NOTE

TEXT "YES" TO GIVE: AN ANALYSIS OF FEC-PERMITTED ELIGIBILITY CRITERIA IN TEXT-MESSAGE-BASED POLITICAL DONATION SYSTEMS

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This Note reviews the permissibility of "eligibility criteria" for text-message-based political donation systems. In 2012, the Federal Election Commission released a series of advisory opinions to clarify the rules governing these new donation platforms, bringing campaign finance regulations further into the digital era. The most onerous component of these systems involve the use of "eligibility criteria" or thresholds, which are set by the wireless carrier, to determine which candidates qualify for participation in the carrier's donation mechanisms.

Part I provides a historical context for how these donation schemes came into existence and the technical mechanics by which they function.

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Part II analyses the eligibility criteria, including discussing their parameters, and addresses the arguments made for and against their permissibility. In arguing for the permissibility of eligibility criteria, this Note draws from relevant analogues where courts have upheld eligibility criteria and systematically addresses the deficiencies in the arguments challenging such criteria. Yet the text message donation systems are critically distinct from these analogues. As these systems utilize wireless spectrum, a regulated commodity, a new challenge could emerge from relevant telecommunications law. Part III argues that such a challenge would fail, by addressing the Federal Communication Commission's common carrier restrictions and delving into an analysis of their applicability to text messages. Finally Part IV concludes with an analysis of the three distinct impacts these donations systems will have on the election landscape.

INTRODUCTION

Since the controversial decision in *Citizens United v. Federal Elections Commission*,[1] the role of money in our political system has come under greater scrutiny.[2] Despite this intensified attention, a record six billion dollars in election expenses were reported to the Federal Election Commission (FEC) in 2012, making it the most expensive election cycle in U.S. history.[3] While the focus, with good reason, has been on high-spending Political Action Committees (PACs), these organizations are not the only innovative funding mechanisms available to campaigns. Recently, text-message-based donations have become a popular new tool for fundraising and, more importantly, campaign development.

As the significance of money has been amplified, increasingly sophisticated campaigns have sought more nuanced ways to reach out to their constituents and into their pockets. Instead of the traditional model of reliance on a core base of wealthy donors, new efforts focus on increasing the number of small donations from a wider base. President Obama's presidential campaigns, for example, were innovative due to their applied use of behavioral economics and social science, and consequently were highly effective at collecting smaller donations.[4] It is no wonder that President Obama, as well as Republican Party presidential

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1 558 U.S. 310 (2010).

2 *See, e.g.*, King & Spalding Client Alert, Greater Scrutiny of Corporate Lobbying and Political Activity Underway (Sept. 19, 2012), http://www.kslaw.com/imageserver/KSPublic/library/publication/ca091912b.pdf.

3 *2012 Election Spending Will Reach $6 Billion, Center for Responsive Politics Predicts*, OPENSECRETSBLOG (Oct. 31, 2012, 2:33 PM), http://opensecrets.org.

4 *See* Benedict Carey, *Academic 'Dream Team' Helped Obama's Effort*, N.Y. TIMES, Nov. 12, 2012, at D1, *available at* www.nytimes.com/2012/11/13/health/dream-team-of-behavioral-scientists-advised-obama-campaign.html. *See also* Dan Morain, *Small Donors' Dollars*

nominee Mitt Romney, were avid proponents of the FEC approval of a text-messaging-based donation system, as requested by Representative Jim Cooper.[5]

Largely unnoticed by the FEC was that someone donating by these systems was automatically "opted in" to a campaign's contact list, allowing campaigns to call and text the donor's mobile number for further donations, or to send information about campaign events and updates.[6] "The real impact is through increasing engagement with the campaign," said Aaron Scherb, a Congressional liaison for campaign finance reform group Public Campaign.[7] "Campaigns can increase the percent of small donors that they have in the short term and build lists for this and future campaigns."[8]

The rationale behind the adoption of this donation system could easily be attributed to overtures of increased political participation for a wider swath of Americans. Research shows that young adults and minorities are more likely to text contributions than donate via the internet or via traditional fundraisers.[9] These systems also appeal to a technologically savvy younger generation and aim to initiate a culture of giving that is maintained through adulthood.[10] By tapping into the highly impulsive nature of text-message-based contributions, political campaigns have found a lucrative way to engage young Americans.[11]

Add Up for Obama, SACRAMENTO BEE, Sept. 30, 2012, at 1E, *available at* http://www.sacbee.com/2012/09/30/4864698/small-donors-dollars-add-up-for.html.

5 Both the Obama for America and Romney for President campaigns submitted comments under FEC Advisory Opinion No. 2012–17 (June 11, 2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-17%20Red%20Blue%20T,%20LLC,%20ArmourMedia,%20Inc.,%20and%20m-Qube,%20Inc.)%20Final%20(Signed)%20(6.11.12).pdf. Obama for America comment available at http://saos.nictusa.com/aodocs/1209994.pdf. Romney for President comment available at http://saos.nictusa.com/aodocs/1209992.pdf.

6 *FEC Will Allow Campaign Donations by Text*, MARKETPLACE (June 19, 2009), http://www.marketplace.org/topics/elections/campaign-trail/fec-will-allow-campaign-donations-text.

7 Janie Lorber, *Obama's Campaign Quick to Capitalize on Text-to-Donate Option*, ROLL CALL (Oct. 24, 2012), http://www.rollcall.com/news/Obama-Campaign-Quick-to-Capitalize-on-Text-to-Donate-Option-218432-1.html.

8 *Id.*

9 *Campaign Donations by Text Coming, But When?*, WIN BY CELL (2012), http://winbycell.com/?p=192.

10 Nicole Wallace, *The Demographics of Text-Message Giving,* CHRON. PHILANTHROPY (Mar. 4, 2010), http://philanthropy.com/blogs/prospecting/the-demographics-of-text-message-giving/21628.

11 A Pew Internet and American Life Project study found that donations can be highly impulsive. Half of the donors who supported disaster relief after the 2010 earthquake in Haiti donated immediately upon hearing about the campaign via text. Overall, nine percent of Americans have made charitable donations with their cellphones, contributing an estimated $43 million to disaster relief in Haiti alone. *See* T.W. Farnam, *Dial a donation*, WASH. POST (Aug. 15, 2012), http://www.washingtonpost.com/politics/the-influence-industry-fec-offers-guidance-for-cellphone-text-message-donations/2012/08/15/bca02562-e6ec-11e1-8f62-58260e3940a0_story.html.

A highly controversial component to these newly approved programs centers on the ability of wireless carriers to establish "eligibility criteria," through which carriers can subsequently exclude certain candidates from utilizing their systems. The eligibility criteria are independently selected requirements a candidate must meet in order to qualify for a carrier's text-message-based donation program. While the FEC has afforded each carrier the liberty to establish their own criteria, CTIA, the Wireless Association trade group representing all of the major carriers in the United States (AT&T, Verizon, Sprint, and T-Mobile), provides guidance on the selection of these criteria to all of its members. Despite this guidance, carriers still possess complete freedom to determine their own requirements so long as the criteria relates to "commercial viability." As will be discussed at length later, this vague term has been interpreted broadly and thus has been ineffective in inhibiting abuse in analogous contexts.[12]

Despite the potential for the use of these criteria to arbitrarily exclude candidates, I argue that the criteria are legally permissible and fully consistent with the Federal Election Campaign Act.[13] Traditionally, challenges to these criteria have been based on free speech, equal protection, or delegation of powers arguments; however, such arguments have proven ineffective because the FEC has passed responsibility for the creation of the criteria on the wireless carriers, thus removing the state action requirement.[14] To circumvent the courts' predisposition to afford deference to FEC decisions, modern challenges have tried more creative legal arguments, such as bringing a restraint of trade argument under the Sherman Act.[15] Given the prior FEC determinations, one should deduce that these eligibility criteria are legally permissible, despite a number of plausible arguments to the contrary.

First, Part I of this Note provides a historical context for how these donation schemes came into existence and the technical mechanics by which they function. The Note then analyses of the eligibility criteria in Part II, including discussing their parameters, and also addressing the arguments made for and against their permissibility. In arguing for the permissibility of eligibility criteria, I draw from relevant analogues where courts have upheld eligibility criteria and systematically address the deficiencies in the arguments challenging such criteria. Yet the text message donation systems are critically distinct from these analogues.

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12 *See infra* Part II.A.

13 Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), *codified at* 2 U.S.C. § 431 *et seq.*

14 The FEC's retained authority to review the criteria has not been held to constitute state action. *See e.g.*, Becker v. FEC, 230 F.3d 381 (1st Cir. 2000).

15 *See, e.g.*, Johnson v. Comm'n Presidential Debs., No. SACV12-01600 PSG (D. Cal. filed Sept. 21, 2012).

As these systems utilize wireless spectrum, a regulated commodity, a challenge could emerge from relevant telecommunications law. Part III argues that such a challenge would fail, by addressing the Federal Communication Commission's common carrier restrictions and delving into an analysis of their applicability to text messages. Here too, the relevant laws support the permissibility of independently-created eligibility criteria. Finally, in Part IV, I conclude my analysis with insights on the three distinct impacts I believe these donations systems will have on the current election landscape.

I. MECHANICS OF TEXT-BASED DONATION SYSTEMS

While text-message-based donations would seem a natural extension of modern fundraising techniques, the Federal Election Commission had not been asked to comment on such donations until the summer of 2012.[16] The Commission was spurred to action by a request from Red Blue T and ArmourMedia, Inc., media and political consulting firms advising political action committees interested in receiving individual contributions through a text-message-based system.[17] The Commission was asked to consider whether such systems could be implemented in accordance with the Federal Election Campaign Act (the Act), specifically with regard to record keeping, recording, and proper segregation of corporate and political funds.[18] The requesting parties proposed working with m-Qube, a "corporate aggregator of business-to-consumer messaging and merchant billing for public wireless service providers," that joined the firms on their request for FEC comment.[19] M-Qube would enter into agreements with the political action committees, process the contributions, and provide the committees with the ten-digit phone number from which the donation was received. However, m-Qube would not disclose contributor names or addresses.[20]

M-Qube identified two potential methods for donating through text message.[21] The first involved an individual texting a word or phrase to a specific "short code," a four or five digit code that is akin to a telephone number.[22] M-Qube would then respond via text, asking the individual to

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16 *See* FEC Advisory Opinion No. 2012–17 (June 11, 2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-17%20Red%20Blue%20T,%20LLC,%20ArmourMedia,%20Inc.,%20and%20m-Qube,%20Inc.)%20Final%20(Signed)%20(6.11.12).pdf.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* The issues concerning disclosure eventually lead to FEC Advisory Opinion No. 2012-26 (Aug. 14, 2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-26.pdf, which addressed each party's disclosure requirements and liabilities.

21 *See* FEC Advisory Opinion No. 2012–17.

22 Short codes are country specific, thus only those which are serviced by US-based wireless providers could opt-in.

confirm their intent to donate and their eligibility to do so under the Act. The second method involved an individual going to a political action committee website and using their mobile number instead of a credit card. M-Qube would process the request and send a personal identification number (PIN) to the specified mobile number, which the individual would need to enter online to complete the transaction. Once completed, the individual's wireless account would be charged.[23] To better comply with the Act, m-Qube would require any political action committee using the service to be registered and in "good-standing" with the Commission, and capped donations at $50 a month for any one political action committee.[24] As any individual who donates over $200 to one candidate, committee, or party is subject to additional FEC disclosure requirements, the aggregator, m-Qube in this scenario, is responsible for keeping a real-time tally of the $50 donations.[25]

After analyzing this proposal, the FEC determined in advisory opinion 2012–17 that m-Qube's system adhered to all existing restrictions, and that thus such text-message-based donations to political committees were permissible.[26] This opinion was limited in its purview and only approved of donations to political action committees.

Inspired by the initial foray into the political realm permitted by the Commission, it was only a matter of time before m-Qube attempted to expand its services into campaign contributions. Representative Jim Cooper's campaign was the first to test the waters, working in tandem with m-Qube.[27] His campaign requested an advisory opinion from the Commission on whether their proposed system, modeled after the one previously approved of in AO 2012–17, was permissible.[28] In Representative Cooper's proposal, disclosure requirements fell to the campaign, and any discounts secured by m-Qube with the wireless carriers did not constitute an in-kind contribution to the campaign.[29] The Commission responded in AO 2012–26 confirming the permissibility of Rep. Cooper's proposal.[30] Then, in response to concerns from the CTIA,[31] the FEC released AO 2012–28, which further clarified that wireless carriers were not liable for confirming whether donors were American citizens or that they were within the annual political contribution limits as set forth

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23 *See* FEC Advisory Opinion No. 2012–17.

24 *Id.*

25 *Id.*

26 *Id.*

27 *See* FEC Advisory Opinion No. 2012–26.

28 *Id.*

29 *Id.* The issue of in-kind contributions will not be addressed in this Note.

30 *See generally* FEC Advisory Opinion 2012–26.

31 Juliana Gruenwald, *FEC Addresses Industry Concerns Over Text Campaign Donations*, NAT'L JOURNAL (Aug. 15, 2012, 6:08 PM), http://www.nationaljournal.com/blogs/techdailydose/2012/08/fec-addresses-industry-concerns-over-text-campaign-donations-15.

by the FEC. Effectively, all disclosure and reporting requirements are the responsibility of the campaign accepting the funds.[32]

One may wonder what constitutes "objective business criteria," and at what point a decision crosses the line from a business decision to a political decision. Although CTIA tasked itself with drafting guidance documents, the organization's current effort provides essentially no clarification on how to adhere to the FEC guidelines. CTIA's *Guidelines for Federal Political Campaign Contributions via Wireless Carrier's Bill, Version 1.0* (Carrier Guidelines) is nothing more than a restatement of FEC opinions on text message campaigns.[33] The Carrier Guidelines expand the discretionary powers of individual wireless companies by providing that

> CTIA and its carrier member companies reserve the right to amend these recommendations at any time and may at their discretion waive any stated recommendation. Individual carriers also reserve the right to establish additional requirements of their own, including contribution thresholds lower than the maximums permitted by the Federal Election Commission.[34]

Yet with a nominal limit of $200 as the cap for text message donations, such exclusionary practices could be seen as an inconvenience, likely inconsequential in the larger scheme of financing political campaigns. However, FEC AO 2012–30 complicated this issue in two significant ways. First, the Commission approved a process for accepting donations in excess of the $50 and $200 limits requiring donors to provide additional information and verification.[35] Second, the Commission validated the sharing of short codes between different political committees,[36] simply requiring that each committee be tied to a specific texted key word.[37] The latter is significant, as short codes can be cost prohibitive to many smaller campaigns, thus opening text-message-based donations as a viable option for smaller operations.[38]

With individual donors able to donate up to the federal cap via text message and the desire of smaller campaigns to tap into text message donations, the prospect of wireless carriers being able to preclude spe-

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[32] *See* FEC Advisory Opinion No. 2012–28 (Aug. 14, 2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-28.pdf.

[33] *See Guidelines for Federal Political Campaign Contributions via Wireless Carrier's Bill, Version 1.0*, CTIA—THE WIRELESS ASS'N (Aug. 23, 2012), http://files.ctia.org/pdf/Political_Contribution_Recommendations_FINAL_v_1_0.pdf.

[34] *Id.* at 3.

[35] *See* FEC Advisory Opinion 2012–30 (Sept. 4, 2012), at 6.

[36] *Id.*

[37] *See id.*, at 8.

[38] *See id.* at 4.

cific campaigns raises concern. As discussed below, the potential impact is more complicated than injury to a third-party candidate. There is ample opportunity for a carrier to utilize its selectivity to the advantage of third-party candidates who demonstrate a likelihood of siphoning votes from the carrier's non-preferred candidate. This is currently permissible under the existing FEC guidelines.

This Part has presented an overview of the technical mechanics by which text-message-based campaign contributions occur. Part II delves into the "eligibility criteria" and the plethora of issues that emerge from their construction by entities outside the FEC. This Part will also address analogous cases where eligibility criteria have been deemed permissible in other FEC-regulated areas.

II. ELIGIBILITY CRITERIA

A. A Problem in Construction

As noted above, the FEC afforded the wireless industry broad discretion to determine who can utilize this new method of political donations by allowing wireless carriers to establish their own eligibility criteria. In doing so, the FEC recalled an advisory opinion from 2006, AO 2006–34, in which the FEC approved an affinity program that a corporate vender (Working Assets, Inc.) proposed to make available "subject to each particular program's commercial viability determined by *common commercial principles*."[39] Although neither the FEC nor Working Assets defined the scope of "common commercial principles," Working Assets provided a non-exhaustive list of potential factors that included: the "number of potential customers, potential for long-term customer commitment, strength of trademark, and credit rating of membership."[40] Importantly, the Working Assets proposal stated the program "would be made available to any political party committee, non-connected political committee, or QNC (qualified non-profit corporation) that asks to participate, *without regard to party affiliation or ideological orientation*."[41]

Yet this non-partisan language is notably absent from the advisory request and supplemental comments for AO 2012–28.[42] In the initial July 3, 2012, request for an advisory opinion, CTIA sought the FEC's approval of a program in which the wireless carriers could "exclude candidates for certain offices, exclude so-called fringe candidates, or poten-

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[39] FEC Advisory Opinion 2006–34 (Feb. 9, 2007), at 2.

[40] *Id.* at 2.

[41] *Id.* (emphasis added).

[42] *See* Request for Advisory Opinion from Jan W. Baran & Caleb P. Burns, on behalf of CTIA—The Wireless Ass'n, to FEC (July 3, 2012), *available at* http://saos.nictusa.com/aodocs/1214939.pdf. This request would lead to the issuance of FEC Advisory Op. 2012–28.

tially refuse to provide service to all political committees," in addition to the commercial viability constraints.[43] The document was subsequently amended on July 26, 2012, to clarify their initial request by framing the proposed eligibility criteria as comparable to non-political text donation programs.[44] CTIA wanted to place the focus on quantitative criteria, specifically stating that objective business criteria would result in accepting only those campaigns that can demonstrate "significant fundraising ability (e.g., candidates with approval ratings over a certain threshold or with a strong record of past fundraising)."[45] Despite the amendment, the criteria remained intentionally vague, opening the door to questioning.

To pose the obvious question—is it not difficult, without appropriate guidance, to determine when certain decisions are made for political rather than commercial reasons? A simple hypothetical illustrates this point: consider a presidential candidate stating that wireless companies are under-regulated and should be subject to greater restrictions from the FCC. This would increase wireless companies' operating costs in addition to prospective costs for litigation. On these grounds, the wireless carriers exclude the candidate from their donation programs on the grounds that it affects the carriers' profit margins. Was that a decision made on "ideological orientation" or rather a stated potential policy that will affect the "commercial viability" of the wireless carrier? When do ideas shift from political theory to policy with quantifiable impact? While such a scenario closely skirts the line between these two poles, it demonstrates that the basis for some decisions is not obvious, and the FEC's omission of defined standards could leave candidates straining to interpret whether their rejection from a carrier program was valid.

B. The Counterpoint

The potential for abuse of discretion did not go unnoticed. During the FEC's notice and comment process, prominent political lawyer Neil Reiff submitted a comment on behalf of his client, Revolution Messaging, noting CTIA's exclusionary processes and their exaggeration of the potential negative effect of allowing access to all candidates.[46] In a pointed criticism, Reiff stated, "[t]ext messaging fundraising is not a new phenomenon. The CTIA and carriers have already provided short codes and premium messaging to very controversial groups such as gangster

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[43] *Id.*

[44] Request for Advisory Opinion Supplemental Submission from Jan W. Baran & Caleb P. Burns, on behalf of CTIA—The Wireless Ass'n, to FEC 1 (Jul. 26, 2012), *available at* http://saos.nictusa.com/aodocs/1214939.pdf.

[45] *Id.* at 6.

[46] Memorandum from Neil P. Reiff, on behalf of Revolution Messaging, to FEC 1 (Aug. 13, 2012), *available at* http://saos.nictusa.com/aodocs/1223426.pdf.

rap ringtones, sex tip messaging, pornography, and horoscopes without hurting their brand images."[47] In referring to these various services, Reiff sought to dispel the argument that certain candidates and their positions could be negatively associated with the wireless company. Reiff continued,

> [c]learly the Commission should not completely abrogate its future responsibilities to determine whether arbitrary denial of access by CTIA or carrier[ ]s may not somehow violate the Act in some future context. There may be circumstances in which such arbitrary actions, such as the complete denial of services of one party or candidate, in preference of another, could implicate the Act.[48]

Despite these comments, the FEC did not impose any additional restrictions on the carriers and approved their proposed programs.[49]

C. Analogues

Although Reiff's comments commendably raise the prospect of arbitrary exclusions, they fail to discuss the FEC's determination that the Act allows for some level of exclusion based on pre-established criteria. Specifically, the Code of Federal Regulations states that "participation in candidate debates can be based on 'pre-established objective criteria.' "[50] The lawyers for CTIA knew this fact and relied on this language in the amended request for AO 2012–28.[51] In grounding its request in a long-standing, though oft-challenged section of the code CTIA sought to legitimize its proposed practice. While the FEC has successfully resisted every challenge to the debate participation criteria, the challenges have increased in both frequency and scope in recent years.

Although evident, it should be noted that presidential debates, compared to the current issue of campaign contribution systems, are entirely different in their function. However, both are highly regulated aspects of the political system that fall under the purview of the FEC; more specifically, they are both governed by the FEC's interpretations on the Federal Election Campaign Act. The coequal reliance on the broad interpretation of "pre-established objective criteria" is what binds these disparate practices and makes them analogous.

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47 *Id.* at 1.

48 *Id.* at 2.

49 *See* FEC Advisory Opinion No. 2012–28 (Aug. 14, 2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-28.pdf

50 11 C.F.R § 110.13(c) (2013).

51 *See* Request for Advisory Opinion Supplemental Submission from Jan W. Baran & Caleb P. Burns, on behalf of CTIA—The Wireless Ass'n, to FEC, *supra* note 42, at 6.

The U.S. presidential debates are moderated by the Commission on Presidential Debates (CPD), a 501(c)(3) organization that is sponsored through private contributions.[52] Although CDP sounds like a department of the federal government, it is actually a private entity created in 1987 by the Democratic and Republican parties to establish the protocols for conducting debates.[53] The organization is responsible for devising and publishing the criteria required for participation in the televised debates.[54] Both its history and financial status have garnered intense scrutiny from pro-democracy groups that believe the CPD is an inherently biased organization.[55] Although some claims are inevitably baseless, the perception of bias is not ill-founded.

Having secured 19% of the popular vote in the 1992 election and having been permitted to appear at the presidential debates that year, Ross Perot assumed the CPD would allow him to appear in the 1996 presidential debates.[56] However, the CPD, after reviewing its factors, informed the candidate that he had not met the criteria for that year's debates.[57] In September, Perot brought an administrative complaint against the CPD to the FEC, alleging "the CPD had used subjective criteria to select debate participants, contrary to the Commission's regulations that state that objective criteria must be used in the selection process."[58] Perot supported this claim by noting the subjectivity of some of the factors, such as polling results and opinions of journalists.[59] Of particular relevance, Perot alleged that the pre-selected eligibility criteria were formulated to prevent any third-party candidate from gaining access to the debate.[60] The circuit court affirmed the district court's summary judgment against Perot, and remanded to the district court to dismiss without prejudice one remaining count. This was, essentially, the death knell for Perot's challenge.

Yet it was not without merit, a fact eventually raised within the FEC. In 1997, Lawrence Noble, the General Counsel of the FEC, recommended a full inquiry into the CPD, believing it had violated numerous

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52 *See National Debate Sponsors*, COMMISSION ON PRESIDENTIAL DEBATES, http://www.debates.org/index.php?page=national-debate-sponsors (last visited Dec. 13, 2012).

53 JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 263, n.4 (2003).

54 *See, e.g.*, *2012 Candidate Selection Criteria*, COMMISSION ON PRESIDENTIAL DEBATES, http://www.debates.org/index.php?page=candidate-selection-process (last visited Dec. 21, 2012).

55 *See Critics of the CPD*, Open Debates, http://www.opendebates.org/news/crtics.html (last visited Dec. 13, 2012).

56 RASKIN, *supra* note 53, at 126.

57 *See id.*

58 *Court Case Abstracts*, Federal Election Commission, http://www.fec.gov/law/litigation_CCA_P.shtml (last visited Dec. 21, 2013).

59 *See* Perot v. FEC, 97 F.3d 553, 556–57 (D.C. Cir. 1996).

60 *See id.*

debate regulations, including the use of impermissible candidate selection criteria, and that the CPD had made prohibited contributions to the Clinton and Dole committees.[61] Without fanfare, a six-member adjudicatory commission unanimously voted to reject the General Counsel's recommendation.[62] With this vote, the eligibility criteria remained unaltered.

One of CPD's most challenged criteria is the "level of support" component, which requires any candidate who wants to debate to have "a level of support of at least 15% of the national electorate as determined by five selected national public opinion polling organizations, using the average of the organization's most recent publicly reported results at the time of determination."[63] Logical flaws in its construction plague these criteria. First, the percentage selected is a patently arbitrary distinction that represents no particular level of awareness of a candidate by the general public. Put another way, "[t]he 15-percent figure raises the bar absurdly high."[64] CDP could have looked to the FEC for guidance, such as selecting five percent, which is the percentage of the national popular vote a candidate must receive in order to qualify his party for public financing in the next election.[65] Yet they disregarded adopting relatively objective standards in favor of their own determinations.

In 2000, presidential candidate Ralph Nader petitioned the Massachusetts District Court to find that the FEC's regulations on debates, specifically 11 CFR 110.13 and 114.4(f), were unlawful.[66] In focusing on the fifteen percent level of support as part of the eligibility criteria, Nader argued the rule was arbitrary and existed solely to exclude third party candidates.[67] The district court held that such regulations were not in excess of the FEC's statutory authority under the Act.[68] Despite an appeal to the First Circuit[69] and a petition for writ of certiorari from the Supreme Court,[70] the district court's ruling was upheld.

While these cases would appear to settle the validity of the eligibility criteria, the exclusionary nature of the practice continues to inspire challenges. Suspecting the previously challenged grounds to be weak, recent cases have relied on vastly broader challenges to the selection cri-

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61 RASKIN, *supra* note 53, at 124–25.

62 *Id.* at 128.

63 *Id.* at 126.

64 *Id.*

65 *See id.*

66 *See* Becker v. FEC, 112 F. Supp. 2d 172, 173 (D. Mass. 2000).

67 *See* Becker v. FEC, 230 F.3d 381, 386 (1st Cir. 2000).

68 *Id.* at 394–97.

69 *See generally id.*

70 *See* Nader v. FEC, 532 U.S. 1007 (2001).

teria. In particular, the 2012 elections presented a number of unique arguments.

Gary Johnson, the Libertarian presidential candidate, took the approach of filing an anti-trust suit against the CPD, Republican National Committee, and Democratic National Committee, alleging violations of the Sherman Act.[71] Johnson makes a restraint of trade argument, calling the $400,000 salary of the president "commerce" and the collusion of the named defendants to restrict his ascension as "restriction of trade."[72] The restrictions he is referencing, in part, are the eligibility criteria. Johnson's challenge did not receive significant media coverage, which led to some parties decrying a continued corporate bias against third-party candidates.[73] As of September 2013, the suit remains active.[74] On September 4, 2013, the parties met with U.S. District Court Judge Fernando Olguin to determine whether the Johnson campaign is entitled to discovery, as they seek to uncover the ways in which the criteria were set and whether there were communications between the CPD and the major national parties.[75] Regardless of whether Johnson is entitled to discovery, the suit is likely to fail. The Supreme Court has explicitly stated the principle that "the antitrust laws regulate business, not politics."[76]

Green Party candidate Jill Stein announced her own lawsuit, not only against the CPD, RNC, and DNC, but additionally the FEC and Lynn University, where the debate was to be held.[77] Stein attempted the "kitchen-sink" approach, claiming exclusion from the debates denies her Due Process under the 14th Amendment, (both substantive and procedural) denial of Equal Protection under both the Florida and Federal Constitutions, and denial of Freedom of Speech.[78] While her panoply of claims are too extensive to parse here, again the claims focus on the exclusionary criteria. Stein says the "clearly arbitrary, capricious, vague, and sub-

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71 *See* Chris Sagers, *Gary Johnson, Antitrust Plaintiff, Sues Major Parties for Monopolizing Politics*, HUFFINGTON POST (Oct. 1, 2012, 2:53 PM), http://www.huffingtonpost.com/chris-sagers/gary-johnson-antitrust-pl_b_1917570.html.

72 Complaint, Johnson v. Comm'n on Presidential Debates, No. SACV12-01600 PSG (D. Cal. Sept. 21, 2012).

73 *See* Matthew Reece, *Lack of Coverage of CPD Lawsuit Reveals Establishment Media Bias*, EXAMINER (Sept. 28, 2012), http://www.examiner.com/article/lack-of-coverage-of-cpd-lawsuit-reveals-establishment-media-bias.

74 *See* Richard Winger, *Gary Johnson Campaign Waits a Ruling from U.S. District Court on Whether Discovery can Proceed in Lawsuit Against Commission on Presidential Debates*, BALLOT ACCESS NEWS (Sept. 17, 2013), http://www.ballot-access.org/2013/09/gary-johnson-campaign-waits-a-ruling-from-u-s-district-court-on-whether-discovery-can-proceed-in-lawsuit-against-commission-on-presidential-debates.

75 *Id.*

76 City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 383 (1991).

77 Jill Stein, *Stein Files Lawsuit Against the CPD*, JILLSTEIN.ORG, (Oct. 22, 2012), http://www.jillstein.org/lawsuit_cpd.

78 Stein v. FEC, (Cir. Ct. Fl. filed Oct. 22, 2012).

jective participation criteria regarding 'polling data' and 'support' and other such unreliable, subjective, manipulable and untrustworthy indicators. Such criteria should be considered and ruled void *ab initio*."[79] Both Johnson and Stein requested that the debates be made open to any person who is constitutionally eligible[80] and has demonstrated "ballot access," which requires that the candidate qualify to have his or her name appear on enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2012 general election.[81]

An additional suit of relevance, in which the challenger was successful, is the 2010 complaint brought against the FEC by Dan La Botz.[82] La Botz, a member of Ohio's Socialist Party, successfully challenged the FEC on the application of pre-established criteria in his pursuit to join the U.S. Senate. La Botz alleged he was not informed of the debate schedule and that the staging organization did not use pre-established and objective criteria.[83] The D.C. District Court found that claim to be accurate, holding that the debate coordination may not have had established criteria, as an internal document stated that they were to "follow[ ] the structure used by the Commission on Presidential Debates, which *allows for only the major-party candidates to debate*."[84] The court pointed out that, although the Commission regulations do not require staging organizations to commit their selection criteria to writing, the FEC strongly encourages the practice and recommends that the criteria be made available to all candidates before a debate."[85] The case has been remanded to the FEC for further proceedings.

It is clear through these cases that the courts are exhibiting great deference to the FEC and are allowing eligibility requirements, on both objective and arguable subjective grounds, to stand. One essential takeaway from the case law is that criteria resulting in an exclusionary effect are permissible; however, that cannot be the stated intent. If exclusionary intent is stated, then a successful challenge can be lodged. That said, it is unfathomable that the CPD would ever admit to such a purpose. As in other areas of jurisprudence, a factitious rationale as to why the criteria were selected is seemingly sufficient. Given this, a wireless carrier would be able to implement an arbitrarily selected threshold for

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79 *Id.*

80 The candidate must be thirty-five years of age, a natural-born U.S. citizen, a resident of the U.S. for fourteen years, and otherwise be eligible for the office of the President under the U.S. Constitution. *See 2012 Candidate Selection Criteria*, COMMISSION ON PRESIDENTIAL DEBATES, http://www.debates.org/index.php?page=candidate-selection-process (last visited Dec. 21, 2013).

81 *See id.*

82 Complaint, La Botz v. FEC, No. 11-cv-01247-BAH (D.D.C. July 8, 2011).

83 *See id.* at 2.

84 *See* La Botz v. FEC, 889 F. Supp. 2d 51, 62 (D.D.C. 2012).

85 *Id.* at 62.

number of prospective donors and rationalize it as within its discretion. As such, it is unlikely that courts would rule differently in order to allow a candidate access to a text-message-based donation system.

D. An Unlawful Delegation of Power?

While the previous cases rested on challenging the permissibility of the eligibility criteria themselves, a final challenge could question whether the FEC has impermissibly delegated its power to the wireless corporations. Such a challenge could be supported on two fronts: first, the FEC's decision to afford wireless companies vast discretion in determining the criteria could be tantamount to those companies establishing agency policy. Second, by only retaining the right to review the criteria, the FEC is impeding judicial review, as agencies are afforded great deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*.[86]

Under *Chevron*, the Supreme Court instituted a two-prong test to determine whether to defer to an agency's determination.[87] The first prong seeks to determine whether Congress has "directly spoken to the precise question at issue."[88] If so, the determination must strictly adhere to such an intent. If, however, there is any ambiguity, or Congress failed to address the question, the court must ask whether the agency's determination was a "reasonable" construction of the statute.[89] "Reasonability" is the essential determination—it need not be the best or most plausible interpretation of the statute.[90]

Such a separation of powers challenge is not novel; Ross Perot challenged the FEC's delegation of eligibility criteria to the CPD.[91] Yet the reviewing court rejected this argument, holding that there was no illegal delegation as all private parties are given some discretion under agency regulations.[92] Despite the holding of the D.C. Circuit Court, there are a number of concerns that suggest a reviewing body could find differently.

First, the FEC is an agency promulgating rules that govern national politics and elections, yet the agency's commissioners are selected equally from the two primary political parties, groups which are subject to FEC regulations.[93] As such, it is not outlandish to assert that the FEC

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86 467 U.S. 837 (1984).
87 *Id.* at 842.
88 *Id.*
89 *Id.* at 843–44.
90 *Id.* at 844 n.11.
91 Perot v. FEC, 97 F.3d 553 (D.C. Cir. 1996).
92 *Id.* at 560.
93 *Reforming the Federal Election Commission*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, http://www.citizensforethics.org/policy/entry/reforming-the-fec#fec2 (last visited Sept. 6, 2013).

is susceptible to self-interest in perpetuating the status quo, which currently demonstrates a bias in favor of non-third party entities. As was the case with the presidential debates, the commissioners have an interest in promulgating rules which allow the carriers to exclude third-party candidates, as it allows them to retain their centralized power. While there is yet an expansive body of evidence to demonstrate the lack of impartiality on the part of the commissioners, it continues to expand.

Second, the quantity of parties to which the discretion is afforded is worrisome. While there are a number of major carriers in the United States, the four major players (AT&T, Verizon, Sprint, and T-Mobile) are members of the CTIA. Given this unifying body, it is logically perceived that the FEC has abdicated its legislative power to a private entity. Put simply, the actions of the wireless companies seem closer to policymaking than permissible discretion afforded to regulated entities. As this implicates one of the essential components of the electoral process, financing a campaign, it is nothing less than curious that the FEC did not promulgate the criteria themselves.

More importantly, however, in permitting this scheme the FEC has essentially sidestepped judicial review. The wireless companies, via the advisory opinions, have been afforded the discretion to determine the eligibility criteria.[94] Any candidate seeking to challenge these criteria must raise their objection with the FEC, which has the authority to render a determination through a quasi-judicial function. This determination can subsequently be reviewed by an Article III court. While the latter review may appear an adequate safeguard, there is a major deficiency: the reviewing court must afford the agency's determination great deference in accordance with the holdings of *Chevron*.[95] This heightened standard is particularly difficult to overcome.

E. Financial Incentive to Avoid Arbitrary Distinctions

Despite having the capacity to do so, wireless companies are highly unlikely to choose to exclude a candidate from one of the two major political parties. Not only would the carrier's reputation be highly susceptible to criticism,[96] but they have a significant financial incentive, in the form of processing fees, to accept contributions from both sides.[97] Nevertheless, the CTIA guidelines clearly provide for terms that would allow for the exclusion of all other candidates, as the guidelines allow

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94 *See generally* FEC Advisory Opinion No. 2012-28.

95 *Chevron*, 467 U.S. at 844

96 *See, e.g.*, Kim Hart, *Verizon Ends Text-Message Ban*, WASH. POST, Sept. 28, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/27/AR2007092700823.html.

97 *See* FEC Advisory Opinion 2012–17, 1, 3 n.6 (discussing payments made to wireless carriers by companies that process text message donations).

carriers to set artificially high barriers to entry that only Democratic and Republican operatives could hope to surmount. As will be addressed later, this provides wireless companies an FEC-sanctioned tool to exclude non-preferred candidates.

While this financial incentive could potentially deter arbitrary exclusion, it has not deterred carriers in the analogous realm of non-political short-code-based messaging systems. These systems allow for organizations to rent short codes from the Common Short Code Administration (CSCA), though each carrier must provide that code for use.[98] The wireless companies profit from the fees generated by text messages from and to the short code over their network.[99] In fact, recent conflicts have brought to light the rather arbitrary and fluid ways in which wireless carriers make determinations for specific organizations.

One prominent incident involved Verizon Wireless and its decision to not provide the short code of a pro-choice group. In September 2007, Verizon chose not to provide a code for NARAL Pro-Choice America,[100] despite having allowed for similar campaigns from other organizations.[101] The wireless carrier "informed NARAL that it 'does not accept issue-oriented (abortion, war, etc.) programs' and that it would refuse service to 'any organization that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of [its] users.'"[102] Though a valid stance under current law, Verizon reversed its position after it suffered substantial negative publicity.[103]

Perhaps more intriguing is Verizon's refusal to release its internal policy on the criteria it employs to approve or deny groups.[104] While the company could have given any number of reasons to mask its true rationale for refusing, it is nearly impossible to imagine that the decision was made for commercial and not for political considerations. As NARAL never sought legal recourse,[105] there is no indication how a court would have evaluated the facts.

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98 *See Text Message & Short Code Services Discrimination*, PUBLIC KNOWLEDGE (last visited Dec. 13, 2012), http://www.publicknowledge.org/node/1372.

99 *See id.*

100 Adam Liptak, *Verizon Blocks Messages of Abortion Rights Groups*, N.Y. TIMES (Sept. 27, 2007), *available at* http://www.nytimes.com/2007/09/27/us/27verizon.html.

101 *See Text Message & Short Code Services Discrimination*, *supra* note 98.

102 *Id.*

103 Adam Liptak, *Verizon Reverses Itself on Abortion Messages*, N.Y. Times (Sept. 27, 2007), http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html.

104 *See id.*

105 *See id.* (noting that Verizon's decision to reverse its position was due to an internal reassessment).

F. A Legislative Response

While there is little indication the Judicial Branch is prepared to address the system's current deficiencies, Congress, in the context of presidential debates, has introduced a number of bills which sought to mandate that any candidate receiving federal funding is eligible to participate in the debates.[106] Yet, none of these bills passed or even received substantial support while the bills were being proposed.[107] Despite this past lack of enthusiasm, Congress could conceivably attempt to introduce legislation mandating that any candidate eligible for federal funds be "eligible" under criteria established by wireless carriers.

An outstanding issue remains, however, as Congress, as an entity comprised almost entirely of Democrats and Republicans, has little incentive to open the door to independent and third party candidates. As such, this bipartisan blockade is likely to impede, nay, prevent, a legislative solution.

This Part provides a context for the numerous arguments and challenges that have been made against eligibility criteria in various aspects of the FEC's purview. Specifically, this Part addresses the key arguments that have been made against the permissibility of the criteria, and why such arguments failed. In addition to highlighting potential grounds ripe for further challenges, this section ultimately serves to demonstrate the difficulty such challenges face, both in the judicial and legislative arenas. Yet as the text message donation scheme utilizes wireless spectrum, it extends into territory governed by the Federal Communications Commission. The following Part seeks to address the potential overlap and the challenges that could be raised under the relevant FCC provisions.

III. THE FCC'S ROLE

While the proposed text message donating methods are consistent with the Federal Election Campaign Act, as the donating methods utilize wireless spectrum to conduct transactions, it is plausible that eligibility criteria could violate tenets of the Federal Communications Act. Specifically, questions arise as to whether or not such restrictions are in violation of a wireless carrier's common carrier status.

Outside observers of the NARAL incident questioned why a wireless carrier was permitted to discriminate on the basis of content, given

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106 *See generally* Keith Darren Eisner, Comment, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. Pa. L. Rev. 973, 1015–20 (1993).

107 *See id.*

that they are subject to regulation by the FCC.[108] Telephone companies that provide voice services are treated as common carriers under Title II of the Communications Act, which requires such carriers to provide all members of the public with access to their services and forbids discrimination based on the content or speaker.[109] Why, then, was Verizon not in violation of Title II?

Professor Susan Crawford posits that such restrictions apply only when the carrier is engaged in providing specific services.[110] She argues that

> The Communications Act says that commercial cellular providers have to act in a nondiscriminatory fashion to the extent they are providing "commercial mobile services." But "commercial mobile telephone services" are defined as services that are interconnected with the traditional phone network—reachable via dialing a phone number. Arguably, the short codes that the carriers allow people to subscribe to . . . are not "phone number" services.[111]

In 2005, the United States Supreme Court validated a similar distinction in its decision in *FCC v. Brand X Internet Services*.[112] In *Brand X*, the Court affirmed the FCC's ruling that cable companies providing broadband Internet access were not "telecommunications services," despite providing access to communication technology, and thus, were not bound by the common carrier rules.[113] The FCC, instead, classified broadband providers as "information services."[114] In 2007, the FCC issued a declaratory ruling in which it reiterated its classification of wireless broadband Internet as an "information service" and not a "commercial mobile service" under section 322 of the Act.[115] The question remains as to what category a text message falls under for purposes of FCC regulation.

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108 *See, e.g.*, Susan Crawford, *The Big Picture: Why the Verizon/NARAL Flap Matters*, SCRAWFORD BLOG (Sept. 28, 2007), http://scrawford.net/the-big-picture-why-the-verizonnaral-flap-matters.

109 *See generally* 47 U.S.C. §§ 201–209 (2000) (outlining fully the regulations, schedules, and fees Title II imposes on common carriers).

110 *See* Marjorie Heins, *Can Cellphone Companies Censor Text Messages?*, THE FREE EXPRESSION POLICY PROJECT (Oct. 24, 2007), http://www.fepproject.org/commentaries/textmessaging.html.

111 *Id.*

112 545 U.S. 967 (2005).

113 *See id.* at 973.

114 *Id.* at 974 .

115 *See* FCC Rcd. 07-30 1, 1–2 (Mar. 22, 2007).

As of yet, the FCC has not indicated how it intends to treat text messages under common carrier restrictions. Since 2008, there has been a pending proceeding with the FCC specifically requesting guidance on whether text messages and short codes are subject Title II or 202 non-discrimination rules.[116] As of December 2012, the proceeding remains open, with over 500 fillings collected.[117] Given the length of the proceeding, it is evident that the FCC is not rushing to make a conclusive determination. Thus, as the laws currently stand, wireless-carrier-established eligibility criteria are permissible under both the Federal Election Campaign Act and the Federal Communications Act.

IV. THE IMPACT

The FEC's decision to permit text-message-based donation programs subject to carrier-applied eligibility criteria influences the election landscape in three distinct ways. First, permissible eligibility criteria serve to perpetuate America's oft-derided two-party system.[118] Through the use of artificially rigorous eligibility criteria, wireless carriers are afforded the ability to bar specific candidates from participating in their systems. As noted previously, candidates likely to meet these thresholds originate from the two dominant political parties, and thus have access to an established network of high-income donors. In contrast, third-party candidates lack the backing of well-financed major-party organizations and PACs and are subsequently more likely to finance their campaigns with personal funds and loans.[119] Thus, the candidates that could benefit most from such a system are disproportionately excluded.[120] The criteria, however, may not simply be used to preclude all third-party candidates. Instead, wireless carriers could tailor the criteria to selectively admit the candidates they believe will harm the company's non-favored candidate. In what I have termed the "Nader-effect," carriers could admit a third-party candidate who is known to appeal to similar constituencies as the carrier's non-preferred candidate. Through such a scheme,

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116 *See generally* Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Non-Discrimination Rules, WT Docket No. 08-7, DA 08-78 (WTB rel. Jan. 14, 2008).

117 THE FCC ELECTRONIC COMMENT FILING SYSTEM, http://apps.fcc.gov/ecfs/proceeding/view;jsessionid=yn8xPKdpDJWRpZj2QFBN6HQjXp1pGcvv6xxw8dBQTkpnpLtpT3Jr!1471562840!-321460796?name=08-7 (last visited Sept. 13, 2013).

118 *See generally* Lisa J. Disch, The Tyranny of the Two-Party System (2002) (discussing how different forms of electoral regulation and eligibility criteria perpetuate the two party system).

119 Paul Herrnson & Ron Faucheux, *Outside Looking In: Views of Third Party and Independent Candidates*, CAMPAIGNS & ELECTIONS, Aug. 1999, *available at* http://www.bsos.umd.edu/gvpt/herrnson/art3.html.

120 *See generally id.*

the carriers could facilitate the siphoning of funds from a mainstream candidate to a third-party candidate in an attempt to diminish the former's standing. While sources remain conflicted about whether Ralph Nader actually siphoned enough votes to cost Al Gore the 2000 election,[121] it seems an apt metaphor for this type of tactic.

Second, the current framework will undoubtedly increase the commercialization of elections. This does not only refer to the increase in expected political contributions and the additional expenditures they enable, but also encompasses the increased resources campaigns will utilize to inform potential donors of this method of giving. There is also a large financial incentive for wireless companies and corporate aggregators, like m-Qube, to reach out to prospective donors and advocate for this new donation method. A typical "outpayment"—the amount that the campaign receives after wireless service and aggregator fees—ranges between fifty to seventy percent of the consumer charges.[122] Phrased in the inverse, thirty to fifty percent of a donor's contribution never reaches their candidate's coffers. It is not irrational to believe that most consumers will not know that their whole donation does not reach the candidate. While some would argue this is no different than donating through a credit card, where there are processing fees, the sum charged by aggregators is significantly higher than their credit card counterparts: credit card companies skim only two or three percent.[123] By June 2012, before the election season was in full swing, the Obama and Romney campaigns had paid over 5 million dollars in credit card swipe fees; thus it is not unreasonable to believe aggregator fees would reach the tens, possibly hundreds, of thousands of dollars.[124]

Yet, should the campaigns have to divulge this information to the individual donor? An Obama campaign official stated that "Every avenue of fundraising that we have costs us money. . . . We pay the most competitive rates available in the marketplace to ensure our supporters have the greatest impact with their contribution."[125] While the "greatest impact" is in their favor, it does little to educate the donor of the quantity

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121 *See, e.g.*, Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil a Gore Presidency? A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election*, April 2006, *available at* http://www.sscnet.ucla.edu/polisci/faculty/lewis/pdf/greenreform9.pdf.

122 FEC Advisory Opinion No. 2012–17.

123 Andrew Zajac, *Campaign Giving by Text Seen as Fee Source: BGOV Barometer*, BLOOMBERG (June 5, 2012), http://www.bloomberg.com/news/2012-06-05/campaign-giving-by-text-seen-as-new-fee-source-bgov-barometer.html.

124 *Id.*

125 Alina Selyukh, *Obama Campaign to Start Accepting Text Message Donations*, NBC NEWS (Aug. 23, 2012), http://www.nbcnews.com/technology/technolog/obama-campaign-start-accepting-text-message-donations-960863.

of funds that are siphoned by private corporations. Should not the FEC offer guidance on this matter?

Consequently, if money is held to be political speech, a question for future debate remains: are these processing fees detracting from a donor's ability to exercise free expression? These questions remain unanswered, but are worth considering as this and similar donation methods continue to evolve.

Notably, these problems are not limited to the federal level. Maryland and California have already approved text campaign donations in state races, and other states will inevitably broach the topic. "It is going to be synonymous with campaign fundraising very soon," according to Jared DeMarinis, a representative for the Maryland State Board of Elections.[126] Further, such schemes will inevitably expand outside of the campaign realm and into those of PACs. A Houston-based PAC has asked the Texas Ethics Commission to approve a proposal that would allow them to solicit contributions via text message across the state.[127]

Lastly, the FEC's decision to open this method of donating to individuals, but not corporations, serves to perpetuate the increasingly arbitrary distinctions in how funds can be contributed to political races. On the pragmatic level, corporations lack opposable thumbs and are thus incapable of donating via text message. Furthermore, corporations are prohibited from donating to federal candidates.[128] On a fundamental level, however, the FEC continues to permit and prohibit funding schemes that treat corporations differently from natural persons without explaining their rationale. While such distinctions are not of paramount importance at this juncture, these decisions serve to highlight the FEC's proclivity for ignoring important issues, issues that will inevitably need to be addressed given the continual influx of money in politics.

CONCLUSION

Given the deference afforded to the FEC, it is highly unlikely that a challenge to the eligibility criteria could be successfully sustained. As the use of criteria in the election process has been upheld and the FCC, under current law, does not require wireless carriers to open their services to all organizations, the viable grounds for a legal challenge are highly limited. As a result, wireless carriers are free to engage in decisions that may not reflect the neutral tendencies some members of the

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126 Zajac, s*upra* note 123.

127 Dave Nyczepir, *PAC Wants State Approval for Text Donations*, CAMPAIGNS & ELECTIONS (Oct. 1 2012), *available at* http://www.campaignsandelections.com/campaign-insider/329152/pac-wants-state-approval-for-text-donations.thtml.

128 Prohibitions on contributions, expenditures and electioneering communications, 11 C.F.R. § 114.2 (2014).

public wish to see exhibited. Thus, barring any potential action from the FCC concerning the classification of text-messages, it can reasonably be assumed that text-message-based political donation systems will be an evolving fixture of the modern election landscape.