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Money, Like Water...: Revisiting Equality in Campaign Finance Regulation after the 2004 Summer of 527s

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INTRODUCTION

The November 2004 presidential election and calls for reform in its aftermath illustrate the wisdom of the United States Supreme Court's most recent pronouncement on campaign finance regulation. In upholding most of the major provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[1] the Court remarked perceptively, "[m]oney, like water, will always find an outlet. What problems will arise, and how Congress will respond are concerns for

1. Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 28, and 47 U.S.C. (2000 & Supp. 2002)). BCRA is also referred to by journalists as the "McCain-Feingold" campaign finance reform bill. *See, e.g.*, Charles Lane, *Justices Uphold Campaign Finance Law: Court Endorses 'Soft Money' Ban, Rejecting Free-Speech Concerns*, WASH. POST, Dec. 11, 2003, at A1 (using McCain-Feingold terminology).

another day."[2] Although BCRA eliminated the flow of unregulated "soft money" into national, state, and local political party coffers,[3] the new law increased "hard money" contribution limits to candidates and political parties.[4] Moreover, BCRA did nothing to prevent the flow of unregulated money to politically-oriented groups outside the political party system.[5] As a result of the changed regulatory landscape and intense interest in the presidential election, the 2004 elections—the first operated after the passage of BCRA—were the most expensive in United States history.[6] In the wake of the 2004 election cycle, members of Congress and campaign reform organizations called for a new wave of legislation aimed at altering the structure of campaign finance laws.[7] To scholars who have watched the campaign finance reform debate over the course of many

2. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224 (2003).

3. BCRA § 101(a), 2 U.S.C. § 441i. The term "soft money" refers to contributions made to national political party organizations in amounts and from sources prohibited by the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972). *McConnell*, 540 U.S. at 122–23; *see infra* text accompanying notes 86–87. FECA was the precursor to BCRA. *See infra* Part I.A.

4. BCRA § 307, 2 U.S.C. § 441a(a). The term "hard money" refers to contributions to political candidates, national political party organizations, and political action committees ("PACs") that are limited in amount by FECA and subject to public disclosure. *See infra* note 51 (summarizing original and current hard money contribution limits on individual contributions to candidates, political parties, and PACs).

5. Whether the Federal Election Commission ("FEC") should regulate independent political groups ("527s") has been a subject of controversy. The FEC initiated a rulemaking proceeding in 2001 to determine whether 527 political committees registering with the IRS were subject to FECA. *See* Definition of Political Committee, 66 Fed. Reg. 13,681, 13,687 (Mar. 7, 2001) (codified at 11 C.F.R. § 100.5 (2005)). However, the Commission suspended its rulemaking later that year "pending, among other things, possible legislative or court action and the completion of other rulemaking projects." *See* Phillip Dean, *Definition of 'Political Committee' Rulemaking Held in Abeyance*, 27 FED. ELECTION COMM'N REC. 1, 3 (2001), *available at* http://www.fec.gov/pdf/record/2001/nov01.pdf. The Commission again considered the issue in 2004, but ultimately decided not to promulgate a rule applicable to all federally-oriented 527 political organizations. *See* Political Committee Status, 69 Fed. Reg. 68,056, 68,064–65 (Nov. 23, 2004) (reporting that the FEC declined to adopt a rule for the 2004 elections defining 527 organizations as "political committees" within the meaning of FECA but adopting a rule to take effect for the 2006 cycle which will apply only to 527s that solicit funds explicitly for aiding in the election or defeat of a clearly identified candidate).

6. Open Secrets, 2004 Presidential Election, http://www.opensecrets.org/presidential/index.asp (last visited Nov. 14, 2005). Total spending by political parties, the candidates' campaigns, and outside groups exceeded $1.7 billion over the 2003–04 election cycle. Thomas B. Edsall & Derek Willis, *Fundraising Records Broken by Both Major Political Parties*, WASH. POST, Dec. 3, 2004, at A7. Unless otherwise noted, all dollar amounts referenced in this Comment are actual amounts reported, unadjusted for inflation.

7. *See infra* notes 20–23 (summarizing congressional reform efforts); Part III.C.3 (same).

years, this most recent course of events and the pressure for additional reform should have come as no surprise.[8]

Much of the media attention during and after the 2004 election cycle focused on the influx of cash to independent political organizations,[9] often called "527s" for the section of the Internal Revenue Code under which they are organized.[10] Although active in previous election cycles,[11] 527s took on new significance in the 2004

8. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hyrdraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1715 (1999) (forecasting that each effort at reform will inevitably lead to unintended consequences that, in turn, will touch off a new wave of reform). Professors Issacharoff and Karlan even predicted fairly accurately the progression of reform when they wrote, "any reform agenda focusing on fundraising and expenditures by the candidates and political parties will have the predictable effect of channeling the influence of money away from the regulated entities and into its own domain." *Id.* at 1717. Indeed, in 2004, BCRA's limitations on political parties' raising and spending of soft money led to the funneling of resources to independent groups. *See infra* Part II.

9. *See, e.g.*, James V. Grimaldi & Thomas B. Edsall, *Super Rich Step into Political Vacuum*, WASH. POST, Oct. 17, 2004, at A1 (asserting that, "[b]y banning the use of large 'soft money' contributions to party organizations, the McCain-Feingold campaign finance law essentially made 527s the only conduit for unregulated and unlimited contributions"); Richard Rainey, *Financing His Own Anti-Bush Campaign*, L.A. TIMES, Sept. 29, 2004, at A21 (discussing billionaire George Soros's individual efforts to defeat President George W. Bush, as well as Soros's multi-million dollar contributions to the 527 organizations MoveOn.org and America Coming Together to aid efforts to defeat Bush).

10. I.R.C. § 527 (2000) (requiring disclosure and reporting by "a party, committee, association, fund, or other organization ... organized and operated primarily for the function of directly or indirectly accepting contributions or making expenditures ... for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office ...."). All political organizations and committees are classified as 527s for tax purposes, but only a subset of these entities are classified as political committees under FECA § 301(d), codified at 2 U.S.C. § 431(4) (2000 & Supp. 2002) and 11 C.F.R. § 100.5 (2005). Unless otherwise noted, the use of the term "527" in this Comment describes independent political organizations that fall within § 527 of the tax code but are not currently regulated by the FEC.

Independent 527s are distinguishable from PACs because 527s cannot formally endorse the election or defeat of a particular candidate or candidates. *See* I.R.C. § 527. In contrast, although run independently of any candidate, political party, corporation, or labor union, PACs have the primary purpose of advocating for the election or defeat of one or more clearly identified federal candidates. 11 C.F.R. § 100.5(a) (defining multi-candidate PACs). PACs are subject to FECA's contribution limits of $5,000 per individual per year, 2 U.S.C. § 441a(a)(1)(C), and their expenditures on behalf of a candidate are counted as contributions to that candidate, *id.* § 441a(a)(7).

11. *See generally* Marie B. Morris, *527 Organizations: Reporting Requirements Imposed on Political Organizations After the Enactment of P.L. 106-230* (Cong. Research Serv. Report No. RS20650, 2001), *available at* http://www.opencrs.net/collections.php (citing Pub. L. No. 93-625, which amended the tax code in 1975 to create a tax category for political organizations, and explaining the 527 disclosure and reporting requirements which took effect in mid-2000).

cycle. With soft money contributions to political parties outlawed,[12] contributors seeking to influence the election debate poured money into 527 organizations.[13] One member of Congress pejoratively labeled the summer of 2004 as "the summer of 527s."[14]

Section 527 groups raised a total of $424 million in the 2004 election cycle,[15] including more than $256 million from individual donors.[16] Philanthropist and venture capitalist George Soros and insurance magnate Peter Lewis commanded the greatest attention from congressional reformers and political analysts for their early public support for two 527s, America Coming Together and The Media Fund, and for the unprecedented size of their multi-million dollar overall contributions.[17] As news stories detailed 527s' fundraising power and chronicled the sizable contributions that 527s attracted,[18] some members of Congress became concerned that 527s

12. Bipartisan Campaign Reform Act of 2002 (BCRA) § 101(a), 2 U.S.C. § 441i (2000 & Supp. 2002). In contrast, there are no limitations on the amount that donors can contribute to 527s, although contributions of $500 or more are subject to disclosure. *See* Internal Revenue Service, Filing Requirements, *available at* http://www.irs.gov/charities/political/article/0,,id=96355,00.html (last visited Nov. 15, 2005).

13. Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT (Michael J. Malbin ed., forthcoming 2005) (manuscript at 2), *available at* http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR_Chapter5_WeissmanHassan.pdf. The most successful 527s during the 2004 election cycle included the Democratic-oriented America Coming Together, the Joint Victory Fund Campaign, and the Media Fund, and the Republican-oriented Progress for America Voter Fund and Swift Boat Veterans and POWs for Truth. *See id.* (manuscript at tbls.5.4 & 5.5).

14. 151 CONG. REC. H5643 (daily ed. July 12, 2005) (statement of Rep. Pence).

15. Weismann & Hassan, *supra* note 13 (manuscript at 2). The Weissman and Hassan study analyzes in-depth $405 million of the $424 million contributed in the 2004 election cycle that had been reported to the IRS by December 12, 2004. *Id.* (manuscript at 3).

16. *Id.* (manuscript at tbl.5.1). More than half of the $256 million raised from individual donors came from twenty-four individuals who gave each $2 million or more. *Id.* The best known of these high dollar donors included George Soros ($24 million) and Peter Lewis ($22.5 million), who gave to Democratic-oriented 527s, and Bob Perry ($8 million), Dawn Arnall ($5 million), and Alex Spanos ($5 million), who gave to Republican-oriented 527s. *Id.* (manuscript at tbl.5.2).

17. *See, e.g.*, Laura Blumenfeld, *Soros's Deep Pockets vs. Bush*, WASH. POST, Nov. 11, 2003, at A3 (describing efforts among Democratic political operatives to launch independent political organizations financed by Soros and Lewis); Jeanne Cummings, *A Hard Sell on Soft Money: 'Shadow Democrats' Work Around Ban on Unlimited Donations*, WALL. ST. J., Dec. 2, 2003, at A4 (same).

18. *See, e.g.*, Grimaldi & Edsall, *supra* note 9 (discussing the tens of millions of dollars raised by 527 groups, noting that all of the top ten 527 donors were on *Forbes* magazine's list of the richest Americans, and reporting that eighty percent of donations to Democratic 527s and ninety percent of donations to Republican 527s came from donors contributing $250,000 or more); Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y. TIMES, Sept. 25, 2004, at A12 (discussing the influx of cash from highly-ideological, activist contributors).

were subverting the intent of federal laws to regulate the flow of money into elections.[19] Congressional action in 2004[20] and 2005[21] touched off a new wave of debate about the role of money in politics.[22]

In articulating the need for additional reform, policymakers repeatedly alluded to the huge infusions of cash from a limited number of wealthy sources as a prime rationale for subjecting 527s to contribution limits.[23] Although the post-2004 debate focused most intensely on seeking to curb the power of 527 organizations, recent calls for reform can also be read more broadly as signaling a discomfort with the role that large contributors play in funding political discourse.[24]

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19. *See, e.g.*, 150 CONG. REC. S9527 (daily ed. Sept. 22, 2004) (statement of Sen. McCain) ("[A] number of 527 groups have been raising and spending substantial amounts of soft money in a blatant effort to influence the outcome of this year's Presidential election. These activities are illegal under existing laws . . . .").

20. *See* Bill Status for S. 2828, 108th Cong. (2004) and H.R. 5127, 108th Cong. (2004), http://thomas.loc.gov/search.html (showing that both the House and Senate versions of the 2004 Reform Act were referred to committee, but no action at the committee or the full chamber level ever occurred).

21. 527 Reform Act of 2005, S. 271, 109th Cong. (as introduced by Senators McCain and Feingold, the Senate sponsors of BCRA). Former Senate Majority Leader and Rules Committee Chairman Trent Lott introduced a substitute bill with the same name, and this is the bill that is currently pending in the United States Senate. *See* 527 Reform Act of 2005, S. 1053, 109th Cong. A similar bill was introduced in the United States House of Representatives by Representative Chris Shays, one of the House's original BCRA sponsors. *See* H.R. 513, 109th Cong. (2005).

22. In response to legislation focused solely on 527s, a group of House members introduced a broader bill, titled the "527 Fairness Act," which would limit contributions to 527s while simultaneously increasing hard money contribution limits to candidates and political parties. *See* 527 Fairness Act, H.R. 1316, 109th Cong. (2005); *infra* Part III.C.3.

23. *See Hearing to Examine and Discuss S. 271, A Bill Which Reforms the Regulatory and Reporting Structure of Organizations Registered Under Section 527 of the Internal Revenue Code Before the S. Comm. on Rules and Admin.*, 109th Cong. (2005) [hereinafter *S. 271 Hearing*], *available at* http://rules.senate.gov/hearings/2005/030805_hearing.htm (statements of Rules Committee Chairman Trent Lott, Senator John McCain, FEC Commissioner David Mason, and Campaign Finance Institute Executive Director Michael Malbin). Press reports similarly characterized the "overriding goal" of reform as stopping "donations like the $24 million that the financier George Soros contributed last year [in 2004] to defeat President Bush." Glen Justice, *McCain Calls for New Limits on Money to Political Groups*, N.Y. TIMES, Feb. 3, 2005, at A14.

24. For example, virtually every discussion of 527 fundraising success mentions the $24 million that George Soros contributed to Democratic 527s. *See, e.g.*, Grimaldi & Edsall, *supra* note 9 (noting that Soros contributed more than any other individual ever has in a single election cycle to independent political organizations); Rainey, *supra* note 9 (discussing Soros contributions to MoveOn.org and America Coming Together); *see also* 151 CONG. REC. S905 (daily ed. Feb. 2, 2005) (statement of Sen. McCain) ("[A] number of 527 groups raised and spent a substantial amount of soft money in a blatant effort to influence the outcome of last year's Presidential election.").

This Comment argues that the 2004 "summer of 527s"[25] provides a lens through which policymakers and the courts should reconsider the importance of equality of opportunity as a guiding principle in campaign finance regulations.[26] Inequality in citizens' ability to affect the democratic process has ill-effects for what Justice Breyer has called "participatory self-government."[27] Thus, this Comment contends that the issue of greatest concern arising from the most recent national campaign is not that large donors are "corrupting" particular politicians or creating the appearance that their large contributions resulted in preferential treatment.[28] Rather, the sheer size of contributions to 527s and the vast outpouring of cash by these political groups cannot help but create the impression that one person's $20 million contribution renders another person's twenty-dollar contribution relatively meaningless in terms of the twenty-dollar contributor's real or perceived ability to affect the debate. The realization that one's participation in the political process may be drowned out by other, more powerful, voices has the potential to undermine participatory democracy.[29]

The notion of equality touches deeply on democratic values, including the principle that all citizens should have a fair chance to affect the election of their leaders and shape their leaders' policy priorities.[30] The inequalities exposed by large contributions to 527

25. 151 CONG. REC. H5643 (daily ed. July 12, 2005) (statement of Rep. Pence).

26. In 1998, evaluating the potential for "equalization" as a cognizable government interest in regulating campaign finance, the Twentieth Century Fund Working Group on Campaign Finance Litigation explained, "the interest claimed is not the interest in ensuring that all speakers have the same ultimate *influence*, but only that they not have completely disparate opportunities to *try*." E. JOSHUA ROSENKRANZ, REPORT OF THE TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FINANCE LITIGATION, *BUCKLEY* STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM 69 (1998).

27. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252 (2002).

28. As discussed *infra* notes 64–67 and accompanying text, corruption and the appearance of corruption have been, to date, the only interest that the Court has found compelling enough to support limits on campaign contributions.

29. *See, e.g.*, Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239, 239–40, 248–51 (2005) (citing 527 contributions as part of a broader argument about how the disproportionate financing of campaigns by wealthy people and groups hampers political equality); Richard Briffault, *The 527 Problem . . . and the* Buckley *Problem*, 73 GEO. WASH. L. REV. 949, 954–55 (2005) (arguing that "the real vice of large individual donations" to 527s is that they allow a small number of very wealthy donors "to play an enormous role in the political process, a role that mocks political equality" and undermines democracy).

30. *See, e.g.*, TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AM. POLITICAL SCI. ASS'N, AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 1 (2004) ("Equal political voice and democratically responsive government are widely cherished American ideals."). The American Political Science Association convened a task force of

organizations provide support for a body of literature on campaign finance reform that advocates equality-focused campaign finance laws.[31] Focusing on equality as a goal of campaign finance regulation would allow policymakers to step outside the current constraints on regulation to craft alternative mechanisms for campaign funding, spending, and discourse that would level the playing field for voters and candidates alike.

Designating equality as a compelling state interest in shaping campaign finance laws would require a significant shift in campaign finance jurisprudence. In 1976, the United States Supreme Court in *Buckley v. Valeo*[32] rejected equality as a justification for regulating campaign finance.[33] The Court held that only corruption or the appearance of corruption could justify regulation[34] and interpreted the First Amendment in a way that limits avenues for regulation.[35] Additionally, some members of the current Court and members of Congress have said that they favor significantly relaxing or abolishing campaign finance regulations altogether.[36]

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noted political scientists to study the issue of inequality in American politics and government. The task force wrote: "Failure to take urgent and concerted steps to expand political participation and enhance democratic responsiveness—and failure to use democratic means creatively to temper rising social disparities—will surely endanger our longstanding democratic ideals . . . ." *Id.* at 2. Although campaign finance reform is certainly not the sole—or even the major—vehicle by which to promote a healthier democracy, this Comment suggests that the reform of campaign finance laws is one component of a more comprehensive plan to promote equality in American politics and government.

31. *See infra* Part III.B.

32. 424 U.S. 1 (1976) (per curiam).

33. *See id.* at 48–49.

34. *Id.*

35. *See infra* notes 60–75 and accompanying text (explaining the current constraints on regulation, particularly the distinction between contributions and expenditures and between expenditures made independently of versus in coordination with a candidate or political party).

36. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 264 (2003) (Thomas, J., dissenting) (arguing that First Amendment principles require limited or no regulation of campaign contributions or expenditures); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) (arguing that the Court's adherence to stare decisis is misplaced, "perpetuat[ing] and compound[ing] a serious distortion of the First Amendment resulting from our own intervention in *Buckley*"); *Shrink Mo.*, 528 U.S. at 412 (Thomas, J., dissenting) (questioning the Court's unwillingness to apply strict scrutiny to the contribution limits set by Missouri state law and stating that "[t]he analytic foundation of *Buckley*, however, was tenuous from the very beginning and has only continued to erode in the intervening years"); *see also* 527 Fairness Act of 2005, H.R. 1316, 109th Cong. (2005) (proposing to abolish aggregate limits on the amount of money that an individual donor can contribute to candidates, political parties, and PACs and seeking to permit fund transfers between federal lawmakers' leadership PACs and political parties).

At the same time, the Court in recent years has taken an increasingly deferential approach to legislative judgments about actual or apparent corruption and accepted the need for new laws to prevent circumvention of existing regulations.[37] Some scholars have suggested that the Court's adherence to "corruption or appearance of corruption" as the only rationale for regulating campaign finance is, at best, disingenuous,[38] and, at worst, harmful to democracy.[39] Advocates of regulation have interpreted the Court's deferential tone in recent cases, including *McConnell v. Federal Election Commision*, as signaling a shift in its willingness to consider new justifications for reform.[40] In the last five years, several Justices, including those Justices that have voted to uphold campaign finance restrictions[41] and those that have voted to invalidate them,[42] have urged the Court to

37. *See McConnell*, 540 U.S. at 224; Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 42 (2004) (describing increased deference in campaign finance cases since 2000).

38. *See* Hasen, *supra* note 37, at 32 ("The Court has continued to entertain the fiction that it is adhering to the anticorruption rationale of *Buckley v. Valeo* . . . .").

39. *See, e.g.*, Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, *in* IF *BUCKLEY* FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 63, 101 (E. Joshua Rosenkranz ed., 1999) (concluding that limiting the amount of money in politics would promote egalitarian citizen participation); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1161–62 (1994) (arguing in favor of replacing a market-driven campaign finance system with a democracy-driven system).

40. *See, e.g.*, Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 85 (2004) (arguing that, by recognizing the impact that disparities in wealth have on the political process, *McConnell* has the potential to shift the terms of the campaign reform debate). Taking a less positive view of this development, Justice Kennedy is inclined to agree. *See McConnell*, 540 U.S. at 287 (Kennedy, J., dissenting) ("To reach today's decision, the Court surpasses *Buckley*'s limits and expands Congress's regulatory power.").

41. Justices Stevens and Breyer, both of whom voted with the majority in *McConnell*, have urged reconsideration of the *Buckley* approach on the grounds that campaign finance regulations should go further than they currently do. *See Shrink Mo.*, 528 U.S. at 398–99 (Stevens, J., concurring) (arguing that "[m]oney is property . . . not speech" and that, while property rights are constitutionally protected, they are not entitled to the same level of protection as speech rights); *id.* at 400–01, 404–05 (Breyer, J., concurring) (urging that important constitutional interests lie on both sides of the campaign finance equation—speech and association rights on one side and the integrity and democratization of the electoral process on the other—and suggesting that the rigid line between contributions and expenditure restrictions be eased or, alternatively, that *Buckley* be reconsidered altogether).

42. Justices Thomas and Kennedy dissented from the majority opinion in *McConnell* on Titles I and II of BCRA arguing that First Amendment principles require limited or no regulation of campaign contributions or expenditures. *See McConnell*, 540 U.S. at 264, 286. Each of these justices, too, has recently argued for overruling *Buckley*. *See supra* note 36.

revisit its application of First Amendment principles to campaign finance regulation.[43] As one scholar wrote recently, "The Court seems to sense the imminence of a paradigm shift, but it is not sure where the analytic road will lead."[44] In fact, whether the Court will accept alternative justifications for regulating campaign finance and allow expenditure limits in furtherance of those alternative rationales may be resolved during the Court's 2005 Term.[45]

Given the possibility of the Court's imminent reconsideration of both the constitutionality of expenditure limits and permissible justifications for government regulation of campaign finance, and using the 2004 elections as a lens through which to evaluate the need for egalitarian-oriented reform, this Comment argues in favor of revisiting the equality rationale as a justification for campaign finance regulation. Part I briefly summarizes the current framework for evaluating campaign finance laws as articulated by the Court in *Buckley v. Valeo* and touches on the Court's most recent decision in *McConnell v. Federal Election Commission*.[46] Part II highlights the role that 527s played in the 2004 election. Part III explores the empirical and doctrinal rationale for recognizing equality as a protectable government interest in crafting and upholding campaign finance laws, as well as the constitutional, practical, and political barriers to this shift. Although acknowledging the potential dangers of reform, Part IV briefly assesses the kinds of reforms and innovations in campaign finance law that might be possible within a revised framework.

I. BACKGROUND: CAMPAIGN FINANCE IN CONGRESS, COURT, AND ON THE GROUND

Because the Supreme Court's decision in *Buckley v. Valeo* continues to be the starting point for any analysis of campaign finance laws, it is useful to summarize at the outset *Buckley*'s key teachings and examine *Buckley*'s impact on subsequent congressional efforts to

43. *See Shrink Mo.*, 528 U.S. at 409–10 (Kennedy, J., dissenting).

44. Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 516–17 (2004).

45. In late September 2005, the Court agreed to hear a challenge to the constitutionality of Vermont's strict contribution limits and candidate expenditure limits in the consolidated cases of *Randall v. Sorrell*, *Vermont Republican State Committee v. Sorrell*, and *Sorrell v. Randall*. *See* Linda Greenhouse, *Justices Take on Spending Limits for Candidates*, N.Y. TIMES, Sept. 28, 2005, at A1. The Court is expected to hear the consolidated cases in early 2006. *Id.*

46. 540 U.S. 93 (2003).

regulate campaign finance.[47] The function of this Part is not to provide an exhaustive history of campaign finance law, but to show briefly how the intersection of law and politics shapes the system in place today.

A. *Early Reform Efforts and the* Buckley *Framework*

Congress began to regulate individual citizens' participation in financing political campaigns in the early 1970s with the enactment of the Federal Election Campaign Act ("FECA").[48] In 1974, after the Watergate scandal highlighted the potential for corruption in political campaigns,[49] Congress amended FECA[50] to include a set of hard money limits to regulate the flow of contributions into the political process. The limits were intended to cap the amount that individual citizens could contribute to candidates, state and national political parties, and political action committees ("PACs").[51] The 1974 and 1976 amendments also included caps on overall expenditures by

47. *See* Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 28, and 47 U.S.C. (2000 & Supp. 2002)).

48. Pub. L. No. 92-225, 86 Stat. 3 (1972). Regulation of corporate and union contributions has existed since the early and mid-twentieth centuries, respectively. *See* Taft-Hartley Act of 1947, Pub. L. No. 80-101 § 304, 61 Stat. 136, 159 (banning labor union contributions to political campaigns); Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (banning corporate and bank contributions to political campaigns).

49. *See* ROSENKRANZ, *supra* note 26, at 23 (citing news report that one donor contributed $2 million to President Nixon's re-election bid and 142 contributors gave more than $50,000 each to Nixon's campaign).

50. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

51. *Id.* § 101(b)(1)–(3), *amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, 486–87 (codified as amended at 2 U.S.C. § 441a (2000)). The Amendments set a $1,000 limit on the amount any individual could contribute to a candidate in an election cycle, a $5,000 annual limit on contributions to state party accounts for the state party's share of federal election activities, a $20,000 annual limit on contributions to national political party organizations, a $5,000 annual limit on contributions to political action committees, and a $25,000 annual limit on the aggregate amount contributed to candidates, party organizations, and PACs combined. *Id.* Hard money limits continue to be a fixture of the regulatory scheme. In 2002, Congress enacted the first increase in the amount of money individuals are eligible to contribute to political parties and federal candidates and provided that contribution limits should be indexed for inflation. *See* BCRA § 307, 2 U.S.C. § 441a (increasing limits on contributions by an individual as follows: $2,000 per election cycle to a federal candidate, $10,000 per calendar year to a state political party, and $25,000 per year to a national political party. Contributions to non-party PACs continue to be limited to $5,000 per year); *see also* Joseph E. Cantor & L. Paige Whitaker, *Bipartisan Campaign Reform Act of 2002: Summary and Comparison with Previous Law* 2 (Cong. Research Serv. Report No. RL31402, 2004), *available at* http://www.opencrs.net/collections.php (providing comparison chart of FECA's pre- and post-BCRA hard money limits).

candidates themselves, the candidates' campaign committee, and independent expenditures made in support of or opposition to a candidate.[52] Additionally, the 1974 legislation contained reporting and disclosure requirements for contributions and expenditures exceeding certain dollar amounts.[53]

Ruling on the constitutionality of the 1974 FECA amendments in *Buckley v. Valeo*, the Court upheld two of the three challenged provisions—contribution limits[54] and disclosure and reporting requirements[55]—but struck down expenditure limits.[56] The Court's analysis in *Buckley* has had a lasting impact on the constitutional framework governing campaign finance in three important respects. First, it set up a dichotomy between contributions and expenditures.[57] Second, it set forth "corruption or the appearance of corruption" as the only constitutionally permissible justification for regulating campaign finance.[58] Third, it distinguished groups whose activities are coordinated with those of a candidate or political party from groups whose activities are independent of a candidate or party.[59] Each of these features is discussed briefly below.

First, the Court established that an individual's First Amendment speech and association interests are implicated by restrictions on contributions and expenditures because of the close relationship between money and speech. The Court said: "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . ."[60] The Court identified FECA's contribution limits as implicating speech and association rights only indirectly,[61] but found FECA's expenditure limits to directly burden speech rights.[62] In subsequent cases, the Court articulated a relaxed standard for evaluating the constitutionality of contribution limits,

52. FECA Amendments of 1974 § 101(c), (e), (f).
53. *Id.* § 201; *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 118–19 (2003) (summarizing the 1974 amendments).
54. Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam).
55. *Id.* at 66–68.
56. *Id.* at 48–49.
57. *See infra* text accompanying notes 61–63.
58. *See infra* text accompanying notes 64–67.
59. *See infra* text accompanying notes 69–73.
60. *Buckley*, 424 U.S. at 14.
61. *Id.* at 28–29.
62. *Id.* at 39.

while applying a rigorous strict scrutiny standard to expenditure limits.[63]

Second, balancing the incursion on an individual's First Amendment rights against the state's interest in regulation, the *Buckley* Court found only one "constitutionally sufficient" state interest to justify regulation of contributions[64]: preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large contributions on candidates' positions and on their actions if elected to office."[65] As discussed in greater detail in Part III, the Court rejected the other two justifications for regulation put forth by proponents of FECA: "equaliz[ing] the relative ability of all citizens to affect the outcome of elections"[66] and stemming "the skyrocketing cost of political campaigns" to "open the political system more widely to candidates without access to sources of large amounts of money."[67] The *Buckley* Court's rejection of equality is the Supreme Court's only pronouncement on this topic.[68]

Third, the *Buckley* Court recognized several differences between outside groups that are affiliated in some direct or indirect way with a particular candidate and groups that are independent. The Court made the basic assumption that organizations that are independent of candidates or party committees bear little risk of corruption and therefore need little regulation.[69] Distinguishing between expenditures made by outside groups in coordination with a candidate's campaign versus those made independently of any candidate's formal campaign organization,[70] the Court held that the coordinated expenditures should be considered contributions to a candidate's campaign and, consistent with First Amendment

63. *Compare* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000) ("[A] contribution limit involving 'significant interference' with associational rights could survive if the Government demonstrate[s] that contribution regulation [is] 'closely drawn' to match a 'sufficiently important interest' . . . .") *with* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990) (noting that expenditure limits that burden political speech must be "narrowly tailored to serve a compelling state interest").

64. *Buckley*, 424 U.S. at 26–28.

65. *Id.* at 25.

66. *Id.* at 26.

67. *Id.*

68. *But cf. infra* note 221 (discussing lower courts' treatment of the equality rationale).

69. *Buckley*, 424 U.S. at 47 (explaining, in striking down expenditure caps on independent groups, that independence "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate").

70. *Id.* at 59.

principles, could be capped.[71] Conversely, expenditures made independently of a candidate could not be similarly limited.[72] The Court explained, "a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.' "[73] The Court applied a similar standard when upholding a provision requiring the disclosure of funds used to support advertising that expressly advocates the election or defeat of a candidate,[74] but striking down a disclosure requirement for sponsors of ads that purport to address partisan election issues more generally.[75]

Buckley's key holdings—distinguishing between contributions and expenditures, embracing corruption as a guiding principle of permissible regulation, and differentiating between coordinated and independent expenditures—created a baseline for strategies employed by political parties and outside operatives to fund campaign activities while remaining within the letter of the law. The *Buckley* framework also served as a warning to Congress about the Court's willingness to entertain additional regulations. As discussed below, the *Buckley* paradigm has proven both unworkable in practice and incomplete in its appreciation of the role that money plays in politics.[76]

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71. *Id.* at 26–27.

72. *Id.* at 47–48.

73. *Id.* at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

74. *Id.* at 44 n.52 (defining "express words of advocacy" as including "vote for," "elect," "support," "vote against," and "defeat"). This notion of "express advocacy," which the Court defined narrowly as applying only to communications that included words that directly promoted, supported, attacked, or opposed a candidate, opened the door to issue ads that steered clear of FECA's limits by avoiding these words. Until Congress revised the standard governing express advocacy through BCRA's "electioneering communications" provisions in 2002, Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 201, 116 Stat. 81, 88–89 (codified at 2 U.S.C. § 434(f)(3) (2000 & Supp. 2002)), lower courts were almost universally reluctant to imply express advocacy where the "magic words" had not been used. *See, e.g.*, Fed. Election Comm'n v. Christian Action Network, 110 F.3d 1049, 1050 (4th Cir. 1997) (holding that an issue ad criticizing Bill Clinton did not constitute "express advocacy" because the ad's text, while clearly intending to attack the President, did not explicitly call for his defeat).

75. *Buckley*, 424 U.S. at 80.

76. BCRA itself and the rise of 527s in 2004 illustrate these realities: Congress enacted BCRA to address soft money and issue ads, two methods by which political actors circumvented the spirit of FECA. *See infra* notes 79–94 and accompanying text. The use of 527s in 2004 was a means of circumventing the soft money limits that BCRA imposed. *See infra* Part II.

B. Buckley's *Aftermath: Congress and the Court Respond to Soft Money and Issue Ad Practices*

Writing separately in *Buckley*, Chief Justice Burger worried that "[l]imiting contributions, as a practical matter, will limit expenditures and will put an effective ceiling on the amount of political activity and debate that the Government will permit to take place."[77] In fact, campaign expenditures skyrocketed between 1976 and 2002.[78] The hard money contribution limits put in place in 1974—combined with the effect of *Buckley*'s distinction between coordinated and independent expenditures and Federal Election Commission ("FEC") interpretations of FECA[79]—led to a maze of loopholes that allowed contributors to continue to fund political speech and other expressive activities as long as such activities were not explicitly coordinated with federal candidates or political parties.[80] Although campaign finance bills were introduced throughout the 1980s and 1990s,[81] Congress's only successful step toward reform before the

77. *Buckley*, 424 U.S. at 242 (Burger, C.J., concurring in part and dissenting in part).

78. The website opensecrets.org, run by the Center for Responsive Politics, provides historical data for each presidential election cycle since 1976. *See* Open Secrets, 2004 Presidential Election, http://www.opensecrets.org/presidential/index.asp?graph=spending (last visited Nov. 14, 2005) (providing bar chart with presidential campaign expenditures for each election since 1976). Of course, presidential campaigns are only one source of campaign spending. The Open Secrets website also provides historical data for the political parties' hard money fundraising in each election cycle from 1978–88 to 2001–02 and soft money fundraising from 1991–92 to 2001–02. *See* Open Secrets, The Big Picture, 2002 Cycle: The Parties, http://www.opensecrets.org/bigpicture/ptytots.asp?cycle=2002 (last visited Nov. 14, 2005).

79. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 123 (2003). In discussing impact of FEC allocation rules on soft money fundraising strategies, the Court stated that:

> [T]he FEC ruled that political parties could fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money .... [T]he parties could also use soft money to defray the costs of 'legislative advocacy media advertisements' even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat.

Id.

80. *Id.* at 122; *see also* Clyde Wilcox et al., *With Limits Raised, Who Will Give More? The Impact of BCRA on Individual Donors*, *in* LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 63 (Michael J. Malbin ed., 2003) (explaining that the fixed hard money limits caused candidates to solicit contributions from larger numbers of contributors and to seek higher average donations, spurred parties to solicit soft money contributions from corporations, unions, interest groups, and wealthy individuals, and led interest groups to run issue ads to increase their impact on elections).

81. *See* Anthony Corrado, *The Legislative Odyssey of BCRA*, *in* LIFE AFTER REFORM, *supra* note 80, at 27 tbl.2.1 (enumerating the legislation that failed at various stages of the legislative process from 1985–96). BCRA itself took six years to pass. *See id.* at 21.

passage of BCRA in 2002 was the enactment of reporting provisions for 527 organizations.[82] During this time, litigation in federal courts tended to focus on interpretations of federal and state law within the *Buckley* framework,[83] rather than on challenges to the *Buckley* framework itself.

In the late 1990s, campaign finance abuses brought the issue to the fore.[84] Reformers in Congress said that their principal goal was to "restore the regulatory framework established by FECA . . . not call for a fundamental change in the financial activities of candidates or attempt to expand FECA."[85] The practice of greatest concern involved soft money contributions by individual contributors, national political parties, corporations, and unions to state political party "non-federal" accounts; the contributed funds went toward advocacy for both federal and state candidates and for the overhead costs associated with these activities, but were not counted toward the contributors' hard money limits because the contribution was technically made to a non-federal entity.[86] Because the FEC permitted this practice as consistent with FECA (and because the

82. *See* An Act to Amend the Internal Revenue Code of 1986 to Require 527 Organizations to Disclose Their Political Activities, Pub. L. No. 106-230, 114 Stat. 477 (2000) (current version at I.R.C. § 527(i) (2000)) (amending § 527 to require 527s not registered to register with the FEC, disclose the fact of their formation, and report contributions and expenditures).

83. This framework includes the assumptions that: (1) corruption is the only acceptable rationale for regulation; and (2) restrictions on contributions are permissible, while restrictions on expenditures are not. The meaning of coordination between parties or outside groups and candidates has been one major source of litigation. *See, e.g.*, Fed. Election Comm'n v. Colo. Fed. Republican Campaign Comm. (*Colorado I*), 518 U.S. 604 (1996) (interpreting the meaning of "coordination" and refusing to imply coordination between political committees and candidates where none has been proven to exist); Fed. Election Comm'n v. Nat'l Conservative PAC, 470 U.S. 480 (1985) (striking down an expenditure limit on a federally-regulated PAC whose efforts were geared toward the election or defeat of a presidential candidate when there was no direct evidence that the PAC had coordinated with the presidential campaign). The ability of government to limit expenditures by corporate groups has been another source of litigation. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (upholding a Michigan state law that banned independent expenditures as applied to a nonprofit corporation whose members are comprised of business leaders); Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238 (1986) (interpreting FECA to allow an ideological nonprofit to contribute directly to federal candidates without having to form a PAC because no possibility of corruption existed).

84. *See* Corrado, *supra* note 81, at 22, 26.

85. *Id.* at 22.

86. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 123–24 (2003). Recall that the 1974 amendments to FECA included hard limits on individuals' contributions to the "federal" accounts of state parties. *See* 2 U.S.C. § 441a(a)(1) (2000 & Supp. 2002); *supra* note 51.

costs of campaigning were ever-increasing while the caps on hard money contributions remained static), parties increasingly turned to soft money—often contributed by donors who had already given the maximum amount allowed in hard money—to fund campaign activities.[87]

Additionally, beginning in earnest in 1996, individuals as well as corporations and unions (sources long prohibited under federal law from contributing directly to parties or candidates) made large soft money contributions both to political parties and to advocacy organizations.[88] By steering clear of *Buckley*'s "magic words" of express advocacy,[89] the funds contributed were immune to the contribution limits that applied to parties and PACs[90] and to FECA's disclosure provisions.[91] The soft money contributions were used to fund broadcast advertisements that typically aired in the period before a federal election[92] and were often sponsored by organizations that used "misleading names to conceal their identity."[93] According to a Senate report, "the ads were often actually coordinated with, and controlled by, the campaigns . . . thus provid[ing] a means for evading FECA's candidate contribution limits."[94]

BCRA's chief goals were plugging "the soft-money loophole" and putting in place funding and disclosure regulations for "issue ads."[95] Implicit in the legislation itself,[96] much of the impetus for reform reflected an understanding among members of Congress and campaign reform advocates of inequities in the way campaigns were run and funded.[97] To curb the circumvention of hard money spending

87. *McConnell*, 540 U.S. at 124 (citing an increase in soft money fundraising over time, from $21.6 million in 1984 (five percent of all money raised by the two major parties) to $498 million in 2000 (forty-two percent of all money raised by the two major parties)).

88. *Id.* at 129–32 (citing S. REP. NO. 105-167 (1998)).

89. Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam) (defining "express words of advocacy" as including "vote for," "elect," "support," "vote against," and "defeat").

90. 2 U.S.C. § 441a(a)(1) (2000 & Supp. 2002) (allowing maximum $5,000 contribution per year to PACs and $25,000 to national political parties).

91. *Id.* § 434(c) (requiring disclosure of communications funded by independent expenditures, defined in § 431(17)(A) as an expenditure "expressly advocating the election or defeat of a clearly identified candidate").

92. *McConnell*, 540 U.S. at 127.

93. *Id.* at 128 (providing example of "Citizens for Better Medicare," an association of drug manufacturers).

94. *Id.* at 130 (citing S. REP. NO. 105-167 (1998)).

95. *Id.* at 133.

96. See, for example, BCRA, Title I, which is entitled "Reduction of Special Interest Influence."

97. *See, e.g.*, 147 CONG. REC. S2958 (2001) (statement of Sen. Thompson) ("We have gone from basically a small donor system in this country where the average person

limits, BCRA amended FECA by placing a wall between candidate and political party fundraising and between state and local parties and national party organizations.[98] Additionally, to regulate issue ads, BCRA added a new section to FECA[99] that defines any broadcast, cable, or satellite communication that "refers to a clearly identified candidate for Federal office" and is made within sixty days of a general election or thirty days of a primary election as an "electioneering communication."[100] BCRA requires the sponsors of such ads—both individuals and organizations expending more than $10,000—to disclose their identity, the amount disbursed, and the identities of contributors of $1,000 or more.[101] Further, BCRA clarifies that any electioneering communication made in coordination with a candidate or party will be treated as a contribution to and expenditure by that candidate or party.[102]

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believed they had a stake, believed they had a voice, to one of extremely large amounts of money . . . .").

98. Bipartisan Campaign Reform Act of 2002 (BCRA) § 101(a), 2 U.S.C. § 441i(a)(1) (2000 & Supp. 2002) (prohibiting national political party committees from soliciting, receiving, or directing contributions to state political parties or tax-exempt advocacy groups or spending any funds that are not subject to FECA's contribution limits, prohibitions, and reporting requirements). Additional regulations prohibit state and local political parties from using soft money for activities that influence federal elections, *id.* § 101(a), 2 § U.S.C. 441i(b), including: "voter registration activity" within 120 days of a federal election, "voter identification, get-out-the-vote activity or generic campaign activity" for an election in which a candidate for federal office appears on the ballot, and sponsorship of a "public communication" that refers to a "clearly identified candidate" for federal office and promotes/supports or opposes/attacks that candidate, *id.* § 101(b), 2 U.S.C. § 431(20)(A). Additionally, BCRA restricts federal candidates and federal officeholders from soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office or any federal election activity unless the funds were solicited and raised in accordance with FECA regulations, *id.* § 101(a), 2 U.S.C. § 441i(e)(1)(A), and prohibits candidates for state or local offices from funding public communications that refer to a candidate for federal office, unless the funds have been raised in accordance with FECA contribution limits and other regulations, *id.*, 2 U.S.C. § 441i(f)(1).

99. *Id.* § 201(a), 2 U.S.C. § 434(f).

100. *Id.*, 2 U.S.C. § 434(f)(3)(A).

101. *Id.*, 2 U.S.C. § 434(f)(1)–(2). Additionally, the law prohibits general treasury funds contributed by unions or corporations from being used for electioneering communications. *Id.* § 203, 2 U.S.C. § 441b(c)(1). Corporate and union PACs (which are funded by voluntary contributions from a corporation's shareholders and a union's members, respectively) are still permitted to produce ads using hard money. *See* 2 U.S.C. § 441b.

102. BCRA § 202, 2 U.S.C. § 441a(a)(7); *see also* 11 C.F.R. § 109.21 (2005) (defining "coordinated communication" as a communication that is: (1) paid for by an independent group; (2) contains content that explicitly endorses or opposes a particular candidate or political party; and (3) involves explicit or implicit coordination with the independent group in the form of a request or suggestion by the candidate or party, material involvement by the candidate or party, "substantial" discussion between the independent

Recognizing the inevitability of a court challenge, BCRA's congressional sponsors took care both in drafting the law and in developing the legislative history "to develop a legislative record that would set forth, plainly, the basis for the various provisions of the statute."[103] In court, the defenders of BCRA were deliberate in their strategy—they were not interested in asking the Court to re-consider the theory underpinning campaign finance regulation. Instead, they merely sought to defend the statute within the current doctrinal regime.[104] The lawyers were, however, cognizant of the broader implications of a broken campaign finance system and used the Court's prior attention to the relationship between campaign finance abuses and democracy to their advantage: "We wanted to show that this case was not just about campaign finance regulation technicalities, but was about something more fundamental, the healthy functioning of our democracy and citizen participation in our democracy."[105]

In *McConnell v. Federal Election Commission*, the Court upheld against First Amendment challenges all of the provisions Congress enacted to stem the flow of soft money,[106] as well as the

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group and the candidate or party, or information-sharing by vendors, former employees, or independent contractors employed by both the independent group and the candidate or political party).

103. Remarks of Roger Witten, *in Lessons Learned from* McConnell v. FEC: *An Analysis by Key Participants in this Historic Supreme Court Case*, at 8 (Jan. 14, 2004), [hereinafter *Lessons Learned*], *available at* http://www.campaignlegalcenter.org/attachments/1200.pdf. Witten served as lead counsel for the congressional sponsors' defense team. Welcome by Fred Wertheimer, in *Lessons Learned*, *supra*, at 6. Witten elaborated further on the team's legal strategy:

> We wanted to have a factual record that would make it difficult to ignore . . . the abuses perpetrated by the political parties and others . . . . We wanted to have a factual record that would provoke in a judge or justice's mind, the question, can it really be that Congress lacks the power to deal with a problem with dimensions such as these.

Remarks of Roger Witten, *supra*, at 8.

104. Remarks of Roger Witten, *supra* note 103, at 9 ("We wanted to show that, as breathtaking as BCRA was, it was, in the end, a loophole closing measure and anticircumvention measure that did not require the development of new constitutional theory to be sustained."). At least one scholar, writing four years before *McConnell*, lamented this tactical approach. *See* Burt Neuborne, *Toward A Democracy-Centered First Amendment*, 93 NW. U. L. REV. 1055, 1055–56 (1999) (explaining the Court's approach "drives equality concerns underground" and forces those seeking to justify additional regulation as necessitated by corruption, which adds to public cynicism about politics and "forc[es] litigants to focus on proving bribery or extortion when what is really at stake is an effort to limit pervasive political inequality caused by massive wealth disparity").

105. Remarks of Roger Witten, *supra* note 103, at 9.

106. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 188–89 (2003).

"electioneering communications" definition, the related disclosure provisions, and the ban on union and corporation general treasury funding of electioneering communications.[107] Election law scholars and practioners have found significant both the level of deference the *McConnell* Court accorded to Congress, as well as the Court's invocation of "circumvention" as a variation on "corruption or the appearance of corruption" as a valid reason for implementing campaign finance laws.[108] Some scholars posit that the Court is signaling a greater willingness to tolerate congressional regulation, premised in part on concerns about the health of American democracy.[109] As one commentator wrote, "[t]he spiraling costs of campaigns and reliance upon unregulated interested money were viewed as contributing to political cynicism, helping to undermine citizen participation, and making a mockery of the nation's claim to be a genuine democratic polity."[110] Thus, the disproportionate inputs into the system seemed so unequal that something had to be done. Some see this rationale—framed by the Court as "actual corruption ... and the eroding of public confidence in the electoral process through the appearance of corruption"[111]—as getting to something

107. *Id.* at 194 (rejecting plaintiffs' challenge to the definition of electioneering communications); *id.* at 201–02, 212 (upholding disclosure requirements); *id.* at 203 (upholding coordination provisions); *id.* at 209 (upholding prohibition on union and corporation financing of electioneering communications).

108. *See, e.g.*, Hasen, *supra* note 37, at 31, 62 (asserting that the Court's "new jurisprudence" in the campaign finance arena is marked by legislative deference on both the need for regulation and the means for achieving it); *see also* Robert F. Bauer, *When "The Pols Make the Calls": McConnell's Theory of Judicial Deference in the Twilight of* Buckley, 153 U. PA. L. REV. 5, 14–16 (2004) (stating that the Court's (misplaced) deference to Congress was due to four features: greater congressional history with crafting campaign finance laws, expertise in the workings of the political party system, understanding of political reality, and experience with enforcement of campaign finance law and potential for circumvention).

109. *See, e.g.*, Hasen, *supra* note 37, at 57 (arguing that the Court's decisions since 2000, which include upholding low contribution limits, limits on political party expenditures on behalf of candidates, and prohibitions on contributions by advocacy nonprofits, reflect an interest in promoting what Justice Breyer has termed "participatory self-government"); Overton, *supra* note 40, at 82–85 (arguing that the *McConnell* Court's attention to the relationship between wealth and undue influence signals a shift from the *Buckley* Court's approach).

110. Allen J. Cigler, *Issue Advocacy Electioneering: The Role of Money and Organized Interests, in* LAW AND ELECTION POLITICS 59, 69 (Matthew J. Streb ed., 2005).

111. *McConnell*, 540 U.S. at 136 (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982)); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (reciting that Missouri espoused corruption and the appearance of corruption as the interest underlying its contribution limit statute, stating that there is no question about the legitimacy of this interest, and then asserting that there are ill effects on democracy when the public perceives that its leaders are corrupt).

more fundamental. They argue that perhaps the Court is coming to accept the notion that inequality undermines democracy and, as a consequence, that equality is a worthy justification for greater or different kinds of regulations.[112]

Although some interpretations of *McConnell* suggest the potential for a departure from the *Buckley* framework, the Court's language remained true—some say torturedly so[113]—to *Buckley*. Addressing the Title I "soft money" provisions in BCRA, the *McConnell* Court said that soft money contributions lead to actual corruption and the appearance of corruption. According to the Court, corruption encompasses both "bribery of public officials" and "the broader threat from politicians too compliant with the wishes of large contributors."[114] In balancing the incursion on contributors' First Amendment rights against the government's interest in regulation, the Court clarified that "a contribution limit involving even 'a significant interference' with associational rights" is valid if it is "closely drawn" to match a "sufficiently important interest."[115] The *McConnell* Court justified the "closely drawn" standard of review as showing "proper deference to Congress' ability to weigh competing constitutional interests in [its] area . . . [of] particular expertise"[116] and "provid[ing] Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the electoral process."[117]

The *McConnell* Court's decision to uphold the "electioneering communications" provisions in Title II of BCRA marked a departure from *Buckley* and its progeny.[118] The Court said that *Buckley*'s definition of "express advocacy," which relied upon the presence of "magic words," was "an endpoint of statutory interpretation, not a

112. *See* Alexander, *supra* note 29, at 291 (arguing that *McConnell*'s broad conception of "corruption" provides an opening to "break out of the *Buckley* box"); Hasen, *supra* note 37, at 31–32 (arguing that the Court is shifting toward "upholding campaign finance laws that promote a kind of political equality" to build public confidence, broaden a candidate's fundraising base, and encourage greater citizen participation); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 151 (2004) (noting that *McConnell* expands the notion of corruption to include the appearance that large donors get "special access" in a corruption of the democratic process).

113. Hasen, *supra* note 37, at 57 (characterizing the *McConnell* Court's decision as "tak[ing] pains to show . . . fidelity to *Buckley*").

114. *McConnell*, 540 U.S. at 143 (quoting *Shrink Mo.*, 528 U.S. at 389).

115. *Id.* at 136 (quoting Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 162 (2003) (citation omitted)).

116. *Id.* at 137.

117. *Id.*

118. *See supra* notes 69–76 and accompanying text.

first principle of constitutional law."[119] Unpersuaded that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy,"[120] the Court pointed to expert testimony that very few election ads, including those funded with hard money, ever use the "magic words."[121] The Court used this finding to support the definition of electioneering communications as "easily understood and objectionably determinable."[122]

The *McConnell* Court's clarification of the *Buckley* "express advocacy" standard is significant in the 527 debate and has implications for future reforms. While the FEC previously only regulated PACs that were, by definition, expressly identified with a candidate or group of candidates,[123] *McConnell* opens the door to regulation of advocacy organizations that, while nominally independent of candidates and political parties, clearly have a message targeted at influencing a specific federal election.[124] Additionally, BCRA's prohibition on the use of corporate and union contributions in funding electioneering communications, combined with the express provision allowing 527s to fund electioneering communications with *individual* donations, made the role of individual wealthy donors to 527s all the more important during the 2004 elections.

II. THE 2004 ELECTIONS AND THE RISE OF 527S HIGHLIGHT INEQUALITY

This Part briefly outlines the role that 527s played in the 2004 elections and summarizes subsequent calls for FEC regulation of 527 organizations. It is important to clarify that this Part examines the current 527 debate more for what the debate reveals about the incomplete nature of "corruption and the appearance of corruption"

119. *McConnell*, 540 U.S. at 190–91 (citing Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam)).

120. *Id.* at 193.

121. *Id.*

122. *Id.* at 194. The Court also noted that the "express advocacy line . . . has not aided in the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system." *Id.*

123. *See* 2 U.S.C. § 431(4)(A) (2000); 11 C.F.R. § 100.5 (2005) (defining political committee); *see also Buckley*, 424 U.S. at 80 (explaining permissible political committee disclosure provisions).

124. This battle is currently being waged by Representatives Shays and Meehan and the Bush-Cheney Committee in district court, where the plaintiffs are arguing that FECA, as interpreted by the *McConnell* Court, requires the FEC to regulate 527s. *See* Shays v. Fed. Election Comm'n, No. 04 Civ. 1597 (D.D.C. filed Sept. 14, 2004).

as a guiding principle in campaign finance regulations[125] than for the proposition that curbing 527 activity in itself would have any real, lasting impact on the state of American democracy.

The 2004 general election was the first in which the soft money prohibitions on political party fundraising enacted in BCRA were in effect, but the headlines throughout the 2004 election cycle focused as much on 527 organizations as on the direct impact of BCRA's reforms.[126] BCRA itself does nothing to proscribe the fundraising activities of the independent 527 political organizations that gained notoriety during the 2004 election cycle, other than to prohibit political parties from donating to these groups[127] and federal candidates from fundraising on behalf of them.[128] Significantly, Congress acknowledged that 527 organizations could be possible conduits for soft money, but chose not to regulate the activities of these organizations.[129] Thus, while BCRA did not "create" the 527 loophole, it tacitly acknowledged the possibility of the loophole's existence. As the Supreme Court itself acknowledged with its "money, like water" admonition in *McConnell*,[130] it is not surprising that political actors and contributors would find another way to influence the political process.[131]

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125. *Buckley*, 424 U.S. at 25.

126. *See, e.g.*, sources cited *supra* notes 9, 17; sources cited *infra* notes 132–33; *see also* Briffault, *supra* note 29, at 949 & n.1 (stating that, during the 2004 election cycle, "In the world of campaign finance, 2004 was without a doubt the year of the 527 organization. No other aspect of campaign financing received as much press coverage or public attention as the rise of the 527s," and reporting that, of the thirty-one stories about the 2004 elections and campaign finance in the *New York Times* during 2004, sixteen addressed 527s while no more than two or three articles addressed any other single topic).

127. Bipartisan Campaign Reform Act of 2002 (BCRA), § 101(a), 2 U.S.C. § 441i(d) (prohibiting political parties from soliciting money for or donating funds to tax-exempt "501(c)" organizations engaged in electioneering activities or designated as political organizations organized under § 527 of the tax code).

128. *Id.*, 2 U.S.C. § 441i(e)(1) (prohibiting federal candidates from "solicit[ing], receiv[ing], direct[ing], transfer[ing], or spend[ing]" soft money on behalf of national or state parties, independent 527s engaged in federal election activities, or PACs).

129. *See* H.R. REP. NO. 107-131, pt. 1, at 2 (2001), *reprinted in* 2002 U.S.C.C.A.N. 106, 106–07 ("Rather than diminish the power of 'special interest' groups, [BCRA] would actually make these groups even more powerful than they are today."); *see also* Mitch McConnell, *The Future Is Now*, 3 ELECTION L. J. 123, 123 (2004) (predicting that 527s would become "king of a soft money monarchy").

130. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224 (2003).

131. For a recent, influential treatment of the unintended consequences of campaign finance reform efforts, see Issacharoff & Karlan, *supra* note 8, at 1705 (critiquing "the law of political motion" and noting that "every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it").

As soon as the Court upheld the major provisions of BCRA, reformers worried that independent 527s were becoming " 'pass-throughs' or 'conduits' for labor unions seeking to use treasury money for partisan registration and turnout efforts."[132] Commentators immediately predicted that the ban on party soft money would shift "influence to outside groups and their wealthy donors, who [will] now financ[e] activities that the parties ... [are] no longer able to" support.[133] At the end of the election cycle, predictions about wealthy donor dominance proved accurate.[134] Independent 527 political organizations raised a total of $424 million in the 2004 election cycle,[135] more than $256 million of which came from individual donors.[136] By the end of the election cycle, 113 people donated at

132. Thomas B. Edsall, *Democratic 'Shadow' Groups Face Scrutiny: GOP, Watchdogs To Challenge Fundraising*, WASH. POST, Dec. 14, 2003, at A5 (explaining "watchdog" organizations' concerns); *see also* Thomas B. Edsall, *Money, Votes Pursued for Democrats*, WASH. POST, Dec. 7, 2003, at A8 (reporting on donations to Democratic 527s from individuals, organized labor, environmentalists, civil rights organizations, and trial lawyers). Ultimately, concerns about large individual contributions eclipsed concern about union and corporate contributions, in large part because corporations gave less to 527s than some commentators initially expected. *See* Weissman & Hassan, *supra* note 13 (manuscript at 10) (reporting that business donations to 527s, including donations by corporations, trade associations, and individual incorporated entities, declined from $32 million in 2002 to $30 million in 2004 and reporting that, although donations from labor unions rose from $55 million in 2002 to $94 million in 2004, this fact has been largely eclipsed by attention to individual wealthy donors like Soros).

133. Jeanne Cummings et al., *Supreme Court Upholds Key Parts of New Campaign-Finance Law*, WALL ST. J., Dec. 11, 2003, at A1; *cf.* Thomas E. Mann & Norman Ornstein, Editorial, *So Far, So Good on Campaign Finance Reform*, WASH. POST, Mar. 1, 2004, at A19 (dismissing claims of BCRA's critics). Indeed, post-election analyses reveal that 527s were able to finance more than $400 million worth of broadcast advertising, direct mail, grassroots voter registration, and get-out-the-vote efforts that, while not coordinated with a campaign or political party effort, made clear appeals on behalf of or in opposition to particular candidates and parties. Ctr. for Pub. Integrity, 527s in 2004 Shatter Previous Records for Political Fundraising (2004), http://www.publicintegrity.org/527/report.aspx?aid=435.

134. This was true, at least, in terms of 527 fundraising. *See* Weissman & Hassan, *supra* note 13 (manuscript at tbl.5.1). In contrast, the political parties actually relied more on small donors than in the past. In 2004, 32% of George Bush's hard money donations and 31% of John Kerry's hard money donations came from contributions of $200 or less. *See* Open Secrets, 2004 Election Overview: 2004 Donor Demographics, http://www.opensecrets.org/presidential/donordems.asp?filter=A&sortby=2 (last visited Nov. 14, 2005) (presenting chart showing contributions of all donors by number and percentage). In comparison, in 2000, 10.5% of George Bush's hard money contributions and 10% of Al Gore's hard money contributions came in amounts of $200 or less. See Open Secrets, 2000 Presidential Race, Source of Funds, http://www.opensecrets.org/2000elect/source/AllCands.htm (last visited Nov. 14, 2005) (showing pie chart for each candidate that illustrates the candidate's source of funds).

135. Weissman & Hassan, *supra* note 13 (manuscript at 2).

136. *Id.* (manuscript at tbl.5.1).

least $250,000 apiece to 527s and these donations together accounted for $207 million, or eighty-one percent of individual donations.[137] Additionally, nearly $178 million, or just under forty-four percent of the total amount 527s raised by the end of 2004,[138] came from fifty-two individual contributors who each gave $1 million or more, including twenty-four contributors who each gave $2 million dollars or more.[139] Between 2002 and 2004, individual giving to 527s increased exponentially, from just over $37 million to more than $256 million.[140] The number of donors who were willing to give $100,000 or more accounts for part of the explosion in 527 fundraising;[141] the other key component of 527 fundraising success in 2004 is due to the twenty-four $2 million-plus dollar donors.[142]

The mega-contributions made during the 2004 campaign season illustrate most vividly the inequalities that marked the 2004 elections. The *Washington Post* editorial page lamented about George Soros's initial $10 million pledge to America Coming Together and Soros's additional multi-million dollar pledges to other progressive organizations: "There remains something unsettling about those Soros checks .... [S]uch outsize voices, on the left or right, pose dangers to a democratic system."[143] While Soros was not seeking particular political favors—that is, his contributions do not perpetuate "corruption" or "the appearance of corruption"—million-plus dollar contributions did allow Soros and other large contributors to have a disproportionate impact on campaign season discourse.[144] As efforts to reform 527s moved forward, the influence of these wealthy contributors attracted a great deal of attention and stimulated debate about the propriety of large political contributions.

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137. *Id.* (manuscript at 12). Only donations of $5,000 or more were considered by the Weissman and Hassan study.

138. *See id.* (manuscript at 3) (stating that 527s raised $405 million by the end of 2004); *id.* (manuscript at tbl.5.1) (showing $178 million coming from individual donations of $1 million or more).

139. *Id.* (manuscript at tbl.5.1).

140. *Id.* (manuscript at 12 & tbl.5.1).

141. *Id.* (manuscript at 12) (stating that the number of contributors giving $100,000 or more increased from 66 in 2002 to 265 in 2004).

142. *Id.* (manuscript at 12).

143. Editorial, *Mr. Soros' Millions*, WASH. POST, Nov. 22, 2003, at A20.

144. In summing up the influence of 527s in the 2004 election, columnist David Broder focused on the groups' TV ad campaigns, "often of the nastiest variety." David S. Broder, Editorial, *An Unlikely Campaign Reformer*, WASH. POST, Mar. 10, 2005, at A21. Broder called Democrats "the main abusers, with billionaire George Soros and friends financing a network of groups run by longtime party and labor activists" but noted that "Republicans drew even more blood, thanks to the Swift Boat Veterans for Truth ads questioning John Kerry's service in Vietnam." *Id.*

By early 2005, members of Congress and outside pro-reform groups were calling for limits on the vast amount of money that individuals could contribute to political organizations.[145] Additionally, Representatives Shays and Meehan and the Bush-Cheney '04 campaign filed actions in federal district court, arguing that the FEC is required by FECA to regulate 527s and requesting that the court order the Commission to do so.[146] As the popular and scholarly debate has unfolded, attention has consistently focused not on the corruption concerns that have been typical of discussions surrounding campaign finance reform in the nearly thirty years since *Buckley*, but on something more fundamental to democracy—the inherent inequality in permitting wealthy donors to dominate the electoral debate while leaving other citizens with little practical ability to participate in politics in an equally effective way.

Despite increasing concerns about the inequality that underlies campaign financing, the current "corruption and appearance of corruption" rationale for campaign finance regulation and the *Buckley* Court's reading of the First Amendment[147] limits the ability of Congress and state legislatures to act. Under the current regime, only individual contributions to political parties, candidates, and PACs are capped. Thus, the donations of wealthy contributors may be brought "in house"[148] or diffused widely among an ever-proliferating array of political organizations, but their influence in shaping the national dialogue is still disproportionate. This inequality

145. Justice, *supra* note 23 (reporting on the introduction of S. 271 and identifying Senator Trent Lott, an opponent of BCRA, as well as Senators Feingold and Schumer, as 527 reform supporters).

146. Shays v. Fed. Election Comm'n, No. 04 Civ. 1597 (D.D.C. filed Sept. 14, 2004); Bush-Cheney '04 v. Fed. Election Comm'n, No. 04 Civ. 1612 (D.D.C. filed Sept. 17, 2004) (consolidated by Judge Emmett Sullivan of the United States District Court for the District of Columbia with the Shays action). The FEC explicitly declined to regulate 527s during the 2004 cycle. *See* Political Committee Status, *supra* note 5, at 68,064–65; *see also S. 271 Hearing*, *supra* note 23 (statement of Sen. McCain) (calling new 527 legislation necessary "to overcome the FEC's failure to properly interpret the original Federal Election Campaign Act"); *S. 271 Hearing*, *supra* note 23 (statement of Sen. Feingold) ("[W]e are here because the FEC has failed to do its job enforcing a law that is now over 30 years old.").

147. *See* Buckley v. Valeo, 424 U.S. 1, 47–48 (1976) (per curiam) (noting that independent expenditure limits "heavily burden[] core First Amendment expression" and that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of public policy generally or advocacy of the passage or defeat of legislation").

148. *See, e.g.*, GeorgeSoros.com, http://www.georgesoros.com (last visited Nov. 14, 2005) (describing Soros's independently funded 2004 election activities, which included the publication of an ad in fifty newspapers, a twelve-city speaking tour, and the production of an anti-George W. Bush book).

diminishes the opportunity of all citizens to participate with equal force in democratic debate[149] and has potentially adverse consequences for citizen political engagement more broadly.[150] Although, in the aftermath of the 2004 elections, reform efforts have focused primarily on curbing the use of a particular type of election instrumentality[151]—527 organizations—527s are just a symptom of a campaign finance regime that, since *Buckley*, has focused too narrowly on one goal and ignored other equally important government interests in regulation.[152]

III. THE NOT-SO-NEW PARADIGM FOR REFORM: EQUALITY AND DEMOCRATIC PARTICIPATION

Because the *Buckley* Court considered the expenditure of money by independent groups and candidates to be equivalent to speech,[153] proposals to limit expenditures or otherwise fundamentally alter the campaign finance regulatory scheme are limited. Thus, as Professor Tobin noted, "George Soros, Bill Gates, or anyone else with a sizeable fortune[] can spend unlimited funds on behalf of a candidate

149. *See, e.g.*, Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 989 (2002) ("By using the First Amendment to undermine legislative restrictions on the use of political money, courts effectively enshrine the existing distribution of property as a baseline for political advantage.").

150. *See* discussion *infra* Part III.A.

151. *But see* discussion *infra* Part III.C.3 (discussing the splintering of the pro-reform coalition in Congress and the introduction of proposals that would increase opportunities for hard money contributions to political parties and ease restrictions on federal lawmakers' transfer of funds from leadership PACs to political party organizations).

152. The Court's narrow focus on corruption and the appearance of corruption calls into doubt whether regulation of 527s is even constitutional under First Amendment campaign finance principles. *See* Edward B. Foley & Donald Tobin, *The New Loophole?: 527s, Political Committees, and McCain-Feingold*, BNA MONEY & POLITICS, Jan. 7, 2004, *available at* http://www.moritzlaw.osu.edu/faculty/docs/the-new-loophole.html (positing that the outcome of a constitutional challenge to 527 regulation would depend on the "strength of the evidence that the Government can develop regarding the potential risk of corruption resulting from large-dollar donations to 'political committees,' as distinct from other politically motivated interest groups"); Gregg D. Polsky & Guy-Uriel E. Charles, *Regulation 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1027 (2005) (arguing that 527 regulation would be unconstitutional). However, the *McConnell* Court's deference to congressional judgment, *see* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 161, 224 (2003), could persuade the Court to uphold legislation aimed at 527 regulation. The changing composition of the Court may also affect the Court's willingness to uphold new campaign finance laws. *See, e.g.*, Editorial, *Stakes for the Court*, WASH. POST, July 21, 2005, at A22 (explaining that Justice O'Connor provided a crucial fifth vote to uphold BCRA).

153. Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (per curiam).

of his or her choice."[154] While some argue that more speech is almost always better for promoting healthy democratic debate and participation,[155] the 527 experience raises questions about whether more speech, funded by a few, is normatively desirable. The 527 experience thus creates the newest chapter in the debate over which core democratic value—expression or equality—should shape campaign finance laws.[156] Perhaps the *McConnell* Court's supposition that negative perceptions of large donors could " 'jeopardize the willingness of voters to take part in democratic governance' "[157] is not tied as much to the appearance of corruption as to a sense of disempowerment that results when wealthy people disproportionately fuel the content of the debate.[158] Arguably, the influence of large contributions in political discourse continues to conflict with the democratization of political participation that has characterized American government since the mid-nineteenth century.[159]

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154. Donald B. Tobin, New 527 Bill Plugs Some Major Holes, But Is It Constitutional?, Election Law @ Moritz Election Commentary (Feb. 22, 2005), http://moritzlaw.osu.edu/electionlaw/comments/2005/comment0222.html.

155. *See, e.g.*, Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1090 (1996) (arguing that "the First Amendment should itself be seen as a considered response to problems inherent in any democratic system of elections" by freeing actors within the political system to engage in a "full interplay of political ideas," prohibiting incumbent self-dealing, improving the viability of electoral challengers, and "free[ing] individuals wishing to engage in political discourse from the regulation that now restrains grassroots political activity"); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688 (1997) (advocating for deregulation of all laws except for meaningful compelled disclosure of contributions).

156. *See, e.g.*, Sullivan, *supra* note 155, at 667 ("*Buckley* involved nothing less than a choice between two of our most powerful traditions: equality in the realm of democratic polity, and liberty in the realm of political speech."); *see also* J. TOBIN GRANT & THOMAS J. RUDOLPH, EXPRESSION VS. EQUALITY: THE POLITICS OF CAMPAIGN FINANCE REFORM 1–2 (2004) (providing examples of the invocation of these values during congressional debate on BCRA).

157. *McConnell*, 540 U.S. at 144 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000)).

158. This, of course, is an empirical question. However, survey research conducted on BCRA and campaign finance reform focuses almost exclusively on corruption and influence. *See generally* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance*, 153 U. PA. L. REV. 119 (2004) (surveying polling data on campaign finance reform). *See also infra* notes 187–94 (discussing data limitations).

159. *See, e.g.*, U.S. CONST. amend. XV (prohibiting the denial of voting rights based on race); *id.* at amend. XIX (extending suffrage rights to women); *id.* at amend. XXIV (prohibiting a poll tax); *id.* at amend. XXVI (setting eighteen as the national voting age). *But see* BRADLEY A. SMITH, UNFREE SPEECH 211–12 (2001) (arguing that the individual access to the ballot box guaranteed by these amendments is the only type of equality the Constitution requires).

Anticipating the problematic role of large contributions by wealthy individuals ten years before the free-spending 2004 elections, professor and former government lawyer David Strauss wrote that "a necessary target of any egalitarian campaign finance reform is large contributions by wealthy individuals .... [F]or people to use their exceptionally large personal wealth to promote their private political agenda is the clearest breach of the 'one person, one vote' ideal."[160] After *McConnell*, scholars wondered whether the Court's decision could be marshaled by reformers to argue for a new paradigm.[161] The 2004 elections provide additional impetus for reevaluating the justifications for campaign finance regulation through the lenses of social science, political debate, and legal argument. The Court's decision to hear argument in early 2006 on Vermont's restrictive campaign finance laws[162] make this reexamination particularly timely.

A. *Why Equality?*

Using equality as a guiding principle in campaign finance regulations encompasses more than just the literal ability of citizens to contribute to campaigns. A critical, broader goal of egalitarian reform is encouraging the belief among all citizens that their engagement in the political process can make a difference. The term

160. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1387–88 (1994). The one person-one vote language originated with *Gray v. Sanders*, 372 U.S. 368, 381 (1963), and constitutes a bedrock principle of voting rights law. *But see* Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976) (per curiam) (disavowing the applicability of the Court's jurisprudence on voting—i.e., the "one person, one vote" ideal—in the campaign finance context: "[T]he principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.").

161. *See* Briffault, *supra* note 29, at 999 ("[B]y enabling a handful of individuals to commit literally millions of dollars to the election campaign, the rise of the 527s is a challenge to the political equality at the heart of democracy. By the same token, the rise of the 527s is also a challenge to the Supreme Court to break with *Buckley*'s rejection of equality as a component of campaign finance law and to see that dramatic funding inequalities present a compelling problem that Congress can address."); *see also* Comments by Richard Briffault, *in Lessons Learned*, *supra* note 103, at 34 ("In *McConnell*, the Court stated that campaign finance restrictions ... can promote public participation .... [T]o the extent that unlimited spending clashes with political equality values[,] ... widely uneven spending is not consistent with fair competition and, thus, with democracy."); Comments by Spencer Overton, *in Lessons Learned*, *supra* note 103, at 44 ("*McConnell* shows that there are values other than the absolute right to use limitless amounts of money. It shows that there are values like democratic integrity, widespread participation, and government that's responsive to the will of the people.").

162. *See* Greenhouse, *supra* note 45.

political scientists use to describe the belief that one can make a difference in the political process is "efficacy." Efficacy can be further divided into "internal efficacy," or the sense that one is qualified to understand and participate in politics and "external efficacy," or the sense that one's political activities have the capacity to affect government actions.[163] This Comment contends that equality-oriented campaign finance laws would have a positive effect on citizens' external efficacy.

Campaign contributions have long been a form of political participation for just a small share of the population.[164] In 2004, only fifteen percent of American voters reported contributing any amount to a presidential candidate's campaign.[165] One half of one percent of the American adult population (.52%) contributed $200 or more (the threshold for reporting under FECA) to a candidate, party, or PAC in 2004,[166] and just over one-tenth of one percent of the adult population (.12%) contributed $2,000 or more.[167] To be sure, it is not

163. *See* STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 15 (1993). Political scientists often use the following two "agree/disagree" questions from the American National Election Study to operationalize efficacy: (1) "I don't think public officials care much what people like me think"; and (2) "People like me don't have any say about what the government does." *Id.* at 258; *accord* Janet M. Box-Steffensmeier et al., *The Effects of Campaign Finance Attitudes on Turnout and Vote Choice in the 2000 Elections*, *in* MODELS OF VOTING IN PRESIDENTIAL ELECTIONS 85, 101 (Herbert F. Weisberg & Clyde Wilcox eds., 2004) (explaining methodology used to study the effect of views on campaign finance on voter turnout and partisan candidate choice, using nearly identical efficacy measures); David M. Primo & Jeffrey Milyo, *Campaign Finance and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. (forthcoming 2006) (June 2005 manuscript at 14), *available at* http://www.rochester.edu/college/psc/primo/primomilyoelj.pdf (using nearly identical efficacy measures).

164. THE NES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: GAVE MONEY TO HELP A CAMPAIGN 1952–2002 tbl.6b.5 (Am. Nat. Election Study ed.), http://www.umich.edu/%7Enes/nesguide/toptable/tab6b_5.htm (last visited Nov. 14, 2005) (providing survey data from 1952 through 2002 on the percentage of Americans reporting contributions to any political candidate or political party in each given election year and indicating that between seven and nine percent of Americans surveyed reported contributing money to any individual candidate or a political party in each presidential election year between 1980 and 2000).

165. Pew Research Center for the People and the Press, Voters Liked Campaign 2004, But Too Much 'Mud-Slinging' (Nov. 11, 2004), *available at* http://people-press.org/reports/display.php3?ReportID=233.

166. Open Secrets, 2004 Election Overview: Donor Demographics, http://www.opensecrets.org/overview/DonorDemographics.asp?cycle=2004 (last visited Nov. 15, 2005) (providing percentage and dollar amounts of contributions of $200 or more reported to the FEC).

167. *Id.* During the 2000 election cycle, an even smaller percentage of the United States adult population contributed $200 or more (.37%), but a slightly higher percentage contributed $2,000 or more (.16%). Open Secrets, The Big Picture 2000 Cycle: Donor

surprising that a citizen's income level affects his or her ability to contribute to election campaigns or that contributors are more likely than non-contributors to have disposable income available for political participation.[168] Barring incentives for more widespread private contributions to political campaign efforts,[169] it is not reasonable to think that a wider cross-section of Americans will donate to campaigns. Thus, a primary goal of campaign finance law must be to assure "average" citizens that, despite their lack of participation in *funding* politics, their political participation in other ways is equally fruitful.[170]

The 2004 election highlights the salience of this broader goal. With press attention focused on million or multi-million dollar contributions by single individuals that drive the political debate, average citizens arguably cannot help but be left with the sense that, personal income aside, an individual's small contribution just does not matter very much.[171] Over the long term, such feelings of inefficacy could have negative effects on voting propensity[172] and, ultimately, public policy. Public opinion data, political science theory and research, and the experiences of policymakers themselves weigh in

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Demographics, http://www.opensecrets.org/bigpicture/DonorDemographics.asp?Cycle=2000&filter=A (last visited Nov. 14, 2005).

168. *See, e.g.*, THE NES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: GAVE MONEY TO HELP A CAMPAIGN 1952–2002, PERCENT AMONG DEMOGRAPHIC GROUPS WHO RESPONDED: "YES" tbl.6b.5.2 (Am. Nat. Election Study ed.), http://www.umich.edu/%7Enes/nesguide/2ndtable/t6b_5_2.htm (last visited Nov. 15, 2005) (providing percentage of citizens reporting contributions to political candidates or party by income level and showing vast disparities in each year from 1952 to 2002 in self-reported contributions by those at the highest income level versus those at lower income levels).

169. Some reformers have suggested just such incentives. *See infra* note 306 and accompanying text.

170. Although the full range of proposals aimed at accomplishing this objective are beyond the scope of this Comment, some potentially promising reforms are discussed in Part IV.

171. On a related point, see Antonio Gonzalez & Stephanie Moore, Op-Ed, *Wealthy Campaign Donors Stifle Minority Voices*, USA TODAY, Dec. 10, 2003, at 23A, *available at* LEXIS, News & Business File, which discusses the link between high dollar donations and the disproportionate influence of wealthy white donors in politics.

172. ROSENSTONE & HANSEN, *supra* note 163, at 144–45 (illustrating drop in external efficacy from 1952 to 1990 and asserting that, in their model, people with the strongest sense of external efficacy were 10.6% more likely to vote than those with the weakest sense of efficacy). Despite any feelings of disempowerment that may have occurred in 2004, however, voter turnout was not affected. In fact, the 2004 presidential election saw higher voter turnout than in 2000. *See* Press Release, U.S. Census Bureau, Census Bureau Reports, U.S. Voter Turnout Up in 2004 (May 26, 2005). However, this statistic cannot reveal anything about the longer term impact of elections dominated by news about wealthy contributors.

favor of this conclusion and the suggestion that equality-oriented regulation could ameliorate the problem. Each of these will be discussed in turn below. Although some opponents of regulation argue that, by lifting rather than heightening restrictions on campaign finance, the interests of efficacy and vigorous public participation in political life will be better served,[173] the data, theory, and policymakers' perspectives outlined below belie this line of argument.

1. Empirical Data

Existing public opinion data illustrate the public's negative perceptions of the impact of large contributions on political discourse and decisionmaking and the public's sense that campaign contributors have more influence than average citizens on policymakers' actions.[174] A study conducted in 2002 by a bipartisan team of public opinion researchers (the "Mellman-Wirthlin Report")[175] provides the most comprehensive evidence to date of public perceptions of the influence of large contributions on political leaders.[176] The Mellman-Wirthlin Report found that people are cynical about the link between political contributions and government decisionmaking. Sixty-two percent of Americans said they disagree that government can be trusted to make fair decisions despite big campaign contributions.[177] Only 27%

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173. *See* SMITH, *supra* note 159, at 205–13, 223–27.

174. A search conducted on September 16, 2005 of National Journal's "Poll Track" database of publicly-released public opinion surveys revealed that none of the public opinion polls conducted during or after the 2004 elections asked specifically about 527s or the contributions of wealthy donors in the 2004 election. Thus, this Comment relies on and extrapolates from data collected earlier.

175. MARK MELLMAN & RICHARD WIRTHLIN, RESEARCH FINDINGS OF A TELEPHONE STUDY AMONG 1300 ADULT AMERICANS (2002), http://www.campaignlegalcenter.org/attachments/84.pdf [hereinafter MELLMAN-WIRTHLIN REPORT]. The survey results have a margin of sampling error of 2.7 percentage points. *Id.* at 22. The United States Justice Department commissioned the Mellman-Wirthlin Report in preparation for defending BCRA. Persily & Lammie, *supra* note 158, at 139.

176. Although the United States Supreme Court did not address the findings from this survey in reaching its decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the three-judge panel in the District Court for the District of Columbia did. *See* McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 229 (D.D.C. 2003) (per curiam); *id.* at 512–14 (mem. op. of Kollar-Kotelly, J.) (incorporating survey findings into findings of fact on "Public Perceptions of Corruption"); *id.* at 784 n.80, 800 & n.117, 870–72 (mem. op. of Leon, J.) (same). *But see id.* at 354–55 (mem. op. of Henderson, J.) (rejecting significance of public opinion data).

177. MELLMAN-WIRTHLIN REPORT, *supra* note 175, at 35 q.19F. The question provided respondents with the information that "individuals, issue groups, corporations, and labor unions" are permitted by law to make $50,000 contributions to political parties and then asked respondents whether and how strongly they agreed or disagreed with the following statement: "The government can be trusted to make fair decisions even when so much big money is involved." *Id.* The responses were distributed as follows: 34% agreed

reported believing that "Members of Congress will do the right thing no matter who has given money to their political party."[178] Put differently, Americans overwhelmingly believe that political contributions tinge the policymaking process: 77% said they believe that "big contributions to political parties" have either a great deal or some impact on "decisions made by the federal government in Washington, D.C."[179] This statistic is similar to the results of a study conducted two years earlier for *The Nation* magazine, in which nearly three-quarters of voters (73%) said they believe that members of Congress make decisions based on what political contributors want at least half the time.[180]

Additionally, the Mellman-Wirthlin Report found strong evidence that voters believe that politicians give more weight to political donors' views than to the politician's own perceptions about what is best for the country or their constituents' preferences. Seventy-one percent of the survey respondents said they believe that members of Congress "sometimes decide how to vote on an issue based on what big contributors to their political party want" even if it's not what the member thinks is best[181] or what the majority of the member's constituents want.[182] In a separate question, 81% of survey

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(9% strongly, 24% somewhat); 62% disagreed (37% strongly, 25% somewhat); 4% volunteered that they neither agreed nor disagreed. *Id.*

178. *Id.* at 33 q.19B.

179. *Id.* at 27 q.7. More than a majority (55%) affirmatively said that such contributions have "a great deal" of impact on federal government decisionmaking. *Id.*

180. LAKE SNELL PERRY & ASSOCIATES, SURVEY FOR *THE NATION* MAGAZINE OF 1000 REGISTERED VOTERS AND 200 DONORS 5 q.15 (2000); *see also* Celinda Lake & Robert L. Borosage, *Money Talks*, NATION, Aug. 21, 2000, at 29, 31, *available at* http://www.thenation.com/doc/20000821/lake. In the interest of full disclosure, the author was a senior research analyst at Lake Snell Perry & Associates during the time this survey was conducted, but did not participate in the fielding or analysis of this particular study.

181. MELLMAN-WIRTHLIN REPORT, *supra* note 175, at 29 q.12. The question asked was:

> Do you think members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what they think is best for the country, or do you think this doesn't happen, or don't you have an opinion on this?

Id. The breakdown of responses was as follows: yes, does happen: 71%; no, doesn't happen: 9%; no opinion: 20%. *Id.*

182. *Id.* q.11. The question asked was:

> Do you think members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their districts want, or do you think this doesn't happen, or don't you have an opinion on this?

respondents said they believe it likely that members of Congress would give "special consideration" to the opinion of an "individual, issue group, corporation, or labor union" that had donated $50,000 or more to the member's political party;[183] 80% also said they believe that a member would give special consideration to a donor who had spent $50,000 or more on political radio or television ads that benefited the member.[184] In contrast, just 24% said it would be likely that a member would give "the opinion of someone like you special consideration."[185] Finally, the Mellman-Wirthlin Report also captures uncertainty among Americans about whether their own views are represented by interest groups that donate to political parties. Asked whether "my views are represented in Washington, D.C., by some of the groups that make large contributions to political parties," just 41% of survey respondents agreed while 46% disagreed.[186]

Although these data offer insight into the public's perceptions of the role of money in politics,[187] they do not capture second-order effects—the resulting lack of efficacy and trust that arises from the perception that politicians are unduly influenced by large contributors.[188] Because legislation and litigation since the *Buckley* decision have focused almost exclusively on justifying regulation based on corruption or the appearance of corruption, supporters and opponents of campaign finance reform have focused only on this issue in commissioning data to bolster their position.[189] Thus, for example,

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Id. The breakdown of responses was as follows: yes, does happen: 71%; no, doesn't happen: 7%, no opinion: 21%; don't know/refused: 1%. *Id.*

183. *Id.* at 30 q.14. Just 9% said it would be "somewhat" or "very" unlikely for a member to give special consideration to such a contributor's views. *Id.*

184. *Id.* at 31 q.16. Just 10% said it would be "somewhat" or "very" unlikely for a member to give special consideration to such a contributor's views. *Id.*

185. *Id.* at 30 q.15. Nearly seven in ten respondents (69%) said a member would be unlikely to give special consideration to the views of someone like them. *Id.*

186. *Id.* at 33 q.19C.

187. Two of the judges on the three-judge panel that initially heard the *McConnell* case incorporated the Mellman-Wirthlin Report findings into their findings of fact on "Public Perception of Corruption." Judge Kollar-Kotelly concluded, "It is clear that the effect of large contributions on the political process has not been lost on the public. The polling surveys entered into the record provide powerful proof that the presence of large donations create the appearance of corruption in the eyes of the majority of Americans." McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 517 (D.D.C. 2003) (mem. op. of Kollar-Kotelly, J.).

188. *See* Persily & Lammie, *supra* note 158, at 134 (explaining that existing opinion polls "do not actually tap into the second order effects that form the justification for the Supreme Court's inclusion of 'appearances' [of corruption] as a unique state interest").

189. *Cf.* Landell v. Sorrell, 406 F.3d 159, 163 (2d Cir.) (Calabresi, J., concurring) (stating that, because of *Buckley*, all of the scholarship on campaign finance reform has focused on the "subsidiary goals" of stemming corruption and guarding against incumbent

the Mellman-Wirthlin Report focused largely on perceptions of the influence that large contributors have relative to other participants in the political process,[190] but not on measuring any corresponding effects in citizens' sense of their own "value" or efficacy in the political system. To date, only one empirical study has attempted to make the connection between campaign finance laws and political efficacy, and the results of that study—while casting doubt on a connection—are inconclusive.[191] Others have tried to argue that because, historically, there has been no correlation between the contemporary campaign finance regulatory regime and survey data on Americans' level of trust in government, changes in campaign finance laws will not affect Americans' perceptions of the political system.[192] This argument is specious, however, because it does not address the very real possibility that existing campaign finance laws have never been adequately responsive to underlying concerns about the inequalities that stem from the role of money in politics and, thus, longitudinal surveys simply reflect citizens' continuing discontent.[193]

Additional empirical analysis of the connection between views of the political system and government generally, political fundraising practices, and measures of external efficacy are needed to better assess the relationship between widespread public perceptions that

protection), *cert. granted sub nom.*, Randall v. Sorrell, 126 S. Ct. 35 (2005). *See generally* Persily & Lammie, *supra* note 158 (providing an overview of public opinion data).

190. *See supra* notes 177–80 and accompanying text.

191. Primo & Milyo, *supra* note 163 (June 2005 manuscript at 27 tbl.2) (providing results of a model that shows a statistically insignificant relationship between: (1) expenditure limits and efficacy; and (2) organizational and individual contribution limits and efficacy).

192. Whitfield Ayres, *The Reform Act Will Not Reduce the Appearance of Corruption in American Politics*, *in* INSIDE THE CAMPAIGN FINANCE BATTLE 270, 272–73 (Corrado et al. eds., 2003) (arguing that BCRA would have no effect on Americans' trust in government). *But see* Robert Y. Shapiro, *Rebuttal to Ayres*, *in* INSIDE THE CAMPAIGN FINANCE BATTLE, *supra*, at 278, 283 (explaining that Ayres reached his conclusion using an over-simplified method and that a thorough approach requires multivariate analysis).

193. Ayres's own work illuminates this assertion: Ayres conducted his survey in response to the Mellman-Wirthlin Report to show that the public perceived BCRA's hard money limits as synonymous with "large contributors" or "big contributors." Ayres, *supra* note 192, at 274. Ayres's objective was to show that BCRA would do nothing to allay public concerns about corruption in American politics. *Id.* at 276. Indeed, Ayres found that 66% of Americans viewed BCRA's $25,000 per person annual contribution limit to political parties as a "large" contribution and 79% viewed BCRA's $50,000 per married couple annual contribution limit to political parties as a "large" contribution. *Id.* at 275. Ayres also found that 71% of survey respondents believed that members of Congress sometimes make voting decisions based on the wishes of what people who give $25,000 contributions to their political party want even if the majority of their district would disagree with that vote. *Id.* These data suggest that our current laws do not go far enough to allay concerns about the influence of wealthy contributors on policymaking.

politicians are influenced by large contributors and feelings of political inequality and disempowerment.[194] However, even in the absence of hard data, the argument for equality is supported by political theory—the notion that individual autonomy and influence in the political process is a value worth promoting.[195]

2. Political Science Theory and Research

Although voting is one avenue in which citizens may participate in political life, the ability to influence the selection of viable candidates is another important form of participation.[196] As Professor Overton summarizes, widespread political participation serves four functions: it (1) exposes politicians to a diversity of viewpoints; (2) creates a greater chance of citizen buy-in to government decisions; (3) increases the likelihood that government resources and priorities will reflect demand; and (4) furthers the "self-fulfillment and self-definition of individual citizens who play a role in shaping decisions that affect their lives."[197]

As discussed above, there is no existing data that provide evidence for or against a relationship between citizens' views of the campaign finance system and efficacy; however, there is ample evidence demonstrating the connection between efficacy and political participation.[198] One study found that people with high levels of

194. Collecting and analyzing such data is, admittedly, very challenging. Researchers face significant limitations in sources of data, as well as problems disentangling the complex interrelationships among variables studied (for example, existing laws influence whether candidates run for office and the competitiveness of elections which, in turn, influence both how voters perceive their ability to influence government and the laws that govern campaign finance). *See* Primo & Milyo, *supra* note 163 (June 2005 manuscript at 9–10 & n.11).

195. *See* Overton, *supra* note 40, at 91 (asserting that the existence of meaningful choices is essential to individual autonomy, resulting in "self-affirmation").

196. *See id.* ("By discounting the importance of meaningful participation in determining the viability of candidates, the antireformers compromise critical autonomy values. An individual who cannot give large sums reaps fewer benefits of self-affirmation and is less able to exercise control over her life and community."); *see also* John M. DeFigueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 594 (2005) (noting that "[i]f more citizens participate, the perception that the system is the property of wealthy special interests will likely decrease, and ordinary citizens' engagement with the political system generally will likely increase"); Overton, *supra* note 40, at 101 (listing voting, financial and other support for candidates, campaigns, political parties or interest groups, and public advocacy and protest as forms of political participation).

197. Overton, *supra* note 40, at 101–02.

198. ROSENSTONE & HANSEN, *supra* note 163, at 141 n.18 (citing classic texts on this issue); *see also* Box-Steffensmeier et al., *supra* note 163, at 96 tbl.5.3 (reporting a highly significant and strong relationship between efficacy and voter turnout in the 2000 presidential election).

external efficacy were 10.6% more likely to vote, 4.8% more likely to try to influence how others vote, and 2.8% more likely to contribute money to a candidate than those with low levels of external efficacy.[199] If skepticism about the financing of campaigns depresses overall interest in political participation, the functioning of representative democracy is stymied.[200] Thus, reducing the perception that large contributors dominate the debate and crafting laws to maximize the ability of citizens to influence the candidate selection process could have important outcomes, both for the citizens themselves and for the effective functioning of government.

3. Policymakers' Experiences

At the level of practical politics, policymakers themselves have acknowledged the sense among average voters that their views count little when stacked up against those of campaign contributors who bankroll increasingly expensive campaigns.[201] For example, as Senator Max Baucus said on the Senate floor in 1998 during debate over an earlier version of BCRA: "People are becoming more and more cynical about government. People tell me they think that Congress cares more about 'fat cat special interests in Washington' than the concerns of middle class families like theirs. Or they tell me the system is corrupt."[202] Similarly, Representative Asa Hutchinson wrote to the Chairman of the Republican Party about citizens in his district: "[A] concern of my constituents . . . is that their influence in

199. ROSENSTONE & HANSEN, *supra* note 163, at 145 (reporting on data collected from 1952 to 1990).

200. *See id.* at 245–48. Rosenstone and Hansen argue that the broader the base of citizens involved in politics, the greater the chance that political leaders will hear and incorporate a diversity of information into their decisionmaking. *Id.* In contrast, "democratic government provides few incentives for leaders to attend to the needs of people who neither affect the achievement of their policy goals nor influence the perpetuation of their tenure in office." *Id.* at 247. Thus, to the extent that campaign finance laws either actually are or are perceived by "average" citizens to be dominated by wealthy people, average citizens may be demobilized and their views not communicated to political leaders. *See also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 144 (2003) (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000)) (recognizing that negative perceptions of large donors' influence in the political system could depress voter participation in "democratic governance").

201. *See, e.g.*, *McConnell*, 540 U.S. at 261 (Scalia, J., dissenting) (quoting members of Congress discussing their constituents' views of the campaign finance system); McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 873 (D.D.C. 2003) (mem. op. of Leon, J.) (same).

202. 144 CONG. REC. S1041 (1998) (statement of Sen. Baucus).

politics is being diminished by the abuses of soft money."[203] The sense illustrated by these examples gets at an underlying sense of political inequality: average citizens feel that their views count less than those of campaign contributors.[204]

Additionally, after the *McConnell* Court upheld BCRA, Senator McCain wrote that among the most significant aspects of the new legislation was the law's restoration of "the American people's faith that their government belongs to them, and not only to those who can afford enormous payments to parties and candidates."[205] McCain worried about the "skyrocketing cost of campaigns . . . [which] causes politicians to focus on large donors . . . [and perpetuates] both the appearance and reality that candidates are largely disengaged from those citizens who can give only small amounts . . . or nothing at all."[206] Senator McCain thus tied together arguments about equality and corruption, suggesting a rationale that the Court might find compelling in reassessing *Buckley*'s core holdings. His language and that of other reformers can be read to articulate a compelling state interest in promoting equality and "a general participatory self-government objective."[207]

B. The Equality Concept in Legal Argument

Although framing the issue in terms of the "appearance of corruption" rather than in terms of equality, *McConnell* acknowledged the connection between large contributions and barriers to equal participation.[208] Recent lower court opinions have recognized this connection as well. In 2005, Judge Calabresi, concurring in the denial of a rehearing in *Landell v. Sorrell*,[209] explicitly addressed equality.[210] Judge Calabresi argued that the

203. Letter from Asa Hutchinson, U.S. Representative, to Jim Nicholson, Republican National Commission Chairman (July 9, 1997), *quoted in McConnell*, 251 F. Supp. 2d at 873 (mem. op. of Leon, J.).

204. To be sure, the role that money plays in the political system has long been acknowledged by political elites. *See* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 317 (2004) (quoting nineteenth century industrialist and political power broker Marcus Hanna's famous statement: " '[T]here are two things that are important in politics. The first is money and I can't remember what the second one is.' ").

205. John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 115 (2004).

206. *Id.* at 120.

207. Breyer, *supra* note 27, at 252.

208. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 143–44 (2003).

209. Landell v. Sorrell, 406 F.3d 159, 162 (2d Cir.) (Calabresi, J., concurring), *cert. granted sub nom.*, Randall v. Sorrell, 126 S. Ct. 35 (2005).

210. *Id.* at 162.

Buckley framework failed to acknowledge that the unequal distribution of wealth necessarily constrains the ability of all citizens to register their political support: "The notion that intensity of desire [to support a candidate] is not well-measured by money in a society where money is not equally distributed has been, since *Buckley*, the huge elephant—and donkey—in the living room in all discussions of campaign finance reform."[211] Similarly, in 2003, a Ninth Circuit panel wrote that an unregulated campaign finance environment "allows the influence of wealthy individuals and corporations to drown out the voices of individual citizens."[212] The panel argued that this inequality has pernicious effects, "producing a political system unresponsive to the needs and desires of the public, and causing the public to become disillusioned with and mistrustful of the political system."[213]

Such calls to incorporate political equality as a compelling state interest in campaign finance regulation are not new. As discussed in Part I.A, using equality as a rationale for campaign finance reform dates back, at least, to Congress's enactment of the 1974 amendments to FECA. In the government's brief to the Supreme Court, the FEC argued that Congress intended the cap on expenditures to "lessen the disproportionate advantage, the distorting effect, of wealthy special interest groups, and to increase opportunities for meaningful participation by ordinary citizens, as voters, supporters and candidates."[214] The *Buckley* Court, however, struck down the idea that Congress could limit individual, non-coordinated, expenditures in an effort to "equalize the relative ability of all citizens to affect the outcome of elections."[215] The Court invoked the First Amendment as incompatible with restrictions on both candidate and independent expenditures:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment .... The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.[216]

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211. *Id.*

212. Jacobus v. Alaska, 338 F.3d 1095, 1107 (9th Cir. 2003) (upholding an Alaska law limiting soft money contributions).

213. *Id.*

214. Brief for the Attorney General and the FEC at 23, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (Nos. 75-436, 75-437), 1975 WL 171459.

215. *Buckley*, 424 U.S. at 26.

216. *Id.* at 48–49.

The Court distinguished the constitutional requirement of equal representation in voting and reapportionment from the prohibition on legislatively-enforced equality in campaign financing, writing that voting and political representation decisions give an equal right to participate regardless of wealth, but that the same principle does not extend to political speech.[217] Significantly, this is the only pronouncement from a majority of the Court on equality in the campaign finance context and reflects a free market approach to the concept of political debate.[218]

Although the full *Buckley* Court rejected the equality rationale as a permissible means of regulating campaign finance, the importance of equality in politics has loomed in the background of Supreme Court opinions on the issue. On the *Buckley* Court itself, three Justices found the equality rationale compelling.[219] Most powerfully, Justice White, dissenting from the Court's holding on the impermissibility of expenditure caps, argued that campaign expenditures do not always amount to speech or other expressive conduct,[220] and found unconvincing the Court's distinction between the permissibility of capping contributions but not expenditures.[221]

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217. *Id.* at 49 n.55.

218. *See* Raskin & Bonifaz, *supra* note 39, at 1161–62.

219. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING INEQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 106–07 (2003) (discussing the Court's consideration of the equality rationale and noting that three justices—Marshall, White, and Brennan—were sympathetic, while five "utterly rejected" it). Hasen also outlines the Court's continued hostility to the equality rationale in most of its post-*Buckley* decisions and explains how the pro-equality Justices refined their defense of equality in subsequent cases. *Id.* at 108–11.

220. *Buckley*, 424 U.S. at 263 (White, J., concurring in part and dissenting in part).

221. *Id.* at 261. In the years since *Buckley*, three lower court cases of note have addressed expenditure caps. In *Landell v. Sorrell*, 406 F.3d 159, 164 (2d Cir.) (Calabresi, J., concurring), *cert. granted sub nom.*, Randall v. Sorrell, 126 S. Ct. 35 (2005), the Second Circuit left open the possibility that Vermont's law limiting contributions to $400 or less per candidate per election cycle and expenditure limits of $300,000 per gubernatorial candidate per election cycle could be justified by a state interest in stemming public cynicism and limiting candidate fundraising time. *See* Greenhouse, *supra* note 45.

In addition, federal appeals courts heard challenges to two municipal laws limiting expenditures. *See* Homans v. City of Albuquerque, 366 F.3d 900, 902 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004); Kruse v. City of Cincinnati, 142 F.3d 907, 909–10 (6th Cir. 1998). Although both cases ultimately held the caps to be unconstitutional under *Buckley*, each sparked a judicial debate about the scope and durability of *Buckley*'s holding. In *Kruse*, the Sixth Circuit struck down as incompatible with *Buckley* the argument that the city's interest in promoting equality justified a spending cap on Cincinnati city council races. *Kruse*, 142 F.3d at 917–18. Although concurring in the judgment in the particular case before the court, one member of the three judge panel argued that *Buckley* did not create a per se constitutional bar on expenditure limits, concluding that "[i]t may be possible to develop a factual record to establish that . . . the interest in preserving faith in

Justice White focused, in particular, on the public's democratic interest in capping expenditures:

> It is also important to restore and maintain public confidence in federal elections. It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money, that federal offices are bought and sold or that political races are reserved for those who have the facility . . . for doing whatever it takes to bring together those interests, groups, and individuals that can raise or contribute large fortunes in order to prevail at the polls.[222]

Beginning nearly fifteen years after *Buckley*, the Court issued a series of opinions that created potential openings for a new framework for assessing campaign finance regulations. A number of the Court's opinions recognize that the unequal distribution of wealth in society has undesirable ramifications in the political arena. In its 1990 *Austin v. Michigan Chamber of Commerce*[223] decision, the Court seemed to open the door slightly to the notion that some speakers—in that case, corporation-backed advocacy groups—should not be

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our democracy is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest." *Id.* at 920.

In *Homans*, the district court initially upheld an expenditure cap on Albuquerque's mayoral candidates against a plaintiff seeking an injunction on the application of the law. Homans v. City of Albuquerque, 160 F.Supp. 2d 1266, 1274 (D. N.M. 2001), *rev'd* 366 F.3d 900 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004). The district court found that *Buckley* did not render expenditure limits per se unconstitutional, *id.* at 1272, and held that the expenditure caps withstood strict scrutiny, *id.* at 1273, based on the government's compelling interest in "preserving faith in democracy." *Id.* at 1272. As its justification, the court said, "[t]he record clearly establishes twenty-five years of expenditure limits that have preserved the integrity of Albuquerque's electoral process and the public's faith in its elections." *Id.* at 1273. Although the Tenth Circuit reversed the district court and held that expenditure caps were per se unconstitutional except where the government could demonstrate a compelling interest in addressing corruption, *see Homans*, 366 F.3d at 916, Judge Lucero's concurrence left open the possibility for "a system of campaign expenditure limits that would survive exacting scrutiny," *id.* at 907 (Lucero, J., concurring), and that "other compelling interests [besides corruption] may be identified in future cases," *id.* at 911.

222. *Buckley*, 424 U.S. at 265 (White, J., concurring in part and dissenting in part).

223. 494 U.S. 652 (1990). *Austin* is the only example of the Court upholding a limit on expenditures by organizations not connected to a candidate or political party. *See* HASEN, *supra* note 219, at 114. The idea that the influence of corporate wealth on elections might be curtailed on the basis of the disparity between corporate money and public support for the corporation's ideas first surfaced in dicta in a case involving a nonprofit corporation's right to make expenditures from its general treasury funds. *See* Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 258–59 (1986) (holding that a nonprofit corporation organized to pursue ideological goals could make contributions from its treasury funds and was not required to use a PAC because the costs involved in forming a PAC would effectively stifle its speech).

permitted to use their wealth to unduly influence public discourse.[224] The *Austin* Court upheld a Michigan law that prohibited most corporations from using general treasury funds to make independent expenditures on behalf of a candidate in state elections.[225] There was no allegation that corruption or the appearance of corruption either motivated or justified the law; rather, the Court upheld the law based on the notion that corporate wealth could distort the political process.[226] In an opinion authored by Justice Marshall, the Court explained that "Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[227]

Although the Court's decision in *Austin* was limited only to independent expenditures made by corporations and was justified largely by the Court's focus on the wealth-amassing advantages of the corporate form, the decision spurred a wave of scholarship on the idea of political equality as a justification for campaign finance regulation.[228] In the wake of *Austin*, and a decade before *McConnell*, notable scholars, practitioners, and "good government" advocates debated the merits of equality as a rationale for regulation of the financial aspects of the political system. A number of scholars endorsed the notion of crafting campaign finance rules to further political equality.[229] Constitutional scholar Cass Sunstein wrote,

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224. *Austin*, 494 U.S. at 666.

225. *Id.* at 668–69.

226. *See id.* at 659.

227. *Id.* at 659–60. Professor Hasen calls the Court's focus on the importance of the level of expenditures being equivalent to the level of public support the "barometer equality rationale." HASEN, *supra* note 219, at 114.

228. *See, e.g.*, Symposium, *Campaign Finance Reform*, 94 COLUM L. REV. 1125 (1994) (bringing together notable campaign finance scholars). *But see Austin*, 494 U.S. at 692–93 (Scalia, J., dissenting). Scalia criticizes the equality rationale:

> Perhaps the Michigan law before us here has an unqualifiedly noble objective—to "equalize" the political debate by preventing disproportionate expression of corporations' points of view .... The premise of our Bill of Rights, however, is that there are some things ... that government cannot be trusted to do .... The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech "for fairness' sake" simply out of bounds.

229. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1288–89 (1994); Raskin & Bonifaz, *supra* note 39, at 1165; Strauss, *supra* note 160, at 1370; Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994).

"[i]nsofar as *Buckley* rejects political equality as a legitimate constitutional goal, it should be overruled."[230] David Strauss diagnosed corruption and the appearance of corruption as symptoms of underlying inequality and argued that, in order to alleviate these symptoms, the inequality must be remedied.[231] Most powerfully, Jamin Raskin and John Bonifaz argued that the government's market-based approach to political campaigns—where money speaks—should be supplanted by a focus on promoting the ability of all citizens to participate equally in the nation's democratic polity:

> The key First Amendment issue at stake in this debate is not the right of the wealthy to spend up to the heavens, but the right of all citizens, poor and wealthy alike, to speak and participate meaningfully in the electoral process. Thus, a campaign finance regime's compatibility with the First Amendment will turn on the extent to which citizens are enabled to ask questions of—and share their thoughts with—candidates, to witness debates between candidates, and to help fashion the public agenda through dialogue.[232]

More recently, although prior to *McConnell*, some of the individual opinions in the Court's campaign finance decisions seem to have moved the Court closer to adopting an equality[233] or "democratic self-

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230. Sunstein, *supra* note 229, at 1400. For an interesting, more pragmatic perspective, see Blasi, *supra* note 229, at 1288–89 (suggesting four reasons that campaign expenditure limits may be constitutionally justified by concerns about the quality of political representation, and focusing on the decline in representation that occurs when politicians spend disproportionate amounts of time talking to campaign contributors). Providing support for this view, the Mellman-Wirthlin Report shows that seventy-one percent of adults surveyed agreed with the statement that "Members of Congress spend so much time raising large campaign contributions for their political party that it interferes with their ability to do their jobs properly" and that, by a two-to-one margin, survey respondents were more likely to think that fundraising interferes with members' job performance than to think that it does not. MELLMAN-WIRTHLIN REPORT, *supra* note 175, at 16–17.

231. *See* Strauss, *supra* note 160, at 1370 (arguing that concern about corruption is really a concern about "inequality and the dangers of interest group politics").

232. Raskin & Bonifaz, *supra* note 39, at 1165. *But see* SMITH, *supra* note 159, at 211 (disputing the validity of regulation aimed at equalizing debate).

233. *See, e.g.*, HASEN, *supra* note 219, at 114–16; Victoria A. Farrar-Myers, *Campaign Finance: Reform, Representation, and the First Amendment*, *in* LAW AND ELECTION POLITICS, *supra* note 110, at 43, 54. In a separate work, Professor Hasen focuses particularly on three pre-*McConnell* cases that, in combination with *McConnell*, he argues, point toward an participatory self-government or equality rationale: *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), upholding a Missouri law limiting candidate contributions; *Colorado Federal Republican Campaign Committee v. Federal Election Commission (Colorado II)*, 533 U.S. 431 (2001), upholding a maximum coordinated expenditure law for political parties on the grounds that coordinated

government"[234] rationale. The tenor of these separate opinions reflects the idea that providing all citizens an opportunity to participate equally may be tantamount to safeguarding positive First Amendment rights.[235] For example, in 1996, when the Court struck down limitations on the amount of money a political party could spend independently of its candidate, Justices Stevens and Ginsburg dissented, arguing that:

> [T]he Government has an important interest in leveling the electoral playing field .... It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena ... will be adverse to the interest in informed debate protected by the First Amendment.[236]

Justice Breyer, in *Nixon v. Shrink Missouri Government PAC*,[237] articulated the view that First Amendment concerns are implicated not only by restrictions on campaign contributions and expenditures, but also by the democratizing influence that campaign finance regulations have on the political process:

> [C]onstitutionally protected interests lie on both sides of the legal equation .... [A] decision to contribute money to a campaign is a matter of First Amendment concern .... On the other hand, restrictions ... protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action.[238]

Justice Breyer elaborated on this view in a 2002 speech. Reiterating his reasoning in *Shrink Missouri*, he explained, "campaign finance laws, despite the limits they impose, help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a

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expenditures are equivalent to a contribution to the party's candidate; and *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), holding that Congress can limit contributions made by nonprofit, ideological corporations. Hasen, *supra* note 37, at 42–46.

234. *See* Breyer, *supra* note 27, at 253.

235. *See, e.g.*, Pildes, *supra* note 112, at 150–51 (noting three subtle differences between the self-government and equality rationales).

236. *Colorado I*, 518 U.S. 604, 649–50 (1996) (Stevens, J., dissenting).

237. 528 U.S. 377 (2000).

238. *Id.* at 400–01 (Breyer, J., concurring). This language was adopted by the *McConnell* Court. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 137 (2003).

workable democracy."[239] In hindsight, Justice Breyer's remarks anticipate the specific issue raised by the vast contributions in the 2004 elections and shed light on the connection between money in politics and political inequality. Justice Breyer noted that "too few individuals contribute too much money" with the "end result . . . a marked inequality of participation."[240]

Most recently, in *McConnell*, the Court hinted that the government interest in promoting a healthy participatory democracy might warrant greater regulation in the area of campaign finance[241] and signaled its deference to Congress in determining appropriate solutions.[242] Professor Hasen characterizes the *McConnell* Court's decision as "tak[ing] pains to show . . . fidelity to *Buckley*, tripping over itself to apply the corruption (as anti-circumvention) rationale .... However, a more natural reading ... is as a *sub silentio* acceptance of the participatory self-government rationale."[243] Professor Farrar-Myers agrees, arguing that the Court implicitly accepted the impact on democracy that large contributions have or appear to the public to have: "The Stevens/O'Connor [majority] opinion moves beyond the quid pro quo concerns raised in *Buckley* to incorporate the conception of representation-as-equality as a judicially accepted basis for campaign finance regulations."[244]

The *McConnell* Court prefaced its opinion by quoting the early twentieth century Nobel Prize winner Elihu Root's advocacy of legislation that curtailed the influence of special interests in government.[245] The majority opinion cited Root's view that campaign finance reform would " 'strik[e] at a constantly growing evil which has done more to shake the confidence of plain people of small means . . . than any other [government] practice.' "[246] The *McConnell* Court also

239. Breyer, *supra* note 27, at 253.

240. *Id.* at 251–52.

241. *See infra* notes 245–52 and accompanying text; *see also McConnell*, 540 U.S. at 136–37 (explaining that contribution limits directly affect the integrity of the electoral process, the role of citizens within the electoral process, and "tangibly benefit public participation in political debate").

242. *McConnell*, 540 U.S. at 223–24 ("Many years ago we observed that '[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny the nation in a vital particular the power of self protection.' " (quoting Burroughs v. United States, 290 U.S. 534, 545 (1934))).

243. Hasen, *supra* note 37, at 57–58.

244. Farrar-Myers, *supra* note 233, at 54.

245. *McConnell*, 540 U.S. at 115 (citing ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143 (Bacon & Scott ed. 1916)).

246. *Id.* (quoting United States v. UAW-CIO, 352 U.S. 567, 571 (1957)).

adopted Justice Breyer's *Shrink Missouri* language about the importance of the electoral process in democracy.[247] Additionally, in upholding the ban on corporate and union electioneering communications, the Court wrote that its decision was justified by " 'preserving the integrity of the electoral process, preventing corruption, and *'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government.'* "[248] Finally, while perhaps questionable evidence of the Court's movement toward equality, Professor Hasen points to the fact that the Court "accurately recounts the *Buckley* holding but pointedly fails to recount *Buckley*'s explicit rejection of the equality rationale as a justification for expenditure limits."[249] Hasen also notes that the Court has never explicitly responded to Justice Breyer's assertion in *Shrink Missouri* that the *Buckley* Court's rejection of the equality rationale "cannot be taken literally."[250] Professor Hasen believes that this textual reading is as an indication of the Court's willingness to reconsider equality[251] and sees the "ultimate question about the direction of the post-2000 jurisprudence . . . [as] whether it may lead the Supreme Court to uphold *expenditure limits* outside the corporate and union context."[252]

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247. *Id.* at 137 ("[T]he electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action . . . .' ") (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

248. *Id.* at 206 n.88 (emphasis added) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788–89 (1978)).

249. Professor Hasen sees this omission as more significant, writing that "[i]t seems as probable as not that the Court's elisional history was intentional and not inadvertent." Hasen, *supra* note 37, at 60.

250. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); *see* Hasen, *supra* note 37, at 60 (discussing Justice Breyer's rejection of the *Buckley* assertion "that government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others" (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam))).

251. *See* Hasen, *supra* note 37, at 60.

252. *Id.* at 67 (suggesting that caps on independent expenditures used to fund electioneering communications may flow from *McConnell*). *But see* Election Law: Breaking News: Supreme Court Agrees to Hear Two Campaign Finance Cases (Sept. 27, 2005), www.electionlawblog.org/archives/004069.html. Reflecting on the changes in the Court's composition with the appointment of John Roberts as Chief Justice and the impending resignation of Justice O'Connor, Professor Hasen explains he is less optimistic about the Court's amenability to expenditure caps. *Id.* ("Since the 1976 *Buckley* case, the Court's cases have swung back and forth like a pendulum, in recent years in favor of upholding campaign finance regulations. We could well be entering the period where the pendulum swings back.").

C. *Roadblocks to Recognizing Equality*

Even if policymakers were to accept the premise of equality-oriented reform as beneficial for encouraging "participatory self-government," there are significant barriers to recognizing equality as a goal in crafting and upholding campaign finance regulations. The three most challenging of these obstacles will be discussed in turn. This Comment does not propose workable solutions to each of these barriers or a comprehensive strategy to persuade Congress to pass and the Court to uphold equality-based reforms. This Comment does seek, however, to spark additional debate about equality as a value worth pursuing.[253]

1. Constitutional Barriers

The primary barrier to a shift in the Court's campaign finance jurisprudence would, of course, be the Court's prior interpretation of the First Amendment, equating a political donor's money with political speech,[254] and finding that only the government's interest in preventing corruption justifies regulation.[255] The corruption issue has been addressed above in Part III.B. As to the Court's equation of money with speech, this premise has come into question from members of the Court. For example, in *Nixon v. Shrink Missouri Government PAC*,[256] Justice Stevens wrote in his concurrence,

253. *Accord* Landell v. Sorrell, 406 F.3d 159, 164 (2d Cir.) (Calabresi, J., concurring) ("[T]he sort of conversation taking place . . . would be a far more fruitful one—from the standpoints both of campaign finance policy and constitutional jurisprudence—were it able to be brought out from under *Buckley*'s corruption mantle and into a framework that more honestly reflects the issues at play."), *cert. granted sub nom.*, Randall v. Sorrell, 126 S. Ct. 35 (2005).

254. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

255. *See supra* Part I.A. *Accord* Homans v. City of Albuquerque, 366 F.3d 900, 916 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004) (interpreting *Buckley* as mandating that only the state's compelling interest in preventing corruption would justify expenditure caps). An additional potential barrier is the Court's unwillingness to consider equal protection challenges to campaign finance laws. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 226–27 (2003) (denying standing to plaintiffs challenging BCRA's increase in hard money contribution limits and stating that "the plaintiffs allege a curtailment of the scope of their participation in the electoral process. But we have noted that '[p]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.' " (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986))). Given the Court's rejection of economic status as a suspect class for equal protection purposes outside of the criminal law and voting rights contexts, *see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 18–25 (1973), this Comment assumes that equal protection challenges to campaign finance laws are untenable.

256. 528 U.S. 377 (2000).

"Money is property; it is not speech."[257] In the same case, Justice Breyer also expressed skepticism about the equivalence of money and speech, writing that "a decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech."[258] Fifteen years before *Shrink Missouri*, Justice White articulated the same concern, arguing: "The First Amendment protects the right to speak, not the right to spend .... [T]he expenditures in this case ... produce [First Amendment] speech; they are not speech itself."[259]

Further, the Court's practice of subjecting restrictions on expenditures to strict scrutiny constrains permissible avenues of regulation.[260] However, were the Court to decide that money and speech are not synonymous, the Court would be free to abandon its distinction between the lesser scrutiny that contribution limits receive and the heightened scrutiny to which expenditures limits are subjected.[261] The Court could then adopt a uniform standard of lesser scrutiny, requiring only a "sufficiently important state interest" and a "closely drawn" regulation.[262] This Comment does not suggest that the Court defer unthinkingly to Congress on matters where congressional actors could clearly have self-interested motives, as incumbent politicians do when crafting campaign finance laws. Nevertheless, the application of strict scrutiny to areas where it is nearly impossible to prove a compelling state interest frustrates efforts at beneficial reforms. The Court undoubtedly has the capacity to assess policymakers' motivation for regulation critically while at the same time considering whether any given reform will further democratic participatory interests.

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257. *Id.* at 377 (Stevens, J., concurring).

258. *Id.* at 400 (Breyer, J., concurring).

259. Fed. Election Comm'n v. Nat'l Conservative PAC, 470 U.S. 480, 508 (1985) (White, J., dissenting).

260. Buckley v. Valeo, 424 U.S. 1, 23 (1976) (per curiam). Indeed, some members of the Court have called on their colleagues to subject both contribution and expenditure restrictions to strict scrutiny. *See, e.g.*, *Colorado II*, 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting) (arguing that *Buckley* should be overruled because of its failure to protect First Amendment speech and association rights); *Shrink Mo.*, 528 U.S. at 406 (Kennedy, J., dissenting) (arguing that the Court's adherence to stare decisis is misplaced, "perpetuat[ing] and compound[ing] a serious distortion of the First Amendment resulting from our own intervention in *Buckley*").

261. *See supra* note 63 (explaining that restrictions on contributions must be closely drawn to match a sufficiently important state interest while expenditure limits must be narrowly tailored to serve a compelling state interest).

262. *See Shrink Mo.*, 528 U.S. at 387–88 (discussing standards of review).

2. The "Media Exception" as Detrimental to Equality

At its core, the argument in favor of equality-oriented reform is rooted in the notion of faith in government: that giving ordinary individuals a more equal playing field for influencing the political debate will enhance efficacy and increase involvement by positively influencing citizens' faith in the political process. Although critics of the equality rationale question even the basic premise that regulation can lead to a more vibrant democracy,[263] both critics and supporters of equality-based reform recognize a central flaw. Equality-oriented reform is hindered by the media exception,[264] a critical inequity built into the existing campaign finance scheme that would only be exacerbated by further restrictions on citizens, candidates, and interest groups.[265]

Under current law, media organizations are exempted from all of the laws and regulations that apply to expenditures made by other corporations,[266] so that "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication" are not considered "expenditures" made on behalf of a candidate and are not regulated by FECA.[267] Thus, the resources that a news organization

263. *See, e.g.*, SMITH, *supra* note 159, at 226–27.

264. 2 U.S.C. § 431(9)(B)(i) (2000).

265. *See, e.g.*, Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1629 & n.18 (1999) (citing multiple campaign finance scholars who have commented on the media exception problem and characterizing their argument as follows: "that equality cannot be achieved when the media are given an even more preeminent place than they already have in the shaping of public attitudes toward federal candidates"). Anti-regulation scholars have long argued that any restrictions on campaign spending and contribution limits increase the influence of the media. *See* Smith, *supra* note 155, at 1078–79; *see also* Danny J. Boggs, *Introduction: Campaign Finance and Media Influence*, 24 HARV. J.L. & PUB. POL'Y 5, 6 (2000) (noting both the absence of scholarship on the regulation of the media within the campaign finance regulatory framework and the importance of the news media in election campaigns).

266. In general, corporations and labor unions cannot make contributions to candidates or expenditures on behalf of candidates from their general treasury funds, *see* 2 U.S.C. § 441b (2000), and must instead set up a corporate or union PAC to make contributions to or expenditures on behalf of candidates, *see id.* § 441b(b)(2)(C). Additionally, as amended by BCRA sections 201 and 204, corporations and labor unions are also prohibited from making "electioneering communications," broadcast advertisements that refer to a clearly identified candidate for federal office within thirty days of a primary election or sixty days before a general election. *See id.* § 441(f)(3)(A)(i) (2000 & Supp. 2002) (defining electioneering communication); *id.* § 441b(b)(2) (including electioneering communications in the list of expenditures prohibited by corporations).

267. *See id.* § 431(9)(B)(i) (excluding the efforts of media corporations from FECA's definition of "expenditure" generally); *id.* § 441(f)(3)(B) (excluding news stories, commentaries, and editorials produced or run by a broadcast station from the definition of "electioneering communication"). The exemption does not apply to media outlets that

expends on political coverage, commentary, and endorsements are not considered contributions to a candidate's campaign,[268] regardless of the news outlet's motivation for the particular coverage.[269]

Scholars who question the rationale for the media exception have documented the changing nature of the media[270] as a basis for arguing that media corporations should be required to pay for endorsements of candidates from a separate corporate PAC.[271] In an era where media organizations are owned by a handful of corporations,[272] some scholars argue that the media exception creates a clear barrier to equality[273] that would only be exacerbated by further limitations on individual, organizational, and candidate spending.[274] Professor Hasen explains that limiting the participation of individuals and corporations but failing to regulate the quantity and visibility of the media's political coverage gives the media a

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are owned or controlled by a political party, political committee or candidate. *Id.* § 431(9)(B)(i). The FEC is currently considering whether Internet communications, particularly Internet sites run or owned by corporate or labor union entities whose primary business does not include "journalism," fall within the media exception. *See generally* Federal Election Commission, Public Hearing on Internet Communications (June 29, 2005), *available at* http://www.fec.gov/pdf/nprm/internet_comm/20050629 transcript_rev.doc (providing views of reformers, bloggers, and others on regulation of the Internet under FECA).

268. *See, e.g.*, David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 455 (2002) (noting that, through their media organization subsidiaries, some corporations are allowed to influence political campaigns in ways that other corporations cannot).

269. *See* Hasen, *supra* note 265, at 1639–44 (examining media corporations' motivations for endorsing particular candidates or providing favorable coverage; presenting evidence, including media corporations' PAC contributions and pro-incumbent endorsement decisions, to support the theory that media corporations use their coverage to obtain access to policymakers).

270. *See* Anderson, *supra* note 268, at 455 (noting that the media has become more corporate since 1990, when the *Austin v. Michigan Chamber of Commerce* Court recognized the special status of news media organizations).

271. *See* Hasen, *supra* note 265, at 1663.

272. *See* BEN BAGDIKIAN, THE NEW MEDIA MONOPOLY 27 (2004) (calculating that five dominant corporations controlled the United States mass media in 2003, down from fifty such corporations in 1983). The five dominant corporations Bagdikian identifies are: Time Warner, The Walt Disney Company, Rupert Murdoch's News Corp, Viacom, and the German corporation Bertelsmann. *Id.* at 3. Each of these corporations owns a variety of media outlets, including newspapers, magazines, book publishers, radio stations, and television stations. *Id.*

273. *See* Hasen, *supra* note 265, at 1629 & n.18 (citing anti-reformer scholars, such as Arthur Eisenberg and Joel Gora, who recognize the inequalities inherent in the media exception, but argue that the problem requires less regulation of other actors); *see also* Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1252 (1994) (treating newspapers and other media enterprises the same as other entities in a hypothetical, equality-oriented reform scheme).

274. *See* Smith, *supra* note 155, at 1078–79 (arguing that any restrictions on contributions and expenditures increase the influence of the media).

greater chance than other individual and organizational actors to influence the outcome of elections and secure access to politicians;[275] further, he argues, leaving the media as the only unregulated player in political campaigns could create the perception that the media hold a higher status than other actors in influencing election outcomes.[276] Thus, efforts to perpetuate equality in order to increase political engagement and efficacy could be stymied by the persistence of the media exception.[277]

Although it is possible that the media exception is not constitutionally-compelled,[278] the plain language of the First Amendment cautions against restraints on the media's ability to publish or air news stories, commentaries, or editorials that mention or endorse federal candidates.[279] Additionally, when upholding the media exception against an equal protection challenge, the Supreme Court noted the press's "unique role" in providing information to the public.[280] Even if the Supreme Court were willing to sanction a congressional decision to repeal the media exception in the name of equality,[281] it is not at all clear that regulating the media is

275. *See* Hasen, *supra* note 265, at 1646.

276. *Id.*

277. *Id.* (concluding that the resulting real or perceived inequality could have political consequences because, "when individuals even incorrectly believe that they have little or no political power, their beliefs may lead them to discontinue political action").

278. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668 (1990) (upholding the permissibility of the media exception, but noting that, although the State had a compelling reason for excluding media corporations from FECA's expenditure limits, "the press's unique societal role may not *entitle the press to greater protection* under the Constitution" (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 782 & n.18 (1978))) (emphasis added); Hasen, *supra* note 265, at 1656–57 (arguing that although it is unlikely that the Court would find regulation of media activity to be constitutional, the question is "an open one").

279. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

280. *See Austin*, 494 U.S. at 667–68 (finding that "a valid distinction exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public"); *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 208–09 (2003) (reaffirming the permissibility of the media exception and dismissing the notion that the prohibition on electioneering communications by non-media corporations unconstitutionally discriminates in favor of media corporations). *But see* Anderson, *supra* note 268, at 455 (calling the *Austin* Court's distinction in 1990 between media corporations and other corporations "extremely dubious" in 2002, given media conglomeration); *supra* note 278 and accompanying text.

281. *See* Hasen, *supra* note 265, at 1657 (arguing that a repeal of the media exception would have a better chance of surviving constitutional review if the Supreme Court were to overrule *Buckley*'s refusal to recognize equality as a compelling justification for campaign finance regulations).

normatively desirable,[282] even to those who otherwise advocate for greater campaign finance regulation.[283] Nonetheless, Professor Hasen's work serves as a warning that either reformers must find creative strategies to neutralize the presence of the media exception in a pro-equality reform scheme[284] or the goals of equality-oriented reform risk frustration.

3. Congressional Aversion to Heightened Regulation

Although the primary focus of this Comment is the theoretical justification, legal framework, and practical need for equality-oriented reform, it is worth considering briefly the political aspects of—and barriers to—heightened campaign finance regulation. The most recent legislative actions relating to campaign finance reform suggest that any effort to enact more restrictive campaign finance regulations has low odds of success in Congress. As discussed in the Introduction and in Part II, during and in the immediate aftermath of the 2004 elections, policymakers focused solely on regulating 527s. During the election cycle, the FEC considered and then declined to implement rules to regulate 527s under FECA.[285] In response, members of Congress in both 2004 and early 2005 introduced the 527 Reform Act to explicitly regulate 527s by bringing 527 organizations

282. Joel M. Gora, Buckley v. Valeo*: A Landmark of Political Freedom*, 33 AKRON L. REV. 7, 27 n.44 (1999) ("Normal First Amendment instincts are fundamentally averse to such government micro management of media and politics.").

283. *See, e.g.*, Overton, *supra* note 149, at 1034 (distinguishing regulation of campaign finance generally from regulation of the media, based on the media's "important role in democracy" by "imparting news and opinion to the public," providing a "forum for the perspectives of various individuals," and "expos[ing] and check[ing] government abuses").

284. The Internet is a significant wild-card in this debate. Some suggest that applying the media exception broadly to all web sites and weblogs ("blogs") that are not affiliated with a political party, partisan organization, or candidate would create a new venue for the unregulated airing of diverse views. *See, e.g.*, Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act's Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6 ¶¶ 83–86 (2004), http://www.vjolt.net/vol9/issue2/v9i2_a06-Zubowicz.pdf. However, others express concern that granting the media exception to blogs and websites could allow corporations, unions, and partisan groups to circumvent the rules. For postings on this subject at the Election Law Listserv, see, for example, Posting of Larry Noble, lnoble@crp.org, to election-law@majordomo.lls.edu (Oct. 7, 2005), http://majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL/archives/election-law_gl .archive.0510/subject/article-34.html (on file with the North Carolina Law Review); Posting of Paul Ryan, PRyan@campaignlegalcenter.org, to election-law@majordomo .lls.edu (Oct. 7, 2005), http://majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL/ archives/election-law_gl.archive.0510/subject/article-40.html (on file with the North Carolina Law Review).

285. *See supra* note 5 (detailing the FEC's consideration of 527 regulation).

active during federal election cycles within FECA.[286] The bill initially enjoyed support even from lawmakers who had opposed BCRA.[287]

Although Congress-watchers originally predicted that the 527 Reform Act was likely to be "a fast-track issue,"[288] by mid-2005, the coalition that had formed around the 527 Reform Act splintered.[289] Each congressional chamber expanded its focus to consider changing existing hard money limits under FECA. By July 2005, the Senate had coupled 527 regulation with a provision that would make it easier for a congressional member's leadership PAC to contribute unlimited sums of money to political party committees.[290] Ultimately, by

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286. *See supra* note 21 (detailing the initial introduction of the 527 Reform Act of 2005).

287. *See* Suzanne Nelson, *Bill on 527s May Be on Fast Track*, ROLL CALL, Feb. 3, 2005, *available at* 2005 WLNR 149159 (citing former Senate Rules and Administration Committee Chairman Trent Lott's conversion to support campaign finance reform); *see also* Amy Keller, *527s Prepare Their Defense*, ROLL CALL, Feb. 22, 2005, *available at* 2005 WLNR 2721445 (citing House Administration Committee Chairman Bob Ney's support).

288. *See* Nelson, *supra* note 287.

289. Eliza Newlin Carney, *Payback Time for '527' Groups*, 37 NAT'L J. 2207, 2208 (July 9, 2005) (explaining that, in April 2005, Senator Charles Schumer, a co-sponsor of the original 527 Reform Act, withdrew his support after a substitute bill had been introduced and objectionable amendments attached to it).

290. *See* Suzanne Nelson & Paul Kane, *Provision Splits Frist, McCain*, ROLL CALL, Aug. 8, 2005, *available at* 2005 WLNR 12456653; *see also* Editorial, *Campaign Funds Mischief*, WASH. POST, Sept. 15, 2005, at A32 (explaining that, by lifting the current $15,000 annual cap on the amount that an incumbent's leadership PAC can transfer to the candidate's national political party committee, incumbents can circumvent existing restrictions on how leadership PAC money is spent). Leadership PACs, like all PACs established by candidates, are currently only permitted to transfer $15,000 to their affiliated national political party each year. *See* 2 U.S.C. § 441a(a)(2)(B) (2000 & Supp. 2002). A leadership PAC can only be established by a federal lawmaker (i.e., a House or Senate incumbent) and the money contributed to these PACs cannot be used to pay directly for that lawmaker's campaign expenses; rather, the funds are used to support the lawmaker's travel and as a means by which the lawmaker can contribute to his or her colleagues' campaigns. *See* Nelson & Kane, *supra*. Supporters say the new provision would help level the playing field within the political party structure between incumbents with competitive races and those without meaningful opposition by giving the former the ability to help his or her national party organization without sacrificing personal campaign funds. *See id.* However, critics say that if leadership PACs are allowed to transfer unlimited funds to the national party committees, candidates will be able to solicit funds from the same donors for both their personal campaign committees and their leadership PACs; leadership PAC funds would then be transferred to the national party with the tacit understanding that these funds will be used to help the lawmaker's reelection. *See id.* Along with the provision in section 3 of the 527 Fairness Act which allows unlimited spending by a political party in coordination with a candidate's campaign, the ability to transfer unlimited sums from leadership PACs to party organizations would be an easy way to circumvent the hard money limits on the amount that an individual contributor can give to a candidate's campaign. *See* Editorial, *supra* (explaining that, under the identical provision in the Senate bill, instead of being limited to raising $2,100 from each donor per election, lawmakers could have their supporters give $5,000 more and concluding that

October, the Senate's efforts to pass both 527 reform and leadership PAC deregulation looked unlikely.[291] In the House, introduction of the expansive 527 Fairness Act[292] diverted Congress's focus from the narrow 527 Reform Act.[293] The 527 Fairness Act would bring most 527s within FECA[294] but would also abolish the aggregate limit on contributions that an individual can make to all political party organizations, candidates, and PACs in an election cycle;[295] permit fund transfers between federal officeholders' leadership PACs and national party committees;[296] and repeal BCRA's limitations on coordination between federal candidates and national political parties.[297] In short, rather than restricting the flow of money into campaigns, the most recent proposals reflect a willingness on the part of some lawmakers to increase the amount of money in politics.[298]

Even if the current legislation fails, the evolution of the debate in Congress shows that the momentum that might have catalyzed into

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"[t]his ill-advised provision would increase the influence of deep-pocketed donors, make incumbents even less vulnerable and set a dangerous precedent for making fundamental changes in campaign finance law").

291. *See* Suzanne Nelson, *Senate Abandons Provision on Leadership PAC*, ROLL CALL, Oct. 19, 2005, *available at* 2005 WLNR 16925020.

292. *See* 527 Fairness Act, H.R. 1316, 109th Cong. (2005).

293. *See* Carney, *supra* note 289 (positing that both bills could come to the House floor and noting that, in the wake of the 2004 elections, supporters of 527 regulation "did not expect to be scrambling just to preserve existing rules").

294. *See* H.R. 1316 § 9.

295. *See id.* § 2. Under current law, $101,400 is the maximum that an individual is permitted to give to all FECA-regulated entities during a two-year election cycle. *See* H.R. REP. NO. 109-146, at 13–14 (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr146.109.pdf. The House Committee considering the legislation explained that the abolition of the aggregate limits was intended to stimulate contributions to political parties and PACs and remove incentives for contributions to "outside groups." *Id.* at 14.

296. *See* H.R. 1316 § 6. This provision mirrors the amendment to the Senate appropriations bill discussed *supra* at note 290. This legislation would, for the first time, codify the term "leadership PAC." *See* Nelson, *supra* note 291.

297. *See* H.R. 1316 § 3.

298. One of the House bill's sponsors, Representative Mike Pence, explained his legislation as "restoring basic fairness to the political parties and outside organizations instead of attempting further regulation .... [W]hen it comes to political speech, greater government control is never the answer. More freedom is." 151 CONG. REC. H2556 (daily ed. Apr. 27, 2005) (statement of Rep. Pence). Assessing the impact of the 527 Fairness Act, the *Washington Post* reported that "[u]nder the bill, one donor could direct as much as $1 million in support of a candidate for federal office." *See* Thomas B. Edsall, *GOP Pushes Bill Easing Election Spending Limits*, WASH. POST, June 9, 2005, at A8; *see also* Carney, *supra* note 289 (reporting that the impact of abolishing the aggregate contribution limit would allow one donor to give as much as $1 million to a political party by donating to multiple party committees and as much as $2 million to federal candidates by spreading donations over a wide group of candidates).

pro-equality reforms after the 2004 election cycle has now dissipated. Thus, a central practical barrier to implementing reforms premised on remedying inequality is the lack of congressional will to effect such changes at the national level. Perhaps, if the Court were to reconsider *Buckley*, congressional interest in previously untenable reforms would emerge—expenditure limits on individual campaigns, political parties, and PACs are obvious candidates in this category. Or, as some commentators have suggested, if and when the Court revisits *Buckley*, perhaps state legislatures will provide the most promising laboratories for reform at both the state[299] and federal levels.[300]

IV. A BRIEF ROADMAP FOR EQUALITY-ORIENTED REFORM

Were Congress and the Court to embrace equality as a government interest worthy of protecting in campaign finance regulations, numerous possibilities for reform would exist, particularly with respect to regulating federal congressional elections and state and local elections. General and specific proposals have received extensive treatment elsewhere[301] and need not be repeated in detail here. Rather, this Part seeks to articulate the broad outlines of a multi-pronged strategy for reform premised on the importance of equality. This Comment asserts that the best approach is to curtail the raising and spending of campaign funds by every player in the system, including wealthy individuals, to allow all voices to be heard

299. States have long shown interest in reform, as evidenced by much of the campaign finance litigation in the post-*Buckley* era. *See generally* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (upholding Missouri state candidate contribution limit); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (upholding state law limiting corporation-backed advocacy group expenditures); Landell v. Sorrell, 406 F.3d 159 (2d Cir.) (denying motion to reconsider en banc the court's earlier decision striking down Vermont's expenditure caps), *cert. granted sub nom.*, Randall v. Sorrell, 126 S. Ct. 35 (2005); Homans v. City of Albuquerque, 366 F.3d 900 (10th Cir.) (ruling unconstitutional Albuquerque's expenditure limits for mayoral candidates), *cert. denied*, 125 S. Ct. 625 (2004); Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998) (rejecting Cincinnati's expenditure limits in city council election contests). For comprehensive information on campaign finance laws in the fifty states, see National Conference of State Legislatures, Campaign Finance, http://www.ncsl.org/programs/legman/about/campfin.htm (last visited Nov. 14, 2005).

300. For an intriguing argument that each individual state should control the campaign finance laws that apply to that state's federal lawmakers, see William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 376–86 (2000).

301. *See, e.g.*, sources cited *infra* at notes 306, 313, 314, 316, 323, 324 (summarizing a range of proposals that address contribution limits, expenditure limits, various types of subsidies for candidates, and proposals to enhance citizen participation in political debate).

and responded to equally as a means of bolstering efficacy and enthusiasm about the value of political participation.[302] While recognizing the danger that regulation may lead to the unintended consequence of elevating the importance of elite political operatives and the media,[303] this Comment contends that the focus of reform should nonetheless be on crafting restrictions that level the playing field among candidates and interest groups; otherwise, average citizens will continue to be discouraged from participating because of their real or perceived inability to compete in the marketplace of political discourse. Regulations should offer attractive incentives to "protect the integrity of the electoral process"[304] and promote the "open political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy."[305] The end of this Part cautions against the pitfalls likely to befall reform efforts.

Any system of campaign finance seeking to maximize citizen equality would require a multifaceted balancing of regulations that address: contributions to candidates, parties, PACs, and independent groups; expenditures by candidates and other players; and incentives for candidates and citizens to engage in dialogue among and between themselves. First, reformers could seek to reduce the maximum allowable contributions to candidates, parties, PACs, and independent groups to neutralize the impact that citizens' wealth plays in their ability to participate in the financing of elections.[306] In

302. The public may respond to the framing of the issue in terms of equality, as well. A recent study concluded that, as between a framing of campaign finance that focuses on "reduc[ing] the role of money in politics" and a framing that focuses on "giv[ing] everyone an equal voice in politics," the equality framing was more salient. *See* GRANT & RUDOLPH, *supra* note 156, at 102 tbl.6.2.

303. *See* SMITH, *supra* note 159, at 206.

304. *Shrink Mo.*, 528 U.S. at 400–01 (Breyer, J., concurring). *But see id.* at 397 (implying that a contribution limit that is so low that it is "so radical in effect as to render political association ineffective" or "drive the sound of a candidate's voice below the level of notice" would pose a constitutional problem).

305. Breyer, *supra* note 27, at 253.

306. *See* Overton, *supra* note 40, at 77 ("Massive disparities in the distribution of wealth cause disparities in political participation. The donor class effectively selects which candidates will be viable through large hard money contributions."). One intriguing proposal that has been advanced and would complement lower contribution limits is the provision of tax credits to individuals wishing to donate to political campaigns. *See id.* at 107–08 (proposing both a $100 annual tax credit per individual for contributions to political campaigns and a four-to-one match from public funds for contributions of $100 or less, the combination of which would make an individual's $100 contribution worth $500 to the recipient candidate, political party, or political organization); *see also* DeFigueiredo & Garrett, *supra* note 196, at 595–96 (proposing a $100 annual tax credit per individual for donations to federal candidates and national political parties).

addition to promoting citizens' sense of efficacy, lower contribution limits would also force candidates, parties, and interest groups to interact with more people. As to candidates, lower contribution limits would potentially increase exposure to a broader cross-section of the population and could positively affect policymaking.[307] Although the justification for capping contributions to independent groups, including PACs and 527s, has a less direct effect on policymaking, it could have an equally important impact on efficacy—perhaps voters would come to see these organizations as more representative of their interests if they felt that their small contribution had the same chance as any other person's contribution to impact the organization's policy priorities and agenda.[308]

Second, if contribution limits are reduced, the imposition of expenditure limits on candidates, campaigns, and both candidate-affiliated and independent political organizations is essential to promoting equality.[309] If contributions were limited but expenditures were left unchecked, there would be more pressure on candidates to spend their time raising money rather than engaging with their opponents and citizens on policy questions. The never-ending pressure to raise money is a primary deficiency of the current system—a deficiency that some commentators have already suggested might warrant expenditure limits[310]—and would only become worse if each candidate or organization could extract just a small amount of money from each donor. By capping expenditures, there would come a point when candidates or organizations could do no more fundraising and would be forced to shift their focus to delivering their message by interacting with voters.[311] Capping independent expenditures would prevent circumvention of limits on candidates

307. *See* ROSENSTONE & HANSEN, *supra* note 163, at 247.

308. *See* MELLMAN-WIRTHLIN REPORT, *supra* note 175, at 33 q.19C (revealing ambivalence about whether citizens feel that interest groups in Washington, D.C. represent their views).

309. This pairing of contribution limits and expenditure caps is precisely what Congress enacted in 1974. *See supra* notes 49–52 and accompanying text.

310. *See, e.g.*, Blasi, *supra* note 229, at 1288–89 (citing politicians' focus on fundraising as a justification for capping expenditures); *see also* Kruse v. City of Cincinnati, 142 F.3d 907, 919 & n.1 (6th Cir. 1998) (Cohn, J., concurring) (articulating a government interest in "freeing officeholders from the pressures of fundraising so they can perform their duties").

311. Although public opinion is not synonymous with good public policy, it is worth noting that capping candidate expenditures is popular among citizens. A post-election survey conducted in 2002 revealed that, among ten potential reforms, a proposal to cap expenditures was the most popular: 85% agreed that congressional candidates' campaign spending should be limited. *See* Box-Steffensmeier et al., *supra* note 163, at 85, 90–91 & n.1 (reporting results from a survey of 1,229 adult respondents).

and parties by using 527s as surrogates for the political party structure.

Third, together with campaign and expenditure limitations, campaign regulations should seek to encourage interactions between candidates and other players in the political system and voters. If fundraising becomes less important and average citizens appreciate its reduced importance,[312] perhaps voters will come to place greater value on their own role in shaping their representatives' priorities. Creating incentives and mechanisms for citizens to hear directly from and interact with elected leaders and candidates seeking office becomes essential to this exchange. Advocates of reform have suggested that giving incentives to broadcasters to provide free or inexpensive airtime to candidates and interest groups,[313] incentives for candidates to communicate directly with voters at town-hall style meetings, and incentives for voters to communicate directly with one another[314] would help to promote more egalitarian democratic discourse. In order to avoid an elitist bias in fora for such exchanges and maximizing broad participation, it would be important for candidates, parties, and political organizations to seek out opportunities that would allow interactions with voters in a range of different settings with varying levels of informality.

Finally, some reformers have suggested that the public financing of campaigns is likely to have the greatest impact in leveling the political playing field and making citizens feel part of the political process. Reforms of this nature would include a strengthened public

312. *See* MELLMAN-WIRTHLIN REPORT, *supra* note 175, at 32 q.18 (reporting that, given two alternate statements and asked which statement best expresses their view of the impact that fundraising commitments have on congressional members' ability to do their job properly, 55% of Americans surveyed agreed with the statement "Members of Congress spend so much time raising large political contributions that it interferes with their ability to do their jobs properly," while only 19% agreed that "Members of Congress have enough time to raise large political contributions without it interfering with their ability to do their jobs properly" and 25% said they had no opinion).

313. *See* Donald J. Simon, *Current Regulations and Future Challenges for Campaign Financing in the United States*, 3 ELECTION L.J. 474, 486–87 (2004) (proposing reform of public financing and suggesting free airtime as a potentially beneficial campaign finance reform); *see also* McCain, *supra* note 205, at 121 (advocating making free or subsidized broadcast time available for candidates). Note, however, that safeguards may be necessary to avoid the development of a symbiotic relationship between incumbent politicians and broadcasters that could harm electoral challengers.

314. *See* BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 3 (2004) (proposing a national deliberation holiday two weeks before an election where citizens would gather in large and small groups to discuss national issues).

financing system for presidential elections[315] and the implementation of a public financing system for congressional elections.[316] Even under *Buckley*, voluntary public financing at the state level has withstood court challenges;[317] in a post-*Buckley* world, it is possible that mandatory public financing could withstand judicial scrutiny.[318]

Undoubtedly, the embrace of equality as a guiding principle in campaign finance laws risks the kind of unintended consequences that have stymied reform efforts for the past quarter-century. Most importantly, there is the risk that Congress would enact, and the Court would uphold, laws that benefit some players in the political system while leaving others at a disadvantage.[319] Indeed, some members of the Court are inherently suspicious of any campaign finance law that Congress enacts because of the self-interested motive that legislators inevitably have to protect their office.[320] Similarly, curtailing the ability of some groups to raise and spend money while

315. FECA includes a presidential public financing system, funded by taxpayer check-off, for candidates who choose to opt into that system. I.R.C. § 9002-13 (2000). The system has come under attack for being insufficiently funded and not attractive enough to candidates, particularly candidates in primary elections. *See, e.g.*, Simon, *supra* note 313, at 482–83 (explaining structural shortcomings in the public financing system).

316. *See* Raskin & Bonifaz, *supra* note 39, at 1189–95 (advocating for public financing of congressional elections).

317. *See, e.g.*, Daggett v. Comm'n on Gov'tal Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding Maine initiative providing full public financing to qualified candidates). For a pro-reform analysis of the constitutionality of so-called "Clean Election" laws, see Memorandum from Brenda Wright, Managing Attorney, National Voting Rights Institute, to Interested Persons (Apr. 2004), http://www.nvri.org/about/constitutionality_of_clean_elections_update.pdf. In 2000, Maine and Arizona both instituted voluntary public funding for state legislative elections; preliminary results indicated that the laws were successful at limiting the amount of private money spent during the election cycle, helped equalize the positions of incumbents and challengers, and created opportunities for new candidates. *See* Samantha Sanchez, First Returns on a Campaign Finance Reform Experiment (Mar. 26, 2001), http://www.followthemoney.org/press/ZZ/20010301.phtml.

318. Some data suggest that public financing may have adverse effects on efficacy, however. *See* Primo & Milyo, *supra* note 163 (June 2005 manuscript at 28 tbl.3) (showing a statistically significant, negative relationship between public funding of candidates conditioned on expenditure limits and two measures of efficacy). Additionally, among the reforms tested by Box-Steffensmeier et al., *supra* note 163, at 91 tbl.5.1, public funding of congressional elections ranked as one of the least popular regulatory proposals tested—just 38.6% of the adults surveyed agreed with this reform.

319. See, for example, the Court's differential treatment of corporations in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and its treatment of nonprofit ideological corporations in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

320. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 249 (2004) (Scalia, J., dissenting) (arguing that regulation of campaign speech is intended to quell dissent against those in power and gives incumbents an unfair advantage over challengers because of increased name recognition and comparatively easy fundraising ability).

leaving others unrestricted[321] unfairly advantages the unregulated groups.

Additionally, regulations would need to take account of the power of incumbency,[322] and provide either a higher expenditure limit or state-conferred benefits for challengers that are not provided to incumbents.[323] Regulations would also need to ensure that all groups interested in influencing the process have equally adequate opportunities to have their message distributed; thus, expenditure limits would need to be high enough that speech would not be curtailed, but low enough that one set of interest or advocacy groups could not dominate others.[324] Such regulations would allow a fairer "marketplace of ideas" that, while not "uninhibited," may be more reflective of the diversity of views of all citizens and interest groups regardless of financial resources.[325]

CONCLUSION

Considering the history of efforts to regulate campaign finance, it is clear that there are many barriers—both structural and constitutional—to wholesale reform. Congress is notorious for piecemeal, incremental measures that are keenly attuned to its

321. Consider the 527 debate and the current difference in regulation between those who engage in express advocacy and those who do not, for example. *See also* SMITH, *supra* note 159, at 206 (arguing that regulation disadvantages average citizens in favor of media elites and political operatives with skills that are valuable to candidates).

322. Incumbents have pre-existing name recognition, pre-existing bases of support, easier means of generating free media coverage, and, often, money left over from previous campaigns. *See* Marshall, *supra* note 300, at 369–70 (discussing the incumbent advantage as a function of three factors: heightened name recognition and the corresponding ability to campaign with less money; higher likelihood of receiving contributions, including contributions from PACs; and greater accessibility to tools that aid in fundraising, such as well-developed donor lists). *See generally* ROBERT G. BOATRIGHT, EXPRESSIVE POLITICS: ISSUE STRATEGIES OF CONGRESSIONAL CHALLENGERS, 2–4 (2004) (discussing disparities between incumbents and challengers in congressional contests); Open Secrets, 2004 Election Overview: Incumbent Advantage, http://www.opensecrets.org/overview/incumbs.asp?cycle=2004 (last visited Nov. 15, 2005) (detailing fundraising disparities between incumbents and challengers in Senate and House races in 2004).

323. *See* Pildes, *supra* note 112, at 152–53 (suggesting various competition-enhancing reforms to help challengers); *see also* PETER LEVINE, THE NEW PROGRESSIVE ERA: TOWARD A FAIR AND DELIBERATIVE DEMOCRACY 132 (2000) (suggesting that qualified candidates be given free postage for mailings to equalize the benefits that congressional incumbents receive from the franking privilege).

324. *Cf.* Dworkin, *supra* note 39, at 68 (advocating for moderately-set expenditure caps for candidates and parties).

325. *But see McConnell*, 540 U.S. at 265 (Thomas, J., dissenting) ("The very 'purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.' " (alteration in original) (quoting Red Lion Broad. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 390 (1969))).

reading of the mood of the Court[326] and that give only minimal guidance to implementing agencies. And, as three decades of experience with campaign finance reform illustrates, intervention by the Court into the legislative realm in the name of protecting the Constitution often leaves in its wake a system of incoherent half-measures.[327] *Buckley* itself is a leading example of the Court's willingness to dismantle a coherent regulatory scheme.[328] One significant issue then is the Court's willingness to defer to the "*value judgments* made by legislative bodies on contested issues of political equality."[329] While the Court's early post-*Buckley* decisions displayed skepticism towards allowing a self-interested legislature to make rules governing elections,[330] more recent decisions, including *McConnell*, have taken a far more deferential approach.[331]

The criticism engendered by the vast outpouring of wealth during the most recent election cycle demonstrates that, under the current regulatory regime, "the money will find an outlet."[332] This, at least, will be true as long as the Court interprets First Amendment interests to allow caps on contributions, but not on expenditures,[333] and treats candidates and political parties differently than

326. *See, e.g.*, Helen Dewar, *McCain, Feingold & Co. Laugh Last: Effort to Avoid Legal Pitfalls Pays Off for Campaign Finance Crusaders*, WASH. POST, Dec. 11, 2003, at A28 (stating that BCRA's sponsors "knew the legal pitfalls and framed the bill carefully, even rejecting attractive amendments that might prove troublesome in courts").

327. *See* Fed. Election Comm'n v. Nat'l Conservative PAC, 470 U.S. 480, 518 (1985) (White, J., dissenting) (describing the Court's approach to analyzing FECA: "By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork.").

328. Buckley v. Valeo, 424 U.S. 1, 235 (1976) (per curiam) (Burger, C.J., dissenting) ("The Court's result does violence to the intent of Congress in this comprehensive scheme of campaign finance. By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts.").

329. Hasen, *supra* note 37, at 62–63.

330. *Id.* at 39–40 (discussing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981), and Fed. Election Comm'n v. Nat'l Conservative PAC, 470 U.S. 480 (1985), in which the Court struck down campaign finance laws that it saw as favoring entrenched political interests).

331. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 223–24 (2003) (explaining the appropriateness of deference to Congress on BCRA); *see also* DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS 947 (2d ed. 2001) (describing *Nixon v. Shrink Missouri Government PAC* as significant for the Court's adoption of a more deferential approach to legislative judgments).

332. *See S. 271 Hearing*, *supra* note 23 (statement of Democratic lawyer Robert Bauer). This warning, of course, echoes the *McConnell* Court's prediction that "money, like water, will always find an outlet." *McConnell*, 540 U.S. at 224.

333. *Buckley*, 424 U.S. at 58–59.

independent groups.[334] As an alternative to the continued flow of cash into political campaigns, Congress and the Court should consider the value of equality and democratic participation as important features of campaign finance regulation. A comprehensive scheme that allows reasonable limits on expenditures, limits on contributions to candidates, parties, and independent political organizations, and a range of incentives to encourage broader political engagement could go a long way toward equalizing opportunities for democratic participation by all citizens to "speak."

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334. *See supra* text accompanying notes 69–73.

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