

The Equal Time Rule Is Anything But: How Can the Federal Communications Commission Apply the Equal Time Rule to Make Televised Political Debates Fairer and Ensure That Candidates Receive Relatively Equal Speaking Time?

Sydney Snower*

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* J.D., May 2021, The George Washington University Law School; B.A., Economics & Political Science, Loyola University Chicago. I would like to acknowledge the hard-working staff of the Federal Communications Law Journal for their dedication to the success of this publication. Special thanks to Christopher Kleihege for his guidance during the writing process and acceptance of my allegiance to the Oxford comma.

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I. INTRODUCTION

21 minutes and 16 seconds.¹

9 minutes and 34 seconds.²

6 minutes and 22 seconds.³

These figures do not represent average wait times for a favorite theme park ride or baking times for the perfect chocolate chip cookie. Instead, the figures represent the difference in speaking time between the candidate who spoke the most and the candidate who spoke the least in three presidential primary debates. Millions of Americans watch the presidential primary debates each election year and some criticize the networks and hosts for unequally allocating speaking time among candidates on the debate stage.⁴ In recent years, post-debate news reports featured minute-by-minute tallies of each candidate's speaking time that highlighted these disparities.⁵ Can the United States presidential debates be fairer? And is there a mechanism already in place that can address the imbalance of speaking time on the national debate stage?

The equal time rule may provide the solution. Although rarely invoked today, the equal time rule requires broadcasting stations to afford equal opportunity in airtime to all legally qualified candidates who submit a request.⁶ The FCC's interpretation of the equal time rule currently excludes

1. See Manuela Tobias, *Debate night: Who got the most talking time?*, POLITICO (Feb. 25, 2016), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/2016-debate-speaking-times-219751> [<https://perma.cc/8MW9-FDZ9>] (During the tenth Republican Party debate of the 2016 U.S. presidential election, hosted by CNN and Telemundo, Donald Trump spoke for 32 minutes and 16 seconds, while Ben Carson spoke for only 11 minutes and 10 seconds.).

2. See Weiyi Cai et al., *Which Candidates Got the Most Speaking Time in the Democratic Debate*, N.Y. TIMES (Dec. 19, 2019), <https://www.nytimes.com/interactive/2019/12/19/us/elections/debate-speaking-time.html> [<https://perma.cc/PW8L-2T5A>] (In the December 2019 democratic primary presidential debate hosted by PBS NewsHour and Politico, Andrew Yang spoke the least amount of time—10 minutes and 56 seconds—as opposed to Bernie Sanders, who spoke for 20 minutes and 30 seconds, the most of any candidate.).

3. *Id.* (In the seventh of twelve primary debates leading up to the 2020 U.S. presidential election, Democrat Tom Steyer spoke for only 12 minutes and 37 seconds, while Elizabeth Warren had the last word, speaking for one second shy of 19 minutes.).

4. See John O'Callaghan, *Final McCain-Obama debate had 56.5 million viewers*, REUTERS (Oct. 16, 2008), <https://www.reuters.com/article/us-usa-politics-ratings-final/final-mccain-obama-debate-had-56-5-million-viewers-idUSTRE49F9SU20081016> [<https://perma.cc/BRF7-GK34>]; see Andrew Yang @AndrewYang, TWITTER (Nov. 23, 2019, 1:01 PM), <https://twitter.com/AndrewYang/status/1198300556885929984> [<https://perma.cc/E8MK-S9AB>] (“[MSNBC] . . . [has] given me a fraction of the speaking time over 2 debates despite my polling higher than other candidates on stage. At some point you have to call it.”); Caitlin Oprysko, *#LetYangSpeak: Andrew Yang accuses NBC of cutting off his mic*, POLITICO (Jun. 28, 2019), <https://www.politico.com/story/2019/06/28/andrew-yang-debate-nbc-microphone-1388053> [<https://perma.cc/Y5GJ-H4YC>] (After Andrew Yang complained that his microphone had been turned off or muted during a Democratic primary debate, Yang supporters tweeted the hashtag #LetYangSpeak.).

5. See Tobias, *supra* note 1; Cai et al., *supra* note 2.

6. See 47 U.S.C. § 315(a).

political debates. This allows speaking time disparities to occur among candidates without penalty.

This Note explores the equal time rule and its viability as a solution to equalize the disparities in speaking time among candidates during televised debates.⁷ Part I introduces the problem of unequal speaking time during televised debates among candidates competing on the same debate stage. Part II discusses the elements of the equal time rule, its origin, its evolution, and concerns about its effectiveness and underlying purpose. Part III addresses the relevance and institutionalized nature of televised debates in U.S. elections, the impact political debates have on voter decision-making, and policy justifications to support continued adherence to and expansion of the equal time rule. Part IV suggests a modification to the equal time rule exemption for on-the-spot coverage of bona fide news events that would subject political debates to the rule. This could be accomplished by applying the two-pronged test created in the FCC's Aspen Institute Program on Communications Memorandum Opinion and Order to determine exemption status for each debate.⁸ The FCC could then impose a more exacting interpretation of the Aspen test's requirement that the program be the result of good faith news judgment and not based on partisan purposes. This would encourage broadcasting stations and licensees to afford relatively equal speaking time to all debate participants by making the two-prong test a requirement for exemption from the rule. Alternatively, Congress could amend Section 315 of the Communications Act to codify both the two-part Aspen test and an enhanced standard. Part V discusses further problems of the equal time rule apart from political debates, ranging from lax enforcement to notice issues. Ultimately this Note suggests that the FCC strengthen the equal time rule by broadening its scope and application to the political debate arena.

II. WHAT IS THE EQUAL TIME RULE AND HOW DID IT GET HERE?

A. Elements of the Equal Time Rule

The equal time rule requires broadcasting stations to afford equal opportunity in airtime to all legally qualified candidates who submit a request.⁹ This rule consists of the following elements: a legally qualified candidate; an opposing candidate; use of programming; equal opportunity; no censorship; and a timely request. Congress also created four statutory exemptions to the rule.¹⁰

7. See PHILIP MILLER, *MEDIA LAW FOR PRODUCERS* 340 (Focal Press, 4th ed. 2003).

8. Petitions of the Aspen Institute Program on Communications and Society and CBS, Inc., For Revision or Clarification of Commission Rulings under Section 315(a)(2) and 315(a)(4), *Memorandum Opinion and Order*, 55 F.C.C. 2d 697 (1975), *aff'd sub nom.* Chisholm v. FCC, 429 U.S. 890 (1976) (denying certiorari) [hereinafter *Aspen Order*].

9. 47 U.S.C. § 315(a); see Miller, *supra* note 7, at 340.

10. 47 U.S.C. § 315(a).

A Legally Qualified Candidate.¹¹ A legally qualified candidate is an individual who has publicly announced her intention to run for office, made a substantial showing that she is a bona fide candidate by participating in campaign activities, and met various local, state, and federal regulations for the office being sought.¹² A substantial showing means engaging “to a substantial degree in activities commonly associated with political campaigning” such as “making campaign speeches, distributing campaign literature, issuing press releases, [and] maintaining a campaign committee.”¹³ Once a candidate is a legally qualified candidate, she is eligible to invoke the equal time rule.¹⁴

An Opposing Candidate. Only an opposing candidate may invoke the equal time rule.¹⁵ During a primary election, only a candidate who is of the same political party is an opposing candidate for purposes of the equal time rule.¹⁶ For example, a Democratic primary candidate cannot request equal time based on coverage that a Republican primary candidate received in the same election cycle.¹⁷ However, during a general election, all candidates running for office are considered opposing candidates for purposes of the equal time rule.¹⁸

Use as Defined in Section 315(b) of the Communications Act of 1934. Only a candidate’s use of programming allows an equal time request.¹⁹ Use consists of a candidate’s appearance by voice or picture, “regardless of [the] candidate’s consent.”²⁰

Equal Opportunity. The equal time rule requires “equal time at equal cost” and applies to paid and unpaid programming.²¹ For example, if a television station affords coverage to Candidate A free of charge, Candidate B may request coverage of an equal duration free of charge.²² A candidate must also receive coverage during the same or comparable daypart.²³ For example, if a station sells 20 seconds of prime-time access to Candidate A for

11. *See id.*

12. 47 C.F.R. § 73.1940(e)-(f); *see State Laws Regarding Presidential Ballot Access for the General Election*, NAT’L ASS’N OF SECRETARIES OF STATE (Jan. 2020), <https://www.nass.org/sites/default/files/surveys/2020-01/research-ballot-access-president-Jan20.pdf> [<https://perma.cc/C4RR-WVJ5>].

13. 47 C.F.R. § 73.1940(f).

14. *See* 47 U.S.C. § 315(a).

15. *See id.*

16. *See* KWFT, Inc., *Letter*, 43 FCC 284, 284 (1948). While Section 315(a) applies to all legally qualified candidates for federal office, this Note focuses specifically on how the equal time rule can shape presidential debates.

17. *See id.*

18. *See id.*

19. *See* Jonathan D. Janow, *Make Time for Equal Time: Can the Equal Time Rule Survive a Jon Stewart Media Landscape?*, 76 GEO. WASH. L. REV. 1073, 1078 (Jun. 2008).

20. Miller, *supra* note 7, at 340.

21. *See id.*

22. *See* LOUIS SANDY MAISEL & MARK D. BREWER, *PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS* 351 (Rowman & Littlefield, 2010).

23. *See* *Rosenberg v. City of Everett*, 328 F.3d 12, 16 (1st Cir. 2003). *See also* Harvey L. Zuckman, *Censorship of Defamatory Political Broadcasts: The Port Huron Doctrine*, 34 N.Y.U. L. REV. 127, 127 n.7 (1959) (noting that “no fixed rule can be drawn” because licensees must consider day of week, time period, and potential size of audience when determining what constitutes equal opportunity).

\$10,000, the station must make available to Candidate B a comparable slot—20 seconds during prime-time—for \$10,000 if she so requests.

No Censorship. Should a candidate receive equal opportunity for time as a result of her request, the broadcasting station or licensee cannot censor the content.²⁴ As a result, a candidate who requests and is granted equal time need not appear in the same forum in which her opponent appeared.²⁵

A Timely Request. A candidate seeking protection under the equal time rule must request equal time from the broadcasting station within seven days of the date the relevant coverage of the opposing party first aired.²⁶ A candidate's appearance that stems from an equal time request does not itself trigger an opportunity to request equal time, eliminating requests made ad infinitum.²⁷ A candidate who has not received equal time may file a complaint with the FCC.²⁸

Four Statutory Exemptions. In 1959, Congress passed an amendment listing four categories of programs that are exempt from the equal time rule: (1) bona fide newscasts, (2) bona fide news interviews, (3) bona fide news documentaries, and (4) on-the-spot news coverage of bona fide news events.²⁹ Although Congress provided little guidance as to which characteristics defined each category, the FCC eventually decided that the fourth exemption, of relevance in this Note, encompasses televised political debates.³⁰

B. A Brief History of the Equal Time Rule: Its Origins and Reshaping Since 1927

The equal time rule³¹ originated from Section 18 of the Radio Act of 1927 which required radio broadcasters to afford equal time to candidates who requested it.³² The rule later expanded to television broadcasting after its

24. See 47 U.S.C. § 315(a).

25. See Shannon K. McCraw, *Equal Time Rule*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/949/equal-time-rule> (last visited Apr. 12, 2020) [<https://perma.cc/8GL8-JRSA>].

26. See 47 U.S.C. § 315(c).

27. See *id.*

28. See *Rosenberg*, 328 F.3d at 16.

29. See 47 U.S.C. § 315(a).

30. See Henry Geller, *Memorandum Opinion and Order*, 95 F.C.C. 2d 1236, paras. 15–19 (1983) [hereinafter *Geller Order*], *aff'd sub nom.* League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1983).

31. The equal time rule should not be confused with the reasonable access rule or the now-defunct fairness doctrine. The reasonable access rule mandates that television and radio stations allow candidates to purchase reasonable amounts of broadcast time. See 47 C.F.R. § 73.1944(a). The fairness doctrine, repealed in 1987, required broadcasting stations to present a balanced narrative. See Andrew Glass, *President Coolidge Signs Radio Act*, POLITICO (Feb. 23, 2019), <https://www.politico.com/story/2019/02/23/this-day-in-politics-february-23-1176607> [<https://perma.cc/JKC5-DASQ>].

32. See Sharon L. Morrison, *Radio Act of 1927 (1927)*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/1091/radio-act-of-1927> (last visited Apr. 12, 2020) [perma.cc/DY8S-6Z3M].

codification in Section 315 of the Communications Act.³³ The law was intended to prevent owners of broadcasting stations from giving more airtime, and thus unfair advantage, to one political candidate over another.³⁴

In 1959, Congress amended Section 315 in response to an FCC ruling that “candidate appearances on news programs would trigger the equal time requirements of the Act” and render it virtually impossible to report on a candidate without being required to provide equal time to all other requesting candidates.³⁵ The amendment created four statutory exemptions to the equal time rule: (1) bona fide newscasts, (2) bona fide news interviews, (3) bona fide news documentaries, and (4) on-the-spot news coverage of bona fide news events.³⁶ The statute offers no further guidance regarding interpretation of each exemption except that the fourth exemption for on-the-spot news coverage of bona fide news events “include[s] but [is] not limited to political conventions and activities incidental thereto.”³⁷ These exemptions gave broadcasters more latitude over their stations’ content and alleviated the burdens posed by giving every candidate, including minor ones, free air time.³⁸ In adopting the four statutory exemptions, Congress judged that “the public benefits of [dynamic coverage of political campaigns] are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters.”³⁹

One year later, Congress temporarily suspended the equal time rule in fear that it would thwart a highly sought televised presidential debate.⁴⁰ The 1960 presidential election cycle was in full swing and featured frontrunners then-Senator John F. Kennedy (D-MA) and then-Vice President Richard Nixon.⁴¹ By 1960, neither Congress nor the FCC had clarified whether the equal time rule applied to political debates or whether debates fell into any of the exemption categories.⁴² Congress recognized this uncertainty would likely deter broadcast stations from hosting a debate out of fear that the rule, if applicable, would require them to accommodate every presidential candidate

33. Brendan Sasso, *FCC Chief Vows to Require “Equal Time” on TV for Candidates*, THE ATLANTIC, (Oct. 22, 2015), <https://www.theatlantic.com/politics/archive/2015/10/fcc-chief-vows-to-require-equal-time-on-tv-for-candidates/457482/> [https://perma.cc/Q53F-N6YG].

34. See Frank Stanton, *The Case for Political Debates on TV*, N.Y. TIMES, Jan. 19, 1964, at SM16, <https://www.nytimes.com/1964/01/19/archives/the-case-for-political-debates-on-tv-a-broadcaster-analyzes-the.html> [https://perma.cc/PK6Z-VRVQ]. See also Thomas A. Durbin, *A Legal Analysis of the Equal Time Rule After the FCC’s Abolition of the Fairness Doctrine*, AM. L. DIV., (Nov. 23, 1987) <http://www.qrd.org/qrd/media/1994/legal.analysis.of.equal.time.rule-08.24.94> [https://perma.cc/4QJF-66EU].

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

36. See 47 U.S.C. § 315(a).

37. *Id.* at (a)(4).

38. See McCraw, *supra* note 25.

39. *Chisolm v. FCC*, 538 F.2d, 349, 368 n.18 (1976) (quoting S. REP. NO. 562, 86th Cong., 1st Sess. 10 (1959)).

40. See *1960 Presidential Debates*, CNN: ALL POLITICS, <https://www.cnn.com/ALLPOLITICS/1996/debates/history/1960/index.shtml> (last visited Apr. 14, 2020) [https://perma.cc/A5PP-L5R9].

41. See *id.*

42. See McCraw, *supra* note 25.

on the debate stage.⁴³ Temporary suspension of the equal time rule opened the doors for the first nationally televised presidential debate.⁴⁴ In response to this pivotal moment in American political history, CBS President Frank Stanton, who proved instrumental in persuading Congress to temporarily suspend the equal time rule, remarked that “[T]he 1960 debates made clear the importance of television as a compelling means of interesting and informing the public—the very foundation of democratic action.”⁴⁵ CBS, NBC, and ABC, which broadcast four debates between Kennedy and Nixon, had no legal obligation to grant equal opportunity to any of the other twelve candidates in the race.⁴⁶ Congress’s suspension of the rule lasted only until the end of the 1960 election cycle.⁴⁷

In 1962, under the direction of FCC Chairman Newton Minow, the FCC issued an opinion finding that political debates were not exempt from the equal time rule and should not be read to constitute bona-fide news events.⁴⁸ This decision had a chilling effect and “in practice . . . wiped politics off television.”⁴⁹ Chairman Minow later reflected: “There is no decision I made in public life that I regret more.”⁵⁰ Not until 1976, sixteen years after the Nixon-Kennedy debates, did a broadcasting station host or televise a presidential general election debate because “there was no way to winnow the field of challengers owed equal time.”⁵¹ The risk of being required to provide equal time to every legally qualified presidential candidate who requested such time, including third-party and minor fringe party candidates, was too great and would be administratively unfeasible and financially costly.⁵²

The FCC soon reversed course. In November 1983, the FCC declared that political debates constituted on-the-spot news coverage of a bona fide news event.⁵³ This meant that televised debates were categorically exempt from the equal time rule and licensees needed not invite all candidates to participate in debates.⁵⁴ A series of decisions followed that expanded the freedom of broadcasters to exercise discretion in the political debate arena.

43. *See id.*

44. *See id.*

45. Stanton, *supra* note 34.

46. *See* Jill Lepore, *The State of the Presidential Debate*, NEW YORKER (Sept. 12, 2016), <https://www.newyorker.com/magazine/2016/09/19/the-state-of-the-presidential-debate> [<https://perma.cc/4HKG-FB2H>].

47. *See id.*

48. *See id.*

49. Lily Rothman, *The 1983 Decision That Created Today’s Packed Debate Schedule*, TIME (Nov. 13, 2015), <https://time.com/4105221/democratic-debate-equal-time-rule-fcc/> [<https://perma.cc/4S4H-5XNN>].

50. *See id.*

51. Lepore, *supra* note 46.

52. *See id.* These concerns were legitimate then and would be legitimate today. For example, earlier this year, in April 2020, at least 552 presidential candidates were registered with the FEC for the 2020 presidential election. *See Presidential Candidates, 2020*, BALLOTEDIA, https://ballotpedia.org/Presidential_candidates_2020 (last visited Apr. 13, 2020) [<https://perma.cc/84SV-HJNN>].

53. *See Geller Order, supra* note 30, at 1243–44.

54. *See* Erwin Chemerinsky, *Changing the Rules of the Game: The New FCC Regulations on Political Debates*, 7 HASTINGS COMM. & ENT. L.J. 1, 6 (1984).

An unanimous three-judge panel of the U.S. Circuit Court of Appeals for the District of Columbia held that stations could sponsor debates “without giving equal time to candidates they don’t invite.”⁵⁵ Commentators coined this decision a “victory for broadcasters.”⁵⁶ Some years later, the U.S. Supreme Court held in *Arkansas Educational Television Commission v. Forbes* that broadcasters have a right to exclude third-party or minor candidates due to First Amendment limitations on content regulation and since debates are not public forums.⁵⁷

The equal time rule has drawn mixed responses. One of the loudest champions of the equal time rule was the League of Women Voters.⁵⁸ The League believed that the rule embodied the fundamental notion that a candidate should have the right to engage in political speech free of a broadcast entity controlling the narrative.⁵⁹ The League also supported the rule’s goals of spurring more robust political debate by entitling all qualified candidates to a national platform which would better inform the public about their electoral options and the political process.⁶⁰ During U.S. Senate hearings, League President Dorothy S. Ridings noted that “[b]roadcasters are profit-making corporations operating in an extremely competitive setting, in which ratings assume utmost importance.”⁶¹ Without safeguards in place, advocates of the equal time rule believed that ratings would likely remain broadcasting stations’ top priority at the expense of democratic access to information.⁶² Ridings also believed that the D.C. Circuit’s decision in *League of Women Voters Educ. Fund v. FCC* “expand[ed] the all-too-powerful role of the broadcasters in elections, which is both dangerous and unwise.”⁶³

Critics of the equal time rule cite First Amendment concerns.⁶⁴ Critics also note that print media is not subject to the same types of conditions as are radio and television.⁶⁵ Neither are online forums, which are an increasingly

55. Jon Pareles, *F.C.C. is Upheld on Equal-Time Rule*, N.Y. TIMES, Mar. 15, 1984, at C32, <https://timesmachine.nytimes.com/timesmachine/1984/03/15/053545.html?pageNumber=87>. See also Kathy Gill, *What is the Equal Time Rule?*, THOUGHTCO. (Aug. 13, 2018), <https://www.thoughtco.com/what-is-the-equal-time-rule-3367859> [<https://perma.cc/K6ZJ-YXR5>]; *League of Women Voters Educ. Fund*, 731 F.2d at 995.

56. See Pareles, *supra* note 55.

57. 523 U.S. 666, 688 (1998) (Stevens, Ginsberg, & Souter, JJ., dissenting); McCraw, *supra* note 25.

58. See Pareles, *supra* note 55.

59. See *id.*

60. *Equal Time: Hearings Before the S. Subcomm. on Commc’ns of the S. Comm. on Commerce*, 88th Cong. 42 (1963) (statement of Sen. Hartke).

61. See Lepore, *supra* note 46.

62. See *id.*

63. See Pareles, *supra* note 55.

64. See Janow, *supra* note 19, at 1090; see, e.g., *Branch v. FCC*, 824 F.2d 37, 49–50 (D.C. Cir. 1987) (finding that equal time rule is consistent with and does not violate First Amendment).

65. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that “right to reply” statute as applied to newspapers violated First Amendment).

popular marketplace for political information among American voters.⁶⁶ Critics note that the rule's inapplicability to the digital forum creates discriminatory and antiquated standards that lag behind our current technological reality and justifies either expansion or elimination of the rule altogether.⁶⁷

III. THE INSTITUTIONALIZED ROLE OF TELEVISED POLITICAL DEBATES IN U.S. ELECTIONS AND THE CONTINUED IMPORTANCE OF THE EQUAL TIME RULE

A. *Why Are Debates Important?*

Political debates today constitute on-the-spot news coverage of bona fide news events, making them categorically exempt from the equal time rule.⁶⁸ Broadcast stations and licensees have considerable discretion with respect to the format of debates, including which candidates to invite, which questions to ask, and the extent of questioning and engagement for each participating candidate.⁶⁹

Notwithstanding the fact that the equal time rule does not currently apply to televised debates, the overall goals of the rule including independence from dominant media companies, information to voters, and fairness are just as important on the debate stage as they are in the aspects of an election to which the rule applies. The particular relevance of televised political debates today supports the notion that they should not be categorically exempt from the equal time rule.

Televised political debates are particularly influential in current politics. "The debates have now become a much anticipated, institutionalized part of presidential campaigning."⁷⁰ In 1960, an estimated 70 million

66. 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, 1498 (1986). See also Mark MacCarthy, *An 'Equal Time' Rule for Social Media*, FORBES, (Jan. 21, 2020), <https://www.forbes.com/sites/washingtonbytes/2020/01/21/an-equal-time-rule-for-social-media/#46e174d45338> [<https://perma.cc/JL4N-YZAK>] (advocating for digital equal time rule to combat false or misleading digital candidate advertisements).

67. See John Hebbe, *With all these media options, fairness and equal time will only get lost*, WASH. POST (Jan. 31, 2020), https://www.washingtonpost.com/opinions/with-all-these-media-options-fairness-and-equal-time-will-only-get-lost/2020/01/31/5bc25a02-430b-11ea-99c7-1dfd4241a2fe_story.html [<https://perma.cc/V366-R6S4>].

68. See McCraw, *supra* note 25.

69. See *Crommelin v. Capitol Broad. Co.*, 195 So.2d 524, 526 (Ala. 1967) (holding that broadcaster did not violate equitable or legal duty); Julia Azari & Seth Masket, *The DNC's Debate Rules Won't Make The 2020 Primaries Any Less Chaotic*, FIVETHIRTYEIGHT (Feb. 20, 2019), <https://fivethirtyeight.com/features/the-dncs-debate-rules-wont-make-the-2020-primaries-any-less-chaotic/> [<https://perma.cc/D64D-UM5Q>] (The Democratic National Committee, when faced with a crowded field for the 2020 presidential election, established its own rules to determine which candidates qualified for a spot on the debate stage during the primary election.).

70. Maisel, *supra* note 22, at 352.

individuals tuned in to their televisions to watch the first televised presidential debate.⁷¹ During the 2008 presidential campaign cycle, 56.5 million viewers tuned in for the debate between then-Senator Barack Obama (D-IL) and Senator John McCain (R-AZ).⁷² More recently, the 2020 debate between former Vice President Joe Biden and President Donald Trump had 73 million viewers.⁷³ Primary debates have seen substantial viewer numbers as well. Part one of the first Democratic Party primary debate of the 2020 presidential election cycle received 15.3 million viewers while 18.1 million viewers tuned in for part two.⁷⁴ Political commentator Walter Lippman wrote, “[t]he TV debate was a bold innovation which is bound to be carried forward into future campaigns, and could not now be abandoned. From now on, it will be impossible for any candidate for any important office to avoid this kind of confrontation.”⁷⁵

Despite the rise of online political advertising and streaming, both of which are exempt from the equal time rule, millions of Americans still choose to watch the presidential debates each election cycle.⁷⁶ This suggests that broadcast media’s influence on voter attitude and preference is not obsolete. Some believe that “television news [has] the most far-reaching voice on who is plausible and who is not as contenders in [elections].”⁷⁷

Televised debates also influence voter perception of candidates by increasing issue knowledge, impacting perception of candidates’ character, and potentially altering voter preference.⁷⁸ A 2016 study reported that 29 percent of individuals surveyed, the largest percentage of those questioned, found televised debates “most helpful” in deciding for whom to vote.⁷⁹ The other categories included news coverage of a campaign, political talk shows, campaign rallies, political advertising, and broadcast interviews of candidates.⁸⁰ A 2008 survey reported that two-thirds of voters surveyed found

71. *First Televised Presidential Debate*, N.Y. TIMES (Sept. 26, 2011), <https://learning.blogs.nytimes.com/2011/09/26/septe-26-1960-first-televised-presidential-debate/> [<https://perma.cc/Q3AQ-S3KU>].

72. See O’Callaghan, *supra* note 4.

73. John Koblin, *In TV Ratings, Trump vs. Biden Was No Match for Trump vs. Clinton*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/business/media/trump-biden-debate-ratings.html> [<https://perma.cc/2HWZ-B2SL>].

74. Brian Stelter, *Second Night of CNN’s Democratic Debate Drew 11.3 Million Viewers on TV and Online*, CNN BUSINESS (Aug. 1, 2019), <https://www.cnn.com/2019/08/01/media/cnn-democratic-debate-ratings-second-night/index.html> [<https://perma.cc/K5E8-GVVR>].

75. Lepore, *supra* note 46.

76. See Koblin, *supra* note 73.

77. Colin Vandell, Note, *Words Signifying Nothing? The Evolution of 315(a) in an Age of Deregulation and its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT. L.J. 443, 445 (2005) (quoting former CBS News Executive Political Director Martin Plissner).

78. See William L. Benoit, et al., *A Meta-analysis of the Effects of Viewing U.S. Presidential Debates*, 70 COMM. MONOGRAPHS, 335, 336, (2010), <https://www.tandfonline.com/doi/abs/10.1080/0363775032000179133#preview>.

79. See Jo Holz, et al., *Presidential Debates: What’s Behind the Numbers?*, ANNENBERG PUB. POL’Y CTR., Sept. 2016, at 8, https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/Presidential_Debates_white_paper_Sept2016.pdf [<https://perma.cc/7XDW-DM2H>].

80. See *id.*

that the Obama-McCain debates were “very or somewhat helpful” in deciding which candidate for whom to vote.⁸¹

B. *Why Is the Equal Time Rule Important?*

The purpose of the equal time rule is to “facilitate political debate by qualified candidates.”⁸² Congress created the rule out of concern that broadcast stations and licensees could manipulate the outcome of elections by discriminating against certain candidates in allowing air time to some and denying it to others.⁸³ Andrew Schwartzman, head of the Media Access Project, commented that “[O]ver-the-air television and radio remain the most important force shaping public opinion with respect to elections. A broadcaster licensed to serve the public should not be able to put a thumb on the scale.”⁸⁴ In 1981, former Director of the United Church of Christ’s Communication Office, Everett C. Parker, also opined on this topic.⁸⁵ Parker noted that, “[I]t’s almost impossible for anyone who isn’t a major corporation with hundreds of millions of dollars in assets to get a (license for) an effective radio or television outlet.”⁸⁶ The same is true today. Barriers to obtaining a television or radio station license, much less a forum in which to host a political debate, create a space in which a small handful of wealthy individuals have the keys to control which candidates are able to reach voters during a debate.

In 1981, when asked if FCC regulations impeded coverage of issues, former President of CBS Broadcasting Gene F. Janowski responded that broadcast journalism could better serve as a channel to information if impediments like the equal time rule no longer existed.⁸⁷ Janowski remarked: “When you have 23 candidates for an office, and the world knows that only three or four have a chance, the broadcaster, as journalist, wants to have the privilege of concentrating on the leading contenders.”⁸⁸ In general, the equal time rule has had an equalizing effect in an environment where broadcasting stations and licensees have considerable power to reach the electorate and have advocated for increased autonomy.

81. See Russel Heimlich, *Most Say Presidential Debates Influence Their Vote*, PEW RSCH. CTR. (Sept. 11, 2012), <https://www.pewresearch.org/fact-tank/2012/09/11/most-say-presidential-debates-influence-their-vote/> [<https://perma.cc/99RL-W79C>].

82. *Rosenberg*, 328 F.3d at 16 (quoting Farmers Educ. & Coop. Union of America, N.D. Div. v. WDAY Inc., 360 U.S. 525, 529 (1959)).

83. See Durbin, *supra* note 34; see Zuckman, *supra* note 23, at 127.

84. Sasso, *supra* note 33.

85. See *id.*

86. *Id.* (Parker further opined: “[The] equal time rule [ensures that] broadcasters [are not] the ones deciding who, if anybody, gets on the air. In the past, newspapers have turned against one or another party or candidate and tried to destroy them by ignoring them. Broadcasters can’t get away with that right now. But do you think they are such angels that in some instances they wouldn’t use their power to destroy a candidate who has a right to reach the people?”).

87. See Ernest Holsendolph, *An Equal-Time Disagreement on F.C.C. Rules*, N.Y. TIMES, Oct. 18, 1981 (§4), at 10, <https://www.nytimes.com/1981/10/18/weekinreview/an-equal-time-disagreement-on-fcc-rules.html> [<https://perma.cc/T44G-SV98>].

88. See *id.*

Furthermore, political elections should exhibit fairness and the appearance thereof. The appearance of fairness and impartiality likely influence the electorate's confidence in the electoral system which may affect whether they decide to vote at all. Unequal speaking time among candidates may invoke the belief that the U.S. political system is unfair and controlled by a handful of individuals.

IV. IDENTIFYING OPPORTUNITIES FOR REFORM: HOW TO HARNESS THE EQUAL TIME RULE TO ENSURE THAT ALL DEBATE PARTICIPANTS HAVE AN EQUAL OPPORTUNITY TO SPEAK TO THE ELECTORATE

Section 315(a)(4) of the Communications Act does not specify the types of programs that constitute “on-the-spot bona fide news events” exempted from the equal time rule.⁸⁹ However, the statute provides that this category “include[s] but [is] not limited to political conventions and activities incidental thereto.”⁹⁰ In interpreting this provision, the FCC specified that televised political debates fit this category and has granted debates total exemption from the rule.⁹¹

The FCC currently “make[s] value judgments when applying the exemptions created by Congress.”⁹² For programs whose exemption status is unclear or disputed, the FCC generally conducts its own inquiry on a case-by-case basis to determine whether the programs qualify as on-the-spot bona fide news events exempt from the rule.⁹³ The FCC's inquiry involves examining the specific features of the television program.⁹⁴ In its 1975 *Aspen Order*, the FCC adopted a two-pronged formula to aid in this inquiry.⁹⁵ The first prong requires that “the format of the program reasonably fit within the news event exemption category.”⁹⁶ The second prong requires that the decision to host and broadcast a particular program or event be “the result of good faith news judgment and not based on partisan purposes.”⁹⁷ Furthermore, stations are not required before broadcasting, by either statute or administrative rulemaking, to obtain clearance from the FCC that a specific program is covered by an exemption.⁹⁸

89. See 47 U.S.C. § 315(a)(4); see Chemerinsky, *supra* note 54.

90. *Id.*

91. See *Geller Order*, *supra* note 30, at 1243–44.

92. See Ricchiuto, *supra* note 35, at 268.

93. A.H. Belo Corporation for Declaratory Ruling, *Staff Ruling*, 11 FCC Rcd. 12306, 12308, para. 4 (1996) [hereinafter *Belo*]; see *Aspen Order*, 55 F.C.C. 2d at 716, para. 40, n.20 (1975).

94. *Belo*, *supra* note 93, at 12308, para. 4; see *Aspen Order*, *supra* note 93, at 700, para. 12.

95. *Belo*, *supra* note 93, at 12308, para. 4; see generally *Aspen Order*, *supra* note 93, at 697.

96. *Belo*, *supra* note 93, at 12308, para. 4; see *Aspen Order*, *supra* note 93, at 704, para. 23.

97. *Belo*, *supra* note 93, at 12308, para. 4; *Aspen Order*, *supra* note 93, at 708, para. 30.

98. *Belo*, *supra* note 93, at 12309, n.6.

Departing from its prior “unnecessarily restrictive” standard, the FCC gives broadcasters broad discretion with respect to the *Aspen* test’s first prong.⁹⁹ *Aspen*’s first prong requires that “the format of the program reasonably fit within the news event exemption category.”¹⁰⁰ Broadcasting stations and licensees may decide the formats of programs that reasonably fit within the bona fide news event exemption category.¹⁰¹ For example, in *Belo*, the FCC held that programming need not be broadcast live to qualify as on-the-spot news coverage and that a taped program later broadcast publicly could satisfy the first prong.¹⁰²

The second prong of the *Aspen* test requires that the decision to carry and broadcast a particular program or event be “the result of good faith news judgment and not based on partisan purposes.”¹⁰³ While the FCC has not explicitly defined what this aspect of the test requires, the Commission’s application of the test has proved helpful in deciphering the meaning of good faith news judgment and non-partisan purposes.¹⁰⁴ In *Belo*, a newscaster moderated a taped program in which congressional candidates were given five minutes to answer questions.¹⁰⁵ The network then merged the candidates’ unedited responses into a one-hour program.¹⁰⁶ In evaluating various characteristics of the program, the FCC determined that there existed “no evidence in the record of any intent to advance a particular candidacy.”¹⁰⁷ The FCC found that a combination of several factors supported this conclusion.¹⁰⁸ Each featured candidate had the opportunity to respond to the same question for five minutes, the station used objective criteria including independent polling results to select the candidates for the event, and the station had assured candidates that it would not interrupt or edit any portion of their responses.¹⁰⁹ These factors contributed to the FCC’s belief that the station took reasonable steps to avoid the appearance of favoritism toward a specific candidate.¹¹⁰ As a result, the FCC held that the program met the *Aspen* test’s second prong in that it was the result of good faith news judgment and not based on partisan purposes.¹¹¹

99. *Id.* at 12308, n.5.

100. *Id.* at 12308, para. 4.

101. *Id.* at 12308, para. 4, 5.

102. *See id.* at 12310, para. 9.

103. *Id.* at 12308.

104. While the FCC has not formally defined partisanship, one definition is “a firm adherence to a party, faction, cause, or person” where one “exhibit[s] blind, prejudiced, and unreasoning allegiance.” *Partisan*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/partisan> (last visited Apr. 13, 2020) [<https://perma.cc/4TT4-3VTH>].

105. *Belo*, *supra* note 93, at 12307, para. 2.

106. *Id.*

107. *Id.* at 12310, para 10.

108. *See id.*

109. *Id.*

110. *Id.*

111. The FCC also reasoned that Congress believed that the equal time rule and its objectives “must be balanced against two other objectives no less vital: encouraging maximum coverage of all news events . . . in order to cultivate a fully informed public, and preservation of licensees’ traditional independent journalistic judgment with respect to broadcasting such events.” *Id.* at 12309, para 8.

In contrast, televised debates are not subject to this type of FCC inquiry because they are categorically exempt from the equal time rule and not subject to *Aspen's* two-pronged test.¹¹² The FCC automatically classifies political debates as on-the-spot bona fide news events and does not conduct any inquiry into the characteristics or quality of the debates.¹¹³ This categorical exemption diminishes the responsibility of broadcasting stations and licensees to achieve the principal goals of the equal time rule—equal opportunity to present ideas to the national electorate, less licensee influence on elections, and fairness in national elections and the appearance thereof.

As a result, televised political debates should no longer be categorically exempt from the equal time rule. Instead, a debate should receive the exemption only after having satisfied the two-pronged *Aspen* inquiry which requires the FCC to determine that the debate was “the result of good faith news judgment and [not] based on partisan purposes.”¹¹⁴

Moreover, the FCC should identify the scope of its inquiry with respect to televised debates. The exemption inquiry for televised debates should specifically contemplate the allocation of speaking time between debate participants. Under this modified approach, a significant difference in speaking time between one candidate and another would be a basis for determining that *Aspen's* second prong was not met. In other words, a disparity in speaking time would constitute evidence that the debate was not a result of good faith news judgment and was instead based on partisan purposes. *Belo* took into consideration the equal amount of speaking time each candidate was afforded but did not find this factor or any others dispositive.¹¹⁵ Additionally, *Belo* did not indicate how much weight it placed on this factor.¹¹⁶ Nonetheless, in the context of televised political debates, the *Aspen* test should be expanded to account for differences in speaking time among candidates. Satisfying the *Aspen* test, as the televised program did in *Belo*, would classify the debate as an on-the-spot bona fide news event which would thus be exempt from the rule.¹¹⁷

Under the *Aspen* test, if a television program does not satisfy the second prong, it is generally not classified as an on-the-spot bona fide news event, and as a result, it is subject to the equal time rule.¹¹⁸ The same should apply in the context of televised political debates. If the FCC determines that the format of a political debate was not the result of good faith news judgment or based on partisan purposes—in other words, one candidate received significantly less speaking time than an opposing candidate—the debate should not be granted the bona fide news event exemption. Thus, it would be subject to the equal time rule.

In application, this proposal has several steps. First, Candidate A must receive less speaking time during a debate than Candidate B. The FCC would then apply the *Aspen* test and determine, based on the test's second prong,

112. See *Geller Order*, *supra* note 30, at 1243–44, paras. 16–17.

113. See *id.* at 1244–45, paras. 18–21.

114. *Belo*, *supra* note 93, at 12308, para. 4.

115. See *id.*

116. See *id.*

117. *Id.*

118. See *id.*

whether the program was the result of good faith news judgment or based on partisan purposes. The disparity in speaking time between Candidate A and Candidate B would be a factor in this determination. Upon a finding that the program did not satisfy *Aspen's* second prong, the FCC would subject the broadcasting station or licensee to the equal time rule.

After the debate, Candidate A would be entitled to request equal time at equal cost. Due to the rule's prohibition of censorship, that equal time need not be redeemed in a subsequent debate but could be redeemed in the form of an advertisement slot during an equivalent daypart.¹¹⁹ In addition, the equal cost requirement would entitle Candidate A to televised coverage at likely no cost since Candidate B's debate appearance was most likely at no cost to her.¹²⁰

It is unreasonable to expect broadcasting stations and licensees to monitor exact speaking time up to the second or to give all participating candidates an exactly equal opportunity to speak and answer questions. Because of this impracticality, the FCC could adopt interpretative rules on how to evaluate the *Aspen* test's second prong. Broadcasting stations and licensees could institute a buffer time, possibly a percentage of the overall debate time, to account for the impracticality of accounting for every second during a debate.¹²¹

The overarching threat of being required to adhere to the equal time rule would pressure broadcasting stations and licensees to act. The financial and administrative burden alone would provide an incentive for broadcasting stations and licensees to air debates in which the candidates received relatively equal speaking time so as not to trigger the rule. Stations would likely press debate hosts to make changes to debate formats in ways that would satisfy the *Aspen* test: tight regulation of candidates' speaking time, even distribution of questions, and perhaps enlistment of a mute button for interrupting candidates.

V. FURTHER EXPLORATION OF THE EQUAL TIME RULE OUTSIDE OF THE POLITICAL DEBATE ARENA

In addition to its inapplicability on the debate stage, the equal time rule has other flaws. First, the FCC currently has no assigned investigative division to identify instances of television appearances by candidates.¹²² Broadcasting stations and licensees are not required to notify a candidate that

119. See McCraw, *supra* note 25.

120. This proposal could be achieved in several ways. For example, the FCC could declare that televised political debates are no longer exempt from the equal time rule and adopt an interpretative rule that affords specificity to the meaning of Section 315(a) that includes candidate speaking time as a factor in the *Aspen* test. Alternatively, Congress could exempt debates from the rule and amend Section 315 of the Communications Act to codify the two-part test established in *Aspen*.

121. This Note does not advocate for every candidate to be granted the opportunity to participate in a televised debate. It only suggests that all candidates who have made it onto the debate stage should be granted relatively equal speaking time.

122. See Ricchiuto, *supra* note 35, at 285, 287–88.

an opposing candidate received coverage on their station.¹²³ In a campaign with multiple candidates, broadcasting stations and licensees have no obligation to notify any candidates that an opponent has requested equal time.¹²⁴ As a result, candidates do not always know when they may invoke the equal time rule which may impose a greater disadvantage on third-party or fringe candidates who lack the resources and manpower to monitor broadcast content. Rather than expecting candidates to monitor nationally televised media coverage of opponents, the FCC could require broadcasters to notify all candidates when an opposing candidate has received non-exempt media coverage.¹²⁵

Moreover, even when a candidate files a complaint for equal time, Section 315 of the Communications Act only provides for equal time at equal cost.¹²⁶ While “willful or repeated” noncompliance with the rule may result in sanctions such as revocation of a licensee or station’s broadcasting license, there currently exists no private cause of action for individual candidates who have been injured by a violation of the rule.¹²⁷ There is also no possibility for the imposition of monetary sanctions.¹²⁸

The only other avenue for redress is the award of equal time at equal cost.¹²⁹ But even when the equal time rule is raised, it is rarely invoked.¹³⁰ Some candidates cannot take advantage of the rule because they cannot afford the time to which they are entitled.¹³¹ In the context of primary election debates, third party and fringe candidates often do not have the opportunity to request equal time because only candidates who are of the same political party are “opposing parties” for purposes of the rule.¹³²

In addition, Congress should consider other modifications to the equal time rule to reconcile the fact that it does not apply to cable stations, print journalism, or electronic media. Although millions of voters still tune in to televised political debates, the electorate is increasingly influenced by content on other forums.¹³³ Congress and the FCC should explore how to advance fairness and equity in the digital world in the spirit of the equal time rule.

123. *See id.* at 287–88.

124. *See id.*

125. *See id.* at 287.

126. *See Miller, supra* note 7, at 340.

127. *See* 47 U.S.C. § 312(a)(4) (authorizing FCC to revoke any station license for “willful or repeated violation of . . . or failure to observe” any FCC rule or regulation); *Daly v. CBS, Inc.*, 309 F.2d 83, 85–86 (7th Cir. 1962); *Ackerman v. CBS, Inc.*, 301 F. Supp. 628, 631 (S.D.N.Y. 1969). *But see Weiss v. Los Angeles Broad. Co.*, 163 F.2d 313, 315–16 (9th Cir. 1947) (holding that complaint alleging violation of Section 315 failed to state claim upon which relief could be granted but did not foreclose possibility that private cause of action exists).

128. *See* 47 U.S.C. § 315(a)(4).

129. *See id.*

130. *See Sasso, supra* note 33.

131. *See Ross Perot v. ABC, Memorandum Opinion and Order*, 11 F.C.C.R. 13109, 13117, para. 19 (1996) (citing difficulty of Ross Perot’s campaign in purchasing desired time due to limited campaign resources).

132. *See* 47 U.S.C. § 315(a).

133. *See, e.g., MacCarthy, supra* note 66.

VI. CONCLUSION

For the foreseeable future, televised political debates are here to stay. Moving forward, there is no promise that licensees will afford candidates an opportunity for equal speaking time on the debate stage. Minute-by-minute tallies of candidate speaking times in recent years highlight the disparities.¹³⁴ The FCC could modify the existing framework of the equal time rule to increase fairness in U.S. televised debates.

The disparities in speaking time among candidates during debates underscore the influence broadcasting stations and licensees have on U.S. debates and in turn, on elections. A broadcasting station or licensee should not be able to “put a thumb on the scale.”¹³⁵ As a solution, the FCC could eliminate its categorical exemption from the equal time rule for political debates and instead condition the exemption on satisfying *Aspen’s* two-pronged test to determine whether the program fits into the category of on-the-spot coverage of a bona fide news event. The inquiry under the *Aspen* test would involve determining whether the debate was a result of good faith news judgment and not based on partisan purposes which would take into account differences in speaking time among debate participants. A candidate who received less than equal time than her opponents during a debate would be able to invoke the equal time rule and redeem her time in an alternative forum.

The equal time rule has the potential to be an equalizing force in U.S. televised debates. By eliminating the categorical exemption for debates, the equal time rule could afford all candidates on the national debate stage an opportunity to be heard by the American electorate.

134. See Tobias, *supra* note 1; Cai et al., *supra* note 2.

135. Tobias, *supra* note 1; Cai et al., *supra* note 2.