



**PUSHING DEMOCRACY:  
CONTENT-BASED REGULATIONS OF  
THE PRESS IN CAMPAIGN FINANCE  
LAW**

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**I. Introduction**

During the last few election cycles, it has become something of a cliché to bemoan the dismal state of campaign coverage in mainstream news media. While political advertising and skewed public perceptions undoubtedly share some of the blame for this dissatisfaction, the state of media coverage itself is far from encouraging. Content analyses of media coverage in recent federal elections indicate that a stark minority of information reaching the public concerns substantive policy issues; an even smaller percentage is geared towards helping voters understand how campaign developments impact them personally.<sup>1</sup> More disturbing still is the de-

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<sup>1</sup> See generally IN THE PUBLIC INTEREST? A CONTENT STUDY OF EARLY PRESS COVERAGE OF THE 2000 PRESIDENTIAL CAMPAIGN, <http://www.journalism.org/files/interest.pdf> (last visited 4/20/07) [hereinafter "PUBLIC INTEREST"]; THE LAST LAP: HOW THE PRESS COVERED THE FINAL STAGES OF THE PRESIDENTIAL CAMPAIGN, <http://www.journalism.org/files/lastlap.pdf> (last visited 4/20/07) [hereinafter "LAST LAP"]; THE DEBATE EFFECT: HOW THE PRESS COVERED THE PIVOTAL PERIOD OF THE 2004 PRESIDENTIAL CAMPAIGN, <http://www.journalism.org/files/debateeffect.pdf> (last visited 4/20/07) [hereinafter "DEBATE EFFECT"]; MIDWEST LOCAL TV NEWSCASTS DEVOTE 2.5 TIMES AS MUCH AIR

gree to which voters in these elections have misunderstood the candidates' actual policy positions,<sup>2</sup> a fact for which the media must bear some responsibility. These problems are of paramount importance, since they affect the successful functioning of American democracy. While most would agree that the optimal solution is to allow the press to self-correct, changes in the geopolitical landscape—such as the War on Terror—which might have precipitated this sort of self-correction by forcing the press to re-examine its role, have largely failed to do so.<sup>3</sup> This note explores the extent to which external regulations requiring the institutional press to carry specific election-related content might be justified, and whether such regulations could withstand a First Amendment challenge.

Section II examines recent federal election campaign coverage; Section III contrasts competing visions of democracy, and how the content and quality of campaign coverage support or undermine different democratic values. Section IV examines federal election law and the purposes of the news media's exemption from restrictions on campaign contributions and expenditures. Section V proposes a framework for structural and content-based regulations designed to hold institutional media more closely to their intended purposes within federal election law and to provide the electorate with information that fosters a defensible vision of democracy. Finally, Section VI examines possible rationales under which these proposed regulations might survive a First Amendment challenge.

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TIME TO POLITICAL ADS AS ELECTION COVERAGE, STUDY FINDS, <http://www.mni.wisc.edu/pdfs/MNI%20%20Release%20FINAL.pdf> (last visited 4/21/07) (hereinafter "MIDWEST LOCAL TV").

<sup>2</sup> PROGRAM ON INTERNATIONAL POLICY ATTITUDES, BUSH SUPPORTERS MISREAD MANY OF HIS FOREIGN POLICY POSITIONS, [http://www.pipa.org/OnlineReports/Pres\\_Election\\_04/html/new\\_9\\_29\\_04.html](http://www.pipa.org/OnlineReports/Pres_Election_04/html/new_9_29_04.html) (9/29/2004) (last visited 12/28/2005).

<sup>3</sup> DEBATE EFFECT, *supra* note 1, at 4.

## II. The State of Campaign Coverage

Content analysis of campaign coverage is a tricky business. Very few studies have attempted to determine the proportion of media coverage devoted to substantive issues (as opposed to other aspects, such as internal campaign politics or personal information about the candidates). Piecing together a coherent picture is further complicated not only by the fact that existing studies have limited their focus almost exclusively to Presidential campaigns and primaries, but also by the commonsense observation that news stories often span multiple topics and defy neat categorization. Content analysis is an emerging field, and much work remains to be done before one can draw any definitive conclusions about the content and impact of the campaign information reaching the electorate. Nevertheless, an examination of the available studies suggests that the news media fail to provide voters with the information they need to make educated decisions about candidates and issues.

The Project for Excellence in Journalism (PEJ) conducted the most thorough studies of content analysis during the 2000 and 2004 Presidential campaigns.<sup>4</sup> The PEJ's study of press coverage leading up to the 2000 Iowa and New Hampshire primaries classified 430 print and broadcast stories by subject matter ("topic"), predominant focus ("frame"),<sup>5</sup> and the group most directly affected by its content ("impact").<sup>6</sup> The results showed that 54% of these stories concerned political topics—i.e., topics internal to campaigns, such as poll results, fundraising efforts, and campaign strategies—whereas only 24% covered issue or policy topics, while 11% concerned a candidate's character or other personal issues.<sup>7</sup>

The PEJ's analysis of the stories' frames highlighted some of the methodological difficulties of content analysis. Frame and topic

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<sup>4</sup> PUBLIC INTEREST, *supra* note 1; LAST LAP, *supra* note 1; DEBATE EFFECT, *supra* note 1.

<sup>5</sup> The distinction between topic and frame is explained in greater detail below.

<sup>6</sup> PUBLIC INTEREST, *supra* note 1 at 5. The sources examined in the study included four daily metropolitan newspapers, one national daily newspaper, and eight national broadcast programs. The other PEJ studies used a similar variety of sources.

<sup>7</sup> *Id.* The coding process used did not allow a story to be coded for multiple topics.

are not always easy to distinguish, as the following example illustrates:

Consider how, on December 14<sup>th</sup>'s Good Morning America, George Stephanopoulos frames John McCain's opposition to federal subsidies for the alternative fuel called ethanol. "It's what a friend of mine called a 'candor pander,' and what he's doing here is hoping that this straight talk, even though it would end up sacrificing the state of Iowa, will appeal to the rest of the country where it fits in with his point that special interests have too much influence in Washington."<sup>8</sup>

Although the story's topic is McCain's opposition to subsidies for ethanol—a policy/issue topic—the story's frame discourages discourse about the desirability of ethanol subsidies in favor of discourse about the wisdom of McCain's campaign tactics—a strategic or tactical frame.

Twenty-two percent of the stories examined in this study had such strategic or tactical frames. The plurality of stories (38%) were framed as straightforward factual news accounts, while 12% focused on "larger issues involving the political system, such as the concerns of voters, or the changing role of primaries," 9% were framed around a candidate's character or temperament, and 9% were framed as horserace stories.<sup>9</sup> While 40% of stories framed as straightforward news accounts dealt with policy topics, only 4% of all stories were framed as explorations of policy ideas, suggesting that treatment of policy topics, when it occurred, may not have provided voters with the depth of information required to critically evaluate a candidate's positions in light of their own concerns.<sup>10</sup>

The PEJ's findings on voter impact reinforced the idea that voters may be receiving insufficient information. "An overwhelm-

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<sup>8</sup> *Id.* at 5-6.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *See id.*

ing amount of the coverage (82%) dealt with things that mainly affected only the candidates, their campaigns and campaign workers. This involved such matters as who was winning and losing, their strategies, fundraising, etc.”<sup>11</sup> Of the remaining stories, 13% dealt with matters that primarily impacted voters or subgroups of voters, e.g. policy or character issues, 4% dealt with matters primarily affecting special interest groups, and 1% addressed matters that would impact more than one group.<sup>12</sup>

Two subsequent PEJ studies examined media coverage during the heart of the 2000 and 2004 Presidential campaigns. In the “Last Lap” study, conducted in early October of 2000, the PEJ analyzed another 1149 news stories, culled from a similar array of sources, with similar results.<sup>13</sup> In terms of theme,<sup>14</sup> this study found that 57% of stories dealt with campaign internals (including debate analysis, which accounted for 22% of all stories), 29% dealt with policy issues, and 13% focused on the candidates’ character or record.<sup>15</sup> A greater proportion of stories were framed either as explorations of policy (13%) or of campaign internals (41%), while a smaller proportion were framed as straight news accounts (29%) or as examinations of a candidate’s character or temperament (6%).<sup>16</sup> The percentage of stories that primarily impacted voters increased to 27%, while the percentage that primarily impacted politicians correspondingly fell to 64%.<sup>17</sup>

The PEJ’s October 2004 “Debate Effect” study reinforced these results.<sup>18</sup> Significantly, the percentage of stories framed as ex-

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<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.*

<sup>13</sup> LAST LAP, *supra* note 1 at 16. This study also incorporated five internet sources, which accounted for 404 of the stories analyzed; content analysis of internet stories was broadly consistent with content analysis of print and broadcast stories. *See id.*

<sup>14</sup> The “topic” category from the PUBLIC INTEREST study corresponds roughly to the “theme” category from the LAST LAP and DEBATE EFFECT studies.

<sup>15</sup> LAST LAP, *supra* note 1 at 3.

<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.*

<sup>18</sup> DEBATE EFFECT, *supra* note 1.

plorations of policy remained stagnant at 13%, prompting the study's authors to posit

some habitual or reflexive pattern in the press behavior, a kind of threshold over how policy oriented their coverage will be. Clearly issues play a different role in a campaign during a war on terror than they did in 2000. While both candidates insist our politics have forever changed, our political journalism in some fundamental way has not.<sup>19</sup>

Impact analysis was less encouraging. Despite efforts within the media to make campaign coverage more voter-oriented, the percentage of voter-impact stories fell to 20%, while the percentage written primarily for the benefit of politicians increased to 73%.<sup>20</sup>

A more recent report released by the Wisconsin NewsLab at the University of Wisconsin-Madison (UW NewsLab) analyzed the volume and content of local broadcast media coverage of the 2006 mid-term elections in five Midwestern states.<sup>21</sup> Unlike the PEJ studies, the UW NewsLab study focused only on the Midwest, examined local rather than national broadcast programs, omitted print and internet sources, included data on local as well as federal elections, and limited its content analysis to a story's topic. Nonetheless, the content analyses of the studies yielded similar results. The UW NewsLab study found that 65% of coverage was devoted to "strategy and polling," while only 17% was devoted to policy issues.<sup>22</sup> More troubling still was its finding that, on average, political advertisements occupied four minutes and 24 second of each 30 minute news broadcast, while election coverage occupied only one

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> MIDWEST LOCAL TV, *supra* note 1; *see also* MIDWEST NEWS INDEX METHODOLOGY, <http://www.mni.wisc.edu/pdfs/MNI-Methodology-PhaseII.pdf> (last visited 4/21/07); ELECTION COVERAGE BY STATION, <http://www.mni.wisc.edu/pdfs/MNI%20Station%20Level%20Results%2060%20capture%20rates.pdf> (last visited 4/21/07).

<sup>22</sup> MIDWEST LOCAL TV, *supra* note 21, at 1.

minute and 43 seconds.<sup>23</sup> Although the UW NewsLab study has been attacked for focusing solely on 6:00 p.m. and 10:00 p.m. news programs,<sup>24</sup> its findings for those two broadcast times are well-supported. These findings are especially salient, given the continuing importance of local television news.<sup>25</sup>

The exact figures vary from study to study, but the data support several general conclusions. In each study, the majority of coverage focused on campaign internals as its primary topic, while stories with policy themes comprise roughly one-fifth to one-quarter of all news accounts. In those studies that examined frame, only a minute fraction of stories (no more than 13%) were framed around policy analysis; straight news accounts seem to be losing ground to stories focusing on campaign internals, which accounted for over one half of all stories in the Debate Effect study. In terms of impact, roughly one-quarter of campaign coverage is geared towards informing the electorate, while the remainder impacts mainly politicians and campaign staff. Although these conclusions suggest that an acute minority of campaign coverage is designed to facilitate informed decision making on the part of voters, they do not necessarily indicate whether enough information is reaching the electorate. A more direct way of measuring voter awareness would be to examine the voters themselves, and the degree to which they are fully and accurately informed about substantive issues.

The results of at least one such study support the conclusion that voters are poorly informed. A survey conducted by the Program on International Policy Attitudes (PIPA) during the 2004 presidential campaign revealed that many voters—particularly Bush supporters—misread the candidates' positions on even those issues where the candidates had taken a clear stand.<sup>26</sup>

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<sup>23</sup> *Id.* at 3.

<sup>24</sup> John M. Laabs, *Campaign Coverage Statistics*, BROADCASTING & CABLE (11/13/06), <http://www.broadcastingcable.com/article/CA6390445.html> (last visited 4/21/07).

<sup>25</sup> Radio Television News Directors Association & Foundation, *RTNDF Study Finds Local Television Remains the Dominant Source of News* (10/03/06) [hereinafter "RTNDF Study"], <http://www.rtna.org/news/2006/100306.shtml> (last visited 4/21/07).

<sup>26</sup> BUSH SUPPORTERS MISREAD MANY OF HIS FOREIGN POLICY POSITIONS, *supra* note 2.

Majorities of Bush supporters incorrectly assumed that Bush favors including labor and environmental standards in trade agreements (84%), and the US being part of the Comprehensive Test Ban Treaty (69%), the International Criminal Court (66%), the treaty banning land mines (72%), and the Kyoto Treaty on global warming (51%) . . . .

Many of the uncommitted . . . also misread Bush's position on most issues, though in most cases this was a plurality, not a majority. The uncommitted incorrectly believed that Bush favors including labor and environmental standards in trade agreements (69%), the US being part of the Comprehensive Test Ban Treaty (51%), the International Criminal Court (47% to 31%), the land mines treaty (50%), and the Kyoto treaty on global warming (45% to 37%). Only 35% knew that Bush favors building a new missile defense system now, while 36% incorrectly believed he wishes to do more research until its capabilities are proven, and 22% did not give an answer. Only 41% knew that Bush favors increased defense spending, while 49% incorrectly assumed he wants to keep it the same (29%) or cut it (20%). A plurality of 46% was correct that Bush wants the US, rather than the UN, to take the stronger role in developing Iraq's new government (37% assumed the UN).<sup>27</sup>

Somewhat surprisingly, both Kerry supporters and undecided voters were much more accurate in assessing Kerry's positions on those same issues,<sup>28</sup> though as one commentator points out, this does not necessarily indicate that voters were better informed about

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The percentage of voters that was able to correctly identify Kerry's positions was still less than spectacular. Roughly three-quarters of Kerry supporters accurately identified his positions on most issues, while either a majority or a plurality of uncommitted voters was able to do so.



Kerry's policies.<sup>29</sup> It would be overly simplistic to ascribe voter ignorance solely to a lack of adequate media coverage, but it strains credibility to deny some connection between voters' inaccuracy on the candidates' positions and the relatively slight proportion of media coverage devoted to supplying this information.

These studies lend support to the results of a survey conducted by the Committee of Concerned Journalists, in which its members gave low marks to coverage of every aspect of the 2004 presidential campaign, except for coverage of campaign internals.<sup>30</sup> The survey also revealed that more than two out of every three suggestions for how to improve the quality of campaign coverage recommended focusing more on substantive issues.<sup>31</sup> The following sections explore the implications that this lack of voter-oriented, issue-driven campaign coverage has for different visions of democracy, and whether the media exemption from campaign finance laws might be used to spur the media into providing the sort of information voters need to effectively participate in the democratic process.

### III. Visions of Democracy

C. Edwin Baker usefully describes competing visions of democracy as falling into two broad categories: elite democracy, which de-emphasizes meaningful participation by the electorate, and participatory democracy, which considers such participation necessary to democratic legitimacy.

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<sup>29</sup> See Noam Chomsky, *2004 Elections*, ZNET, Nov. 29, 2004, <http://www.zmag.org/content/showarticle.cfm?ItemID=6751> (last visited July 26, 2007) (suggesting that accuracy of voters' beliefs about Kerry were due to surveyors giving "highly sympathetic interpretations to vague statements [by Kerry] that most voters had probably never heard").

<sup>30</sup> See generally COMMITTEE OF CONCERNED JOURNALISTS, CCJ MEMBER SURVEY: 2004 ELECTION COVERAGE, Oct. 20 2004, <http://concernedjournalists.org/node/54> (last visited Apr. 22, 2007).

<sup>31</sup> *Id.*

*Elite Democracy* is the view that primary (or the only) good of democracy is its superiority over other models.<sup>32</sup> This model evinces a deep skepticism about public involvement in running a nation as complex as ours, suggesting instead that the workings of government are best left to experts.<sup>33</sup> Nevertheless, democracy within such a system serves an important function by lending legitimacy—or at least the perception of legitimacy—to government actions, and by allowing voters to replace corrupt or unskilled experts with more competent ones.<sup>34</sup> Under this vision of democracy, the press' checking function—its ability to expose incompetence and corruption in order to facilitate the replacement of inept government officials—assumes paramount importance, though the promotion of intelligent public participation in political matters need not (and perhaps should not) be among its concerns. Elite democracy's concern with incompetence and corruption among government officials leads naturally to the view that the press should focus its attention on the character and private behavior of those leaders.<sup>35</sup> This view of democracy also counsels that the press should serve as an informative tool for elites, in order to facilitate better government on their part.<sup>36</sup>

An examination of campaign coverage partially supports the idea that the media furthers the goals of elite democracy. The lack of issue-oriented information geared towards educating the electorate is consistent with elite democracy's idea that the media need not promote fully informed participation in the democratic process. Although empirical data do not suggest that the institutional press is supplying voters with a wealth of information about candidate character, survey data suggest that an overwhelming majority of voters base their votes on a candidate's "qualities" or "values," while only about 10% base their votes on a candidate's agen-

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<sup>32</sup> C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 318-19 (1998-99).

<sup>33</sup> *Id.* at 320-22.

<sup>34</sup> *Id.* at 322-23.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

das, ideas, platforms, or goals.<sup>37</sup> The degree to which this result can be ascribed to the content of campaign coverage is not clear from the data. Also unclear is the degree to which the press serves as an informative tool for elites. While most campaign coverage is geared towards informing the candidates themselves, the empirical data do not clearly support the idea that the information candidates receive facilitates better government on their part. An analysis of how well the press performs its role as government watchdog—an important requirement of elite democracy—is beyond the scope of this paper, but at least one study suggests that the press is failing in this regard as well.<sup>38</sup>

*Participatory Theories of Democracy.* Even if the current state of the media adequately supports a vision of elite democracy, elite democracy itself suffers from a lack of widespread acceptance as a normatively legitimate theory.<sup>39</sup> Baker identifies liberal pluralism, republican democracy, and complex democracy as three distinct strands of participatory democracy that stand in opposition to elite democracy.<sup>40</sup> Each participatory theory has its unique vision of the good, but all stand in contrast to elite democracy in that they share the central idea that genuine public involvement in government is crucial to both the proper functioning and the legitimacy of democratic institutions.<sup>41</sup> Campaign-related media that support participatory democracy would perform at least three tasks: first, campaign coverage would contain substantive information—particularly on policy issues—sufficient to foster informed public discourse; second, it would inform voters when their interests are at stake; finally, by covering a diversity of viewpoints within campaigns, the media would further the broad goals of participatory democracy, both by promoting a cross-cultural notion of a genuinely common good,

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<sup>37</sup> Chomsky, *supra* note 29 (citing a Gallup poll).

<sup>38</sup> See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 477 (2001-02) (citing a 1998 PEJ study for evidence that fewer than 1 in 10 investigative news stories focused on politics, economics, foreign affairs, or national security).

<sup>39</sup> Baker, *supra* note 32, at 327.

<sup>40</sup> *Id.* at 327-40.

<sup>41</sup> See *id.* at 328-29.

and by involving a variety of interest groups in the electoral process.<sup>42</sup> The PEJ studies cited above bear out the conclusion that media coverage is failing to serve the goals of participatory democracy. Although lack of diversity of viewpoints in media coverage is difficult to measure, using candidates as a proxy for viewpoints supports a finding of a general lack of diversity in coverage. Six presidential candidates appeared on the ballot in more than half of all states in 2004; 99% of all stories examined in the Debate Effect study—and 100% of all stories on broadcast or cable news programs—concerned themselves entirely with one or both major party candidates.<sup>43</sup>

Baker proposes what are essentially structural changes in the media—regulations that promote a diversity of speakers, whether in single or multiple press organs—in order to better serve participatory goals.<sup>44</sup> As the PEJ studies indicate, the structural regulations currently in place, such as those requiring “Equal Time”<sup>45</sup> and guaranteeing a candidate’s right to purchase reasonable amounts of broadcast time,<sup>46</sup> have not created a media that adequately serves participatory goals. The uses and limits of these regulations are discussed in greater detail in Section V.

If, as the PEJ studies suggest, the institutional press is resistant to internal change, it is worth exploring whether content-based regulations could remedy deficiencies in election coverage, and whether such regulations could withstand a constitutional challenge. A natural place to begin this inquiry is with campaign finance law, in which the press plays a specially designated role.

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<sup>42</sup> *See id.* at 329-44.

<sup>43</sup> DEBATE EFFECT, *supra* note 1, at 25.

<sup>44</sup> Baker, *supra* note 32, at 397-98.

<sup>45</sup> 47 U.S.C. § 315(a) (stating that if a broadcast station allows any candidate for public office to use its station, it must permit other candidates to use its station; bona fide news stories are exempted from Equal Time provisions).

<sup>46</sup> 47 U.S.C. § 312(a)(7), upheld in *CBS, Inc. v. FCC*, 453 U.S. 367, 380-81 (1981).

#### IV. The Unique Status of the Press in Federal Election Campaigns

##### A. Campaign Finance Law: From the FECA to *McConnell*

The Federal Election Campaign Act of 1971 (FECA), as amended in 1974, prohibits “any corporation organized by authority of any law of Congress[] to make a contribution or expenditure in connection with any election to any political office, any primary election, or any political convention or caucus held to select candidates for political office.”<sup>47</sup> The FECA defines “expenditure” broadly to include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”<sup>48</sup> Since most newspapers and nearly all television and radio news programs are either owned or operated by corporations,<sup>49</sup> the letter of FECA law would seem to sweep these media entities within its scope. To address this concern, the 1974 amendments exempt “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication” from the definition of expenditure, “unless such facilities are owned or controlled by any political party, political committee, or candidate.”<sup>50</sup>

The restrictions on corporate contributions and expenditures (and the corresponding media exemption) are part of a broader set of restrictions that limit contributions and expenditures by all actors in the political sphere. Congress more clearly articu-

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<sup>47</sup> 2 U.S.C. § 441b(a) (2002).

<sup>48</sup> 2 U.S.C. § 431(9)(a)(i) (2002); accord 2 U.S.C. § 441b(b)(2) (2002).

<sup>49</sup> See, e.g., *2006 Fact Pack: 4<sup>th</sup> Annual Guide to Advertising & Marketing*, ADVERTISING AGE, Feb. 27, 2006, at 25 - 35, available at <http://adage.com/images/bin/pdf/FactPack06.pdf>.

<sup>50</sup> § 431(9)(b)(i); see also 11 C.F.R. § 100.73 (2006) (stating that costs incurred by a newspaper, magazine, periodical, broadcast or cable station in carrying news stories are exempt from contribution restrictions, unless the stations are owned or controlled by a political party or candidate, in which case such stories must give reasonable coverage to opposing candidates in order to be exempt); 11 C.F.R. § 100.132 (2006) (stating that news stories meeting the requirements of § 100.73 are not expenditures).

lated the purposes of these restrictions in the House Report accompanying the amendments:

The unchecked rise in campaign expenditures, coupled with the absence of any limits on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors . . . . Such a system is not only unfair to candidates, but even more so the electorate. *The electorate is entitled to base its judgments on a straightforward presentation of a candidate's qualifications for public office and his programs for the Nation rather than on a sophisticated advertising program which is encouraged by the infusion of vast amounts of money.*<sup>51</sup>

The institutional press, however, is exempted from these restrictions “[i]n order to preserve the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”<sup>52</sup> The media’s ability to provide campaign coverage was also central to the FECA as originally enacted; the Report of the Senate Commerce Committee that accompanied the Act stated that “one of the primary purposes of the Federal Election Campaign Act of 1971 was to ‘give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters.’”<sup>53</sup> Congress implemented campaign finance law—at least in part—as a tool for ensuring that the electorate was fully informed about candidates’ qualifications and their stands on major issues; as the FECA, its 1974 amendments, and the surrounding legislative history make clear, the media exemption is simply a portion of campaign finance law tailored to meet that goal.

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<sup>51</sup> H.R. REP. NO. 93-1239, at 3 (emphasis added).

<sup>52</sup> *Id.* at 4.

<sup>53</sup> S. REP. NO. 92-96, at 20 (1971), as reprinted in 1972 U.S.C.C.A.N. 1773, 1774 (quoted in *CBS, Inc. v. FCC*, 453 U.S. 367, 379 (1981) (emphasis omitted)).

Congress' repeated emphasis on the rights of the electorate indicates that the theory of free speech underlying the "unfettered right of newspapers, TV networks, and other media" within campaign finance law derives at least as much from the electorate's right to hear a full range of ideas rather as it does from the right of the press to make autonomous decisions regarding the news. Although Congress did not condition the news media's exemption from the general restrictions of campaign finance law on its providing any particular content, it justified the exemption in terms of the electorate's need to "base its judgments on a straightforward presentation of a candidate's qualifications for public office and his programs for the Nation." The language of the House and Senate Reports indicate that Congress exempted the press for the benefit of potential listeners, rather than for the benefit of the speakers. This, in turn, suggests a special right of the press *as the press*, with a justification distinct from that of traditional content-based/content-neutral First Amendment jurisprudence (which derives primarily from speakers' rights).<sup>54</sup> The theoretical difference underlying the press' rights within campaign finance law may partially explain why, in similar circumstances, the Court has had such difficulty analyzing press rights under traditional First Amendment doctrine, and why traditional doctrine may, in such cases, be an inadequate analytical tool.<sup>55</sup>

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<sup>54</sup> See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409 (1986) ("[u]nder the Traditional [doctrine] . . . the freedom of speech guaranteed by the first amendment amounts to a protection of autonomy—it is the shield around the speaker.") Significantly, "[t]he theory that animates this protection . . . and that now dominates the field, casts the underlying purpose of the first amendment in social or political terms: The purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live." *Id.* at 1410. Thus, a theory of free speech that focuses on listeners' autonomy supports rather than challenges the underlying social and political goals of a theory based on speakers' autonomy—provided that a focus on listeners' autonomy leads to a greater degree of self-determination.

<sup>55</sup> See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

The Bipartisan Campaign Reform Act of 2002 (BCRA) further restricts nonparty entities' ability to participate in federal elections by prohibiting "unions and corporations—including nonprofit corporations—from using general treasury funds to influence federal elections through issue ads."<sup>56</sup> Congress coined a new term, "electioneering communications," to describe these ads. The BCRA defines an "electioneering communication" as

any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate.<sup>57</sup>

The BCRA further provides that disbursements for electioneering communications "coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party," whether or not there is explicit agreement between the donor and the recipient.<sup>58</sup> This provision builds upon a broader BCRA provision, which states more generally that "'expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of' a candidate or party" constitute contribu-

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<sup>56</sup> *The Supreme Court, 2003 Term: Leading Cases*, 118 HARV. L. REV. 248, 365 (2004) (citing Bipartisan Campaign Reform Act § 203, 2 U.S.C. § 441b (2003)). Corporations may still fund electioneering communications via political action committees by using segregated funds, thus avoiding the "temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell v. FEC*, 540 U.S. 93, 204 (2003) (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)).

<sup>57</sup> 2 U.S.C. § 434(f)(3)(A) (2004). Electioneering communications refer solely to broadcast transmissions; omitted from the definition of electioneering communications are those communications made via newspapers or magazines, or over the internet.

<sup>58</sup> *McConnell*, 540 U.S. at 202 (citing Bipartisan Campaign Reform Act § 202, 2 U.S.C. § 441a(a)(7) (2003)).



tions for the purposes of determining contribution limits.<sup>59</sup> Mirroring the FECA's press exemption, the BCRA specifically excludes from the definition of electioneering communications any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate."<sup>60</sup> Coupled with the more general press exemption, the press' specific exemption from electioneering communications gives the institutional news media enormous power relative to other corporations—and relative to other conduits of information—in federal election campaigns.<sup>61</sup>

In the massive constitutional challenge to the BCRA that culminated in *McConnell v. Federal Election Commission*, several plaintiffs seized on the disparity in power that the BCRA created between media corporations and nonmedia corporations and argued that the Act's failure to regulate both types of corporations under the same rules rendered it fatally underinclusive<sup>62</sup>:

[T]he uncontested evidence before the trial court confirms that "Big Media" has become part of "Big Business." There is no longer any qualitative distinction between the two that can justify (1) immunizing broadcast corporations from the same corruption concerns that Title II ostensibly attributes to all other corporations, or (2) giving, say, General Electric a special license to comment on federal elections, while muzzling advocacy groups whose defining

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

<sup>60</sup> 2 U.S.C. § 434(f)(3)(B)(i) (2004).

<sup>61</sup> In *FEC v. Wisconsin Right to Life*, No. 06-969 (2006), decided as this note was going to press, the Court determined that an issue ad mentioning a candidate for office within electioneering communications time window violates the BCRA only if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This decision promises to restore a considerable degree of power to nonmedia corporations. *FEC v. Wisc. Right to Life*, No. 06-969, 2007 U.S. LEXIS 8515, at \*48 (2007).

<sup>62</sup> *See, e.g.*, Brief for the National Rifle Association at 44–50, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1675).

corporate purpose is not profit but the dissemination of ideas.<sup>63</sup>

The Supreme Court in *McConnell* postponed these concerns, citing *Buckley v. Valeo* for the proposition that “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”<sup>64</sup> Significantly, the Court’s underinclusiveness analysis focused solely on the behavior of nonmedia corporations and labor unions in assessing the reasonableness of Congress’ decisions; conspicuously absent was any assertion that media corporations did not similarly contribute to corruption or the appearance of corruption.<sup>65</sup>

The Court also dismissed the argument that no qualitative difference exists between media and nonmedia corporations, stating that the BCRA:

excepts news items and commentary only; it does not afford *carte blanche* to media companies generally to ignore FECA’s provisions. The statute’s narrow exception is wholly consistent with First Amendment principles. A valid distinction . . . exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Numerous federal statutes have drawn this distinction to ensure that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.<sup>66</sup>

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<sup>63</sup> *Id.* at 50.

<sup>64</sup> *McConnell*, 540 U.S. at 207–08 (quoting *Buckley v. Valeo*, 424 U.S. 1, 105 (1976)) (internal quotation marks omitted).

<sup>65</sup> *See id.*

<sup>66</sup> *Id.* at 208–09 (internal quotation marks omitted) (citations omitted) (ellipsis in original). Notable among these statutes is 47 U.S.C. § 315(a), which exempts “news-casts, news interviews, and news documentaries from the requirement that broadcasters provide equal time to candidates for public office.” *Id.*

This distinction between media and nonmedia corporations built on the one articulated in *Austin v. Michigan Chamber of Commerce*, in which the Court stated that “media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public.”<sup>67</sup> But modern ownership structures, in which a media outlet may be but one holding among many for a giant conglomerate, cast serious doubts on the continued validity of this distinction.<sup>68</sup> As David A. Anderson notes, “it is difficult to believe that [such conglomerates] are any less eager to influence politics than their nonmedia counterparts.”<sup>69</sup> Anderson further argues that “the only sensible basis for giving some information providers preferential treatment is the belief that some of them provide more important information than others, which requires distinctions to be drawn on the basis of content.”<sup>70</sup> This argument merits attention, since it echoes the rationale that Congress provided in enacting the FECA’s media exemption: the institutional press deserves preferential treatment because it provides content critical to an informed electorate.

The *McConnell* Court’s defense of the media’s right to report and comment on “newsworthy events” left open the critical questions of who determines what is newsworthy and on what criteria. To leave these determinations solely in the hands of the media leads to circularity: information provided by a media corporation is entitled to preferential treatment because it is of greater importance; the information is of greater importance because a media corporation has chosen to provide it. As illustrated below, however, the FEC and federal courts have employed precisely this sort of content-blind doctrinal framework in evaluating press entities under federal election law. For the distinction between media and nonmedia corporations to continue to have significance—and for Congress to be able to hold the press to the purposes of its exemption from

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<sup>67</sup> 494 U.S. 652, 667 (1990).

<sup>68</sup> Anderson, *supra*, note 38, at 455.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 498.

campaign finance restrictions—an electorate’s right to hear “a straightforward presentation of a candidate’s qualifications for public office and his programs for the Nation” must be allowed to play some role in determining what is newsworthy.

### **B. Who is Exempt? A Doctrinal Framework**

Over the years, the FEC and the federal courts have developed a two-part analysis to determine whether the press exemption applies to a given media activity.<sup>71</sup> The exemption applies when 1) a qualifying press entity 2) “spends resources to cover or carry a news story, commentary, or editorial.”<sup>72</sup> Qualifying press entities consist only of broadcasting stations (including cable television)<sup>73</sup> and bona fide newspapers, magazines, or other periodical publications.<sup>74</sup> A “bona fide” publication must ordinarily derive revenue from advertisements or subscriptions, and appear at regular intervals.<sup>75</sup>

Once a qualifying press entity has been identified, the FEC considers two criteria to determine whether press activity is exempt: “(1) whether the press entity is owned or controlled by a political party, political committee, or political candidate and (2) whether the press entity is acting like a member of the media in conducting the activity at issue.”<sup>76</sup> A press entity under the control of a political party or candidate is not automatically denied the protection of the press exemption, but it must meet more exacting standards to demonstrate that it is engaged in a legitimate press activity and must give reasonably equal coverage to opposing can-

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<sup>71</sup> Christopher V. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act’s Press Exemption to Online Political Speech*, 9 VA. J. L & TECH. 6, 13 (2004).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 16 (citing Candidate Debates and News Stories, 61 FED. REG. 18049 (Apr. 24, 1996)).

<sup>74</sup> *Id.* at 14 (citing Explanation and Justification for Funding and Sponsorship of Federal Campaign Debates, 44 FED. REG. 76734 (Dec. 27, 1979)).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 17.

didates.<sup>77</sup> For press entities not under partisan control, the second criterion is relatively easy to meet.

### C. Illustration: *In re CBS*

*In re CBS* exemplifies how differently the BCRA treats non-media corporations and a press entities. On September 8, 2004, *60 Minutes Wednesday* broadcast a now-infamous news story, based largely on documents of questionable validity, charging that President Bush received favorable treatment in the Texas Air National Guard. CBS officials admitted placing the source of the documents—retired Texas National Guard official Bill Burkett—in contact with Joe Lockhart, a senior advisor in John Kerry’s election campaign; in exchange, Burkett granted CBS access to the documents.<sup>78</sup> Shortly thereafter, the Center For Individual Freedom (CFIF) filed a complaint with the FEC, alleging that CBS had violated 2 U.S.C. § 434(f) by broadcasting a prohibited electioneering communication coordinated with John Kerry’s election campaign, and §§ 441b(a) and (c) for failing to report the broadcast as a contribution to the Kerry campaign.<sup>79</sup> The CFIF argued that CBS was not entitled to the press exemption: “CBS failed to verify its news sources and improperly coordinated with the Kerry-Edwards campaign, and the broadcast did not fit the definition of a news story, commentary, or editorial under 11 CFR §100.73 because it expressly advocated the defeat of President Bush.”<sup>80</sup>

Applying the doctrinal framework described above, the FEC determined that CBS met the first criterion for exemption—i.e., it was a press entity for FEC purposes, and was not controlled by a

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<sup>77</sup> *Id.* at 18.

<sup>78</sup> Howard Kurtz, *Rather Admits “Mistake in Judgment”*, WASH. POST, Sept. 21, 2004 at A01.

<sup>79</sup> *In re CBS Broadcasting, Inc.*, MURs 5540 & 5545, Statement of Reasons of Vice Chairman Toner and Comm’rs Mason and Smith (Federal Election Comm’n, July 12, 2005).

<sup>80</sup> *Id.*

political party or candidate.<sup>81</sup> The FEC further determined that *60 Minutes Wednesday* was a regularly scheduled, recurring program, and that the broadcast in question was similar in form and manner of transmission to other *60 Minutes Wednesday* broadcasts; thus, CBS was engaged in a protected press activity when it aired the story.<sup>82</sup> The FEC Commissioners unanimously found no reason to believe that CBS or any other party to the matter had violated the FECA. By way of explication, three of the six FEC Commissioners stated:

[i]t is not for this agency to determine what is a 'legitimate news story' or who is a 'responsible journalist' . . . [T]he Commission's inquiry is limited to determining whether a press entity charged with a violation is owned or controlled by a party or candidate and whether the distribution complained of was of the type exempted by the statute . . . No inquiry may be addressed to the sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred by the statute unless it is shown that the press exemption is not applicable.<sup>83</sup>

By this reasoning, once it has been determined that an actor is a qualifying nonpartisan press entity, the analysis of whether that entity was engaged in a legitimate press activity is purely structural. Therefore, even if *60 Minutes* had *intended* to disseminate misinformation about the president, CBS would still be beyond the reach of federal election law. In contrast, a nonmedia corporation that contributed funds to a 15-second advertisement stating that John Kerry met the constitutional requirements for the presidency (age, residency, and natural born citizenship) could have faced

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (quoting *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1308, 1314–15 (D.D.C. 1981)) (internal quotation marks omitted).

criminal sanctions under the BCRA had the ad aired during that same *60 Minutes* broadcast.<sup>84</sup>

The point here is neither to accuse CBS of intentional wrongdoing nor to suggest that the press is out of control; the *60 Minutes* snafu and other similar incidents may be unavoidable missteps in the course of pursuing legitimate journalism.<sup>85</sup> Curbing the press' ability to comment freely on electoral politics seems unlikely to improve the quality of information reaching the electorate and would run directly counter to Congress' purposes for exempting it from campaign finance law.<sup>86</sup> Congress enacted the media exemption not to limit the range of what the press may report, but to set a floor on what it must provide. The scope of this exemption, and the degree of power that comes with it, should inform any analysis of how forcefully the electorate may assert itself in holding the press to the purposes for which it was exempted.

## V. Structural and Content-Based Solutions: A Conditional Exemption for the Press

### A. A Note on Structural Regulations

As noted above, the two primary structural regulations imposed on broadcast media—the Equal Time doctrine and the right of a candidate to purchase reasonable amounts of broadcast time—have failed to bring about the sort of news media Congress envisioned when it enacted the FECA. The Equal Time doctrine states that if a broadcaster “permit[s] any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”<sup>87</sup> Bona fide newscasts, news interviews, and documentaries, however, are exempted

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<sup>84</sup> While this was certainly true in 2004, this result is no longer clear after *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007).

<sup>85</sup> See generally *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>86</sup> See H.R. REP. NO. 93-1239 at 4.

<sup>87</sup> 47 U.S.C. § 315(a) (2006).

from Equal Time provisions.<sup>88</sup> Thus, Equal Time guarantees a candidate media exposure only if a broadcaster permits another candidate use of its facilities; it does not necessarily guarantee equal coverage—or, in fact, any coverage at all. Similarly, the statutory right of a candidate to purchase broadcast time grants only such time as a candidate is able to purchase; it does not guarantee any particular amount of coverage in the news media.<sup>89</sup> While these regulations prevent broadcasters from openly promoting some candidates while forcibly silencing others, neither seems likely to create more balanced exposure, and neither has direct implications for regulating campaign coverage in the institutional news media.

Nor do the two doctrines suggest a model which, by itself, is likely to remedy the problems with the current state of campaign coverage. Extending the Equal Time doctrine to include bona fide news programs and the right-of-access doctrine to include free access (including news media access), seems likely to increase the diversity of candidate voices, if not the diversity of viewpoints. These changes, however, are unlikely to address the most serious deficiency in campaign coverage: the relatively slight proportion of substantive, issue-driven information reaching the electorate. Structural regulations should comprise a part of any regulatory solution, but a complete solution requires more.

### **B. Content-Based Regulations: A Conditional Exemption**

The problem with the current state of campaign coverage is not the complete lack of substantive, issue-driven information; the problem is the relatively slight proportion of total coverage it receives. Moreover, too little of it reaches the voting public in a meaningful fashion. If the press is to carry out its designated role in campaign finance law, it must give greater prominence to content that adequately informs the electorate. Since purely structural regula-

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<sup>88</sup> *Id.*

<sup>89</sup> *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 446 (D.C. Cir. 1980) (construing 47 U.S.C. § 312(a)(7) (2006)).



tions are unlikely to provide a solution, it is worthwhile to consider whether a possible solution lies in content-based regulations, and whether such regulations are likely to survive a First Amendment challenge. Three sorts of content-based regulations could plausibly increase the prominence of substantive information in campaign coverage: regulations restricting the press's ability to report on "inessential" information; regulations requiring the press to increase its coverage of substantive, issue-driven information; and regulations creating specialized formats showcasing substantive information (e.g., something based on the model of candidate debates).

History, doctrine, and campaign finance law all provide substantial reasons for rejecting the option of curtailing the range or content of the information that the institutional press may carry.<sup>90</sup> Thus, I propose a solution that combines features of the latter two types of regulations: to condition the protections of the press exemption upon a media entity's agreement to carry, within a designated format, the sort of issue-driven content that would allow the electorate "to base its judgments on a straightforward presentation of a candidate's qualifications for public office and his programs for the Nation." A conditional exemption would parallel the FCC's ability to revoke a broadcaster's license for failing to allow a candidate for public office to purchase reasonable time<sup>91</sup> by providing Congress (or a designated regulatory agency) the power to deny a media outlet the protections of the press exemption if it refused to carry specified content.

Such an unambiguously content-based regulation is unlikely to survive traditional First Amendment strict scrutiny analysis, which requires that the regulation be "narrowly tailored to promote a compelling Government interest."<sup>92</sup> In practical terms, narrow tailoring means that the regulation could stand only if there were no less restrictive alternatives that would be at least as effec-

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<sup>90</sup> See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Mills v. State of Alabama*, 384 U.S. 214 (1966); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>91</sup> 47 U.S.C. § 312(a) (2006).

<sup>92</sup> *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000).

tive in accomplishing the government's goals.<sup>93</sup> While the government's interest in promoting an informed electorate is certainly compelling, satisfying the "least restrictive alternative" prong of the test would likely prove impossible, given the virtually infinite array of means that could conceivably accomplish the goal of informing the electorate, and the difficulty in measuring the effectiveness of hypothetical solutions. However, two related alternatives to traditional First Amendment doctrine might allow an explicitly content-based regulation to survive a First Amendment challenge.

Baker provides support for one such alternative, suggesting that where listeners' autonomy forms a significant component of the First Amendment rights at stake, a lesser degree of scrutiny may apply to content-based regulations.<sup>94</sup> "Since there is no natural set of communications to receive," he argues, "the government will inevitably influence and ought to self-consciously and wisely influence the communications that people receive."<sup>95</sup> Baker proposes a method of analysis under which the editorial autonomy of a press entity is not an insurmountable obstacle to its regulation.<sup>96</sup> A second alternative may be drawn from two leading cases supporting a right of access to the press: *Red Lion Broadcasting Co. v. Federal Communications Commission*,<sup>97</sup> and *Turner Broadcasting v. Federal Communications Commission*.<sup>98</sup> Each case upholds what is ostensibly a content-based restriction on a media entity due to restricted access to the medium in question. I will examine both theories in greater detail in the following section.

The precise contours of the content that a conditional exemption might require are beyond the scope of this paper, but a

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

<sup>94</sup> Cf. C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 72 – 77 (1994). Baker suggests more explicitly that government can disrespect listener autonomy by paternalistically prohibiting certain communications. However, I contend that the government can protect listeners' autonomy by promoting a more thorough set of communications.

<sup>95</sup> *Id.* at 77.

<sup>96</sup> *Id.* at 81–91.

<sup>97</sup> 395 U.S. 367 (1969).

<sup>98</sup> 512 U.S. 622 (1994).

brief sketch is necessary in order to evaluate if, and how, a conditional exemption might fit within First Amendment jurisprudence. Two important factors are how to determine the issue (or range of issues) to be discussed and how to format the discussion. Purely structural issues, such as the quantity of the information a press entity would be required to carry, or the frequency with which the conditioned content would appear, might present administrative issues, or Fifth Amendment concerns, but are unlikely to impact a First Amendment analysis.

The more precisely the government specifies the issues to be discussed, the greater the degree of intrusiveness upon editorial functions, and the more objectionable such regulations would appear. Baker acknowledges that it would be an overstatement to assert that the press has no rights analogous to those of an independent speaker,<sup>99</sup> and that “constitutional doctrine radically distinguishes the press from other entities.”<sup>100</sup> To the greatest degree possible, editorial discretion should be preserved in this regard. The portion of the now-defunct fairness doctrine that required broadcast licensees to “give suitable time and attention to matters of great public concern”<sup>101</sup> provides a reasonable framework in theory. The term “great public concern,” however, begs for content. A standard that requires exempted press entities to provide information on issues likely to be faced by the holder of the office at stake in the exercise of his or her official authority seems likely to improve the quality of public debate.<sup>102</sup> Better still might be some combination of the “public concern” and “official authority” standards. For the purposes of the discussion to follow, it is enough to note that any

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<sup>99</sup> Baker, *supra* note 94, at 78.

<sup>100</sup> *Id.* at 80.

<sup>101</sup> 395 U.S. at 394.

<sup>102</sup> The Vote-USA website provides an online version of the sort of forum I propose here, and features an admirably extensive list of topics on which candidates for federal office are asked to respond. See <http://www.vote-usa.org/> (last visited 4/21/2007). Ironically, one such topic—the “Rich Poor Internet Divide”—highlights an important deficiency of any purely internet-based forum.

standard would likely be a general guideline that leaves the determination of specific issues to editorial discretion.

While I am concerned primarily in this paper with the theoretical justification for a conditional press exemption, rather than with its practical workability, it is worth noting that some of the same problems that led to the demise of the fairness doctrine are likely to reappear under any content-based regulation of campaign coverage. For example, the FCC noted that “the [fairness] doctrine often worked to dissuade broadcasters from presenting *any* treatment of controversial viewpoints, that it put the government in the doubtful position of evaluating program content, and that it created an opportunity for incumbents to abuse it for partisan purposes.”<sup>103</sup> The most serious of these concerns—that a content requirement modeled on the fairness doctrine would unduly chill speech by discouraging controversy—seems unlikely to apply to a conditional press exemption, given the apparent public appetite for campaign coverage. The problems of requiring the government to evaluate content and the potential for abuse, however, seem likely to remain.<sup>104</sup>

An informed, intelligent electorate requires more than substantive information; it requires that such information be presented in a format that allows for ready comparison of viewpoints and policies. Federal regulations governing the conditions under which press entities are allowed to stage debates would serve as a workable structural model.<sup>105</sup> Since the debates must be “nonpartisan in nature,” and “may not be structured so as to favor one candidate over another,”<sup>106</sup> they provide a framework that encourages reasoned comparison of candidates’ views.

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<sup>103</sup> *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989).

<sup>104</sup> More detailed analysis is beyond the scope of this paper; I am merely flagging the issues here in order to point out that a theoretically defensible regulation of presses is not necessarily a practical one.

<sup>105</sup> Explanation and Justification for Funding and Sponsorship of Federal Campaign Debates, 44 Fed. Reg. 76, 734–36 (Dec. 27, 1979) (to be codified at 11 C.F.R. pts. 100, 110 and 114).

<sup>106</sup> *Id.* at 76, 735.

Although the FEC interprets the abovementioned regulations to allow major-party-only debates, a conditional exemption that excludes minor-party candidates is unlikely to satisfy either republican democrats' desire for inclusive collective discourse, or liberal pluralists' desire for a diversity of viewpoints.<sup>107</sup> Subject to inevitable practical concerns, participatory theories of democracy would require that each candidate on the ballot for a particular office be afforded access to the news media—at least within this specially designated format—in roughly equal proportion to that of every other candidate. Ideally, the candidates themselves would supply the content, while the press, exercising its editorial function, would set the range of issues for debate, acting under government standards.

As a final note, while a conditional press exemption would require all exempted media to supply some form of issue-driven content, print media would be best suited to carrying out its goals. Reasoned discourse requires reflection and reexamination; cable, satellite, and broadcast media are ephemeral, tending to encourage instantaneous judgments rather than thoughtful, considered analysis. Further, print media are capable of reaching a large segment of the general public<sup>108</sup> and occupy an historic role in the development

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<sup>107</sup> See Baker, *supra* note 32, at 327–35. This argument assumes that a greater variety of candidates is a good proxy for a greater variety of viewpoints; however, “what is essential is not that everyone shall speak, but that everything worth saying shall be said.” ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

<sup>108</sup> Although some data suggest that traditional print media is waning in importance, “[n]ewspapers are [still] the country’s biggest newsgathering organizations in most towns and [are] the Internet’s largest suppliers.” PROJECT FOR EXCELLENCE IN JOURNALISM, 2006 ANNUAL REPORT ON THE STATE OF THE NEWS MEDIA EXECUTIVE SUMMARY at 1, <http://www.stateofthenewsmedia.org/Executivesummary.pdf> (last visited 4/21/2007); see also PROJECT FOR EXCELLENCE IN JOURNALISM, STATE OF THE NEWS MEDIA 2007 at 2, <http://www.journalism.org/summary.pdf> (last visited 4/21/2007) (stating that “old newsrooms now seem more likely than a few years ago to be the foundations for newsrooms of the future.”) The other likely source of print media is the internet. Despite the internet’s rapid growth, a recent survey found that only 11.2% of respondents named it as one of their three main sources for news; two thirds of respondents had never read a blog, or did not know what one was. RTNDF Study, *supra* note 25.

of American democracy. Though print media has traditionally fallen outside the scope of government regulation, there is no compelling reason for dissimilar treatment if the rationale no longer applies.

## VI. Theoretical Defenses of a Conditional Press Exemption

One plausible defense of a conditional press exemption could derive from the line of cases culminating in *Rust v. Sullivan*.<sup>109</sup> A defense based on these grounds would depend on whether carving out an exemption from campaign finance law for the press could plausibly be characterized as “fund[ing] a program to encourage certain activities [the government] believes to be in the public interest.”<sup>110</sup> Refusing to “fund” protected speech activities by denying an exemption to those press entities that refused to carry the required content could conceivably pass First Amendment muster under the *Rust* framework.<sup>111</sup> This is not the route I wish to pursue here; instead, I argue that strict scrutiny is inapplicable to must-carry laws generally if the entity required to carry the specified content has limited or no autonomous speech rights of its own.

### A. Listener Autonomy and the Regulation of “Instrumentally Created Collective Entities”

Common to all constitutional theories that concern role of the press in public discourse is the idea that the press should provide the public with opinions “uncensored by government.”<sup>112</sup> Explicit constitutional protections distinguish the press from other

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<sup>109</sup> 500 U.S. 173 (1991). “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.” *Id.* at 193.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> Baker, *supra* note 94, at 80.

collective entities; as such, laws that *restrict* expression by the press should be evaluated on the same basis as laws restricting the rights of autonomous individual speakers.<sup>113</sup> Unlike autonomous individuals, however, the vast majority of press entities are corporations, which are necessarily structured by law. Within “instrumentally created collective entities”<sup>114</sup> such as the institutional press—or, more to the point, the institutional press within campaign finance law—regulations that determine whose speech choices will prevail are inevitable.<sup>115</sup> “Whatever framework is adopted necessarily favors some and disfavors other speakers and content;” there is no default state of affairs in which certain speech choices prevail automatically.<sup>116</sup> Given the inevitability of regulations that influence speech choices in this context, there is no normative obstacle to regulations favoring speech choices that benefit voters over speech choices indifferent or hostile to their needs.<sup>117</sup>

From this perspective, a content-based regulation of the sort I propose need not be subject to strict scrutiny. Two critical features that make content-based regulation of individuals problematic—i.e., that the speech choices of individuals have intrinsic (as opposed to merely instrumental) value, and that individuals are not commonly thought of as being inevitably structured by law—are absent from press entities.<sup>118</sup> In addition, a conditional press exemption would not directly curtail any protected speech. It would preserve the press’ “unfettered right . . . to cover and comment on political campaigns”<sup>119</sup> (subject only to the proviso that it provide certain additional content), and would enhance the public’s entitlement to

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 79.

<sup>115</sup> See *id.* at 66-68. Baker’s point here is that law helps “structure and maintain power relationships” within corporations—i.e., when a corporation speaks, the determination of who gets to speak on its behalf is legally determined; there is no natural default corporate speaker. *Id.* at 66. In contrast when an individual speaks, he or she is the “natural or appropriate locus of choice for [that] speaker’s expressive acts.” *Id.*

<sup>116</sup> *Id.* at 67.

<sup>117</sup> See *id.*

<sup>118</sup> *Id.* at 81.

<sup>119</sup> H.R. REP. NO. 93-1239 at 4.

base its assessment of a political candidate on “a straightforward presentation of [his] qualifications for public office and his programs for the Nation.”<sup>120</sup>

Further, the press, under the FECA’s media exemption, is a paradigm case of an instrumentally created collective entity. Since laws favoring some speech choices over others are inevitable in such entities, a content-based law would be relatively unobjectionable “as long as the law does not suppress expression or undermine the media’s integrity but, rather, supports a desirable communications order.”<sup>121</sup> The legislative history accompanying both the 1971 Act and the 1974 amendments makes clear that a law designed to provide the electorate with increased access to substantive information on policy issues would support a desirable communications order.

The above considerations support the idea that a constitutional objection to a conditional press exemption would lie in its *incidental* suppression of speech—i.e., communications displaced by the required content—rather than in its direct promotion of favored speech. As such, intermediate *O’Brien*-level scrutiny, rather than strict scrutiny, would be appropriate framework under which any such objection should be analyzed.

“Under *O’Brien*, a content-neutral regulation will be sustained if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>122</sup> *O’Brien* does not require a least restrictive means analysis; the regulation is appropriately tailored to its purpose if the “governmen[tal] . . . interest would be achieved less effectively absent the regulation,” and the “means chosen do not burden substantially more speech than is necessary to further the govern-

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<sup>120</sup> *Id.* at 3.

<sup>121</sup> Baker, *supra* note 94, at 91.

<sup>122</sup> 512 U.S. at 662 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (internal quotation marks omitted)).



ment's legitimate interests."<sup>123</sup> Promoting the effective functioning of democracy is indisputably a substantial government interest. Whether a conditional press would burden substantially more speech than is necessary would involve a weighing of hypotheticals, but intermediate scrutiny would allow a conditional press exemption a reasonable likelihood of surviving a First Amendment challenge whereas strict scrutiny would not.

The primary obstacle to relying on the above reasoning is that the Court has applied it only to facially content-neutral regulations, and not specifically to content-based regulations. A theory more thoroughly grounded in case law would provide a useful supplement.

## B. The Legislative Bottleneck

In both *Red Lion Broadcasting Co. v. Federal Communications Commission*<sup>124</sup> and *Turner Broadcasting System, Inc. v. Federal Communications Commission*,<sup>125</sup> the Court sustained a law mandating that a media outlet carry specified content against a First Amendment challenge. Significantly, the Court did not apply strict scrutiny in its First Amendment analysis in either case. Factoring heavily in each decision were limits on general access to the medium in question: the scarcity of broadcast frequencies in *Red Lion*,<sup>126</sup> and the "bottleneck" or "gatekeeper" control that cable companies exercise over the content accessible to their subscribers in *Turner*.<sup>127</sup> In neither case did the Court explicitly state that the medium's lack of general accessibility mitigated the level of scrutiny warranted in a First Amendment challenge, but this inference best explains the *Turner*

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<sup>123</sup> *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (internal quotation marks omitted)).

<sup>124</sup> 395 U.S. 367 (1969).

<sup>125</sup> 512 U.S. 622 (1994).

<sup>126</sup> 395 U.S. at 390.

<sup>127</sup> 512 U.S. at 656.

and *Red Lion* holdings, especially in light of *Miami Herald Publishing Co. v. Tornillo*.<sup>128</sup>

If the lack of general accessibility to a medium mitigates the degree of scrutiny the Court will apply to must-carry laws governing that medium, then—to the extent that the FECA creates a “legislative bottleneck” that restricts speech in federal election campaigns—a conditional press exemption from FECA restrictions may warrant a lesser degree of scrutiny. This analysis approaches the problems of campaign coverage from the more traditional standpoint of speaker’s autonomy, and thus has a firmer grounding in case law. The analogy between physical limits on access in *Red Lion* and *Turner* and legislative limits on campaign speech under the FECA, however, is far from perfect; ideally, analysis under a “legislative bottleneck” theory would supplement, rather than supplant, a collective entity/listener autonomy rationale.

The *Red Lion* Court upheld an author’s right to free on-air reply time in response to a personal on-air attack under the “fairness doctrine,” which required that broadcast licensees devote air time to discussion of public issues, and that each side of the issue be given fair coverage.<sup>129</sup> The Court justified the fairness doctrine in the scarcity of the medium:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.<sup>130</sup>

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<sup>128</sup> See 418 U.S. 241 (1974).

<sup>129</sup> 395 U.S. at 369.

<sup>130</sup> *Id.* at 390.

In spite of the fairness doctrine's undeniably content-based impositions on broadcasters, the Court seemed willing to analyze it in some respects as content-neutral restriction on time, place, and manner.<sup>131</sup> Although the Court did not explicitly state the degree of scrutiny it applied, it upheld the constitutionality of the fairness doctrine based on three factors: (1) "the scarcity of broadcast frequencies"; (2) "the Government's role in allocating those frequencies"; and (3) "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression."<sup>132</sup> The Court reinforced the idea that scarcity of the medium was responsible for its relaxed degree of scrutiny by explicitly reserving judgment as to whether, in the absence of scarcity, Congress would abridge any First Amendment rights "by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public."<sup>133</sup>

*Miami Herald* seems to indicate that it would. There, the Court invalidated a Florida statute requiring a newspaper that attacked the character or official record of any candidate for public office to print any reply that such candidate might care to make, free of charge.<sup>134</sup> Two factors assumed primary importance in the Court's decision: (1) the penalty (and the accompanying chilling effect) that the statute exacted upon a newspaper for publishing certain content, and (2) the "intrusion into the function of editors."<sup>135</sup> Elaborating on the second factor, the Court stated that:

[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material

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<sup>131</sup> *Id.* at 387.

<sup>132</sup> *Id.* at 400. "[J]ust as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment." *Id.* at 387.

<sup>133</sup> *Id.* at 401, n. 28.

<sup>134</sup> 418 U.S. at 244.

<sup>135</sup> *Id.*

to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the first amendment guarantees of a free press as they have evolved to this time.<sup>136</sup>

The Court observed that the Florida statute “exact[ed] a penalty on the basis of the content of a newspaper,”<sup>137</sup> but it failed to indicate the degree of scrutiny applied in assessing the statute’s constitutionality. The absence of any discussion of Florida’s legitimate interests, and the negligible weight given to any burden the statute might or might not place on newspapers,<sup>138</sup> suggested that any intrusion into the editorial function is per se unconstitutional.

Apart from the asserted scarcity of broadcast media, little separates *Red Lion* from *Tornillo*.<sup>139</sup> In *Turner*, however, the Court limited the application of the scarcity rationale to physically scarce media, reasoning that “mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media.”<sup>140</sup> This reasoning would seem to preclude the reasoning in *Red Lion* from being directly applied to a conditional press exemption.

As the *Turner* Court closed one door, however, it opened another. It cited cable companies’ “bottleneck, or gatekeeper, con-

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<sup>136</sup> *Id.* at 258.

<sup>137</sup> *Id.* at 256.

<sup>138</sup> *Id.* at 258 (“Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.”)

<sup>139</sup> The two cases may also be plausibly distinguished on federalism grounds, i.e., the Court upheld a federal statute in *Red Lion*, whereas it struck down a state statute in *Tornillo*, though this distinction has little relevance for this paper.

<sup>140</sup> 512 U.S. at 640.

trol over most (if not all) of the television programming that is channeled into the subscriber's home,"<sup>141</sup> as grounds for analyzing federal must-carry regulations as content-neutral rather than content-based (and thus subject to intermediate rather than strict scrutiny)<sup>142</sup>—in spite of evidence that Congress justified the must-carry rules by explicit reference to content.<sup>143</sup> Nevertheless, the Court held that "heightened scrutiny is unwarranted when the differential treatment [of a medium] is justified by some special characteristic of the particular medium being regulated," the special characteristic here being the monopoly power that cable companies exercise over information reaching their subscribers.<sup>144</sup> Although the Court noted that the bottleneck resulted from the physical connection between the cable company and the subscriber, it did not explicitly require that the bottleneck be physical for the rationale to apply.<sup>145</sup>

Whether the bottleneck rationale can support a reduced level of scrutiny for a conditional press exemption hinges on whether the power campaign finance law confers on the news media more closely resembles a "dysfunction or failure in a speech market," in which case lessened scrutiny would be unwarranted, or a concentration of monopoly power over information reaching the voters, in which case it would be appropriate. While it is true that a candidate cannot reasonably hope for success in a campaign for federal office without significant media coverage, other means of reaching the electorate are available, the most notable example being a candidate's statutory right to purchase reasonable air time from a broadcaster. Not every candidate or campaign has equal power to purchase such air time, but the Court has not looked favorably on arguments attempting to justify regulations on the

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<sup>141</sup> *Id.* at 656.

<sup>142</sup> 512 U.S. at 660-62.

<sup>143</sup> *Id.* at 676 (citing Congressional findings that justify the must-carry provisions on the basis that they promote a diversity of viewpoints) (O'Connor, J. dissenting); see also Baker, *supra* n. 98, at 61 (suggesting that the dissent got the better of the content-based/content-neutral argument in Turner).

<sup>144</sup> 512 U.S. at 660-61.

<sup>145</sup> See *id.* at 656-62.

grounds that they will equalize the power of money to influence elections.<sup>146</sup> Thus, the “bottleneck” of campaign finance will not likely prove tight enough to independently justify a relaxed level of scrutiny for a conditional press exemption. A “bottleneck” argument could, however, be used to strengthen a justification based on the electorate’s right to a “straightforward presentation of a candidate’s qualifications for public office and his programs for the Nation.”

## VII. Conclusion

Under traditional First Amendment doctrine, a conditional press exemption is unlikely to succeed—though the decisions in *Red Lion* and *Turner* suggest that the Court has not always rigorously adhered to this doctrine when media access is limited. As matters stand, however, the vitality of *Red Lion* and the scope of *Turner* remain uncertain.

A regulation requiring media entities to carry specified content need not unduly burden the essential right of the press to deliver uncensored information to the public, and could prove a valuable tool for promoting vigorous public debate. Further, such a regulation would supplement Congress’ purpose in exempting news media from campaign finance restrictions by encouraging the institutional press to provide the electorate with substantive information about candidates’ policies and positions. The weight of these prudential concerns argues against applying strict scrutiny to a conditional press exemption, especially when traditional doctrine does not unambiguously require it.

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<sup>146</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48-50 (1976).