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## SYMPOSIUM

### A DEBATABLE ROLE IN THE PROCESS: POLITICAL PARTIES AND THE CANDIDATE DEBATES IN THE PRESIDENTIAL NOMINATING PROCESS

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*As the federal campaign finance laws have withered, leading to the rise of super PACs and other forms of largely unregulated spending, the parties have remained subject to stringent legal restrictions and must contend with other factors adverse to their competitive position in the electoral landscape. Certain of the limitations they have encountered affect their ability to fund, control, and manage core institutional functions. One such function is the conduct of presidential debates, now largely financed, planned, and operated by the news media organizations and nonprofit organizations. The candidates, especially front-running candidates and party nominees, also have some say in the conduct of debates. But the parties occupy the periphery of these major campaign events that bear directly on how they present themselves and showcase their candidates to the electorate. Empowering parties through modest legal reforms to play more of a role in the debate process would be one limited but potentially important step in bolstering their standing and capabilities.*

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## INTRODUCTION

The measures of health of the major political parties are much in dispute.<sup>1</sup> If the parties say they are short on money and blame McCain-Feingold, they face the response that they have been compensated more than adequately with “hard money” fundraising.<sup>2</sup> If they complain that they must compete on uneven terms with so-called outside groups, they must contend with the rebuttal that a number of these groups are *their* outside groups—i.e., “shadow parties” which

<sup>1</sup> The debate, for those engaged with it, begins with the premise that American democracy requires strong parties. For examples of the literature arguing for the importance of parties, see generally JOHN H. ALDRICH, *WHY PARTIES?: A SECOND LOOK* 4 (2011), explaining why parties, and the two-party system, is necessary for effective democracy, and Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 *HOUS. L. REV.* 845, 849 (2017), examining how the hollowing out of contemporary political parties has weakened parties’ ability to raise money, control the candidate nomination process, and reward loyal workers. See also Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 *U. ILL. L. REV.* 363, 366 (2013) for an argument that though not a panacea, political parties are “necessary for the operation of mass democracy given voter inattention to politics.”

<sup>2</sup> For a full dress treatment of McCain-Feingold amendments to the Federal Election Campaign Act of 1971, see ROBERT F. BAUER, *MORE SOFT MONEY HARD LAW: THE SECOND EDITION OF THE GUIDE TO THE NEW CAMPAIGN FINANCE LAW 1–3* (2004), explaining the measure’s objective of preventing the use of “soft money”—corporate and union general treasury funds and large individual donations—to influence the outcome of federal elections. For the view that parties have not suffered under the financing restrictions imposed by the reform regime, see THOMAS E. MANN & E. J. DIONNE, JR., *BROOKINGS, THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS* 15 (June 2015), [https://www.brookings.edu/wp-content/uploads/2016/07/new\\_political\\_realists\\_mann\\_dionne.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/new_political_realists_mann_dionne.pdf), noting that “the claim of the new realists that campaign finance laws have had devastating effects on parties is simply not supported by the evidence.”

operate relatively freely through super PACs.<sup>3</sup> This shadow presence is sometimes elaborated by defining the major political parties as the sum of parts within “networks,” rather than as formally self-identified institutions.<sup>4</sup> Each party’s network is said to include all allied organizations, such as reliable voting constituencies organized through Planned Parenthood or the National Rifle Association, and sympathetic media outlets like Fox or MSNBC. On this view, a party’s network is an amalgam of resources distributed across the political landscape and orchestrated toward a common, partisan purpose. So we are encouraged to believe that the political parties are in sounder condition than some have imagined.

The larger debate in which this network analysis appears is concerned primarily with one measure of party health: its access to resources. Does the party have enough funding to maintain an infrastructure and spend meaningful sums to elect its candidates? While not unimportant, this line of investigation is incomplete, in that it fails to consider whether the parties in their institutional role have a claim on or control over specific *functions*. For example, the Supreme Court has, over many years, ruled both for and against parties on specific questions about their control over the structure of particular primary nominating processes, such as open, closed, and blanket primaries.<sup>5</sup>

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<sup>3</sup> See Joseph Fishkin & Heather Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 188 (2014) (“Outside groups [such as super PACs] have always played some role in this process . . . . But now they are not just nibbling around the edges by buying ads for this or that race. They are controlling large amounts of political funds and carrying out core party activities on the ground.”). Fishkin and Gerken argue that this development is not healthy for the institutional parties or their “faithful,” but it is one response of parties to super PACs: to have their own. *Id.* at 212–13.

<sup>4</sup> See, e.g., Seth E. Masket et al., *Networking the Parties: A Comparative Study of Democratic and Republican National Convention Delegates in 2008*, at 4 (Aug. 1, 2012) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1451174](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451174) (“[The parties-as-networks perspective] conceives of a party to include its candidates and officeholders, formal party officers, loyal donors, campaign staffers, activists, allied interest groups, social movements, and friendly media outlets.”).

<sup>5</sup> See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457–58 (2008) (rejecting a facial challenge to a law allowing candidates to designate their party affiliation on “blanket primary” ballots from which voters would chose “top two” vote getters for the general election contest); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570, 586 (2000) (holding that California’s “blanket primary” system—which was open to all voters and wherein the candidate from each party with the most votes would win, becoming the party’s nominee in the ensuing general election—violated the First Amendment); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 212, 225 (1986) (invalidating a state statute that prohibited political parties from opening its primary process to independent voters); *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 109, 126 (1981) (holding that a state may not require a national party to seat delegates through an open primary when such seating would contravene party rules).

For the parties, these issues of party function are fundamental. The weaker their hold on these functions, the weaker the parties are as formal and vibrant institutions with a committed membership, elected officials who maintain a modicum of party loyalty, and clear political identity. Diminished parties are impaired in attracting the resources and building the capacity to carry out core activities: development of competitive policy differences, clarification of the choices in elections, engagement of the electorate, and the performance of core political organizing functions, from candidate recruitment to get-out-the-vote activity.

Often overlooked in assessing the parties' struggles is their role in setting the schedule and structure of candidate debates during the presidential nominating process, both in the primaries and the general election. The debates are main events in the selection of the President.<sup>6</sup> Yet parties struggle to overcome legal and political limits on their ability to influence, if not control, the timing, number, subject matter, and location of the debates—and, critically, which candidates will be invited to participate in them. Though the general election debates have long been preserved as a platform for the two major party candidates, with independent candidates taking the stage in only two years, 1992 and 1980, the political parties have limited sway over debate scheduling and format.<sup>7</sup> They face similar constraints in managing candidate demands for inclusion in primary election debates.<sup>8</sup>

To some extent, the quandary of the parties is the inescapable product of a changed politics in which their institutional position is not

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<sup>6</sup> See, e.g., Russell Heimlich, *Most Say Presidential Debates Influence Their Vote*, PEW RESEARCH CTR.: FACT TANK (Sept. 11, 2012), <http://www.pewresearch.org/fact-tank/2012/09/11/most-say-presidential-debates-influence-their-vote/> (finding that two-thirds of those who voted in the 2008 election said the debates were very or somewhat helpful in deciding which candidate to vote for). In its 2015 report on potential reforms of the presidential debate process, a working group writing under the auspices of the Annenberg Public Policy Center wrote that the debates “continue to attract a larger viewing audience than any other campaign event or message” and made reference to a 2014 survey that “found that [p]residential [d]ebates’ were a top source of information in helping voters with their decisions and deemed the ‘most helpful’ by a plurality of respondents.” ANNENBERG DEBATE REFORM WORKING GRP., ANNENBERG PUB. POL’Y CTR., *DEMOCRATIZING THE DEBATES* 6 (2015) [hereinafter *DEMOCRATIZING THE DEBATES*], <https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2015/06/Democratizing-The-Debates-150625.pdf>.

<sup>7</sup> See James K. Glassman, *Open Up the Presidential Debates!*, DAILY BEAST (Sept. 8, 2015), <https://www.thedailybeast.com/open-up-the-presidential-debates> (arguing for the inclusion of independents on behalf of Change the Rules, a group of fifty current and former public officials and leaders in business, academia, and the military).

<sup>8</sup> The Democratic and Republican primaries in 2016 were the sites of active contention over the thresholds established for participation in the debates. See *infra* Section IV.A; *infra* notes 25–30 and accompanying text.

secure. A candidate-centered nominating system means that the parties, even if so disposed, cannot easily control or have the means to winnow the field of candidates. They must also contend with a steady movement in the electorate towards independence and away from strong party affiliation.<sup>9</sup> These pressures on parties complicate their ability to make use of the debates as opportunities to build clear party identity into the framing of electoral choice. Of course, the Trump and Sanders candidacies demonstrate that the parties are inclined to accommodate those prospective nominees with strong public support, even if they have patchy histories of associating with the party.<sup>10</sup> In Trump's case, the party could not be sure that he would even consent to support any nominee other than himself.<sup>11</sup> When candidates like Sanders or Trump can enter party primaries at will and win them, the parties are not well positioned to resist accepting them into their ranks and including them in the debates.

There is also the matter of resources: Parties are regulated entities whose sources of financing are restricted.<sup>12</sup> They must pick their battles, because fighting is not cheap. Any major function is costly, and parties must weigh the expense of planning and holding debates against other priorities, such as funding for state parties, cash for their

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<sup>9</sup> See, e.g., *A Deep Dive into Party Affiliation: Sharp Differences by Race, Gender, Generation, Education*, PEW RESEARCH CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/> (“The share of independents in the public, which long ago surpassed the percentages of either Democrats or Republicans, continues to increase,” and is now at “the highest percentage of independents in more than 75 years of public opinion polling.”). Moreover, younger voters are increasingly describing themselves as politically unaffiliated. See *Millennials in Adulthood: Detached from Institutions, Networked with Friends*, PEW RESEARCH CTR. (Mar. 7, 2014), <http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood> (finding that half of millennials describe themselves as politically independent).

<sup>10</sup> See, e.g., Nicole Gaudiano, *Sen. Bernie Sanders: ‘I Am an Independent,’* USA TODAY (Oct. 23, 2017, 4:43 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/10/23/bernie-sanders-i-am-an-independent/792186001/> (explaining that Bernie Sanders identifies as an independent despite running as a Democrat); Jason Le Miere, *Is Trump Republican? Timeline of President’s Shifting Political Views After He Sides with Democrats*, NEWSWEEK (Sept. 7, 2017, 2:15 PM), <http://www.newsweek.com/trump-republican-democrats-president-661340> (discussing Donald Trump’s different party registrations from the 1980s through 2012).

<sup>11</sup> See Mark Katkov, *Trump Abandons Pledge to Support Republican Nominee*, NPR (Mar. 30, 2016, 4:49 AM), <http://www.npr.org/sections/thetwo-way/2016/03/30/472363315/trump-abandons-pledge-to-support-republican-nominee> (explaining that Republican party leaders were unnerved by Trump’s refusal to endorse the eventual Republican nominee).

<sup>12</sup> See 52 U.S.C. §§ 30116(a)(1), 30118(a), 30125(a)–(b) (2012) (setting limits on contributions to national, state, and local party committees, and prohibiting contributions from corporate and union general sources).

candidates, and the resources needed for grassroots get-out-the-vote and other activities.<sup>13</sup>

These vulnerabilities arising out of the structure of American politics transcend in importance any specific legal incentives or disincentives for parties to perform particular party-type functions, such as the staging of candidate debates. At the same time, the effect of the campaign finance law is not insignificant. By definition, the law drives the parties more in one direction than another, either inviting the parties to assume a major role in particular electoral activities or making it harder for them to do so. The rules governing candidate debates are a case study.

Moreover, the rules governing debates, first fashioned in 1979, are geared toward narrow objectives of campaign finance regulation. They were meant to facilitate use of otherwise prohibited sources, specifically corporate funds, to stage these events.<sup>14</sup> What they do not do is advance the purposes we may now see as equally important, or even more so: improvement in civic discourse, strengthening of the parties, and having the debates serve as effectively as possible as a mechanism to illuminate the governing potential of particular candidates. In this world, the risks of corruption or undue donor influence presented by corporate contributions to the parties, to support their staging of debates, seem like distinctly second-order concerns.

This Article explores the travails of the parties in the presidential debate process and considers whether changes to the law could at least remove impediments to enhanced party control and accountability for the structuring and staging of debates. The political conditions in which parties operate, compounded by perverse incentives in the law, have resulted in a shift away from the parties as a dominant or even especially influential voice in the debate process and toward candidates, media corporations, and nonprofit organizations. And yet because the debates are still presented as party debates, providing a forum for those contesting for the parties' nominations, the parties have the worst of the possible worlds: accountability without authority. It is to address this problem that the Article sets out a modest program of legal reform to give parties at least some better

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<sup>13</sup> See, e.g., Michael Moss & Ford Fessenden, *Interest Groups Mounting Costly Push to Get Out Vote*, N.Y. TIMES (Oct. 20, 2004), <https://www.nytimes.com/2004/10/20/politics/campaign/interest-groups-mounting-costly-push-to-get-out-vote.html> (explaining how parties and interest groups work to raise hundreds of millions of dollars for get-out-the-vote activity); see also BAUER, *supra* note 2, at 47 (explaining how parties can raise money to pay for their conventions).

<sup>14</sup> Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734, 76,734 (Dec. 27, 1979).

choices in defining their roles in presidential primary and general election debates.

## I

### THE NUMBER OF DEBATES—AND THE CANDIDATES ALLOWED INTO THEM

This issue of control has surfaced for the parties most visibly on two questions: the number of debates and the candidates who would be invited to participate in them. The law governing the sponsorship of debates impedes the parties' capacity for controlling the debate function while affording them the means of evading accountability for hard political choices.

The presidential primary debates are a crucial ground of competition for the party's candidates; it is an important part of the process by which the field is winnowed. The front-runners must hold their own against the longer shots that rely on these debates to raise their profile, expand their base of contributors, and, in the case of candidates with weak prospects but a distinctive ideological profile, move the party and its platform in the desired direction. Performance in these debates is also an audition for potential vice presidential choices.

From a party perspective, debates are an opportunity for them to present themselves to the voters for the benefit of affiliated candidates up and down the ticket. Ratings for these debates have varied (as has the viewership for the three presidential general election debates), but the numbers are substantial and offer an exceptional opportunity for parties to showcase candidates and to press policy and ideological differences. By one estimate, the Republican Party attracted 15.53 million viewers per primary debate, for a total of 186.3 million viewers, over the course of twelve debates in 2016.<sup>15</sup> The Democratic performance was weaker: eight million viewers per debate, for a total of 72.03 million, across nine primary debates in 2016.<sup>16</sup>

So, for the strongest candidates, who have to protect their front-runner or leading positions, more is less, while for the party, it may be the reverse. A candidate's interests are all the more powerful when, as in the Democratic Party in 2016, there is from the beginning of the primary process a clear and dominant front-runner. In those cases, the party may come under pressure to limit the potential for debates to

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<sup>15</sup> Memorandum from Simon Rosenberg & Chris Murphy, New Democrat Network, to Interested Parties (May 25, 2016), [http://www.ndn.org/sites/default/files/blog\\_files/President%20Primary%20Debate%20Audiences%20for%202008%202016%20-%20Final.pdf](http://www.ndn.org/sites/default/files/blog_files/President%20Primary%20Debate%20Audiences%20for%202008%202016%20-%20Final.pdf) (reporting audience attendance for the 2008 and 2016 presidential primary debates).

<sup>16</sup> *Id.*

sap resources and attention from a candidate judged virtually certain to win the nomination. On this score, the party faces a difficult balancing of interests; its choices are constrained by the inevitable political pressures from a candidate with the apparently highest chance of winning the nomination.

The determination of the number of candidates invited to participate in the debates also affects the interests of the candidates in ways that limit the parties' room to maneuver. In theory, the party may wish to showcase its talents and diversity of viewpoints. It may wish to avoid alienating wings within the party by failing to adequately represent them in the debates. But the leading candidates are more interested in winning, and, as in the choice of the number of debates, the number and types of candidates allowed onto the stage cannot fail to have an effect on their campaign strategies.

Adding to the pressures on the parties is a fundamental issue of resources. Debates are a financial and logistical challenge.<sup>17</sup> The legal allowances for the financing of debates set the terms for the payment of these expenses, and it is now simplest for parties to cede these obligations to "staging organizations" that may collect unrestricted funds, including donations from corporations.<sup>18</sup> One could call this the easy way out: The basic responsibilities and hard choices fall to the networks or nonprofit debate sponsors, thus allowing the parties to keep their political distance from controversial decisions.

What is gained, however, in plausible deniability and cost savings is lost in institutional influence or leadership, and in the age of weaker parties, this is both another indication of weaker parties and a further cause of it. One might lament or celebrate this weakness, depending on one's normative view of the role of parties or the dominance of the major ones, but it is a development worth noting and fully understanding.

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<sup>17</sup> See, e.g., Colton Lochhead, *UNLV's Presidential Debate Price Tag Grows to \$8M*, LAS VEGAS REV. J. (Sept. 29, 2016, 2:25 PM), <https://www.reviewjournal.com/uncategorized/unlvs-presidential-debate-price-tag-grows-to-8m> (explaining that the October 2016 presidential debate ended up costing twice as much as originally estimated); Rebecca Savransky, *Presidential Debate Security May Cost Up to \$2M: Report*, HILL (Sept. 21, 2016, 4:17 PM), <http://thehill.com/blogs/ballot-box/presidential-races/297089-presidential-dtebate-security-may-cost-up-to-2m-report> (reporting that one thousand police officers were present at the September 2016 presidential debate).

<sup>18</sup> See 11 C.F.R. § 110.13(a) (2018) (defining "staging organizations" as certain nonprofits or news organizations).

## II CONTROL OF THE DEBATES: SIGNIFICANCE AND LEGAL STRUCTURE

Federal campaign finance law provides special rules for the financing of candidate debates. The purpose of these laws is to facilitate the payment of debate expenses by allowing for corporate and other unrestricted donations that parties and candidates cannot otherwise accept directly for any other campaign-related purpose.<sup>19</sup> The theory behind this allowance is that debates are a form of “nonpartisan” voter education, akin to non-partisan voter registration drives and get-out-the-vote campaigns.<sup>20</sup> So corporations may avail themselves of campaign finance law exemptions from the general rule prohibiting them from “influencing an election,” pursuant to which they may underwrite nonpartisan candidate debates.<sup>21</sup>

The rules identify debate “staging organizations” and limit them to “bona fide” news media or nonprofit organizations that may not, by the terms of their tax exemption, support or oppose political candidates.<sup>22</sup> These staging organizations, or sponsors, must structure the debates in a nonpartisan fashion, which means, at a minimum, that they must include at least two candidates, and may not be designed or managed to “promote or advance one candidate over another.”<sup>23</sup> The regulatory history of this provision, contained in an Explanation and Justification issued by the FEC, provides a few examples of what it might mean for them to cross over into impermissible partisanship. For example, a staging organization cannot give one candidate more time than the others, and it may not provide “advance information” about the questions or topics that will come up in the debate.<sup>24</sup>

The regulations also address the criteria for candidate selection. These must be “pre-established” and “objective,”<sup>25</sup> except that in primaries, a sponsor may limit a debate to members of the same party and need not hold debates for both.<sup>26</sup> Authorized debate sponsors have developed the practice of using polling criteria to judge the level of public interest in a candidate, although the networks are not all

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<sup>19</sup> See 52 U.S.C. § 30118(a) (2012) (prohibiting national parties from accepting contributions from corporate and union general treasuries and from national banks).

<sup>20</sup> Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734, 76,734 (Dec. 27, 1979).

<sup>21</sup> *Id.*

<sup>22</sup> 11 C.F.R. § 110.13(a).

<sup>23</sup> *Id.* § 110.13(b)(1)–(2).

<sup>24</sup> Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,261 (Dec. 14, 1995).

<sup>25</sup> 11 C.F.R. § 110.13(c).

<sup>26</sup> *Id.*

required to adopt and use the same criteria.<sup>27</sup> While the staging organization cannot be “partisan” in development and application of the criteria, it may use those criteria to winnow the field to a manageable number.<sup>28</sup> Independent candidates routinely excluded from general election debates have challenged the “objectivity” of the criteria typically used.<sup>29</sup>

The parties remain on the sidelines in this process, and some candidates are content to have them there. In fact, during a conflict with the party over debate access, counsel to one 2016 Democratic presidential candidate, Martin O’Malley insisted that, “the format and structure of each debate must be controlled exclusively by the debate sponsor, not by any party or candidate committee.”<sup>30</sup> The parties cannot dictate or control the format or structure of any network or nonprofit-sponsored debate. The underlying conception of the rules is that the corporations and media organizations authorized to sponsor debates are doing so in a “nonpartisan” fashion. They cannot operate as proxies for the parties, which cannot accept funding for their own activities from corporate entities. So the presidential debates are party debates, but they are not *the parties’ debates*. But that is not to say that the parties cannot attempt to influence the sponsor’s exercise of discretion. Nothing in the rule bars that.

Could the parties sponsor their own debates? They could, of course, but then entirely at their own expense.<sup>31</sup> The cost of general election debates in the current format is high, and, given the larger number of primary election debates, the costs of these events in the

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<sup>27</sup> See, e.g., David Jackson, *New NBC Debate Criteria Could Pose Problems for O’Malley*, USA TODAY (Jan. 11, 2016, 12:33 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/01/08/nbc-democratic-debate-criteria-clinton-sanders-omalley/78502784/> (describing how NBC news executives selected debate criteria for their Democratic primary debate).

<sup>28</sup> Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. at 64,261–62 (explaining that the use of criteria to control the number is justified “if the staging organization believes there are too many candidates to conduct a meaningful debate”).

<sup>29</sup> See, e.g., *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 143–45 (D.D.C. 2017) (reviewing the FEC’s dismissal of a challenge to the presidential debates’ fifteen percent polling criterion); *infra* notes 92–95 and accompanying text.

<sup>30</sup> Memorandum from Joe Sandler, Counsel, O’Malley for President Campaign (Aug. 9, 2015), <https://www.scribd.com/document/274183960/O-Malley-attorney-on-DNC-debate-process>.

<sup>31</sup> In primary elections, the parties could finance the debates as party-building activities—essentially an overhead expense. 11 C.F.R. § 106.1(c) (2018) (indicating that party-building costs are not attributable to the support of a particular candidate). The major political parties could share the expenses of a general election debate, again as a cost of party-building, and there is no clear legal barrier to one party’s assumption of the full expense (unlikely as that would be in the case of a party funding a debate in which the candidate from the opposing party would appear).

pre-nomination period are also substantial.<sup>32</sup> The steepest of these costs is the “feed” of the broadcast.<sup>33</sup> The networks are committed to financing the broadcasts and retaining control of the feed; they can profit handsomely from licensing the feed.<sup>34</sup> The costs of production associated with staging a debate are ones that the parties could easily bear.

Even during the period prior to the enactment of McCain-Feingold, when parties raised and spent “soft money,” they could not accept unrestricted funds for the payment of debate expenses.<sup>35</sup> To underwrite these costs, they would have to draw on the limited “hard” resources available.<sup>36</sup> It is noteworthy in this respect that the law has for years provided parties with special funding exemptions for the high cost of holding another unique event in the presidential campaign season—conventions.<sup>37</sup> Not so for debates.<sup>38</sup> The expense of

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<sup>32</sup> See, e.g., Memorandum from Simon Rosenberg & Chris Murphy, *supra* note 15, at 1 (reporting that in 2016 Republican presidential candidates participated in twelve primary election debates and Democratic candidates participated in nine debates prior to the primaries). The Annenberg Report describes a debate in the general election as an “extravaganza, elaborate in design and costly,” and notes a range of expensive facilities and services, including “temporary buildings or retrofit spaces not just to create a debate venue, but also for spin alleys, candidate holding rooms, surrogate viewing areas, press filing centers, staff work spaces, and ticket distribution.” *DEMOCRATIZING THE DEBATES*, *supra* note 6, at 21.

<sup>33</sup> See Paul Fahri, *TV Networks Raise the Price of Pool Video—and Concerns Among Other Media*, WASH. POST (July 11, 2016), [https://www.washingtonpost.com/lifestyle/style/tv-networks-raise-the-price-of-pool-video—and-concerns-among-other-media/2016/07/11/006df768-477b-11e6-bdb9-701687974517\\_story.html](https://www.washingtonpost.com/lifestyle/style/tv-networks-raise-the-price-of-pool-video—and-concerns-among-other-media/2016/07/11/006df768-477b-11e6-bdb9-701687974517_story.html) (describing the sharp increase in prices that networks charge for footage of important political events).

<sup>34</sup> *Id.*

<sup>35</sup> See 52 U.S.C. § 30118(a) (2000); see also BAUER, *supra* note 2. Following the enactment of McCain-Feingold, national parties could not pay for operating expenses, including debates, with anything other than funds subject to contribution limits and source restrictions. § 30118(a) (2012) (requiring that certain groups, including national banks and labor organizations, not make contributions to political campaigns, including conventions or caucuses). However, even before the 2002 reform, the parties could use unrestricted or “soft” funding for “nonfederal” purposes only—such as to support state and local candidates. See, e.g., 11 C.F.R. § 102.5 (2001) (providing for limits on the spending of federal account funds for political committees that also raise money for non-federal elections). A debate featuring only federal candidates is, of course, purely federal in character, and the parties could only use restricted “hard money” or federal funding to pay the associated expenses. It is in light of this broad prohibition that the FEC promulgated the debate rules in order to provide limited exceptions for corporate entities, such as broadcasters and certain tax-exempts, to fund federal candidate debates.

<sup>36</sup> See 52 U.S.C. § 30118(a) (2012) (stating that national parties cannot accept contributions from restricted sources such as corporate or union general treasury funds).

<sup>37</sup> See, e.g., 11 C.F.R. § 9008.9 (2002) (providing special rules for services and goods obtained from commercial vendors); *id.* § 9008.52 (allowing for financing through city “host committees”); *id.* § 9008.53 (allowing for funding through municipal funds).

<sup>38</sup> There is no legislative or regulatory history that explains why special funding authority was provided for the convention function, and for other functions like the

debates gives parties additional reason to yield authority over the debates to news media organizations and nonpartisan staging organizations.

### III

#### THE NUMBER OF DEBATES: THE “EXCLUSIVITY” RULE IN THE PRIMARIES

In 2016, the two major parties did make an ostensible bid for some larger measure of control of the primary election debate process. The Republicans moved first,<sup>39</sup> followed shortly by the Democrats, in asserting an exclusivity principle.<sup>40</sup> Under this principle, the parties would sanction a certain number of debates staged by media organizations, and these would be the only sanctioned debates that party candidates were authorized to participate in. Should the candidates violate this exclusivity rule and accept other invitations to debate, the penalty would be disqualification from further participation in the sanctioned series.<sup>41</sup>

Behind the rule was a fairly defined objective of the parties: to run interference for candidates faced with a proliferating number of debates.<sup>42</sup> It was a protective function, but still an important service to the candidates, who could decline a debate invitation on the grounds that the event was not among those that their party sanctioned.

Not all candidates, however, were satisfied that the rules’ restrictions operated to the benefit of *all* the contestants. The Democratic National Committee (DNC) had to defend against a complaint that, in enacting this rule, it was acting for the benefit of the front-runner, former Senator and Secretary of State Hillary Clinton, and not in furtherance of the broader institutional purpose of allowing for a suffi-

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expenses of building and maintaining office facilities, but not for the sponsorship of debates.

<sup>39</sup> See Press Release, Republican Nat’l Comm., RNC Announces Debate Schedule Sanctions 9 Debates (Jan. 16, 2015), <https://www.gop.com/rnc-announces-debate-schedule-sanctions-9-debates/> (announcing the schedule of “sanctioned debates”).

<sup>40</sup> See Press Release, Democratic Nat’l Comm., DNC to Sanction Six Presidential Primary Debates (May 5, 2015), <https://www.democrats.org/post/dnc-to-sanction-six-presidential-primary-debates> (explaining that Democratic primary candidates may only participate in Democratic National Committee (DNC)-sanctioned debates, or forfeit the ability to participate in the remainder of the sanctioned debates).

<sup>41</sup> See *id.*; Press Release, Republican Nat’l Comm., *supra* note 39; RNC Commc’ns, *RNC Approves Debate Rule*, GOP: BLOG (May 9, 2014), <https://www.gop.com/rnc-approves-debate-rul/> (“Any presidential candidate who participates in any debate that is not a Sanctioned Debate shall not be eligible to participate in any further Sanctioned Debates.”).

<sup>42</sup> See Press Release, Democratic Nat’l Comm., *supra* note 40 (explaining that one of the key principles guiding the decision to formulate a debate schedule is “[s]etting a reasonable number of impactful debates”).

cient number of wide-ranging debates that include diverse views.<sup>43</sup> The O'Malley campaign disputed that the party had the authority to impose this exclusivity requirement. A memorandum from the campaign pointed out both that the party had never done this before and that "in 2008, all of the major candidates . . . participated in one or more debates not sanctioned by the DNC."<sup>44</sup> Moreover, in keeping with its view of the full control exercised by staging organizations under FEC rules, the O'Malley campaign objected that the DNC could not require those organizations to enforce the exclusivity requirement. In fact, under the O'Malley theory, "it would be legally problematic if any of the sponsors of the sanctioned debates actually agreed to the 'exclusivity' requirement."<sup>45</sup>

As it turned out, the parties did not press the networks to enforce the exclusivity rules. The DNC blessed the Clinton and Sanders campaigns' negotiation of four debates in addition to those the party had sanctioned.<sup>46</sup> Three of the four debates were held. Later, one of the candidates, Clinton, withdrew from the agreement for the fourth debate.<sup>47</sup> The party stepped out of the way, making it clear that it was up to the candidates to agree or disagree as their interests dictated. Even in shielding a candidate from any consequences in withdrawing from the debate agreement, the party showed that it was not in charge. Candidates who decided, as Clinton and Sanders did, to add debates to their schedule, could do so without regard to any party-imposed sanction or fear that any such penalty would be imposed.

There are a number of reasons why the DNC would have cause to impose the exclusivity requirement yet shy away from its aggressive

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<sup>43</sup> See, e.g., Liz Fields, *Sanders and O'Malley Accuse DNC of Favoring Clinton Ahead of Third Democratic Debate*, VICE NEWS (Dec. 19, 2015, 9:50 AM), <https://news.vice.com/article/sanders-and-omalley-accuse-dnc-of-favoring-clinton-ahead-of-third-democratic-debate> (reporting complaints from the O'Malley and Sanders campaigns that the DNC was favoring the Clinton campaign through the limited debate schedule); Patrick Healy & Maggie Haberman, *Martin O'Malley Rails at Democrats for Debate Schedule 'Rigged' to Aid Hillary Clinton*, N.Y. TIMES (Aug. 8, 2015), <https://www.nytimes.com/politics/first-draft/2015/08/28/martin-omalley-rails-at-democrats-for-debate-schedule-rigged-to-aid-hillary-clinton>.

<sup>44</sup> Memorandum from Joe Sandler, *supra* note 30.

<sup>45</sup> *Id.*

<sup>46</sup> See Ben Kamisar, *Clinton, Sanders Agree to Four More Debates*, HILL (Feb. 3, 2016, 3:05 PM), <http://thehill.com/blogs/ballot-box/presidential-races/268079-clinton-sanders-agree-to-four-more-debates> (reporting Chairwoman Debbie Wasserman Schultz's decision to sanction an additional four debates in the Democratic primary).

<sup>47</sup> See Dan Merica & Brian Stelter, *Clinton Declines to Debate Sanders in California*, CNN (May 24, 2016), <http://www.cnn.com/2016/05/23/politics/hillary-clinton-bernie-sanders-fox-debate-california/index.html> (reporting the Clinton campaign's decision to pull out of a final Democratic debate).

enforcement. Each of these reasons underlined the institutional limits within which the party was operating.

First, as the O'Malley campaign recognized, "it is highly unlikely that any of [the] sponsors of the sanctioned debates would ultimately be willing to enforce [the] 'exclusivity' requirement."<sup>48</sup> If Clinton and Sanders decided on more debates, as they eventually did, the networks were going to cover them. This was both a journalistic imperative and a business necessity, with audiences to be attracted and money to be made. There is nothing in the relationship of party to network that would compel the network to protect the parties' interests in their exclusivity policies.

Second, the leading candidates had the superior say in the matter. If Clinton were to agree to a debate, because she judged it to be in her political interest, the DNC would have been hard-pressed to resist or to enforce against her the penalty of disqualification from the sanctioned debates, or any other punishment. Such penalties would only harm a front-running candidate whose prospects the party was committed to enhancing, not undermining.

Third, and related to the primacy of candidate will, the party had to contend with pressures from the party membership and, in particular, from the supporters of particular candidates. O'Malley never had the following to enable him to succeed with his demands.<sup>49</sup> But Trump, Clinton, and Sanders all did, and their supporters could make themselves heard.

The Republicans had to deal with similar limitations when Trump chose to skip one of the Iowa primary debates sponsored by Fox.<sup>50</sup> He was feuding with the network at the time, and declared that he had no interest in helping it make money.<sup>51</sup> The Republican National Committee (RNC) declined to intervene.<sup>52</sup> "Candidates can choose

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<sup>48</sup> Memorandum from Joe Sandler, *supra* note 30.

<sup>49</sup> O'Malley's weak political position was well illustrated by his failure to draw significant support from even his home state of Maryland. See John Wagner & Peyton M. Craighill, *Poll: O'Malley Gets 4 Percent Support from Home State*, WASH. POST (Oct. 4, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/10/12/poll-omalley-gets-4-percent-support-from-home-state/?utm\\_term=.522de26d6033](https://www.washingtonpost.com/news/post-politics/wp/2015/10/12/poll-omalley-gets-4-percent-support-from-home-state/?utm_term=.522de26d6033). It is not at all clear that, in light of this anemic level of support, Governor O'Malley would have received more generous treatment from the networks than from the DNC.

<sup>50</sup> See Phillip Rucker et al., *Trump Says He Won't Participate in GOP Debate on Fox News*, WASH. POST (Jan. 26, 2016), [https://www.washingtonpost.com/politics/trump-says-he-wont-participate-in-gop-debate-on-fox-news/2016/01/26/58fa0b2e-c490-11e5-a4aa-f25866ba0dc6\\_story.html](https://www.washingtonpost.com/politics/trump-says-he-wont-participate-in-gop-debate-on-fox-news/2016/01/26/58fa0b2e-c490-11e5-a4aa-f25866ba0dc6_story.html) (explaining that Trump skipped the Fox News debate in part because he felt that television networks had been taking advantage of him through debate ad sales).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

whether to participate in a debate or not,” its spokesperson, Sean Spicer, advised the press.<sup>53</sup> The case he was addressing was the obverse of exclusivity: The candidate was stepping out, not trying to get in. The party was in no position to compel participation. But the GOP’s response was stronger—that whether Trump participated was not its concern, whatever the effect on the viewership or impact of the debate.

What unites the two parties’ experiences is the question of how much control each party was in a position to exercise in structuring and managing the debates. In the case of the exclusivity requirement, it is possible to dismiss the significance of the rule. After all, if the parties were merely blocking and tackling for the benefit of the candidates, it might not matter if they declined to enforce the rule when the candidates no longer wanted the protection. But the Democratic Party in 2016 did enforce the rule against some candidates—e.g., O’Malley—and not against others. The rule did not amount to much. It yielded to the politics of the moment, in favor of the apparently strongest candidates.

It is natural to see in this experience a party pursuing only the interests of front-running or leading candidates. Supporters of Sanders were inclined to view the party’s actions in just this way. But the colder reality is that neither the DNC nor the RNC had much choice in the matter, regardless of how they may have perceived the politics. The networks could put on the show, promoting and paying for it, and the candidates could decide whether to join. Or, in the case of Trump, he could withdraw from a debate altogether. In each of these cases, the choice of who would participate and when was driven by the sponsors’ and the candidates’ self-interest. Had either party concluded that its institutional interest was well-served by imposing a limitation on the number of debates, there is little to nothing it could have done about it. The RNC’s and DNC’s institutional interests carry less weight than the commercial interests of networks and the demands of individual candidates.

#### IV

##### THE ELIGIBILITY CRITERIA: POLLING THRESHOLDS IN THE PRIMARY AND GENERAL ELECTION DEBATES

Under the candidate debate criteria, staging organizations select the standards for inclusion. While the regulations governing these standards require the use of “pre-established objective criteria,” the

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<sup>53</sup> *Id.*

staging organizations are given wide discretion in their choice.<sup>54</sup> The use of polling criteria is not mandated, and not, in general election debates, always favored. In 1992, when the Commission on Presidential Debates invited Independent candidate Ross Perot to participate in a general election debate alongside George H.W. Bush and Bill Clinton, it did not rely on Perot's standing in the polls.<sup>55</sup>

As noted, in both the Democratic and Republican primaries, and in the general election, polling data have come to be the preferred, objective means of establishing eligibility.<sup>56</sup> The staging organizations can land wherever they wish in setting the threshold polling results, choosing the period of time during which public opinion would be measured, and selecting which of the many available polls to consult.

### A. *Polling in the Primaries*

In 2016, media organizations used polling data to sort the large Republican field into prime time events and “undercard” debates, which included second-tier candidates and were scheduled earlier in the day with vastly reduced audiences and press coverage.<sup>57</sup> For example, CNN's criteria for invitations to the fifth debate, to be held in Las Vegas, Nevada, judged candidates by their showing in national polls *or* their polling in the early caucus and primary states of Iowa

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<sup>54</sup> See 11 C.F.R. § 110.13(c) (2018) (providing that staging organizations must use “pre-established objective criteria” to choose the candidates that may participate in a debate but that the organizations shall not use party nominations as the sole criterion). Moreover, apart from committing the choice of “pre-established objective criteria” to the staging organizations, the rules also provide that “[f]or debates held prior to a primary election, caucus, or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.” *Id.*

<sup>55</sup> See *The Commission on Presidential Debates: An Overview*, COMMISSION ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=overview> (last visited Aug. 9, 2018) (noting that prior to the 2000 general election debates “the panel’s recommended candidate selection criteria . . . included a review of three types of factors: (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national public enthusiasm or concern, to determine whether a candidate had a realistic chance of election”). Under this system, “[t]he criteria did not consider any one piece of evidence to be determinative.” *Id.*

<sup>56</sup> For a legal challenge to this practice, see *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 143 (D.D.C. 2017), in which plaintiff argued that the Commission on Presidential Debates’ fifteen percent polling criterion was not “objective.”

<sup>57</sup> Sometimes called the “undercard” debate, it has also come to be derided as the “kids’ table.” See, e.g., Jillian Jorgensen, *Who Emerged as the Adult in the Republican “Kids’ Table” Debate?*, OBSERVER (Aug. 6, 2015, 7:21 PM), <http://observer.com/2015/08/who-emerges-as-the-adult-from-the-republican-kids-table-debate/>.

and New Hampshire.<sup>58</sup> The threshold for performance in the national poll was 3.5%, and in the two early state contests, at least four percent.<sup>59</sup> Fox News, in contrast, chose to limit participation in the debates to the candidates who placed in the top ten in national polls.<sup>60</sup> Notably, it was reported that the national party “struggled” to offer its view of suitable inclusion criteria, and that the RNC Chair could manage only a statement of “support” and “respect” for the criteria announced by Fox, the first of the debate sponsors.<sup>61</sup>

One result of these polling-determined invitations was that experienced party leaders like Lindsey Graham, a United States senator and seasoned voice in national security affairs, never made it to prime time and participated only in the “undercard” debate.<sup>62</sup> But the criteria were not always fixed. When it appeared that Republican presidential candidate Carly Fiorina might slip from the main event to the undercard, the debate sponsor, CNN, changed the criteria to keep her in the prime time event.<sup>63</sup>

The Democratic Party candidates had to satisfy a different polling threshold, set lower and hence more inclusively. The networks elected to set the threshold to reflect the preference of the party at that stage in the primaries for the more “expansive” criterion of inclusion<sup>64</sup>: one

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<sup>58</sup> Eric Bradner, *CNN Republican Presidential Debate Criteria Announced*, CNN (Dec. 10, 2015), <http://www.cnn.com/2015/11/20/politics/republican-presidential-debate-criteria-announced/index.html>.

<sup>59</sup> *Id.*

<sup>60</sup> Maggie Haberman, *Fox News Seeks to Limit First Presidential Debate to 10 Republicans*, N.Y. TIMES (May 20, 2015, 5:22 PM), <https://www.nytimes.com/politics/first-draft/2015/05/20/first-republican-debate-is-limited-to-10-candidates/>.

<sup>61</sup> See Todd J. Gillman, *See (10 of) You in Cleveland: Details Emerge for First 2016 Primary Debate on Aug. 6*, DALL. NEWS (May 20, 2015), <https://www.dallasnews.com/news/politics/2015/05/20/see-10-of-you-in-cleveland-details-emerge-for-first-2016-primary-debate-on-aug-6> (reporting that the Republican National Committee deferred to Fox News and allowed the network to establish qualifying criteria).

<sup>62</sup> See WALTER SHAPIRO, BRENNAN CTR. FOR JUSTICE, *THE CHOSEN ONE: THOUGHTS ON A BETTER, FAIRER, AND SMARTER WAY TO PICK PRESIDENTIAL NOMINEES* 17 (Apr. 26, 2017), <https://www.brennancenter.org/sites/default/files/publications/PresidentialNominationsFINAL%20.pdf>. Shapiro argues that the networks “deliberately marginalized” candidates like Senator Graham while giving disproportionate attention to Donald Trump for ratings purposes. *Id.*

<sup>63</sup> See Hadas Gold, *CNN Changes Debate Criteria, Clearing Path for Fiorina*, POLITICO (Sept. 1, 2015, 6:55 PM), <http://www.politico.com/story/2015/09/cnn-changes-debate-criteria-clearing-path-for-fiorina-213237> (explaining how CNN changed the criteria to include candidates, like Fiorina, in the debate by using one method that disregarded polls from earlier in the primary cycle).

<sup>64</sup> See Debbie Wasserman Schultz, *Announcing the Democratic Debate Schedule*, MEDIUM (Aug. 6, 2015), <https://medium.com/@DWStweets/announcing-the-democratic-debate-schedule-d8e284513221> (explaining the process of “working with our media partners on formats that allow a robust discussion of critical issues, with all our candidates having equal opportunities to make their views known”).

percent nationally, judged by reference to credible national polls conducted over a defined period prior to the debate.<sup>65</sup> This standard guaranteed that, for the first debates, Sanders and Clinton would be joined on stage by former Senator and Secretary of the Navy Jim Webb and by former Governor and Senator Lincoln Chaffee. Neither Webb nor Chaffee could demonstrate major campaigns in development or in progress. They qualified under the most lenient of standards, which enabled the party to accommodate—and to avoid the awkwardness of excluding—two former national officeholders. But the decision was the networks' to make.

However, the one percent threshold became an issue when Lawrence Lessig, a professor at Harvard Law School and a passionate advocate of political reform, declared his presidential candidacy in August 2015 and pressed for inclusion in the debates as central to the viability of his candidacy.<sup>66</sup> The networks did not invite him to any debate. Lessig chose not to argue the point with the networks, but instead took his cause to the DNC in hopes of enlisting its support—perhaps in the belief that, while the sponsoring organization supposedly established the criteria, the party would have a meaningful measure of influence. The DNC declined to support him in his quest.<sup>67</sup> Having qualified for neither the first nor the second debates, and concluding that the game was rigged, Lessig announced that he had no choice but to withdraw from the race.<sup>68</sup>

The Lessig episode clearly brings out the issues presented by the allocation of responsibility for criteria-setting, and by the polling

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<sup>65</sup> See Ben Kamisar, *Lower-Tier Dems in for CNN Debate*, HILL (Sept. 28, 2015), <http://thehill.com/blogs/ballot-box/presidential-races/255223-lower-tier-dems-in-for-cnn-debate> (explaining that the criteria CNN set for the first Democratic primary debate “set the bar so low that every major candidate” would get in).

<sup>66</sup> See Phillip Rucker, *Lawrence Lessig Wants to Run for President—In a Most Unconventional Way*, WASH. POST (Aug. 11, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/08/11/lawrence-lessig-wants-to-run-for-president-in-a-most-unconventional-way/?utm\\_term=.07d326860e2b](https://www.washingtonpost.com/news/post-politics/wp/2015/08/11/lawrence-lessig-wants-to-run-for-president-in-a-most-unconventional-way/?utm_term=.07d326860e2b) (quoting Lessig explaining that “[i]f we can be in the debates and frame the issue in a way that becomes compelling, then I think there’s a chance to see it take off”).

<sup>67</sup> See, e.g., Tom McCarthy, *Larry Lessig Drops Presidential Run: Democrats “Won’t Let Me Be a Candidate,”* GUARDIAN (Nov. 2, 2015), <https://www.theguardian.com/us-news/2015/nov/02/larry-lessig-quits-presidential-campaign-democratic-party-video> (reporting Lessig’s frustration that the Democratic Party was not welcoming to his candidacy).

<sup>68</sup> See, e.g., David Weigel, *Larry Lessig Ends Presidential Campaign, Citing Unfair Debate Rules*, WASH. POST (Nov. 2, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/11/02/larry-lessig-ends-presidential-campaign-citing-unfair-debate-rules/?utm\\_term=.4165446befdd](https://www.washingtonpost.com/news/post-politics/wp/2015/11/02/larry-lessig-ends-presidential-campaign-citing-unfair-debate-rules/?utm_term=.4165446befdd) (reporting Lessig’s frustration that the Democratic Party “won’t let [him] be a candidate”). For Lessig’s full explanation of this conclusion, see Lawrence Lessig, *Why I Dropped Out*, NEW YORKER (Jan. 28, 2016), <https://www.newyorker.com/news/news-desk/why-i-dropped-out>.

threshold criterion in particular. Lessig came late to the race but he brought with him what he believed to be a distinctive program: a strong position on the role of money in politics. He put forward an elaborate proposal to run on comprehensive political reform and, if successful, to serve for only one term.<sup>69</sup> He proceeded to raise funds—a million dollars in the first month—and to make the case for his inclusion in the debate.<sup>70</sup> His problem, and it proved fatal, was the application of the one percent polling requirement for eligibility.

The networks found that Lessig had not met the threshold, but Lessig insisted that the rules had been manipulated to deny him qualification. The question was whether he had to make the requisite showing *during* the six weeks prior to a debate or *at least* six weeks prior.<sup>71</sup> On only the second of these standards did Lessig have a case, and he contended that the parties acquiesced in a switch of standards executed to keep him out.<sup>72</sup> Moreover, Lessig pressed hard on the point that a number of polls consulted for this period had not included him, and that in the relevant period he scored higher in some polling than did either Chaffee or Webb.<sup>73</sup>

Lessig engaged the DNC in this argument—a notable choice because, under the debate rules, the networks as staging organizations were responsible for the nonpartisan selection criteria. This was in part a savvy move: If Lessig wanted to argue that he was being unfairly denied a chance to voice a particular position, the party was the more compelling adversary. He was the outsider, in hand-to-hand combat with a party establishment that, as Sanders charged, had embraced the Clinton candidacy.<sup>74</sup> Lessig may also have appreciated that, as in the case of Fiorina, the argument on the merits for inclusion would fail or succeed on the strength of political factors—such as his showing in the polls, as an indication of strength, or the growth in his

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<sup>69</sup> Hayley Walker, *Harvard Professor Larry Lessig Says He's Running for President*, ABC NEWS (Sept. 6, 2015), <http://abcnews.go.com/Politics/harvard-professor-larry-lessig-running-president/story?id=33568066>. Lessig began running in August, but did not make the decision final until he had met a goal of raising one million dollars in a period of one month. *Id.*

<sup>70</sup> *See id.*

<sup>71</sup> For a history and extended argument on behalf of his candidate, see Steve Jardig, *The Democrats Have Now Changed the Rules, and Forced Larry Lessig Out*, HUFFINGTON POST (Nov. 2, 2015), [https://www.huffingtonpost.com/steve-jardig/the-democrats-have-now-ch\\_b\\_8445202.html](https://www.huffingtonpost.com/steve-jardig/the-democrats-have-now-ch_b_8445202.html).

<sup>72</sup> *See* Weigel, *supra* note 68 (reporting that Lessig blamed his campaign's failure on the rules that excluded him from the Democratic primary debates).

<sup>73</sup> *See, e.g.*, Lawrence Lessig, *I'm Trying to Run for President but the Democrats Won't Let Me*, POLITICO (Oct. 1, 2015), <http://www.politico.com/magazine/story/2015/10/lessig-lawrence-democrats-debate-2016-213215>.

<sup>74</sup> *See id.* The title of the article speaks for itself: Lessig did not place the blame on the networks.

strength, in the electorate. That political case would be bolstered by appealing for public support from Democrats lobbying their own party for his admission to the debates.

But Lessig's strategy overlooked the party's own political difficulties. Neither the networks nor the leading candidates in the race had reason to support Lessig's participation in the debates. Lessig was not a national celebrity, and his presence on the stage would not necessarily boost ratings. The issue he was promoting—political reform—was not uniquely his own. Sanders also campaigned vigorously against *Citizens United*<sup>75</sup> and for the abolition of “super PACs.”<sup>76</sup> The candidates, for their part, were silent about Lessig's case for joining the debates. It was not in their interest to share the stage, and hence split the available airtime, with a newcomer. As was seen in the case of the 1992 general election debates, a third party or independent candidate may gain access to the debate stage only if one of the major candidates sees a strategic advantage in including her and can successfully negotiate for her inclusion.<sup>77</sup>

Lessig's case was strongest when he called for attention to measures other than polling data. He had raised money, qualified for public financing, and had established campaign organizations in two early primary states.<sup>78</sup> He was knowledgeable about a significant issue, and he brought to the discussion of it considerable experience and expertise as an active reformer and published author.<sup>79</sup> The Lessig campaign *looked like* a serious campaign, albeit a small one. It would remain small, however, if he could not attract national attention and expand his visibility and sources of financial and popular support.

None of his campaign assets counted as “objective” criteria, only the polling. The decision on how to apply those criteria, favorably or unfavorably, to the Lessig cause rested organizationally with the networks and politically with the leading candidates. The party answered politically for the exclusion of Lessig,<sup>80</sup> but did not have—and could

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<sup>75</sup> 558 U.S. 310 (2010).

<sup>76</sup> See, e.g., *Getting Big Money Out of Politics and Restoring Democracy*, BERNIE SANDERS, <https://berniesanders.com/issues/money-in-politics/> (last visited Aug. 9, 2018).

<sup>77</sup> See *infra* note 85 and accompanying text.

<sup>78</sup> See *supra* note 71 (reporting on the successes of Lessig's campaign).

<sup>79</sup> See *supra* notes 66, 69; see also Faculty Profile for Lawrence Lessig, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10519/Lessig/publications> (last visited Aug. 9, 2018) (listing publications by Professor Lessig).

<sup>80</sup> For an example of the DNC's accountability for the structure and determination of eligible participants in the debates, see *An Undemocratic Party? Ahead of First Debate Criticism Grows Over DNC's Move to Control Process*, DEMOCRACY NOW! (Oct. 13, 2015), [https://www.democracynow.org/2015/10/13/an\\_undemocratic\\_party\\_ahead\\_of\\_first](https://www.democracynow.org/2015/10/13/an_undemocratic_party_ahead_of_first).

say it did not have—formal control. In fact, under the debate rules, the party as a partisan organization could not set the eligibility requirements.

Lessig might say, as Sanders in other contexts did, that the DNC had lined up behind Clinton and had no intention of pressing for any result she did not favor. It would be more accurate to say that the DNC would have been in the same position regardless of any imputed favoritism toward Clinton or any other candidate. The networks paid the money and administered the eligibility rules. Their commercial interests required them, in putting on a show, to pay close attention to the leading candidates. Where neither the producers nor the cast had any interest in revisions to the script, the show would go on—without Larry Lessig.

### B. Polling in the General Election

Since 1988, the Commission on Presidential Debates (the Commission), a tax-exempt organization, has assumed the role of organizing the presidential general election debates.<sup>81</sup> It operates within the same debate rules as a staging organization and funds the debates with support from the host community and from private (including corporate) sources.<sup>82</sup> The eligibility requirements for admission to the debates include a threshold for performance in national polls. Since 2000, the threshold has been set at fifteen percent.<sup>83</sup>

Only once since 1988 has an independent or third-party candidate appeared alongside the general election candidates on the debate stage. In 1992, Perot was in and out of the race, and the Commission initially resisted his inclusion in the debates.<sup>84</sup> President George H. W.

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<sup>81</sup> *Our Mission*, COMMISSION ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=about-cpd> (last visited Aug. 9, 2018). The Commission defines its mission as “ensur[ing] that debates, as a permanent part of every general election, provide the best possible information to viewers and listeners.” *Id.*

<sup>82</sup> *The Commission on Presidential Debates: An Overview*, *supra* note 55 (“The CPD obtains the funds required to produce its debates every four years and to support its ongoing voter education activities from the communities that host the debates and, to a lesser extent, from corporate, foundation and private donors.”).

<sup>83</sup> *Id.* (“It was the CPD’s judgment that the 15 percent threshold best balanced the goal of being sufficiently inclusive to invite those candidates considered to be among the leading candidates, without being so inclusive that invitations would be extended to candidates with only very modest levels of public support . . .”).

<sup>84</sup> See *Complaint Against the Commission on Presidential Debates at 13–14*, Comm’n on Presidential Debates, MUR 5414 (FEC 2004), <http://eqs.fec.gov/eqsdocsMUR/00002CFA.pdf> (“The [Commission’s] Advisory Committee recommended that Perot be included in the first debate, but that his inclusion in the [next two] debates [undergo] further review after that first debate. . . . Perot participated in all of the 1992 presidential debates only because President Bush wanted him there, and President Clinton agreed.”).

Bush insisted, however, and Governor Bill Clinton agreed, and on that basis, the Commission relented and issued the invitation.<sup>85</sup>

Since 2000, the Commission adopted, and has stuck firmly by, the fifteen percent requirement. Third-party or independent candidates have protested that this threshold is almost certain to disqualify them. They argue that they are caught in a vicious circle.<sup>86</sup> To approach fifteen percent, these candidates must be given a chance to make their case, and for this purpose, the debates are indispensable.<sup>87</sup> But their exclusion from the debates will mean the virtual impossibility of garnering fifteen percent.<sup>88</sup>

As in the primaries, the decision rests with the staging organization and the major party candidates. Neither typically have an interest in adding participants to the debate. The exception—the inclusion of Perot in the 1992 debates—shows only that the staging organization, as the producer, has to be attentive to the strongly held views of its talent: the candidates. In that case, twenty-six years ago, the sponsor acquiesced.<sup>89</sup>

Since that time, the independent or third-party candidates have been kept off of the stage and have taken their complaints to the courts. For the most part, the courts have been unsympathetic to their cause. The judicial coolness to these appeals has been such that, in 2005, a court upheld the Commission's decision to block Independent

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<sup>85</sup> See *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 134, 144 (D.D.C. 2017) (noting the plaintiff's evidence that Perot was included "only . . . at the request of the two major parties"). This history of third-party and independent exclusion is noted in an administrative complaint filed with the FEC by Open Debates, alleging that the Commission on Presidential Debates operated as a political committee committed to the major parties at the exclusion of the minor parties. Complaint Against the Commission on Presidential Debates, *supra* note 84, at 13–16 ("'If not for the candidate's agreement that Perot be included in 1992, he wouldn't have been included,' said Bobby Burchfield." (quoting Interview by George Farah with Bobby Burchfield, Gen. Counsel of Bush Re-Election Campaign (Apr. 5, 2001))); see also Gene Healy, *Let a Third Candidate Join the Clinton-Trump Debates*, NEWSWEEK (Aug. 27, 2016, 9:10 AM), <http://www.newsweek.com/let-third-candidate-join-clinton-trump-debates-493083> (discussing the Commission's history of excluding third-party candidates and advancing the interests of the two major parties).

<sup>86</sup> See *DEMOCRATIZING THE DEBATES*, *supra* note 6, at 15 (noting the view expressed by independents and others appearing before the Working Group that "the rules should take account of the possibility that through inclusion in the debates an independent candidate could build the potential for victory that he or she did not have at the outset").

<sup>87</sup> Even in an era of social media proliferation and cheap communications options, the 2016 independent candidates failed to meet the fifteen percent threshold. See Dan Cassino, *How Polls Overestimate Support for Third-Party Candidates*, HARV. BUS. REV. (NOV. 4, 2016), <https://hbr.org/2016/11/how-polls-overestimate-support-for-third-party-candidates>.

<sup>88</sup> See *infra* notes 93–94 and accompanying text (discussing the unreliability of polling and the money required to reach the fifteen percent threshold).

<sup>89</sup> See *supra* note 85 and accompanying text.

candidate Ralph Nader from even *attending* a presidential debate.<sup>90</sup> Nor have the courts shown interest in novel “antitrust” theories under which the Commission would be liable for engaging in a conspiracy with the major parties to control the political debate “market.”<sup>91</sup>

One court, however, did recently find fault with the FEC for not giving due consideration to evidence against the polling threshold as an “objective” criterion. In *Level the Playing Field v. FEC*, the plaintiffs appealed from the agency’s refusal to consider certain evidence in enforcement actions and in support of a request for a rulemaking to amend the debate rules.<sup>92</sup> They had submitted expert testimony stating that polling data was “not inherently reliable” in any field of more than two candidates.<sup>93</sup> They also purported to show that, unless independent candidates spent up to \$300 million prior to the polling, their chances of achieving the fifteen percent threshold were virtually non-existent.<sup>94</sup> The FEC, on reconsideration, restated its rationale for declining to initiate a rulemaking to reconsider the use of polling data.<sup>95</sup>

The history of these claims and their disposition show how rarely party interests appear in the arguments over the structure and eligibility for debates. The staging organizations administer the polling criteria and, as the rules are set up, the parties must, in theory, keep their distance. The criteria are meant to be nonpartisan, though disaffected candidates doubt the truth of this construct. As a result, Lessig pursues his claim against the DNC and, in the general election, independents argue that the Commission and the parties are silent confederates or co-conspirators. But the rules are designed to put the parties on the periphery and, as a practical matter, that is where they remain.

Much of the time, however, a major party might well be politically better off in the backseat. In the general elections in particular, their candidates are (mostly) assured a place on the stage. Nominees run their own campaigns: If there is a voice the Commission must heed in making decisions, it is that of the aspiring president and vice president. One could imagine a different set of circumstances, where

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<sup>90</sup> See *Hagelin v. FEC*, 411 F.3d 237 (D.C. Cir. 2005) (upholding the FEC’s ruling that the Commission had not violated federal law in barring Nader and other third-party candidates from attending the first debate of the 2000 election).

<sup>91</sup> See e.g., *Johnson v. Comm’n on Presidential Debates*, 869 F.3d 976, 983 (D.C. Cir. 2017) (dismissing the antitrust claims of third-party candidates for failing to plead an injury to commercial competition or define a commercial market in which they participated).

<sup>92</sup> 232 F. Supp. 3d 130, 137–38 (D.D.C. 2017).

<sup>93</sup> *Id.* at 143.

<sup>94</sup> *Id.* at 144.

<sup>95</sup> *Candidate Debates*, 82 Fed. Reg. 15,468, 15,469–74 (Mar. 29, 2017).

prominent party figures competing for a party's nomination lose to someone who enters the race from outside the party. Then a party may have an interest in debate access for an "independent" who better represents the party's platform. Or it may push for a third-party or independent candidate's admission to the debate for purely strategic reasons, as President George H. W. Bush did in 1992.

The arguments over the fifteen percent requirement for eligibility in the general election debates are also relevant to the overall question of the use of polling by staging organizations, including in the primaries. Polling as a measurement is, of course, specific to candidates and their standing in the electorate. By definition, while the candidates might benefit from party associations, and in particular the higher name recognition that may travel with it, it is in their roles as individual aspirants that they seek the office. None of the ways in which they may represent the party's positions, or have organized themselves to do so, are directly relevant to establishing eligibility under the fifteen percent criterion. For example, a candidate might fare well under this criterion with strong support from independents. In sum, it is not only the case that the parties do not administer this eligibility requirement, but they do not necessarily benefit as formal institutions from its use as opposed to other more flexible measures.<sup>96</sup>

## V

### PARTY FUNCTIONS AND THE DEBATES: THE POLITICAL AND LEGAL QUESTIONS

Much of the political reform debate is taken up with questions of whether the parties can be strengthened by legislative and regulatory measures.<sup>97</sup> Reform advocates worried about a return to the days of party "soft money" view parties as able to compete well on their own and as skilled at adapting to changed political conditions.<sup>98</sup> Others argue that the law cannot transform the standing of parties but can help—or at least not further weaken—their competitive capabilities.<sup>99</sup>

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<sup>96</sup> For example, the parties could be relieved of the requirement that they use "pre-established objective criteria" in determining which candidates would be eligible to participate. See 11 C.F.R. § 110.13(c) (2018); *supra* note 54 and accompanying text.

<sup>97</sup> For a discussion of the importance of stronger political parties see *supra* note 1.

<sup>98</sup> See, e.g., Press Release, Campaign Fin. Inst., Political Parties and Candidates Dominated the 2016 House Elections While Holding Their Own in the Senate (Apr. 13, 2017), <https://www.brookings.edu/wp-content/uploads/2016/07/states.pdf> ("Perhaps it is time to stop bemoaning the weakness of political parties in financing federal elections.").

<sup>99</sup> See, e.g., RAYMOND J. LA RAJA & JONATHAN RAUCH, BROOKINGS, THE STATE OF STATE PARTIES—AND HOW STRENGTHENING THEM CAN IMPROVE OUR POLITICS 1–2, 5–18 (Mar. 2016), <https://www.brookings.edu/research/the-state-of-state-parties-and-how-strengthening-them-can-improve-our-politics/> (citing an election law expert who opines

This last question is pertinent in assessing the parties' opportunities under the legal rules of the game to protect and advance their institutional interests. It is certainly striking that the parties, in this period of contestation with super PACs and third-party groups, don't have more legal latitude to influence the scheduling and structure of debates. As noted, super PACs operate outside the limits and source restrictions with which parties must comply, with considerable impact on their relative position within the competitive electoral landscape. This heavier regulation of parties hits home especially hard when it affects the parties' financing of core institutional functions—such as the conduct of the presidential selection process—in which the candidate debates play so central a role.

The parties' interests in primary and general election seasons are not, of course, the same. During the primary campaign season, the parties are trying to order a crowded field and balance a number of interests, including promoting the party brand. Where there is no undisputed front-runner, then it is the party that comes under pressure to make a good showing for itself and all its candidates. In the general elections, the parties become more like another authorized committee of the nominee, and the institutional interests are secondary to the candidate's choice of strategies for winning the election. This is a difference, however, of degree. As noted, while the parties' interests may vary between the two election cycles, the parties have an interest in both—and so, necessarily, in the major campaign events that are the primary and general election debates.

Yet the current legal structure for the debate process is not helpful to the parties' cause. Debates are expensive, and because the parties are faced with stiff costs, they have the incentive to off-load them to networks and nonpartisan sponsors.<sup>100</sup> Under the O'Malley theory, the staging organizations must have full freedom of operation, which he took to mean that the parties could not enforce their "exclusivity" principle.<sup>101</sup> This theory may go too far, but it is true overall that the networks, by paying the way, call the shots, and that commercial interests—or a mix of commercial and journalistic judgments—supplant those of the parties.

One answer, provided that parties will be prepared to make use of it, is a change in the rules—both those governing financing and those controlling the terms of eligibility. At a minimum, the structural

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that state parties are the "most regulated entities in campaign finance" and discussing the weakening effect of legal restrictions on party fundraising).

<sup>100</sup> See *supra* notes 17–18 and accompanying text.

<sup>101</sup> See *supra* notes 44–45 and accompanying text.

forces working under the rules against party control or influence could be brought more into balance with institutional party interests.

### A. *Basic Theory Governing the Rules*

The legal framework for the debate rules is organized around concerns that are either overdrawn or outdated. The FEC sought, reasonably, to allow for private sponsorship of the debates by including corporate funding, while also minimizing the risk that the debates would serve as a subterfuge for “partisan” purposes. It erected safeguards against that outcome through its definitions of eligible sponsorship and the terms it set for the structure of the debates. Only media organizations free of candidate or party control, or nonprofits without an electioneering program, could sponsor the debates, and the debates themselves had to be fair and impartial, not designed to promote one candidate over another.<sup>102</sup> The current version of the rules is a vestige of 1970s post-Watergate campaign finance regulation.<sup>103</sup> It served as a constructive measure to secure the role of news media organizations and to recognize the role of nonprofit organizations—formerly the League of Women Voters, now the Commission—in establishing the norm that presidential candidates would participate in “nonpartisan” debates in the broader public interest.<sup>104</sup>

The theory of the rules does not match up well with the structure of the contemporary media industry or nonprofit community. Media organizations are not free of partisan suspicion, and if not “controlled” by parties or candidates, they are arrayed along an ideological continuum—or so their faithful viewers wish to be assured.<sup>105</sup> This does not mean that MSNBC or Fox may not run a fair debate: They have some reason to try to do so, with their reward being much coveted praise or recognition for staging a lively, memorable contest. This is good business, a bonanza for the network’s reputation. The check on excessive media partisanship in staging a “bad debate” is simply corporate self-interest. But the rules as originally fashioned contem-

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<sup>102</sup> See *supra* notes 22–24 and accompanying text.

<sup>103</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 359—TERMINATION OF PUBLIC FINANCING OF PRESIDENTIAL CAMPAIGNS AND PARTY CONVENTIONS (2011), [https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/112/saphr359r\\_20110125.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/112/saphr359r_20110125.pdf) (“The Presidential election public financing system was enacted in the aftermath of the Watergate scandal to free the Nation’s elections from the influence of corporations and other wealthy special interests.”).

<sup>104</sup> See *supra* notes 19–20 and accompanying text.

<sup>105</sup> See, e.g., “Fake News,” *Lies and Propaganda: How to Sort Fact from Fiction*, U. MICH. LIBR., <http://guides.lib.umich.edu/c.php?g=637508&p=4462444> (last updated Mar. 30, 2018) (sorting media organizations according to political views along the spectrum).

plated “media” that came to the task without any question of preference for one party or the other.<sup>106</sup> It would be hard to say that this assumption holds today.

There is less compelling reason now in a fractured, heavily populated media environment, especially with the advent of politically polarized networks and the explosion of social media, to focus the regulation on media organizations.<sup>107</sup> Nonpartisanship in this sponsorship setting does not mean quite what it once did. In addition, the “extravaganzas” that the debates have become, with the news organizations under pressure to compete on ratings, may not serve the interest in debates that transcend the schoolyard brawling and name-calling that is so much a part of contemporary political discourse.<sup>108</sup>

The time has also come to reconsider the role of nonprofit organizations in the (c) community of tax-exempt organizations. Many (c) organizations that might have an interest in staging a debate are not able to meet the nonpartisanship criteria—(c)(3) organizations are barred from intervention in political campaigns, and (c)(4) “social welfare” organizations can only participate if their program does not include support for or opposition to candidates or political parties.<sup>109</sup> But any one such (c) organization might have a set of programs or policy preferences that line up more with one party or the other. What is more, it is often the case that a (c) organization that is nonpartisan is organizationally affiliated with another (c) entity that is not.<sup>110</sup>

In the general election, only one (c) organization, the Commission, has staged a debate in recent years. The Commission has more or less cornered that market. But as the various independent candidates turned away at the door have complained, the Commission

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<sup>106</sup> See Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734, 76,735 (Dec. 27, 1979) (stating that the “fundamental principles of journalism” contribute to the “safeguards as to nonpartisanship”).

<sup>107</sup> See, e.g., *id.* (providing a description of regulation focused on news media).

<sup>108</sup> See, e.g., Daniella Diaz, *Trump Calls Clinton ‘A Nasty Woman,’* CNN (Oct. 20, 2016, 7:01 AM), <https://www.cnn.com/2016/10/19/politics/donald-trump-hillary-clinton-nasty-woman/index.html>; Dan Roberts, Ben Jacobs & Sabrina Siddiqui, *Donald Trump Threatens to Jail Hillary Clinton in Second Presidential Debate*, THE GUARDIAN (Oct. 10, 2016, 11:57 AM), <https://www.theguardian.com/us-news/2016/oct/10/debate-donald-trump-threatens-to-jail-hillary-clinton>.

<sup>109</sup> 26 U.S.C. § 501(c)(3)–(4) (2012); 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii) (2018).

<sup>110</sup> See, e.g., Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, in INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2000, at 255, 259 (1999), <https://www.irs.gov/pub/irs-tege/eotopics00.pdf> (stating that 501(c)(3) tax-exempt educational organizations that may not lobby “can establish and control” 501(c)(4) “social welfare” organizations that do).

has durable, prominent ties to the two major parties.<sup>111</sup> In candid moments, Commission officials have acknowledged their mission as one of putting the major party candidates before the public.<sup>112</sup> The exception, the invitation to Perot with the active support of the Republican and Democratic nominees, bolsters the conclusion that, for the most part, independents need not apply.<sup>113</sup>

If the rules are not altogether convincing in protecting against partisan staging organizations, the additional requirements of sponsors, such as the use of “pre-determined, objective” criteria, do not add much to their credibility. The independent candidates, unaffiliated with a major party, who have complained about the inherent unreliability of polling have a fair case. But it is not so much a matter of unreliability, as if better polling techniques could solve the problem. It would be more to the point to say that they bear too much weight in answering the question of who is appropriately in the roster of debate invitees.

So a candidate with impressive past accomplishments, a clear program, and an active campaign may well struggle to be considered for inclusion, and it is not obvious, especially early in a campaign, why her standing in the polls is relevant. Candidates from outside the party who develop national constituencies, like Sanders and Trump, are assured a place in the debates; candidates from within the party and with a party perspective to offer, yet who are unable to establish an early showing in the polls, are not. The same could be said for a candidate in public life, like Senator Graham, who might have little money or organization, but whose expertise and influence in the Senate seemingly compelled his consideration for a prime-time appearance.<sup>114</sup>

Because of their focus on partisanship and its significance in guarding against corporate contributions, the debate rules are concerned with limiting the scope for political judgments. On the theory of regulation shaping the rules, those judgments invite the intrusion of

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<sup>111</sup> See Complaint Against the Commission on Presidential Debates, *supra* note 84, at 4–9.

<sup>112</sup> See, e.g., *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 141 (D.D.C. 2017) (mentioning comments made by the CPD chairmen and directors in which they stated that “the CPD was not likely to look with favor on including third-party candidates in the debates,” that “the CPD should exclude third-party candidates from the debates,” and that “Democrats and Republicans on the commission [ ] are interested in the American people finding out more about the two major candidates—not about independent candidates who mess things up.” (internal citations omitted)).

<sup>113</sup> For a sharp complaint on this point, see generally GEORGE FARAH, *NO DEBATE: HOW THE REPUBLICAN AND DEMOCRATIC PARTIES SECRETLY CONTROL THE PRESIDENTIAL DEBATES* (Seven Stories Press 2004).

<sup>114</sup> See *supra* note 62 and accompanying text.

partisan considerations and, with them, the increased risk that the corporate “sponsor” is, in fact, an illegal corporate contributor.<sup>115</sup> Revised rules with less of this preoccupation could give freer rein to political judgments, and with more room for partisanship, the parties could be empowered to take more responsibility for the debates.

Moreover, the purposes of the current rules, rooted on the post-Watergate reform era, are due for reconsideration in light of more current concerns. More control over the debates could help restore the parties to the exercise of “vetting” candidates and elevating the debate. In a party-sponsored debate, the Republican Party could guarantee that a candidate like Lindsay Graham would have the chance to face the inexperienced “outsider” Trump. The Democratic Party could assure the appearance of candidates who have articulated commitments and programs consistent with the party platform, and who might, like Joe Biden or Chris Dodd in 2008, bring attention to their experience with the complexities of governing and their seasoned views of the challenges that lie ahead for the next president. The parties could emerge in these respects as responsible actors, staging a debate with objectives different from those captured in the Nielsen ratings. They might escape the gravitational pull of polling data and the staging priorities that necessarily affect large media organizations.

Of course, with that responsibility comes accountability, which is a tonic for the parties. There is no guarantee that the parties will relish the challenge and take it up. But as of now, they have every excuse to pass on the effort, and little chance of succeeding even if they tried.

### B. *Regulatory Alternatives*

One plausible reform might authorize parties to accept corporate contributions for the dedicated purpose of funding candidate debates. The parties have received in the recent past some limited soft money authority for specific and limited uses.<sup>116</sup> Though enhanced financing authority will raise campaign finance regulatory concerns, these can be mitigated. For example, the rules could provide that only the party, not the candidates, may *raise* the special debate funding, consistent with McCain-Feingold limitations already in effect on candidates or

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<sup>115</sup> The irony of this preoccupation in the post-*Citizens United* age cannot be overlooked.

<sup>116</sup> See R. SAM GARRETT, CONG. RESEARCH SERV., INCREASED CAMPAIGN CONTRIBUTION LIMITS IN THE FY2015 OMNIBUS APPROPRIATIONS LAW: FREQUENTLY ASKED QUESTIONS (Mar. 17, 2015), <https://fas.org/sgp/crs/misc/R43825.pdf> (discussing laws increasing contribution limits to national political party committees).

federal officeholder “soft money” fundraising.<sup>117</sup> In addition, very specific limits could be placed on what the money is used for—such as the infrastructure costs of sponsoring a debate. Transparency requirements would apply through public reporting on particular schedules of the amounts received and spent for this purpose. Through the adoption of measures such as these, the party would have the financial wherewithal to sponsor debates, but with protections against the risk of quid pro quo corruption arising from the relationship with large donors.

Another approach would be to strike from the regulations the requirement that staging organizations use pre-established objective criteria to decide on the candidates who will receive invitations to debate. They could be permitted to consult with the party on these criteria, or utilize the criteria supplied by the parties. The parties then would have to answer for those criteria as a political choice.

Changes to a rule such as these would not have to rule out other options. Parties might, if they wished, have the choice of staying with the standing arrangement under which nonprofits and news media organizations stage the debates. But they would not have any disincentive to take control. At a time when parties and advocates for their interests are decrying their weakened position,<sup>118</sup> the major parties might at least be provided with the feasible regulatory option of assuming a more commanding role in the primary and general election debate processes.

## VI

### DOES IT MATTER WHETHER PARTIES HAVE MORE CONTROL OVER DEBATES?

If the law is a problem, then the answer is a change in the law. But do the parties perceive a problem, and if so, what is it—and what are they prepared to do about it?

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<sup>117</sup> See 52 U.S.C. § 30125(e) (2012) (prohibiting federal candidates and officeholders from raising funds outside the source restrictions (e.g., corporate and union general treasury funding) and dollar limitations established by the Federal Election Campaign Act of 1971).

<sup>118</sup> The literature of lament for the parties is voluminous. For a poignant and recent version by an astute commentator, see David Von Drehle, Opinion, *The Party Is Over*, WASH. POST (Oct. 20, 2017), [https://www.washingtonpost.com/opinions/both-political-parties-may-be-doomed/2017/10/20/4c6cf8b2-b5ca-11e7-be94-fabb0f1e9ffb\\_story.html](https://www.washingtonpost.com/opinions/both-political-parties-may-be-doomed/2017/10/20/4c6cf8b2-b5ca-11e7-be94-fabb0f1e9ffb_story.html). “[T]he future is dim for the major parties as we’ve known them. They were too often arrogant, unresponsive and borderline corrupt, but they vetted candidates, gave them training and fostered the compromises that hold teams together. We may miss them when they are gone.” *Id.*

They have not demanded legal reform. The current arrangement might be defended as giving them needed flexibility. It may suit the parties, and their candidates, to have the networks in substantial control of the debates. Rather than view the debate rules as a liability, it is possible to imagine that party officials embrace them. In a candidate-centered nominating process, one that depends on the media to set the standards for success, the parties may be assuming the only feasible role.

Parties' acceptance of these limitations presents its own sets of risks. The parties, in seeming weak, may become progressively weaker. The uncertainties of their position, with influence exercised only at the margins, strengthens the hands of other interests. As the networks pay for the debates and control the structure and invitations, and as candidates with the necessary following or supply of political capital work their will as they see fit, it is apparent to all that parties fill in only where they can.

In considering this challenge to the parties' authority, it is useful to turn attention to the kind of nominating process function they do discharge: They must plan for conventions. They solicit and select among the city site bids, set up the mechanisms for amassing the resources, and address other logistical requirements for these events. Of course, once these arrangements are in place, the nominee takes charge of developing the "message" communicated through the convention.<sup>119</sup> But even if the nominee eventually takes control of the convention content, the steps taken by the party to that point, in site selection and on other logistical matters, constitute a critical function. It is a nominating convention dominated by the nominee, and yet also a party convention, which enables it to showcase themes, programs, and candidates for other offices.

So the question is whether there are advantages to the party in exercising more influence over, and accountability for, the debate process. The campaign finance rules could be changed to provide them with this opportunity, should they wish to take it.

Reform of the debate rules to the advantage of parties would only help the parties so much in this time of institutional struggle and competitive pressure. The 2016 election cycle was a reminder of the depth of their problems. By the time of the conventions in 2016, the DNC Chair had lost her job to complaints that she had not been even-handed or fair toward the "outsider" candidate, meaning Sanders, the

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<sup>119</sup> See Opinion, *Hillary Clinton's Convention: Day 2*, N.Y. TIMES (July 26, 2016), <https://www.nytimes.com/interactive/2016/07/26/opinion/campaign-stops/Hillary-Clinton-Convention-Day-2.html> (providing multiple opinion pieces over the course of the 2016 convention, under the header "Hillary Clinton's Convention").

independent who came from outside the party.<sup>120</sup> The RNC Chair who embraced the GOP's own outsider, Donald Trump, became, for a while at least, that outsider's presidential Chief of Staff.<sup>121</sup> It is difficult to imagine a legal reform that would address these trying circumstances for the political parties. They will either find a way to reinvigorate themselves, or we may be entering into, effectively, a post-party phase of American politics in a period of turbulent change.

At a minimum, however, the parties should be able to compete fairly for a place in whatever new political landscape will emerge. This will require thinking about how they might be restored to the management of core functions—functions that parties should be able to perform. Legal reform can help in that project. After that, it is up to the parties to make and win the political case.

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<sup>120</sup> Jonathan Martin & Alan Rappeport, *Debbie Wasserman Schultz to Resign D.N.C. Post*, N.Y. TIMES (July 24, 2016), <https://www.nytimes.com/2016/07/25/us/politics/debbie-wasserman-schultz-dnc-wikileaks-emails.html>.

<sup>121</sup> Katie Zezima, Dan Balz & Chris Cillizza, *Reince Priebus Named Trump's Chief of Staff*, WASH. POST (Nov. 13, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/11/13/reince-priebus-named-as-trumps-chief-of-staff/?utm\\_term=.4b3e51be4258](https://www.washingtonpost.com/news/post-politics/wp/2016/11/13/reince-priebus-named-as-trumps-chief-of-staff/?utm_term=.4b3e51be4258).