.S. 367, 373–74 (1981). The Court required, pursuant to the FCC's need to regulate the airwaves in the public interest, that the networks provide airtime. *Id.* at 377–78. Another example centered on Republican presidential hopeful Michael Stevens Levinson, who, while running in the New Hampshire Republican Primary in 1992, was denied access to a three-hour timeslot. *In re Complaint of Michael Steven Levinson*, 9 FCC Rcd. 3018, 3018 (1994). In exchange, he was offered a five-minute spot in primetime; the FCC ruled that such an offer—five minutes instead of three hours—particularly in light of the number of primary contenders, was reasonable access. *Id.*

119. *CBS, Inc. v. FCC*, 629 F.2d 1, 12 (D.C. Cir. 1980) (internal quotation marks

Indeed, it was less a concern that broadcasters withheld time from candidates, than the nature of the debate over broadcasts—supplemented by candidate advertisements—was insufficient to properly inform the electorate. Section 312(a)(7) was created out of “‘concern that the broadcast media were not making enough time available to candidates’ . . . . In Congress’ view, greater candidate access to the electronic media, and television in particular, was necessary so that [candidates] may better explain their stand[s] on the issues, and thereby more fully and completely inform the voters.”<sup>120</sup>

Section 312(a)(7) states that a broadcaster is required to “allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station . . . by a legally qualified candidate for *Federal elective office*.”<sup>121</sup> Importantly, section 312(a)(7) applies only for legally qualified candidates for federal office.<sup>122</sup> Moreover, broadcasters are not compelled to provide airtime to all federal candidates—only those who have fulfilled the requirements of a legally qualified candidate, as mentioned above for section 315(a).<sup>123</sup>

The section has been affirmed, both explicitly and implicitly, by the Court’s case law.<sup>124</sup> Of course, despite the later administrative abandonment of the fairness doctrine, the Court’s opinion in *Red Lion* affirmed the government’s ability to regulate speech over the broadcast medium.<sup>125</sup> Specifically, however, the Court in *CBS v. FCC* implicitly affirmed the constitutionality of the provision by upholding the obligation of broadcasters that “reasonable amounts of time be afforded [to] candidates for Federal office.”<sup>126</sup> Further, *Red Lion*, by upholding the constitutionality of the fairness doctrine, affirmed the policy determination of the public’s implicit right to hear the candidates’ platforms. By affording time to federal candidates to make clear their stances on the issues, viewers learn such positions simply by exposure.

The equal access provision, more than creating a new rule by itself, might best be seen as an extension of the equal opportunities provision. Not only must broadcast licensees afford equal airtime to an opposing candidate if one is given, or purchases time, but so too must the broadcaster explicitly make available time for such political discussion for federal candidates. This is rooted in the strong constitutional notion, most clearly reflected in First Amendment doctrine, that information distributed to the voting public is paramount to fostering a healthy, functioning democracy. The Court affirmed the constitutionality of the rule, noting that “[i]n a footnote . . . we referred to the then recently enacted § 312(a)(7) as . . .

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omitted) (emphasis in original) (citation omitted).

120. Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1499 (1986) (footnote omitted) (internal quotation marks omitted).

121. 47 U.S.C. § 312(a)(7) (2006) (emphasis added).

122. *Id.* § 312(a)(7) (referring to a “legally qualified candidate for Federal elective office on behalf of his candidacy.”).

123. *See id.* § 315(a).

124. *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391 (1969); *CBS, Inc.*, 629 F.2d at 12.

125. *Red Lion*, 395 U.S. at 391.

126. 453 U.S. 367, 382 (1981).

‘essentially codif[ying] the Commission’s prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates.’<sup>127</sup>

*D. The Zapple Doctrine: Extending Equal Opportunity to Supporters*

The final extension from the equal time provision is the so-called Zapple doctrine. Articulated in response to a 1970 inquiry for clarification sent to the FCC by U.S. Senate Commerce Committee counsel Nicholas Zapple, the rule articulated a standard to be followed by broadcasters when asked by supporters or spokesmen of a candidate to provide airtime.<sup>128</sup> The FCC, recognizing the paramount importance of informing the voting public, found such an obligation for broadcasters: “First, we hold that the fairness doctrine is plainly applicable in the circumstances [where a licensee sells time to a supporter of a candidate].”<sup>129</sup> Broadcasters, therefore, are compelled to make available airtime for reply or rebuttal, if an opposing supporter’s group or candidate spokesman is provided time. Moreover, “[w]hen spokesmen or supporters of candidate A have purchased time, it is our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing candidate B’s spokesmen or supporters with free time . . . .”<sup>130</sup> The Zapple doctrine, therefore, requires that, like section 315(a), if one candidate spokesman or supporting group is given time, an equal opportunity must be afforded to the opposition to reply or rebut.<sup>131</sup> However, the broadcaster need not subsidize or lower its airtime rates to accommodate the opposing candidate.<sup>132</sup>

While appearing to be an extension of section 315(a), the Zapple doctrine may rather be understood as resting on the same theoretical framework as 312(a)(7) and 315(a). Former Commissioner William E. Kennard, for instance, explained in 1998 that all three rules were based on the public interest standard asserted by the Communications Act of 1934 and affirmed in *Red Lion* for the fairness doctrine.<sup>133</sup> The Zapple doctrine, therefore, is premised on well-trodden footing: to best further the political debate, such supporters’ or spokesmen’s messages ought to be

127. *Id.* at 385 (quoting *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 113–14 n.12 (1973)).

128. *See In re Request by Nicholas Zapple, Commc’ns Counsel, Comm. on Com.*, for Interpretative Ruling Concerning Section 315 Fairness Doctrine, 23 F.C.C. 2d 707 (1970).

129. *Id.* at 707.

130. *Id.* at 708.

131. An example of this, while occurring during the fairness doctrine’s heyday, and specifically centering on the Zapple doctrine, is an excellent parallel to the doctrine’s application to sections 312(a)(7) and 315(a). In *Democratic National Committee v. FCC*, the court found that supporters’ groups may speak when the opposition’s supporters’ groups are given airtime. 460 F.2d 891, 898 (D.C. Cir. 1972).

132. *In re Request by Nicholas Zapple, Commc’ns Counsel, Comm. on Com.*, for Interpretative Ruling Concerning Section 315 Fairness Doctrine, 23 F.C.C. 2d 707, 708 (1970).

133. William E. Kennard, Chairman, FCC, Preliminary Views in Support of FCC Authority to Require Broadcasters to Provide Free or Reduced-Rate Air Time to Political Candidates, (Feb. 19, 1998) [hereinafter Kennard Statement], available at [www.fcc.gov/Speeches/Kennard/Statements/stwek809.html](http://www.fcc.gov/Speeches/Kennard/Statements/stwek809.html).

included. Not only is the Zapple doctrine separate from the fairness doctrine and, thus, has escaped repeal, but its theoretical underpinnings are validated by the Court.<sup>134</sup>

Such validation was affirmed not only by the judiciary, but also by continued FCC use. First, the D.C. Circuit Court affirmed the FCC's Zapple doctrine practice. Although not explicitly reaching the constitutionality of the doctrine, the court, writing in the 1972 case *Democratic National Committee v. FCC*, found valid in dicta the FCC's continued adherence to the doctrine.<sup>135</sup> Moreover, the Zapple doctrine survived the sacking of the fairness doctrine in the late 1980s. In 1998, FCC Commissioners Susan Ness and Gloria Tristani issued a joint statement acknowledging the survival of and continued adherence to the doctrine.<sup>136</sup> Despite holding that the fairness doctrine is applicable when dealing with political supporters' groups,<sup>137</sup> the FCC implied that it merely implicated the same theoretical framework;<sup>138</sup> the same principles supporting the fairness doctrine support the Zapple doctrine. Indeed, as the underpinning of both the fairness and Zapple doctrines is the public interest standard—fostering the political debate, but as well, that the fairness doctrine broadly encompassed virtually all political content on broadcast—such non-candidate political speech was thus covered by the fairness doctrine.<sup>139</sup> While the *1985 Fairness Report* merely sought to invalidate elements of the fairness doctrine whose *effect* was to chill speech, the Zapple doctrine avoided such scrutiny.<sup>140</sup> Crucially, the Zapple doctrine likely survived due to the nominal economic cost imposed on broadcasters by requiring that they offer airtime to supporting groups. Unlike the fairness doctrine, which placed squarely on the shoulders of broadcasters the obligation to pay for coverage of all sides of a controversial dispute, the Zapple doctrine merely requires that if one side is given time or pays for time, the other side must be given the same opportunity.<sup>141</sup> Without demanding that broadcasters generate their own content, the FCC through the Zapple doctrine does not chill licensee speech; broadcasters simply must allow

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134. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391 (1969).

135. See 460 F.2d at 898 (noting the existence of the Zapple doctrine and implicitly affirming its continued use).

136. Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani Concerning the Political Editorial and Personal Attack Rules, no. 83-484, at ¶ 24 n.68 (June 22, 1998) (“Zapple was a corollary aspect of the Fairness Doctrine but is still enforced by the Commission.”).

137. *Id.* at ¶ 28 (calling this idea “simply a common sense application of the statutory scheme”).

138. *Id.*

139. See generally *In re Obligations of Broad. Licensees Under the Fairness Doctrine*, 23 F.C.C. 2d 27, 28 (1970).

140. See *1985 Fairness Report*, *supra* note 89, at 226–27. The *1985 Fairness Report* even suggested that other doctrines, such as the so-called Cullman doctrine—which ran corollary to the fairness doctrine but required that when a broadcaster sponsored a program on an issue, it needed to provide *free* airtime to the opposition, see *Cullman Broad. Co.*, 40 F.C.C. 576 (1963)—fall in line with the Zapple doctrine. *1985 Fairness Report*, *supra* note 89, at 226.

141. See *In re Request by Nicholas Zapple, Commc’ns Counsel, Comm. on Com.*, for Interpretative Ruling Concerning Section 315 Fairness Doctrine, 23 F.C.C. 2d 707 (1970).

opposing groups the same opportunity for airtime, and only if one group initiates the speech.

### III. POLITICAL BROADCAST REGULATIONS SHOULD APPLY TO CABLE

Few today would argue with the social importance of television in modern American society. Particularly, non-broadcast channels have become greatly utilized; indeed, the viewing public has increasingly turned to alternative television media, rather than traditional broadcast for programming. Nearly 128 million American homes have access to programming available on cable channels, with sixty-one million of those homes subscribing to at least basic cable.<sup>142</sup>

In light of the changing nature of communications technologies and changes in viewer preferences, with many seeking news and entertainment from an increasingly diverse array of sources, some on the Supreme Court have called for a reconsideration of the standards of review for modern constitutional communications doctrine. Justice Thomas, in his concurrence in *FCC v. Fox Television Stations*, for instance, suggests that the modern “dichotomy in First Amendment jurisprudence” has no rational basis, considering the evolving nature of communications technologies.<sup>143</sup> Although Justice Thomas argues that this technological shift warrants that all communication be unregulated, his observation about the efficacy of the current regulatory regime is correct.<sup>144</sup>

In this Part, the arguments behind the application of the political advertising rules to cable channels will be examined. A determination will be made concerning the applicability of such rules under current First Amendment doctrine. Further policy considerations—some of which were ignored or misconstrued by the Court—shall then be explored.

#### *A. The Political Advertising Rules Could Apply to Cable Under the Current Rationale*

The Court relies on a scarcity rationale to justify regulation of the broadcast spectrum in *NBC v. United States*.<sup>145</sup> Indeed, by analyzing the scarcity of the broadcast spectrum, the Court developed the public interest standard that underpins the broadcast rules.<sup>146</sup> On the other hand, the Court analyzed economic considerations and the survival of local broadcast stations in permitting federal regulation of cable.<sup>147</sup> Although the Court in *Turner I* ruled that the *O'Brien* intermediate standard of scrutiny should apply for cable regulation cases, it

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142. *Availability*, NAT'L CABLE & TELECOMMS. ASS'N (June 2011), <http://www.ncta.com/StatsGroup/Availability.aspx>.

143. 129 S. Ct. 1800, 1821 (2009) (Thomas, J., concurring).

144. *Id.* at 1821–22. Thomas suggests that as most broadcast media are now transmitted via cable or satellite, there is little reason to impose one form of regulation to broadcast channels but not to those originating on cable or satellite. *Id.*

145. 319 U.S. 190, 226–27 (1943); *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–89, 396–99 (1969).

146. *See NBC*, 319 U.S. at 214.

147. *See Turner I*, 512 U.S. 622, 656 (1994).

nevertheless held that must-carry provisions apply to cable system operators.<sup>148</sup> Thus, under current First Amendment doctrine, equivalents to equal opportunity, reasonable access, and the Zapple doctrine logically could apply to non-broadcast stations carried over cable and satellite. The rationales underpinning these, however, are different. While *Turner I* relied on the survival of local broadcast and economic competition to justify mandating must-carry rules, equally important policy considerations would allow other cable regulations to pass intermediate scrutiny, and therefore, First Amendment muster.

The first question to this analysis is whether applying the political advertising rules to cable would constitute content-based or content-neutral regulations. Of course, if content-based, strict scrutiny would apply; if content-neutral, the intermediate *O'Brien* test would apply.<sup>149</sup> The application of the rules to non-broadcast channels would clearly qualify as a content-neutral regulation. No matter one's political perspective or affiliation, one may access these channels to air their advertisements. Indeed, such application of the rule would be based less on the message discussed by the candidate than on the candidate's status as legally qualified. Although imposing rules that require certain types of speech is inherently an imposition on the absolute rights of broadcasters—that is, infringing on their editorial discretion—the FCC by extending such rules to cable system operators and networks would merely enhance the political debate by diversifying the voices. As the rules are content-neutral, *O'Brien* applies.<sup>150</sup>

Applying the political advertising rules in the context of cable to the *O'Brien* test still passes constitutional scrutiny.<sup>151</sup> Truly, the importance of informing the public, as an essential and substantial government interest, most helps the political advertising rules avoid defeat. First, the right to regulate cable speech is—as defined by a host of precedents<sup>152</sup>—within the constitutional power of the federal government. Next, satisfying the “substantial interest element,” is the government's interest of informing voters on the platforms of political campaigns. It is an interest perhaps unsurpassed in ensuring the health of the American democratic system,<sup>153</sup> and is clearly furthered by applying such rules to cable. Third and fourth, while restricting what advertisers a cable network may use may technically prohibit the network's exercise of free speech, the amount of speech that it prohibits pales in comparison to the beneficial effect it engenders. By all measures, such rules would promote all legally qualified candidate speech on cable, which, itself, is a core First Amendment goal.<sup>154</sup> Thus do the political advertising rules clear the *O'Brien* hurdle

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148. *Id.* at 643–44.

149. *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

150. *Id.*

151. *See supra* note 76 and accompanying text.

152. *See, e.g., Turner I*, 512 U.S. at 622; *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488 (1986); *Cnty. Commc'ns Co. v. Boulder*, 455 U.S. 40 (1982).

153. *See Turner I*, 512 U.S. at 641 (“At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.” (citations omitted)).

154. *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978) (noting that a substantial interest exists in having candidates reach voters by achieving “the widest



by virtue of the immensely compelling nature of informing the public to properly participate in democracy while infringing only on what advertisements a cable network may choose.

A number of further policy considerations support the assertion as part of the “substantial interest” prong of *O’Brien*. The Court has already ruled that the federal government may impose certain regulations on cable speech in *Turner I*.<sup>155</sup> The justification for this regulation is, of course, the economic survival of local broadcast stations. But equally important is ensuring that the public stays properly abreast of current news—no doubt including the positions taken by candidates on policy matters.<sup>156</sup> It would be, without doubt, a logical extension of this rationale to apply such rules to non-broadcast channels. Applying such rules is critical in light of changing viewer habits, particularly viewers gathering news from a greater number of sources, to ensure the noted goal of the FCC and affirmed by *Red Lion* of maintaining an informed citizenry—indeed paramount to the proper functioning of our democratic system.<sup>157</sup> Again, as an intermediate scrutiny test applies to the regulation of cable non-broadcast channels, the only element of the test at issue is the government’s compelling interest; the interest of keeping the public informed helps such a regulation pass as more than compelling. Indeed, the very health of our democratic system relies on it.<sup>158</sup> Simply, by permitting pervasive private interests to dominate the political discussion—and particularly over the voices of the candidates and their supporters themselves—the American voting bloc receives a fragmented, and indeed, manipulated fact set upon which it bases its decisions. By permitting candidates to speak for themselves, much misinformation is alleviated.

Moreover, other considerations supporting the advancement of such advertisement rules to non-broadcast channels are legion. First, in analyzing a purported rationale behind the First Amendment and the non-regulation of the print media, modern government policy has failed to keep up. As indicated, at the writing of the First Amendment, voters gathered news from a variety of sources: from newspapers, to pamphlets, sermons, and articles.<sup>159</sup> One engaged in society would hear varied political views—including the views of the particular candidates—simply by osmosis. By walking through a market, one might hear soapbox lectures, see headlines on newspapers at newsstands, or receive pamphlets

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possible dissemination of information from diverse and antagonistic sources”) (citation omitted). This mirrors in many ways, Holmes’s notion of fostering the “marketplace of ideas.” See *United States v. Abrams*, 250 U.S. 616, 630 (1919).

155. *Turner I*, 512 U.S. at 657. The Court noted this, founded in the belief that “[t]he First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.” *Id.* (citation omitted).

156. See Kennard Statement, *supra* note 133. As part of the public interest standard, the FCC was tasked with ensuring that its regulations further the public interest. The political advertisement and broadcast rules maintain this goal.

157. *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Pub. Importance*, 40 F.C.C. 598, 604 (1964).

158. See *Turner I*, 512 U.S. at 641; see also *supra* note 154.

159. WOOD, *supra* note 5, at 6.

advocating a variety of opinions. One engaged in this marketplace would unavoidably hear from a range of sources, and thereby, implicitly, further inform one's own voting habits. No need clearly existed for government to intervene to ensure a proliferation of the political debate—it naturally proliferated. Over the past two centuries, the means of staying informed changed. The current state of the media marketplace is not like the physical marketplace of yore. Indeed, the very nature of communications media no longer reflects a central tenet of the First Amendment: protecting speech, but also, protecting one's right to receive information. Viewers no longer are involuntarily exposed to the diversity of thought of the former marketplace. A greater number of people today are relying on fewer sources—accessed remotely and pandering to one side of the political or ideological debate—than at any time before in formulating their views.<sup>160</sup>

To achieve the desired First Amendment goals asserted by *Turner I*, and to a less-related extent in the broadcast cases,<sup>161</sup> it would appear poor public policy to deny application of the political advertisement rules to non-broadcast channels. If the ultimate goal is to properly inform the populace, the continued application of these rules to broadcast channels—which are becoming increasingly less-relied upon—but not to the emerging social forces of non-broadcast channels, would hardly achieve this. Rather, to best achieve an informed citizenry, candidates and groups must be allowed to directly address their positions on issues via all channels—broadcast and cable.<sup>162</sup>

There are two further considerations analyzed by the Court that, although unlikely determinative of a lesser standard of scrutiny for non-broadcast channels carried over cable, are revealing of the medium nevertheless. The first of these is the Court's current—and to a much greater extent the FCC's in recent years—implicit reliance on allowing the effects of the free market to best ensure the diffusion and diversity of political speech.<sup>163</sup> While the market-based approach might be successful in certain contexts, as a mode of ensuring healthy political debate, this is inherently flawed. As two commentators put it, the free market approach “fundamentally disregards an important political insight: that democratic governance requires accurate information and knowledge of public affairs, not mere opinion, and certainly not an aggregation of uninformed preferences.”<sup>164</sup> The networks this Note targets are, without coaxing, incapable of eliciting the accurate information called for by these commentators; cable networks will often afford

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160. See *supra* notes 11–23 and accompanying text.

161. *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978); *NBC v. United States*, 319 U.S. 190, 214 (1943).

162. Again, while this Note focuses specifically on cable systems and cable programmers, many of these policy justifications are also persuasive when applied to other media. Whether applying such concerns to channels distributed through DBS or the Internet, the ultimate goal of informing the voting bloc remains substantial and the same.

163. This is perhaps best encapsulated by the *1985 Fairness Report*. See *1985 Fairness Report*, *supra* note 89, at 147 (asserting that natural market pressures act as the best mechanism for ensuring a healthy and diverse political debate over broadcast).

164. R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1938 (1996).

airtime to whatever content receives the greatest viewership; this commonly takes the form of opinion-dominated talk shows—oft ill-informed and hyperbolic. While these shows are not in themselves bereft of intrinsic informative value, policy-laden stories, interviews, and advertisements are an electorate's greater boon. As evidenced by the media's overreliance on non-policy related stories in their run up to elections, stories heavy on policy do not sell.<sup>165</sup> Indeed, candidate and supporters' speech—in the form of advertisements—may best remedy this. Short of imposing strict fairness doctrine-like content requirements, how better might the facts about a current issue—and candidates' stances on them—be discussed than by the candidates themselves in their advertisements? Without offering the opportunity to both clearly identified sides of a political debate, cable news channels' bottom lines are not providing impetus to change; in the absence of such voluntary change, in the interest of public political discourse, government must fill the gap.

The second flaw in the Court's analysis concerns the "scarcity" rationale justifying the regulation of broadcast, but explicitly rejected in *Turner I* for cable systems. As the Court notes in this seminal cable regulation case, cable allows that "no practical limitation" be placed on the possible number of speakers.<sup>166</sup> Indeed, the Court seems to suggest that an unlimited number of speakers could be available. In light of the market-approach analysis, however, it is clear that only a certain number of economically viable voices may truly reach viewers.<sup>167</sup> Moreover, as cable system operators themselves have broad editorial discretion as to what they shall carry (save, of course, for the must-carry local broadcast channels), they may refuse to carry those channels—perhaps politically or informatively important—that confer little economic benefit. As such, a marketplace-imposed, monopolistic scarcity, much less a physical capacity, limits the number of voices over cable. Indeed, this metaphorical scarcity has the potential to create as strong a barrier as any physical scarcity.

One might argue that extending the political advertisement rules to non-broadcast channels would little affect the informing of the voting populace. Why rely on a candidate to convey his message, while the nature of much modern political discourse might well be described as "sordid ephemera," consisting of an exchange of ad hominem attacks or non-issues?<sup>168</sup> Quite simply, having an opposing voice—especially when speaking directly to facts asserted by candidates or political groups—is the best way to inform the public on a candidate's views. Allowing non-broadcast viewers to watch such channels, while hearing opposing views only through the lens of scorn and disdain, does little in the way of informing. Again, the greatest means to *properly* inform the viewing public on such matters is to allow candidates and supporters' groups to address the issues directly. By emulating the effect of the traditional colonial market, where information was learned by simple exposure, a better-informed electorate on candidates' positions on issues should result.

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165. See Benjamin, *supra* note 24, at 604.

166. *Turner I*, 512 U.S. 622, 639 (1994).

167. See Rainey & Rehg, *supra* note 164, at 1937 (arguing that the free marketplace does not foster truthful, or even equitable, political discourse).

168. Crouch, *supra* note 24.

Indeed, for all the above reasons, political advertisement rules, currently used for broadcast channels, could and ought to apply to cable channels through the current constitutional framework.

### *B. In Application*

The total sum spent on political advertisements over the course of the 2010 election cycle reached nearly \$1 billion.<sup>169</sup> As such, the effect of these political broadcast and advertising rules should be far-reaching. Although many campaigns do, and shall continue to tailor their advertisements to localities, seen only on the broadcast channels, there remains enough of a need, particularly for federal candidates, their spokesmen, and supporters' groups, to be heard on nationally available cable channels. The instances of cable networks, above-noted, denying advertisement access to certain groups<sup>170</sup> deprive the public of an important part of the democratic debate. Indeed, all three of these rules would impose an obligation on cable news programmers, as well as cable system operators. These obligations would apply to whomever sells advertising space—operators and programmers included.

As to the potential for overlapping demands for airtime, an order of priorities would likely be inherent. For instance, many candidates for the House of Representatives would be ill-advised to advertise on cable channels to a national audience. Senatorial candidates would be slightly less so. Given the nature of current election financing, campaigns are usually hard-pressed to spend their funds judiciously. When presidential and senatorial candidates both seek the same time, however, priority ought to go to the candidate with the greatest need to reach that channel's given geographic audience. If these candidates seek airtime on a national network, a presidential candidate would have a greater need than a senatorial candidate; if the network catered merely to a specific geographic location—such as a state—the senatorial candidate would be given priority.

Such obligations should not be difficult to determine; thus, the vagueness criticisms fraught in the fairness doctrine should not apply. Candidates and their supporters' groups are easily identifiable. In addition, following all three of the doctrines, networks and cable system operators need not give time away for free; rather, only if an opposing candidate or group is able to afford the equal time slot would it be provided.

### CONCLUSION

The regulation of communications media is well recognized by American jurisprudence. Although the First Amendment particularly protects certain forms of media from government intrusion, implicit in the amendment's doctrine is the fundamental right to receive information. *Turner I* notes that “[a]t the heart of the

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169. Michael Malone, *TVB Conference: Political Could Top \$1 Billion This Year*, BROAD. & CABLE (Nov. 10, 2010, 2:11 PM), [http://www.broadcastingcable.com/article/340266-TVB\\_Conference\\_Political\\_Could\\_Top\\_1\\_Billion\\_This\\_Year.php](http://www.broadcastingcable.com/article/340266-TVB_Conference_Political_Could_Top_1_Billion_This_Year.php).

170. See *supra* note 27 and accompanying text.

First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.<sup>171</sup> To receive information is a necessity for the proper functioning of a democracy; currently, cable news networks fall far short of achieving this necessity.

As such, under modern First Amendment doctrine, government is considered capable of cable and satellite regulation, but only after passing Court-imposed intermediate scrutiny. Requiring candidate speech on cable channels is not only a content-neutral obligation but also the most effective form of informing the populace on candidate positions on issues.

Furthermore, permitting supporter groups and others to do the same is perhaps the best method of directly addressing issues raised by opposing groups. Indeed, much of this obligation would stem from the need to correct misstatements of fact presented in many political advertisements. Similar to permitting a defamed person to clear one's name, the application of section 312(a)(7), 315(a), and the Zapple doctrine across all television media ensures that simple to gross misstatements of fact—all too common in the modern political arena—be corrected or immediately rebutted. Without such provisions, a partial picture may remain across many television stations. The result, aside from encouraging the continued transmission of untruths, is a voting bloc misguided on the issues and poorly informed on candidates' stances. To best achieve the lofty goal of informing the citizenry, candidates and supporters' groups must be afforded the opportunity to communicate a candidate's actual platform and address attacks launched against them. If not, the increased reliance on non-broadcast communications media by many in the voting public, relaying only those candidates' and supporters' messages in line with their own worldviews, will remain a deciding, and indeed, debilitating factor in elections in the United States. And although the technical constitutional justifications for regulating cable news networks may well soon be outdated, antiquated by the merging of traditional media through the Internet, the policy justifications made in this Note—advocating the continued health of the American democratic system through voter education—shall remain compelling.

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171. *Turner I*, 512 U.S. at 641 (citation omitted).