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Ending a Peculiar Evil: The Constitution, Campaign Finance Reform, and the Need for Change in Focus after Citizens United v. FEC, 44 J. Marshall L. Rev. 773 (2011)

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ENDING A PECULIAR EVIL: THE CONSTITUTION, CAMPAIGN FINANCE REFORM, AND THE NEED FOR A CHANGE IN FOCUS AFTER *CITIZENS UNITED V. FEC*

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I. INTRODUCTION

Money and politics are strange bedfellows. Money has always been an essential element to running a political campaign, especially at the federal level.[1] Yet money's involvement in a campaign also gives the appearance that candidates are being bought by certain groups and individuals with interests disparate from the constituency.[2] Despite this unseemly connection, monetary contributions are often the easiest and most valuable way for an individual or group to voice support for a candidate.[3] It is this feature of campaign contributions that has sparked a thirty-year debate over the constitutionality of campaign finance reform

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1. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 7-8 (2005) (noting that, in the early republic, candidates used personal funds to print and distribute pamphlets and treat constituents to food and drink on Election Day); *e.g.*, Thomas Mann, *Money in the 2008 Elections: Bad News or Good?*, BROOKINGS INSTITUTION, (July 1, 2008), http://www.brookings.edu/opinions/2008/0701_publicfinance_mann.aspx (reporting that by June 2008, Barack Obama, Hillary Clinton, and John McCain had raised a total of over $650 million in campaign funds).

2. *See* Brief for Bipartisan Former Members of the United States Congress as Amici Curiae Supporting Appellees at 2-3, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) (No. 02-1674) (stating that, as former members of Congress, the authors noticed that members of Congress are more attentive to large moneyed interests and elevated those interests over the general public welfare in order to raise the large amount of campaign funds necessary to conduct a modern campaign); *e.g.*, CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS, AND CONTROVERSY 41 (1992) (noting that during Richard Nixon's reelection campaign, almost $20 million of the $63 million raised came from only 153 donors contributing $50,000 or more).

3. *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976) (noting that the First Amendment gives its greatest protection to speech in the political arena, including the right to associate oneself with a particular party or ideology).

in the Supreme Court.[4] Recently, the Supreme Court decided the watershed *Citizens United v. FEC*.[5] In light of this decision, it is time for our nation to reevaluate where to go from here. Rather than continuing to beat its collective head against the wall created by the First Amendment, Congress should instead focus on how to uphold the principle of free speech while informing the public of the sources of campaign funds to foster healthy and open public discourse.[6]

This Comment will begin with a brief history of the constitutional battle over campaign finance reform, noting the recent strong trend toward deregulation in *Citizens United*. Next, it will outline the arguments on both sides of the constitutional question, concluding that campaign financing should be mostly unregulated. Also, this section will include a discussion of why reform efforts have failed and will continue to fail, arguing that disclosure requirements are the best solution. Finally, this Comment will propose a fundamental shift in the Federal Election Commission's purpose from an enforcement agency, levying fines and suing rule-breakers, to a reporting agency whose aim is getting information to the public and fostering greater ties to candidates and the media.

II. BACK AND FORTH: THE HISTORY OF CAMPAIGN FINANCE REFORM AND ITS CIRCUMVENTION

A. The Federal Election Campaign Act of 1974

In response to the Watergate scandal and the 1972 presidential election, Congress passed the Federal Election Campaign Act of 1974 (FECA).[7] There were five major parts of FECA: 1) contribution limits to candidates for federal office;[8] 2)

4. It should be noted that the debate over the proper role of money in federal elections extends back much farther than thirty years. For instance, in the 1830s, debates over the "spoils system" of awarding government positions to party supporters began, which led to the first regulations of campaign finance in 1868. Corrado, *supra* note 1, at 8-9 (citing an 1868 naval appropriations bill that included a prohibition on soliciting campaign contributions from naval yard workers). I begin my history of campaign finance reform with the Federal Election Campaign Act of 1974 because this statute ushered in the modern era of campaign finance reform and the debate over its constitutionality. *Id.* at 20.

5. Citizens United v. FEC, 130 S. Ct. 876 (2010).

6. *See* McConnell v. FEC, 540 U.S. 93, 258-59 (2003) (Scalia, J., concurring in part and dissenting in part) (stating that the First Amendment is not premised upon the idea that there is such a thing as "too much speech" and that the American people are "neither sheep nor fools").

7. Frederick G. Slabach, *Introduction to Campaign Finance Law and Organization of Materials*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 3, 3 (Frederick G. Slabach ed., 2006).

8. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-

expenditure limits for candidates;[9] 3) disclosure requirements for candidates, their committees, and individuals making expenditures independent of the campaign;[10] 4) a public financing system of matching funds if candidates agreed to expenditure limits;[11] and 5) an administrative body called the Federal Election Commission (FEC) in charge of civil enforcement of FECA, disclosure of campaign information to the public, and administering the public financing program.[12] Almost immediately, FECA resulted in a constitutional challenge from candidates, parties, and affected interest groups.[13]

B. Buckley v. Valeo

This challenge came in the form of *Buckley v. Valeo*. In determining the constitutionality of FECA, the Supreme Court had several important holdings. First, the Court departed from the Colorado Court of Appeals's original holding, which found that FECA regulated conduct rather than speech.[14] Instead, the Court defined money as speech within the First Amendment's protections.[15] Thus, the Court held that the expenditure limits of FECA would be reviewed under strict scrutiny.[16]

Second, the Court held that the government's only compelling interest was preventing corruption or the appearance of corruption.[17] Originally, the government offered three interests to justify FECA's contribution and expenditure limits: 1) preventing corruption or the appearance of corruption; 2) equalizing the ability of all citizens to affect the outcome of elections; and 3) attempting to curb the "skyrocketing" cost of political campaigns.[18] The Court rejected the latter two government interests as insufficiently compelling to justify expenditure or contribution

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443, § 101(b), 88 Stat. 1263 (1974).

9. *Id.* § 101(c).

10. *Id.* § 101(d).

11. Slabach, *supra* note 7, at 4.

12. Vassia Gueorguieva, *Election Administration Bodies and Implementation Tools*, 13 GEO. PUB. POL'Y REV. 95, 96 (2007-2008)

13. *E.g.*, *Buckley*, 424 U.S. at 7-8 (naming among the parties challenging FECA as a presidential candidate, a U.S. senator, a potential contributor, the Conservative Party of the State of New York, the Mississippi Republican Party, and the New York Civil Liberties Union, Inc.)

14. *Id.* at 15-16; *see also* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 119, 124-25 (Frederick G. Slabach ed., 2006) (comparing the expenditure of money in political campaigns to burning a draft card, picketing, or using a soundtruck).

15. *Buckley*, 424 U.S. at 15-16.

16. *Id.* at 23.

17. *Id.* at 26-27.

18. *Id.* at 25-26.

limits.[19]

Third, the Court struck down FECA's expenditure limits.[20] Finding that such limits were "direct and substantial restraints on the quality of political speech,"[21] the Court held that restrictions on both independent and candidate expenditures were unconstitutional.[22] Fourth, the Court upheld FECA's contribution limits, reasoning that such limits were a less severe restriction on political speech that would be subjected to a lower level of scrutiny, and that the compelling interest in preventing corruption or the appearance of corruption justified these limits.[23]

Fifth, the Court upheld FECA's disclosure requirements.[24] In doing so, the Court first noted that precedent determined that compelled disclosure could seriously impinge on an individual's privacy of association and belief.[25] Despite this, the Court noted that, in most instances, disclosure of campaign sources is the least restrictive means to prevent corruption or the appearance of corruption.[26] Noting both of these qualities of disclosure requirements, the Court subjected FECA's disclosure requirements to a form of intermediate scrutiny.[27] The Court then held that the government's interests in preventing corruption or the appearance of corruption, disseminating information to voters,

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19. *Id.* at 48-49.

20. *Id.* at 44-59. While the Court noted that Congress did have a compelling interest in preventing corruption or the appearance of corruption, the Court held that the expenditure limits of FECA were not sufficiently narrowly tailored because it only limited large expenditures that expressly call for the election or defeat of a clearly identified federal candidate. *Id.* at 45. Because some of these large expenditures would escape regulation, the statute was not sufficiently related to solving the problem of corruption. *Id.* Also, the Court noted that expenditures made independent of a candidate do not pose a significant enough threat of corruption to justify limits on them. *Id.* at 46.

21. *Id.* at 39.

22. *Id.* at 44-59.

23. *Id.* at 23-38. The Court rejected the appellants' argument that the currently existing bribery laws of the U.S., coupled with a disclosure requirement, would be a better, more narrow means of preventing corruption or the appearance of corruption. *Id.* at 27-28. Bribery laws, the Court said, only deal with the most obvious and blatant forms of corruption, neglecting the appearance of corruption created by large donations to federal candidates. *Id.*

24. *Id.* at 68-84.

25. *Id.* at 64.

26. *Id.* at 68.

27. While the Court noted that the disclosure requirements satisfy "exacting scrutiny," it then said that they must merely show a "relevant correlation" or "substantial relation" between a government interest and the disclosed information. *Id.* at 64; *but see* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (requiring that an Ohio disclosure statute that affected a woman handing out leaflets at a ballot initiative must be narrowly tailored to serve an "overriding state interest" because it burdened "core political speech").

and detecting violations of FECA's other provisions were directly served by the disclosure requirements.[28]

Sixth, the Court distinguished "express advocacy" from "issue advocacy." The Court stated that only those communications that directly advocate the election or defeat of a clearly identified candidate could be regulated.[29] Then, the Court gave several examples of such express advocacy, which would become the *Buckley* "magic words."[30] The reformers had won a significant battle in *Buckley* and the pendulum had swung in their favor.

C. *Circumvention of Reforms Post-*Buckley

In the wake of *Buckley*, candidates, parties, and interest groups tried different methods to avoid campaign finance regulations.[31] These circumvention techniques took two major forms: "soft money" and issue advocacy.

1. *"Soft Money" and Grass-Roots Campaigning*

The first method groups used to evade FECA involved "soft money," which simply refers to money raised outside the restrictions of FECA.[32] In the 1970s, rule changes by Congress and the FEC created a loophole for money raised and spent for party-building or grass-roots activities.[33] Thus, throughout the 1990s, huge amounts of soft money were being raised by parties and candidates.[34]

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28. *Buckley*, 424 U.S. at 66-68.

29. *Id.* at 44.

30. The Court listed "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44, n.52.

31. *See* Corrado, *supra* note 1, at 30 (stating that candidates, parties, and political practitioners adapted to FECA in innovative ways that raised concern over the law's efficacy); Slabach, *supra* note 7, at 9 (noting that attempts by contributors, candidates, and political parties to avoid FECA's limits accelerated during the 1990s).

32. Corrado, *supra* note 1, at 32; Slabach, *supra* note 7, at 9.

33. *E.g.*, Gerard J. Clark & Steven B. Lichtman, *The Finger in the Dike: Campaign Finance Regulation After McConnell*, 39 SUFFOLK U.L. REV. 629, 636 (2006) (noting that the 1979 amendments to FECA permitted parties to spend unlimited funds on get-out-the-vote activities to promote grass-roots activity); Corrado, *supra* note 1, at 32 (noting that, during the 1970s, Congress was easing restrictions on party spending, while the FEC was easing restrictions on party fundraising); Slabach, *supra* note 7, at 9-10 (noting that new FEC rules exempted the distribution of publications that listed three or more state and federal candidates and voter registration drives by local party groups on behalf of their particular presidential candidate).

34. *See* Clark & Lichtman, *supra* note 33, at 636-37 (noting that after the 1988 presidential election, soft money became crucial for fundraising in both presidential and congressional elections); Corrado, *supra* note 1, at 33 (reporting that the national parties' receipts of soft money increased from $86 million in 1992 to more than $495 million in 2000); Leslie Wayne, *Parties*

2. Issue Advocacy

While soft money was becoming central to federal elections, candidates and contributors found another way to circumvent FECA by utilizing *Buckley*'s "magic words" test.[35] Candidates and other groups such as corporations, labor unions, and nonprofits utilized issue advocacy by not expressly calling for the election or defeat of a federal candidate while still trying to influence the outcome of an election.[36] By not using the *Buckley* "magic words," these issue advertisements fell outside FECA's regulatory framework.[37] Congressional efforts to try and close this widening loophole floundered for several years, and the pendulum swung away from the regulators.[38]

Raised $15 Million in "Soft Money" in '97, Data Show, N.Y. TIMES, (June 13, 1997), http://www.nytimes.com/1997/06/13/us/ parties-raised-15-million-in-soft-money-in-97-data-show.html (reporting that the two major national parties raised $250 million in soft money in the 1996 election and that a bipartisan bill currently in Congress seeks to ban soft money contributions).

35. *See Buckley*, 424 U.S. at 44, n.52 (listing examples of express advocacy); Adam Welle, Comment, *Campaign Counterspeech: A New Strategy to Control Sham Issue Advocacy in the Wake of* FEC v. Wisconsin Right to Life, 2008 WIS. L. REV. 795, 799 (2008) (arguing that, in order to protect public discourse, the Supreme Court in *Buckley* created an area of political advertising that was unaffected by campaign finance restrictions, known as "issue advocacy," that groups took advantage of to circumvent these laws).

36. *E.g.*, Clark & Lichtman, *supra* note 33, at 637-38 (noting that the 1996 election was the first time soft money was used by national party committees to finance candidate-specific issue advertisements); Emma Greenman, Comment, *Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-*Wisconsin Right to Life *Era*, 24 J.L. & POL. 209, 226 (2008) (noting that by 1996, spending on issue advocacy was growing faster than on express advocacy); Slabach, *supra* note 7, at 10 (defining issue advocacy as any communication that does not expressly endorse or oppose the nomination or election of a candidate for federal office); Welle, *supra* note 35, at 801 (stating that "sham issue advocacy" includes those advertisements which avoid the *Buckley* magic words to escape regulation, but usually attack a candidate and thus are clearly related to an election).

37. *See* Clark & Lichtman, *supra* note 33, at 638 (noting that in the 1996-2002 elections, the parties spent millions of dollars in soft money on issue advocacy); Corrado, *supra* note 1, at 33 (noting that issue advertisements allowed parties to support candidates without worrying about contribution or coordinated spending limits); Slabach, *supra* note 7, at 11-12 (noting that, so long as advertisements did not expressly advocate the election or defeat of a candidate and there was no coordination between the group making the advertisement and the candidate, an advertisement could avoid the size and source limits of FECA).

38. *See* CONGRESSIONAL QUARTERLY, *supra* note 2, at 51-54 (citing several failed attempts to further reform campaign finance in the late 1980s and early 1990s, including a proposed constitutional amendment to overcome *Buckley*, a 1988 Democratic bill that would set include public funding of Senate campaigns, and 1990 bills in both the House and Senate to restrict independent expenditures).

D. The Bipartisan Campaign Reform Act of 2002 and McConnell v. FEC

Spurred by the explosion of soft money in the 1990s,[39] reformers finally scored a legislative victory in 2002[40] with the passage of the Bipartisan Campaign Reform Act (BCRA).[41] The major purpose behind BCRA was to close the soft money loophole created by *Buckley*.[42]

BCRA also established a new category of communications that could be regulated known as "electioneering communications."[43] These communications are defined as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office and is made within a specific

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39. *See also* Statement on Signing the Bipartisan Campaign Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 517 (Mar. 27, 2002) (stating the view of President Bush that along with the bringing soft money into the regulatory framework, BCRA raises the limits on individuals' contributions to strengthen the role of individuals in the political process, as well as imposes new disclosure requirements to promote fast and free dissemination of information to the public); David Stevenson, *A Presumption Against Regulation: Why Political Blogs Should Be (Mostly) Left Alone*, 13 B.U.J. SCI. & TECH. L. 74, 77 (2007) (suggesting that the Enron scandal might have been part of the reason for the passage of BCRA).

40. It is important to note that reformers were winning court battles between the time *Buckley* was decided and BCRA was passed. For example, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court reviewed a Michigan statute that prohibited corporations from making either contributions or independent expenditures in connection with state elections. *Id.* at 655. In doing so, the Court first established that the Michigan statute burdened corporations' right to free speech and that the state must thus satisfy strict scrutiny. *Id.* at 658. Despite this difficult burden, the State was able to identify a compelling interest in preventing corruption or the appearance of corruption that arises from the "corrosive and distorting effects of immense aggregations of wealth" obtained through the special status of corporations. *Id.* at 659-60. The Court also held that the statute was sufficiently narrow to target the distorting effects of corporate wealth, while still allowing corporate entities to express their political viewpoints through contributions made from separate segregated funds. *Id.* at 660-61.

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

42. *E.g.*, *id.* § 323(a)(1) (prohibiting national parties from soliciting or receiving funds not subject to the limitations of BCRA); Clark & Lichtman, *supra* note 33, at 638 (noting that BCRA limited soft money contributions by individuals to national parties to $25,000); Greenman, *supra* note 36, at 226 (noting that BCRA's primary purpose was to close the soft money loophole and impose restrictions on issue advertisements); *but see* H.R. REP NO. 107-131(I), at 2 (2001) (arguing that BCRA fails to ban soft money from federal elections, as it allows soft money donations to political parties up to $10,000 and does not prohibit soft money contributions to any entities other than political parties).

43. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(3), 116 Stat. 81 (codified at 2 U.S.C. § 434).

time window.[44] This new provision was very controversial when it was enacted, practically inviting another constitutional challenge.[45]

This challenge came in the form of *McConnell v. FEC*.[46] In this facial challenge to the validity of BCRA,[47] the pendulum of campaign finance reform swung in favor of the reformers.[48] *McConnell* reiterated that contribution limits should be subject to a less exacting form of scrutiny than expenditures.[49] Also, the Court seemed to shift its focus from the government interest in preventing corruption to the importance of preventing the appearance of corruption.[50] This pro-reform stand would not last, however, as Court personnel and attitudes changed over the next four years.[51]

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44. That time window is defined as sixty days before a general, special, or runoff election or thirty days before a primary or preference election. *Id.* § 201(3)(A)(II).

45. *See* 148 CONG. REC. E261-01, E261 (2002) (speech of Representative Robert Ney arguing that BCRA emasculates political parties and makes it harder for political parties to involve potential voters in the political process); Greenman, *supra* note 36, at 227 (stating that BCRA's electioneering provision was controversial because it applied to a wider group of communications than contemplated by *Buckley*, it completely prohibited communications for a period of time, it limited independent speech by groups, and it went beyond regulating business and union groups to nonprofit organizations); Ryan Ellis, Comment, *"Electioneering Communication" Under the Bipartisan Campaign Reform Act of 2002*, 54 CASE W. RES. L. REV. 187, 188 (2003) (noting that many members of Congress fiercely opposed the passage of BCRA).

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

47. *Id.* at 134.

48. *E.g.*, Trevor Potter, *The Current State of Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 48, 48 (2005) (arguing that the Court in *McConnell* deferred to Congress's ability to identify and regulate the appearance of corruption or undue influence); Joshua Downie, McConnell v. FEC*: Supporting Congress and Congress's Attempt at Campaign Finance Reform*, 56 ADMIN. L. REV. 927, 936 (2004) (concluding that the decision in *McConnell* reflects greater congressional deference by the Court, as well as a stronger recognition of Congress's interest in preventing corruption or the appearance of corruption); Greenman, *supra* note 36, at 641 (stating that the joint opinion of *McConnell* upheld a substantial majority of BCRA).

49. *McConnell*, 540 U.S. at 135-37 (holding that because contributions are only a "marginal restriction" on free speech, strict scrutiny should not be applied).

50. *E.g.*, *id.* at 129-30 (citing the Senate Committee on Governmental Affair's report, which concluded that parties and candidates promised contributors special access to government officials in exchange for soft money contributions); *see also* Brief for Bipartisan Former Members of the United States Congress as Amici Curiae Supporting Appellees at 13, McConnell v. FEC, 540 U.S. 93 (2003) (No. 02-1674) (citing personal interactions with members of Congress, where the members expressed reluctance to vote a particular way because of the potential detriment it could have on their ability to raise funds in future elections).

51. *See* Joel Roberts, *Alito Sworn in as High Court Justice*, CBS NEWS, (Jan. 31, 2006), http://www.cbsnews.com/stories/2006/01/31/politics/

E. FEC v. Wisconsin Right to Life *and* Citizens United v. FEC

With the appointments of Chief Justice Roberts and Justice Alito, the Court gained two pro-business, anti-regulation justices.[52] The first opportunity for these new justices to decide a campaign finance reform case came with the challenge in *FEC v. Wisconsin Right to Life*.[53] Wisconsin Right to Life, Inc. (WRTL), a nonprofit organization, wanted to broadcast several radio advertisements within BCRA's electioneering communications time window, urging voters to contact Wisconsin Senators Herb Kohl and Russ Feingold to convince them not to filibuster judicial nominees.[54] Conceding that the advertisements violated § 203 of BCRA, WRTL argued that BCRA's "blackout" period, barring electioneering communications near an election, was unconstitutional as applied to the advertisements.[55]

In a 5-4 decision, the Court held that BCRA was unconstitutional as applied to WRTL's advertisements.[56] In holding this, the Court split into three different groups. Justice Scalia, joined by Justices Thomas and Kennedy, argued in a concurring opinion that *McConnell* should be overturned.[57] The

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main1260362.shtml (reporting that Samuel Alito was appointed to the Supreme Court and that the generally conservative Alito is replacing Sandra Day O'Connor, a moderate swing vote on campaign finance reform issues); *U.S. confirms Roberts as Top Judge*, BBC NEWS, (Sept. 29, 2005), http://news.bbc.co.uk/2/hi/americas/4294938.stm (reporting that John Roberts, a conservative judge, was appointed as Chief Justice of the Supreme Court, and also stating that many hot-button issues such as campaign finance reform will be coming before the Court).

52. *See* Robert L. Kerr, *Considering the Meaning of* Wisconsin Right to Life *for the Corporate Free-Speech Movement*, 14 COMM. L. & POL'Y 105, 106 (2009) (noting that during the first term of the Roberts Court, the position of the U.S. Chamber of Commerce was upheld in thirteen out of fifteen cases in which it filed amicus briefs).

53. FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).

54. *Id.* at 458-60. Ironically, the three advertisements never actually ran. Wisconsin Right to Life (WRTL) wanted to run the ads, but new that it would run afoul of BCRA § 203's prohibition on electioneering communications broadcast thirty days before a primary. *Id.* at 460. Thus, WRTL filed suit against the FEC in federal District Court, seeking injunctive and declaratory relief. *Id.* The District Court denied WRTL's request on the basis that *McConnell* left no possibility for an "as applied" challenge to BCRA. *Id.* The Supreme Court vacated this holding and remanded to the District Court, which held that BCRA § 203 was unconstitutional as applied to WRTL. *Id.* at 460-61.

55. *Id.* at 464.

56. *Id.* at 457.

57. *Id.* at 489-91 (Scalia, J., concurring). Justice Scalia argued that the Court in *Austin*, upon which *McConnell*'s independent expenditure analysis was largely based, was flawed in identifying the "corrosive and distorting effects of immense aggregations of wealth" as a sufficiently compelling state interest. *Id.* at 489. According to Justice Scalia, the holding in *Austin* was inconsistent with the Court's decision in *First National Bank of Boston v.*

dissenting opinion, authored by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer, argued that WRTL's advertisements were clearly within BCRA's scope, and that the decision in *McConnell* should control.[58]

Chief Justice Roberts took the middle ground and authored the Court's opinion.[59] The most important part of this decision was the promulgation of a new test to determine what qualified as express advocacy: "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[60] This new test was a sea change in the Court's analysis of campaign finance reform and the First Amendment by making most campaign advertising exempt from regulation.[61]

These new views demonstrated their effect in *Citizens United v. FEC*.[62] Citizens United, a nonprofit corporation, produced a ninety-minute film entitled *Hillary: The Movie* to be broadcast on cable video-on-demand, which criticized Hillary Clinton's credentials during the 2008 campaign.[63] Before the disposition of

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Bellotti, 435 U.S. 765 (1978), which held that a Massachusetts law could not restrict political speech simply on the ground that the speaker was a corporation. *Wis. Right to Life*, 551 U.S. at 488-89.

58. *Id.* at 523-25 (Souter, J., dissenting). The dissenters characterized WRTL's advertisements as the type of "sham issue ads" that BCRA was drafted to combat and that *McConnell* said it could. *Id.* at 525. Chief Justice Roberts's principal opinion rejected this approach, echoing the idea, first promulgated in *Buckley*, that an intent-based test could chill core political speech. *Id.* at 468.

59. *Id.* at 454; *see also* Greenman, *supra* note 36, at 230 (stating that Chief Justice Roberts's middle position between the concurrence and the dissent controlled the direction of the Court's campaign finance jurisprudence).

60. *Wis. Right to Life*, 551 U.S. at 469-70 (Scalia, J., concurring); *see also* Greenman, *supra* note 36, at 230-31 (arguing that the new, strict "functional equivalency" test eviscerates the ability of BCRA to limit independent campaign advertising by groups and significantly narrows Congress's ability to regulate issue advocacy in the future); Kerr, *supra* note 52, at 138-39 (arguing that the new test could be used by campaign advertisers to avoid regulation so long as there was the slightest bit of issue advocacy in their broadcasts).

61. *See* Greenman, *supra* note 36, at 232 (suggesting that the Court may soon overturn *McConnell*, as three justices explicitly advocated overturning it, Justice Alito almost invited another facial challenge to BCRA, and Chief Justice Roberts devised a new test that went further to protect corporate speech than even WRTL suggested); Kerr, *supra* note 52, at 151 (arguing that Chief Justice Roberts's new test has the potential to create a large loophole in the current campaign finance regulatory framework and to dismantle nearly two decades of jurisprudence seeking to restrict corporate political speech); Welle, *supra* note 35, at 814 (arguing that the new test in the principal opinion preserves the loophole for sham issue advocacy and could result in a return to the post-*Buckley* world where only those ads that blatantly advocate the election or defeat of a candidate will be subject to regulation).

62. 130 S. Ct. 876 (2010).

63. *Id.* at 887. Just like the plaintiff in *Wisconsin Right to Life*, Citizens

the case, many signals indicated that this would be another victory for the advocates of deregulation and free speech.[64]

The Court did not disappoint. In a 5-4 decision authored by Justice Kennedy, the Court held that corporate independent expenditures could not be banned, overruling part of *McConnell*.[65] First, the Court examined whether the case could be decided on narrow grounds, ultimately determining that it could not do so without chilling core political speech.[66] Next, the Court

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United filed suit before broadcasting the film, arguing that BCRA's bar on electioneering communications and disclosure and disclaimer requirements were unconstitutional as applied to the film. *Id.* at 888.

64. *See* Transcript of Oral Argument of Malcolm L. Stewart on Behalf of the Respondent at 26-27, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205) (quoting Justice Alito as noting the possibility that—under the government's argument—a book published by a corporate publisher that mentioned a candidate within BCRA's blackout period could be banned, and that this prospect is "pretty incredible"); *Id.* at 24-26 (quoting Chief Justice Roberts as suggesting that neither BCRA nor *McConnell* contemplated covering a ninety-minute video-on-demand film, and that if the government's position were taken an action figure of a candidate sold in the blackout period could be covered); Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 131-32 (2009) (arguing that, so long as neither Justice Roberts or Alito are swayed by a stare decisis argument, it is likely that part or all of *McConnell* or *Austin* could be overruled); Jesse J. Holland & Mark Sherman, *Hillary Movie Puts Campaign Finance Limits at Risk*, ASSOCIATED PRESS, Sept. 7, 2009, *available at* http://www.komonews.com/news/national/57648592.html (reporting that the justices are considering striking down the part of *McConnell* that upheld major portions of BCRA); *A Threat to Fair Elections*, N.Y. TIMES, Sept. 7, 2009, http://www.nytimes.com/2009/09/08/opinion/08tue1.html?_r=1&hp (reporting that the Court may be radically changing campaign finance law by striking down corporate contribution limits in federal elections); *but see* Aaron Harmon, Comment, *Hillary: The Movie*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 331, 346 (2009) (arguing that there are not enough votes to overrule *Austin* or *McConnell* in *Citizens United* because Justices Roberts and Alito previously declined to, and that the *Wisconsin Right to Life* test will probably applied narrowly to the facts of this case); Mark A. Samsel, Comment, *Peering Into the Campaign Finance Law Crystal Ball: Guiding Principles for the Future of BCRA and "Issue Advocacy" in* Citizens United *and Beyond*, 58 U. KAN. L. REV. 211, 229 (2009) (noting that newly-appointed Justice Sonia Sotomayor will likely replace Justice Souter in the pro-regulation camp, which would maintain its four-justice composition).

65. *Citizens United*, 130 S. Ct. at 916. It is important to remember, however, that *Citizens United* only overruled *McConnell* as to its restrictions on corporate expenditures made independent of candidates. *Id.* Thus, many portions of *McConnell* and BCRA remain intact, such as the limits on soft money contributions and disclosure requirements.

66. *Id.* at 892. Specifically, the Court examined four arguments posited by Citizens United that could have resolved the case narrowly. First, Citizens United argued that the film fell outside the ambit of BCRA because it was not an "electioneering communication." *Id.* at 888. In support of this argument, Citizens United noted that video-on-demand programs reach only one household as opposed to at least 50,000 people, as required by regulations. *Id.* at 888-89. The Court disagreed, noting that the count in the regulations is

characterized the "blackout" provision as an outright ban on speech, as corporations' only way to speak is through a Political Action Committee, the cost of which burdens speech too heavily.[67] As such, the Court applied strict scrutiny to BCRA's communication ban.[68]

In examining BCRA's electioneering communication bar, the Court rejected the government's desire to curb distorting effects of corporate money as sufficiently compelling.[69] Next, the Court upheld the compelling interest in preventing corruption or the appearance of corruption first noted in *Buckley*.[70] Despite this, the Court found an outright ban on corporate expenditures was far too overbroad to justify this interest.[71] Finally, the Court rejected the government's asserted interest in preventing corporate shareholders from being coerced to fund the corporation's political speech because any such conflict has no bearing on government

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based on cable subscribers, not who actually receives the transmission. *Id.* at 889. Moreover, the Court noted that it could not limit BCRA's reach to restrict only those communications likely to reach at least 50,000 viewers, as this would be too onerous a determination for speakers to make, especially when faced with possible criminal sanctions. *Id.* Second, Citizens United argued that its film was not the functional equivalent of express advocacy under *Wisconsin Right to Life*, as it was simply a documentary. *Id.* at 889-90. The Court dismissed this argument, as the content of the film was clearly critical of Clinton. *Id.* at 890. Third, Citizens United argued that the Court should strike down the communication ban in BCRA as applied to video-on-demand movies alone, as they are less likely to influence the political process. *Id.* The Court disagreed with this because of difficulty, inconsistency, and hypocrisy that could result from case-by-case determinations of which media influence politics and which do not. *Id.* at 890-91. Fourth, Citizens United asked the Court to make an exception to the communications ban for nonprofit corporations funded predominantly by individuals, and position that the Government also preferred to outright invalidation. *Id.* at 891. The Court dispensed with this position by stating that the text of different sections of BCRA and its amendments would make such an exemption impossible without reconsidering *Austin* and, therefore, *McConnell*. *Id.* at 891-92.

67. *Id.* at 897-98.

68. *Id.* at 899.

69. *Id.* at 905-10. In particular, the Court highlighted the hypocrisy in *Austin*'s rationale that such an interest was compelling by noting that if it were carried to its logical end, corporations that print political books or run media outlets could be barred from speaking before an election simply due to their being incorporated. *Id.* at 905.

70. *Id.* at 908-11. The Court found that *Buckley*'s original acceptance of this compelling state interest was limited simply to quid-pro-quo corruption. *Id.* at 909.

71. *Id.* at 910-11. Still, the Court was firm in its affirmation of this compelling interest: "[i]f elected officials succumb to improper influences from independent expenditures . . . then there is surely cause for concern." *Id.* at 911. Also, the Court distinguished the findings of increased access in *McConnell* from the case at bar, as *McConnell* related to soft money contributions, whereas *Citizens United* dealt with independent expenditures. *Id.* at 910-11.

authority to restrict speech.[72]

After invalidating the speech bans in BCRA, the Court next turned to *Citizens United*'s as-applied challenge to BCRA's disclaimer and disclosure provisions.[73] Here, the Court applied "exacting scrutiny," which commands that the government action be substantially related to an important government interest.[74] The Court found that informing the electorate of the sources of funding was a sufficiently important interest, and that BCRA's disclosure requirements were not overly burdensome on free speech.[75]

Citizens United was a clear victory for the deregulatory camp. Despite the landmark nature of the decision, the battle is not over: many regulations, such as BCRA's contribution limits, still exist and more reforms are already being planned to counter the effects of *Citizens United*.[76]

III. UNCONSTITUTIONALITY AND FUTILITY: THE FAILED EXPERIMENT OF CAMPAIGN FINANCE LAWS

The United States Constitution prohibits Congress from making any law that abridges freedom of speech.[77] The Supreme Court has continually recognized this prohibition as essential to maintaining a representative democracy and upholding the values upon which the United States government rests.[78] One of the easiest and most effective ways for someone to exercise this right is to contribute to a candidate or political issue of his or her choice.[79] Thus, restrictions on the ability of an individual or group to contribute to a candidate of their choosing, or on the ability of a

72. *Id.* at 911.

73. *Id.* at 914-17.

74. *Id.* at 914.

75. *Id.* at 914-17.

76. *See* David D. Kirkpatrick, *Lobbies' New Power: Cross Us, and Our Cash Will Bury You*, N.Y. TIMES, January 22, 2010, at A1 (reporting that Senator Charles Schumer of New York and Representative Chris Van Hollen of Maryland have been drafting legislation to respond to *Citizens United* for months).

77. U.S. CONST. amend. I.

78. *See Buckley*, 424 U.S. at 14 (stating, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the system of government established by our Constitution"); *Citizens United*, 130 S. Ct. at 882 (stating, "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting that the United States has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

79. *See* Kusper v. Pontikes 414 U.S. 51, 56-57 (1973) (stating that the freedom to associate oneself with political beliefs is protected by the First and Fourteenth Amendments, and that being able to associate with a political party "is an integral part of this basic constitutional freedom").

candidate to spend the money he or she receives directly suppress the fundamental tenet of freedom of speech.[80]

This section will examine the constitutionality of campaign contribution and expenditure limits. First, it will argue that the Court should apply strict scrutiny to both kinds of restrictions. Next, it will examine the government interests in preventing corruption or the appearance of corruption and promoting equality, arguing that neither is sufficiently compelling to justify curbing free speech. Finally, it will examine the practical inadequacies of campaign finance reform and argue that disclosure requirements are a more agreeable and workable method of reform.

A. Level of Scrutiny

Thankfully, the Court in *Buckley* was able to recognize the implications expenditure limits have on free speech and subject them to strict scrutiny.[81] Despite this holding, some commentators maintain that campaign expenditures are not speech, but conduct relating to speech.[82] Therefore, according to this argument, a form of less-strict scrutiny outlined in *United States v. O'Brien* should apply to campaign finance reforms that restrict the ability of candidates to spend the money they have raised.[83] Such an argument is both faulty and futile. First, the Supreme Court explicitly refused to apply the *O'Brien* scrutiny in *Buckley*.[84] Also, the *O'Brien* standard rests on the highly dubious distinction between "speech" and "nonspeech" elements of expression that have been widely criticized.[85]

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80. *E.g.*, *Buckley*, 424 U.S. at 14 (stating that FECA's "contribution and expenditure limits operate in an area of the most fundamental First Amendment activities").

81. *Buckley*, 424 U.S. at 16.

82. *E.g.*, Wright, *supra* note 14, at 124-25 (arguing that the expenditure of money in political campaigns serves as a vehicle to free expression analogous to burning a draft card, picketing, or using a sound truck); *see also* Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 524 (2010) (arguing that contributions and expenditures by corporations should garner no constitutional protection because the Framers intended the Bill of Rights to apply only to individuals).

83. *See* U.S. v. O'Brien, 391 U.S. 367, 382 (1968) (holding that burning a draft card was not pure speech, that the government had an important interest in the preservation of draft cards, and that a congressional law prohibiting the burning of draft cards was unrelated to the suppression of speech); Wright, *supra* note 14, at 124-29 (arguing that campaign finance regulations do not target speech itself, which would be subject to strict scrutiny; rather, they merely restrict a nonspeech element of conduct).

84. *Buckley*, 424 U.S. at 15-17.

85. *See* Lillian R. BeVier, *Money and Politics: A Perspective on the First*

Despite the hard line taken by the Court in regard to expenditure limits, ceilings on contributions continue to evade a strict analysis.[86] This distinction between expenditures and contributions should be expelled from the Court's jurisprudence for several reasons. First, it is an arbitrary distinction: Just because an individual elects to have a message that he or she agrees with disseminated by a politician does not strip it of its expressive character.[87] Second, limits on contributions severely restrict an individual's right to associate with groups and political committees that pool resources to advocate an issue through campaign contributions.[88] Third, exchanges between candidates and their contributors are an essential part of representative democracy because every candidate offers a voter something he or she wants in order to garner votes and get elected.[89]

B. The Government's Interest

The two interests most commonly posited by reform advocates are preventing corruption and the appearance of corruption and promoting equality. While only one of these has been held by the Court to be compelling enough to justify campaign finance restriction,[90] this section will discuss both.

1. Preventing Corruption or the Appearance of Corruption

The government's alleged compelling interest in preventing corruption or the appearance of corruption is, in reality, not as

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Amendment and Campaign Finance Reform, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 141, 146 (Frederick G. Slabach ed., 2006) (noting that after the decision in *O'Brien*, a scholarly consensus emerged that the speech and conduct elements distinguished by the Court were "an undifferentiated whole").

86. *See Buckley*, 424 U.S. at 20-21 (holding that a regulation on campaign contributions is only a marginal restriction on speech because the contributions are not speech themselves, they are transformed into speech by the candidate's use of funds); *see also McConnell*, 540 U.S. at 135-37 (reaffirming the holding in *Buckley* that because contributions only a marginal restriction on free speech, strict scrutiny should not be applied).

87. *E.g.*, J. Robert Abraham, Note, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1109-14 (2010) (arguing that because political advocacy is so expensive, the burden of contribution limits should be assessed based on the impact of the average voter); BeVier, *supra* note 85, at 154 (quoting L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 258-59 (1982)) (noting that all campaign finance involves speech by someone else, and that so-called "proxy speech" is not somehow less expressive because someone else does it).

88. Abraham, *supra* note 87, at 1111; BeVier, *supra* note 85, at 155.

89. Cecil C. Kuhne III, *Rethinking Campaign-Finance Reform: The Pressing Need For Deregulation and Disclosure*, 38 J. MARSHALL L. REV., 633, 641 (2004).

90. *Buckley*, 424 U.S. at 26-27 (holding that the government's only compelling interest is preventing corruption or the appearance of corruption).

pressing as reformers make it out to be.[91] Ultimately, votes win elections, not money. As such, politicians would be much more likely to act in the interests of their constituency than in any supposed adverse interest possessed by certain wealthy groups or individuals.[92] Even if candidates did respond to the sources of campaign money when they reached office, this is analogous to a voter promising his or her vote, or a group promising to mobilize voters in exchange for a politician taking a certain position on an issue.[93]

Furthermore, violations of campaign finance rules actually occur very rarely, despite the notion posited by reform advocates that such violations are rampant.[94] Of the few violations that do occur, even fewer lead to charges of bribery or other criminal corruption charges.[95]

Along with corruption being less prevalent than reformers claim, fewer contribution limits may actually abate corruption while more limits may encourage it. Essentially, what reformers label "corruption" can also be called "shirking": actions taken by elected officials that are at odds with their constituents' interests.[96] While individuals may be unable to hold their representatives accountable for shirking, corporations, unions, and other interest groups allow people interested in promoting or opposing a particular issue to pool their resources and more closely

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91. *See id.*; Abraham, *supra* note 87, at 1114-15 (arguing that contribution limits to independent expenditure committees would not withstand strict scrutiny, as *Citizens United* found this "prophylaxis-upon-prophylaxis" justification unavailing).

92. Kuhne, *supra* note 89, at 642; *see also* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 247, 250 (Frederick G. Slabach ed., 2006) (arguing that, since campaign contributions can only be spent to obtain votes and thus improve a candidate's chance at election, it would be irrational for a legislator to cast a vote adverse to his or her constituents' interest and thus destroy their chances for reelection because such action would directly counter any benefit from the contribution); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 177, 193 (Frederick G. Slabach ed., 2006) (stating that a substantial majority of studies of voting patterns have found that a legislator's votes are primarily guided by party affiliation, ideology, and constituent interest).

93. Strauss, *supra* note 92, at 251.

94. *See* Stephen Ansolabehere, *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELECT. L.J. 163, 175 (2007) (noting that, in the 2000 election, a total of $3 billion was spent by all federal candidates, parties, and committees, but the FEC's enforcement activities in 2001-2002 only resulted in about $1.78 million in fines involving 742 individuals, candidates, and committees).

95. *Id.*

96. Smith, *supra* note 92, at 203.

monitor elected officials' behavior.[97] Moreover, increased limits on the ability of these entities to contribute directly to candidates may force them to make independent expenditures to disguised groups that evade regulation and further muddy the already cloudy waters through which voters evaluate campaigns.[98] Lastly, some groups may go so far as to resort to outright bribery as the lawful avenues for expressing their views are blocked.[99]

2. *Promoting Equality*

Many reformers often claim that they are interested in "preventing corruption" when, in actuality, they seek to promote egalitarianism.[100] Others state that equality should be considered a compelling state interest, outright.[101] This is problematic, as the

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97. *Id.*

98. *See* Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECT. L.J. 295, 297-98, 305-06 (2005) (noting that knowledge of the support of certain groups can provide heuristic cues to voters, but that groups create "Veiled Political Actors" that can mislead voters by using patriotic and populist names and disguising notorious entities; Welle, *supra* note 35, at 803-08 (discussing the proliferation of 527 organizations such as MoveOn.org and Swift Boat Veterans for Truth in the 2004 campaign, and arguing that such groups lead to ineffective disclosure by misinforming voters of the source of campaign advertisements, as well as excessively negative ads, and corruption); *see also* Kuhne, *supra* note 89, at 641-42 (arguing that reform advocates should expect interest groups to try and circumvent campaign finance laws because they are being prohibited from directly contributing to the candidates of their choice); Kevin J. Madden, *Turning the Faucet Back On: The Future of McCain-Feingold's Soft-Money Ban After* Davis v. Federal Election Commission, 59 AM. U.L. REV. 385, 414 (2009) (arguing that BCRA's soft-money ban merely leads to contributors channeling contributions from political parties to largely unregulated third-party groups).

99. Smith, *supra* note 92, at 203-04.

100. Strauss, *supra* note 92, at 248.

101. *E.g.*, Grant Fevurly, Casenote, Davis v. Federal Election Commission*: A Further Step towards Campaign Finance Deregulations and the Preservation of the Millionaires' Club*, 81 U. COLO. L. REV. 627, 654-65 (2010) (arguing that both Supreme Court precedent and academic thought support the notion that equality of speech in political campaigns is a compelling government interest); Edward B. Foley, *Equal-Dollars-Per Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1211 (1994) (arguing that *Buckley* should be overturned to allow for a system where equal electoral funds are guaranteed to all voters); Stephan Stohler, Comment, *One Person, One Vote, One Dollar? Campaign Finance, Elections, and Elite Democracy Theory*, 12 U. PA. J. CONST. L. 1257 (2010) (arguing that, in order for representative democracy to properly function, the resources that influence elections must be distinct from the unequal distributions of resources in other aspects of society); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 637 (1982) (arguing that First Amendment principles can be promoted by enhancing equality because large amounts of wealth can drown out other speech).

Court rejected this interest as compelling enough to justify campaign finance regulation.[102] While every person is guaranteed only one vote, there is nothing in the Constitution that suggests that each person should have equal influence.[103]

Although not a compelling interest, campaign finance reform works against the interest reformers posit in creating greater equality in elections. Campaign finance reform, passed by legislators currently in office, serves to further entrench incumbents and the status quo.[104] By making it more difficult to raise campaign funds, reform efforts favor incumbents who already have access to networks of funding.[105] Furthermore, incumbents are able to take advantage of the benefits of their office, such as the franking privilege, which provides for postage-free mailing from candidates to their constituency.[106]

In addition to favoring incumbents, campaign finance reform tends to benefit wealthier candidates.[107] With no limits on expenditures of personal funds, independently wealthy individuals

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102. *Buckley*, 424 U.S. at 26-27. The Court's decision in *Austin* may have indirectly permitted egalitarianism to be a compelling interest by defining corruption as the corrosive and distorting effects of large aggregations of corporate wealth. *Austin*, 494 U.S. at 660. Now, as *Citizens United* has overturned *Austin*, the Court has limited compelling government interests to preventing corruption or its appearance in order to satisfy strict scrutiny. *Citizens United*, 130 S. Ct. at 913.

103. Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2774 (2008) (stating "[t]he argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office"); Kuhne, *supra* note 89, at 641.

104. *E.g.*, *id.* at 644 (arguing that excluding money from politics increases the value of other non-monetary resources that incumbents have more access to, such as media access and volunteers); Smith, *supra* note 92, at 198-201 (arguing that contribution limits make it harder for challengers to raise money, which favors incumbents who already have the benefits of name recognition and press coverage).

105. *E.g.*, Smith, *supra* note 92, at 198-99 (arguing that contribution limits make it harder for challengers to raise money from a small group of followers and citing Theodore Roosevelt's Bull Moose campaign in 1912, Eugene McCarthy's antiwar campaign in 1968, and Ross Perot's campaign in 1992 as examples where people challenging the status quo relied on small numbers of wealthy, dedicated supporters to gain public attention).

106. *Id.* at 200.

107. Abraham, *supra* note 87, at 1116-17; *see also Buckley*, 424 U.S. at 51-54 (holding that limits on the amount a candidate can spend from his or her personal funds are unconstitutional because they impose a direct restraint on political speech and do not pose a threat of corruption); Clark & Lichtman, *supra* note 33, at 667 (noting the recent increase in wealthy candidates willing to fund their own campaigns); Smith, *supra* note 92, at 209 (arguing that the rise of the "millionaire candidate" phenomenon—exemplified in the candidacies of Michael Huffington, Ross Perot, and Herb Kohl—is a direct result of the ability of candidates to spend unlimited personal funds coupled with the restrictions on raising contributions from the general public).

are free to spend as much as they want, while small, unknown candidates face limits on individual contributions.[108] Moreover, greater inequality in the electoral process in favor of wealthy individuals is amplified by the ways that reform entrenches incumbents: The only way a challenger may be able to compete with an incumbent is to aggregate massive amounts of his or her own personal wealth.[109]

In recent years, the Supreme Court began to realize the contradictions and inconsistencies in reformers' constitutional arguments.[110] This trend is continuing, with the Court's decision in *Citizens United* ending the government's ability to restrict speech based merely on the speaker being a corporation.

C. Past Reform Efforts Have Been Ineffective and Will Continue to Be

Along with the questionable constitutional basis for restricting campaign finance, Congress and reformers should realize that previous methods of reform have been ineffective when considering future reform proposals. Any law that seeks to restrict a group's ability to voice its opinion will be circumvented.[111] This is because the constitutional constraints that are rightfully placed on reform will always allow expenditures to be made that could affect elections while evading regulation.[112] Also, the current deregulatory trend of the Court will only further tie the hands of reformers.[113]

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108. Smith, *supra* note 92, at 209-210.

109. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1402-03 (1994).

110. *See* Greenman, *supra* note 36, at 231 (stating that both advocates and critics of campaign finance reform agree that *Wisconsin Right to Life* shows an emerging new Court majority in favor of deregulation).

111. Abraham, *supra* note 87, at 1115-16; *see also* Kuhne, *supra* note 89, at 641 (arguing that evading contribution limits is the reaction that should be expected when people and groups are prohibited from contributing what they want to candidates of their choice).

112. *E.g.*, Clark & Lichtman, *supra* note 33, at 659-667 (noting that, even under BCRA, expenditures by corporations to convince their own employees and stockholders to vote for a candidate and by 527 and 501(c) organizations, as well as those used on issue advocacy continue to escape regulation); Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Deterring Campaign Finance Violations*, 2 ELECT. L.J. 23, 30 (2003) (arguing that constitutional restraints on campaign finance regulations prevent the FEC from effectively enforcing them when regulated groups shift strategies to comply with the literal words of the law but circumvent its purpose).

113. *E.g.*, Lauren Daniel, Comment, *527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections*, 5 NW. J.L. & SOC. POL'Y 149, 172 (2010) (stating that *Speechnow.org v. FEC*, *Emily's List v. FEC* and *Citizens United* all signal an "amplifi[cation] of [campaign finance] loopholes in the interest of First Amendment rights");

Future reform will also be significantly hindered as the Internet becomes increasingly important to federal elections. The FEC has already stated its intent to exempt almost all forms of Internet communication from regulation.[114] This exemption will apply not only to bloggers and other forms of electronic news media, but groups that engage in issue advocacy.[115] As was demonstrated in the 2008 presidential election, the Internet's role in election campaigns continues to expand.[116]

D. The Middle Ground: Disclosure Requirements

Despite the ineffectiveness of reform, its advocates need not despair entirely, for a solution exists. Both reform and free speech advocates agree that campaigns should be open and honest.[117] The principle way to achieve this is through disclosure requirements. Disclosure is a middle ground because it comports better with the principles of the First Amendment and is less restrictive on speech than limits on contributions and expenditures.[118] If the goal of the

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Greenman, *supra* note 36, at 230-31 (arguing that *Wisconsin Right to Life* had the effects of eviscerating BCRA's to limit independent expenditures and closing off a wide range of future regulatory possibilities); Kirkpatrick, *supra* note 76, at A1 (reporting that President Obama called the decision in *Citizens United* a "green light" for special interest money to enter elections).

114. Stevenson, *supra* note 39, at 86.

115. *E.g.*, *id.* at 90-91, 90 n.147 (reporting that in an advisory opinion regarding Fired Up! LLC, the FEC stated that Fired Up qualified for a press exemption because it was not owned or controlled by any political party, entity, or candidate, even though editorials may expressly call for the election or defeat of a candidate; despite Fired Up having been founded by former members of the Democratic Party who published progressive viewpoints).

116. *E.g.*, Greenman, *supra* note 36, at 266-67 (citing a Pew Research Center study that revealed that forty-one percent of people under forty watched an online campaign video in January of 2008, as well as the Obama campaign's use of Internet tools to engage supporters by allowing them to organize their own campaign events or blog about the campaign); Adam Nagourney, *The '08 Campaign: Sea Change for Politics as We Know It*, N.Y. TIMES, Nov. 4, 2008, at A1 (quoting former campaign managers who believed that Barack Obama's use of the Internet allowed him to garner support in traditionally Republican areas, and that Republicans must learn to use the Internet effectively in order to compete better in the next election).

117. *See* Kuhne, *supra* note 89, at 634 (arguing that the best solution is to completely deregulate the campaign finance system, except for complete disclosure of all sources of campaign contributions); Raymond J. LaRaja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in American States*, 6 ELECT. L.J. 236, 236 (2007) (noting that even proponents of deregulating campaign finance embrace disclosure because it allows voters to make an educated decision of whether or not to vote for a candidate).

118. *See Buckley*, 424 U.S. at 68-84 (upholding the disclosure requirements in FECA and stating that in many cases, disclosure is the least restrictive means to prevent corruption in federal elections); *Citizens United*, 130 S. Ct. at 914 (noting that, while disclosure requirements burden speech, they are

First Amendment is to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open,"[119] then it only makes sense to allow people to be informed of who is speaking.[120]

Along with the constitutional argument, disclosure requirements work just as—if not more—effectively than more restrictive types of campaign finance reform. Disclosure can help combat the negative effects that reformers believe money has on campaigns by allowing voters to keep candidates and contributors in check.[121] By revealing the source of campaign advertisements and contributions, there is less opportunity to mislead voters about what position a group is supporting.[122] Perhaps more importantly, disclosure allows voters to keep candidates in check. It provides voters with heuristic cues about the ideology and policy of candidates.[123] With information about which groups support candidates, voters can either vote for or against a candidate based on the groups' infamy or policy views.[124] Giving voters the tools necessary to hold their elected officials accountable is not only good policy, but critical to the proper functioning of American

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less restrictive because they place no ceiling on campaign activity and do not prevent speech from occurring); *McConnell*, 540 U.S. at 259 (Scalia, J., dissenting) (stating that effective disclosure rules are necessary to combat any effect that corporate wealth could have on elections). Since *Citizens United*, the Court, in an 8-1 decision, upheld a Washington state statute mandating disclosure of referendum votes upon request. Doe v. Reed, 130 S. Ct. 2811, 2821 (2010).

119. *Sullivan*, 376 U.S. at 270.

120. *But see* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding that an Ohio disclosure statute was unconstitutional as applied to an Ohio citizen handing out handbills at a ballot initiative, given the citizen's interest in anonymity). While *McIntyre* notes the danger that compelled disclosure could chill speech, the decision also explicitly distinguished itself from *Buckley*. *Id.* at 353-56. Specifically, the Court noted that simply disclosing the source of money is far less averse to free speech than revealing the source of writing on a handbill. *Id.* at 355. Telling the public where campaign contributions flow from is far less likely to spark retaliation and chill speech than telling the public who wrote a specific election-related handbill containing personal opinions and being distributed by the author. *Id.*

121. *See Citizens United*, 130 S. Ct. at 914 (noting that disclosure allows both the electorate and corporate shareholders to make informed decisions and respond to independent corporate expenditures properly); *McConnell*, 540 U.S. at 259 (Scalia, J., concurring in part and dissenting in part) (stating that the influence of moneyed interests is checked by the politicians' reluctance to seem in the pocket of such interests so long as adequate disclosure is effectuated).

122. *See* Welle, *supra* note 35, at 84 (arguing that "sham issue advocacy" denies voters the ability to determine the speaker's credibility and bias and citing the "Bush Clean Air" advertisement, which appeared to be from an environmental group, but really stemmed from two Texas supporters of George W. Bush).

123. Garrett & Smith, *supra* note 98, at 297; Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141, 1151 (2003).

124. Kang, *supra* note 123, at 1150-51.

democracy.[125]

Finally, the efficacy of disclosures can now be maximized through the Internet.[126] The Internet is fast becoming the most important medium for political news and advertising.[127] Even the FEC has recognized the Internet as a tool for expedient disclosure to large groups of people.[128] This recognition of the importance of the Internet shows that the seeds for a new campaign finance paradigm are in place; one that not only abides by the First Amendment's principles, but can be effective and workable.[129]

IV. THE DISCLOSURE PROGRAM: ACCESS, AWARENESS, AND INCENTIVES

In light of the increasingly deregulatory stance of the Supreme Court, as well as the generally agreeable middle ground of using disclosure to regulate campaign finance, it is time for reformers to shift their focus.[130] Specifically, Congress should

125. *E.g.*, Ansolabehere, *supra* note 94, at 165-66 (arguing that disclosure requirements make elections more transparent and thus make it easier for voters to ensure that their elected officials are acting in their best interests); Greenman, *supra* note 36, at 215 (positing that knowledge of candidates' positions and voting history is critical to hold them accountable).

126. Abraham, *supra* note 87, at 1120.

127. *See* Greenman, *supra* note 36, at 266-67 (noting the increased use of the Internet in the 2008 presidential election for shoring up small contributions, broadcasting debates, and connecting with voters); Mayer, *supra* note 64, at 141 (noting that the government's interests in informing the populace and preventing corruption are acutely served when the Internet is involved because of the speed and ease with which information can be made available); Stevenson, *supra* note 39, at 81 (describing how bloggers unveiled a 2004 scandal involving Senator Trent Lott and how Howard Dean used blogs to effectively raise money and grassroots support).

128. Federal Election Commission, http://www.fec.gov (last visited Mar. 1, 2011). The FEC's website utilizes many features for disclosure, most notably "Campaign Finance Maps" that allow voters to see which states have active races and how much money is being spent by the candidates in those states.

129. *See Citizens United*, 130 S. Ct. at 913 (noting that Congress passed BCRA without a proper disclosure regime, which could now exist with the proliferation of the Internet).

130. *See* Greenman, *supra* note 36, at 233-34 (arguing that the Supreme Court's decision in *Wisconsin Right to Life* leaves reformers with the option of either attempting to continue to restrict spending—a futile effort—or accepting the Court's deregulatory stance and developing a new stance focusing on empowering voters). Congressional Democrats seem to have accepted this stance with their introduction of the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, which would have required the top five donors to a campaign advertisement to have their names placed on the advertisement. Summer Lollie, *House Passes DISCLOSE Act for New Reporting Requirements on Independent Expenditures*, CENTER FOR RESPONSIVE POLITICS: OPENSECRETS BLOG, (June 24, 2010), http://www.opensecrets.org/news/2010/06/house-passes-campaign-finance-refor.html. The bill targeted donations by corporations, unions, 527 groups, and trade associations. *Id.* Critics of the DISCLOSE Act argued that it favored

amend FECA or pass new legislation changing the directive of the FEC. In doing this, the new FEC should take a more conciliatory approach with both candidates and contributors, focusing on three specific areas: access to disclosure reports, public awareness of disclosure reports, and incentives for candidates and their supporters to disclose.

This section will propose first that the FEC make it easier for the public to access disclosure reports. In particular, it will argue that the FEC's current course of increasing electronic disclosure via the Internet should continue. Next, this section will argue that the FEC should try to make the public more aware of the availability of reports and importance of reviewing them to hold their legislators accountable. Lastly, this section will propose a set of both positive and negative incentives to induce open disclosure of campaign fund sources.

A. Access to Disclosures

Currently, the FEC is recognizing the important role that the Internet can play in giving the public access to disclosures.[131] This effort is a step in the right direction, especially considering the increasing role that the Internet is playing in election campaigns.[132] Although this is the right direction, several features can be added to this system to increase its effectiveness.

First, the information about candidates should be made easier

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Democrats by favoring contributions by labor unions. *E.g.*, Susan Crabtree, *Collins Skeptical of DISCLOSE Act*, THE HILL, (July 14, 2010), http://thehill.com/homenews/senate/ 108937-collins-skeptical-of-disclose-act (reporting that Senator Susan Collins (R-Maine), a past supporter of campaign finance reform, doubted the bills fairness because it favored unions over businesses and exempted certain interest groups such as the National Rifle Association and the Sierra Club). Others felt that the DISCLOSE Act failed to adequately protect the confidentiality of small, controversial organizations. *E.g.*, Press Release, American Civil Liberties Union, DISCLOSE Act Passed By House Today Compromises Free Speech, (June 24, 2010), *available at* http://www.aclu.org/free-speech/disclose-act-passed-house-today-compromises-free-speech (noting that an amendment in the bill passed by the House exempted certain large, mainstream organizations from disclosure requirements, which "fails to improve the integrity of political campaigns in any substantial way while significantly harming the speech and associational rights of Americans"). Ultimately, the DISCLOSE Act failed to pass the Senate and garnered no Republican support. David M. Herszenhorn, *Campaign Finance Bill Grinds to a Halt in Senate*, N.Y. TIMES, July 28, 2010, at A14.

131. *E.g.* Federal Election Commission, FISCAL YEAR 2010 BUDGET JUSTIFICATION & PERFORMANCE BUDGET, 1, 9-10 (May 7, 2009) (highlighting the ways in which the FEC has created new features on its website); *see also* Kang, *supra* note 123, at 1168 (noting that advocates of the Internet argue that it can boost public awareness and allow them to make better electoral decisions).

132. *See* Discussion *supra* notes 126-128 and accompanying text.

to digest. Currently, the FEC's website contains candidate information pages that include general information, such as the candidate's party, as well as a general financial summary for the candidate.[133] Then, by following certain links, readers can proceed to a list of contributors and descriptions of who they are. While this is very valuable information, the correlation between candidates and their contributors should be made more direct. Making the connection more obvious will increase the likelihood that voters will remember that connection on Election Day and use it when making their decision.[134] For instance, candidates should be able to post pictures of themselves on their profiles. This would allow readers to immediately connect a public figure, who they likely have seen before, with his or her contributors. Also, candidates would probably not object to having a chance to get more public exposure.

In addition, this connection could be heightened by directly posting a candidate's top ten contributors on the first page of his or her profile. Not only would this give the electorate an idea of where a candidate's funds come from, but it would also likely withstand judicial scrutiny by focusing only on large contributors whose speech is unlikely to be chilled by disclosure.[135] Links for these top ten contributors' websites should be posted next to their names, so that voters can quickly investigate the group and hopefully cut down on the number of groups that try to conceal their ideological stance through patriotic or populist monikers.[136]

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133. Federal Election Commission, http://fec.gov/DisclosureSearch/mapHSApp.do?election_yr=2010 (last visited Mar. 1, 2011) (search for candidate or click on a state to browse a list of candidates currently involved in a race).

134. *See* Kang, *supra* note 123, at 1179-80 (arguing that disclosure of the source of speech in direct democracy is most effective when it is given before the speech is disseminated in order to give voters the ability to assess a speaker's credibility); Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U.L. REV. 665, 680 (2002) (arguing that disclosure of campaign contributions gives voters information regarding how badly a particular interest group wants a candidate to be elected by the size of its contribution).

135. *See Citizens United*, 130 S. Ct. at 916 (noting that Citizens United has been disclosing its expenditures for years and has faced no harassment or retaliation as a result); Garrett & Smith, *supra* note 98, at 325-26 (arguing that future disclosure statutes should exempt individuals contributing small amounts because they are less helpful as heuristic cues and are less restrictive on First Amendment rights); Kang, *supra* note 123, at 1178 (arguing that campaign regulations should focus only on the most active contributors to ballot initiatives because such regulations are less likely to chill speech).

136. *See* Garrett & Smith, *supra* note 98, at 324-25 (arguing that, in order to be effective, disclosure requirements must be strong enough to penetrate the cloaking mechanisms groups use for their contributions). Also, only listing the top ten contributors will ensure that voters are not saturated with too much information, which can also be problematic. *Id.* at 327.

Finally, the "financial summaries" that currently take up the most space on candidate profiles[137] should be minimized. Although the calculations present on the FEC website are by no means overly complex, the amounts of money received and spent are less important to keep candidates in check than where that money comes from.[138] Seeing a number gives a voter no insight into a candidate's views or where the candidate garners support, whereas adding the source of the funds gives a plethora of information about that candidate's ideology.[139]

B. Awareness of Disclosures

While increasing voter access to disclosures is highly important, it means very little unless voters actually look at the reports. And voter ignorance is a continual complaint over the efficacy of disclosure regimes.[140] Thus, the FEC should strive to make voters aware of the existence of disclosure reports and their content.

One way to accomplish this is by having the FEC advertise. This could potentially serve two purposes. First, it could improve public views of the FEC and redefine its role from that of a complacent bureaucracy to one of a public watchdog.[141] Second, such advertisements could increase a sense of civic duty in voters.[142] Television or radio broadcasters could be required or

137. Federal Election Commission, *supra* note 132.

138. *See* Kang, *supra* note 123, at 1156 (noting that increased campaign spending coupled with strict disclosure of sources of campaign funds can help voters discern which candidates support certain issues).

139. *See* Garrett, *supra* note 133, at 678-79 (citing studies that show that even ignorant voters are able to ascertain which industries will support which policies, so that evidence of industry support coupled with the amount of that industry's contribution—signaling the issue's salience—can be very helpful to voters).

140. *E.g.* Abraham, *supra* note 87, at 1120-21 (noting the potential positive effects that deregulation of political campaigns could have if measures were taken to ensure that politicians appealed to all voters rather than moneyed interests, such as mandatory voting, voting by mail, weekend elections, extended voting periods or compensated voting); Greenman, *supra* note 36, at 263 (citing the work of Robert Putnam, which showed that involvement in civic organizations is declining); Kang, *supra* note 123, at 1145-46 (citing several examples of voters' inability to understand ballot initiatives in direct democracy campaigns); LaRaja, *supra* note 117, at 237 (citing research that shows most voters are "rationally ignorant": they avoid the costs of learning about politics because they benefit very little from being well-informed).

141. *See* Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1156 (2006) (noting that legislators have little incentive to reform the FEC until the public urges them to do so, which is unlikely given voter apathy even when faced with clear corruption such as the Jack Abramoff scandal).

142. *See* Greenman, *supra* note 36, at 250 (citing scholarship that notes the correlation between the decline of civic education in schools and the decline in

encouraged to donate certain portions of airtime near election time for this purpose.[143]

Another way to increase awareness of disclosures would be by fostering ties between the FEC and the mass media. The media plays a very important role in educating the public and framing public debate during elections.[144] Thus, the press should play an important role in parsing out the information in disclosure reports and transmitting it to the public. This method is likely to be more effective than relying on individuals to find information on their own, and will be more reliable than having information come from candidates trying to make their opponents look bad.[145] Moreover, news sources will likely welcome increased access to government officials and a wellspring of "juicy" stories on possible political corruption.[146] Increasing the number of press releases or press conferences could enhance relationships between the media and the FEC, and benefit both entities.

C. Incentives to Disclose

Finally, the FEC should change its priorities from issuing citations and suing violators to encouraging candidates and their contributors to abide by disclosure requirements.[147] Because

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political participation and knowledge).

143. *See id.* at 244 (noting that a former FCC chairman has argued that requiring broadcasters to provide free airtime for political purposes would be within that agency's powers and within constitutional limits); Welle, *supra* note 35, at 826 (arguing for a "dual airtime" approach to combating sham issue advertising, wherein negative advertisements could be directly countered by giving the attacked candidate free airtime of his or her own). While both Greenman and Welle discuss the possibility that free airtime be given to candidates, this may indicate government support for a particular candidate. This Comment suggests giving the FEC airtime to air its own reporting advertisements, which would not raise potential problems of implicit government support for a candidate.

144. *See* Eber, *supra* note 140, at 1194 (noting that the amount of emphasis placed on a campaign issue by the media directly corresponds with the amount of public attention given to it); LaRaja, *supra* note 117, at 237 (noting that the news media serves as an "essential intermediary" in elections).

145. Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629, 653 (2000).

146. *See* LaRaja, *supra* note 117, at 243 (concluding—from the results of studies of media coverage in states with both extensive and minimal disclosure rules—that the higher the quality of the disclosure system, the more scandal-related stories will be printed by the press); Lochner & Cain, *supra* note 144, at 655 (reporting the results of a study of media coverage of campaign finance violations in the disclosure-centric Californian system, and concluding that campaign finance infractions are covered in newspapers frequently).

147. Currently, the FEC's enforcement program for violations of disclosure requirements follows a long string of procedures. First, a complaint is filed by the public, another federal or state agency, or the FEC itself. Gueorguieva,

taking an adversarial stance to candidates has failed, the FEC should try to now work with candidates, stressing how beneficial disclosing their sources of campaign funds can be.

Most importantly, candidates should be told that fully disclosing their contributors' identities gives an appearance that the politician has nothing to hide.[148] This understanding can be furthered by the issuance of a "stamp of approval" on the candidate's FEC profile that he or she has met all disclosure requirements. In addition, the candidate should be allowed to tout the "stamp" in his or her campaign advertisements. While the process of scrutinizing disclosures would have to be efficient and expedient in order for this to function properly, the funds presumably saved by not pursuing litigation could be diverted to this end.[149]

Finally, in order to ensure that the regulatory scheme had some teeth, Todd Lochner's "Scarlet Letter" approach should be adopted for the most serious campaign finance violators.[150] This system would allow the FEC to issue public statements through popular media, informing voters that their representatives have failed to meet reporting requirements.[151] Such public shaming has proved effective in deterring other crimes like drunk driving and could only be expected to be more effective against candidates relying on a positive public image to get elected.[152] Still, only persistent or purposeful offenders should be punished in this way,

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supra note 12, at 98. Then, the FEC is required to try and resolve these "Matters Under Review" through conciliation. *Id.* at 99. If this fails, then the FEC can file suit in federal district court. *Id.*

148. *See McConnell*, 540 U.S. at 259 (Scalia, J., concurring in part and dissenting in part) (stating that politicians will be reluctant to appear as though they can be bought and sold by interest groups); Lochner & Cain, *supra* note 145, at 652 (arguing that, under a well-functioning disclosure system, candidates who seek to keep public trust will avoid taking money from groups and individuals who have bad reputations).

149. *See* Gueorguieva, *supra* note 12, at 99 (noting that, between 1980 and 2005, the FEC was involved in more than 530 court cases). Along with court cases, it should also be noted that the FEC currently partakes in an Alternative Dispute Resolution program, which would presumably be unnecessary under the proposed paradigm. *Id.*

150. *See generally* Lochner, *supra* note 112.

151. *Id.* at 24. Specifically, Lochner calls for placing advertisements in newspapers according to the type of representative that failed to disclose. He suggests that for House candidates, the "scarlet letter" advertisement would run in the newspaper that has the largest circulation in the district. *Id.* at 34. For Senate candidates, three newspapers in the state where the election was occurring would run the notice. *Id.* Finally, Presidential candidates would get notices published in three well-known, national newspapers like the *New York Times* or *Chicago Tribune*. *Id.*

152. *E.g. id.* at 26 (noting that studies have found that public shaming can have a large deterrent effect, such as for the offenses of driving under the influence and tax cheating).

in order to avoid being unconstitutional and undermining the other goals of the FEC.[153]

V. CONCLUSION

Campaign finance reform has had a long and contentious history. It is time for Congress and the pro-regulatory camp to recognize that change is inevitable. The Supreme Court demonstrated its willingness to strike down campaign finance laws and overrule precedent in *Citizens United*. In light of this new jurisprudence, regulators should take it upon themselves to adapt the FEC to focus on effective disclosure and dissemination of campaign information.[154] Then, reformers may come to realize that the supposed evils of unfettered political speech are nothing compared to those cultivated by restricting core political speech:

> [T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race . . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose . . . the clearer perception and livelier impression of truth produced by its collision with error.[155]

153. Lochner suggests reserving the sanction for serious offenses, defining them through four considerations: the intent of the offender, the severity of the offense, the past behavior of the offender, and whether the violation resulted from reasonable interpretation of the law. *Id.* at 35-36. While these four criteria provide some guidance, Lochner's proposal is too tentative to be effective. *See id.* at 37-41 (criticizing the "scarlet letter" sanction on the grounds of its questionable legality, equity, and efficacy). While caution should be exercised, trying to divine an offender's intent or reasonableness would result in far too much litigation. Instead, a bright line rule should be adopted that gives the candidate or interest group ample time to comply or ask for extensions on reporting requirements.

154. Reported ideas for new legislation do not seem to recognize the importance of disclosure as the way forward. Such ideas include banning advertising by corporations that hire lobbyists, receive government funds, or collect revenue abroad, tightening rules about coordination between contributors and campaigns, and requiring shareholder approval of political expenditures. Kirkpatrick, *supra* note 76, at A1.

155. JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., Hackett Publishing Company) (1859).