Candidates and the New Technologies: Should Political Broadcasting Rules Apply

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For candidates and other political advertisers, the 1984 elections may be a watershed in the use of new media technologies. Thirty-eight percent of American homes with television sets now subscribe to cable television. Direct broadcast satellites, videotex, teletext, subscription television, multiple distribution systems, satellite master-antenna television, low power television, and electronic mail will be reaching enough viewers to make them attractive media for candidates and campaigns by the mid- to late-1980’s.

With the advent of these technologies, the historical distinctions between broadcasting and common carriage have become less clear. The Federal Communication Commission (FCC), operators, and candidates must deal with the issues created by the equal opportunity (equal time) and fairness doctrine requirements and decide whether these traditional broadcast principles apply to...
the new communications media. These issues are sensitive because they affect
the cornerstone of our system of government, the political process. The first
amendment envisions a system of self-government based on free discussion
that allows voters "to make informed choices among candidates."4 The elec-
tronic media dominate the providing of information that forms the basis for
that discussion. There is legitimate concern that the first amendment rights of
broadcasters and related providers of information not be unduly impinged. In
the sensitive area of political campaigns, however, where meaningful "alterna-
tive channels for communication"5 do not exist, the counterveiling right of citi-
zen access to candidates and issues also must be given great weight. Failure to
require roughly equal treatment of candidates and issues may well "undermine
democratic processes."6 Thus, just as the state may impose reasonable restric-
tions to facilitate the functioning of the electoral process—e.g., barring the
sale of alcoholic beverages on election day, or preventing campaigning within
fifty feet of polling places—it may reasonably regulate to ensure the free flow
of political information.7

This Article reviews the current political information regulatory scheme
of several of the new media technologies, and it suggests that the equal oppor-
tunity and fairness doctrine requirements should apply to a number of them.

II. THE NEW MEDIA TECHNOLOGIES

A. Cable Television

Cable television is the most watched, most regulated, and most confusing
medium in the application of equal opportunity and fairness doctrine require-
m. The FCC first applied these rules to cable systems before receiving

only by the Government." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969). The
docrine requires the broadcast media to provide air time for balanced coverage of controversial
issues of public importance. See Fairness Report, 48 F.C.C.2d 1, 7 (1974). The fairness doctrine
does not require broadcast licensees to provide access to particular persons, groups, or viewpoints.
Broadcasters may exercise discretion in selecting the time and manner of presentation of conflict-
ing views. Id. at 9, 11, 16; see CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 118-19 (1973).

Section 315 of the Federal Communications Act provides 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 in the use of such
broadcasting station," subject to certain exceptions. 47 U.S.C. § 315(a) (1976). Section 315 is
triggered only when a candidate actually appears in a broadcast. It does not apply when a candi-
date appears in a newscast, news interview, news documentary, or on-the-spot coverage of news
events. Id.

748, 771 (1976).
7. The Supreme Court has recognized the importance of the right of access of candidates
to the airwaves. While acknowledging the first amendment guarantees of journalistic freedom, it
has concluded that "the statutory right of access . . . properly balances the First Amendment
rights of federal candidates, the public, and broadcasters." CBS, Inc. v. FCC, 453 U.S. 367, 397
statutory authority\(^8\) under the standard "reasonably ancillary to broadcast-
ing."\(^9\) Subsequently, section 315(c) of the Federal Communications Act was amended to include cable operators under political broadcasting rules.\(^10\) As a result, the FCC adjusted its regulatory scheme to reflect court decisions\(^11\) and decided not to apply the equal opportunity and fairness doctrine requirements to access programing.\(^12\) The FCC retained the regulations applying these re-
quirements to cable originators.\(^13\)

On March 31, 1983, the FCC adopted a rulemaking notice seeking public 
comment on the reduction or elimination of political broadcast rules as they 
apply to cable television.\(^14\) This notice brings into focus a series of issues relating 
to the regulation of political broadcasting on cable television, and it raises 
questions about the effect that the elimination of these rules would have on 
political candidates.

While the equal opportunity requirement has been specifically applied to 
cable operators by statute,\(^15\) the fairness doctrine's application, it is argued, is a 
creature of regulation. There is, however, substantial support for the proposition 
that the 1959 amendments to the Communications Act\(^16\) codified the fairness 
doctrine as part of the Act, thus preventing its repeal by administrative 
regulation. The FCC has recently suggested that cable systems do not occupy 
scarce radio frequency space, and that therefore the "scarcity rationale"\(^17\) is 
not a proper basis for applying the doctrine to cable systems.\(^18\) Absent the 
scarcity rationale, suggests the Commission, the first amendment rights of 
broadcasters override the Commission's regulatory authority, and therefore 
cable operators should not be subject to fairness obligations.

The Supreme Court held in Red Lion Broadcasting Co. v. FCC\(^19\) that "[i]t is the 
right of the viewers and listeners, not the right of the broadcasters, 
which is paramount."\(^20\) Removing the fairness' doctrine's application to cable 
could injure this right in one of its most crucial areas—the political arena. The 
Court has recognized that "it is of particular importance that candidates have

\(^{10.}\) Pub. L. No. 92-225, § 104(c), 86 Stat. 4, 7 (1972) (codified at 47 U.S.C. § 315(c) (1976)).
\(^{11.}\) See, e.g., FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (invalidated FCC regulations requiring cable operators to provide access channels for government, public, or educational use).
\(^{12.}\) Order in Docket No. 20,508, 83 F.C.C.2d 147 (1980).
\(^{13.}\) See 47 C.F.R. §§ 76.205, 209 (1982). Origination programming is subject to the "exclusive control" of the cable operator. \(\text{Id.}\) § 76.5(w).
\(^{15.}\) See Geller & Lampert, \textit{Cable, Content Regulation and the First Amendment}, 32 \textit{CATH. U.L. REV.} 603 (1983); note 10 and accompanying text \textit{supra}. 
\(^{16.}\) Pub. L. No. 86-274, § 1, 73 Stat. 557, 558 (codified at 47 U.S.C. § 315(a) (1976)). 
\(^{17.}\) The scarcity rationale was part of the basis for the Supreme Court's decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), which upheld the constitutionality of the fairness doctrine as applied to broadcasters. \textit{See note 3 supra.} 
\(^{20.}\) \textit{Id.} at 390.
the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."

Scarcity does exist in the franchising of cable systems. Just as constitutionally permissible government regulation prohibits an individual from operating a radio or TV station without a license, local government franchising creates a monopoly for the local cable operator. There is almost never more than one cable operator in a particular community. This circumstance will continue well into the future, since most cable operators have long-term exclusive franchises. The cable operator, an unelected private individual or corporation selected by local government, has exclusive control over what channels subscribers receive. Because the number of cable systems generally is fixed at one, the scarcity in cable systems is at least as great as the scarcity of frequencies.

Cable television, unlike newspapers, involves a form of government regulated scarcity that prevents many members of the public from owning and operating cable systems. The government may regulate cable television to insure that there is an opportunity for the presentation of views expressed by those excluded from cable ownership. As the Supreme Court stated in Red Lion:

"[T]he First Amendment confers no right . . . to an unconditional monopoly of a scarce resource which the Government has denied others the right to use. . . . It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."

Cable operators also are proxies for the community, and they should provide response time for a candidate whose opponent has been endorsed on the cable system.

The measure of fairness by which broadcast licensees are obliged to abide

23. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979) and Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978), are often cited for the proposition that absent physical scarcity, any "economic scarcity" which limits communities to a single operator cannot justify applying the fairness doctrine. Cable operators, however, do face a physical scarcity, not a scarcity of frequencies, but the "sheer limit on the number of cables that can be strung on existing telephone poles" or laid underground in public right of ways. Community Communication Co. v. City of Boulder, 660 F.2d 1370, 1378 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).
24. 395 U.S. at 391, 394. The Supreme Court recognized the need for regulation even in the absence of physical scarcity, because cable operators benefit from a "preferred position conferred by the government." Id. at 400.
inheres in the public interest standard under Title III of the Communications Act of 1934. While the FCC had long recognized that fairness was a statutory requirement, the 1959 amendment to section 315(a) of the Communications Act made it plain that Congress understood that the obligation of fairness was imposed under the Act. Congress did not merely "ratify" the Commission's fairness doctrine; it made the obligation a binding part of the statute.

One way to discuss the application of the equal opportunity and fairness doctrine principles under current regulation, the potential effects of ending regulation, and some proposals to meet existing and potential problems, is to look at the four general sources of programming carried on cable systems.

1. Retransmission of Imported Signals

The retransmission of the "super stations" has become a staple of cable systems across the country, along with the importation of nearby but nonetheless distant signals. The FCC maintains that the super stations, as local broadcasters, are subject to the equal opportunity and fairness doctrine requirements, while concluding that retransmitting systems are not similarly obligated.

Thus, if a congressional candidate from northern Virginia is interviewed on a "Phil Donahue" type program on WGN in Chicago, it would constitute a "use" only if he were a Chicago-area candidate. If the northern Virginia cable system carries WGN, this appearance would not give his opponent the right to an equal opportunity, since the local cable system does not "control" the retransmission. The opponent has no right to an equal opportunity on WGN since he is not a candidate in the station's local service area. But what about a presidential general election candidate? In the event that a "use" occurred, the right to an equal opportunity on WGN would be available to the opponent. The effect, however, is not clear if a local cable system pre-empted the opponent's time. The ability to pre-empt might constitute "control" and

27. See note 16 and accompanying text supra.
29. Examples include WTBS-TV, Atlanta, Georgia; WGN-TV, Chicago, Illinois; and WOR-TV, New York, New York.
30. See note 35 infra.
31. The Donahue program is not a news interview program exempt from equal opportunity restrictions. Multimedia Program Prods., Inc., 80 F.C.C.2d 217 (1980).
32. For a discussion of the definition of "use," see notes 80-87 and accompanying text infra.
33. This practice presumably is prohibited by the copyright laws. See 17 U.S.C. § 111
subject the local system to an equal opportunity claim.

It seems likely that national candidates in 1984 will purchase advertising on the super stations as a cost-effective way of reaching a significant portion of the electorate. This will create an equal opportunity right for opponents to purchase equivalent time because the advertising is being broadcast locally. The issue, however, is what equal opportunity rights are created at the local cable system level. Should the local operator at least be obliged to carry that candidate advertising? This question remains unanswered.

2. Original Satellite Programing

Local cable systems carry a number of channels of original programing provided by satellite. ESPN, C-SPAN, and the Movie Channel are prominent examples. Unlike the super stations, these programers are not regulated—by the FCC or anyone else. Under current FCC policy, neither equal time nor fairness doctrine requirements apply to this original satellite programing. If ESPN, for example, could sell advertising to a candidate and would be under no obligation to provide equal time. Similarly, it could carry an endorsement of a candidate, carry programing constituting a personal attack on a person or institution, or treat a controversial issue of public importance without being obligated to carry opposing views.

The equal opportunity and fairness doctrine rules should be applied to satellite programing. The programer has a choice of whether to carry advertising or endorsements, just as a broadcaster has a choice whether to accept paid political issue advertising. If they are carried, then the programmer should be required to provide equal time or response time.

Admittedly, the current communications statutory and regulatory scheme does not provide an obvious basis for the imposition of regulation on the satellite programer. The FCC regulates satellites used by the programers only as common carriers; there is no content regulation. The issue, however, is as much about election regulation as communications regulation. A combination of sound public policy, a legitimate governmental interest in regulating elec-

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34. The "reasonable access" provision for federal candidates in § 312(a)(7) is not applicable to any form of cable programming. Title I of the 1971 Federal Election Campaign Act included a provision applying § 312(a)(7) to cable. It was repealed as part of the 1974 Federal Election Campaign Act Amendments. Pub. L. No. 93-443, § 205(b), 88 Stat. 1263, 1278 (1974). The repeal of Title I appears to have been a legislative oversight, rather than a policy decision. It makes little sense for Congress to have originally applied both §§ 312 & 315 to cable, and then arbitrarily repeal the application of § 312.

35. The FCC has limited the applicability of equal time and fairness doctrine to programs originated by local cable operators. 47 C.F.R. §§ 76,205, 76,209 (1982). This is clearly contrary to the statute, which places cable operators in the same posture as local TV stations. They are responsible for all programming which they transmit, not just that which they originate.


tions,\textsuperscript{38} and the intrusiveness of television\textsuperscript{39} provide a basis for regulating satellite programers in the narrow context of political candidate broadcasting.

In \textit{Miami Herald Publishing Co. v. Tornillo},\textsuperscript{40} the Supreme Court held unconstitutional a Florida statute requiring newspapers to afford a right of reply to candidates. It has been argued that according to this decision, the first amendment rights of cable operators would be abridged by obligating them to comply with equal opportunity and fairness doctrine rules.\textsuperscript{41} The Court has noted that the varying characteristics of the news media justify differences in the first amendment standards applied to them.\textsuperscript{42} The almost absolute ability of newspapers to operate free of governmental restriction has never been available to broadcasters. At least in their current mode of operation, cable systems are not so different from broadcasters that they should be treated like newspapers.\textsuperscript{43} The impact of the television screen, whether the program is broadcast or cablecast, is immense. When the impact is directed at campaigns and elections, the public interest requires that full and vigorous debate be available to the electorate.

Alternatively, the cable operator who makes the editorial decision to carry ESPN or C-SPAN and who is already regulated by the FCC and local government could be obligated to adhere to equal opportunity and fairness doctrine requirements. The FCC position of imposing equal opportunity and fairness doctrine obligations only on cable origination is the result of rulemaking,\textsuperscript{44} and the FCC has the authority to amend its rules to impose requirements on the local operator in this context. This approach creates practical difficulties: the cable operator would have to know in advance that political advertising was to be sent by the programer, contractually he would have to be able to delete it, and he would have to have something to replace it. It would seem easier to place the burden on the originator, who is benefiting economically by selling the advertising time and can most easily, as a mechanical matter, make equal time available.

3. "Must Carry" Requirements

A major portion of a local system's cable channels are devoted to significantly viewed local area television stations.\textsuperscript{45} All the programing carried on a cable system is subject to equal opportunity and fairness doctrine requirements

\begin{itemize}
\item \textsuperscript{38} See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976).
\item \textsuperscript{39} See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); see also Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) (creating a regulatory interest), cert. denied, 396 U.S. 842 (1969).
\item \textsuperscript{40} 418 U.S. 241 (1974).
\item \textsuperscript{41} See also Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978) (invalidated FCC regulations requiring access to cable channels for government, public, or educational use), aff'd, 440 U.S. 689 (1979); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.) (invalidated application of program fare regulations to pay-cable stations), cert. denied, 434 U.S. 829 (1977).
\item \textsuperscript{42} Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).
\item \textsuperscript{43} See Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983).
\item \textsuperscript{44} See First Report & Order in Docket No. 18,397, 20 F.C.C.2d 201 (1969).
\item \textsuperscript{45} For a definition of "significantly viewed" stations, see 47 C.F.R. § 76.5(k) (1982).
\end{itemize}
because the originator is a broadcaster. The requirements would not apply only where there is a discontinuity between the service area of a broadcast station and the significantly viewed area for "must carry" purposes.\(^4\) For instance, a candidate for an office outside of the station's service area could appear, create a use, and have the appearance "must carried" into the electoral district. The opponent would have no equal time right, however, since the election is outside of the originating station's service area, and the cable operator did not originate the program.

4. Local Origination

FCC rules apply equal opportunity and fairness doctrine requirements to local cable origination programming.\(^4\) The regulations are essentially identical to those for broadcasters, with the same news program exemptions for equal time. The rules apply to locally-originated programs and advertising, a very small portion of cable programs. This presumably includes local ads inserted in non-local programs. It does not include access channels.\(^4\) It is these rules which the FCC is currently opening for repeal or modification.

Since the Commission recognizes that it cannot repeal the equal opportunity requirement, it is seeking to minimize regulation. The FCC currently is seeking comments on the proposal by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce that equal time obligations be met through use of access channels.\(^4\) This proposal would effectively repeal equal opportunity requirements, since it would mean that candidate ads which are aired during a popular prime time program merely trigger the right for the opponent to appear on the access channel. An appearance on an access channel would not be an equal opportunity in terms of audience and would not be on the same channel.

Equal opportunity rules as currently applied to cable origination should remain unchanged. This will be important in the future as cable reaches more homes. Candidates, particularly those in legislative districts where broadcast advertising is prohibitively expensive, may begin to use cable as a significant part of their advertising campaigns.

The fairness doctrine is in a different posture. The FCC's view is that the doctrine is not statutory and thus can be rescinded by regulation.\(^5\) It has been suggested, however, that the 1959 Amendments to the Communications Act enacted the fairness doctrine as part of the Act.\(^5\) Moreover, the doctrine should remain intact and applicable to cable as a matter of policy. Candidates

\(^{46}\) 47 C.F.R. §§ 76.59, 61 (1982) outline the local stations that must be carried on cable systems in specific geographic areas.  
\(^{47}\) Id. §§ 76.205, 209.  
\(^{48}\) Order in Docket No. 20,508, 83 F.C.C.2d 147 (1980).  
\(^{50}\) Id. at 26,483 n.64.  
\(^{51}\) See Geller & Lampert, supra note 15, at 606.
ought to be entitled to reply to editorials endorsing opponents. Individuals and institutions ought to be able to respond to personal attacks. Both sides of controversial issues of public importance should be carried. Commission-created political rights, such as the "Zapple doctrine," which is as much quasi-fairness as it is quasi-equal opportunity, should remain available.

The NTIA proposal to substitute access channels for a real right to respond is inadequate. Equally deficient are such ideas as grouping all channels on a cable system to determine whether fairness doctrine requirements are being met. The political process is too important for candidates and issues not to have certain extraordinary rights to reach the public.

B. Direct Broadcast Satellites

The Direct Broadcast Satellite Service (DBS) is a radio-communication service in which signals from earth stations are retransmitted by satellite for direct reception by home terminals. Direct broadcast satellites can transmit signals much more powerful than those of current communications satellites, allowing reception of television broadcasts by small home dishes.

Whether the equal opportunity and fairness doctrine rules apply to DBS is determined by whether the FCC classifies the applicant’s proposal as broadcasting or as common carriage. If the applicant’s proposal closely resembles broadcasting, then the requirements generally applicable to broadcasting, including those relating to political content, will apply.

Inquiring into the development of regulatory policy in regard to DBS, the Commission has noted that it will “impose any applicable statutory requirements upon interim DBS systems,” including equal opportunity and fairness doctrine in the case of broadcasters, and 47 U.S.C. §§ 201-224 for common carriers. The Commission proposed to resolve “classification questions . . . in the context of considering each individual application,” believing that the public interest will be served by maintaining a flexible approach that will allow satellite operators to act as “broadcasters, common carriers, private radio operators, or some combination or variant of these classifications” according to what they find “most feasible.”

The Commission has provided a general account of the standards that guide its classification decision making. If an applicant proposes to provide direct-to-line service and retains control over the content of the transmissions, the service is probably a broadcast service and the broadcasting provisions of

52. See Nicholas Zapple, 23 F.C.C.2d 707 (1970) (statement by candidate’s spokesman invokes equal time for opponent).
53. See Stern, Krasnow & Senkowski, supra note 2, at 541.
54. Id. at 541-42.
58. Id.
59. Id. at 708-09.
Title III will apply.\textsuperscript{60} If the applicant offers its "satellite transmission services indiscriminately to the public pursuant to tariff under the provisions of Title II of the Act,"\textsuperscript{61} it will be a common carrier. The applicant may have some stations in each category.

Programer-customers of common carrier DBS operators will not be subject to content regulation. The Commission has argued that any control of this sort would: merely duplicate the more pervasive access obligations already imposed upon the carrier itself; go against the wishes of Congress, who probably did not intend for the customers of common carriers to be licensed and regulated as broadcasters; and be unnecessary because similar systems are in operation without regulation and without harm to the public.\textsuperscript{62} Thus, common carrier DBS will be completely insulated from the political broadcasting rules.

The advent of DBS provides yet another way for political advertisers to target potential voters. At least two companies (United Satellite Communications Inc. and Inter-American Satellite Television) are planning to provide satellite broadcast service by the end of 1983. By the end of 1984, COMSAT expects to be broadcasting to subscribers with rooftop receiving dishes.\textsuperscript{63} There should be little doubt that DBS programming is broadcasting, and therefore subject to equal opportunity and fairness doctrine rules. The program originator, be it the satellite owner or a company leasing a transponder, is obligated to carry out the requirements of section 315. The major issue is fixing the responsibility for compliance, \textit{i.e.}, deciding who is accountable for meeting the obligations under the rules.

C. Teletext

Teletext systems transmit textual and graphic material to home viewing screens.\textsuperscript{64} The Commission recently authorized television stations to engage in teletext services.\textsuperscript{65} It permits stations to broadcast on the vertical blanking interval (VBI)\textsuperscript{66} textual and graphic matter, which would appear on the television screen of a subscriber with a decoder. A number of teletext systems are in limited operation around the country; CBS is sending its Extravision teletext services to all local affiliates. Limited local origination is planned for the near future.

The FCC has decided that the equal opportunity and fairness doctrine

\begin{footnotesize}
\begin{enumerate}
\item Id. at 709.
\item Id.
\item Id. at 710-11.
\item By 1986, U.S. Satellite Broadcasting Company plans to provide a free channel with network-like programming, an all news, advertiser-supported channel, and a subscription and pay-per-view channel with individual addressability capability. Com. Daily, July 14, 1983, at 6.
\item Stern, Krasnow, & Senkowski, \textit{supra} note 2, at 534-35.
\item VBI is the black bar appearing on a television screen when the vertical hold is incorrectly adjusted. See Stern, Krasnow, & Senkowski, \textit{supra} note 2, at 535 n.23.
\end{enumerate}
\end{footnotesize}
rules do not apply to teletext, a conclusion which is incorrect as a matter of law. The Commission’s rationale is illustrative of its approach to applying the equal opportunity and fairness doctrine regulations to other new technologies. Teletext is broadcasting, and all broadcasting is subject to these regulations. Broadcasting is defined as “the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.”

The crucial factor in determining if programing is broadcasting is whether it is intended for the use of the general public. Although content is a factor to be considered, it is not dispositive. Mass appeal and availability weigh in favor of finding that a particular activity is broadcasting. These factors may be negated by clear objective evidence that the programing is not intended for use of the general public. Indeed, broadcasting remains broadcasting even though a segment capable of receiving the broadcast signal is equipped to delete a portion of that signal.

The Commission has concluded that the reasonable access provision should not apply to teletext because the requirement “is adequately satisfied by permitting federal candidates access to a licensee’s regular broadcast operation.” The Supreme Court, however, has emphasized that 47 U.S.C. § 312(a)(7) confers an obligation on licensees “to tailor their responses to accommodate, as much as reasonably possible, a candidate’s stated purposes in seeking air time.” “Across-the-board policies are an unacceptable response.

The Commission’s approach ignores the statute and the Supreme Court’s construction. It is impossible to reconcile the duty to meet candidates’ needs with the Commission’s decision to permit stations to “operate their teletext service on a franchise basis or to lease space to multiple users.” The stations would be under no obligation to provide any access to candidates, even though the teletext service might provide entry into specific markets of value to the candidates. Under such circumstances, unless section 312(a)(7) is applied to teletext, a broadcaster would have no power to meet, even in theory, a candidate’s needs by offering access on the regular channel.

Consideration of the potential effect of the Commission’s decision demonstrates its inherent weakness. By not enforcing reasonable access to teletext, a local teletext originator could repeatedly broadcast advertisements carrying

73. (1976).
75. Id. at 387-88.
76. Report, supra note 65, at 27,060.
the likeness of a candidate who chose not to advertise on the TV station whose signal was original. An opponent's only recourse would be access on the regular TV airwaves. If the TV station has already provided both candidates with paid or free time sufficient to meet the Commission's reasonable access requirements, it would have no obligation to afford the opponent any access to respond to the teletext programing. The opponent would be shut out.

Finally, the Commission relies on its decision that political broadcast rules do not apply to FM SCA operations. A primary basis for this decision is that broadcasting has been defined as communications intended for the general public. The Commission has determined that by contrast, SCA's are not intended for the general public, but rather intended for a specialized audience. The opposite is true here; teletext is intended for the general public, and is wholly distinguishable from SCA service.

The Commission has decided that the equal opportunity provision in section 315 is not applicable to teletext. The decision is predicated on the Commission's conclusion that a candidate cannot make a personal appearance or deliver a personal message on teletext; therefore, no "use" can occur and no equal time obligation is created. The term "use" has no statutory definition; it is interpreted by the FCC. The term's scope has expanded or narrowed to reflect each Commission's understanding of the term and the evolving technology.

The scope of the term "use" is very broad. In fact, "use" and the original equal opportunity doctrine were included in section 18 of the Radio Act of 1927. At that time, television did not exist and the rule applied only to radio. When the Communications Act of 1934 was adopted, section 18 was incorporated as section 315. Subsequently, the definition of "use" was expanded to encompass television. Another change came in 1975, when the Commission overruled three of its earlier decisions and held that under certain conditions candidate appearances on broadcasts of debates and broadcasts of candidate press conferences would not be a "use," but rather could be excepted from equal opportunity requirements under the news program exemption. The clearest definition of "use" given by the Commission is found in its primer,

78. Functional Music, 274 F.2d at 548.
80. See Report, supra note 65, at 27,061.
83. Interpretive Opinion, 26 F.C.C. 715 (1959); see Paulsen v. FCC, 491 F.2d 887 (9th Cir. 1974).
The Law of Political Broadcasting and Cablecasting,\textsuperscript{85} where it is defined as “any broadcast or cablecast of a candidate’s voice or picture.”\textsuperscript{86} The key is whether the candidate is easily identifiable or recognizable by some means.\textsuperscript{87}

Teletext has the technical capacity to meet the current definitional requirement. It can produce graphic images, including logos of products and perfectly recognizable portraits of persons, including candidates.\textsuperscript{88} To say that a teletext portrait of a candidate accompanying a written campaign commercial would not be the functional equivalent of a traditional TV “use” is to ignore reality.

In keeping with the evolution of the definition, the Commission is required by the Communications Act to recognize the technology of teletext for what it is—a slightly different way of broadcasting information—and adjust its definition of “use” to include teletext images and text. Under the Commission’s conclusion, a local teletext originator could repeatedly broadcast a candidate’s campaign commercials—free or purchased—and the opponent would have no right to respond.

The Commission has determined that the fairness doctrine does not apply to teletext.\textsuperscript{89} The doctrine has assured that public issues are given roughly balanced treatment. To exclude teletext from its purview would give teletext operators “unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.”\textsuperscript{90} The Commission has stated that the 1959 legislative enactment concerning the fairness doctrine in section 315 “does not mandate extension of the fairness doctrine to new services like teletext.”\textsuperscript{91} Even if it is concluded that the 1959 amendments did incorporate the doctrine, to the FCC “it seems clear that novel services such as teletext were beyond its scope.”\textsuperscript{92}

To the contrary, the public interest standard does require the application of the doctrine to teletext. Congress “did not . . . give [the Commission] a completely free hand for the future” regarding the fairness doctrine.\textsuperscript{93} The Commission’s assertion that Congress has entrusted the matter entirely to the discretion of the Commission is unfounded.\textsuperscript{94}

If, as the Commission contends, it is not required to apply these principles, it should consider whether they should nonetheless be applied, in some

\textsuperscript{85} 69 F.C.C.2d 2209 (1978).
\textsuperscript{86} *Id.* at 2240.
\textsuperscript{87} Fleeting appearances are not uses. National Urban Coalition, 23 F.C.C.2d 123, 124 (1970).
\textsuperscript{88} CBS’ Extravision teletext service has the capacity to broadcast in 512 shades of color. Com. Daily, May 26, 1983, at 5.
\textsuperscript{89} *See Report, supra* note 65, at 27,062.
\textsuperscript{90} *Red Lion*, 395 U.S. at 392.
\textsuperscript{91} *Report, supra* note 65, at 27,061.
\textsuperscript{92} *Id.* n.24.
\textsuperscript{93} *Red Lion*, 395 U.S. at 385.
\textsuperscript{94} *See Report, supra* note 65, at 27,061.
form, as a matter of discretion. The origin of the fairness doctrine is in the Commission's regulation under the public interest standard. Other mechanisms, such as reasonable access, could also be adopted under the public interest standard, perhaps in modified versions. The Commission's failure to address these provisions effectively excluded discussion as to whether they should be adopted as a matter of discretion. The FCC failed even to consider or seek comment on alternatives which might be better suited to the special circumstances of teletext, but which would accommodate the needs of the listening public, whose first amendment rights to receive information are "paramount."55

D. Other Media

Other new technologies, like videotex, present similar problems. Videotex is a two-way medium, permitting subscribers to respond to information provided textually and graphically.96 Subscribers may bank, pay bills, purchase goods and services, as well as respond to requests for opinions—mini-polls, in effect. Videotex is usually considered a common carrier service, since the information is transmitted over telephone wires or cable. The FCC has no existing or proposed rules or orders regarding the application of equal opportunity and fairness doctrine requirements to videotex.

If videotex, which is essentially a television set hooked up to a central computer, is limited to home banking and shopping, it is not likely that political content will become an issue. The potential exists for local programing, however, at least over those videotex operators using cable rather than telephone wires. Unlike teletext, which is broadcasting, regulation of political information on videotex raises the same issues as with cable. Equal opportunity and fairness doctrine requirements as now applied to local cable origination ought to be applicable to videotex.

Multi-point distribution service (MDS) is a microwave transmission service, with line-of-sight transmission of a signal which travels typically no more than twenty-five miles. It is the noncable conduit for such services as Home Box Office and Showtime. MDS is a common carrier and is not subject to the rules regarding political broadcasting.97 According to a 1974 Report and Order, MDS "offers a transmission service for hire and can not control program material. . . . [The] carrier's responsibility is to provide a 'pipeline.'"98

A recent request for a declaratory ruling raises questions about the common carrier nature of MDS. An operator in San Antonio, Texas, has asked the FCC to decide whether an MDS licensee may "refuse to transmit cus-

95. Red Lion, 395 U.S. at 390.
96. One-way transfer of textual information is teletext; two-way transfer is videotex. Stern, Krasnow, & Senkowski, supra note 2, at 554-55.
97. The Commission has expressly declined to address the issue. Report & Order in Docket No. 80-112, at 66-67 (May 26, 1983).
tomer supplied programing that the licensee reasonably determines to be obscene, profane or indecent."99 This request, and another concerning obscenity on telephones,100 caused the FCC to issue a Notice of Inquiry into common carrier anti-obscenity rules.101 Permitting this sort of censorship would move MDS out of the pure common carrier status, and it would raise questions as to whether, for example, the airing by Home Box Office of an old Ronald Reagan movie during the 1984 campaign would create an equal opportunity for his opponent.

Subscription television (STV) is the broadcasting of a scrambled television signal, which upon payment of a fee, subscribers are authorized to unscramble through use of a decoder.102 Since it is broadcasting, STV is subject to the same regulations regarding political broadcasting as other broadcasters. In 1982, the Commission substantially deregulated the service, but the political broadcasting rules were not included among the regulations lifted.103

The Commission has, however, afforded STV special treatment for the application of the "reasonable access" requirement based on its special characteristics:

The purpose of giving of federal candidates the right to prime time spots and programming is based upon the fact that prime time generally is the period of maximum audience potential. Since subscription television programming is "generally" geared to selective audiences it would appear that those stations engaged in STV would have their periods of maximum audience potential outside of normal prime time viewing periods. Therefore, we do not believe that reasonable access requires STV stations to make available to federal candidates those periods of time in which they are engaged in STV programming.104 Aside from this modification, STV operators must comply with all other equal opportunity and fairness doctrine requirements.105

Low power television (LPTV) uses very weak signals to broadcast over a small area, perhaps ten to fifteen miles, without interfering with other signals. The stations are limited to 1000 watts of power, compared to as many as five million watts for some standard broadcast stations. The FCC has received thousands of applications for LPTV licenses, and it is granting licenses now in rural areas. It will be years before LPTV stations are operational in urban areas. The potential exists, however, for LPTV stations to target particular

102. The earlier STV orders refer to both cable STV and broadcasting STV, e.g., First Report & Order in Docket Nos. 18,893 & 19,554, 52 F.C.C.2d 1 (1974), but later orders refer only to broadcasting.
105. See Stern, Krasnow, & Senkowski, supra note 2, at 573.
The FCC has decided that equal opportunity and fairness doctrine requirements will apply to programs originated by the LPTV station. In 1982, the Commission wrote:

If the Commission receives a complaint related to Part I of the Fairness Doctrine, the station may meet it by showing that it aired responsive issue-oriented programming submitted in a mode compatible with the station’s origination equipment. Likewise, to meet its obligation under Part II of the Fairness Doctrine, the station must make time available, with or without sponsorship, to responsive issue-oriented programming submitted in a format compatible with the station’s origination equipment. The fairness obligation would be on a sliding scale, depending upon the direct involvement of the station management in program production and decisions. Similarly, Sections 312(a)(7) and (f) and 315 will apply to low power stations, to the extent that their origination capacity permits.

Since LPTV is broadcasting, these requirements should certainly continue to apply. To the extent that LPTV stations are engaged principally in the retransmission of other broadcast stations, or of satellite programing, the issues raised regarding cable television also arise here. While it may be premature to attempt to define the scope of regulation of political broadcasting, the potential of LPTV for candidate use is enormous, and the originator must be held responsible for assuring that both sides of issues and campaigns are presented.

In satellite master antenna television (SMATV) systems, earth stations pull down signals from satellites, including pay channel signals, and programming is provided to tenants of apartment buildings and complexes, to hotels and to other densely populated buildings which are internally wired to distribute the signals. On November 8, 1983, the FCC issued a declaratory ruling that state and local regulation of SMATV are preempted by federal regulations. The commission has not decided whether political broadcasting rules apply to SMATV.

Electronic mail is considered to be a type of videotex, in which the sender types a letter on a home computer keyboard. The letter is transmitted as digital data over telephone lines or cable. A central computer sorts and delivers the message to the “electronic address” of the recipient’s home computer, where the signal is reconstructed into words on a screen or printed on paper. Several companies are developing commercial systems, and the United States Postal Service’s ECOM service allows bulk mailers to transmit letters electronically to special postal centers, where they are printed out and delivered by mail carriers. Electronic mail as currently conceived is a common carrier ser-

106. See id. at 538-39.
vice, and therefore not subject to political content rules.\textsuperscript{109}

III. CONCLUSION

The rapid advance of technology means that candidates, issue groups, the FCC, and the bar soon will be faced with applying the current broadcasting rules to new modes of communication. To assure the continued availability of the fullest public debate on candidates and issues, the equal opportunity rule and the fairness doctrine should be applied in every reasonable circumstance. Such application is constitutionally permissible and required by the public interest.

\textsuperscript{109} See Geller & Lampert, \textit{supra} note 15, at 621.