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In Defense of Corruption: CNN Debates, the Press Clause, and Campaign Finance Regulation

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Introduction

This election cycle, CNN's Republican presidential debates have twice violated campaign finance law, specifically by failing to issue invitations based on "pre-established objective criteria."[1] These violations went unpunished, not because of the ineptitude of the regulators, but because of the absurdity of the regulation violated, which *presumes* that television debates violate campaign finance law, and only permits such debates as an exception.

More important than the absurdity of one regulation, though, is the broader issue CNN's violations highlight, namely, an unresolved tension that arises whenever campaign finance's free speech jurisprudence regulates press activity. The tension follows inexorably from the law's current free speech framework: the Speech Clause permits any campaign speech besides corruption, be it natural (endorsements) or monetary (contributions).[2] Press activity has a monetary value that amounts to a contribution. Corporate contributions are corrupting. Therefore, press activity amounts to corruption that may be prohibited. Thus, all press activities, from hosting debates to publishing newspapers, are vulnerable to prohibition, and *necessarily* so.

In part, the tension stems from the strength of a speech claim—because the Court cannot conceive of a press claim adding anything to a speech claim, it protects campaign-related activities solely under a speech framework. However, as this Essay argues, the Press Clause offers protection beyond that of the Speech Clause. Namely, it protects press activity even when the press

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1. 11 C.F.R. § 110.13(c) (2015).

2. Buckley v. Valeo, 424 U.S. 1, 27-28 (1976) (per curiam).

engages in "corruption or the appearance of corruption."[3] In doing so, this Essay provides a reading of the Press Clause consistent with the Constitution's design and capable of resolving an absurdity that mars much of campaign finance law.

This Essay proceeds in three Parts. Part I explains the underlying logic of the relevant regulation, 11 C.F.R. § 100.13, and how CNN violated that regulation in both of its Republican debates. Part II traces the free speech jurisprudence that inexorably led to 11 C.F.R. § 100.13, and the tension that arises whenever campaign finance law regulates the press. Part III reviews the original design of the Press Clause and shows how it can be applied to today's campaign finance law in a way that makes better sense of the Constitution and relevant regulatory scheme.

I. CNN Debates and FEC Regulation

Under 11 C.F.R. § 110.13, "broadcasters" may stage debates *only if* those debates feature "at least two candidates"[4] and invitations issue based on "pre-established objective criteria."[5] This requirement is key: *only* compliant broadcaster-sponsored debates qualify for an exception to both contribution[6] and expenditure[7] regulations; any debate that fails to feature multiple candidates or does not employ such criteria violates the regulation.

The regulation follows inexorably from the logic of corporate contributions. To wit, federal law bars all corporate contributions to a candidate,[8] on the theory that such contributions are corrupting, and therefore receive no protection under the Speech Clause.[9] By extension, federal law bars in-kind contributions—just as a corporation cannot give a candidate $100, so too a corporation cannot give the candidate $100 worth of campaign supplies.[10] Media exposure amounts to an in-kind contribution: offering free airtime qualifies as a contribution just like offering free campaign supplies.[11] In sum,

3. *Id.* at 25, 28-29.

4. 11 C.F.R. § 110.13(b)(1).

5. *Id.* § 100.13(c).

6. *Id.* § 100.92.

7. *Id.* § 100.154.

8. *Id.* § 114.2(a). By definition, "contribution[s]" include "any direct or indirect payment." *Id.* § 114.1(a) (emphasis omitted). Corporations thus may make *expenditures* in elections that are independent of candidates, but, unlike natural persons, are prohibited from making *contributions*. I will leave aside questions of the constitutionality of this prohibition, which has not (yet) been deemed unconstitutional despite *Citizens United v. FEC*. 558 U.S. 310, 365 (2010) (holding that the "[g]overnment may not suppress political speech on the basis of the speaker's corporate identity").

9. *See* FEC v. Beaumont, 539 U.S. 146, 154-56 (2003).

10. 11 C.F.R. § 104.13.

11. *See id.* § 100.52(d)(1).

giving a candidate airtime amounts to an in-kind contribution, which amounts to a monetary contribution, which is corrupting, and therefore impermissible under campaign finance law.

Because Congress and the Federal Election Commission (FEC) recognized the absurdity of this result, they fashioned a debate exception—11 C.F.R. § 100.13. The exception relies on the following reasoning: if a broadcaster employs "pre-established, objective criteria" and invites multiple candidates, then the broadcaster is not favoring any candidate, and thus is not contributing to a specific candidate.[12] Conversely, the failure to use such criteria amounts to giving a candidate free airtime, which is an impermissible in-kind contribution.[13]

CNN failed to employ "pre-established, objective criteria" in both of its 2015 Republican presidential debates. Before hosting its first debate, CNN published the criteria for candidates to debate on the main stage: be constitutionally eligible, file a statement of candidacy, poll in the top ten in an average of the listed polls, etc.[14] Yet, after a strong showing by Carly Fiorina in the Fox News "undercard" debate on August 6, pressure built to promote her to the main stage at CNN's September 16 debate.[15] By that time, though, CNN's criteria had been set. Further, nearly all of the relevant polls were taken, and Fiorina would have failed to qualify barring an unprecedented showing in the last few polls.[16] So CNN changed the criteria, adding a new criterion that allowed Fiorina alone to join all of the candidates who had qualified under the original criteria.[17] This violation of the "pre-established objective criteria" requirement under 11 C.F.R. § 100.13 went unpunished.

Perhaps emboldened by this outcome (or simply ignorant of its violation), CNN violated the regulation in its next debate more blatantly. As with its first debate, CNN published criteria well in advance and did so transparently.[18]

12. Neither Congress nor the FEC have provided an explanation for the exception, so I have reconstructed the reasoning based on the current jurisprudence.

13. Even on this reasoning, it is hard to explain why a debate is considered to not be a contribution to any candidate invited, rather than to be a contribution to all. Below I highlight the other exceptions for press activities, such as news stories and interviews, that fall into this category and also receive exceptions under the regulations. *See infra* notes 30-32 and accompanying text.

14. *CNN Debate: Candidate Criteria for September 16, 2015*, CNN (Sept. 1, 2015, 5:07 PM ET), http://cnn.it/1L25D5h.

15. *See* Mark Preston, *CNN Amends GOP Debate Criteria*, CNN (Sept. 2, 2015, 8:30 AM ET) http://cnn.it/1Q73OrZ; Eli Stokols, *Fiorina Shines—But Will It Matter?*, POLITICO (Aug. 6, 2015, 8:00 PM EDT), http://www.politico.com/story/2015/08/fiorina-shines-but-will-it-matter-121111.

16. Stokols, *supra* note 15.

17. *See* MJ Lee, *Let the Sparks Fly: Carly Fiorina Takes on Donald Trump*, CNN (Sept. 17, 2015 1:53 AM ET), http://cnn.it/1YclRCn.

18. *See CNN Debate*, *supra* note 14; Thomas Kaplan, *Rand Paul Will Appear on Main Debate Stage*, N.Y. TIMES (Dec. 13, 2015), http://nyti.ms/1IO157z; Preston, *supra* note 15.

However, as the debate drew near, Rand Paul looked likely to be left out, and the Paul campaign clamored to be included.[19] Unlike the first debate, CNN did not bother to change its criteria, but invited Rand Paul anyway, despite his failure to qualify.[20] Again, the FEC remained silent in the face of CNN's violation of 11 C.F.R. § 100.13's requirement for "pre-established objective criteria."

II. The Tension Between Free Speech and Debates

The lack of enforcement against CNN owes not to the complexity of campaign finance law, nor to the dysfunction of the FEC,[21] but to the absurdity of 11 C.F.R. § 100.13. Intuitively, CNN ought to be able to invite or disinvite candidates as it pleases, just as it may interview any candidate, refuse to interview any candidate, or interview none at all, and just as it may endorse as many or as few candidates as it pleases.

Yet campaign finance law has developed in a fashion that ignores this intuition, and instead uses a free speech model that demands, *necessarily*, that the FEC regulate debates. This Part traces that free speech model and shows how it necessarily leads to the regulation of debates embodied in 11 C.F.R. § 100.13. Further, I show how Congress, the FEC, and the Court have all recognized the tension of this model but have failed to resolve it because they fail to account for the extra protections offered by the Press Clause, and therefore they continue to treat campaign finance solely under free speech jurisprudence.

Since the Founding, courts have continually expanded free speech,[22] a trend that makes it nearly impossible to restrict speech—natural,[23] symbolic,[24]

19. *See* Kaplan, *supra* note 18.

20. *Id.* CNN claimed that a last-minute poll in Iowa showed Rand Paul's "viability," and in the "spirit of being as inclusive as possible," invited him. *The Rachel Maddow Show* (MSNBC television broadcast Dec. 14, 2015), on.msnbc.com/1YbLcyW. CNN did not, however, justify doing so despite Paul's failing to meet the criteria, or demonstrate how Paul qualified. *See id.*

21. *See* Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), http://nyti.ms/1E4sjOu ("People think the F.E.C. is dysfunctional. It's worse than dysfunctional." (quoting FEC Chair Ann M. Ravel)).

22. *See generally* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

23. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (holding that the Speech Clause protected funeral protestors against a claim of intentional infliction of emotional distress).

24. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding that the Speech Clause protects desecration of the American flag).

or monetary.[25] Thus, when campaign finance law came of age in the 1970s, plaintiffs challenged restrictions on free speech grounds in *Buckley v. Valeo*.[26]

Buckley enshrined free speech as the Court's governing framework for campaign finance. The Court recognized contributions as speech, and held that contributions may only be limited when they amount to "corruption or the appearance of corruption."[27] The opinion thereby set the bound of campaign finance by tracking the ordinary limits on free speech, which does not permit bribery. Thus, contributions that have corrupting power[28] may be prohibited (just as bribes may be prohibited), while other forms of contribution or expenditure may not be prohibited. As a result, natural speech and monetary speech receive protection up to the point of bribery and corruption, but receive no protection beyond that point.

Congress prohibits corporate contributions altogether on this theory.[29] Because Congress, quite sensibly, treats in-kind contributions as contributions, when a broadcaster gives a candidate airtime, as in a debate, the gift of airtime qualifies as corruption under *Buckley*, and may be prohibited.

The oddity of this result has not been lost on the Congress, the FEC, or the Court, which have routinely excepted the media and media activities. When Congress passed the Bipartisan Campaign Reform Act (BCRA), it included a media exception—exempting the media from electioneering communication restrictions that apply to individuals.[30] Likewise, the FEC created 11 C.F.R. § 100.13, which carves out an exception for debates, and 11 C.F.R. § 100.73, which carves out an exception for media stories,[31] even though under *Buckley*, such activities qualify as corrupting in-kind contributions that may be regulated, and are regulated when conducted by individuals.

The Court has also picked up on the tension in play when *Buckley* allows the FEC to regulate media. In a telling moment during the *Citizens United v. FEC* oral argument, Justice Alito asked then-Solicitor General Elena Kagan if the government could ban books under BCRA.[32] She replied that if it did, there

25. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 246-49, 253, 261 (2006) (holding that low contribution limits violate the Speech Clause).

26. 424 U.S. 1 (1976) (per curiam).

27. *Id.* at 25, 28-29.

28. Congress may regulate contributions in accordance with what it considers necessary and effective to prevent corruption. *See id.* at 28; *see also* Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C.) (regulating contributions).

29. 11 C.F.R. § 114.2(a) (2015).

30. 52 U.S.C. § 30104(f)(3)(B) (2014).

31. 11 C.F.R. § 100.73 (excepting a variety of media activity from the definition of contributions).

32. Transcript of Oral Argument at 66, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205).

would be a "good as-applied challenge."[33] Similarly, Justice Kennedy's majority opinion in *Citizens United* fretted that campaign finance laws, under the present rationale, logically extend to FEC regulation of endorsements and hence might be unconstitutional.[34]

The Press Clause went unmentioned at oral argument.[35] Books, an exemplar of press freedom, were treated by the Justices under the same logic as speech freedom. In part, the absence of the Press Clause owes to the lost distinction between press and speech, and in part, this absence owes to the Court's inability to conceive of any protections offered by the Press Clause, beyond those provided by the Speech Clause.

III. The Press Clause and Debates

The Press Clause resolves the jurisprudence's tension by permitting *Buckley* corruption in the press. In other words, the reason that BCRA and the FEC must exempt the press, and the reason that Congress may not censor books or limit endorsements, is that the press is permitted to speak corruptly—either in monetary form[36] or in natural speech.[37] The Press Clause provides more protection than does the Speech Clause,[38] while not limiting the Speech Clause, and thus creates a campaign law model that respects both freedoms. In this Part, I review the original design of the Press Clause, its policy rationale, and show why it ought to protect *Buckley* corruption in the press.

The press in early America published extensively on politics.[39] Press rights were understood to protect individuals' use of the levers shaping public opinion, especially on political matters.[40] Press freedom, by extension, meant that the federal government could not censor or co-opt the means of forming

33. *Id.* at 67.

34. *Citizens United*, 558 U.S. at 343-44, 371-72.

35. In the written opinions, the Press Clause received treatment in dueling footnotes, which debated whether the Press Clause distinguishes based on a speaker's identity. *Compare id.* at 390-91 n.6 (Scalia, J., concurring) (arguing that the Press Clause does not distinguish between the rights of individuals and the rights of the press as an institution), *with id.* at 431 n.57 (Stevens, J., concurring in part and dissenting in part) (arguing the opposite).

36. For example, by interviewing a candidate and thereby affording her airtime.

37. For example, by stating, "President Obama, we will contribute $5000 to your campaign if you repeal Executive Order 12,333."

38. The Speech Clause protects neither a *New York Times* interview of a candidate (as a potentially corrupting in-kind contribution) nor its publishing a bribe. Indeed, *Buckley* allows Congress to regulate both. *See supra* Part II.

39. *See* David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013-2014 CATO SUP. CT. REV. 15, 28.

40. *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?: From the Framing to Today*, 160 U. PA. L. REV. 459, 463, 466-68 (2012).

public opinion, in particular on political matters.[41] Hence the press, by providing individuals a means of reaching the public and engaging public fora in politics, differed from speech, which could only reach the hearer and whomever she wished to share the content with. And, for this reason, the Founders considered the press, not free speech, as their "bulwark" against tyranny.[42] By depriving the tyrant of the levers of shaping public political thought, press freedom gave the people themselves a mechanism of countering governmental overreach beyond their votes.[43]

The policy rationale of press freedom also differs from that of speech, in two key respects. First, while speech contributes to the marketplace of ideas, a free press *is* the marketplace of ideas. And, as much as we balk at excising the content of speech on the grounds that excision inhibits the flow of ideas, even more so should we balk at tinkering with the marketplace itself. For example, the government may need to excise an article that reveals troop movements, but that is no reason to ban the offending newspaper altogether.[44] Second, because press activity, by definition, communicates to the public, it needs fewer checks than speech—anyone may access the publications of a press, and that transparency limits the danger of wrong views, outright lies, and even corruption. In fact, such publications tell the public precisely what it wants to know about the author and the candidate.

The distinction between a speech rationale and a press rationale in campaign finance law thus becomes clear. The former (i.e., current campaign finance law) fears the *New York Times* endorsing candidates to curry favor, or Rush Limbaugh offering airtime to Ted Cruz but not Carly Fiorina, or CNN tweaking its rules to let Rand Paul onto the debate stage. It fears these scenarios because both the natural speech of an endorsement and the monetary speech of airtime are corrupting.

By contrast, press freedom permits all of these. Indeed, it permits speech, both monetary and natural, that campaign finance law currently deems corrupting. Not only does this follow from the special protections that press freedom affords on political matters and in the public arena, but it also fits the logic of those protections. By permitting the in-kind contribution that is an interview or debate, press freedom keeps government hands out of the marketplace of political ideas. And, in allowing otherwise-corrupting speech in the public sphere, it lays bare that speech to all. A backroom bribe cannot be protected speech, but a bribe on the front page is hardly concerning—if anything, it tells the public precisely what it wishes to know about the offeree

41. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 490-91 (1983).

42. *Id.* at 463-64, 491.

43. *Id.* at 493.

44. Indeed, banning a newspaper does substantially more harm to the marketplace of ideas than does banning one article—it distorts the market rather than excising the minimum amount of unprotected speech.

and offeror. Thus, press freedom differs from speech freedom, and in a campaign finance context, permits corrupting speech in public fora, even when *Buckley* prohibits such speech.

Conclusion

CNN's debates violated 11 C.F.R. § 100.13, highlighting the conflation of speech and press freedoms that bedevils campaign finance law. This conflation results in a campaign finance jurisprudence built on free speech, but replete with absurdities any time free speech regulates press activity. Reviving the Press Clause and recognizing that it permits *Buckley* corruption would eliminate some of *Buckley*'s absurdities and provide a more sensible model for campaign finance regulation, while adhering more closely to the constitutional text.