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## The Political Duopoly: Antitrust Applicability to Political Parties and the Commission on Presidential Debates

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— Note —

THE POLITICAL DUOPOLY:  
ANTITRUST APPLICABILITY TO  
POLITICAL PARTIES AND THE  
COMMISSION ON PRESIDENTIAL  
DEBATES

*“[S]ooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.”<sup>1</sup>*

*“The League of Women Voters is withdrawing its sponsorship of the presidential debate scheduled for mid-October because the demands of the two campaign organizations would perpetrate fraud on the American voter.”<sup>2</sup>*

ABSTRACT

The Commission on Presidential Debates (CPD) has created a catch-22 for third-party candidates. To be eligible for its debates, the CPD requires candidates to show a 15% level of national support. But third-party candidates cannot reach this threshold without first participating in the CPD’s debates. As a result, the 15% requirement deprives third-party candidates of a meaningful opportunity to compete against their major-party opponents.

In 2012, third-party candidate Gary Johnson sued the CPD under the theory that its selection criteria violate antitrust laws. This Note explores the viability of this novel legal theory. Although the Supreme Court has usually barred antitrust application within the political arena, Johnson’s claim is distinguishable and possibly meets the elements of a section 1 violation of the Sherman Act. Further, this Note discusses the public-policy benefits of third-party inclusion and considers less restrictive, alternative criteria that would still satisfy the proffered justifications of the 15% requirement.

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1. George Washington, The Address of General Washington to the People of the United States on his Declining of the Presidency of the United States (Sept. 19, 1796).
  2. Press Release, League of Women Voters, League Refuses to “Help Perpetrate a Fraud” (Oct. 3, 1988), [hereinafter League], *available at* <http://www.lwv.org/press-releases/league-refuses-help-perpetrate-fraud>.

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INTRODUCTION

Just two days before the 2012 election, the U.S. presidential candidates decided to hold another debate. Unlike the previous debates, the candidates sparred at length over the contentious issues of reforming immigration, fixing campaign finance, and combatting climate change. But also unlike the previous debates, millions of voters were not watching. It took place in the back of a coffeehouse.<sup>3</sup>

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3. Annie Lowrey, *Another Presidential Debate, But This Time the Candidates Are Much Less Familiar*, N.Y. TIMES, Nov. 5, 2012, at A12.

Gary Johnson, Jill Stein, Virgil Goode, and Rocky Anderson—all third-party candidates—held this last minute debate to highlight some issues of widespread interest that were largely avoided in the major-party debates.<sup>4</sup> Historically, a key value of third-party candidates has been to popularize issues of voter concern that would otherwise be ignored by the major parties.<sup>5</sup> However, these third-party candidates do not run solely for such altruistic purposes. They want to win. And in today’s political landscape, participation in the debates sponsored by the Commission on Presidential Debates (CPD) would be essential to a third-party victory.<sup>6</sup>

But third-party candidates are essentially excluded from this opportunity. The CPD restricts its invitations to candidates who are (1) constitutionally eligible, (2) on enough state ballots to possess a theoretical chance of winning the Electoral College, and (3) able to show at least a 15% level of support in national public opinion polls.<sup>7</sup> This last requirement has created a catch-22 for third-party candidates. In order to access the debates, the candidate must first gain popularity; but in order to gain popularity, the candidate must first establish viability by participating in the debates.<sup>8</sup>

Realizing this dilemma, third-party candidates seek relief through the courts every election season. The plaintiffs have sued the CPD and previous staging organizations for inclusion in the debates under an array of legal theories. Despite this persistence, no third party has successfully sued for inclusion; more often than not, courts have been bound by deference to agency interpretations.<sup>9</sup> Possibly in an attempt to avoid this, Libertarian candidate Gary Johnson sued the CPD under a new theory, novel in its application in this field: antitrust law.<sup>10</sup>

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4. Press Release, Ralph Nader to Host Third-Party Presidential Debate in D.C. Nov. 4 (Nov. 1, 2012), *available at* <http://nader.org/2012/11/01/ralph-nader-to-host-third-party-presidential-debate-in-d-c-114/>.
  5. STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA* 221 (2d ed. 1996).
  6. See THERESA AMATO, *GRAND ILLUSION* 224–25 (2009) (noting that the debates are essential to candidate viability and that the publicity benefits from participation are irreplaceable).
  7. See *2012 Candidate Selection Criteria*, COMMISSION ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=candidate-selection-process> [hereinafter *2012 Criteria*].
  8. Ted G. Jelen, *The Perot Campaigns in Theoretical Perspective*, in ROSS FOR BOSS 1, 4 (Ted G. Jelen ed., 2001).
  9. See, e.g., *Buchanan v. FEC*, 112 F. Supp. 2d 58, 74 (D.D.C. 2000) (noting the “substantial deference” the court had to give an FEC interpretation of its own regulation).
  10. Complaint, *Johnson v. Comm’n on Presidential Debates*, 8:2012cv01600 (filed Sept. 21, 2012).

This Note explores whether antitrust law can or should be applied to the CPD and its 15% polling requirement for participation. Part I provides a background on the initial legal hurdles involved in allowing political debates to even be broadcast. Part I also discusses the history and origins of the staging organizations, the selection criteria used by staging organizations, and the claims brought by third-party candidates challenging the selection criteria.

Part II identifies two obstacles third-party candidates would face suing under antitrust law and advances a possible distinction between a third-party candidate's suit and the "political activity" exemption. While recognizing counter arguments, Part III attempts to demonstrate that the CPD's exclusion of third-party candidates could possibly violate section 1 of the Sherman Act.<sup>11</sup> It discusses the challenges presented with applying the Act—notably that the novel theory, without direct precedent, stands on imperfect analogies. Part III also attempts to distinguish *Sheppard v. Lee*,<sup>12</sup> which addressed a similar issue. Lastly, this Part suggests a number of alternatives to the 15% requirement. These alternate standards represent possible compromises that would make access to this essential resource reasonable and feasible while adhering to the proffered justifications for exclusionary rules.

Part IV argues that if a court finds it could apply antitrust within its discretion, the court should apply this law. It explains how public policy would benefit from third-party inclusion and how this would align with the broader purposes of antitrust law. While the debates are a part of the political process, they are also the manifestation of a competitive enterprise. And the Sherman Act's goal of maintaining a level playing field in competitive arenas compels a more lenient policy of access to the debates.

## I. BACKGROUND OF TELEVISED DEBATES

### A. *Development and Issues of Broadcast Debates*

Political debates have long been subject to controversy and criticism. The initial legal issues involved the ability to broadcast a debate.<sup>13</sup> When the Communications Act of 1934<sup>14</sup> was enacted,

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11. Sherman Act § 1, 15 U.S.C. § 1 (2012).

12. 929 F.2d 496 (9th Cir. 1991).

13. NEWTON N. MINOW & CRAIG L. LAMAY, *INSIDE THE PRESIDENTIAL DEBATES: THEIR IMPROBABLE PAST AND PROMISING FUTURE* 29 (2008). It should be noted that Newton N. Minow is a former chairman of the Federal Communications Commission, and is currently Vice Chairman of the Commission on Presidential Debates. *Id.* at ix–x.

14. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C. (2006)).

section 315 regulated public office candidates' use of a broadcasting station.<sup>15</sup> This section came to be known as the "equal opportunity" or "equal time" rule.<sup>16</sup> This rule stated that any broadcaster giving or selling airtime to one candidate in any political race must provide the same opportunity to all other "legally qualified candidate[s]" running for the same office.<sup>17</sup>

The equal time rule mirrored section 18 of its predecessor, the 1927 Radio Act.<sup>18</sup> In passing the Radio Act, legislators hoped providing political candidates with equal access to broadcast time would prevent manipulation of the airwaves. This fear of propaganda worried Congress because "American thought and American politics will be largely at the mercy of those who operate these stations."<sup>19</sup> Yet approval of an equal opportunity rule was not universal; the possible consequences of such a requirement created some apprehension on the congressional debate floor. One U.S. senator feared such a regulatory scheme would lead to a situation where anyone "desir[ing] to deliver a lecture on bolshevism or communism . . . would be entitled to do so."<sup>20</sup> However, none of these concerns came to fruition with the Communications Act until the advent of television.<sup>21</sup>

Candidates viewed this new medium as an essential feature to a successful campaign strategy, which led to a growing concern about the distribution of its access. The first major amendment to the Communications Act occurred in 1959, following the events of a Chicago mayoral election. During that race, an independent candidate challenged that any television news segments featuring the incumbent mayor entitled him to equal airtime under section 315.<sup>22</sup> The Federal

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15. § 315, 48 Stat. at 1088 (codified in part as amended at 47 U.S.C. § 315 (2006)).
  16. MINOW & LAMAY, *supra* note 13, at 30.
  17. 47 U.S.C. § 315.
  18. Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934); *see also In re Columbia Broad. Sys., Inc. and Nat'l Broad. Co.*, 26 F.C.C. 715, 730 (1959) (noting that section 18 of the Radio Act of 1927 was carried forward later as section 315 of the Communications Act).
  19. 67 CONG. REC. 5,558 (1926) (statement of Sen. Luther Johnson).
  20. 67 CONG. REC. 12,502 (1926) (statement of Sen. Earl B. Mayfield).
  21. MINOW & LAMAY, *supra* note 13, at 32 ("Section 315 caused no serious problems until the advent of television, and then it quickly became clear that access to this new medium was essential for any politician seeking to gain or maintain public office.").
  22. *See In re Columbia Broad. Sys., Inc.*, 26 F.C.C. at 716-17. ("Lar Daly [independent mayoral candidate] filed a complaint with the Commission alleging that certain Chicago television stations had, in the course of their newscasts, shown film clips of his primary opponents in connection

Communications Commission (FCC)—the regulatory authority responsible for enforcing the Communications Act—agreed.<sup>23</sup> In its decision, the FCC noted that in 1956, Congress considered a “CBS-sponsored amendment to exempt news and other broadcasts from section 315” but failed to pass such an amendment.<sup>24</sup> As a result, Congress responded almost immediately by amending the Act to allow “legally qualified candidate[s]” to appear in a “(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary,” or “(4) on-the-spot coverage of bona fide news events,” without triggering the equal time rule.<sup>25</sup>

Following this amendment by Congress, the next major issue became whether debates were to be considered bona fide news events. If not, televised debates would be subject to the equal time rule, and the opportunity to participate would need to be available to all legally qualified candidates. Before this issue would be decided, Congress passed a resolution to suspend section 315 of the Communications Act for the 1960 presidential race.<sup>26</sup> This opened the door for the 1960 debates between Richard Nixon and John Kennedy, which enabled nearly 70 million Americans to view presidential candidates square off in a televised debate for the first time in history.<sup>27</sup>

Despite the excitement that followed these “Great Debates,”<sup>28</sup> just two years later in *In re Inquiry Concerning Section 315 of the Communications Act of 1934 As Amended (Goodwill Station, Inc.)*,<sup>29</sup> the FCC declined to interpret “bona fide news events” as including debates.<sup>30</sup> In *Goodwill Station*, during a 1962 Michigan gubernatorial

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with certain events and occasions; that he had requested equal time of said stations; and that his requests had been refused.”).

23. *Id.* at 743 (“We are further of the opinion that when a station uses film clips showing a candidate during the course of a newscast, that appearance of a candidate can reasonably be said to be a use, within the meaning and intent of section 315.”).
24. *Id.* at 734 (emphasis omitted).
25. Pub. L. No. 86-274, 73 Stat. 557 (1959) (codified at 47 U.S.C. § 315(a) (2006)).
26. Joint Resolution of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554 (“[S]ection 315(a) of the Communications Act of 1934 . . . is suspended for the period of the 1960 presidential and vice presidential campaigns . . .”).
27. See MINOW & LAMAY, *supra* note 13, at 27–28.
28. See *id.* at 41 (noting that the Kennedy-Nixon debates “appeared to usher in a new age of political communication”).
29. 40 F.C.C. 362 (1962).
30. *Id.* at 363 (1962) (ruling that debates are not exempted from section 315 in part because before the enactment of the 1959 amendments to the

race, a Socialist Labor Party candidate complained to the FCC that he was entitled to equal time after a radio station broadcasted a dinner debate between the Democratic and Republican candidates.<sup>31</sup> The FCC ruled in favor of the Socialist Labor Party candidate, even though it found that his party only gathered 0.04% of the vote in the previous election<sup>32</sup> and that the station merely played a passive role in covering the debate.<sup>33</sup> Although an FCC Chairman at the time of *Goodwill Station* later lamented the agency's decision in that case,<sup>34</sup> the FCC did not revisit the issue again for over a decade.

In 1975, the FCC finally overruled *Goodwill Station* when it responded to a petition urging the agency to issue an interpretation of section 315 that would include debates within the meaning of the "bona fide news events" exemption.<sup>35</sup> The FCC agreed with the petitioners' argument that *Goodwill Station* was "based on . . . an incorrect reading of the legislative history" and that Congress never intended the "unduly restrictive approach" of discouraging news coverage of political debates.<sup>36</sup> However, in order for a debate to qualify as a "bona fide news event" that is outside the reach of the equal time rule of section 315, the debate must also (1) be broadcast live in its entirety<sup>37</sup> and (2) be sponsored by an independent

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Act, "Congress had considered bills which would have exempted debate" but did not provide for such an exemption in the law that was passed).

31. *Id.* at 362–63.
32. *See id.* at 363 ("[T]he Socialist Labor Party received 1,479 votes in a state-wide total vote of 3,255,991.").
33. *See id.* at 362–63 (noting that the radio station "play[ed] no part in the selection or production of the program[ ]"; "exercise[d] no control whatsoever" over its content; and contended it merely covered the debate for its "exceptional newsworthiness").
34. *See* MINOW & LAMAY, *supra* note 13, at 41 ("In retrospect, there is no decision I made in public life that I regret more. I regret it because I now believe it to have been an incorrect legal interpretation of Section 315. I also regret it because it led to bad policy effects in 1964, 1968, and 1972.").
35. *In re* Aspen Inst. Program on Commc'n and Soc'y and CBS, Inc., 55 F.C.C.2d 697, 697, 703 (1975).
36. *Id.* at 703, 705 ("Rather, Congress intended that the [FCC] would determine whether the broadcaster had in such cases made reasonable *news judgments* as to the newsworthiness of certain events . . .").
37. *See id.* at 703.

organization.<sup>38</sup> Challenges were brought against this decision, but courts deferred to the FCC's new interpretation.<sup>39</sup>

*B. Sponsorship of the Presidential Debates*

1. The League of Women Voters and the Origin of the Commission on Presidential Debates (CPD)

Following the FCC's decision allowing debates to be categorized as news events that were exempt from the equal time rule, televised debates were now feasible. The League of Women Voters became the initial organizers of presidential debates, satisfying the sponsorship requirement under the new interpretation.<sup>40</sup> The League sponsored the debates in the 1976, 1980, and 1984 elections. In the 1980 election, the League invited third-party candidate John Anderson to participate in the debate thanks to his twenty percent show of support in the polls.<sup>41</sup> But following Anderson's invitation, President Jimmy Carter refused to participate, leaving only Anderson and Ronald Reagan to participate.<sup>42</sup> Carter's refusal was considered a "disappointing failure" for the League because it "fail[ed] to give voters an opportunity to see and hear all of the serious presidential contenders at the same time."<sup>43</sup> This disappointing result, coupled with increasingly hostile negotiations during the 1984 election, led the two major parties to believe they would need to become responsible for the debate in order to make each other and their own candidates more accountable.<sup>44</sup>

In November 1985, the chairmen of the Democratic and Republican National Committees coauthored a memorandum that concluded the two parties "should . . . principally and jointly sponsor[ ] and conduct[ ]" future joint appearances of their candidates, in order to "better fulfill [their] parties' responsibilities for educating and informing the American public and to strengthen the role of

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38. See *id.* at 714–15; see also MINOW & LAMAY, *supra* note 13, at 46 ("[T]he *Aspen* decision . . . came with a significant hitch: it did not allow stations themselves to organize candidate debates.").

39. See, e.g., *Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976) ("[W]e are obligated to defer to the [FCC's] interpretation, even if it is not the only interpretation possible.").

40. See MINOW & LAMAY, *supra* note 13, at 46 ("The *Aspen* proposal was made with a willing sponsor in mind: the League of Women Voters of the United States.").

41. Anthony Corrado, *Background Paper to LET AMERICA DECIDE: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES* 39, 61–62 (1975).

42. *Id.* at 62.

43. MINOW & LAMAY, *supra* note 13, at 57.

44. *Id.* at 57–62.

political parties in the electoral process.”<sup>45</sup> Just fifteen months later, the committee chairmen of the two major parties announced the creation of the Commission on Presidential Debates.<sup>46</sup> The parties’ press release described the CPD as “a bipartisan, non-profit, tax exempt organization formed to implement joint sponsorship of general election presidential and vice presidential debates, starting in 1988.”<sup>47</sup>

While the CPD’s press release assumed it would take sole responsibility for future presidential and vice presidential debates,<sup>48</sup> the League did not immediately surrender its role. After negotiations regarding the 1988 presidential debates, the two organizations compromised that the CPD would sponsor the first debate and the League would sponsor the second.<sup>49</sup> However, in preparing for the second debate, the League received a “memorandum of understanding” from the campaigns for Vice President Bush and Governor Dukakis; the memorandum essentially contained a list of demands needed for the candidates’ participation.<sup>50</sup>

As a result, the League withdrew its sponsorship because it felt “the demands of the two campaign organizations would perpetrate a fraud on the American voter.”<sup>51</sup> The most objectionable factor cited was the “unprecedented control” sought by the two major parties, which included demands for “the selection of questioners, the

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45. Memorandum of Agreement on Presidential Candidate Joint Appearances from Frank J. Fahrenkopf, Jr., Chairman of the Republican National Committee, and Paul G. Kirk, Jr., Chairman of the Democratic National Committee (Nov. 26, 1985) [hereinafter Memorandum of Agreement], *available at* <http://www.opendebates.org/theissue/memo.jpg>.
  46. Press Release, Democratic and Republican National Committees, RNC and DNC Establish Commission on Presidential Debates (Feb. 18, 1987), [hereinafter CPD Press Release], *available at* <http://www.opendebates.org/theissue/CPDrelease.pdf>.
  47. *Id.*
  48. *See id.* (“We applaud the League for laying a foundation from which we can assume our own responsibilities . . . [and] we would expect and encourage the League’s participation in sponsoring other debates, particularly in the presidential primary process.”).
  49. *Revealing History*, OPENDEBATES.ORG, <http://www.opendebates.org/theissue/strengthenmajorparties.html>.
  50. *See* Memorandum of Understanding from Vice President Bush and Governor Dukakis’ representatives (1988), *available at* <http://web.archive.org/web/20121019085633/http://www.museum.tv/debateweb/html/history/1988/88essay/memorandum.htm> (providing very detailed rules governing the dates, location, times, format, moderator selection, panelist selection, staging, ticket distribution, seating arrangements, dressing rooms, and holding rooms, among other miscellaneous rules).
  51. League, *supra* note 2.

composition of the audience, hall access for the press and other issues.”<sup>52</sup> League President Nancy M. Neuman further stated:

It has become clear to us that the candidates’ organizations aim to add debates to their list of campaign-trail charades devoid of substance, spontaneity and honest answers to tough questions . . . . The League has no intention of becoming an accessory to the hoodwinking of the American public.<sup>53</sup>

The League’s withdrawal left the CPD as the lone staging organization that the two major parties would agree to use. It has sponsored each presidential debate since 1988.<sup>54</sup>

## 2. CPD Eligibility Requirements for Participants

The CPD is legally obligated to use objective, nonpartisan criteria in choosing the debate participants.<sup>55</sup> For the first three elections it sponsored the presidential debates, the CPD did not use any quantitative measures. In 1988, the CPD considered three criteria in selecting its debate participants: (1) evidence of national organization, (2) signs of national newsworthiness, and (3) indications of public concern. No third-party candidates were invited.<sup>56</sup> By 1992, the CPD developed the “realistic chance” standard.<sup>57</sup> Even though third-party candidate Ross Perot’s public support was as low as nine percent in the polls, an advisory committee concluded the possibility of his election was not unrealistic, so the CPD invited him to the debates.<sup>58</sup>

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52. *Id.*

53. *See* League, *supra* note 2.

54. *Our Mission*, DEBATES.ORG, <http://www.debates.org/index.php?page=about-cpd>.

55. *See* 11 C.F.R. § 110.13(c) (2012) (“For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organizations(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.”).

56. MINOW & LAMAY, *supra* note 13, at 91.

57. *Id.*; *see also* Letter from Richard E. Neustadt to Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., Commission on Presidential Debates (Sept. 17, 1996) [hereinafter Neustadt Letter], *available at* <http://cgi.cnn.com/ALLPOLITICS/1996/news/9609/18/election.commission/letter.shtm> (describing the realistic chance standard as a “chance [that] need not be overwhelming but must be more than theoretical”).

58. MINOW & LAMAY, *supra* note 13, at 91–92; *but see* AMATO, *supra* note 6, at 226 (stating that Perot’s inclusion in the 1992 debates was a demand of the George H.W. Bush campaign after “calculating, erroneously, that Perot appealed to Bill Clinton voters more than Bush voters”).

Despite finishing the 1992 election with 18.7% of the popular vote,<sup>59</sup> the CPD declined to invite Perot to the 1996 debates after the advisory committee determined he did not meet the realistic chance standard.<sup>60</sup> A number of media outlets fiercely criticized the decision to exclude Perot.<sup>61</sup> In response, the CPD decided to make its eligibility requirements more quantitative and unambiguous by the 2000 election.<sup>62</sup>

This concern for objectivity led to the development of the eligibility rules that remain in place today. The CPD has established three requirements for a candidate to be eligible for participation in the debates. Each candidate must (1) be constitutionally eligible,<sup>63</sup> (2) appear on the ballots in states whose cumulative total of Electoral College votes is 270 or more,<sup>64</sup> and (3) indicate a level of support of at least 15% in an average of five national polls.<sup>65</sup>

### 3. Challengers to the CPD

The CPD and other staging organizations are no strangers to litigation. Third-party candidates have a long history of suing—under a range of legal theories—for inclusion in the televised debates during election season.<sup>66</sup> Rather frequent subjects of litigation include the

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59. MINOW & LAMAY, *supra* note 13, at 92.

60. See Neustadt Letter, *supra* note 57 (“We have concluded that, at this stage of the campaign, Mr. Perot has no real chance either of popular election in November or of subsequent election by the House of Representatives, in the event no candidate obtains an Electoral College majority.”); see also AMATO, *supra* note 6, at 226 (stating that Perot’s exclusion was influenced by the Dole campaign’s adamant insistence that Perot not be invited).

61. See, e.g., *Fixing the Presidential Debates*, N.Y. TIMES, Sept. 18, 1996, at A20 (“[B]y deciding yesterday to exclude Ross Perot from this year’s debates, the commission proved itself to be a tool of the two dominant parties rather than a guardian of the public interest.”); Editorial, *Include Perot in Debates; Abolish Dysfunctional Debate Commission*, SUN-SENTINEL, Sept. 20, 1996, at A22 (calling the CPD’s decision “an outrageous, unfair, discriminatory violation of Perot’s rights and an intolerable effort to muzzle his minority views”).

62. MINOW & LAMAY, *supra* note 13, at 93.

63. U.S. Const. art. II, § 1 (requiring a candidate to be a natural born citizen, of at least thirty-five years of age, and a U.S. resident for at least fourteen years, to be “eligible to the Office of President”).

64. This represents the “theoretical” chance of winning the election. See *2012 Criteria*, *supra* note 7 (providing that a candidate must “have at least a mathematical chance of securing an Electoral College majority in the 2012 general election”).

65. *Id.*

66. See generally Eric B. Hull, Note, *Independent Candidates’ Battle Against the Exclusionary Practices of the Commission on Presidential*

CPD's partisanship and the 15% polling requirement. For example, in 2000, Patrick J. Buchanan—the presidential candidate for the Reform Party—filed a complaint with the Federal Election Commission (FEC) alleging that because the CPD violated FEC regulations with regard to its political affiliations<sup>67</sup> and selection criteria,<sup>68</sup> it could not qualify as a debate-staging organization.<sup>69</sup> After the FEC dismissed his administrative complaint, Buchanan challenged its decision in federal court.<sup>70</sup>

While the district court ultimately upheld the FEC's dismissal of Buchanan's complaint,<sup>71</sup> it appeared reluctant to do so. In refusing to overturn the FEC's determination that the CPD is nonpartisan,<sup>72</sup> the court noted the "extremely deferential standard of review" it had to apply and that "the FEC is entitled to the benefit of the doubt even if the unfortunate by-product of the FEC's decision is increased public cynicism about the integrity of our electoral system."<sup>73</sup> The court hinted at some skepticism with the 15% threshold,<sup>74</sup> but it nevertheless declined to override the FEC's finding that this requirement was both "reasonable" and "objective."<sup>75</sup> The court again

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*Debates*, 90 IOWA L. REV. 313 (2004) (reviewing the history of litigation against the CPD and other staging organizations, which includes challenges regarding the First Amendment, organizations' tax-exempt status, organizations' partisanship, acceptance of corporate sponsorships, and selection criteria).

67. See 11 C.F.R. § 110.13(a) (2012) (providing that only organizations that "do not endorse, support, or oppose political candidates or political parties may stage candidate debates").
68. See § 110.13(c) (requiring "pre-established objective criteria to determine which candidates may participate in a debate").
69. See *Buchanan v. FEC*, 112 F. Supp. 2d 58, 61–62 (D.D.C. 2000) (describing Buchanan's administrative complaint).
70. *Id.* at 62.
71. *Id.* at 76.
72. See *id.* at 72 ("[T]he FEC found evidence of possible past influence simply insufficient to justify disbelieving the CPD's sworn statement, corroborated by the [Democratic and Republican National Committees], that the CPD's 2000 debate criteria were [not] influenced by the two major parties.").
73. *Id.* at 73.
74. See *id.* at 74 ("A reasonable person could find it ironic that a candidate need win only 5% of the popular vote to be eligible for federal funding, but must meet a 15% threshold to be eligible for the debates. However, the relevant test is not based on irony, but on objectivity.").
75. *Id.* With regard to the "reasonableness" element, the court stated, "[t]he history of 11 C.F.R. § 110.13 makes clear that, although the word 'reasonable' does not appear in the regulation's text, 'reasonableness is implied.'" *Id.* (quoting 60 Fed. Reg. 64,262 (Dec. 14, 1995)).

noted the “substantial deference [it] must accord to the FEC’s interpretation of its own regulations.”<sup>76</sup> In light of this deference, the court did not find the FEC interpretations to be arbitrary or capricious—even though the court acknowledged that “it might be good public policy to allow more third party candidates into the presidential debates.”<sup>77</sup>

Other third-party suits against the CPD have ended in a fashion similar to Buchanan’s. At this point, no third-party suit for inclusion in the televised presidential debates has been successful.<sup>78</sup> But there is some evidence—like the dicta in *Buchanan*—that courts are not entirely settled on the idea of having only two parties involved in presidential debates. Therefore, despite the lack of success, courts may be listening with open ears as third-party candidates continue to use the courts to pursue a debate podium.

#### 4. Challenging the CPD Under a New Theory: Antitrust Violations

Gary Johnson, the 2012 presidential candidate for the Libertarian party, recently continued this pursuit by seeking inclusion under antitrust law principles—a legal theory novel in its application to the CPD or any staging organization. On September 21, 2012, Johnson filed an antitrust suit alleging that (1) the CPD was formed and run by both the Republican and Democratic National Committees and (2) the 15% polling requirement is a conspiracy to restrain commerce by unfairly limiting the opportunities of other competitors to obtain the salaried position of the United States Presidency.<sup>79</sup> Since this complaint does not involve an agency’s interpretation of a statute, it would not face the substantial challenge of overcoming the “extremely deferential standard of review” a court must use in such interpretations.<sup>80</sup>

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76. *Buchanan*, 112 F. Supp. 2d at 74.

77. *Id.* at 76.

78. Hull, *supra* note 66, at 323; *see, e.g.*, *Becker v. FEC*, 230 F.3d 381 (1st Cir. 2000) (arguing that FEC regulations allowing corporate funding violated FECA); *Natural Law Party of the United States v. FEC*, 111 F. Supp. 2d 33 (D.D.C. 2000) (challenging the CPD’s selection criteria from 1996); *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996) (challenging the partisanship of the CPD, but the court declined jurisdiction because the plaintiff failed to exhaust administrative remedies first); *Fulani v. Brady*, 935 F.2d 1324 (D.C. Cir. 1991) (seeking to invalidate the CPD’s tax-exempt status).

79. Complaint, *Johnson v. Comm’n on Presidential Debates*, 8:2012cv01600 (filed Sept. 21, 2012). As of April 2013, nothing has been decided in this case. However, Johnson did seek to enjoin the 2012 debates unless he was entitled to participate, and this was not successful. Each debate went on as scheduled, featuring only the candidates of the two major parties.

80. *Buchanan*, 112 F. Supp. 2d at 74.

While Johnson is certainly not the first to accuse the CPD of being controlled by the two major parties,<sup>81</sup> the goal of this Note is not to establish the veracity of this claim. Instead, this Note explores whether antitrust could be applied as a viable remedy, even if the facts alleged by Johnson are assumed to be true.

## II. OBSTACLES TO REACHING THE MERITS

Plaintiffs seeking to sue political parties and staging organizations under antitrust law would need to overcome a few obstacles before the court reaches the merits of the claim. First, a plaintiff must show that he or she has standing.<sup>82</sup> Second, the plaintiff must persuade a court that the political activity exemption to the Sherman Act does not extend to candidates seeking to obtain political office.<sup>83</sup>

### A. *Standing*

A third-party candidate suing the CPD for antitrust violations would not have an issue with the standing requirement for jurisdiction. In order to satisfy standing in a suit against the CPD, a plaintiff must establish (1) an “injury in fact,” (2) a causal connection between the injury and the defendant’s conduct, and (3) that a favorable decision would “likely” redress the injury.<sup>84</sup> Missing out on an opportunity to participate in the debates typically suffices as an injury in fact because of its instrumentality to a candidate’s success in the election.<sup>85</sup> Third-party candidates only fail to meet the causation

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81. See, e.g., *Buchanan*, 112 F. Supp. 2d at 62 (“[T]he CPD is not a nonpartisan organization, but rather a bipartisan organization supporting the Democratic and Republican parties while opposing third parties . . . .”); see also, e.g., GEORGE FARAH, NO DEBATE: HOW THE REPUBLICAN AND DEMOCRATIC PARTIES SECRETLY CONTROL THE PRESIDENTIAL DEBATES 10 (2004) (claiming that the CPD is a fraudulent, bipartisan organization seeking to keep at bay any potential threats to the two major parties); BRENNAN CENTER FOR JUSTICE ET AL., DETERRING DEMOCRACY: HOW THE COMMISSION ON PRESIDENTIAL DEBATES UNDERMINES DEMOCRACY 3 (2004) (“The CPD secretly submits to the demands of the Republican and Democratic candidates. . . . [and] [m]asquerad[es] as a nonpartisan sponsor . . . .”).
82. See *infra* Part II.A.
83. See *infra* Part II.B.
84. *Buchanan*, 112 F. Supp. 2d at 62–63 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (internal quotation marks omitted).
85. See *Buchanan*, 112 F. Supp. 2d at 65 (“[P]laintiffs will suffer such an injury—the loss of an opportunity to participate in the presidential debates which few would doubt can be instrumental to a candidate’s success in the general election.”); see also *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989) (“[T]he loss of competitive advantage flowing from the . . . exclusion of Fulani from the

element where the causal nexus is too attenuated.<sup>86</sup> By suing the CPD directly, third-party candidates would create an immediate link to the source of the alleged injury and put to rest any causation issue.

The redressibility requirement is met if a favorable decision could have redressed the plaintiff's injury at the time he or she brought the suit.<sup>87</sup> A judgment preserving the possibility of participation in the debates would qualify as a relief that would redress the plaintiff's injury.<sup>88</sup> If the debates are over by the time the court hears the case, it would become an issue of mootness.<sup>89</sup> However, mootness here would not be a difficult obstacle to overcome because third-party-inclusion suits qualify for the "capable of repetition, yet evading review" exception.<sup>90</sup>

Standing is typically not an issue for suits seeking third-party inclusion in the debates. The situations where it has precluded courts from reaching the merits of a case would not apply to a plaintiff alleging Johnson's claim.<sup>91</sup>

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national debates constitutes sufficient 'injury' for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates.").

86. *See Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991) *cert. denied* 502 U.S. 1048 (1992) (suing the IRS was too attenuated to establish standing in a suit seeking inclusion in the debates); *cf. Buchanan*, 112 F. Supp. 2d at 68 ("Here, by contrast [to *Fulani v. Brady*], plaintiffs have sued the FEC . . . . By eliminating the IRS as a link in the chain of causation, plaintiffs take a giant leap closer to the actual source of harm[, the CPD].").
87. *E.g.*, *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 389 *cert. denied* 532 U.S. 1007 (2001) (1st Cir. 2000) (finding that Nadar's injury could have been redressed by a judgment that prevented corporate sponsorship of debates and allowed him to participate); *see also Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000) ("Standing is assessed 'at the time the action commences' . . ." (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 191 (2000))).
88. *Becker*, 230 F.3d at 389.
89. *Id.*
90. *Id.* ("As other courts have held in similar cases, this sort of case qualifies for the exception to mootness for disputes 'capable of repetition, yet evading review': corporate sponsorship of the debates is sure to be challenged again in future elections, yet, as here, the short length of the campaign season will make a timely resolution difficult."); *League of Women Voters*, 882 F.2d at 628 (2d Cir. 1989); *Johnson v. FCC*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987)).
91. *See Brady*, 935 F.2d at 1331 (failing to meet the causation element when suing the IRS for inclusion); *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193 (2d Cir. 2001) (supporters of third parties lack standing to sue for a candidate's exclusion from the debates); *Perot v. FEC*, 97 F.3d 553,

B. “Political Activity” Exemption

Third-party candidates seeking inclusion to the debates through antitrust law would need to show that the *Noerr-Pennington* doctrine does not apply. The *Noerr-Pennington* doctrine stands for the general principle that the Sherman Act does not apply to political activity with regard to influencing legislative action. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>92</sup> long-distance trucking companies brought an antitrust claim against twenty-four major railroad companies, alleging the companies hired a public relations firm to campaign against the truckers and lobby for laws that would be destructive for the rival trucking business.<sup>93</sup> The Supreme Court held that the Sherman Act does not apply to joint ventures seeking to persuade the legislative or the executive branches “to take particular action with respect to a law that would produce a restraint or a monopoly.”<sup>94</sup> The Court broadly stated that political activity has no basis in the legislative history of the Act, and that the Act is “not at all appropriate” for the “political arena.”<sup>95</sup>

The situation in *United Mine Workers v. Pennington*<sup>96</sup> was very similar to that in *Noerr*. In *Pennington*, a coal labor union and some larger coal companies jointly and successfully persuaded the Secretary of Labor to raise minimum wages to a point that would drive out smaller coal companies.<sup>97</sup> A group of those smaller companies brought an antitrust suit against the union and larger companies. The Supreme Court held that the *Noerr* rule applied to this situation as well, that it “shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose,”<sup>98</sup> and that it was necessary to instruct the jury of this shield.<sup>99</sup>

The Supreme Court’s decision to award an antitrust exemption for political activity would appear to bar antitrust suits against political parties and the CPD, but there is a notable distinction. The

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561 (D.C. Cir. 1996) *cert. denied* 520 U.S. 1210 (1997) (finding that Perot lacked standing after failing to initially produce the administrative record).

92. 365 U.S. 127, 129 (1961).

93. *Id.* at 129.

94. *Id.* at 136.

95. *Id.* at 137, 140–41.

96. 381 U.S. 657 (1965).

97. *Id.* at 660.

98. *Id.* at 669–70.

99. *See id.* (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. . . . The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.”).

*Noerr-Pennington* doctrine deals with political activity in that it refuses to extend the Sherman Act to situations in which organizations are persuading official legislative actions of individuals already holding government office. In cases against the CPD, however, there is no official action by the government. The CPD and its televised debates involve actions of those seeking to obtain a political office, not actions of those already in office. While the exclusion of third-party candidates may be a strategy to influence governmental policy similar to the parties in *Noerr* and *Pennington*, the difference is that the CPD's alleged strategy is far more attenuated. *Noerr* and *Pennington* each involved private parties seeking to change a specific governmental policy by influencing those already in power. The exclusion of third-party candidates would be an attempt to prevent others from ever reaching that position of power.

### III. ELEMENTS OF A SECTION 1 VIOLATION APPLIED

Assuming the first two threshold hurdles are met and the court reaches the merits of the case, a plaintiff would then need to prove that the staging organization's selection criteria constitute a restraint of trade in violation of section 1 of the Sherman Act.<sup>100</sup> Section 1 provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

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100. This Note dedicates its focus to a section 1 claim; nevertheless, it is noteworthy that just a decade ago, a third-party candidate could have potentially made a compelling argument for a section 2 violation of the Sherman Act through the “essential facilities” doctrine. To qualify as an “essential facility,” a plaintiff must show that there are no feasible alternatives and that “denial of its use inflicts a ‘severe handicap’ on potential market entrants.” *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990) (emphasis and alteration omitted) (quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1997)). If an “essential facility” is found, the Supreme Court has held that the defendants must provide access to competitors on a nondiscriminatory basis and in a reasonable manner. Third-party candidates could have alleged that the debates were an “essential facility” because access is necessary to a successful campaign, that they are excluded unreasonably, and that if the Republican and Democratic National Committees control the CPD, they would not participate in other staged debates, making duplication impossible. Arguments for the instrumentality of the debates and the unreasonableness of the 15% requirement are discussed *infra* Part III.C and evidence of major-party control of the CPD are discussed *infra* Part III.A. In 2004, however, the Supreme Court held that the “essential facilities” doctrine is not appropriate where a regulatory agency has the ability to compel access. *Verizon v. Trinko*, 540 U.S. 398, 411 (2004). Thus, since the FEC could compel access through its regulations, the “essential facilities” doctrine is likely no longer a viable option.

several States, or with foreign nations, is declared to be illegal.”<sup>101</sup> To establish a section 1 violation, a plaintiff must show three elements: (1) an agreement or conspiracy exists between two entities, (2) this agreement affects interstate commerce, and (3) this agreement constitutes an unreasonable restraint of trade.<sup>102</sup>

*A. Agreement or Conspiracy*

The agreement or conspiracy element is reflective of the fact that section 1 of the Sherman Act only applies to concerted action.<sup>103</sup> To qualify as concerted action, the parties involved do not need to be legally distinct entities.<sup>104</sup> Instead, courts favor a “functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.”<sup>105</sup> This functional approach has resulted in numerous instances in which a single legal entity was still found to have engaged in concerted activity.<sup>106</sup> The Supreme Court has explained that it will look to “the central substance of the

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101. Sherman Act § 1, 15 U.S.C. § 1 (2012).

102. *Richter Concrete Corp. v. Hilltop Basic Res., Inc.*, 547 F. Supp. 893, 917 (S.D. Ohio 1981), *aff’d*, 691 F.2d 818 (6th Cir. 1982). The analysis for a section 1 violation of the Sherman Act has also been summarized as a “two-part test.” If a plaintiff can meet the “threshold requirements”—showing concerted action that affects interstate commerce—courts will move to the “competitive effects test,” which requires the showing of an unreasonable restraint of competition. *See* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 65, 71 (2013).

103. *See Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2208 (2010) (“Section 1 only applies to concerted action that restrains trade.”); *see also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984) (noting that Congress “treated concerted behavior more strictly than unilateral behavior” because concerted activity is “fraught with anticompetitive risk” since it “deprives the marketplace of independent centers of decisionmaking”).

104. *Am. Needle*, 130 S. Ct. at 2209.

105. *Id.*

106. *See id.* (noting that legally single entities “violate[ ] § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity”); *United States v. Sealy, Inc.*, 388 U.S. 350, 356 (1967) (finding Sealy, Inc., which owned and controlled a group of mattress manufacturers, met the concerted activity requirement because Sealy was not “a separate entity, but . . . an instrumentality of the individual manufacturers”); *Associated Press v. United States*, 326 U.S. 1 (1944) (holding that the Associated Press, a cooperative association of newspapers, acted in concert despite being a single legal entity incorporated under New York law).

situation,” and therefore will be “moved by the identity of the persons who act, rather than the label of their hats.”<sup>107</sup>

A single legal entity can even be found to act in concert when it comprises competitors.<sup>108</sup> For example, in *Associated Press v. United States*,<sup>109</sup> the Supreme Court held that a cooperative association comprising competitor newspapers violated section 1 by acting in concert through its bylaws that allowed members to block nonmember competitors from membership and prohibited members from selling to nonmembers.<sup>110</sup> These bylaws “in and of themselves were contracts in restraint of commerce in that they contained provisions designed to stifle competition in the newspaper publishing field” and “had hindered and impeded the growth of competing newspapers.”<sup>111</sup>

Even though the CPD is legally a single entity, a third-party candidate could make a compelling case that, despite the “label of its hat,” the staging organization is actually run by the Democratic and Republican National Committees. Notably, the two chairmen of the major parties announced the formation of the CPD as a “bipartisan” organization,<sup>112</sup> and each of these prominent figures continued to play influential roles in the CPD.<sup>113</sup> In *Buchanan v. Federal Election*

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107. *Sealy*, 388 U.S. at 353.

108. See Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 506 (1992) (“In a variety of cases, courts have found the Section 1 concert of action requirement satisfied when participants in an enterprise are also competitors.”).

109. 326 U.S. 1 (1944).

110. *Id.* at 11–13.

111. *Id.*

112. See CPD Press Release, *supra* note 46 (calling the CPD “a bipartisan, non-profit, tax-exempt organization formed to implement joint sponsorship of general election presidential and vice-presidential debates”); see also Memorandum of Agreement, *supra* note 45 (“It is our *bipartisan* view that a primary responsibility of each *major* political party is to educate and inform the American electorate . . . . Therefore, . . . it is our conclusion that joint appearances should be principally and jointly sponsored and conducted by the *Republican and Democratic National Committees*.”); AMATO, *supra* note 6, at 226 (noting that Frank Fahrenkopf, former chairman of the Republican National Committee, admitted in a sworn deposition that the CPD was only officially formed as a nonpartisan entity because the lawyers counseled them that they “probably couldn’t do it if [they] were a bipartisan entity”).

113. See Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1982 (1999) (“From the beginning, the CPD has been co-chaired by none other than Frank Fahrenkopf and Paul Kirk, who had together declared their commitment to bipartisan televised joint appearances and both of whose party affiliations are continually and carefully noted in major CPD communications.”); *supra* Part I.B.1 (discussing how the chairmen of the Republican and Democratic Committees formed the CPD).

*Commission*,<sup>114</sup> the court acknowledged the reasonableness of such a claim and further noted that the FEC's finding to the contrary created the "unfortunate by-product of . . . increased public cynicism about the integrity of our electoral system."<sup>115</sup>

While no court has made a factual finding that the CPD is run by the two major parties, courts have typically been bound by the "extremely deferential standard of review" owed to the FEC's interpretation.<sup>116</sup> Under an antitrust claim, no such deference would be required. Instead, courts would have much more room to allow for this factual determination because the Supreme Court has endorsed a functional approach that asks courts to look at the "essence" of an entity.<sup>117</sup> Thus, it is reasonable to think that a court could find the CPD is controlled by a group of competitors and thus able to act in concert for purposes of the Sherman Act.

*B. Effect on Interstate Commerce*

1. Debates as Commerce

The second threshold issue in an antitrust case is establishing that the alleged concerted activity affects interstate commerce. While the majority of case law on this element focuses on the interstate aspect, the activity must still implicate commerce.<sup>118</sup> Showing that the presidential debates constitute commercial activity for purposes of the Sherman Act would likely be the toughest obstacle for a third-party candidate to overcome. Only one case has ever discussed an issue close to this one, and the court held that holding a political office did not implicate commerce under antitrust law.<sup>119</sup> But it can be distinguished.<sup>120</sup> Since this is a novel legal issue, there are no precedents directly on point. Therefore, the best a third-party candidate could do is argue that other instances where commerce were found are sufficiently analogous to this situation. This section discusses a few different arguments a third-party candidate could make. Even if none of these arguments are persuasive enough standing alone, courts will classify the nature of conduct as

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114. 112 F. Supp. 2d 58 (D.D.C. 2000).

115. *Id.* at 73.

116. *Id.* (applying the deferential standard although "reasonable people could certainly disagree about whether the CPD's credibility determination [by the FEC] was correct").

117. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209 (2010).

118. *See United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993) ("[W]hen [parties] perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation.").

119. *Sheppard v. Lee*, 929 F.2d 496, 498 (9th Cir. 1991).

120. Discussed *infra* Part III.B.2.

commercial or noncommercial in light of the totality of circumstances.<sup>121</sup> Therefore, in light of a combination of reasonable arguments, a court could classify the CPD's role in staging presidential debates as affecting commerce.

*a. Presidency as a Salaried Position*

Under the Sherman Act, "commerce" is not limited to interstate commerce.<sup>122</sup> In *Goldfarb v. Virginia State Bar*,<sup>123</sup> the Court held that the exchange of services for money constitutes commerce for Sherman Act purposes and that minimum fee schedules prescribed by the county bar constituted price fixing in violation of section 1.<sup>124</sup> The Bar had sought an exclusion from antitrust regulation, "arguing that learned professions are not 'trade or commerce.'"<sup>125</sup> The Court rejected this argument, however, stating that the "nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions."<sup>126</sup> Further, the Court held that the examination of a land title is a service, and "the exchange of such a service for money is 'commerce' in the most common usage of that word."<sup>127</sup>

Applying *Goldfarb* to the subject of this Note, the Court's statements that the nature of an occupation alone does not bar Sherman Act litigation tends to suggest that a political office could be open to antitrust claims. More specifically, the fact that a position's public-service nature is not controlling seems to further section 1's applicability given the public-service nature of holding a political office. Lastly, if the exchange of services for money constitutes commerce for the purposes of the Sherman Act, holding the position of the president could constitute commerce since it is a salaried position in which services are rendered in exchange for money.

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121. *Brown*, 5 F.3d at 666 (3rd Cir. 1993).

122. *See* *United States v. Natl. Ass'n of Real Est. Bds.*, 339 U.S. 485, 488 ("The fact that no interstate commerce is involved is not a barrier to this suit. Section 3 of the Sherman Act is not leveled at interstate activities alone. It also puts beyond the pale certain conduct purely local in character and confined to the District of Columbia.").

123. 421 U.S. 773 (1975).

124. *Id.* at 782-88.

125. *Id.* at 787.

126. *Goldfarb*, 421 U.S. at 787 (citation omitted); *see also* *United States v. Brown University*, 5 F.3d 658, 666 (3rd Cir. 1993) ("The exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction.").

127. *Id.* at 787-88.

b. *Nonprofit Contributions and Sponsorships*

The CPD is financed primarily through corporate sponsorships.<sup>128</sup> Multinational corporations—some of the largest in the country<sup>129</sup>—have donated millions of dollars to the staging organization.<sup>130</sup> In exchange for these donations, corporations receive an array of benefits: tax-deductions,<sup>131</sup> advertisement opportunities,<sup>132</sup> and a chance to make what amounts to a “bipartisan contribution.”<sup>133</sup> In addition to this reciprocal relationship, it has been argued that the CPD benefits from third-party exclusion not only because it insulates the two parties from competition but also because this exclusion appeases its funding sources.<sup>134</sup> Corporate sponsors of the CPD will donate millions of dollars to the two major parties every year in order to “sustain a business-friendly two-party system.”<sup>135</sup> After such an investment, these corporations “aren’t very eager to allow a third-party candidate the opportunity to ascend to the presidency and thereby render their investment less valuable.”<sup>136</sup> Under this theory, a plaintiff could even argue that the CPD serves as a vehicle for ensuring a return on investment for these corporations.

Even if a defendant’s activity is not in itself interstate commerce, the Supreme Court has made clear that a plaintiff can still meet the “effect on interstate commerce” element by showing that the activity

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128. *Corporate Sponsorship*, OPEN DEBATES, <http://www.opendebates.org/theissue/corpsponsor.html> (last updated Jan. 2, 2013).
129. *See id.* (“Tobacco giant Phillip Morris was a major sponsor in 1992 and 1996. Anheuser-Busch has sponsored presidential debates in 1996, 2000, 2004, 2008 and 2012.”).
130. *Id.*
131. *See FARAH*, *supra* note 81 at 16 (“[D]onations to the CPD are tax-deductible.”).
132. *See id.* at 14 (describing how in 1992 Philip Morris was able to “hang a large banner that was visible during postdebate interviews” after donating \$250,000 (citing Jonathan Groner & Sheila Kaplan, *Buying Smoke and Mirrors at the Debates*, LEGAL TIMES, Nov. 2, 1992)); *id.* (describing how in 2000 Anheuser-Busch was able to set up informational booths at the debate site after donating \$550,000 (citing Joe Battenfeld, *Company Sponsors’ Funds ‘Ad’ Up*, BOSTON HERALD, Oct. 2, 2000, at 6)).
133. *See id.* at 15–16 (noting that corporations view a donation to the CPD as a way to donate to both major parties simultaneously) (quoting an interview with Nancy Neuman, former president of the League of Women Voters, Aug. 24, 2001).
134. *See id.* at 16.
135. *Id.*
136. *Id.* (quoting Nathan Johnson, *Presidential Debates Betray Democracy*, PRESS & DAKOTAN, Oct. 17, 2000).

“has an effect on some other appreciable activity demonstrably in interstate commerce.”<sup>137</sup> A third-party candidate could argue that the CPD’s quid-pro-quo relationship with such giant businesses helps establish the debates’ link to commercial activity. For example, advertising—which has been an antitrust issue on its own<sup>138</sup>—can affect a company’s sales. Therefore, by offering advertising opportunities to companies that do business across the country, the CPD has arguably had “an effect on some other appreciable activity demonstrably in interstate commerce,” thus meeting the second threshold requirement to an antitrust claim.

The CPD’s status as a nonprofit organization would not serve as a deterrent to antitrust litigation. The Supreme Court has plainly stated that “[t]here is no doubt that the sweeping language of § 1 applies to nonprofit entities.”<sup>139</sup> However, there are differing views about the application of nonprofit contributions to antitrust law. In *Dedication and Everlasting Love to Animals v. The Humane Society*,<sup>140</sup> the Ninth Circuit held that contributions to a nonprofit organization did not constitute commerce under the Sherman Act, and therefore there was no liability under the Act.<sup>141</sup> But in *United States v. Brown University*,<sup>142</sup> the Third Circuit held that a nonprofit entity can be subject to Sherman Act claims if it conducts commercial, rather than “pure[ly] charit[able],” transactions.<sup>143</sup> In its analysis, the *Brown* court specifically noted that courts should classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances.<sup>144</sup> While the CPD’s receipt of corporate funds may not on its own help constitute commerce for purposes of the Sherman Act, the fact could be weighed in the totality of circumstances and help tip the scales in favor of third-party-candidate claims.

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137. *McLain v. Real Est. Bd. of New Orleans, Inc.*, 444 U.S. 232, 233 (1980).

138. See Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising As an Antitrust Issue*, 1990 DUKE L.J. 321, 328 (1990) (discussing how mass advertising creates anticompetitive effects through entry barriers).

139. *NCAA v. Bd. of Regents*, 468 U.S. 85, 100, n. 22 (1984).

140. 50 F.3d 710 (9th Cir. 1995).

141. *Id.* at 712.

142. 5 F.3d 658 (3rd Cir. 1993).

143. *Id.* at 665–68 (finding a university properly subject to the Sherman Act because “financial assistance to students is part and parcel of the process of setting tuition and thus a commercial transaction”).

144. *Id.* at 666.

c. *An Economic Doctrine Extended to the Political Arena*

Politics and economics are certainly not interchangeable, but they are nevertheless connected. In law, there is at least one example where an economic doctrine has been extended to aid third-party candidates. The “competitor standing doctrine” began as “well-settled [law] that an economic actor may challenge the government’s bestowal of an economic benefit on a competitor.”<sup>145</sup> Courts then “expanded the competitor standing doctrine to the political arena, recognizing that political actors may bring suit when they are competitively disadvantaged.”<sup>146</sup> While this doctrine would not be needed for a plaintiff alleging antitrust violations against the CPD, it still demonstrates that courts have recognized a link between economic activity and politics. Thus, it shows that there is a chance courts could look beyond the presidential debates as purely political and consider, in the totality of circumstances, its broader effects in concluding that the debates sufficiently affect commerce for purposes of the Sherman Act.

2. Distinguishing *Sheppard*

While Gary Johnson was the first third-party candidate to allege antitrust violations by a staging organization in its televised debates, it is not the first time an aspiring candidate has sued under antitrust law for exclusion in seeking to obtain political office. In *Sheppard v. Lee*,<sup>147</sup> an Arizona county road maintenance crew worker filed a petition to run for a seat on the Apache County Board of Supervisors.<sup>148</sup> After learning of his intention, the members of the Board unanimously voted to amend to the Apache County employee rules and regulations to prohibit employees from running for any elected office while they were still employed by the county.<sup>149</sup> The defendants then promptly fired Sheppard pursuant to this new amendment.<sup>150</sup> Sheppard responded by suing the Board under the Sherman Act. But the United States Court of Appeals for the Ninth Circuit rejected this argument, holding that “[d]ismissal of Sheppard’s case was proper because neither the business of conducting the

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145. *Buchanan v. Fed. Election Comm’n*, 112 F. Supp. 2d 58, 63 (D.D.C. 2000).

146. *Id.*

147. 929 F.2d 496 (9th Cir. 1991).

148. *Id.* at 497.

149. *Id.* The amendment provided that “[n]o employee may remain employed if he offers himself for nomination or election to any salaried Apache County, State of Arizona or Federal elective office unless that office will become vacant at the next election by retirement of the elected official.” *Id.*

150. *Id.*

government nor the holding of a political office constitutes ‘trade or commerce’ within the meaning of the Sherman Act.”<sup>151</sup>

Such precedent is discouraging for third-party candidates hoping antitrust law is their ticket to the debate, but it does not create an insurmountable barrier because this case can be distinguished. In *Sheppard*, the plaintiff was fired “pursuant to a May 16, 1988, amendment to the Apache County employee rules and regulations,”<sup>152</sup> meaning it was an official governmental action that was limiting his opportunity to obtain the public office. Therefore, the court could have reached the same conclusion without addressing whether holding political office constituted commerce because the court could have based its decision solely on the fact that it involved a governmental action—where antitrust law does not apply according to the *Noerr-Pennington* doctrine.<sup>153</sup>

Another issue is that both *Noerr* and *Pennington* involved private parties seeking to influence the government to use its power to disadvantage their rivals. But in *Sheppard*, it is actual members of the government seeking to insulate themselves from competition. This appears to be more problematic since that is essentially what Johnson is alleging—that the two major parties are using the debates to keep third-party competition at bay. But the difference again lies in official governmental action. In *Sheppard*, the Board passed an official anticompetitive act. In a case such as Johnson’s, there is no official act that has been passed to govern the selection criteria of the debates. If Congress were to do so, it would then certainly be insulated from antitrust law. But until then, this precedent would not be overly detrimental.

### C. *An Unreasonable Restraint*

Not all concerted activity affecting interstate commerce is subject to antitrust liability. Section 1, if read literally, would appear to bar all contracts because most business deals restrain trade to *some* degree.<sup>154</sup> Consequently, in 1911, the Supreme Court held that the restraint must be “unreasonably restrictive of competitive conditions.”<sup>155</sup> Thus, even if a court found that the CPD’s eligibility

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151. *Id.* at 498.

152. *Id.* at 497.

153. *See supra* Part II.B.

154. *See* *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2208 (2010) (“Taken literally, the applicability of § 1 to ‘every contract, combination . . . or conspiracy’ could be understood to cover every conceivable agreement . . . [section] 1 would address ‘the entire body of private contract,’ that is not what the statute means.” (citing *Nat’l Soc. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978))).

155. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

requirements met the two threshold elements, a third-party candidate would still need to prove that the requirements were unreasonably restrictive.

Restraints are usually analyzed under the “traditional ‘rule of reason.’”<sup>156</sup> The rule of reason is used where there is likely some consumer benefit,<sup>157</sup> and requires a court to “weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”<sup>158</sup> A plaintiff “bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets.”<sup>159</sup> Therefore, in an antitrust suit against the CPD, a plaintiff would bear the burden of proving that the eligibility criteria are unreasonable after weighing all of the circumstances.

#### 1. Justifications for the 15% Requirement

A court would likely apply a rule of reason test because the CPD has a number of reasonable justifications for its eligibility requirements. The first two requirements—that a client be constitutionally eligible and be on a number of ballots that would make it mathematically possible to win the Electoral College—would likely be conceded as justified because absent those two requirements, the candidates would not even have a theoretical chance of winning.<sup>160</sup> The criterion likely to receive the most scrutiny is the third element, which requires a 15% showing of support in polls.<sup>161</sup>

In justifying the 15% requirement, the CPD would argue that the most important goal of the debates is to ultimately give the voters a chance to observe and decide between the two candidates with a “*real* chance” of winning as they discuss their stances on key issues.<sup>162</sup> In fact, the original founders of the CPD described this aspect of the

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156. *United States v. Brown Univ.*, 5 F.3d 658, 668 (1993) (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

157. *See also* Edelman, *supra* note 102, at 73–75 (noting that there are three sanctioned tests for a competitive effects analysis: (1) the per se test for highly “nefarious” restraints that likely have no “redeeming value,” (2) the rule of reason test for restraints that might benefit consumers, and (3) the “abbreviated or quick-look rule of reason” for a combination).

158. *Cont'l T.V.*, 433 U.S. at 49.

159. *Brown*, 5 F.3d at 668.

160. *See 2012 Criteria*, *supra* note 7.

161. *Id.*

162. MINOW & LAMAY, *supra* note 13, at 95.

debates as a “primary responsibility” of the two major parties.<sup>163</sup> If access to the debates becomes too easy for third-party candidates, the CPD risks scaring away the major candidates and thus depriving voters of a valuable opportunity to make an informed voting decision.<sup>164</sup> Further, new eligibility rules could create a disparate impact on public confidence in the debates. More relaxed standards for entry could lead to an overcrowded and chaotic event<sup>165</sup> and open the doors to some of the more extreme parties—reminiscent of Senator Mayfield’s “bolshevism and communism” concern prior to the enactment of the 1927 Radio Act.<sup>166</sup>

## 2. Whether the 15% Requirement Is Overly Broad

While there are reasonable justifications for limiting access to the debates, the restraint can still be unreasonable if it is broader than necessary to achieve its legitimate objectives.<sup>167</sup> A third-party candidate could argue that the 15% requirement is overly broad because it unduly limits access to a necessary event when less restrictive alternatives are readily available.

### a. *Necessity of Access to the Debates*

Third-party candidates would argue that the 15% requirement is still unreasonably restrictive because the threshold is too high for access to a vehicle that is necessary for success.<sup>168</sup> Media coverage is “an essential component of a successful modern campaign” because it legitimizes candidates and generates recognition, both of which are “indispensable in attracting votes.”<sup>169</sup> Voters expect to see their

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163. See Memorandum of Agreement, *supra* note 45 (“It is our bipartisan view that a primary responsibility of each major political party is to educate and inform the American electorate of its fundamental philosophy and policies as well as its candidates’ positions on critical issues.”).

164. See MINOW & LAMAY, *supra* note 13, at 95.

165. See *id.* at 85–86 (discussing a crowded Italian political debate in which the participating politicians began calling each other names such as “drunkard” or “useful idiot”).

166. 67 CONG. REC. 12,502 (daily ed. Jul. 1, 1926) (statement of Sen. Earl B. Mayfield).

167. See *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1385 (5th Cir. 1980) (holding that a realty service’s membership requirements were “overly broad to accomplish any legitimate goals of the association” in violation of section 1 of the Sherman Act).

168. *Id.* at 1370 (“[W]hen the association possesses the requisite market power, membership in the listing service becomes essential to a broker’s ability to compete effectively, and the unreasonable (in competitive terms) exclusion of a broker may create unjustified harm to the broker and the public.”).

169. ROSENSTONE ET AL., *supra* note 5, at 33.

candidates on television.<sup>170</sup> The benefits of participation in the presidential debates—the free publicity and opportunity to reach tens of millions of voters—are irreplaceable in terms of campaign strategy.<sup>171</sup> Debates thus serve a monumental role in campaigns and serve as a “defining feature of candidate viability.”<sup>172</sup> In light of the debates’ significance, the 15% requirement thus creates “something of a catch-22. In order to gain popular support, the candidate must participate in the debates; but in order to participate in televised debates, the candidate must demonstrate popular support.”<sup>173</sup>

The CPD’s brief history reveals the potential efficiency of the debates as a vehicle to gain support and the restrictive nature of its criteria. In 1992, Ross Perot was the last third-party candidate to participate in a presidential debate.<sup>174</sup> Prior to the debates, Perot polled at less than ten percent.<sup>175</sup> After the debates, Perot approximately doubled his support, as he was able to capture nearly nineteen percent of the popular vote.<sup>176</sup> Perot’s subsequent exclusion from the 1996 debates under the same realistic chance standard led to a public backlash, which influenced the CPD to amend its eligibility requirements that are used to this day.<sup>177</sup> Since the 15% requirement has been enforced, no third-party candidates have been able to participate in the debates.

Courts have also recognized the weighty competitive advantage debate participants receive over nonparticipants. In *Fulani v. League of Women Voters Education Fund*,<sup>178</sup> the Second Circuit stated:

In this era of modern telecommunications, who could doubt the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office. The debates sponsored by the League were broadcast on national television, watched by millions of

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170. See SIDNEY KRAUS, TELEVISED PRESIDENTIAL DEBATES AND PUBLIC POLICY 20 (2d ed. 2000) (“Young voters today have been raised with television, and they expect to see presidential candidates perform at least adequately on television.”).

171. AMATO, *supra* note 6, at 224–25.

172. *Id.* at 224.

173. JELEN, *supra* note 8, at 4.

174. See MINOW & LAMAY, *supra* note 13, at 91–92 (noting Perot was invited pursuant to the realistic chance standard).

175. Jeff Milchen, *Presidential Debates is Really Duopoly by Design*, SFGATE (Aug. 22, 2000, 4:00 AM), <http://www.sfgate.com/opinion/openforum/article/Presidential-Debate-Is-Really-Duopoly-by-Design-2709060.php>.

176. *Id.*

177. See *supra* notes 60–65 and accompanying text.

178. 882 F.2d 621 (2d Cir. 1989).

Americans, and widely covered by the media. It is beyond dispute that participation in these debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers.<sup>179</sup>

When the D.C. Circuit quoted this passage from *Buchanan v. Federal Election Commission*,<sup>180</sup> the court described it as a “fundamental, and rather obvious, point.”<sup>181</sup> Such language clearly demonstrates a judicial acknowledgement of the instrumentality debates serve to a successful campaign in the modern political landscape.

*b. Availability of Less Restrictive Alternatives*

The availability of less restrictive alternatives can also influence the reasonableness analysis.<sup>182</sup> For the presidential debates, there have been a number of recommendations for less restrictive options for the third criterion in selecting the participants. One suggestion is to remove the third criterion altogether, leaving just the first two requirements.<sup>183</sup> This alone would significantly lower the field of constitutionally eligible candidates because just getting on the ballot involves an arduous petition process in most states.<sup>184</sup> Since 1988, of the roughly 200 individuals who run each year, the highest number of third-party candidates to reach the ballot requirement in a single year has only been five.<sup>185</sup> However, if ballot eligibility became the strictest

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179. *Id.* at 626.

180. 112 F. Supp. 2d 58 (D.D.C. 2000).

181. *Id.* at 65.

182. *See* *White Motor Co. v. United States*, 372 U.S. 253, 271 (1963) (Brennan, J., concurring) (“Another pertinent inquiry would explore the availability of less restrictive alternatives.”).

183. *See, e.g.,* Compl., *Johnson v. Comm’n on Presidential Debates*, 8:2012cv01600, at 6–7 (asking the court to limit the CPD’s eligibility requirements to the first two); Raskin, *supra* note 113, at 1997–98 (calling for all constitutionally eligible candidates who meet the balloting requirement to be allowed to participate in the debates, so long as they are “serious” about their candidacy and not “lamprooning” the event). In fact, Raskin’s suggestion was even broader because it called for there to always be a third party present at the debate. If no third party met the requisite ballot total, then whichever candidate had the third highest total number of ballots would be invited. *Id.* at 1997.

184. WILLIAM J. KEEFE & MARC J. HETHERINGTON, *PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA* 50 (9th ed. 2003).

185. *See The 15 Percent Barrier*, OPEN DEBATES, <http://opendebates.org/theissue/15percent.html> (“In 1988 only two third-party candidates, in 1992 only three third-party candidates, in 1996 only four third-party candidates, in 2000 only five third-party candidates, in 2004 only four third-party candidates, in 2008 only four third-party candidates, and in 2012 only two third-party candidates.”).

requirement, that would become the full-time focus of all third-party campaigns and might eventually result in an unmanageable amount of qualified debaters.<sup>186</sup>

Another proposal is to drop the 15% requirement down to a 5% show of support. This makes sense for a number of reasons. For one, it is a compelling argument that if the ballot barrier were the highest bar, then third-party campaigns would make that their primary concern<sup>187</sup> due to the bounty of advantages that accompany participation.<sup>188</sup> Secondly, one of the crucial benefits of third-party inclusion is that they serve an important function of raising issues that the two major candidates may otherwise ignore.<sup>189</sup> But voter support of third-party candidates typically only occurs where there is substantial dissatisfaction with the major-party candidates;<sup>190</sup> thus a showing of some support would help reveal what issues are most important to voters. Lastly, this percentage mirrors the threshold requirement for minor parties to be eligible for federal campaign funding.<sup>191</sup> The D.C. Circuit has noted the logical sense it would make to align these thresholds.<sup>192</sup> As former New York Governor, Mario Cuomo, reasoned, “[i]f you’re going to give them taxpayers’ money on the theory that they’re credible candidates, then you ought to let them participate.”<sup>193</sup> One possible and interesting change to this suggestion is to set an initial debate at a 5% threshold, which then increases with each debate in a given election year.<sup>194</sup>

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186. MINOW & LAMAY, *supra* note 13, at 95.

187. *Id.*

188. *See* discussion *supra* Part III.C.

189. ROSENSTONE, *supra* note 5, at 221.

190. *Id.* at 163.

191. *See* 11 C.F.R. § 9008.2(d) (defining “minor parties” as those who receive “5 percent or more, but less than 25 percent” of the popular vote in an election); § 9008.3(b) (entitling “minor parties” to payments with respect to any presidential nominating convention).

192. *See* Buchanan v. FEC, 112 F. Supp. 2d 58, 74 (D.D.C. 2000) (“A reasonable person could find it ironic that a candidate need win only 5% of the popular vote to be eligible for federal funding, but must meet a 15% threshold to be eligible for the debates.”).

193. *The 15 Percent Barrier*, OPEN DEBATES, <http://opendebates.org/the-issue/15percent.html>.

194. *See* FARAH, *supra* note 81, at 152 (describing a senator’s proposal that a staging organization host a preliminary debate including any candidate who was either on all fifty state ballots or showed a 5% level of support; subsequent debates would then require a 10% threshold); Hull, *supra* note 66, at 342–43 (noting that a polling threshold represents a good compromise because it gives third-party candidates a legitimate chance to participate and share their ideas while trimming the participants to the more likely victors as the election nears).

Representative Jesse L. Jackson Jr. proposed another noteworthy suggestion: in addition to the 5% barrier, a third party should be included if a majority of those polled indicated they would like to see that candidate participate. Jackson proposed the following resolution to Congress:

Presidential candidate should be permitted to participate in debates among candidates if—(1) at least 5 percent of respondents in national public opinion polls of all eligible voters support the candidate's election for President; or (2) if a majority of respondents in such polls support the candidate's participation in such debates.<sup>195</sup>

While Jackson's proposal was not successful, it would have addressed the issue that third-party exclusion from the debates is often at odds with the preferences of the majority of voters.<sup>196</sup>

These examples of offered suggestions illustrate the variety of selection criteria available to a staging organization. While they may not be perfect, these alternatives are less restrictive than the 15% requirement while still achieving the CPD's legitimate justifications of preventing a chaotic event. In light of all of these considerations, a court could reasonably conclude that the CPD's 15% requirement meets the elements of a section 1 violation as an unreasonable restraint on competitive activity.

#### IV. WHY COURTS SHOULD ALLOW ANTITRUST APPLICATION

A court faced with a third-party suit against the CPD alleging antitrust violations may understandably be unwilling to rule in the plaintiff's favor. The Supreme Court's sweeping statements in direct opposition to Sherman Act application in the political arena<sup>197</sup> would likely serve as a powerful deterrent, and with good reason. However, there is a possible distinction between a third-party suit against the CPD and this political activity exemption<sup>198</sup> and, further, the Supreme

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195. H.R. Con. Res. 373, 106th Cong. (2000).

196. *The 15 Percent Barrier*, OPEN DEBATES, <http://opendebates.org/the-issue/15percent.html> (noting that seventy-six percent of voters wanted to see Perot debate in 1996 and that sixty-four percent of voters wanted to see both Ralph Nader and Pat Buchanan included in the 2000 presidential debates).

197. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961) ("The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.").

198. *See supra* Part II.B (discussing a possible distinction to the *Noerr-Pennington* doctrine).

Court is capable of changing its treatment of antitrust applicability in certain arenas.<sup>199</sup>

But even if the court reaches the merits, there is neither direct nor wholly analogous precedent to control the application. Consequently, each of the possible third-party-candidate arguments regarding the elements of a section 1 violation may be viewed as somewhat strained.<sup>200</sup> Nevertheless, a court could still rationally conclude, after weighing the totality of circumstances, that the 15% requirement constitutes a concerted action resulting in an unreasonable restraint of competition affecting commerce. If a court finds that it could rule in favor of a third-party candidate in an antitrust suit against the CPD, it should rule accordingly due to the number of public policy benefits that can stem from third-party inclusion in the debates.

*A. Public Policy Benefits of Including Third-Party Candidates*

The Supreme Court has long recognized the impact and importance of debates in public policy. It has stated that there is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>201</sup> The Court has further recognized that debates have an “exceptional significance in the electoral process”<sup>202</sup> because they give voters the opportunity to “intelligently evaluate the candidates’ personal qualities and their positions on vital public issues” before making a decision.<sup>203</sup> Additionally, political campaigns enjoy First Amendment protections because they involve the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>204</sup> Third-party candidates are often the vehicle to energize these desired political and social changes valued by the Court.

The CPD’s emphasis on only featuring candidates with a realistic chance of winning<sup>205</sup> devalues the contributions third-party candidates can make without receiving a single vote. Third-party candidates

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199. See *infra* Part IV.B.2 (discussing the evolution of antitrust application in professional sports).

200. See *supra* Part III.A–C (discussing these possible third-party candidate arguments).

201. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

202. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 675 (1998).

203. *Id.* (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981)).

204. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

205. The 15% requirement was an attempt to quantify the realistic chance standard. See MINOW & LAMAY, *supra* note 13, at 93 (discussing the need to revise its selection criteria so that it was more concrete).

serve two critical roles in American politics: (1) they bring issues to the table that the major parties may otherwise ignore and (2) they reflect and amplify citizen discontent with the major-party policies.<sup>206</sup> Rationally, the major parties will react to these signs of voter discontent.<sup>207</sup> Third-party candidates have helped popularize several groundbreaking ideas—such as the abolition of slavery, social security, child labor laws, labor union formation, public schools, and public power—before they were adopted by major parties.<sup>208</sup> But while third-party candidates may bring different ideas to the forefront, the more effective route to alter policy may be to target specific candidates within the major parties who share the same values and are willing to represent that point of view.<sup>209</sup>

Even if it is not the most effective method, that does not discredit third-party candidates' value as a vehicle for effectuating social change. For example, in 1992 Ross Perot made the growing federal budget deficit a main tenet of his campaign. Neither the Republicans nor Democrats were eager to raise the issue because the deficit ballooned during Republican presidencies and Democratic majorities in the House of Representatives.<sup>210</sup> Perot forced the issue at the debates and was able to swiftly bring attention to the problem, which increased public concern.<sup>211</sup> However, the changes third-party candidates help bring are not always positive. For example, in 1968, the Nixon administration softened its stance on racial integration in order to attract the supporters of American Independent Party candidate George Wallace.<sup>212</sup> Nevertheless, third-party candidates serve as an important check on the major parties. Voters can use the threat of exit to enforce accountability among elected officials.<sup>213</sup> Thus, even if they are not elected, third-party candidates serve a crucial role in the preservation of democracy.<sup>214</sup>

Third-party inclusion in the debates can result in a positive impact on voter interest and turnout.<sup>215</sup> Ross Perot's inclusion in the

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206. ROSENSTONE ET AL., *supra* note 5, at 221.

207. *Id.* at 222.

208. *The 15 Percent Barrier*, OPEN DEBATES, <http://opendebates.org/the-issue/15percent.html>.

209. *See* KEEFE & HETHERINGTON, *supra* note 184, at 51.

210. *Id.* at 53.

211. *Id.* at 53–54.

212. ROSENSTONE ET AL., *supra* note 5, at 111.

213. *Id.* at 222.

214. *Id.*

215. The debates themselves would also benefit by receiving less skepticism and a boost of public confidence. *See* MINOW & LAMAY, *supra* note 13, at 100.

1992 debates demonstrated this possibility. For one, he was able to raise public consciousness about vital matters.<sup>216</sup> Another indicator of voter interest is the viewership of the debates, and the 1992 three-way debates had over twice as many viewers as the Clinton-Dole debates of 1996.<sup>217</sup> Television ratings dropped with each Clinton-Dole debate, while the 1992 debates drew progressively larger audiences.<sup>218</sup> Finally, Perot's inclusion in the 1992 debates helped boost voter turnout. Roughly twelve million more people voted than in the previous presidential election.<sup>219</sup>

The American political system currently seems ripe for the introduction of third-party candidates into the presidential debates. Recently, a polling indicated that a record-high forty percent of Americans identified themselves as independents.<sup>220</sup> This percentage was higher than the level of support shown for either of the two major parties.<sup>221</sup> Thus, voters may be more interested than ever to hear alternative points of view. Besides, even if the third-party candidate does not have a realistic chance of winning the presidency, voters may still simply want to see them debate.<sup>222</sup>

### *B. Historical Support*

#### 1. Broader Purposes of the Sherman Act

Benefits to public policy should be influential in antitrust litigation because “the Sherman Act embodies what is to be characterized as an eminently ‘social’ purpose.”<sup>223</sup> Senator John

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216. *Include Perot in Debates; Abolish Dysfunctional Debate Commission*, *supra* note 61. *See also* KEEFE & HETHERINGTON, *supra* note 184 (discussing Perot's use of the debates to raise public awareness of the federal budget deficit issue).

217. *See* Milchen, *supra* note 175.

218. *Id.*

219. *Id.*

220. Jeffrey M. Jones, *Record-High 40% of Americans Identify as Independents in '11*, GALLUP POLITICS (Jan. 9, 2012), <http://www.gallup.com/poll/151943/record-high-americans-identify-independents.aspx>.

221. *See id.* (polling indicated levels of support for Democrats and Republicans at thirty-one percent and twenty-seven percent, respectively).

222. *See, e.g., Include Perot in Debates; Abolish Dysfunctional Debate Commission*, *supra* note 61 (“Perot isn't going to win the election. But so what? He has a lot of interesting, informative things to say, and ought to be heard . . .”).

223. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY* 227 (1954). *See also* RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 205 (1965) (“The political and social arguments against monopoly were pressed with greater clarity than the economic argument and with hardly less fervor.”).

Sherman himself at times evinced the idea that one of the key attributes of the Act was to free citizens of corruption and maintain “freedom of independent thinking in political life.”<sup>224</sup> Its cornerstone principle rests on the philosophy of competition.<sup>225</sup> This philosophy reflects the deep-seated American value of establishing checks to prevent the concentration of power.<sup>226</sup> In addition to its economic uses, there existed a “moral” objective of the Sherman Act, which stood for a notion of fairness and that “newcomers be able to enter the game . . . on reasonably open terms.”<sup>227</sup> Thus, beyond the economic purposes of the Act, there exist the broader purposes of fair competition and checks on concentrated power. These goals would appear to support an application of the Act to the CPD if a court found that the staging organization helps insulate two entities from competition.

For such a powerful law, the Sherman Act contains relatively little and simple language. Section 1, in its entirety, is less than one hundred words.<sup>228</sup> One extensive review of the legislative intent of the Act theorized that Congress was intentionally vague in order to allow for greater judicial discretion.<sup>229</sup> In light of this, a court could point to some historical support if it decides to extend the doctrine for the purposes of limiting exclusionary practices for public good.

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224. THORELLI, *supra* note 223, at 227.

225. *Id.*; see also Peter R. Dickson and Philippa K. Wells, *The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared*, 20 J. PUB. POL’Y & MARKETING 3, 3 (2001) (noting that the Sherman Act “enshrine[ed] the principle that more competition is better than less competition”).

226. See HOFSTADTER, *supra* note 223, at 205 (“From the pre-Revolutionary tracts through the Declaration of Independence and *The Federalist* to the writings of the states’ rights advocates, and beyond the Civil War into the era of antimonopoly writers and the Populists, there had been a perennial quest for a way of dividing, diffusing, and checking power and preventing its exercise by . . . a consolidated group of interests at a single center.”).

227. *Id.* at 209.

228. Sherman Act § 1, 15 U.S.C. § 1 (2012) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”).

229. See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 48 (1966) (“Sherman and others clearly believed that they were legislating a policy and delegating to the courts the elaboration of subsidiary rules.”).

2. Evidence of an Evolving Doctrine: The Baseball Trilogy

Although the Supreme Court has previously frowned upon the idea of applying antitrust law to the political arena,<sup>230</sup> that does not mean this will always be its impression. Antitrust law doctrine has shown an ability to change over time, and this flexibility is well evidenced by the evolution of baseball's "antitrust exemption." In *Federal Baseball Club v. National League of Professional Baseball Clubs*<sup>231</sup>—the Court's first opportunity to review the application of antitrust law to sports—the Supreme Court ruled that this profession did not constitute commerce for purposes of the Sherman Act.<sup>232</sup> Although the lower courts may not have liked this result,<sup>233</sup> the Court—in follow-up case *Toolson v. New York Yankees*<sup>234</sup>—refused to overturn *Federal Baseball* because the sport had developed a reliance on the exemption.<sup>235</sup>

Despite its refusal to subject baseball to antitrust violations, the Court eventually changed its stance that sports did not constitute commerce under the Sherman Act. In the years following *Federal Baseball* and *Toolson*, the Court ruled that professional boxing,<sup>236</sup> football,<sup>237</sup> and basketball<sup>238</sup> leagues were all subject to antitrust liability. In *Flood v. Kuhn*<sup>239</sup>—the final case of the "baseball trilogy"—the Court, still refusing to remove baseball's antitrust exemption,<sup>240</sup> admitted this was an illogical conclusion supported only by stare

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230. See *supra* Part II.B (discussing the *Noerr-Pennington* doctrine).

231. 259 U.S. 200 (1922).

232. *Id.* at 208–09 (refusing to analyze baseball's reserve clause after holding that the fans' personal effort to cross state lines to pay to watch the exhibitions "is not a subject of commerce").

233. PETER A. CARFAGNA, SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA'S THREE "MAJOR LEAGUES" 56 (2d ed. 2011) (noting a statement by the Second Circuit that players were regarded as "quasi-peons" (quoting *Gardella v. Chandler*, 172 F.2d 402, 410 (2d Cir. 1949))).

234. 346 U.S. 356 (1953).

235. See *id.* at 357 ("The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.").

236. *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955).

237. *Radovich v. NFL*, 352 U.S. 445 (1957).

238. *Haywood v. NBA*, 401 U.S. 1204 (1971).

239. 407 U.S. 258 (1971).

240. *Id.* at 283–84 ("Congress, by its positive inaction, has allowed [*Federal Baseball* and *Toolson*] to stand for so long . . . [that it] has clearly evinced a desire not to disapprove of them legislatively.").

decisis that could only be remedied by the legislature.<sup>241</sup> Nevertheless, the Court firmly stated that “[p]rofessional baseball is a business and it is engaged in interstate commerce,”<sup>242</sup> thus coming full circle on its initial determination. This willingness to adapt its analysis in different times may somewhat relieve any third-party candidate discouraged by the Courts initial reaction to antitrust application in the political arena in *Noerr-Pennington*.

### C. *Ease of Transition*

A court should not hesitate to find the 15% requirement unreasonable for fear of the unknown aftermath following its decision. No chaos would ensue. The CPD would need to establish a new set of “pre-established objective criteria” for its candidate selection in order to comply with FECA.<sup>243</sup> In doing so, it would be able to maintain its first two requirements—that a client be constitutionally eligible and be on a number of ballots that would make it mathematically possible to win the Electoral College.<sup>244</sup> These represent a candidate’s theoretical chance of winning, and without them, the debates could be open to countless participants.<sup>245</sup> Such an overcrowded event would likely render it impossible to “intelligently evaluate the candidates’ personal qualities and their positions on vital public issues,”<sup>246</sup> thus depriving the public of a key benefit of the debates. These first two requirements are therefore reasonable because they allow a staging organization to avoid this outcome.

Additional requirements could also be added to ensure the public benefits from the debates. There are justifications to limit access to the debates beyond the first two requirements because it is reasonable to think that these alone would be insufficient to guarantee a manageable number of participants.<sup>247</sup> And as discussed earlier, there are a number of available limitations that could meet these

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241. *Id.* at 284 (“If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.”).

242. *Id.* at 282.

243. *See* 11 C.F.R. § 110.13(c) (2012) (“For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate.”).

244. *See 2012 Criteria, supra* note 7.

245. *See* MINOW & LAMAY, *supra* note 13, at 85–86 (noting concerns that relaxed standards will lead to a chaotic event and risk losing the major-party candidates).

246. *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 53 (1976)).

247. *See supra* note 186 and accompanying text.

justifications without being unduly restrictive.<sup>248</sup> Therefore, if a court rules that the current CPD requirements are unreasonable, a chaotic event to the detriment of the public is not likely to follow. Instead, it is reasonable to envision a better debate platform emerging as the dust settles.

## CONCLUSION

Unless the CPD voluntarily revises its selection criteria, third-party candidates are likely to continue their pursuit of the podium through the court system each election season. The debates have become essential to establishing a third-party candidate's viability, and without them, the candidates are unlikely to ever reach the 15% threshold requirement. This catch-22 leaves litigation as the most feasible route for seeking inclusion, despite the third-party candidates' historical lack of success using this tactic.

The Supreme Court's sweeping statements in direct opposition to antitrust application in the political arena<sup>249</sup> would probably be very influential in a court's analysis. Furthermore, the Sherman Act is universally known as an economic doctrine.<sup>250</sup> These considerations make a third-party victory under the theory seem unlikely. Nevertheless, a plaintiff could make credible responses to both of these issues. For one, the situations in *Noerr-Pennington* can be distinguished. Those facts involved political activity in the form of influencing official legislative action, while a third-party-inclusion suit would deal with seeking to obtain a position. Further, the baseball trilogy demonstrates the Court's flexibility in broadening its antitrust application.

If a court reaches the merits, it would need to find that the CPD's selection criteria have an effect on commerce, arise out of a conspiracy between the Republican and Democratic National Committees, and constitute an unreasonable restraint of competition. Due in part to the candor of its founders, there is a compelling argument that the CPD is, in essence, a bipartisan organization; and due to the essential nature of the debates and the feasibility of alternate criteria, there also exists a compelling argument that the 15% requirement is an unreasonable restraint. The most strained argument is probably showing an effect on commerce. While no argument is likely to win on its own, mentioning all those suggested

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248. See *supra* Part III.C.2.b (providing examples of less restrictive alternatives).

249. See *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961) (noting the application of the Sherman Act is "not at all appropriate . . . in the political arena.").

250. See *id.* (noting that the Sherman Act is "tailored . . . for the business world").

in this Note—the effect on salaried position involved, the corporate funding, and advertisements—could be persuasive to a court weighing the totality of circumstances.

Also, there is evidence suggesting both a more expansive, social purpose of the Sherman Act and that its simplistic language was drafted to allow for more judicial discretion. Therefore, if a court finds that it could plausibly apply antitrust law, it should do so in light of the public policy benefits that stem from third-party inclusion.

Despite third-party candidates' lack of success in the courts, some opinions appeared reluctant to rule in favor of the CPD. Recall in *Buchanan*, the court noted that the FEC's decision to classify the CPD as "nonpartisan" would unfortunately lead to "increased public cynicism about the integrity of our electoral system" and recognized the "good public policy" of allowing third-party candidates in the debates.<sup>251</sup> This language may suggest that a wind of change is around the corner, and that a court is looking for the right moment to step in. Antitrust application could prove to provide that opportunity.

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251. *Buchanan v. FEC*, 112 F. Supp. 2d 58, 73, 76 (D.D.C. 2000).

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