WHACKING THE POLITICAL MONEY "MOLE" WITHOUT WHACKING SPEECH: ACCOUNTING FOR CONGRESSIONAL SELF-DEALING IN CAMPAIGN FINANCE REFORM AFTER *WISCONSIN RIGHT TO LIFE*

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This note examines the current campaign financing scheme's effectiveness in fighting campaign corruption and the significant restrictions these laws place on political speech. The author begins by chronicling the myriad of campaign finance scandals that plagued United States elections throughout the past century, as well as the hodgepodge of legislative reactions to these scandals that led many commentators to characterize campaign finance reform as a game of "Whack-a-Mole." Beyond the legislation itself, the Supreme Court's current framework for evaluating campaign finance restrictions is also problematic and tends to perpetuate incumbency and corruption while stifling political criticism. To combat these problems, the author proposes a heightened legal standard for evaluating campaign speech restrictions that requires members of Congress to justify any self-dealing legislation under the inherent fairness standard used in corporate law. Borrowing from the framework of corporate-finance disclosure laws, the author further recommends a shift from today's ineffective, nebulous campaign finance model to a less restrictive scheme focused on disclosure and fueled by grassroots participation. By promoting transparency and accountability for campaign contributions, parties in interest will be forced out of the shadows, preventing campaign corruption and enabling voters to make informed decisions on Election Day.

I. INTRODUCTION

In late 2005, while campaigning for national Democrats in an attempt to gain a legislative majority, then-Senate Democratic Leader

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Harry Reid called the 109th Congress "the most corrupt in history."[1] Contemporaneous and current public opinion snapshots suggest the voting public held (and still holds) similar views,[2] and for good reason: in the twelve months preceding the 2006 federal elections, one U.S. representative resigned after admittedly accepting more than $2 million in a brazen bribery scheme,[3] two representatives resigned after being implicated in the Jack Abramoff fundraising and lobbying scandal,[4] the FBI found $90,000 cash in another representative's freezer while searching his home and office as part of a bribery probe,[5] and police suspected several representatives of participating in or attempting to conceal a sex scandal involving former congressional pages.[6] As it has been for years, money and power, including massive political donations, were the root of much Washington corruption.

Amazingly, many events in the Abramoff saga, called "the biggest scandal in Congress in over a century,"[7] occurred *after* Congress passed the McCain-Feingold Bipartisan Campaign Reform Act of 2002 (BCRA),[8] campaign finance legislation that restricts certain forms of political speech in exchange for a promise to "end a system of unlimited donations that has blatantly put political access and influence up for sale."[9] In upholding several of BCRA's most controversial and restrictive provisions, the Supreme Court recognized the law's significant burden on First Amendment-protected speech but found Congress's legiti-

1. Then-Senate Democratic Leader Reid's classification came during an appearance on a weekly public affairs news program on December 18, 2005. *Fox News Sunday* (Fox News television broadcast Dec. 18, 2005) (transcript available at http://www.foxnews.com/story/0,2933,179088,00.html). Senator Reid is now the Senate Majority Leader.

2. Public opinion polls reveal exceptionally high levels of distrust. *See, e.g.*, *News Hour: Congress Approval Rating Slides to Lowest Point in 14 Years* (PBS television broadcast Oct. 19, 2006) (transcript available at http://www.pbs.org/newshour/bb/politics/july-dec06/congress_10-19.html).

3. Representative Randy "Duke" Cunningham resigned from Congress after confessing to tax evasion and conspiring to pocket $2.4 million in bribes, "including a Rolls-Royce, a yacht [that he re-christened 'Duke-Stir'] and a 19th-century Louis-Philippe commode." Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns: GOP's Cunningham Faces Jail Term,* WASH. POST, Nov. 29, 2005, at A1.

4. Representative Bob Ney resigned after pleading guilty to conspiracy and making false statements, acknowledging taking trips, tickets, meals, and campaign donations from disgraced lobbyist Jack Abramoff in return for official actions on behalf of Abramoff clients. Susan Schmidt & James V. Grimaldi, *Ney Sentenced to 30 Months In Prison for Abramoff Deals*, WASH. POST, Jan. 20, 2007, at A3. Representative Tom Delay resigned after being implicated in several unethical activities, including the Abramoff scandal. *Id.*

5. Jeffrey H. Birnbaum, *A Few Degrees of Separation From Hillary Clinton's Top Adviser,* WASH. POST, Feb. 20, 2007, at A11.

6. Charles Babington & Jonathan Weisman, *Rep. Foley Quits In Page Scandal: Explicit Online Notes Sent to Boy, 16*, WASH. POST, Sept. 30, 2006, at A1.

7. Philip Shenon, *Corruption Inquiry Threatens to Ensnare Lawmakers*, N.Y. TIMES, Nov. 20, 2005, at 25.

8. Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C. and 47 U.S.C.).

9. Senator Russell Feingold, *Campaign-Finance Reform? Think Enron*, COUNTERPUNCH, Jan. 27, 2002, http://www.counterpunch.org/feingoldenron.html (last visited Feb. 1, 2008).

mate interest in preventing corruption, or the appearance of corruption, sufficient to override it.[10]

Despite these fundamental restrictions on donations and communications, fundraising and lobbying scandals plague the federal executive and legislative branches, federal campaign spending and costs continue to outstrip inflation in the post-BCRA period,[11] and third-party groups such as "Swift Boat Veterans for Truth" and "MoveOn.org" continue to play major roles in federal campaigns.[12] Reform crusaders recognize BCRA's failure to curb campaign expenditures or limit money's influence in political circles and have begun advocating for further restrictions, particularly on third-party election communications.[13] However, a recent shift in Supreme Court jurisprudence may thwart these efforts;[14] a newly formed majority of Justices are signaling a willingness to revisit restrictive campaign finance laws.

This note contrasts the current campaign financing scheme's effectiveness in combating corruption against its significant restrictions on political speech. It proposes a move from today's centralized, restrictive, shadowy, and mostly ineffective design to a less-restrictive, transparent model fueled by grassroots participation. Part II chronicles campaign finance scandals over the last century, coupled with corresponding legislative reactions, introducing the Whack-a-Mole strategy Congress employs to combat corruption. Part III analyzes the Supreme Court's framework for evaluating BCRA and other campaign finance restrictions, appraising both previously measured variables and overlooked considerations in light of actual and perceived corruption at the federal level and cataloguing the Court's various twists and turns from early campaign finance law to the present day. Part IV proposes that the Court adopt a heightened legal standard for evaluating campaign speech restrictions, requiring Congress to justify self-dealing legislation under the inherent fairness standard borrowed from corporate law. After finding BCRA's most restrictive provisions deficient, this section proposes replacing the current restrictive model with a robust campaign finance disclosure scheme patterned after corporate-finance disclosure laws, preventing corruption by

10. McConnell v. FEC, 540 U.S. 93, 224 (2003).

11. BCRA became effective for the 2004 election cycle. The term "election cycle" means the period beginning on the day after one election for an office or seat (for example, the 2006 congressional election cycle began November 3, 2004) and ending on the date of the next election for the same office or seat (the 2006 congressional cycle ended November 7, 2006). 2 U.S.C. § 431(25) (2000 & Supp. VI 2006).

12. *See* Tim Jones & John McCormick, *Attack Ads by 527s Spark Bitter Debate*, CHI. TRIB., Aug. 27, 2004, at C1.

13. Third-party election communications are made by those who are not candidates and are affiliated with a political committee. Senators John McCain and Russ Feingold recently introduced legislation to further reduce these third-party communications. *See* 527 Reform Act of 2007, S. 463, 110th Cong. (2007); *see also* Senator Russ Feingold, Factsheet on 527 Reform Act, http://feingold.senate.gov/issues_527facts.html (last visited Oct. 16, 2007).

14. *See* FEC v. Wis. Right to Life, 127 S. Ct. 2652 (2007).

increasing transparency and holding candidates responsible for the company they keep.

II. BACKGROUND

Government attempts to restrict campaign financing are appropriately compared to playing "Whack-a-Mole," a game in which a player wielding a mallet attempts to "whack" plastic mole-shaped creatures as they pop out of varying "mole holes."[15] The idea is "the mole pops up in one hole, and you whack him down. But then he pops up somewhere else."[16] The analogy to campaign finance is apt: whenever restricted in one form, campaign money always surfaces in another,[17] a pattern repeated *ad infinitum* since Congress began regulating campaign receipts and expenditures in 1907.[18] From Theodore Roosevelt's influence peddling to the Teapot Dome scandal, and Watergate to Enron, Congress has been selectively whacking at (often partisan) campaign finance moles for more than a hundred years. BCRA is simply its most recent strike.

A. Campaign Finance Regulation: Early Attempts

Campaign financing has been a political issue since at least the Civil War, but it remained largely unregulated until 1904, when Democratic presidential nominee Alton Parker alleged that corporations used campaign gifts to purchase influence with President Theodore Roosevelt.[19] Although Roosevelt denied it, subsequent investigation (conveniently completed *after* the election) forced several major companies to admit making significant contributions to his campaign.[20] In a politically expedient move, Roosevelt then championed campaign finance reform in 1905 and 1906; in 1907, Congress passed the Tillman Act, prohibiting corporations and national banks from contributing to federal political campaigns.[21]

Congress enacted the nation's first campaign finance disclosure requirement under the Publicity Act in 1910, compelling every national party or campaign committee operating in two or more states to file *post-election* reports of receipts and expenditures made in connection with

15. Chuck Alston, *The Maze of Spending Limits: An Election Field Guide*, 48 CQ WKLY. 1621, 1622 (1990).

16. *Id.*

17. *Id.*; *see also* McConnell v. FEC, 540 U.S. 93, 224 (2003) (noting that "[m]oney, like water, will always find an outlet"). The term "Whack-a-Mole" is slang for repetitious and seemingly futile tasks: for example, the computer industry uses it to describe the near-impossible task of fending off recurring spammers. *See* Spambot Beware, Glossary of Spam Related Terms, http://www.turnstep.com/Spambot/glossary.html#whackamole (last visited Oct. 16, 2007).

18. BROOKINGS INST., CAMPAIGN FINANCE REFORM: A SOURCEBOOK 27 (1997).

19. *Id.*

20. *Id.*

21. *Id.* at 27–28.

elections for the U.S. House of Representatives.[22] Congress amended the Publicity Act in 1911, adding Senate committees to its ambit and requiring that all committees report receipts and expenditures both before and after an election.[23] The 1911 amendment also introduced campaign spending limitations, restricting House campaigns to $5000 and Senate campaigns to $10,000, but the Supreme Court struck down the expenditure limits in 1921 on the very narrow ground that congressional authority to regulate elections did not extend to party primaries and nomination activities.[24]

The Teapot Dome scandal created another opportunity for reform in 1922, when Secretary of the Interior Albert Fall leased the rights to oil fields located on public land to Harry Sinclair (of Sinclair Oil) and Edward Doheny (of Pan American Petroleum) in exchange for gifts totaling approximately $404,000.[25] The bribery initially went unnoticed because most of the gifts were made during nonelection years, thus avoiding the Publicity Act's disclosure requirements.[26] Congress passed the Federal Corrupt Practices Act of 1925 (FCPA) soon after Fall's misdeeds became public.[27]

FCPA required all multistate political committees and federal candidates to file quarterly statements, reporting all contributions exceeding $100, even in nonelection years.[28] Congress also reworked its spending limits scheme, limiting Senate campaigns to $25,000 and House campaigns to $5000.[29] Although seemingly a very powerful tool in the fight against corruptive campaign financing practices, FCPA proved to be unwieldy, and Congress spent the next fifty years responding to various minor scandals.[30]

B. The Federal Election Campaign Act of 1971: No Scandal, but Partisan Self-Interest Motivates Reform

In the late 1960s and early 1970s, Congress once again looked to overhaul the campaign finance system, despite the absence of a significant fundraising scandal. Instead, legislators appear to have been motivated by self-interest: in 1968, aggregate campaign spending eclipsed $300 million, with more than $58.9 million going towards radio and television spots (compared with $155 million and $9.8 million, respectively,

22. *Id.* at 28.
23. *Id.*
24. Newberry v. United States, 256 U.S. 232 (1921).
25. BROOKINGS INST., *supra* note 18, at 29. The Teapot Dome is a rock formation on the Wyoming oil field leased by Secretary Fall to Sinclair. *Id*.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 29–35.

just twelve years before).[31] In other words, campaigns became expensive,[32] and many legislators were concerned they would be unable to keep up with rising campaign costs, especially as television gained a more integral role in campaign advertising.[33] Democrats were particularly concerned about the rising costs, since Republicans were more successful in raising large sums and had spent more than twice as much money in the 1968 presidential contest.[34] Democratic leadership seized on these concerns, triggering further reform that culminated in the Federal Election Campaign Act of 1971 (FECA 1971),[35] legislation designed to restrict rising campaign costs and strengthen disclosure requirements.[36]

FECA 1971 altered campaign finance law in two major ways: first, by imposing complex spending limits on all candidates for federal elections;[37] and second, by requiring federal candidates and political committees to publicly disclose receipts and expenditures.[38] The law became effective for the 1972 election but did little to slow a spending surge that heavily favored Republicans—President Richard Nixon spent more than twice as much in 1972 as he did in 1968, while his Democratic opponent, George McGovern, spent more than four times what Hubert Humphrey did in 1968, but Republicans still outspent him by a substantial margin.[39] Although representing a significant attempt to reshape the way candidates and parties finance campaigns, FECA 1971 failed to curtail money's effect on the political process.

C. FECA Amendments and Buckley*: Dawn of Modern Reform*

On Saturday, June 17, 1972, in the midst of the first post-FECA 1971 election cycle, police arrested five men in what turned out to be "an elaborate plot to bug the offices of the Democratic National Committee" at the Watergate building in Washington, D.C.[40] In the following months, the FBI discovered that the Watergate bugging incident "stemmed from a massive campaign of political spying and sabotage conducted on behalf of President Nixon's re-election" and that the spy-

31. *Id.* at 31.

32. The 1968 election would have cost $1.6 billion in 2004 dollars, and the 1956 election would have cost $1.041 billion. These calculations were made using the U.S. Department of Labor consumer price index calculator, available at http://www.bls.gov/cpi/ (last visited Mar. 14, 2007). Federal candidate spending in 2004 (the first election held under BCRA restrictions) totaled $1.852 billion. Ctr. for Responsive Politics, The Big Picture: 2004 Election Cycle, http://www.opensecrets.org/bigpicture/stats.asp?cycle=2004&display=T&type=A (last visited Oct. 23, 2007).

33. BROOKINGS INST., *supra* note 18, at 31.

34. *Id.* at 32.

35. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (amended 1974).

36. BROOKINGS INST., *supra* note 18, at 52.

37. *Id.*

38. *Id.*

39. *Id.* at 32.

40. Alfred E. Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST, June 18, 1972, at A1.

ing efforts were "financed by a secret, fluctuating $350,000–$750,000" Nixon campaign fund.[41] Despite reports that he orchestrated the illegal activity, Nixon crushed Democratic nominee George McGovern in "a landslide victory rivaling the greatest of American political history."[42] But as the *Washington Post*'s investigation into Nixon's campaign committee illuminated the depths of Washington corruption, political expediency once again provoked reform. In 1974, the Democratically controlled Congress amended the Federal Election Campaign Act (FECA 1974),[43] creating the most comprehensive campaign finance restrictions in U.S. history.[44]

FECA 1974 is an amendment in name only; it essentially replaced the entire federal campaign finance structure with new, more restrictive provisions. For example, Congress substituted the media spending limits enacted in 1971 with strict campaign expenditure limits.[45] FECA 1974 also limited national party expenditures made on behalf of candidates,[46] preserved FECA 1971's contribution limits placed on candidates and their immediate families, and introduced additional restrictions preventing candidates from accepting large donations from either individuals or political action committees (PACs).[47] Congress also established a federal agency tasked with administering and enforcing federal campaign finance laws, the Federal Election Commission (FEC).[48]

Soon after FECA 1974 became effective, Senator James Buckley and presidential aspirant Eugene McCarthy sued Francis Valeo, Secretary of the Senate and member of the newly formed FEC, challenging several provisions under the First Amendment.[49] In *Buckley v. Valeo*, the Supreme Court upheld many of these provisions, including (1) contribution limitations to federal candidates,[50] (2) disclosure and recordkeeping requirements,[51] and (3) public financing of presidential elec-

41. Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST, Oct. 10, 1972, at A1.

42. David S. Broder, *Nixon Wins Landslide Victory; Democrats Hold Senate, House*, WASH. POST, Nov. 8, 1972, at A1.

43. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, *amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 2 U.S.C. §§ 431–456 (2000)).

44. BROOKINGS INST., *supra* note 18, at 53.

45. *Id.*

46. *Id.*

47. *Id.* at 54. Officially termed a "nonconnected committee" by the FEC, a PAC is a "political committee that is not a party committee, [or] an authorized committee of any candidate." 11 C.F.R. §§ 100.5(a), 106.6(a) (2006).

48. BROOKINGS INST., *supra* note 18, at 53.

49. CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS; CAMPAIGN FINANCE REGULATION UNDER THE FIRST AMENDMENT: *BUCKLEY V. VALEO* AND ITS SUPREME COURT PROGENY, at CRS-3 (2003) (on file with author).

50. *See* Buckley v. Valeo, 424 U.S. 1, 35, 38 (1976) (upholding the provisions at 2 U.S.C. § 441a (2000 & Supp. 2006)).

51. *See id.* at 84 (upholding the provisions at 2 U.S.C. § 434).

tions.[52] Endorsing these provisions, the Supreme Court confirmed Congress's constitutional authority to limit contributions to candidates and committees as long as they were enacted to prevent actual or perceived corruption.[53] However, the Court found other provisions unconstitutional under First Amendment "exacting scrutiny" review, including candidate and independent (noncandidate) expenditure limitations, effectively equating money with speech.[54] After receiving judicial approval, the remaining FECA 1974 provisions became the foundation for modern campaign finance regulation, and the Court's rationale in upholding them the basis for future regulatory tightening.[55]

D. Enron: Another Scandal Provokes Massive Reform, Congress Passes BCRA

For nearly two decades after *Buckley*, federal campaign finance laws stood mostly static, although campaign techniques became increasingly sophisticated and outside players more engaged.[56] Questionable fundraising practices during the 1996 presidential election once again propelled campaign finance reform to the forefront. Senators John McCain and Russ Feingold proposed BCRA to "clean up" campaigns,[57] however, partisan politics and constitutional concerns prevented its passage for several more years. In 2002, reformers seized on scandal once again: the untimely demise of Enron, which reached deep into legislators' pockets, goaded a reluctant Congress and President into action. Just four months after Enron declared bankruptcy,[58] President George W. Bush signed BCRA into law.[59]

*1. Post-*Buckley *Campaigning: Unparalleled Sophistication*

In its first decade after enactment, FECA 1974 appeared effective in increasing transparency and eliminating the large financial gifts that led to Watergate and other scandals.[60] However, campaigns, national par-

52. *See id*. at 85–86 (upholding the provisions at 26 U.S.C. §§ 6096, 9001–9012, 9031–9042).

53. *Id.* at 58.

54. *Id.* at 17.

55. CONG. RESEARCH SERV., *supra* note 49.

56. BROOKINGS INST., *supra* note 18, at 34.

57. R.W. Apple, Jr., *Odd Couple Cross Political Lines to Fight System*, N.Y. TIMES, Oct. 6, 1997, at A14.

58. *See* Rebecca Smith, *Enron Files for Chapter 11 Bankruptcy, Sues Dynegy—Proceeding Is Biggest Ever In the U.S., With Assets Of Just Under $50 Billion,* WALL ST. J., Dec. 3, 2001, at A3.

59. Press Release, Office of the Press Secretary, the White House, President Signs Campaign Finance Reform Act, Statement by the President (Mar. 27, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/03/20020327.html.

60. CAMPAIGN LEGAL CTR., THE FEDERAL ELECTION CAMPAIGN ACT: A NEW ERA OF REFORM (2006), *available at* http://www.campaignfinanceguide.org/guide-34.html.

ties, and special interest groups soon found new loopholes in the system, resulting in substantial levels of unregulated campaign spending.[61]

Party committees found and exploited loopholes as soon as the early 1980s, collecting "unregulated" money—corporate and labor union donations and unlimited funds from individuals—to fund "party-building" activities such as voter registration and get-out-the-vote (GOTV) programs.[62] Known in campaign vernacular as "soft money," these funds could not be used to fund explicit campaign advertisements.[63] However, noncandidate committees could use soft money for "issue advocacy" purposes,[64] so long as they did not cross over into "express advocacy" by using any of the "magic words" the *Buckley* Court deemed to explicitly advocate for election or defeat.[65] In 1988, both Democratic and Republican national party committees raised and spent large sums of soft money in efforts to influence the presidential election.[66] The tactic proved so successful that soft money became an increasingly significant factor in financing presidential and congressional elections from 1988 through 2002.[67]

2. The Clinton Fundraising Scandal, Partisan Politics, and Congress's Convoluted Self-Interests

The 1996 presidential campaign brought to light many questionable fundraising practices, including contributions to party committees from foreign nationals and the "selling" of access to the White House by offer-

61. *Id.*

62. *Id.* The national committees petitioned the FEC to allow them to use unregulated money in this way in 1979; the FEC granted this request. *Id.*

63. The FEC describes "soft money" as funds prohibited under FECA 1974, "either because they come from a prohibited source, see 2 U.S.C. §§ 441b, 441c and 441e, or because the amount exceeds the contribution limits in 2 U.S.C. § 441a." Memorandum from Lawrence M. Noble, General Counsel, FEC, to the Commissioners of the FEC (June 6, 1997) (on file with author). These funds could not legally be used in connection with federal elections, but could be used for other purposes. FED. ELECTION COMM'N, TWENTY-YEAR REPORT 23 (1995). The term "hard money," refers to funds raised and spent in accordance with the limitations, prohibitions, and reporting requirements of federal election law. *See* 2 U.S.C. §§ 441a, 441b(a) (2000 & Supp. VI 2006). While committees could not use soft money to fund express advocacy (and candidates could not use soft money at all), all political actors could use hard money in connection with a federal election. CAMPAIGN LEGAL CTR., *supra* note 60.

64. "Issue advocacy" is campaign vernacular for communications that do not directly or explicitly call for a candidate's election or defeat. The Court created the express issue-advocacy distinction in *Buckley*. Buckley v. Valeo, 424 U.S. 1, 44 (1976). Independent groups often used words along the lines of "Call [candidate *X*], tell [him or her] you don't appreciate [vote *Y*]" to distinguish an issue advocacy mailer from an express advocacy mailer. For an example of a television commercial using this type of "call to action," see Mark H. Rodeffner, *NRSC Blasts Democrats in Iowa, Colorado*, NATIONAL JOURNAL.COM, Sept. 18, 2002, http://nationaljournal.com/members/adspotlight/2002/09/0918nrsc2.htm (reprinting script of "Exposed" ad stating on screen "Tell Harkin No More Taxes; www.HarkinExposed.com; 515-284-4574").

65. *Buckley*, 424 U.S. at 44 n.52; *see also infra* notes 133–36 and accompanying text (explaining the distinction and specifying the magic words).

66. CAMPAIGN LEGAL CTR., *supra* note 60.

67. *Id.*

ing coffee meetings and sleepovers in the Lincoln bedroom to large donors. These practices led to three separate federal government investigations into the financing of the 1996 presidential race alone.[68] Campaign finance reform once again became a priority for certain members of Congress, particularly Senators McCain and Feingold and Representatives Shays and Meehan, who drafted legislation that would build upon the FECA 1974 framework.[69] Called the Bipartisan Campaign Reform Act, the bill languished in committee, failed in either one or both legislative bodies, and faced insurmountable procedural roadblocks from 1996 through 2000.[70]

Senator McCain made reform a central issue of his "Straight Talk Express" campaign for the presidency in 2000, bringing independent, reform-minded voters into the Republican primary process.[71] His chief rival, George W. Bush, appeased the conservative Republican base by promising to veto the bill on both partisan and constitutional grounds.[72] Although Bush won the White House, McCain's national visibility encouraged reformers, who appeared poised to enact campaign finance reform in 2001. Reform opponents turned to the Republican House leadership, employing procedural machinations to frustrate a substantive vote on the issue.[73] In the early morning hours of July 12, 2001, the House Rules Committee reported House Resolution 188 to the floor, a rule amalgamating several free-standing "poison pills" designed to prevent the bill's passage into one "manager's amendment."[74] One particularly unpalatable provision would have forced incumbent representatives to raise at least fifty percent of their total campaign contributions from their home states,[75] a provision representatives did not accept because it would impair their incumbency fundraising advantage. After a rollercoaster day of voting, the resolution to send BCRA to the floor for a substantive vote failed 203-228.[76] The vote proved fortuitous for House

68. CAMPAIGN LEGAL CTR., THE BIPARTISAN CAMPAIGN REFORM ACT: RESTORING THE REFORMS (2006), *available at* http://www.campaignfinanceguide.org/guide-35.html.

69. *Id.*

70. *Id.* Campaign Finance Reform was a mostly partisan issue, with Republicans fighting reform efforts and Democrats supporting them. Democrats appear to have been motivated by Republicans' fundraising success under FECA rules; Republicans blocked the bill to preserve the status quo in the party's favor. *Id.*

71. Howard Kurtz, *McCain's Life? It's an Open Bus*, WASH. POST, Feb. 14, 2000, at C1 (noting that Straight Talk Express was both a campaign slogan and a campaign bus).

72. *See, e.g.*, *This Week: Roundtable on Confederate Flag and Iowa Caucuses, Interview with George W. Bush* (ABC television broadcast Jan. 23, 2000) (transcript on file with author). When host George Will asked Bush if he would veto the McCain-Feingold legislation, Bush replied: "[Y]es I would." *Id.*

73. *See* H.R. REP. NO. 107-135, at 1–2 (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_reports&docid=f:hr135.107.pdf.

74. *See id.*

75. *Id.* at 4.

76. The vote tally went up and down throughout the afternoon, with both parties trying to "whip" their members into voting with party leadership. House Republican leadership threatened its freshman representatives, suggesting the national party would withhold financial election resources or

leadership, providing them plausible political cover for leaving the bill languishing in committee.[77]

Frustrated by House procedure, Shays and Meehan deployed the discharge petition, a procedural countermeasure that would force House leadership to discharge the bill from committee and onto the floor for a vote on the merits.[78] The petition immediately attracted 205 of the necessary 218 signatures[79] but floundered until reformers seized on a new scandal they used to pry holdouts from their positions.

3. The Enron Scandal

On December 1, 2001, Houston energy giant Enron filed for Chapter 11 Bankruptcy protection, culminating a corporate collapse of historic proportions.[80] Seventy-one then-incumbent U.S. Senators and 188 then-incumbent members of the U.S. House of Representatives, Republicans and Democrats alike, received money from Enron.[81] Media reports uncovered the close ties between campaign donations and Enron's largely unregulated status.[82] For example, Senator Charles Schumer received more than $21,000 during his campaign to defeat Senator Al D'Amato; he subsequently supported Enron's position on electricity deregulation as a way to lower consumer prices.[83] The Bush campaign received thousands of dollars from Enron sources, and the Administration included Enron on its Energy Task Force—a group formed to evaluate and recommend national energy policy.[84] BCRA proponents used these incidents to suggest Enron "bought" the federal government, deftly using the scandal and its political fallout to enact new campaign finance restrictions.[85]

4. Congress Responds to Enron, Enacts BCRA

Congress quickly responded to the Enron scandal: the House passed BCRA on February 14, 2002, less than three months after the

committee assignments should they vote against the rule. In the end, Representative Rob Simmons was the only Republican freshman to vote against House leadership. Alexander Bolton, *GOP Leaders Threaten Freshman on Reform Vote*, HILL, July 18, 2001, at 1.

77. Kerry Kantin, *McCain Helps to Map Next House Moves*, HILL, July 18, 2001, at 1.

78. H.R. Discharge Petition No. 107-0003 (2002), *available at* http://clerk.house.gov/107/lrc/pd/Petitions/Dis3.htm.

79. *Id*.

80. Smith, *supra* note 58.

81. Liz Marlantes & Gaik Russell Chaddock, *Enron's Reach in Congress: The Company's Deep Connections to Both Parties Renews Calls for Campaign-Finance Law*, CHRISTIAN SCI. MONITOR, Jan. 15, 2002, at 1, 4, *available at* http://www.csmonitor.com/2002/0115/p1s2-uspo.html.

82. *Id.* at 4.

83. *Id.*

84. *Id.*

85. *See, e.g.*, *Campaign Finance: Exploiting Enron—Proponents of Campaign Finance Reform Are Pointing to Enron as an Example of Why Legislation Should Be Passed*, NAT'L REV., Feb. 25, 2002 at 16–17.

company declared bankruptcy, and the Senate approved the legislation a little more than a month after the House acted.[86] President Bush broke his campaign promise and signed the bill into law. At the signing ceremony, Bush expressed his concern that the newly enacted law was in many respects unconstitutional, but left it to the courts "[to] resolve these legitimate legal questions."[87]

BCRA changed the campaign financing landscape by preventing national political parties, federal officeholders, and candidates from raising and spending soft money[88] and by enacting a new definition of electioneering communications (express advocacy) to reduce candidate-specific advertisements during political campaigns.[89] Under BCRA, national party committees can use only hard money, originally limited to $2000 per person, per cycle (but indexed to inflation), to create and disseminate "campaign" or "issue" information.[90] Furthermore, any advertisement that refers to a clearly identified federal candidate within sixty days of a general election, or thirty days before a primary election, is considered a campaign ad—meaning it may only be funded only by hard money.[91]

5. BCRA Upheld in McConnell v. FEC[92]

The same day President Bush signed BCRA into law, Senator Mitch McConnell and the National Rifle Association challenged BCRA as an unconstitutional First Amendment restriction.[93] They were soon joined by the American Civil Liberties Union and more than eighty additional plaintiffs, forming an unlikely alliance.[94] The three-judge federal district court panel hearing the case issued a split decision, resulting in a 1600-page hodgepodge striking down many BCRA provisions.[95] However, the district court stayed its ruling, leaving the law intact pending Supreme Court resolution.[96] On December 10, 2003, the Supreme Court upheld much of the statute, although the Justices projected uncertainty and in-

86. Thomas.gov, Library of Congress, Bill Summary and Status for H.R. 2356, To amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform, http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02356:@@@X.

87. Statement on Signing the Bipartisan Campaign Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 517–18 (Mar. 27, 2002).

88. Bipartisan Campaign Finance Reform Act, 2 U.S.C. § 441(i) (2000 & Supp VI 2006).

89. *Id.* § 434(f)(3).

90. The figure is $2300 for the 2008 electoral cycle. Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294 (Feb. 5, 2007).

91. 2 U.S.C. § 434(f)(3).

92. 540 U.S. 93 (2003).

93. CAMPAIGN LEGAL CTR., CONSTITUTIONAL CHALLENGE TO THE NEW LAW (2006) *available at* http://www.campaignfinanceguide.org/guide-36.html.

94. *Id.* Plaintiffs included liberal and conservative interest groups, both political parties, and other opposing political players. *Id.*

95. McConnell v. FEC, 251 F. Supp. 2d 176, 251 F. Supp. 2d 948 (D.D.C. 2003) (opinion split into two parts due to excessive length).

96. CAMPAIGN LEGAL CTR., *supra* note 93.

consistency by issuing eight separate opinions.[97] As a result, BCRA continues to govern federal campaign financing today, but political players have already found new loopholes to exploit.

E. Modern Campaigns: 527 Groups, Bundling, and Other Loopholes

McCain and Feingold designed BCRA to become effective for the 2004 election cycle, but because political players found ways to skirt the new law almost immediately after President Bush signed it, BCRA has not been effective in preventing corruption or making elections less expensive. For example, third-party groups found new ways to air issue advertisements, exploiting a loophole in the law just months after it became effective.[98] In 2004, the first post-BCRA election, these "527" groups[99] spent more than $400 million on issue advertising, with most of the money coming in large portions from people seeking to gain heightened influence in Congress or with a presidential administration.[100] In many respects, 527 groups are more nefarious than PACs and political parties because they are not tied to specific interests and need not disclose their donors' identities, preventing voters from using political accountability to discipline political actors.[101]

In addition to encouraging unprecedented 527-group spending, the BCRA system allows Washington insiders, who already wield significant influence, to become more closely aligned with incumbent officeholders.[102] This occurs because BCRA forces candidates and parties to raise money in smaller quantities, and influential Washington insiders can provide easy access to money through a concept called bundling.[103] Fallen lobbyist Jack Abramoff wielded immense power by controlling a large donor base, enticing incumbent representatives to take his positions and do him favors in exchange for easy access to regulated money.[104]

Candidates have also found new ways to skirt federal regulations in the current election cycle. Prior to announcing his candidacy for presi-

97. McConnell v. FEC, 540 U.S. 93 (2003).

98. Jones & McCormick, *supra* note 12.

99. These groups, called "527s" after the Internal Revenue Code provision under which they organize, need not disclose their financiers nor comply with typical political advertising rules. *See* Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L.J. 82 (2005) (explaining why the FEC cannot regulate section 527 groups).

100. Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y. TIMES, Sept. 25, 2004, at A12.

101. *See* Frank J. Favia, Jr., Note, *Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections*, 2006 UNIV. ILL. L. REV. 1081, 1084–87. Favia argues that Congress should solve the 527 problem by enacting more restrictive regulations. This note takes the opposite approach.

102. Roy A. Schotland, *Act I: BCRA Wins in Congress. Act II: BCRA Wins Big at the Court. Act III: BCRA Loses to Reality*, 3 ELECTION L.J. 335, 340 (2004).

103. *See infra* notes 230–31 and accompanying text.

104. R. Jeffrey Smith, *A High-Powered Lobbyist's Swift Fall From Grace*, WASH. POST, Aug. 12, 2005, at A6.

dent, Mitt Romney, an early front-runner for the 2008 Republican nomination, created campaign committees in states that do not have finance limitations, raising more than $7 million for campaign expenses from donors like Compuware Inc. founder Peter Karmanos, who gave $250,000. This tactic is perfectly legal because Romney was not a candidate for federal office at the time he formed the committees and raised the funds. Democrat Tom Vilsack used a similar tactic, raising more than $500,000 from labor unions before announcing his intent to run for president.[105] Moreover, bundling has become "an election season cornerstone" in the 2008 presidential race, accounting for more than twenty-five percent of presidential campaign contributions.[106]

Campaign finance reformers stand poised to eliminate these new financing loopholes, beginning with legislation designed to restrict 527 groups from spending large amounts of money in the 2008 presidential election.[107] However, the Supreme Court's recent jurisprudential shift as seen in *Wisconsin Right to Life* may thwart these efforts.[108] When evaluating the legal challenges that will inevitably follow this decision, the Court should abandon its past practice of cramming ill-fitting, illogical variables and tests into a flawed legal analysis while perpetuating a Whack-a-Mole scheme that restricts speech. Instead, it should examine and account for Congress's motivations in conjunction with campaign finance realities.

III. ANALYSIS

In weighing FECA 1974 provisions against constitutional challenge,[109] the Supreme Court established a framework still used to evaluate contemporary campaign finance regulations,[110] although jurisprudential shifts and incremental nuances leave the original analysis incredibly disfigured. When the Court upheld most BCRA restrictions in 2003, a plurality of Justices pledged allegiance to this fundamental precedent: although certain campaign finance provisions restrict speech, Congress's professed interest in combating corruption, or the appearance of corruption, is sufficiently compelling to outweigh First Amendment concerns.[111]

105. Jeanne Cummings, *Testing the Limits: How Mitt Romney Avoided Campaign-Finance Rules,* WALL ST. J., Jan. 30, 2007, at A1.

106. Brody Mullins, *Donor Bundling Emerges as Major Ill in '08 Race*, WALL ST. J., Oct. 18, 2007, at A1.

107. 527 Reform Act of 2007, S. 463, 110th Cong. (2007).

108. FEC v. Wis. Right to Life, 127 S. Ct. 2652 (2007).

109. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

110. *See* Allison R. Hayward, *The Per Curiam Opinion of Steel:* Buckley v. Valeo *as Superprecedent? Clues from Wisconsin and Vermont* 2 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 06-40, 2006), *available at* http://ssrn.com/ abstract=923459 [hereinafter Hayward, *Superprecedent*].

111. McConnell v. FEC, 540 U.S. 93, 187 (2003). However, the Court did not provide a clear view of its balancing standards. *See* Richard L. Hasen, Buckley *is Dead: Long Live* Buckley: *The New*

Early Roberts Court decisions appeared to embrace this framework, but the majority professed an overall "discomfort" with some of its underlying assumptions.[112] Despite its general acceptance, contemporary scandals show that Congress's Whack-a-Mole model is not sufficiently effective in preventing corruption, or the appearance of corruption, to justify intrusions on First Amendment speech.[113] Further, an exacerbated fundraising disparity between incumbents and challengers, which contributes to heightened incumbency advantages, suggests the public needs the Supreme Court's supervision to ensure Congress creates fair and effective rules.

A. The Buckley *Framework*

In *Buckley v. Valeo*,[114] the Supreme Court evaluated FECA 1974 against a First Amendment challenge, ostensibly applying the "exacting scrutiny" standard of review because the legislation "implicates 'speech' . . . guaranteed by the First Amendment."[115] The Court generally struck down expenditure limitations, but upheld contribution restrictions and disclosure requirements. However, the Court's "exacting scrutiny" treatment is anything but clear, particularly when applied to contribution/expenditure limits and issue/express advocacy communications.[116]

1. Expenditure and Contribution Limitations

FECA 1974 limited citizens' ability to contribute to candidates for federal office, imposed expenditure limitations on candidates, limited independent (noncandidate) expenditures to $1000, and restricted the amount a candidate could spend from her own personal resources.[117] Buckley and McCarthy contended that the First Amendment protects

Campaign Finance Incoherence of McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 32 (2004) [hereinafter Hasen, *McConnell Incoherence*].

112. Professor Hayward reports that "many [Roberts Court] justices" are uncomfortable with *Buckley*, but have so far relied on it when considering campaign finance restrictions. Hayward, *Superprecedent*, *supra* note 110, at 1–3. However, in *Wisconsin Right to Life*, Justices Scalia, Kennedy and Thomas took the position that the Court should overturn *McConnell*, *Wis. Right to Life,* 127 S. Ct. at 2674–87, and Justices Roberts and Alito rejected BCRA's issue advocacy prohibition as it applied to Wisconsin Right to Life's advertisements. *Id.* at 2654–56.

113. *See supra* notes 3–9 and accompanying text.

114. 424 U.S. 1, 58 (1976).

115. CONG. RESEARCH SERV., *supra* note 49, at CRS-4. "Exacting scrutiny" requires that the Court strike down a regulation "unless it is narrowly tailored to serve a compelling governmental interest." *Id.* at CRS-3.

116. *See* Hayward, *Superprecedent*, *supra* note 110, at 9–10 (noting that *Buckley* is an "odd" and "analytically incomplete" opinion).

117. Comprehensive Amendments to the Federal Election Campaign Act of 1974, 2 U.S.C. §§ 431–456 (2000).

political contributions and expenditures because they are forms of speech upon which Congress cannot infringe.[118]

On careful examination, the Court concluded that candidates need vast sums of money to effectively disseminate information to the electorate[119] and that by constraining political contributions and expenditures, FECA 1974 "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached."[120] Observing that the First Amendment should *increase* the quantity of public expression of political ideas and noting that free and open debate is "integral to the operation of the system of government established by our Constitution,"[121] the Court equated money used for political purposes, whether in the form of contributions or expenditures, with speech protected by the First Amendment.[122]

However, the Justices chose to distinguish contributions from expenditures on the First Amendment protection continuum,[123] stressing that "contributions are given to secure a *quid pro quo*" from candidates[124] and that limiting this arrangement "serve[s] the basic governmental interest in safeguarding the integrity of the electoral process"[125] from "the actuality and appearance of corruption."[126] This is not to say the Court believed contributions were not First Amendment liberties; it simply believed that Congress had a sufficiently compelling interest to warrant infringing upon these liberties in the name of preventing actual or apparent corruption.[127]

The Court did find that individual, PAC, and candidate expenditure limitations imposed "direct and substantial restraints on the quantity of political speech" such that Congress could not justify such restrictions under Congress's asserted interest in preventing corruption.[128] The Court based its decision on the effects it believed expenditure restrictions would have, including diminished "campaign speech by individuals, groups and candidates,"[129] reduced numbers of issues discussed, shallow issue exploration, and inability to reach a sufficiently large audience.[130] As Justice Scalia noted, *Buckley* does more than draw an analogy between money and speech; per *Buckley*, spending money in the political context *is* speech: "what [Buckley] said and what many of our other cases

118. *Buckley*, 424 U.S. at 17.
119. *See id.* at 21.
120. *Id.* at 19.
121. *Id.* at 14.
122. *Id.* at 17.
123. *See id.* at 23.
124. *Id.* at 26.
125. *Id.* at 58.
126. *Id.* at 26.
127. *See id.*
128. *Id.* at 39. The Court also deemed Congress's asserted interests in equalizing candidate resources and reducing overall campaign costs insufficient to justify expenditure limits. *Id.* at 48–49.
129. *Id.* at 39.
130. *Id.* at 19.

say, with regard to expenditures in particular, is that *you're not talking about money here. You're talking about speech.* So long as all that money is going to campaigning, you're talking about speech."[131]

Accordingly, the Court upheld campaign contribution limitations, justifying them under the "compelling government interest" test, but struck down all expenditure restrictions, including the restriction limiting a candidate's ability to draw upon personal wealth.[132]

2. Issue and Express Advocacy Communications

Congress intended FECA 1974 to apply to all parties engaging in election activity—candidate and noncandidate alike.[133] However, the Court found the legislation too vague to survive constitutional scrutiny unless the law only applied to candidate and noncandidate "expenditures for communications that in *express terms* advocate the election or defeat of a clearly identified candidate for federal office."[134] The Court defined "express words of advocacy of election or defeat" as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."[135] The campaign consulting community referred to these as "magic words," meaning that as long as you did not use any of the magic words in a direct mail advertisement, television commercial, or radio spot, the expenditure fell outside FECA's ambit.[136] Thus, per *Buckley*, any noncandidate committee could avoid FECA compliance so long as it avoided using the magic words in its communications.

3. Disclosure Requirement

The Court upheld FECA 1974 disclosure requirements against a facial First Amendment challenge. Although the Court recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," it found the provisions justified by a governmental interest in (1) helping voters to evaluate candidates by informing them about the sources and uses of campaign funds, (2) deterring corruption and the appearance of it by

131. Transcript of Oral Argument at 50, Randall v. Sorrell, 126 S. Ct. 2479 (2006) (No. 04-1528), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1528.pdf (emphasis added).

132. *Buckley*, 424 U.S. at 51–54. The Court allowed for one exception, upholding the federal financing scheme wherein a candidate for presidential election voluntarily limits expenditures in order to receive public campaign funds. *Id.* at 86.

133. CONG. RESEARCH SERV., *supra* note 49, at CRS-7.

134. *Buckley*, 424 U.S. at 44 (emphasis added).

135. *Id.* at n.52.

136. Because these communications referenced issues, not direct election or defeat, they became known as "issue advocacy." *See* CONG. RESEARCH SERV., *supra* note 49, at CRS-7.

making public the names of major contributors, and (3) providing information necessary to detect campaign finance law violations.[137]

The Court also rejected a challenge seeking blanket exemption from the public disclosure provisions for all minor parties, who claimed that minor party contributors were more vulnerable to threats, harassment, and reprisal as a result of the public disclosure of their names.[138] Although the Court acknowledged a potential disadvantage for minor parties that could result from public disclosure, it noted that none of the minor parties associated with the litigation could demonstrate an actual injury.[139] The Court thus found comprehensive exemption unnecessary, but it left open the possibility that minor and new parties might successfully claim an exemption from FECA 1974 disclosure requirements by showing proof of injury.[140]

4. The Buckley *"Incoherence"*[141]

At this point, the reader is likely quite confused about the *Buckley* test, and understandably so. At first, the Court seems enthusiastically protective of *all* money spent in the political sphere, resolutely arguing that both expenditures and contributions "operate in an area of the most fundamental First Amendment activities."[142] The Justices also signaled a high place for political speech in the First Amendment hierarchy, rejecting an argument analogizing campaign spending to nonspeech activities that receive little protection, such as burning a draft card.[143] Finally, the Court claimed to apply strict scrutiny to the laws limiting expenditures but inexplicably reversed course on contributions, applying "some unclear lower level of scrutiny" and failing to explain why contributions are constitutionally inferior to expenditures—simply bifurcating its analysis without sufficient exploration or explanation.[144]

Commentators criticize *Buckley*'s reasoning on many grounds, most notably because the Court does not cite precedent "in the pages . . . where the standard of review argument is made most explicitly."[145] This lack of precedent is not the product of laziness or inconsistency; it simply reflects previous courts' attempts to avoid addressing the constitutional

137. *Buckley*, 424 U.S. at 64–69.

138. *See id.* at 69–74 (rejecting plaintiffs' contention that FECA 1974 disclosure requirements "are overbroad insofar as they apply to contributions to minor parties and independent candidates because the governmental interest in this information is minimal and the danger of significant infringement on First Amendment rights is greatly increased"); *id.* at 68–69.

139. *Id.*

140. *Id.* at 74.

141. *See* Hasen, *McConnell Incoherence*, *supra* note 111, at 31.

142. *Buckley,* 424 U.S. at 14.

143. *Id.* at 15–16. The United States Court of Appeals for the District of Columbia Circuit had previously found this argument persuasive. *See* Buckley v. Valeo, 519 F.2d 821, 840–41 (D.C. Cir. 1975).

144. Hayward, *Superprecedent*, *supra* note 110, at 11.

145. *Id.*; *see also Buckley*, 424 U.S. at 20–21.

questions inherent in bans on political speech.[146] *Buckley* was in many ways a case of first impression, and the Court, "while grabbing bits and pieces from other kinds of cases, could not synthesize precedent into an intelligible principled decision . . . because there was not much to use."[147] The Justices resolved the dispute by acting more like a court of equity than a court of law, basing their decisions on a sense for what seemed fair in the absence of defined legal principles.[148]

Further, the Court faced intense pressure to issue an opinion in time for the 1976 presidential election, intensifying an already difficult analysis. *Buckley*'s inconsistencies may ultimately derive from the Justices' decision to draft by committee, an extremely disjointed process wherein Justices changed position numerous times, accommodating each other in the interest of projecting a semblance of cohesiveness.[149] Professor Hasen suggests this is one of the pitfalls of drafting by committee, contending that the strange mix of reverence for the First Amendment, bifurcated standards of review, and deference to Congress results from the give-and-take realities dominating the action behind the scenes.[150] Finally, as Professor Hayward notes while examining *Buckley*'s utility as "superprecedent," the decision is very narrow, leaving "some of the most intractable questions unanswered."[151] This constriction, combined with the Court's bifurcated analysis and inconsistent rhetoric, makes applying *Buckley* to subsequent cases particularly difficult. *Buckley* might best be described as the Court's attempt to "find a middle road between two alternatives—that of regulating campaign finance activity like ordinary economic activity and that of protecting it as core First Amendment speech."[152] However, in searching for the middle position in an attempt to appease, the Court sacrifices coherency and consistency.[153]

B. Evaluating BCRA under Buckley*: Greater Incoherence*[154]

Despite its inconsistencies and analytical schizophrenia and even though judges applying it reach incompatible conclusions, *Buckley* became the legal linchpin for evaluating campaign finance laws over the last two decades.[155] When evaluating BCRA against First Amendment

146. *See, e.g.*, United States v. UAW, 352 U.S. 567 (1957); United States v. CIO, 335 U.S. 106 (1948).

147. Hayward, *Superprecedent*, *supra* note 110, at 12.

148. *See* Richard L. Hasen, *The Untold Drafting History of* Buckley v. Valeo, 2 ELECTION L.J. 241 (2003) (closely examining *Buckley*'s drafting history).

149. *Id.* at 242.

150. *Id.* at 241–51.

151. *See* Hayward, *Superprecedent*, *supra* note 110, at 12.

152. *Id.* at 16.

153. *Id.*; *see also* Hasen, *McConnell Incoherence*, *supra* note 111.

154. Hasen, *McConnell Incoherence*, *supra* note 111, at 31.

155. *Buckey*'s logical and practical problems may not be detrimental to its continued use, but may actually *extend* its useful life. Professor Hayward notes: "Buckley lives on because it provided a new rule in a contentious area, and nobody yet seems to be able to come up with something more agree-

challenges in *McConnell v. FEC*, the Court again claimed adherence to the *Buckley* framework, noting that although certain provisions invoke First Amendment concerns, Congress's legitimate interest in preventing corruption, or the appearance of corruption, justifies free speech intrusions.[156] Unfortunately, given its bifurcation and contradiction, the Justices' attempts to apply *Buckley* to BCRA merely exacerbate the framework's legal incoherence, leaving campaign finance jurisprudence in an unpredictable morass.[157]

The *McConnell* plaintiffs challenged more than twenty BCRA provisions. The Court upheld most of them, including perhaps the two most controversial: the ban on soft money and the thirty- and sixty-day issue advocacy restriction windows.[158] Once again, the Court achieved very little consensus: the nine Justices issued eight opinions, upholding the most controversial provisions on a cobbled 5-4 basis.[159] *McConnell* is problematic because the majority cited *Buckley* as precedent but did not actually follow it, fundamentally altering the First Amendment calculus without explaining why.[160]

Although the majority upheld many of the soft money provisions under a standard *Buckley* analysis, the Court created new standards in others. For example, in upholding the ban on soft money donations to state political parties for use in federal elections, the majority afforded Congress great deference, more or less abandoning the *Buckley* balancing rationale by concluding that the Court "'must accord substantial deference to the *predictive* judgments of Congress.'"[161] This deferential posture represents a substantial shift from the high evidentiary standard the Court required in *Buckley*.

Despite explicitly deferring to Congress's predictive (nonevidentiary) judgments in some matters, the majority responded to Justice Kennedy's concern that BCRA seems to have been designed to protect incumbents[162] by claiming it requires legislators to show "concrete evidence":

> Any concern that Congress might opportunistically pass campaign-finance regulation for self-serving ends is taken into account by the applicable level of scrutiny. Congress must show concrete evidence

able. It also lives on by being sufficiently vague and general to support a range of results." Hayward, *Superprecedent*, *supra* note 110, at 8.

156. McConnell v. FEC, 540 U.S. 93, 187 (2003).

157. Hasen, *McConnell Incoherence*, *supra* note 111, at 32.

158. *See McConnell*, 540 U.S. at 141–201.

159. *Id.* at 93, 110–11.

160. *See* Hasen, *McConnell Incoherence*, *supra* note 111, at 32–33.

161. *McConnell*, 540 U.S. at 164, 165 n.59 (citation omitted) (emphasis added); *see also* Hasen, *McConnell Incoherence*, *supra* note 111, at 50 (noting that "[t]he local party ban . . . depended not on any *evidence* of corruption (or even the sale of access) but on a supposition that local parties have the potential to corrupt federal officeholders"). In this case, the Court deferred to the deposition of one former Senator, suggesting local parties would use soft money to subvert federal contribution limits or gain access to federal officeholders.

162. *See McConnell*, 540 U.S. at 306–07 (Kennedy, J., dissenting).

> that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that real or apparent corruption. It has done so here.[163]

Thus, on one hand, the majority specifically holds that predictive judgments are sufficient to justify First Amendment intrusions (contrary to *Buckley*'s strict scrutiny), yet it justifies its findings by falling back on a position that looks more like *Buckley*. The result is an inconsistent and unpredictable legal framework.

This altered evidentiary standard is just one example of the majority's convoluted *McConnell* analysis.[164] On the whole, while "entertain[ing] the fiction that it is adhering to the anticorruption rationale of *Buckley*," the Stevens- and O'Connor-led majority in *McConnell* further altered the game by lowering the level of scrutiny applied in campaign finance cases (though claiming faithfulness to strict scrutiny) and "engag[ing] in unusually sloppy and incomplete reasoning to justify its holdings."[165] Although it is certainly difficult to understand or justify the majority's decision under substantive First Amendment principles, perhaps the most critical aspect of *McConnell* is not what the majority added and altered but what it continued to leave out: a substantive look at actual results and the potential for congressional self-dealing.

C. The Roberts Court, Round One: Discomfort, but Deference

When Justice O'Connor left the Court in 2006, many commentators wondered whether the *Buckley* framework would disintegrate, with Justices Alito and Roberts joining the *McConnell* dissenters to form a new First Amendment majority.[166] They did not have to wait long to find out: a short time into its first term, the Roberts Court heard a First Amendment challenge to "Act 64," a 1997 Vermont statute imposing strict contribution and candidate expenditure limits.[167] Act 64 restricted per-cycle campaign expenditures to $300,000 for gubernatorial candidates, $100,000 for lieutenant governor candidates, and $45,000 for other statewide office candidates.[168] Act 64 also severely restricted contributions:

163. *Id.* at 185 n.72 (majority opinion). Professor Hasen calls this an "unsatisfying and disingenuous" claim. Hasen, *McConnell Incoherence*, *supra* note 111, at 61.

164. For a full picture of the Court's convoluted analysis, see Hasen, *McConnell Incoherence*, *supra* note 111, at 41–51.

165. *Id.* at 32.

166. *See, e.g.*, Richard Briffault, *U.S. Supreme Court Case Preview: A Changing Supreme Court Considers Major Campaign Finance Questions:* Randall v. Sorell, *and* Wisconsin Right to Life v. FEC, 5 ELECTION L.J. 74, 83 (2006); Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law,* 57 S.C. L. REV. 669 (2006). Although Chief Justice Rehnquist, a member of the *McConnell* dissent, was deceased, commentators expected Chief Justice Roberts would assume a similar ideological stance. *See* Hasen, *supra*.

167. VT. STAT. ANN. tit. 17, § 2801 (2002).

168. Randall v. Sorrell, 126 S. Ct. 2479, 2486 (2006). The figures were adjusted for inflation each election cycle per the Consumer Price Index. *Id.*

an individual could only contribute $400 per cycle to a gubernatorial or other statewide candidate, $300 to a candidate for state senator, and $200 for state representative.[169] Contributions to political parties and committees fell under the statute as well, and were subject to the same per-cycle contribution limitations.[170]

The Roberts Court analyzed Act 64 under *Buckley*, but did so without adding any consistency to the framework.[171] Predictably, the Justices struck down the expenditure limitations under *Buckley*, emphasizing the Court's 1976 conclusion "that '[n]o governmental interest . . . is sufficient to justify the restriction on the quantity of political expression imposed by' the statute's expenditure limitations."[172]

The Court's reaction to Vermont's contribution limits was less predictable; its ruling was a fractured mess that Justice Stevens appropriately called "today's cacophony."[173] The nine Justices offered six opinions, each of which sheds some insight into the Justices' personal thought processes but does little to signal the Court's future direction or create any new coherence.[174] For example, the plurality claimed allegiance to *Buckley* but established a *new* two-part contribution limits query, asking:

(1) Are there "danger signs" that the risks to the political process in terms of decreased political competition are too high?

(2) If so, based on a review of the record, is the measure "closely drawn," or is it too restrictive given the anticorruption goals it is trying to accomplish?[175]

After applying this new test to Vermont's contribution limits, the plurality concluded the restrictions "violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance."[176] The plurality, most notably the two new Justices, appears to have abandoned *McConnell*'s deferential posture, "command[ing] the use of 'independent judicial judgment' to determine if the Vermont contribution limits were

169. *Id.* (citation omitted).

170. *Id.* (citations omitted).

171. *See* Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After* Randall v. Sorrell, 68 OHIO ST. L.J. 775, 788–89 (2007) [hereinafter Hasen, *Randall Greater Incoherence*]; Richard L. Hasen, *Political Portents: Latest Supreme Court Rulings on Election Law May Foreshadow a Far More Conservative Approach,* LEGAL TIMES, July 10, 2006 (noting that the nine Justices issued twelve opinions, leaving "even seasoned election-law scholars scratching their heads over the intricacies of the opinions").

172. *Randall,* 126 S. Ct. at 2488 (plurality opinion) (citing Buckley v. Valeo, 424 U.S. 1, 55 (1976)).

173. *Id*. at 2510 (Stevens, J., dissenting).

174. Chief Justice Roberts joined Justice Breyer's plurality opinion, Justice Alito joined as to all but Parts II-B-1 and II-B-2, *see id.* at 2485 (plurality opinion), but his concurrence only revealed that he did not believe Vermont made a strong enough case to revisit *Buckley*, s*ee id.* at 2500–01 (Alito, J., concurring in part).

175. *Id.* at 2492 (plurality opinion).

176. *Id.* at 2500.

unconstitutionally low."[177] Further, the plurality concluded: "[C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."[178]

Perhaps more telling than the opinions themselves are the Justices' comments and questions during oral argument. Justice Roberts "asked repeatedly and aggressively for hard evidence that campaign contributions had caused corruption in Vermont,"[179] conceivably foreshadowing a future emphasis on whether campaign finance restrictions actually prevent corruption. Justice Kennedy "voiced doubts about the state's 'highly restrictive rule' . . . [a]nd even Justice David H. Souter, who has a history of defending campaign finance regulations, voiced concern that, under Vermont's rules, a candidate saddled with a primary could go broke before the general election."[180]

Combined with Justices Scalia and Thomas, who would overturn all contribution limits under First Amendment strict scrutiny analysis,[181] the *Randall* plurality's less-deferential position suggested a general hostility to restrictive campaign finance laws. For a short time, it also appeared the Court would begin considering potentially anticompetitive results when analyzing legislation designed to alter or restrict electoral structures.[182] This possibility became less likely just two days after *Randall*, when the Court decided a partisan redistricting case, *LULAC v. Perry*.[183] In *LULAC*, the Justices explicitly rejected the anticompetitive rationale as sufficient to overturn legislation designed to create noncompetitive ("safe") legislative districts.[184] Writing for the majority, Justice Kennedy placed the burden of proof squarely on the challengers, requiring them to "show a burden, as measured by a reliable standard, on [their] representational rights."[185] He further concluded that the challengers had not proffered any "judicially manageable standards for judging partisan gerrymandering."[186] Justices Roberts and Alito agreed that the standards were difficult to measure, a position that substantially limits the anticor-

177. Hasen, *Randall Greater Incoherence*, *supra* note 171, at 792 (quoting *Randall*, 126 S. Ct. at 2492).

178. *Randall,* 126 S. Ct. at 2482.

179. Eliza Newlin Carney, *Rules of the Game: Winds Shifting on Campaign Finance Law?*, NATIONALJOURNAL.COM May 30, 2006, http://nationaljournal.com/members/buzz/2006/rules/053006.htm.

180. *Id.*

181. *See* Hasen, *Randall Greater Incoherence*, *supra* note 171, at 788.

182. Immediately after *Randall*, Professor Pildes, a leading advocate for using a type of "anticompetitiveness test," stated his belief that the Court had accepted the "principle that there is a risk that those who currently hold office—current legislators—can regulate elections in a way that insulates themselves improperly form [sic] competition and that undermines the integrity and accountability that should be central to democracy and democratic elections." Posting of Amy Howe to SCOTUSBlog, http://www.scotusblog.com/movabletype/archives/2006/06/25-week/ (June 26, 2006, 11:44 EST).

183. 126 S. Ct. 2594 (2006).

184. *See* Hasen, *Randall Greater Incoherence*, *supra* note 171, at 797–98.

185. *LULAC*, 126 S. Ct. at 2610.

186. Hasen, *Randall Greater Incoherence*, *supra* note 171, at 797.

ruption rationale.[187] Under this approach, challengers who allege legislative self-dealing must prove the legislation actually harms a constitutional right, and the Court provides no standard for doing so. Thus the anticompetition principle, originally thought to have sustainable promise, "appears cabined to . . . cases raising the question whether particular campaign contribution limits are too low" and is quite limited, even in this context.[188]

Although it at first appeared Justices Alito and Roberts opened the door for an anticompetition challenge to future campaign finance laws in *Randall*, *LULAC* evidences the majority's conclusion that this kind of contest is too difficult to control. Consequently, the resulting standard for evaluating campaign finance laws appeared to be a tepid form of *Buckley*,[189] despite its convoluted reasoning and plebian drafting heritage. A majority of the Roberts Court Justices appeared uncomfortable with applying it as precedent, but without judicially manageable standards to guide an anticompetition inquiry, the Court was once again left without a principled or comprehensible conclusion.

D. The Roberts Court, Round Two: Another Jurisprudential Shift, an Additional Test

Before the Court made its substantive assessment of campaign finance law in *Randall*, the Justices also heard oral arguments in a case involving a small nonprofit organization called Wisconsin Right to Life (WRTL).[190] WRTL ran afoul of BCRA's "electioneering communications" restriction, whereby corporations may not spend general (non-PAC) funds on communications that refer to a candidate for federal office and are aired within thirty days of a primary election or sixty days of a federal election.[191] WRTL sought to run television commercials in Wisconsin opposing the Senate's filibuster of federal judicial nominations supported by Senators Feingold and Kohl within thirty days of a primary election in which Feingold ran unopposed.[192]

WRTL sought a preliminary injunction to run the advertisements as genuine issue ads, but it was denied relief by a three-judge federal district panel on the grounds that *McConnell* barred as-applied challenges to BCRA.[193] WRTL appealed directly to the Supreme Court, which issued a *per curiam* opinion rejecting this interpretation of *McConnell* and re-

187. *See LULAC*, 126 S. Ct. at 2610.

188. Hasen, *Randall Greater Incoherence*, *supra* note 171, at 795.

189. Professor Hayward reports that many Roberts Court Justices are uncomfortable with *Buckley*, but have so far relied on it when considering campaign finance restrictions because they have not coalesced around a better framework. Hayward, *Superprecedent*, *supra* note 110, at 2–3.

190. Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006).

191. 2 U.S.C. § 434(f)(3)(A) (2000 & Supp. VI 2006).

192. FEC v. Wis. Right to Life, 127 S. Ct. 2652, 2660 (2007).

193. *Id*. at 2661.

manded the case to district court for hearing on the merits.[194] The district court panel sided with WRTL on remand;[195] the FEC appealed to the (post-O'Connor) Roberts Court.

Although once again presented with an opportunity to revisit the flawed *Buckley* framework, Chief Justice Roberts's "principal opinion," joined in full by Justice Alito and representing the opinion of the Court, ostensibly relied on *Buckley* and *McConnell* while creating a new test to determine whether an advertisement falls under BCRA's ambit. Chief Justice Roberts first declared that the electioneering communications provision is subject to strict scrutiny analysis because it "burdens political speech."[196] He then noted that under *McConnell*, "BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent."[197] The advertisements at issue in *Wisconsin Right to Life* were clearly devoid of express advocacy, but the question remained whether they were its "functional equivalent" because they mentioned Senator Feingold by name.

Chief Justice Roberts rejected the idea that language in *McConnell* justified looking at the advertisers' intent to discern whether an advertisement was express advocacy's functional equivalent, claiming that the *McConnell* majority did not endorse an "intent and effect" test when it suggested that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect."[198] Moreover, Chief Justice Roberts claimed that such a test was not permitted under *Buckley* and "would chill core political speech" because "[n]o reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure."[199] Instead, Chief Justice Roberts created a new test to answer the "functional equivalency" question, declaring "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[200]

The principal opinion then applied Roberts's "reasonable interpretation" test to WRTL's advertisements, noting that "their content is consistent with that of a genuine issue ad" because they "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter."[201] Moreover, Roberts argued, "their content lacks indicia of ex-

194. *Wis. Right to Life,* 546 U.S. at 412.
195. Wis. Right to Life, Inc. v. FEC, 466 F. Supp. 2d 195, 210 (D.D.C. 2006).
196. *Wis. Right to Life*, 127 S. Ct. at 2664.
197. *Id*.
198. *See id*. at 2664–65 (quoting McConnell v. FEC, 540 U.S. 93, 206 (2003)).
199. *Id*. at 2665–66.
200. *Id*. at 2667.
201. *Id*.

press advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office."[202] Inexplicably, Chief Justice Roberts found the advertisements distinguishable from a hypothetical commercial the *McConnell* majority found to be the essence of electioneering communication: a spot that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think,'"[203] claiming that WRTL's ads took a position on an issue instead of on Feingold's record.[204] This supposed distinction is the epitome of Supreme Court obfuscation in its campaign finance jurisprudence, leading to what Justice Scalia called "faux judicial restraint"[205] that masks the damage done to *Buckley* and *McConnell* precedent.

Instead of clarifying the Court's position on restrictive campaign finance laws, the principal opinion in *Wisconsin Right to Life* adds to the recent "cacophony" of Supreme Court jurisprudence. Moreover, the "test" Chief Justice Roberts created does not provide sufficient clarity for entities seeking to run issue advertisements in the future; how is the average issue group to determine whether their ad is like the "Jane Doe" commercial the Chief Justice would prohibit per *McConnell* or like the *Wisconsin Right to Life* ad he would permit? And how will the test be applied in the real world? It is at once "either too onerous, with nearly every issue ad requiring vetting for the range of reasonable interpretations they admit, or toothless, in which case it's hard to see why *McConnell* and the relevant portions of McCain-Feingold should be upheld at all."[206]

Instead of joining Chief Justice Roberts and Justice Alito in creating a new test ostensibly within the old framework, Justices Scalia, Thomas, and Kennedy proposed an alternative to the seemingly perpetual madness—arguing that the Court should be more intellectually honest and explicitly overrule *McConnell*.[207] Scalia's lengthy discourse on the

202. *Id*.

203. McConnell v. FEC, 540 U.S. 93, 127 (2003).

204. *Wis. Right to Life*, 127 S. Ct. at 2667 n.6. The text of one of WRTL's ads reads as follows:

> PASTOR: And who gives this woman to be married to this man?
> BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up. . .
> VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Id. at 2660.

205. *Id*. at 2683 n.7 (Scalia, J., concurring in part and concurring in the judgment).

206. Review & Outlook, *Roberts Rules*, WALL ST. J., June 26, 2007, at A14.

207. *Wis. Right to Life*, 127 S. Ct. at 2686–87 (Scalia, J., concurring in part and concurring in the judgment).

principle of *stare decisis*[208] feels like an impatient lecture given to an imprudent child, as if Scalia has himself lost patience with retaining the trappings of *McConnell* and *Buckley* precedent while eviscerating their effect.

E. A New Legal Calculus: The Case for Incorporating Efficacy and Self-Dealing

Randall represents a chaotic framework at its worst, with Justices advancing significant rhetorical criticisms, yet falling back on the flawed *Buckley* framework. Despite explicitly suggesting that money and influence will always be a part of politics, the Court does not inquire whether restrictions actually advance Congress's anticorruption goal. Further, individual Justices reference Congress's interests in creating an electoral framework that insulates incumbents from substantial challenge, but they fail to account for the potential for congressional self-dealing in the final analysis. *Wisconsin Right to Life* does no better, creating an unwieldy and inconsistent test that for all intents and purposes negates the very precedent it claims to uphold. Given Congress's unique position in both creating and benefiting from campaign finance law, the Court should look beyond emblematic First Amendment law in its future analytical framework.

1. Efficacy: Do Restrictive Policies Actually Prevent Corruption?

In *Buckley*, the Court suggested that contributions are given to secure a quid pro quo from candidates and that limiting this arrangement "serve[s] the basic governmental interest in safeguarding the integrity of the electoral process"[209] from "the actuality and appearance of corruption."[210] However, in subsequent cases decided under the *Buckley* framework, the Court has not required Congress to demonstrate that limiting contributions or restricting speech actually works—that restrictions prevent the would-be contributor from gaining the influence he seeks.

a) Is BCRA Effective?

Instead of eliminating large, unregulated donations and preventing "sham" issue advertisements, BCRA pushes money away from political parties and into the hands of shadowy players who have no incentive to act in the public interest.[211] Current regulations also make people seek-

208. The discussion included a string cite highlighting eleven recent opportunities the Court took to "[o]verrul[e] a constitutional case decided just a few years earlier." *Id.* at 2683, 2685 n.9.

209. Buckley v. Valeo, 424 U.S. 1, 27, 58 (1976).

210. *Id.* at 27.

211. Schotland, *supra* note 102, at 337–40; *see also* Mullins, *supra* note 106.

ing influence *more* powerful, because individuals with access to potential contributors can "bundle" hard-money contributions, effectively becoming the conduit for extremely large campaign contributions.[212]

BCRA's ban on PAC and other interest group funding, along with its promise to prevent third-party groups from airing issue advertisements near Election Day, was supposed to restrict these interest groups' voices in the electoral process. Yet Congress left a huge loophole in the law: BCRA allows organizations meeting Internal Revenue Code section 527 criteria to be exempt from the law.[213] Because these organizations need not disclose their financiers, groups such as "Swift Boat Veterans for Truth" and "Moveon.org" can flood the airwaves in many of the same ways PACs and political parties once did.[214] In 2004, the first election cycle *after* BCRA, third-party groups played a greater role in the presidential campaign than they had in any election in U.S. history.[215] One estimate places 527 spending at almost $400 million in the 2004 federal elections.[216] Despite this heavy spending, the Federal Election Commission did not regulate 527s as political committees during the 2004 or 2006 election cycles because Congress did not delegate the authority to do so.[217] BCRA has clearly been ineffective in achieving its sponsors' stated goal to keep third-party interest groups out of elections, ineffectively whacking at PACs while the more nefarious and sophisticated 527 groups surface somewhere else.[218]

Even if the law actually restricts third-party groups from engaging in the electoral process, it remains questionable whether this is a virtuous goal. The current regulatory structure "makes it a felony for a nonprofit group like the National Rifle Association or the Sierra Club to broadcast an ad within 60 days of an election that criticizes an elected official by name."[219] This is a most fundamental speech restriction, directly contrary to the Court's finding in other circumstances "that 'the debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.'"[220]

Moreover, BCRA fails to make candidates themselves less reliant on money. In 2000, the last presidential election cycle before BCRA,

212. Schotland, *supra* note 102, at 340–41.

213. Hayward & Smith, *supra* note 99.

214. Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 79 (Michael J. Malbin ed., 2006).

215. *Id.*

216. *Id.* at 81.

217. Hayward & Smith, *supra* note 99, at 97.

218. *See supra* text accompanying note 99 (noting that it only took one election cycle to find and exploit a loophole).

219. GENE HEALY & TIMOTHY LYNCH, POWER SURGE: THE CONSTITUTIONAL RECORD OF GEORGE W. BUSH 6 (2006).

220. Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)) (declaring unconstitutional a law banning political parties from endorsing candidates in the primary election).

candidates, political parties, and interest groups spent $3.8 billion on advocacy; in 2004, these same groups spent $4.27 billion.[221] Candidates and third-party groups spent $1.83 billion on the 2006 midterm elections,[222] a substantial increase beyond the $944 million these actors spent during the 2002 midterm cycle.[223] Further, since BCRA, it has become more expensive to unseat an incumbent and more difficult to raise the money necessary to do so.[224] Although it is clear BCRA did not create the need for more money, it certainly has not made elections less expensive.[225]

Finally, BCRA has not diminished big-money political donors' influence; it has effectively made those with access to money *more* powerful through the concept of "bundling." For example, a person wishing to influence a candidate for federal office can only contribute up to $2300 per election, and the candidate must report this contribution to the FEC.[226] Because $2300 will not get a candidate very far, this person is unlikely to expect or receive anything substantive in return. However, a lobbyist wishing to gain influence can host a fundraiser or otherwise arrange contributions for an officeholder that result in tens of thousands of dollars, and "there is no public disclosure required of these large sums provided by the lobbyist to the Member."[227] One way bundlers do this is by arranging fundraising dinners on the candidate's behalf, charging invitees $2300 to attend. The candidate makes a brief appearance, poses for photo opportunities, gives a short speech and leaves—often gaining thousands of dollars for the effort.[228] He or she reports the individual sums as given by fundraiser attendees, and although the public never knows an intermediary existed, the candidate certainly remembers.[229]

Candidates and national parties covet these "bundled" hard-money donations because of their economies of scale. Instead of making several individual pleas for $2300, the candidate or party can pick up thousands

221. Kelly D. Patterson, *Spending in the 2004 Election*, *in* FINANCING THE 2004 ELECTION (David B. Magleby et. al eds., 2006). This represents a $100 million increase beyond the cost of inflation.

222. Figure derived by adding the $1.4 billion candidates spent in 2006, *see* Ctr. for Responsive Politics, The Price of Admission, http://www.opensecrets.org/bigpicture/stats.asp?Cycle=2006&display=T&type=A (last visited Oct. 16, 2007), to the $426 million 527 groups spent, *see* Ctr. for Responsive Politics, Advocacy Group Spending in the 2006 Elections, http://www.opensecrets.org/527s/index.asp (last visited Oct. 16, 2007).

223. Figure derived by adding the $930 million candidates spent in 2002, *see* Ctr. for Responsive Politics, The Big Picture, 2002 Cycle, http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002&display=T&type=A (last visited Oct. 16, 2007), to the $14 million PACS spent in 2002, *see* News Release, FEC, PAC Activity Increases for 2002 Elections (Mar. 27, 2003), *available at* http://www.fec.gov/press/press2003/20030327pac/20030327pac.html.

224. *See infra* notes 262–67 and accompanying text.

225. *See* Patterson, *supra* note 221; *supra* note 221 and accompanying text.

226. Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294 (Feb. 5, 2007).

227. *See Lobbying Reform: Accountability Through Transparency: Hearing Before the H. Comm. on Rules*, 109th Cong. 5–6 (2006) (statement of Fred Wertheimer, President, Democracy 21), *available at* http://www.rules.house.gov/techouse/109/lobref/testimony/fwertheimer.pdf.

228. *See id.*

229. "Bundlers" are often the recipients of favorable policy. *See, e.g.*, Thomas B. Edsall et al., *Pioneers Fill War Chest, Then Capitalize*, WASH. POST, May 16, 2004, at A1.

of dollars in just a few minutes. Both major parties offer significant incentives to encourage bundling. The George W. Bush presidential campaign[230] and Republican National Committee led the most successful bundling operations to date.[231] The Republican fundraising effort offered three bundling levels: "Pioneers" bundled $100,000; "Rangers" bundled $200,000; and "Super Rangers" bundled $300,000.[232] Democrats employed a similar, though less popular, bundling structure in 2004, launching the "Kerry Victory Fund" for those who could bundle $250,000.[233]

Lobbyist Jack Abramoff, lead player in the "biggest scandal in Congress in over a century,"[234] was a Bush Pioneer in 2004, and also provided large amounts of campaign contributions for members of Congress by arranging for his clients to contribute the funds.[235] Abramoff gained incredible influence because federal candidates, ranging from those with presidential aspirations to would-be representatives, need money to win campaigns. In the post-BCRA fundraising world, that money is even more difficult to come by; Abramoff (and others like him) can provide it in huge chunks. The 2008 Presidential candidates employ bundlers to an ever-expanding degree: the Campaign Finance Institute estimates that bundlers have provided Obama more than sixty percent of the $79 million raised for his presidential election campaign; "Hillraisers" likely provide fifty-nine percent of Clinton's fundraising total.[236] Bundling is problematic because candidates need not disclose the bundlers' identities under BCRA, thus the law effectively drives political money, even hard money, further underground.[237]

230. Thomas B. Edsall & Sarah Cohen, *Bush Campaign Raises A Record $49.5 Million. For Their Efforts, Fundraisers Also Gain*, WASH. POST, Oct. 15, 2003, at A1. In 2002, the Bush campaign took in "record receipts—more than triple the top Democrat's fundraising for the quarter—[which] were driven in large part by just 285 men and women, who collected $38.5 million or more, which was at least 45 percent of Bush's total take. This fundraising elite, many of whom were beneficiaries of Bush administration policies, included 100 'Rangers,' who raised at least $200,000 apiece, and 185 'Pioneers,' who collected at least $100,000 each." *Id.*

231. Charles Laurence, *Bush's Rangers on Trail to Round up Record $200 m*, DAILY TELEGRAPH, June 15, 2003, http://www.telegraph.co.uk/news/main.jhtml?xml= /news/2003/06/15/wbush15.xml.

232. Jonathan Kaplan, *RNC Offers 'Super Ranger' Status,* HILL, May 18, 2004, at 4.

233. *Id.* Hillary Clinton bestows the title of "Hillraiser" on her bundlers, Hillary Clinton for President, http://www.hillaryclinton.com/actioncenter/raise (last visited Jan. 23, 2008), including Norman Hsu, who secretly reimbursed contributors for donations he claimed were bundled, *see* Mullins, *supra* note 106.

234. Shenon, *supra* note 7. Abramoff pleaded guilty to conspiracy to corrupt public officials, mail fraud, and tax evasion. Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts; Lobbyist to Testify About Lawmakers in Corruption Probe*, WASH. POST, Jan. 4, 2006, at A1.

235. Smith, *supra* note 104.

236. Press Release, Campaign Fin. Inst., "Bundlers" and Other Fundraisers Appear Responsible for the Majority of Contributions to the Best-Financed Presidential Campaigns (Dec. 20, 2007), *available at* http://www.cfirst.org/pr/prRelease.aspx?ReleaseID=176.

237. Schotland, *supra* note 102, at 337–40. However, in a sign that candidates recognize the importance of disclosure, many candidates disclose at least some of their bundlers. *See, e.g.*, Campaign Fin. Inst., *supra* note 236. Bradley A. Smith, former Chairman of the Federal Election Commission, argues that bundling is not the "abuse" or "ill" it is made out to be, noting that it allows more people to engage in the political process. Bradley A. Smith, *Why Donor 'Bundling' Is a Good Thing*, WALL ST. J., Oct. 27, 2007, at A7. I argue that the problem with bundling is not the donations themselves,

Banning large individual donations also creates unpleasant results. For example:

> [The soft money] provision, as Justice Anthony Kennedy noted in his [*McConnell*] dissent, would have criminalized Ross Perot's efforts to build the Reform Party in the 1990s, sending him to jail for up to five years for giving over $25,000 to a national party. Such a provision can only have the effect of protecting the established duopoly of the Republican and Democratic parties.[238]

Instead of preventing corruption, the current model appears to consolidate power around entrenched interests and confine influence to a select few.

BCRA appears to fall far short of its goals to prohibit large, unregulated campaign contributions and reduce third-party election communications. If these contributions and advertisements lead to corruption, as Congress claims, the Whack-a-Mole strategy fails to advance legislators' professed interest in preventing it. Given the severe restrictions BCRA places on the right to criticize sitting legislators during the electoral process, the Court should meticulously analyze Congress's assertion that these provisions actually work.

b) Can Any Restrictive Campaign Finance Policy Keep Money Out of Politics?

Congress has long justified campaign finance restrictions under an anticorruption rationale, seizing upon the Supreme Court's observations that "[c]orruption is a subversion of the political process," and money will influence "[e]lected officials . . . to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."[239] Congress has set out to prevent corruption by adopting restrictive contribution requirements and attempting to limit campaign spending by candidates and third parties. The reality is that these restrictions do little (if anything) to eliminate money's place in the political process. They do, however, produce undesirable consequences, such as further entrenching incumbents against serious electoral challenge. In fact, Congress's passion for reelection fuels the money machine.

Congress has vast taxpayer funds at its disposal, and representatives send these funds home to their constituencies in the form of district- or

nor the potential influence bundlers may obtain. Instead, the problem is that bundlers' identities are not disclosed, or are only partially disclosed, preventing the electorate from incorporating the information into its voting calculus.

238. HEALY & LYNCH, *supra* note 219, at 5 (footnote omitted).

239. FEC v. Nat'l Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 497 (1985) (defining corruption).

state-specific projects known as "pork-barrel spending."[240] Many representatives tout their ability to pry large sums of money from federal coffers when seeking additional terms of office, knowing voters back home will be more apt to reelect an incumbent if they believe it necessary to keep the money flowing. The amount of money available to corporations, interest groups, and individuals ($29 billion in FY 2006) is so alluring that these actors turn to individual representatives to obtain pieces of the pie for themselves.[241] Legislators are all too willing to oblige, working closely with corporation and interest group lobbyists to identify potential projects and insert earmarks in federal legislation, and they become extremely hostile when questioned about these connections.[242] However, these are the relationships lobbyists like Jack Abramoff wish to cultivate and exploit, and political giving is one way they cultivate them. Another is becoming adept at the pork-barrel process themselves, gaining influence in Congress because they can help individual legislators take spending home to their constituents, thereby increasing reelection chances.[243]

If money will always find an outlet in the political process, it is at least in part because Congress encourages the result. Unless legislators agree to do away with pork-barrel projects, the Whack-a-Mole strategy will always fail because moneyed interests have too much at stake to simply sit on the sidelines.[244] Limiting campaign money in a way that protects incumbents actually incubates corruption because those seeking to gain influence find unregulated ways to do so, and legislators reward these efforts with pork and other favors. The current system rewards influence seeking, and it limits those who criticize and challenge incumbents—making the remedy more nefarious than the disease.

2. Considering Congressional Self-Dealing

While making the case for campaign finance reform, legislators bemoaned the ills befallen Congress because of "special interest groups" bent on pursuing their self-interested agendas.[245] These reform proponents argued that by engaging in the political system, special interest

240. *See* Gerald W. Scully, *Congressional Tenure: Myth and Reality*, 83 PUB. CHOICE 203 (1995). Research shows that vulnerable incumbents aggressively pursue pork-barrel spending, *see* Robert M. Stein & Kenneth N. Bickers, *Congressional Elections and the Pork Barrel*, 56 J. POL. 377, 377–99 (1994), and that the success of incumbents in bringing back agency grants influences a potential challenger's decision to run, *see* Kenneth N. Bickers & Robert M. Stein, *The Electoral Dynamics of the Federal Pork Barrel*, 40 AM. J. POL. SCI. 1300, 1300–26 (1996).

241. CITIZENS AGAINST GOV'T WASTE, 2006 CONGRESSIONAL PIG BOOK 1–2 (2007).

242. For example, when Citizens Against Government Waste suggested Senator Robert Byrd reject these pork-barrel interests, he responded by spewing: "Those peckerwoods don't know what they're doing. They don't. They're not being realistic." *Id.* at i (quoting *National Public Radio Interview*, July 19, 2001).

243. *Id.* at 1–2.

244. McConnell v. FEC, 540 U.S. 93, 224 (2003); *see also* Alston, *supra* note 15, at 1621 (comparing campaign finance restrictions to Whack-a-Mole).

245. *See* Feingold, *supra* note 9.

groups exert "undue influence" on Congress and the lawmaking process.[246] First in *Buckley*, then in *McConnell*, the Supreme Court considered how these self-interested groups might work to shape the law, justifying speech restrictions because the Justices believed these groups would corrupt the legislative process.[247] But in *Buckley* and *McConnell*, the majority failed to consider Congress itself as a special interest group—and whether by defining the terms of their own elections, legislators may be acting upon less-than-pure motives.

In 1974, Professor David Mayhew published the findings of a study he undertook to ascertain individual legislators' motivations for official acts (their "purposive behavior").[248] In this seminal work, Mayhew discovered that legislators are almost singularly focused on reelection and gaining influence—that good public policy almost always takes a backseat to individual self-interests.[249] Further, Professor Mayhew observed that most representatives focus on doling out favors, scheming, and protecting the habits and routine of the Congress itself, resulting in a self-perpetuating system of nepotism.[250] These observations play themselves out *ad nauseum*. For example, in 2003, Congress authorized the "National Do-Not-Call Registry,"[251] under which the Federal Trade Commission may fine callers $11,000 for each telephone call made to numbers on a "Do Not Call" list[252]—*except* calls made by or for politicians.[253] This blatant display of self-interest came *after* representatives made impassioned speeches and pleas to "save" the Do-Not-Call Registry because their constituents demanded freedom from "unwanted" and "harassing" telemarketing calls.[254] Although this kind of nepotism is disconcerting, the Do-Not-Call List is just one example of Congress's self-dealing; it pales in comparison to the preferential treatment Congress grants itself

246. *Id.*

247. *See supra* Parts II.C, II.D.5.

248. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (YALE STUDIES IN POLITICAL SCIENCE) 5 (1974). Although written more than thirty years ago, this work remains incomparable in its field.

249. *Id.* at 5–7.

250. *See id.*

251. Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *invalidated by* Mainstream Mktg. Servs. v. FTC, 283 F. Supp. 2d 1151 (D. Colo. 2003), *ratified by* An Act to ratify the authority of the Federal Trade Commission to establish a do-not-call registry, Pub. L. No. 108-82, 15 U.S.C.A. § 6102 (West 2006).

252. Press Release, Senator Diane Feinstein, Congress Approves Legislation Authorizing National "Do Not Call" Telemarketing List (Sept. 25, 2003), http://feinstein.senate.gov/03Releases/r-dnc2.htm [hereinafter Feinstein Press Release].

253. Lee Davidson, *Do-Not-Call List Is Risk for Bishop, Cannon*, DESERET NEWS, Oct. 15, 2003, at A11. Congressman Rob Bishop, one of just eight Members of Congress to vote against the bill, noted this concern in explaining his vote: "I know [the vote] likely will be unpopular . . . . [B]ut I think it's the right thing to do. The bill doesn't ban all calls, just some. For example, it doesn't ban calls from politicians. It's hypocritical for Congress to block other calls but not its own." *Id.*

254. For example, Senator Diane Feinstein, a vocal supporter of the registry, noted that "many millions of Americans have made there [sic] strong preferences [to avoid receiving telemarketing calls] known," Feinstein Press Release, *supra* note 252, yet despite her constituents' preferences, she left the self-serving exemption for politicians in place.

when defining the process under which legislators take and retain office.[255]

Because the law itself defines the extent of a democracy, those who create it "have the capacity to shape, manipulate, and distort democratic processes."[256] Thus Congress, as the body that controls the existing arrangement for campaign finance structure, has the capacity to make the rules, and (consistent with Professor Mayhew's observations) "[h]istorical experience provides convincing reasons to believe that those who currently hold power will deploy that power to try to preserve their control."[257] Congress seeks to preserve its power in many ways. For example, when California state legislators presented a plan to create nonpartisan methods for redrawing legislative districts in 2007, Speaker of the House Nancy Pelosi worked to block the legislation, fearing a nonpartisan scheme would eliminate safe Democratic districts in California, making reelection harder for incumbents and tipping the balance of power away from Democrats in Washington, D.C.[258] In 2005, Republicans (who then controlled Congress) opposed a similar measure proposed by Governor Arnold Schwarzenegger for the same reasons.[259] Congress opposes nonpartisan redistricting because partisan schemes allow legislators to create safe districts, resulting in noncompetitive reelections. Much like partisan redistricting, campaign finance laws also afford Congress the opportunity to perpetuate incumbency.

Power over the campaign financing structure gives the sitting legislator an enormous advantage in the electoral process due to the power of incumbency. Simply put, candidates who challenge incumbent representatives have almost no chance of winning.[260] The "power of incumbency"

255. *Cf.* ROBERT CLARK, CORPORATE LAW 147 (1986) (describing a "self-dealing" transaction as one where a corporate director or officer, who is in a unique position of trust, takes advantage of his position in the transaction, using that position to act on his own best interests rather than working for the best interests of the person he owes a duty). In creating campaign finance regulations, Congress uses its position in the transaction to make reelection easier.

256. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 2 (rev. 2d ed. 2002).

257. *Id.*

258. Nancy Vogel, *Dems May Thwart Remap Effort; Opposition from Democrats in Congress Could Derail Plans that Would Change the Way the State's Voting Districts Are Drawn*, L.A. TIMES, Feb. 25, 2007, at B1. California State Assembly Speaker Fabian Nunez recognizes Congress's potential for self-dealing: he plans to exempt federal congressional districts from the 2007 nonpartisan redistricting plan (leaving only state districts to be drawn independently) because if the plan includes congressional districts, "'Congress will wage a $10-million campaign against it.'" *Id.* (quoting Speaker Nunez).

259. *See id.* (explaining "Schwarzenegger's fellow Republicans in Congress urged him to abandon the [2005 nonpartisan redistricting] measure because it could have jeopardized their party's control of Congress").

260. In 2002 and 2004, only nine out of 604 challengers defeated incumbent members of the U.S. House of Representatives (an approximate 1.5% success rate). Ctr. for Responsive Politics, The Big Picture: 2002 Election Cycle, http://www.opensecrets.org/bigpicture/incumbs.asp?cycle=2002&display=A&type=G (last visited Oct. 23, 2007); Ctr. for Responsive Politics, The Big Picture: 2004 Election Cycle, http://www.opensecrets.org/bigpicture/incumbs.asp?cycle=2004&display=A&type=G (last visited Oct. 23, 2007). In 2006, Democrat challengers beat an extremely abnormal number of

manifests itself in two major ways: the incumbent has an advantage in name recognition (forcing a challenger to spend more on media to introduce himself to voters), and he enjoys a heightened ability to raise campaign funds.[261] By restricting political speech, incumbents increase their advantages in both categories.

In the 2002 elections for the U.S. House of Representatives, the last year prior to BCRA, the average challenger raised only $197,608, while the average incumbent raised $898,382.[262] Since 2004, the first year under BCRA, this disparity increased: the average challenger now raises only $193,281, more than $4000 *less* than in 2002, while the average incumbent raises $1.12 million, a 25% increase over 2002.[263] Accordingly, the incumbency fundraising advantage has increased by more than 32% since 2002.

While the fundraising disparity increased post-BCRA, the costs of defeating an incumbent rose as well. In 2002, the four winning challengers spent an average of $1.59 million to unseat incumbent representatives.[264] In contrast, the average winning House incumbent only needed $846,250.[265] A challenger's odds of beating an incumbent in 2002 were directly tied to spending: a challenger spending less than $500,000 had a zero percent chance of beating the incumbent; a challenger spending $500,000 to $1 million had 8:1 odds; a challenger spending $1 million or more had 10:1 odds.[266] Since BCRA, the cost of winning has increased dramatically: a challenger spending less than $1 million now has a zero percent chance of beating the incumbent; a challenger spending $1 million to $1.5 million has 16:1 odds; a challenger spending over $1.5 million has 5:2 odds.[267] BCRA concomitantly makes defeating an incumbent *more expensive* and *decreases challengers' opportunities* to raise the cash needed to fund a competitive campaign.

incumbents, yet the overall incumbent reelection rate was still 94%. Press Release, Ctr. for Responsive Politics, 2006 Election Analysis: Incumbents Linked to Corruption Lose, but Money Still Wins (Nov. 9, 2006), *available at* http://www.opensecrets.org/pressreleases/2006/PostElection.11.8.asp.

261. *See* Roger H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 71 (2002). Through extensive campaign consulting experience, I found an added benefit closely tied to name recognition—a "built-in" advantage. An incumbent has already won (at least) a plurality of the votes in his district, thus voters have learned to vote for him or her. It is very difficult for a challenger to overcome this built-in advantage; to win, the challenger must give voters a reason *not* to reelect the incumbent. My campaign consulting experience bears this out: I have never seen a challenger defeat an incumbent legislator without discussing *the incumbent's* record. *See* Peter Valcarce & Robert Beard, *The Right Time for Your Opponent's Wrongs,* CAMPAIGNS & ELECTIONS MAG., Feb. 2005, at 36.

262. Ctr. for Responsive Politics, The Big Picture 2002 Cycle: Incumbent Advantage, http://www.opensecrets.org/bigpicture/incumbs.asp?Cycle=2002 (last visited Oct. 16, 2007).

263. Ctr. for Responsive Politics, The Big Picture 2004 Cycle: Incumbent Advantage, http://www.opensecrets.org/bigpicture/incumbs.asp?Cycle=2004 (last visited Oct. 16, 2007).

264. Ctr. for Responsive Politics, Election Overview: The Dollars and Cents of Incumbency, http://www.opensecrets.org/bigpicture/cost.asp (last visited Oct. 16, 2007).

265. *Id.*

266. *Id.*

267. *Id.*

Further, given incumbents' name-recognition and "built in" advantages, it is not surprising that challengers disproportionately benefit from independent expenditures made by national party committees and third-party groups.[268] One of the great paradoxes of electoral politics is that challengers can win only by talking about their opponents. Yet challengers are afraid to do so because of what researchers have long called the "boomerang effect," a concern that the voters the candidate targets will find the critical communication repulsive because it carries a negative message.[269] Typically, when a challenger attacks an incumbent's record, the incumbent immediately accuses the challenger of "negative campaigning," hoping to exacerbate the boomerang phenomenon.[270] For this reason, many challengers choose not to personally air advertisements attacking their opponents' records.[271]

This is a difficult choice because challengers want these advertisements; they "can take a virtual unknown against an apparently strong incumbent and provide a tremendous and strong margin [of victory]"[272] in a way advertisements focusing on the challenger herself cannot.[273] When a third-party or national-party committee runs the advertisement, its potential upside increases because the challenger has no creative control or advance warning, allowing the candidate to condemn the advertisement while reaping the effect bestowed upon the electorate. This effectively eliminates the potential for a boomerang effect,[274] allowing the candidate to wage a "positive" campaign, while the electorate begins to doubt the incumbent.[275] A positive campaign run by the candidate, combined with third-party attacks on an opponent's record, provides an unusually effec-

268. *See* McConnell v. FEC, 540 U.S. 93, 249 (2003) (Scalia, J., dissenting).

269. Michael Burgoon & Gerald R. Miller, *An Expectancy Interpretation of Language and Persuasion*, *in* RECENT ADVANCES IN LANGUAGE, COMMUNICATION, AND SOCIAL PSYCHOLOGY 200 (Howard Giles & Robert N. St. Clair eds., 1985).

270. *See* Richard R. Lau et al., *The Effectiveness of Negative Political Advertisements: A Meta-Analytic Review*, 93 AM. POL. SCI. REV. 851, 851–75 (1999); *see also* Gina M. Garramone, *Voter Responses to Negative Political Ads*, 61 JOURNALISM Q. 250, 250–59 (1984); Sharyne Merrit, *Negative Political Advertising: Some Empirical Findings*, 13 J. ADVERTISING 27, 27–38 (1984); Charles J. Stewart, *Voter Perception of Mud-Slinging in Political Communication*, 26 CENT. STATES SPEECH J. 279, 279–86 (1975); Stuart Surlin & Thomas Gordon, *How Values Affect Attitudes Toward Direct Reference Political Advertising*, 54 JOURNALISM Q. 89, 89–98 (1977).

271. *See* Valcarce & Beard, *supra* note 261.

272. Lau et al., *supra* note 270, at 852 (quoting Richard Wirthlin, President Reagan's pollster, who many consider the father of modern political polling and regression analysis).

273. *See id.* (quoting Democratic media consultant Philip Friedman, who contends that a challenger who does not talk about the incumbent will suffer electoral defeat: "If [the message is] negative, it works. If it's positive, save it for your tombstone" (citation omitted)).

274. *See generally* STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE 109–10 (1995) (discussing how voters react to negative advertisements).

275. Behavioral studies reveal the "tendency for negative information to have more weight than equally extreme or equally likely positive information appears in a variety of cognitive processing tasks." Richard R. Lau, *Negativity in Political Perception*, 4 POL. BEHAV. 353, 353 (1982). Further, studies reveal that "[p]eople are more apt to vote 'against' than 'for' something." KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, NEGATIVE POLITICAL ADVERTISING: COMING OF AGE 30 (1991).

tive recipe for incumbent defeat.[276] Since a sitting legislator usually does not need to talk about the challenger due to incumbency advantages, a rational incumbent would prefer to eliminate these advertisements altogether, as they represent no discernable upside.

In passing BCRA, Congress attempts to do exactly that.[277] While pleading for reform enactment, incumbent legislators demonized those parties who had the temerity to criticize elected officials:

> Senator Paul Wellstone: "These issue advocacy ads are a nightmare."
>
> Senator Maria Cantwell: BCRA "is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves."
>
> Senator Jim Jeffords: Issue ads "are obviously pointed at positions that are taken by you saying how horrible they are."
>
> Senator Tom Daschle: "Negative advertising is the crack cocaine of politics."
>
> Senator John McCain: Negative ads "do little to further beneficial debate and a healthy political dialogue" and BCRA will "raise the tenor" of elections.[278]

Senator McCain's comments evidence his belief that criticizing an incumbent legislator detracts from the marketplace of ideas.[279] This sentiment seems to directly contradict the foundational principle of healthy democratic institutions: that citizens not only have "the right to criticize the government,"[280] but "that 'the debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.'"[281] BCRA limits this right in very fundamental ways, most notably by restricting issue dialogue by establishing thirty- and sixty-day preelection windows wherein independent groups cannot even *mention* a federal candidate by name. Noncandidate and non–political-party actors may advertise prior to these windows, but their efforts will not be effective because voters, especially *undecided* voters, do

276. *See* Valcarce & Beard, *supra* note 261, at 37 (discussing how third-party negative messages are helpful when challenging an incumbent).

277. Voters typically do not start paying attention to elections until October, thus BCRA effectively eliminates the potential that meaningful criticisms will motivate the electorate. *See* Charlie Cook, Foreign Press Center Briefing: The 2004 Election—The Undecided Vote (Aug. 12, 2004) (transcript available at http://fpc.state.gov/fpc/35169.htm) (noting the electorate does not begin paying attention until approximately two to three weeks before an election).

278. George F. Will, *The First Amendment on Trial*, WASH. POST, Dec. 1, 2002, at B7 (quoting the various legislators).

279. *See id.*

280. McConnell v. FEC, 540 U.S. 93, 248 (2003) (Scalia, J., concurring).

281. Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (declaring unconstitutional a law banning political parties from endorsing candidates in the primary election) (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976)).

not start paying attention until the last two or three weeks before the election.[282]

This restriction aids incumbents because it deters advertisements that criticize their voting records in the month prior to a primary election and the two months prior to a general election—the period when the electorate pays attention. Incumbents know challengers need advertisements that take incumbents to task for their record; they also know the potential boomerang effect deters many challengers from airing these advertisements themselves.[283] By restricting third parties, they force challengers into a Solomonic choice.

After hearing oral arguments in *Buckley*, Justice Powell observed Congress's obvious interests at stake in passing restrictive campaign finance laws, noting: "I am convinced that the central thrust of [FECA 1974] is to favor incumbents and seriously disadvantage challengers (both individuals and minor parties)."[284] Today's reality vindicates Justice Powell's observation; campaign finance law has become more restrictive in the three decades since *Buckley*, creating "a nearly impenetrable financial force field of protection around incumbents"[285] and prompting scholars to label BCRA "the incumbency protection act."[286]

3. Accounting for Self-Dealing: The Corporate Context

Campaign finance analysis does not currently contemplate congressional self-dealing, but judges have created and applied tests to analyze self-dealing transactions in other circumstances, most notably those arising in the corporate context. In corporate law, a self-dealing transaction occurs when a controlling shareholder or director, who owes a fiduciary duty to shareholders not to misuse his or her power to promote personal interests at the expense of the minority or corporate interests, uses corporate authority to enter into a transaction that provides the individual with an extra or "unearned" benefit.[287] If a shareholder challenges the transaction as a self-dealing breach of fiduciary duties, the controlling shareholder or director must prove that he or she acted in good faith with respect to the transaction and that it was inherently fair to all parties.[288] This standard restrains corporate officers from using their posi-

282. *See* Cook, *supra* note 277.

283. *See* Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 135 (1992) (explaining that "laws that restrict interest group activity tend to favor incumbents").

284. Hasen, *supra* note 148, at 243 (quoting Justice Powell's post oral argument, preconference notes) (citation omitted).

285. Michael Munger, *Unintended Consequences 1, Good Intentions 0*, LIBR. ECON. & LIBERTY, Jan. 9, 2006, http://www.econlib.org/library/Columns/y2006/ Mungergoodintentions.html.

286. James E. Campbell & Steve J. Jurek, *The Decline of Competition and Change in Congressional Elections*, *in* THE UNITED STATES CONGRESS: A CENTURY OF CHANGE (Sunil Ahuja & Robert Dewhirst eds., 2003).

287. *See* Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) (discussing the exacting standard of review when a controlling shareholder has interests on both sides of a transaction).

288. *See* 18B AM. JUR. 2D *Corporations* § 1510 (2004).

tions of trust to benefit themselves at shareholders' expense, yet it allows for these benefits so long as the transaction is just.

Congress's duty to its constituents is similar to the fiduciary duty directors owe shareholders: citizens trust that their representatives will act in the constituency's best interests.[289] However, representatives may use the legislative power to insulate themselves from electoral defeat. The Supreme Court should begin asking whether it can trust Congress to unilaterally whack at partisan and self-serving moles, protecting itself while failing to prevent corruption, or whether disadvantaged dissenting voices need the Court's intervention.

IV. RESOLUTION

Famed economist Adam Smith observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[290] Smith's observation holds true for those in the legislative trade, who upon entering office appear highly focused on finding ways to make reelection easier. Yet in evaluating campaign finance regulations, conflicting Supreme Court factions universally focus on traditional First Amendment forms of scrutiny, failing to incorporate this inclination to self-deal when fashioning the rules under which Congress takes and retains office. In addition to evaluating campaign finance regulations under its "tiers of scrutiny" approach, the Court should add another layer to its calculus, analyzing Congress's self-dealing actions under an inherent fairness standard borrowed from corporation law. The Court would reject third-party expenditure limitations, candidate expenditure limits, and contribution restrictions as impermissible forms of congressional self-dealing under this inquiry, leaving only the disclosure requirement intact.

Far removed from its weak Publicity Act iteration, a strong disclosure system would result in an inherently fair system predicated on grassroots participation and voter preferences. A revised campaign finance structure should replace restriction with transparency, allowing federal candidates and third-party groups complete freedom in accepting and spending money, but requiring them to immediately divulge these trans-

289. Members of both the House and Senate frequently acknowledge this duty. *See, e.g.*, Senator Clinton's Letter to Constituents on the Accomplishments of the 109th Congress, July 10, 2006, http://clinton.senate.gov/news/statements/details.cfm?id=261846 (last visited Oct. 23, 2007) ("I have worked hard in the Senate to honor my duty to you, to represent the interests of all New Yorkers."); Congresswoman Carolyn Cheeks Kilpatrick, Constituent Services, http://www.house.gov/kilpatrick/constituent_services.shtml (last visited Oct. 23, 2007) ("My most important duty in Congress is addressing the needs of my constituents."). The Continental Congress also believed a representative owed a duty to his or her constituents. *See* 30 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 76 (John L. Fitzpatrick ed., 1934).

290. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 128 (1937).

actions through a system modeled after the SEC's public corporation filing requirements.

A. Analyzing Campaign Finance Law Under the "Entire Fairness" Standard

Confining campaign finance law analysis exclusively to emblematic First Amendment mechanics diminishes the Supreme Court's ability to reign in congressional self-dealing, because the framework cannot adequately address legislators' incentives to stifle dissenting speech for their own benefit.[291] The *Randall* plurality suggests a desire to give congressional self-dealing some weight,[292] but the post-*Randall* majority has not yet discovered discernable standards to account for this new variable, unnecessarily restricting its application to very limited circumstances.[293] Instead of shoehorning legislative self-dealing into a traditional First Amendment analysis, the Supreme Court should add a new layer to its examination, borrowing from corporation laws requiring self-dealing actors to justify their transactions under an "inherent fairness" standard.

The inherent fairness approach allows Justices to initially evaluate individual campaign finance restrictions using typical First Amendment "tiers of scrutiny."[294] But instead of trying to cram ill-fitting variables into this analysis, a problem plaguing previous decisions, the Supreme Court would commence future inquiry by asking whether the regulation at issue affects the way current legislators take or retain office. Upon finding that a regulation changes election rules, the Court should require Congress to justify the provision under the inherent fairness standard. In a rough analogy to burden allocation under the corporate inquiry, the Court would hold Congress accountable for its legislative transaction, requiring legislators to show that the provision is inherently fair to incumbents and challenging voices alike. If Congress cannot prove the regulation affects challengers and incumbents equally, conferring no advantage upon sitting legislators, the Court would strike down the action as impermissible legislative self-dealing.

Although explicitly adding this layer to traditional First Amendment analysis is a novel approach, it gives proper weight to the judicially recognized concept "that government may not restrict the speech of some elements of our society in order to enhance the relative voice of

291. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668–69 (1998) (noting that the current First Amendment framework is inadequate to prevent incumbents from entrenching themselves in office).

292. Randall v. Sorrell, 126 S. Ct. 2479, 2492 (2006).

293. *See* FEC v. Wis. Right to Life, 127 S. Ct. 2652 (2007); LULAC v. Perry, 126 S. Ct. 2594 (2006).

294. *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence,* 2007 UNIV. ILL. L. REV. 783, 785 (chronicling the Supreme Court's First Amendment jurisprudence and coining the term "tiers of scrutiny").

others," a principle for which the current framework cannot account.[295] Moreover, the First Amendment "tiers of scrutiny" approach is itself a Supreme Court fabrication, designed to give meaning to constitutional principles.[296] Adding a disinfecting layer to this analysis gives meaning to constitutional prohibitions against iniquitous legislative self-dealing, falling well within the bounds of acceptable First Amendment jurisprudence. Finally, employing the inherent fairness standard would also aid the Court when evaluating partisan gerrymandering schemes, minor-party ballot access issues, and a host of transactions implicating legislative self-dealing concerns the Court has so far been unable to definitively address.

Congress cannot justify its contribution limitations and third-party advocacy restrictions under a self-dealing analysis because the provisions do not affect incumbents and challengers equally.[297] Reformers may argue that BCRA's powerful prophylactic procedures are bound to create some unfortunate side effects but that Congress did not intend to preference itself or suppress dissenting voices. This argument is particularly unpersuasive given the reality that scandals of Abramoff magnitude occurred *after* incumbents enact legislation resulting in further power entrenchment. Whether intended or not, when Congress creates rules conferring unearned benefits upon itself, the potential for corruption escalates.

Although much of the current Whack-a-Mole campaign financing model embodied by BCRA and FECA 1974 would fail under self-dealing examination, one provision would likely survive the inquiry: the requirement that candidates, party committees, and third-party actors report contributions in excess of $200.[298] This requirement confers no special benefit upon incumbents, and although reporting obligations implicate compelled speech concerns, even plaintiffs challenging them on overbreadth bases consider "narrowly drawn disclosure requirements . . . the proper solution to virtually all of the evils Congress sought to remedy" by enacting campaign finance laws.[299] Not only is a focus on disclosure inherently fair, but allowing entry to all groups desiring to compete in the electoral system encourages responsiveness to constituents' interests.[300] It is also the most effective solution, throwing sunlight—what Jus-

295. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (noting the First Amendment was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (citation and internal quotation omitted)).

296. Bhagwat, *supra* note 294, at 784.

297. *See supra* notes 239–86 and accompanying text.

298. 2 U.S.C. § 434(b)(3) (2000).

299. *Buckley*, 424 U.S. at 60.

300. Ribstein, *supra* note 283, at 136 ("Permitting expenditures by all competing groups can result in a more informed electoral choice, and thus benefit voters generally even more than it benefits the competing interest group.").

tice Brandeis calls "the best of disinfectants"—on campaign finance and interest groups.[301]

B. Unleashing the Political Market by Informing Citizens

Contemporary disclosure vehicles far exceed those at work when Congress introduced reporting requirements in 1910. Although perhaps initially appearing to be insufficient to prevent corruption, disclosure ably prevents fraud by increasing transparency and aligning interests. Financial market regulation provides an excellent example of disclosure at work: financial reporting links shareholder and market interests with manager interests, encouraging corporations to act in ways that maximize shareholder value. The political market would do well to borrow from financial markets' sophisticated disclosure structure, resulting in a regulatory system that closely aligns legislators' interests with those of their constituents.[302]

Accepting the Supreme Court's conclusion that corruption occurs when legislators act contrary to the duties they owe constituents in hopes of receiving some kind of personal gain, the best hope for eliminating corruption is removing incumbents' incentives to act contrary to constituents' interests.[303] Information is key: if each candidate discloses the identity of all parties from whom she accepts campaign contributions, and voters learn of and act on this information, incumbents will lose the incentive to grant influence to parties not aligned with constituents' interests.[304] Incumbents will still need and collect money to conduct campaigns, but they will accumulate campaign resources from groups and individuals whose interests more closely interweave with constituent preferences.[305]

For example, Midwest corn producing districts may wish to elect a candidate who promises to represent ethanol interests. If elected, the constituency would want the candidate to pay heed to certain corpora-

301. L.D. BRANDEIS, OTHER PEOPLE'S MONEY (1914) ("Sunlight is said to be the best of disinfectants: electric light the most efficient policeman.").

302. This note proposes disclosure as the focus for any campaign finance regulatory scheme, but it is just a starting point. Additional issues remain, such as what amount of activity requires disclosure. *See, e.g.,* Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185 (2006) (discussing whether bloggers should be required to disclose under the current system). What about a prominent citizen placing a bumper sticker on his or her car—is that campaign activity under the system?

303. FEC v. Nat'l Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 497 (1985) (stating the Court's definition of corruption).

304. Professor Ribstein argues that laws restricting the amount of information available to constituents make "incumbents more secure in office and more able to indulge their personal ideologies . . . instead of constituents' preferences." Ribstein, *supra* note 283, at 135. Policies encouraging information dissemination would have the opposite effect, aligning incumbents' preferences with those of their constituents.

305. This idea reflects the Public Choice Theory first introduced by Anthony Downs in the 1950s, *see* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957), but also addresses the political realities noted by Issacharoff and Pildes. *See* Issacharoff and Pildes, *supra* note 291, at 708.

tions and interest groups comprising the energy lobby, but not others. Allowing this influence is not corruptive because it is not a subversion of the political process, nor would the legislator granting access act contrary to an obligation of office.[306] Corruption results from actions taken *against* constituents' interests, as would be the case if a legislator took money from or gave access to the oil and gas lobby, which generally opposes using ethanol as an additive or alternative fuel. To prevent corruption, voters need to know who is trying to influence their legislators. If money could result in influence, voters should know who is giving it, so the electorate can determine whether the legislator is acting in the constituency's best interests in taking the donation.

However, campaign finance information is an effective tool only if voters rely on it to indicate their candidate preferences on Election Day. In this sense, the electoral market is quite similar to capital markets: legislators compete for voters in elections by representing constituents' interests ("representative performance"), whereas corporations compete for investors through financial performance.[307] Investors and voters face similar decisions, choosing from among various offerings by determining whether a certain performance is worth the associated risk. Investor preference studies in the capital market context reveal a universal truth: stock prices (indicating investor preferences) adjust based on information.[308] Capital market regulations thus focus on financial disclosure as the primary vehicle for regulating the markets. Corporate managers may attempt to manipulate financial reports to show inflated performance, but they universally realize they must be willing to distribute information to the public in order to compete, and the regulatory scheme makes them liable if they lie.[309]

The federal securities regulation scheme focuses on disclosure because transparency and consistency are effective tools for reducing fraud.[310] Rapid consumer access to timely and accurate financial information is key; the Securities and Exchange Commission (SEC) facilitates prompt corporate disclosure through an electronic data gathering, analysis, and retrieval system accessible to the public (EDGAR).[311] Corporations submit required financial reports through EDGAR, and consumers

306. *NCPAC*, 470 U.S. at 497.

307. *See* JAMES C. MILLER, MONOPOLY POLITICS, chs. 2–4 (1999) (comparing the political market to the commercial market).

308. Eugene F. Fama, Lawrence Fisher, Michael Jensen & Richard Roll, *The Adjustment of Stock Prices to New Information*, 10 INT'L ECON. REV. 1, 1 (1969).

309. The connection between investors and information is so acute that corporations would likely disclose financial information voluntarily; thus, mandatory reporting requirements might not even be necessary. *See* Roberta Romano*, Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2367–68 (1998) (discussing these arguments).

310. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 277 (1991) (discussing the antifraud rationale).

311. Ruth Armfield Sanders & Shaswat K. Das, *EDGAR Filer Information: Electronic Filing and the EDGAR System: A Regulatory Overview*, SEC, Nov. 14, 2000, http://www.sec.gov/info/edgar/overview1100.htm.

access the information through the SEC's website.[312] Although not perfect, the system provides relatively easy access to corporate financial information for anyone with a computer. Investors then use this information to assess individual corporations' financial health, and reflect this assessment when determining the price they will pay for an individual stock. If a stock is priced higher than the investor believes the data supports, he or she will not purchase until the price accurately reflects the corporation's genuine value and will instead purchase stocks the market either undervalues or values consistently with the investor's financial analysis. When investors holding a particular stock believe its market price to be higher than the data supports, they will choose to sell. If a sufficiently large group of investors sell the stock, its price will fall until it reaches performance equilibrium. Accordingly, market price is acutely dependent on accurate financial data and timely disclosure.[313]

Political markets operate in much the same way. Voters consider candidates like investors consider stocks: they learn what they can about the various candidate substitutes and vote based on a belief that one candidate will better represent their interests. The current campaign finance regulatory scheme prevents an accurate analysis because it rewards stealth transactions and shadowy fundraising schemes. If money will always find an outlet, voters would be better served by a transparent system that recognizes this reality.

Congress can prevent corruption by embracing the model it enacted for financial markets: disclosure. To take advantage of political market efficiencies, a revamped disclosure scheme would require candidates to immediately disclose all donations received in excess of $250. To aid rapid dissemination, Congress should empower the FEC to create a more robust disclosure database along the lines of the SEC's EDGAR system, paying for the database by shifting current FEC priorities away from intensive rule promulgation. Candidates would be free to accept donations from any individual, interest group, corporation, or other entity under this system, but they must immediately disclose the actual source of the funds—eliminating bundlers' chokehold on financing power and heightening transparency.

By encouraging information dissemination, Congress would illuminate campaign finance practices and players, and it would trust the electorate to decide for itself when certain political donations become excessive or cease to reflect constituent preferences. In this regard, financing would become a campaign issue, perhaps *the* issue, for individual voting

312. *Id.*

313. The reality that investors react to information and price stock accordingly was first explained by the Efficient Capital Markets Hypothesis (ECMH) and is widely accepted by modern economists. *See* Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 383–417 (1970) (explaining the ECMH and addressing potential criticisms).

decisions.[314] Instead of restricting speech to prevent corruption, Congress would empower the electorate to define and punish corruption in individual congressional districts.

V. CONCLUSION

Money will always flow into the political process; the stakes are too high for interested parties to remain on the sidelines. Congress's Whack-a-Mole approach merely perpetuates incumbency and corruption, forcing money into hidden avenues and restricting the hallmark of healthy democracies: the right to criticize government. In a period where "the very working materials of American constitutional law may be in the process of changing,"[315] the Supreme Court should carefully contemplate the potential for congressional self-dealing when considering future challenges to restrictive campaign finance regulations. By forcing Congress to justify speech restrictions under an inherent fairness standard, the Court can encourage legislators to focus on disclosure, bringing those parties interested in shaping America's future out of the shadows. Political players previously encouraged to form stealthy PACs and bundle campaign contributions must step into the light of day so that voters can decide for themselves how much influence is too much. Instead of watching Congress take self-serving whacks at partisan campaign finance moles, voters will wield unprecedented power through information, preventing corruption by holding politicians accountable where it matters most: the ballot box.[316]

314. Campaign financing has been proven to work as a campaign issue. In 2004, the National Republican Congressional Committee executed a successful direct mail campaign based largely on the fact that a candidate running for Congress in Indiana received most of his campaign contributions from Boston. An example of these direct mail piece is available at, http://www.theaapc.org/globalimages/pollie2005/gold/19%20-%20Why%20Give%20Them%20One%20of%20Ours.pdf.

315. Lawrence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 297 (2005).

316. *See* MAYHEW, *supra* note 248.