
RESTORING ELECTORAL EQUILIBRIUM IN THE WAKE OF CONSTITUTIONALIZED CAMPAIGN FINANCE

Campaign finance laws have been frequently in the minds of legal scholars, politicians, and American citizens since the release of the *Citizens United v. FEC*¹ decision in January 2010. Some treated *Citizens United* as an outlier, shocking in its creation of a brave new world of corporate and union campaign expenditures.² But in reality, the Roberts Court has been systematically deciding campaign finance cases involving the independent expenditures of groups and individuals over the past five years,³ holding again and again that the First Amendment is unconstitutionally burdened when regulations prevent independent expenditures⁴ from being made during elections.⁵

The total effect of these decisions is an overall increase in speech. But this increase benefits only groups advantaged by the liberalization of laws governing independent expenditures — namely individuals, corporations, and groups not governed by Federal Election Commission (FEC) contribution limits⁶ — leaving traditional political speakers like candidates and parties behind. Because these independent groups and individuals are now free to spend unlimited money from sources other than individuals and political committees contributing in FEC-limited amounts — such as personal finances,⁷ corporate profits or union dues,⁸ or large private donations⁹ — they account for most of the significant uptick in the campaign spending curve.¹⁰ But the tradi-

¹ 130 S. Ct. 876 (2010).

² See, e.g., President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H418 (daily ed. Jan. 27, 2010).

³ Even before the Roberts Court, Professor Richard Pildes noted the Rehnquist Court's "constitutionalization of democratic politics." Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 31 (2004).

⁴ An independent expenditure is "an expenditure for a communication 'expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents.'" FED. ELECTION COMM'N, COORDINATED COMMUNICATIONS AND INDEPENDENT EXPENDITURES 7 (2007, updated 2011) (quoting 11 C.F.R. § 100.16(a) (2010)), available at http://www.fec.gov/pages/brochures/ie_brochure.pdf.

⁵ These cases include *Citizens United*, 130 S. Ct. 876; *Davis v. FEC*, 128 S. Ct. 2759 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); and *Randall v. Sorrell*, 548 U.S. 230 (2006). See also Part III, pp. 1545–49.

⁶ This Note will refer to these groups as "independent" groups since their speech rights are granted only insofar as their speech is not tied to a candidate or party.

⁷ See generally *Davis*, 128 S. Ct. 2759.

⁸ See generally *Citizens United*, 130 S. Ct. 876.

⁹ See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

¹⁰ See Fredreka Schouten, *Campaign Spending by Groups Gone Wild*, USA TODAY, Oct. 15, 2010, at 4A.

tional outlets for political speech — candidates, parties, and political action committees (PACs) — are still limited in their operations by the realities of having to aggregate money according to FEC regulations by gathering lots of relatively small individual contributions.¹¹

Opening the floodgates of money for some entities but not others has changed the relative power of the FEC-regulated entities and independent speakers. The campaign finance world is essentially an artificial, hyper-regulated market created by the government, and in any market, spending power is power. The fundamental theory of this market is that only government-approved money can enter the system, so the statutory contribution caps created an electoral equilibrium¹² of sorts — balancing power based on the size of the contributions each entity could accept. But in the post-*Citizens United* world, half the market of political spending is still extensively regulated while the other half is extensively free. And because the system of regulation is premised on a closed system, there can be no equilibrium after *Citizens United*. This Note argues that the efficacy of a hyper-regulated market of campaign finance depends on the exclusion of nonsystemic money and that recapturing a coherent electoral equilibrium is, as a policy matter, critical to the continued functionality of the campaign finance market.

The most obvious solution to this problem would be for Congress to legislate the system back into balance, to ensure the same types of regulations govern all speakers during elections. Since the Federal Election Campaign Act of 1971¹³ (FECA), Congress has taken this approach to regulating the campaign finance world. The most recent congressional overhaul of the campaign finance system — known informally as “McCain-Feingold” and officially as the Bipartisan Campaign Reform Act of 2002¹⁴ (BCRA) — reflected this desire for extensive regulation. But now that the Roberts Court has completed the “constitutionalization”¹⁵ of the right to spend infinitely on independent

¹¹ The 2011–2012 annual limits for individual contributions are as follows: \$2500 to candidates, \$5000 to PACs, \$10,000 to state or local party committees, and \$30,800 to national party committees. Press Release, Fed. Election Comm’n, FEC Announces 2011–2012 Campaign Cycle Contribution Limits (Feb. 3, 2011), available at <http://www.fec.gov/press/20110203newlimits.shtml>.

¹² Though “electoral equilibrium” is sometimes used in a technical manner by political scientists, here it is meant to describe the balance of power struck among interests as a policy matter when regulating various actors during an election. The system’s being in equilibrium would mean that it strikes a coherent balance of power among groups, taking into account all the spending in the system.

¹³ Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of the U.S. Code).

¹⁴ Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of the U.S. Code).

¹⁵ This Note borrows the term that Professor Pildes introduced in his Foreword in 2004. See generally Pildes, *supra* note 3. The term alludes to the fact that “[o]ver the last generation, issues

campaign expenditures from nearly any source of money,¹⁶ any attempt to rebalance the system to the benefit of candidates or parties may *not* do so by restricting independent expenditures of third parties.

This Note attempts to capture and describe the fundamental tension that now exists in the U.S. campaign finance system and to identify and consider the issues this tension presents for electoral politics in general. Instead of building the case for or against the increased constitutionalization of speech rights vis-à-vis elections and campaign finance, this Note argues that this increased, but incomplete, constitutionalization of campaign finance law has created a dystopic system that lends itself to no quick and simple remedy. Rather, the Court has painted the system into the proverbial corner. The tension between Congress, which has repeatedly attempted to close the system, and the Roberts Court, which has repeatedly required certain aspects of the system to be open, has created an impasse. The view that this problem must be addressed does not depend on whether one is a free speech libertarian or a free speech egalitarian.¹⁷ The disturbance in the “electoral equilibrium” should concern both sides alike. And this semi-constitutionalization poses difficult questions about whether Congress can remedy this situation by placing hurdles and disclosure restrictions in the way of independent expenditures or whether the situation is remediable only by relaxing restrictions on candidates and parties.

To explore this dilemma, Part I reviews the roles and changing relative power of parties, candidates, and other organizations in American campaigns over the course of the history of campaign finance regulation. This Part argues that the dominant and constant theory of American campaigns emphasizes parties and candidates as the main actors in running for office, but that our campaign finance system has sometimes failed to take this value into account and instead has favored parties, candidates, and independent groups differently over the

concerning the design of democratic institutions and the central processes of democracy have increasingly become questions of constitutional law throughout the world.” *Id.* at 31. Pildes argues that the Rehnquist Court transformed the law of democracy by “constitutionalizing” certain aspects of voting, elections, and political life and thus instituted rules untouchable by normal law-making processes. *See id.* at 31–32. Pildes notes the negative effects of constitutionalization in its present form — like the fact that it separates First Amendment cases from equal protection cases even when the substantive effects of these disputes are similar — and argues that this approach creates a disjointed law of democracy. *Id.* at 39–41. Pildes’s critiques are outside the scope of this Note, but the idea of constitutionalization is critical to it.

¹⁶ The Roberts Court completed the constitutionalization of the area of independent expenditures that began with *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). But foreign sources of money may still be excluded from the system. *See* 2 U.S.C. § 441e (2006).

¹⁷ These terms are from Professor Kathleen Sullivan’s conception of the free speech divide in campaign finance and other First Amendment areas. *See generally* Kathleen M. Sullivan, *The Supreme Court, 2009 Term — Comment: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

years. This Part concludes by tracking the evolution of post-BCRA campaign finance law in the Roberts Court, focusing on the constitutionalization of independent expenditure rights for various groups. Part II outlines the new parameters of permissible regulation under these decisions and explores how today's campaign finance structure has fundamentally altered the balance of power from the one struck by BCRA. Finally, Part III discusses the dystopic effects of the imbalance of power the Court has created in the electoral system and the barriers to remedying the problematic situation.

I. ESTABLISHING THE RELATIVE POWER
OF CANDIDATES, PARTIES, AND POLITICAL ORGANIZATIONS:
THE DEVELOPMENT OF MODERN CAMPAIGN FINANCE

A. *The Role of Parties in Elections*

The United States has always struggled with the role of democratic institutions in elections. While some of the most familiar Framers were suspicious of them,¹⁸ political parties developed almost immediately after the Founding¹⁹ and have been with us ever since. American democracy was in need of the parties as supporting institutions, even in the era of Founding Fathers and great statesmen. As the United States grew and the recognizable early American statesmen faded away, parties became vital to democracy, playing a large role in political organization, candidate selection, and campaign funding.²⁰ Adding the fact that campaign funding was funneled largely through parties²¹ meant the balance of power tilted heavily in their favor. But parties did not have clean hands in their role supporting democracy. Corruption was rampant, patronage was the backbone of the system, and transparency was nonexistent.²²

The problems growing in the parties were no secret,²³ but there was little agreement about how to fix them. Early attempts at reform of corrupt party funding practices largely failed to clean up elections.²⁴

¹⁸ See, e.g., THE FEDERALIST NO. 10 (James Madison).

¹⁹ See JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 68–82 (1995).

²⁰ See generally *id.*

²¹ See *id.* at 55.

²² See James L. Sundquist, *Party Decay and the Capacity to Govern*, in THE FUTURE OF AMERICAN POLITICAL PARTIES 42, 47 (Joel L. Fleishman ed., 1982).

²³ See *id.* at 47–51.

²⁴ Among the failed reforms were the Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)), which outlawed campaign contributions by companies and banks. But the Act, like others before FECA and the 1974 amendments thereto, lacked sufficient enforcement mechanisms and so did not effectively stop companies and banks from donating. See *Appendix Four, The Federal Election Campaign Laws: A Short History*, FED.

The American Political Science Association issued a report advocating strengthening the two-party system to increase the effectiveness of government.²⁵ But what happened instead — both by implementation of some of their proposals and by reforms undertaken by the parties themselves — was a serious weakening of the parties vis-à-vis candidates and, eventually, other political organizations.²⁶

In the 1950s and 1960s, internal reforms began the process of changing the role of parties in campaigns and government.²⁷ And with FECA, Congress developed the campaign finance system with an eye toward combating corruption, enacting regulations that imposed caps²⁸ on contributions from political committees to candidates.²⁹ Then, as the laws were challenged, the Supreme Court reviewed the laws under the First Amendment. Each branch pursued its own institutional end, without regard to whether the resulting laws and decisions provided a coherent structure that valued the institutions essential to effective representation. In fact, even as the Court implemented structural changes that fundamentally altered the role parties play in the political system, some Justices continued to note the important role parties play in supporting American democracy.³⁰ But the independent actions of Congress and the Court created a system that today disadvantages parties in favor of candidates, individuals, nonconnected political committees, corporations, and unions. And though many examples of nonparty corruption continued, it was the

ELECTION COMMISSION, <http://www.fec.gov/info/appfour.htm> (last visited Feb. 26, 2011). During Watergate, for example, it was discovered that Goodyear, American Airlines, and 3M were among the companies that contributed to the Committee to Reelect the President. See Dean McSweeney, *Parties, Corruption and Campaign Finance in America*, in PARTY FINANCE AND POLITICAL CORRUPTION 37, 40 (Robert Williams ed., 2000). Like the Tillman Act, other attempts at reform also lacked adequate enforcement measures and monitoring devices. See *id.* (“In the 49 years of the Corrupt Practices Act only one case was taken to court and that produced a not-guilty verdict.”).

²⁵ Comm. on Political Parties, Am. Political Sci. Ass’n, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. (SUPPLEMENT) 1 (1950).

²⁶ See Stephen E. Gottlieb, *Election Reform and Democratic Objectives — Match or Mismatch?*, 9 YALE L. & POL’Y REV. 205, 210–18 (1991).

²⁷ Arguably, the most important of these reforms was implementation of primaries to select the party nominees. *Id.* at 216–17.

²⁸ Many contend that imposing caps on party contributions is indicative of our treatment of parties as suspect special interests rather than as integral parts of candidates’ campaigns. See, e.g., McSweeney, *supra* note 24, at 43 (“The assumption behind contribution caps was that all private sources of money represent[ed] vested interests. Parties, like individuals and groups, had to be constrained to allow candidates to serve the public interest.”).

²⁹ See section I.B, pp. 1533–35.

³⁰ For example, Justice O’Connor registered her conception of the importance of the two-party system succinctly: “The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.” *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O’Connor, J., concurring in the judgment).

parties that felt the impact of increasing regulation.³¹ Thus, “[t]he financial independence of candidates from parties, already well advanced, gained legal authority.”³²

The campaign finance world is one in which the legal system constructs a network of haves and have-nots among electoral actors. Along with the historical events discussed above, the campaign finance regime has shaped how parties and candidates interact, which speakers in elections dominate, and how campaigns are run more generally.

B. *The Birth of Campaign Finance Regulations*

Modern campaign finance laws were born in 1971 when FECA ushered in fundamental changes in what had been a largely unregulated electoral system. The main thrusts of the initial FECA were the disclosure requirements for campaign contributions and expenditures³³ and a cap on advertising expenditures.³⁴ FECA also provided for the creation of PACs.³⁵ Though it would later be amended³⁶ and challenged,³⁷ the initial success of FECA was in forcing accountability and transparency in the system by requiring the reporting of campaign contributions and by establishing enforcement by the U.S. Department of Justice.³⁸

Then came Watergate, which uncovered a series of abuses of the campaign system that had occurred during the 1972 presidential election. Congress followed up by drastically amending FECA in 1974.³⁹ Among the amendments to FECA were the provision for the creation of the FEC as an independent agency to promulgate regulations, track required disclosures, and enforce FECA,⁴⁰ and a provision implemen-

³¹ See McSweeney, *supra* note 24, at 40–41. McSweeney notes: “It was a party organization, the Democratic National Committee, which was the target of the failed burglary in the Watergate complex from which the scandal unraveled. Yet the reforms of election finance law which followed Watergate capped the donations parties could make to candidates.” *Id.* at 41.

³² *Id.*

³³ Pub. L. No. 92-225, §§ 302–311, 86 Stat. 3, 11–19 (1972).

³⁴ *Id.* §§ 103–104, 86 Stat. at 4–7.

³⁵ *Id.* § 303, 86 Stat. at 14.

³⁶ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S. Code), *partially invalidated* by Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). The FECA Amendments of 1976 also widely curtailed corporate and union uses of general treasury funds to organize PACs. See Pub. L. No. 94-283, sec. 112, § 321, 90 Stat. 475, 490–92 (codified as amended at 2 U.S.C. § 441b (2006)).

³⁷ See Buckley, 424 U.S. 1.

³⁸ There were laws on the books requiring disclosure prior to FECA’s enactment, but they were widely circumvented: “In 1968, still under the old law, House and Senate candidates reported spending \$8.5 million, while in 1972, after the passage of the FECA, spending reported by Congressional candidates jumped to \$88.9 million.” *Appendix Four, The Federal Election Campaign Laws: A Short History*, *supra* note 24.

³⁹ 88 Stat. 1263.

⁴⁰ *Id.* sec. 208, §§ 310–315, 88 Stat. at 1280–87.

ting public funding for presidential campaigns.⁴¹ Congress also imposed stringent limits on contributions to and expenditures by federal candidates and political committees acting in federal elections.⁴²

FECA and the 1974 Amendments were challenged under the First Amendment two years later in the seminal case *Buckley v. Valeo*.⁴³ *Buckley* created a dichotomy in campaign speech by holding that expenditure limitations violated the First Amendment⁴⁴ while allowing contribution limitation regulations to stand, so long as the regulations fulfilled the permissible government purpose of combating corruption or the appearance thereof.⁴⁵

From the time of *Buckley* onward, the law decreed strict separation between parties and candidates, treating parties as harshly as, or more harshly than, individuals and other political organizations when it came to making contributions directly to candidates.⁴⁶ Though *Buckley* invalidated overall spending caps for candidates, it upheld restrictions on party coordination with candidates.⁴⁷ FECA and its amendments made some allowances for coordinated spending on behalf of candidates, but with rising costs of campaigns, these allowances were so low as to be “a drop in the bucket” of the overall money candidates needed to raise to be successful.⁴⁸ Candidates relied on individuals and PACs⁴⁹ for funding. For presidential candidates, this effect was exacerbated by a more protracted primary process and the public financing system for the presidential election.⁵⁰ Because candidates had to fend for themselves throughout the primary process before gaining

⁴¹ *Id.* §§ 403–406, 408, 88 Stat. at 1291–96, 1297–1303.

⁴² *Id.* §§ 101–102, 88 Stat. at 1263–71.

⁴³ 424 U.S. 1 (1976) (per curiam).

⁴⁴ *Id.* at 39–51.

⁴⁵ *Id.* at 24–29 (explaining that the limitation was narrowly tailored to combat “the problem of large campaign contributions — the narrow aspect of political association where the actuality and potential for corruption have been identified — while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources,” *id.* at 28).

⁴⁶ See McSweeney, *supra* note 24, at 42 (discussing the caps on overall party spending and other legal factors leading to the decline in the proportion of a candidate’s overall financing derived from party contributions).

⁴⁷ See *Buckley*, 424 U.S. at 46 & n.53 (upholding FECA’s prohibition of any entity’s coordinating otherwise independent expenditures with candidates).

⁴⁸ PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT* 45 (2009) (noting that in 2006 the cap on coordinated expenditures for a House race in a multi-district state was \$42,100, while the average successful winning House race cost \$1.26 million); see also McSweeney, *supra* note 24, at 41–43 (reporting, among other statistics, that in 1972, before FECA took effect, seventeen percent of House campaign receipts were from parties; in 1976, after FECA took effect, this number fell to eight percent, *id.* at 42).

⁴⁹ During the time when parties were evolving away from candidates, single-issue PACs sprang forward into the void the parties had left. See McSweeney, *supra* note 24, at 49–52.

⁵⁰ See *id.* at 42.

access to the public financing system if they were successful, party funding began to play only a meager role in the presidential election process.⁵¹

C. *The Introduction of Soft Money*

The effect of these changes on the balance of power between candidates and parties was clear: strict separation of party finances from candidates and the introduction of competitive party primaries in most states meant that candidates became largely self-sufficient in financing and messaging.⁵² But in 1979, Congress made additional amendments to respond to the lessons learned from the first elections held under FECA.⁵³ Most importantly, these amendments granted limited exceptions to state and local political parties for electioneering activities, including grassroots organization and get-out-the-vote efforts. This reform was a response to FECA's impact on grassroots campaign organization by the parties. This partial exception to FECA's highly structured limits allowed parties to raise "soft money" for electioneering purposes, though not for the direct benefit of any particular candidate.⁵⁴ Thus, the 1979 amendments ushered in the soft money-hard money distinction. Soft money — money not subject to FEC restrictions — could be used for electioneering activities so long as they did not "expressly advocate"⁵⁵ for the election or defeat of a candidate.⁵⁶ Accordingly, certain state and local parties' federal campaign activities could be funded by donations from corporations, unions, or individuals well in excess of the FEC-mandated maximums. This allowance be-

⁵¹ Here, it is instructive to note the parallel experience of Germany and its public financing system. Germany publicly finances its parties, which spend robustly on campaigns. And since the party structure is a dominant feature of the electoral system, the vast majority of election-based spending is done by parties rather than by candidates. As a result, some argue, the federal-level parties, which receive funding from the public financing system and large donations, are not reliant on local parties, membership dues, or individual donors. Though the public coffers finance German candidates through their parties, some have observed that this phenomenon has exacerbated the rift between parties and the people who once provided the bulk of the funding for their activities. It is only natural that American candidates experience roughly the same thing. See generally Thomas Saalfeld, *Court and Parties: Evolution and Problems of Political Funding in Germany*, in PARTY FINANCE AND POLITICAL CORRUPTION, *supra* note 24, at 89.

⁵² Gary R. Orren, *The Changing Styles of American Party Politics*, in THE FUTURE OF AMERICAN POLITICAL PARTIES, *supra* note 22, at 4, 33-41.

⁵³ See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified as amended in scattered sections of the U.S. Code).

⁵⁴ McSweeney, *supra* note 24, at 42-43.

⁵⁵ The phrase "expressly advocate" comes directly from *Buckley*, when in an effort to define the term "expenditure" to avoid overbreadth concerns, the Court construed it "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (per curiam) (footnote omitted). This phrase became important in the "issue ad" phenomenon that followed.

⁵⁶ By contrast, "hard money" is money that flows through the FEC contribution limits.

came important in the ensuing years, when parties took advantage of this source of funding to get around FEC-created restrictions.⁵⁷

Soft money gave oxygen to parties that had been suffocating under FECA. And a pair of cases empowered parties — though on a limited basis — in the way *Citizens United* has recently empowered corporations and unions. *Colorado Republican Federal Campaign Committee v. FEC*⁵⁸ (*Colorado I*) affirmed the right of political parties, like individuals and PACs, to make independent expenditures in support of (but not coordinated with) their favored candidates.⁵⁹ This decision strengthened the parties by allowing them to use soft money to fund “issue ads,” which effectively allowed parties to support their candidates with soft money. The proliferation of “issue ads” — advertisements about candidates or issues aired during an election that do not run afoul of the prohibition on “express advocacy” — was rampant. In 1996, the amount of parties’ independent spending was double their amount of spending on candidates directly.⁶⁰ But the result of the requirement that such spending be completely uncoordinated with candidates themselves was that parties operated at an even greater “arm’s length” from the candidates to avoid any possibility of running afoul of the law.⁶¹ Parties could not push their hand further, though; a follow-up case, *FEC v. Colorado Republican Federal Campaign Committee*⁶² (*Colorado II*), upheld congressionally mandated limits on direct coordinated expenditures by parties with candidates, holding that this limit was necessary to prevent circumvention of campaign finance rules by wealthy donors and parties.⁶³

D. Reforming the System: BCRA and McConnell

All the while, campaign finance reformers had gained the support of the people, and calls for campaign finance reform had permeated Congress. In 2002, the resulting law, BCRA, instituted two main reforms. First, it banned all soft money contributions and spending within the campaign finance system, instead forcing all federal candi-

⁵⁷ One example of this practice was a major factor in the eventual call for reform. In the 1990s, in exchange for large soft money donations, the Democratic National Committee granted access to (and, some argue, political influence over) President Clinton and Vice President Gore by inviting donors to “coffees” held at the White House and on Air Force One and Two. Overall, this fundraising drive raised \$27 million for the DNC before the scandal broke, and much of the money was eventually returned to the donors (some of whom were illegal foreign contributors). See McSweeney, *supra* note 24, at 52–53.

⁵⁸ 518 U.S. 604 (1996).

⁵⁹ *Id.* at 608 (plurality opinion).

⁶⁰ McSweeney, *supra* note 24, at 43.

⁶¹ *Id.*

⁶² 533 U.S. 431 (2001).

⁶³ *Id.* at 457–65.

dates and committees to subsist on contributions made according to the FEC restrictions and limits.⁶⁴ Second, BCRA banned the purchase and airing of “issue ads” within thirty days of a primary election and sixty days of a general election by defining prohibited “electioneering communications” as inclusive of any advertisement that mentioned the name of a candidate.⁶⁵ Corporations, unions, nonprofits, and other independent entities funded by corporations or unions all fell under the electioneering communications blackout period before elections.⁶⁶ BCRA also made a number of other changes to the system.⁶⁷

It is important to understand what the original version of BCRA attempted to do: namely, to bring a system that had been plagued by the leach of soft money into the FEC-regulated system back into balance. It did so by attempting to close the system to independent groups. On balance, parties — which had exercised much of their power through practices that BCRA disallowed — were the main losers in the reformed system, closely followed by organizations affected by the blackout period before elections. Candidates, as they had been since *Buckley*, remained the freest speakers in the system. By bringing all the money into the FEC system of contribution limits, sterilizing the time immediately before an election from “issue ads,” and allowing only these FEC-governed groups to aggregate money for political speech, the campaign finance market could maintain the equilibrium that Congress intended.⁶⁸ But it could maintain this balance only so long as outside money was unable to seep into the system.

⁶⁴ Pub. L. No. 107-155, sec. 101, § 323, 116 Stat. 81, 82–86 (2002) (codified at 2 U.S.C. § 4411 (2006)).

⁶⁵ *Id.* § 201 (codified at 2 U.S.C. § 434(f)(3)(A)).

⁶⁶ *Id.* § 203 (codified at 2 U.S.C. § 441b(b)(2)).

⁶⁷ BCRA made a number of technical changes and updates, including updating contribution limits and indexing them to inflation. *Id.* § 307 (codified at 2 U.S.C. § 441a(a), (c), (h)). It also tightened certain types of contribution restrictions. For example, BCRA strengthened the prohibition on foreign nationals’ contributions, *id.* § 303 (codified at 2 U.S.C. § 441e), and restricted individuals under age eighteen from donating to certain committees, *id.* § 318 (codified at 2 U.S.C. § 441k), though this latter provision was later invalidated in *McConnell v. FEC*, 540 U.S. 93, 231–32 (2003). It enacted the “Millionaire’s Amendment” aimed at curtailing the use of personal funding for one’s own campaign, *id.* §§ 304, 316, 319 (codified at 2 U.S.C. §§ 431, 441a(a), 441a(i), 441a-1). Though this provision stood through *McConnell* because the Court ruled that particular challenge nonjusticiable for lack of standing, 540 U.S. at 229–30, it was later overturned by *Davis v. FEC*, 128 S. Ct. 2759 (2008). Finally, BCRA enhanced certain disclosure requirements, especially accompanying television advertisements. *See* BCRA sec. 311, § 318 (codified at 2 U.S.C. § 441d). These included the “stand by your ad” provision, requiring candidates to voice over or appear on screen to indicate their approval of the advertisement. *Id.* § 318(d)(1)(B).

⁶⁸ At least, it could have maintained an equilibrium if not for the almost instant proliferation of “527” money. *See, e.g.*, PUBLIC CITIZEN, THE LAST MAJOR “SOFT MONEY” LOOPHOLE: SECTION 527 GROUPS IN THE 2004 FEDERAL ELECTIONS I, available at <http://www.citizen.org/documents/TheLastSoftMoneyLoophole.pdf> (last visited Feb. 26, 2011).

BCRA was almost immediately challenged under the First Amendment in *McConnell v. FEC*.⁶⁹ *McConnell* largely deferred to Congress, approving of BCRA's soft money contribution ban as applied to all potential recipients of the contributions,⁷⁰ its disclosure requirements,⁷¹ and its redefinition of "electioneering communications"⁷² to prohibit corporate and union independent expenditures during the blackout period.⁷³ Certain of BCRA's requirements were invalidated, mainly a provision that had restricted the amount parties could spend on candidates through either coordinated or independent expenditures. The Court ruled that the restriction on expenditure amounts unconstitutionally burdened a party's right to engage in unlimited independent expenditures as recognized in *Colorado I*.⁷⁴ But fundamentally, *McConnell* upheld BCRA's main elements against constitutional challenge.

E. The Roberts Court and the Decline of BCRA

Though the Court had been largely deferential to congressional regulation of the campaign finance system, that changed with the arrival of Chief Justice Roberts and Justice Alito. In 2006, the new Court began scrutinizing campaign finance law more closely and wasted little time before starting to chip away at certain aspects of campaign finance regulation.⁷⁵ The Court has primarily directed its efforts toward liberating independent groups' speech, while it has left the speech rights of FEC-regulated entities largely untouched.

In 2007, the Court provided its first clear signal that it considered independent expenditure limitations on speech to be a violation of the First Amendment in *FEC v. Wisconsin Right to Life, Inc.*⁷⁶ (*WRTL*).

⁶⁹ 540 U.S. 93.

⁷⁰ *Id.* at 142–89.

⁷¹ *Id.* at 189–202.

⁷² *Id.* at 206 (“[I]ssue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters’ decisions and have that effect. . . . [T]he vast majority of ads clearly had such a purpose.”)

⁷³ *Id.* at 203–11.

⁷⁴ *Id.* at 213–19.

⁷⁵ Lest the reader take away from this description that the Roberts Court has attacked election law wholesale, in reality other aspects of the Roberts Court’s election law jurisprudence have remained highly deferential to precedent, the states, and Congress. See, e.g., *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) (holding that Washington state law authorizing disclosure of signatures for referenda does not violate the First Amendment); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009) (declining to disturb section 5 of the Voting Rights Act against constitutional challenge); *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610 (2008) (holding that Indiana law requiring voters to present a photo ID does not violate the Constitution).

⁷⁶ 127 S. Ct. 2652 (2007).

By shifting the burden of proof to the FEC⁷⁷ and creating a presumption that advertisements do *not* constitute “express advocacy,”⁷⁸ *WRTL* expanded the ability of independent spenders to engage in advocacy that toed the line between legal issue ads and illegal express advocacy. This standard made it more difficult for the government to prevent independent speakers — including corporations spending from their general treasuries — from speaking in the thirty- and sixty-day blackout periods. Though it did not disrupt the fundamental goal of BCRA — quieting independent speakers near primary and general elections — *WRTL* did usher back the possibility of independent expenditures for issue ads and thus an entire segment of political speech that could not be limited during campaigns. This ruling meant parties were free to run advertisements to the same extent as corporations and political groups not regulated by the FEC. But it also broke the monopoly on issue advertisements that parties had held under *McConnell* and *Colorado I.*⁷⁹

Perhaps, in retrospect, the Court’s intention to liberalize expenditure laws should have been abundantly clear by 2008, when the Court in *Davis v. FEC*⁸⁰ overturned the BCRA’s so-called Millionaire’s Amendment⁸¹ provisions that had intended to discourage self-financing candidates from exercising their right to spend massive amounts of money on their own campaigns.⁸² Though *Davis* altered the balance of power not between independent and FEC-governed actors, but rather between self-funding candidates and their opponents relying solely on donations, it did lay the foundation for future changes to the system.⁸³

⁷⁷ *Id.* at 2663–64.

⁷⁸ The 5–4 majority held that an advertisement must be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” to violate BCRA. *Id.* at 2667. While these determinations were important changes at the time, now that *Citizens United* has lifted many of the restrictions in BCRA, including the ban on corporation and union express advocacy, the distinctions drawn in this case are far less important in practice.

⁷⁹ The monopoly was a result of the pre-election blackout period upheld in *McConnell* and the constitutionalized right of parties to spend independently on issue ads under *Colorado I.* The level playing field was created because the restrictive definition of “express advocacy” adopted by the Court in *WRTL* applied to all entities airing these advertisements.

⁸⁰ 128 S. Ct. 2759 (2008).

⁸¹ The Millionaire’s Amendment had sought to change the balance of power between candidates by relaxing fundraising limitations for opponents of self-funders once self-funders contributed a threshold amount to their own campaigns. BCRA, Pub L. No. 107-155, §§ 304, 316, 319, 116 Stat. 81, 97–100, 108–12 (2002).

⁸² See *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976) (per curiam) (“[L]ike the limitations on independent expenditures[,] . . . [the] ceiling on personal expenditures by a candidate in furtherance of his own candidacy . . . clearly and directly interferes with constitutionally protected freedoms.”).

⁸³ The Court held that there was no “legitimate government objective” in “level[ing] electoral opportunities” or in “equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Davis*, 128 S. Ct. at 2773 (quoting Brief for Appellee at 34, *Davis*, 128 S. Ct.

By 2010, *Citizens United* and two D.C. Circuit cases had left BCRA in pieces and fundamentally altered the balance of power among political actors. First, in *EMILY's List v. FEC*,⁸⁴ the D.C. Circuit established that nonprofit, nonconnected political committees may make unlimited independent expenditures from their soft money accounts, so long as any direct contributions to federal candidates are made from their hard money fundraising.⁸⁵ The net effect of *EMILY's List* is that nonprofit, nonconnected political committees may now use soft money to undertake the types of activities that political parties may only engage in using money raised under FEC constraints, like voter education and enrollment. This development is important because it changes the balance of power between parties and nonconnected committees by allowing nonconnected committees to accept donations in larger amounts and from organizations as well as individuals, even though these committees engage in the same activities as do parties.⁸⁶

Shortly afterward, *Citizens United* overturned parts of *McConnell* and *Austin* en route to striking down BCRA's ban on corporate and union electioneering advertisements within the thirty- and sixty-day blackout periods before primary and general elections.⁸⁷ This decision added corporations and unions to the list of entities (which already included individuals, through *Davis*, and nonconnected committees, through *EMILY's List*) permitted to make unlimited independent expenditures to expressly advocate for the election or defeat of federal candidates. And because it freed up previously constrained organizations to engage in express advocacy — not just issue advocacy or electioneering communications — it effectively rendered moot the distinction drawn between express advocacy and issue advertising in *WRTL*.

The second D.C. Circuit case, *SpeechNow.org v. FEC*,⁸⁸ was decided by an en banc panel in spring 2010. The decision declared that

2759 (No. 07-320), 2008 WL 742921 (internal quotation mark omitted); *Buckley*, 424 U.S. at 48 (internal quotation mark omitted)). Thus, these proffered objectives were inadequate to support an imposition on a self-funding candidate's free speech rights. *Davis*, 128 S. Ct. at 2773–74. D.C. Circuit Judge Kavanaugh, in the course of his majority opinion in *EMILY's List v. FEC*, 581 F.3d 1, 5–6 (D.C. Cir. 2009), picked up on these important passages in *Davis* that presaged *Citizens United's* eventual overruling of *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which had previously suggested that these were permissible objectives for regulation, *id.* at 659–60. See *Davis*, 128 S. Ct. at 2773–74.

⁸⁴ 581 F.3d 1.

⁸⁵ *Id.* at 14, 16.

⁸⁶ See *id.* at 39 (Brown, J., concurring in part).

⁸⁷ For an extended explanation of *Citizens United*, see *The Supreme Court, 2009 Term — Comment: Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75, 75–81 (2010).

⁸⁸ 599 F.3d 686 (D.C. Cir. 2010) (en banc). The en banc panel relied heavily on the reasoning and rule in *Citizens United*, *id.* at 694–98, and issued a remarkably succinct opinion on the issue.

SpeechNow.org, a “527 organization,”⁸⁹ had a constitutional right under *Citizens United* to aggregate unlimited contributions from individuals (and, under *Citizens United*, from corporations and unions, too), which it could use to fund its unlimited independent expenditures.⁹⁰ It could potentially do so without registering with the FEC as a political committee and thus, along with escaping other regulations,⁹¹ could take unlimited contributions instead of being restricted to the \$5000 per individual per year limit on donations to PACs. The FEC and the Office of the Solicitor General declined to appeal this ruling after the Acting Solicitor General realized there would be little chance of success on the merits.⁹²

II. THE CURRENT STATE OF THE CAMPAIGN FINANCE SYSTEM

As a result of the Supreme Court and D.C. Circuit cases, today’s campaign finance system essentially allows individuals,⁹³ corporations, and unions⁹⁴ to pool resources in unlimited amounts to make uncoordinated (independent) expenditures at any time⁹⁵ on a candidate’s behalf (or against an opponent’s interest) either directly or through an intermediary or group⁹⁶ other than a party.⁹⁷ The distinction between hard and soft money, then, serves a far different purpose now than it served before. There is no need for soft money to be made kosher by being funneled through an FEC-overseen political committee. As one

⁸⁹ This name derives from the provision of the Internal Revenue Code under which these organizations are created. *See id.* at 689; *see also* I.R.C. § 527 (2006).

⁹⁰ *See SpeechNow.org*, 599 F.3d at 694–96.

⁹¹ *See id.* at 691–92 (detailing regulations with which political committees are required to comply, including filing certain reports, having particular officers, and reporting donations to the FEC).

⁹² *See* Lyle Denniston, *No Appeal in SpeechNow*, SCOTUSBLOG (June 17, 2010, 11:55 AM), <http://www.scotusblog.com/2010/06/no-appeal-in-speechnow/>.

⁹³ *See* *Davis v. FEC*, 128 S. Ct. 2759 (2008); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

⁹⁴ *See* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁹⁵ *See id.* at 913 (lifting the thirty- and sixty-day pre-election bans on electioneering communications by corporations and unions).

⁹⁶ *See SpeechNow.org*, 599 F.3d 686; *EMILY’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

⁹⁷ Parties may make unlimited expenditures on behalf of candidates only so long as they do not coordinate with the candidate. *See Colorado I*, 518 U.S. 604 (1996) (holding that parties have the same right to make independent, uncoordinated expenditures as do other individuals or political organizations). However, parties are prohibited from using soft money to directly advocate for the election or defeat of candidates in express advocacy advertisements. *See supra* note 55 and accompanying text. Parties attempted to get around this regulation by using soft money for “issue ads,” which did not expressly advocate the election or defeat of particular candidates but could effectively convey the message nonetheless. *See* section I.C, pp. 1535–36. And since BCRA prohibits parties from accepting soft money donations, even though they have the legal ability to make unlimited, uncoordinated expenditures on behalf of candidates, parties are at a debilitating competitive disadvantage to other entities that participate in this way with unlimited funds. *See* WALLISON & GORA, *supra* note 48, at 47–49.

observer noted: “That is good for free speech, but it magnifies the negative impact on political parties of the continued restrictions on *their* ability to raise funds to speak on behalf of themselves or to support their candidates.”⁹⁸

Parties are now viewed with at least as much skepticism as are other outside influences on candidates and elected officials.⁹⁹ Rather than seeing parties as providing a vital link between the voters and their officials, modern America considers parties to pose the same daunting threat to the independence and integrity of their candidates as do big donors, independent spenders, PACs, and issue groups — they are special interests.¹⁰⁰ So it is no surprise that our campaign finance system treats them as suspect special interests as well. The decreasing strength of parties over the last fifty years is partially attributable to the internal reforms they undertook, but their position in 2011 is largely attributable to the legal barriers the campaign finance system has imposed. Now parties are not just treated as special interests, but are actually disadvantaged compared to other special interests, which can raise unlimited amounts to advocate for or against the election of certain candidates, while parties can fundraise only in relatively small chunks. And, under *EMILY’s List*, parties will have direct competition from nonconnected political committees, which have a competitive advantage in organizational and general electioneering activities.¹⁰¹

Candidates have not been immune to these changes either. Under *Buckley*, candidates have traditionally been and are still the freest speakers in the system. But though they are the most accountable actors in elections — after all, it is *their* election or defeat that occurs on election day — candidates are the most heavily limited in their ability to accept contributions and thus in their ability to aggregate money to speak. And now that speakers that are unconstrained by contribution limits are one hundred percent free to engage in election speech of any

⁹⁸ WALLISON & GORA, *supra* note 48, at 49.

⁹⁹ Ironically, this skepticism is somewhat of a return to the Founders’ original conception of political parties — that of interested extragovernmental influences rather than democracy-strengthening institutions. See THE FEDERALIST NO. 10 (James Madison).

¹⁰⁰ See ALDRICH, *supra* note 19, at 259 (explaining that the public perceives party professionals as “external forces . . . ‘manipulating’ the candidate, controlling the campaign from behind the scenes”); McSweeney, *supra* note 24, at 43 (“Parties, like individuals and groups, had to be constrained to allow candidates to serve the public interest.”).

¹⁰¹ Judge Kavanaugh, in deciding *EMILY’s List*, was aware of this effect of the case: “If eliminating this perceived asymmetry is deemed necessary, the constitutionally permitted legislative solution, as the Court stated in an analogous situation in *Davis*, is ‘to raise or eliminate’ limits on contributions to parties or candidates.” *EMILY’s List*, 581 F.3d at 19 (quoting *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008)); see also section III.A, pp. 1545–47.

kind at any time, candidates no longer have an edge over these other interests in the elections.¹⁰²

Whatever values Congress pursued in crafting BCRA, they have certainly been obscured by the Court's subsequent rulings. One of the fatal flaws of BCRA was the stifling effect on speech it was intended to have for those outside the purview of the FEC. But outside money always finds its way in.¹⁰³ Almost immediately after BCRA, the "527" phenomenon arose. Soon after that, outside groups took the fight for independent speech to the courts, and they eventually won the battle in *WRTL* and *Citizens United*. Through the Court, outside money has secured the status of a constitutional right. But we are left with a system that is half governed by BCRA, which assumed a closed system and expressed policy choices based on that design, and half governed by First Amendment cases, which opened the system completely to independent actors. The result is a lack of equilibrium and some odd consequences.

Congress's most recent expression of policy preference was to allow candidates, parties, and other political actors within the FEC system to have priority status insofar as pre-election spending was concerned. The Court's most recent expression of First Amendment requirements was that independent speakers could not be prevented from spending on election speech. But neither body sought to make parties or candidates worse off than independent speakers. Perhaps the system could be seen as better now than it was before BCRA, but the point is that there is no coherent institutional design at work in the current system, and it does not seem that any will be introduced back into the system anytime soon.

There are endless possibilities for how to design the system given the new constitutional reality. A full examination of them is outside the scope of this Note, but there are important questions to ask in considering the next steps. In reforming the system, we must ask what roles we want the different actors to play.

Certainly, regarding their ability to make independent expenditures, parties are currently treated no worse than is any other actor¹⁰⁴ — corporations, nonprofits, political committees, candidates, or

¹⁰² In fact, in the 2010 election season, there were nineteen races in which outside spending eclipsed the candidate's own spending. See Michael Beckel, *Outside Groups Out-Spend Candidates in Some Competitive Races*, CENTER FOR RESPONSIVE POL. OPEN SECRETS BLOG (Oct. 30, 2010, 5:43 AM), <http://www.opensecrets.org/news/2010/10/outside-groups-outspend-candidates.html>.

¹⁰³ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("[P]olitical money, like water, has to go somewhere. It never really disappears into thin air.")

¹⁰⁴ But as noted above, they are somewhat hamstrung compared to the outside organizations that can fundraise in unlimited amounts, since parties are limited to accepting contributions in relatively small amounts from only some entities.

individuals. And although we may be skeptical of them, parties do provide important informational and signaling functions, and they are instrumental in the current organization of governing bodies.¹⁰⁵ We also know that the American system has developed in such a way that political parties are secondary to the primacy of candidates. But what role should parties play in a campaign finance system — funnel, primary spender, mere donation amalgamator? We have allowed parties to play a number of these roles, even in recent history. Not since the rise of parties, however, have they had such little power in comparison to other actors.

Candidates, meanwhile, have not had such volatile fortunes as have parties. Their role in elections has largely been unchanged since *Buckley*.¹⁰⁶ The difference, then, is their power relative to parties and outside groups. Like parties, candidates are hampered by their relative inability to raise money. Candidates must accept donations in even smaller amounts than can parties or PACs, and so they must develop a donor base twice as large to raise the same amount of money as PACs, four times as large to raise the same amount as local parties, and more than twelve times as large to raise the same amount as national party committees.¹⁰⁷ And this is in comparison to the relatively disadvantaged FEC-regulated entities.

Instead of maintaining a system where candidates and parties — the two electoral actors that are held accountable by voting — have the most relative control over the message, the Court's actions in declaring wide swaths of BCRA unconstitutional, while leaving the rest of BCRA in effect, have turned the system upside down. The world the Court created is one where the institutionally accountable actors are under the most restrictions regarding their ability to raise, gather, and spend money because of contribution limits and disclosure requirements. At the same time, others can spend unimpeded by FEC contribution caps and can even hide behind Orwellian-named organizations that are fronts for aggregations of individuals or corporations attempting to influence electoral outcomes. Though the Court likely would not have created it in the first instance, this system is the logical extension of its jurisprudence.¹⁰⁸

¹⁰⁵ See ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? 77 (2006).

¹⁰⁶ BCRA made one important change to the role of candidates by ordering the strict separation between candidates and soft money entities. Prior to BCRA, candidates could play a role in fundraising for soft money entities and have some degree of awareness of soft money expenditures made on their behalf. But under BCRA, candidates have to remain strictly separate from any independent expenditure or soft money efforts. See 2 U.S.C. §§ 441a(a)(7)(B), 441a note (2006).

¹⁰⁷ See Press Release, Fed. Election Comm'n, *supra* note 11.

¹⁰⁸ Cf. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406–07 (2000) (Kennedy, J., dissenting) (“Issue advocacy, like soft money, is unrestricted, while straightforward speech . . . subject to full disclosure and prompt evaluation by the public, is not. . . . The current system would be unfortu-

Some would argue this independent control of the message is a good thing, choosing to see independent speech as a populist outlet. This view would be more persuasive if, empirically, the independent speakers were individuals rather than corporations, unions, and non-profits. Others would argue that more speech is necessarily a good thing in campaigns, so we should not be concerned about any imbalance between speakers so long as it comes from opening up speaking opportunities rather than foreclosing them. This is a valid argument coming from a principled position, but it does not address the concern this Note raises: the resulting power imbalance among different entities in the electoral market. One can, at once, be a speech libertarian, to borrow Professor Kathleen Sullivan's term,¹⁰⁹ and also be concerned about the power imbalance among actors and entities within the realm of the campaign.

III. RESTORING ELECTORAL EQUILIBRIUM?

In the end, the Court has painted itself, Congress, and the FEC into a corner. Because it has declared any restrictions on independent expenditures (other than disclosure requirements) unconstitutional, it has restricted the possible universe of campaign finance systems in the United States. Perhaps this was its aim. Perhaps not. But continuing the trend of constitutionalizing campaign finance laws definitely has this effect on the world.

A. *Can Congress Reestablish Electoral Equilibrium?*

It seems that Congress should take the initiative to address this problem. But the only way for Congress to rebalance the system given the constitutional restraints now in place would be for it to liberalize — or remove completely — the contribution limits in place for candidates, parties, and political committees, or to place obstacles in the way of independent spenders. And both roads are quite bumpy.

Congress spent a significant amount of energy on the latter option in 2010, crafting no fewer than nine proposed bills¹¹⁰ to mitigate the effects of *Citizens United*. The bill that got the most traction, the

nate, and suspect under the First Amendment, had it evolved from a deliberate legislative choice; but its unhappy origins are in our earlier decree in *Buckley*, which by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system, one which distorts the meaning of speech." (citation omitted).

¹⁰⁹ See Sullivan, *supra* note 17, at 155–63.

¹¹⁰ For a complete list of all nine *Citizens United*-related proposals since the decision was released, see *The Supreme Court, 2009 Term — Comment: Citizens United v. FEC*, *supra* note 87, at 81 n.62.

DISCLOSE Act,¹¹¹ sought to require corporations to disclose political expenditures made in association with elections.¹¹² Others sought to use corporate law to erect hurdles to corporate political speech,¹¹³ and still others sought to ensure that foreign funds were completely fire-walled from American corporate funds being used for speech.¹¹⁴ But the DISCLOSE Act and other *Citizens United* “fixes” were merely band-aids on the major structural problem that faces campaign financing in the United States.¹¹⁵ Simply making independent speakers jump through more regulatory hoops may not create any curbing effect in the real world, and backers of these types of reforms must wait and hope the measures pass muster under the watchful eye of the Roberts Court. More to the point would be a rethinking of BCRA altogether. After all, when half the system has been opened and the other half is still heavily regulated, the overall system cannot function properly and must be revised with these new parameters of permissible regulation in mind.

Aside from Congress’s placing hurdles in the way of more corporate or independent speech, however, the option of reforming the independent expenditure half of the campaign finance system is largely foreclosed to Congress because of the Court’s constitutional view of independent expenditures. Congress, then, is left with the option of liberalizing limits governing party and candidate contributions to allow these preferred actors to compete more effectively with independent groups in the campaign speech market. But even if the people were clamoring for change, it is unlikely that they would support completely abandoning all contribution limits or raising them substantially, since few bystanders would likely agree that there should be *more* money in politics. It is further unlikely that sitting legislators would have a personal interest in abolishing or significantly raising

¹¹¹ Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010).

¹¹² *Id.* §§ 211–214, 301.

¹¹³ See, e.g., Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010).

¹¹⁴ See, e.g., Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, 111th Cong. (2010); Freedom from Foreign-Based Manipulation in American Elections Act of 2010, H.R. 4517, 111th Cong. (2010).

¹¹⁵ The DISCLOSE Act and the other bills failed to pass before the 112th Congress — including a new crop of Republican congressmen for whom campaign finance reform was far from a priority — arrived. And these *Citizens United* fixes are unlikely to pass now that the impetus for campaign finance reform has faded and other challenges facing the country will likely consume the attention of a divided Congress. Further, the President’s famous (or infamous) criticism of the Court occurred more than a year ago, and now he faces far more immediate concerns that make it unlikely that he will expend political capital to push for reforms.

contribution limits, since doing so would sacrifice some of their incumbents' advantage.¹¹⁶

B. Can the Court Reestablish Electoral Equilibrium?

1. *The Parties (Attempt to) Strike Back: Republican National Committee v. FEC.* — Parties have begun challenging their position in the courts. But they have not yet been successful in persuading the Court to venture into liberalizing any aspect of campaign finance law that would free the parties from the FEC contribution limits. Former Solicitor General Ted Olson filed a jurisdictional statement with the Supreme Court in April 2010¹¹⁷ requesting that the Court review the U.S. District Court for the District of Columbia's memorandum opinion in *Republican National Committee v. FEC*.¹¹⁸ In that case, a three-judge panel held that BCRA's ban on soft money for political parties was constitutionally permissible.¹¹⁹ But the Supreme Court refused to disturb that opinion and affirmed the D.C. District Court,¹²⁰ leaving political parties on the same side as candidates and PACs, which may accept only hard money from individuals in limited amounts.

2. *An Unlikely Resolution: Abandon Buckley?* — It is unclear how much appetite there really is on the Court for abolishing contribution limits in general. To do so would require the explicit overruling of *Buckley* and decades of practice. In *Davis*, the Court hinted at this possibility,¹²¹ but it would be difficult to argue that the Court would actually strike down contribution limits to balance the system. Doing so would require either a drastic reversal of the campaign finance jurisprudence by reversing *Buckley* or a revocation of the Court's own pronouncement that remedying distorting effects is not a compelling

¹¹⁶ See WALLISON & GORA, *supra* note 48, at 47–48 (explaining how liberalized campaign spending rules provide more opportunities for challengers to criticize incumbents).

¹¹⁷ Jurisdictional Statement, *Republican Nat'l Comm. v. FEC*, 130 S. Ct. 3544 (2010) (No. 09-1287), 2010 WL 1653051.

¹¹⁸ 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3544 (mem.).

¹¹⁹ *Id.* at 157–63.

¹²⁰ *Republican Nat'l Comm. v. FEC*, 130 S. Ct. 3544 (mem.).

¹²¹ The *Davis* Court stated:

The advantage that wealthy candidates now enjoy and that § 319(a) seeks to reduce is an advantage that flows directly from *Buckley*'s disparate treatment of expenditures and contributions. . . . If the normally applicable limits on individual contributions and coordinated party contributions are seriously distorting the electoral process, if they are feeding a "public perception that wealthy people can buy seats in Congress," and if those limits are not needed in order to combat corruption, then the obvious remedy is to raise or eliminate those limits.

Davis v. FEC, 128 S. Ct. 2759, 2774 (2008) (quoting Brief for Appellee, *supra* note 83, at 34).

enough government interest to justify regulation, let alone to justify constitutionalizing that end.¹²²

Abandoning *Buckley* would be an especially bold step given the Court's 2006 decision in *Randall v. Sorrell*.¹²³ In that case, the Court struck down Vermont's campaign finance system because, among other things, Vermont's contribution limits were unconstitutionally low.¹²⁴ In the Court's view, while some limits on the amounts individuals and organizations can contribute to candidates are permissible under the First Amendment, the low contribution limits in Vermont were disproportionate to the interest of combating corruption and the appearance thereof.¹²⁵

But the reaffirmation of *Buckley* was limited to the plurality opinion. Justice Thomas, joined by Justice Scalia, wrote a concurrence in *Randall*¹²⁶ specifically to advocate for his position that *Buckley*'s distinction between contributions and expenditures did not sufficiently protect political speech under the First Amendment.¹²⁷ Justice Thomas went so far as to declare that *Buckley* was illegitimate and thus that stare decisis would not protect *Buckley*.¹²⁸ Likewise, Justice Kennedy has expressed his "skepticism" of the Court's campaign finance jurisprudence.¹²⁹ Like Justices Scalia and Thomas, Justice Kennedy refused to sign on to the *Randall* plurality opinion because it was such an enthusiastic endorsement of *Buckley*.¹³⁰ He has also had strong words about the negative effects *Buckley* has created in campaign finance law in other cases.¹³¹ But whether Justice Kennedy would vote to overturn *Buckley* in order to allow unlimited contributions to candidates, parties, and PACs is unclear.

It is harder to surmise Chief Justice Roberts's and Justice Alito's positions on *Buckley* in light of their positions in campaign finance cases to date, especially since they have found sufficient room within the *Buckley* framework to consider the First Amendment validity of campaign finance reforms. But Justice Alito's concurrence in *Randall* points out that revisiting *Buckley* would require addressing stare decisis concerns.¹³² This comment serves as a reminder that to discuss

¹²² See *Citizens United v. FEC*, 130 S. Ct. 876, 904–08 (2010).

¹²³ 548 U.S. 230, 244 (2006) (plurality opinion).

¹²⁴ *Id.* at 253–62.

¹²⁵ *Id.* at 247–48, 262.

¹²⁶ *Id.* at 265 (Thomas, J., concurring in the judgment).

¹²⁷ *Id.* at 266.

¹²⁸ *Id.*

¹²⁹ *Id.* at 265 (Kennedy, J., concurring in the judgment).

¹³⁰ See *id.* at 264–65.

¹³¹ See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406–07 (2000) (Kennedy, J., dissenting).

¹³² *Randall*, 548 U.S. at 263 (Alito, J., concurring in part and concurring in the judgment). Of course, Justice Alito signed on to the majority opinion in *Citizens United*, see 130 S. Ct. 876, 886

overturning or “revisiting” *Buckley* in the abstract is a far different matter from actually voting to overturn fifty years of campaign finance jurisprudence.

3. *A Third Route for the Court.* — The Court may have a third option to restore equilibrium. Recall the discussion earlier comparing the current campaign finance system to a hybrid market out of equilibrium, half hyper-regulated and half essentially free. Considering that market more closely, to say the regulated entities are at a competitive disadvantage would be a gross understatement. Indeed, the efficacy of a BCRA-type system depends on the exclusion of the nonsystemic money, and achieving electoral equilibrium is critical to the system’s functionality. BCRA, in its original form, attempted to accomplish this goal. But now, with the third parties infinitely free to spend, the equilibrium BCRA attempted to create can no longer exist. There seems, then, to be no coherent basis — other than the inertia of policy and *Buckley* — for so heavily regulating the FEC abiders.¹³³

Though it is impossible to balance the limited against the infinite, could it be that, compared with the (legally) unlimited spending power of third parties, a contribution limit of, say, \$2500 per year from individuals is unconstitutionally low under the *Randall* rationale? After all, BCRA’s indexing of contribution limits to inflation does not help when some independent entities’ spending power is indexed to increases in personal wealth, union dues, or corporate profits. Though this outcome is unlikely — and certainly not one favored by this author¹³⁴ — the Court *could* expand the rationale of unconstitutionally low contribution limits to attempt to restore equilibrium, while leaving *Buckley* technically intact.

IV. CONCLUSION

After the experience of the 2010 elections, it seems the time for making a decision on where next to go with the campaign finance system should be imminent. But the options for reform remain drastically limited and potentially fatally flawed. So we may be stuck with this imbalanced electoral equilibrium until either Congress or the Court invents a way to work with — or around — the Court’s new campaign finance jurisprudence.

(2010), suggesting he is open to overturning precedent when he feels stare decisis concerns are sufficiently addressed.

¹³³ Of course, the government may still limit contributions under *Buckley*’s anticorruption rationale; this assertion is limited to the comparative *strictness* of the contribution limits.

¹³⁴ Such an overt act to legislate from the bench — and to further constitutionalize the law on campaign finance — would certainly draw ire from across the political spectrum. Moreover, this option would inherently require the Court to revisit a version of the antidistortion rationale it abandoned in *Citizens United*, see 130 S. Ct. at 904–08.