

# The John Roberts Salvage Company: After *McConnell*, a New Court Looks to Repair the Constitution

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*The Bipartisan Campaign Reform Act of 2002 (“McCain-Feingold”) failed to achieve its objectives, and exposed a number of weaknesses in the campaign finance regulatory system for which the current regulatory paradigm has no answer. The most far-reaching solution, complete government financing, remains politically unpopular and, more importantly, cannot achieve its stated goals at an acceptable price under the First Amendment. In the wake of the McCain-Feingold debacle, last term’s decisions in *Randall v. Sorrell* and *Wisconsin Right to Life v. FEC* indicate that the Supreme Court, by a narrow 5-4 majority, is turning away from the deferential approach of the last decade, but how far the Court might go in rolling back regulation is uncertain. However, within the context of a re-invigorated *Buckley v. Valeo* framework, there are several moderate but important steps the Court can take to restore First Amendment balance in campaign finance.*

## I. INTRODUCTION

I was asked in this symposium to provide a few comments on the papers of Professors Briffault<sup>1</sup> and Hasen.<sup>2</sup> However, fundamental differences in our approach—not only to campaign finance questions, but to constitutional interpretation more generally—make it difficult to say much in limited space. In fact, I largely agree with what both professors have written in describing the *Wisconsin Right to Life v. Federal Election Commission*<sup>3</sup> (“*WRTL*”) and *Randall v. Sorrell*<sup>4</sup> decisions. The gulf between my views on campaign finance and those of Professors Briffault and Hasen has less to do with our understanding of the empirical evidence or the actions of the Supreme Court in various cases than with our fundamental understanding of how both the political process and the Constitution ought to work, and the relative values we place on freedom versus equality. These are issues that go well beyond the scope of this brief essay.

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<sup>1</sup> Richard Briffault, *Campaign Finance at the Dawn of the Roberts Court*, 68 OHIO ST. L.J. 807 (2007).

<sup>2</sup> Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after *Randall v. Sorrell**, 68 OHIO ST. L.J. 849 (2007).

<sup>3</sup> 126 S. Ct. 1016 (2006).

<sup>4</sup> 126 S. Ct. 2479 (2006).

Thus, I propose to proceed first by briefly discussing what I see as some of the major issues facing campaign finance regulation—a review of the wreckage of the Federal Election Campaign Act (“FECA”)<sup>5</sup> and the Bipartisan Campaign Reform Act (“BCRA”),<sup>6</sup> if you will. I will then discuss, again in abbreviated form, why the Supreme Court’s decision in *McConnell v. FEC*<sup>7</sup> is necessarily headed to the ashbin, drawing from and commenting on some of the points made by Professors Hasen and Briffault. Finally, I want to devote the bulk of this essay to some speculation about how a pro-speech Court might set about salvaging some measure of constitutional order without overruling all of *McConnell*, or the *Buckley v. Valeo*<sup>8</sup> framework on which *McConnell* relied.

## II. CAMPAIGN FINANCE REFORM: A NAPOLEONIC CAMPAIGN

### A. *McConnell v. Federal Election Commission: To the Gates of Moscow*

Trying to clean up campaigns by regulating political speech is a bit like invading Russia in the nineteenth century: no matter how far one presses on, there is always more to conquer. And then winter sets in.

I think it is all but incontestable that the Bipartisan Campaign Reform Act has failed to achieve any of its stated goals. After two election cycles, it is clear that it has not slowed the growth in campaign spending;<sup>9</sup> no one has seriously claimed, so far as I am aware, that it has reduced the time that officeholders spend fundraising for their campaigns; it has not increased

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<sup>5</sup> 2 U.S.C. §§ 431–56 (2000).

<sup>6</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C. §§ 431–55 and 47 U.S.C.).

<sup>7</sup> 540 U.S. 93 (2003).

<sup>8</sup> 424 U.S. 1 (1976) (per curiam).

<sup>9</sup> See, e.g., Steve LeBlanc, *Campaign Spending Hit All-Time High in 2006*, B. HERALD, Dec. 5, 2006, at 1; Jack Torry, *Costliest Ohio Battle for U.S. Senate: Amazing \$24.8 Million Race*, COLUMBUS DISPATCH, Dec. 8, 2006, at D1; Mark Hornbeck et al., *Governor’s Race a Splurge at \$56 Million*, DETROIT NEWS, Dec. 8, 2006, at 1B; Robynn Tysver, *U.S. Senate Candidates Spent Way to #1*, OMAHA WORLD, Nov. 9, 2006, at A1. Most experts think the final tally at the Federal level will set a new record for a mid-term election in 2006. See, e.g., Center for Responsive Politics, *Center for Responsive Politics Predicts ‘06 Election Will Cost \$2.6 Billion*, Oct. 25, 2006, available at <http://www.opensecrets.org/pressreleases/2006/PreElection.10.25.asp> (last visited Mar. 24, 2007) (noting prediction of spending up approximately twenty percent since 2002, before BCRA took effect).

public confidence in government<sup>10</sup> (“the appearance of corruption”);<sup>11</sup> it has not prevented actual corruption; it does not appear to have made campaigns less “negative,”<sup>12</sup> whatever that would mean; and there is no serious argument that it has dramatically enhanced the voice of average citizens—whatever that might mean, or however that might be measured—by shutting large contributors out of the process.

Supporters of McCain-Feingold have responded to its failures by arguing that we just haven’t regulated enough speech. In particular, they have called for tougher enforcement by the Federal Election Commission (FEC) or some new agency,<sup>13</sup> added regulation of independent spending by organizations based on their status under Section 527 of the tax code,<sup>14</sup> and more spending on taxpayer-funded campaigns. I can only briefly touch on these issues, but it is worth doing so.

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<sup>10</sup> See The Harris Poll, *Overall Confidence in Leaders of Major Institutions Remains Steady*, Mar. 2, 2006, available at [http://www.harrisinteractive.com/harris\\_poll/printerfriend/index.asp?PID=646](http://www.harrisinteractive.com/harris_poll/printerfriend/index.asp?PID=646) (last visited Mar. 24, 2007) (showing confidence in the White House as an institution fell from 50% in 2002, shortly before passage of McCain-Feingold, to 25% in 2006; and confidence in Congress as an institution fell from 22% to 10% in the same time span); see also CNN.com, *Poll: Half of Americans Think Congress is Corrupt*, Oct. 19, 2006, <http://www.cnn.com/2006/POLITICS/10/19/congress.poll/index.html> (last visited Mar. 24, 2007).

<sup>11</sup> See *Buckley*, 424 U.S. at 27.

<sup>12</sup> See, e.g., Shanto Iyengar, *Negative Ads Turn Off Voters, Enthrall News Media*, Washington Post.com, Nov. 15, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/15/AR2006111500827.html> (last visited Mar. 24, 2007).

<sup>13</sup> See Democracy 21, *Democracy 21 Endorses New Bill to Replace FEC with Real Enforcement Agency*, June 26, 2006, <http://www.democracy21.org> (follow “issues” hyperlink; then follow “FEC” hyperlink) (last visited Mar. 24, 2007).

<sup>14</sup> A 527 organization is “organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1) (2000). An “exempt function” is “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office.” 26 U.S.C. § 527(e)(2) (2000). Historically, an organization was regulated under FECA based on its activity in making “expenditures.” 2 U.S.C. § 431(9) (2000). This definition was not co-extensive with the definition in the Internal Revenue Code. The constitutional argument for regulating groups based on their tax status was set out shortly after the *McConnell* opinion, in Edward B. Foley & Donald Tobin, *The New Loophole?: 527s, Political Committees, and McCain-Feingold*, BNA MONEY & POL. REP., Jan. 7, 2004. An opposing view is found in Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1027–34 (2005).

## B. Retreat: Current Dilemmas in Regulation

### 1. "527" Organizations

The first explanation for the failure of campaign finance regulation, that enforcement has simply not been tough enough, is merely a political cover for the law's failure that has been invoked ceaselessly for the past thirty years.<sup>15</sup> In the context of explaining the failures since the passage of McCain-Feingold, however, it blends rather seamlessly into the call for added regulation of "527" organizations. The Federal Election Commission's alleged failure to "enforce the law" is primarily in its coddling of "527 groups."<sup>16</sup> "527 groups" are merely politically-oriented organizations operating under section 527 of the U.S. Tax Code. Such groups had historically avoided regulation as political action committees by eschewing express advocacy communications in favor of "issue" ads.<sup>17</sup> The McCain-Feingold law was specifically designed so as to leave them largely untouched—in major part because of concerns about the constitutionality of added regulation. The only major change McCain-Feingold made with respect to these organizations was to limit their right to broadcast ads within thirty days of a primary election or sixty days of a general election.<sup>18</sup> Beyond that restriction—which has been rigorously enforced, as the facts of *WRTL* demonstrate—McCain-Feingold left them untouched.<sup>19</sup>

In any event, regulating these organizations on the basis of their tax status is highly problematic because there is nothing that an independent 527

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<sup>15</sup> Bradley A. Smith & Stephen M. Hoerling, *A Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145 (2002); see also *Oversight of the Federal Election Commission: Hearing Before the S. Comm. on Rules and Admin.*, 108th Cong. (2004) (statement of Bradley A. Smith, Chairman, FEC).

<sup>16</sup> On December 13, 2006, the FEC fined three prominent 527 organizations—Swift Boat Veterans for Truth, the League of Conservation Voters, and MoveOn.org—a total of \$630,000 for activities during the 2004 campaign. Press Release, Federal Election Commission, FEC Collects \$630,000 in Civil Penalties from Three 527 Organizations, (Dec. 13, 2006), available at <http://www.fec.gov/press/press2006/20061213murs.html> (last visited Mar. 24, 2007). This was followed by a fine of \$750,000 against Progress for America Voter Fund in February, 2007. Press Release, Federal Election Commission, FEC to Collect \$750,000 Civil Penalty from Progress for America Voter Fund, Feb. 28, 2007, available at <http://www.fec.gov/press/press2007/20070228MUR.html> (last visited Mar. 24, 2007).

<sup>17</sup> Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L.J. 82, 84–86 (2005).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; see also Polsky & Charles, *supra* note 14, at 1022–24.

organization can do that cannot also be done by an organization operating under section 501(c)(4) of the Tax Code. Thus, regulation in the area would accomplish little unless extended to 501(c)(4) organizations. At that point, the law would reassume the form in which it was first passed in 1974, and struck down as unconstitutional by *Buckley*; it would in essence regulate all speech “relative to” federal elections.<sup>20</sup> Regulating independent 527 organizations promises to be a difficult task, indeed.

But regulating independent 527 organizations may be the easiest dilemma facing the “reform community.” As fast as one loophole can be closed, new avenues of political speech keep cropping up, including the Internet, the press exemption, movies, and books, for openers.

## 2. The Press Exemption

The Federal Election Campaign Act exempts periodicals and broadcasts from its restrictions and prohibitions.<sup>21</sup> Without this exemption, many of the activities of the institutional press would violate campaign finance laws. Editorial commentary expressly advocates the election or defeat of candidates, and broadcast stations routinely mention candidates in both news and entertainment stories within sixty days of a federal election, violating the “electioneering communications” provisions of McCain-Feingold, but for the press exemption. News reporters “coordinate” their activities with campaigns, which would subject their stories to regulation as contributions and expenditures, but for the press exemption.

Furthermore, most of America’s leading “think” magazines, such as the *New Republic*, *National Review*, *Washington Monthly*, and the *Weekly Standard*, are openly partisan in their political preferences. Meanwhile, the National Rifle Association reacted to McCain-Feingold by launching a satellite radio program, thereby availing its commentary of the press exemption. Wealthy liberals banded together to form Air America, a broadcast network that seemed to be less concerned with making money by airing programs with appeal to audiences than with airing partisan, left-wing programming no matter what the ratings.<sup>22</sup>

Historically, the idea that there would not be an exemption from campaign finance laws for the press would have been considered preposterous, patently unconstitutional.<sup>23</sup> That is no longer so. In the last decade, some of the nation’s most prominent professors in the field,

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<sup>20</sup> See *Buckley v. Valeo*, 424 U.S. 1, 39–40 (1976) (per curiam).

<sup>21</sup> 2 U.S.C. § 431(9)(B)(i) (2000).

<sup>22</sup> See, e.g., John R. Lott, Jr. & Bradley A. Smith, Op-Ed., *Special Treatment for Air America*, WASH. TIMES, Oct. 26, 2006, at A19.

<sup>23</sup> See, e.g., L.A. Powe, Jr., *Boiling Blood*, 77 TEX. L. REV. 1667, 1670 (1999).

including Edward Foley<sup>24</sup> and Professor Hasen,<sup>25</sup> have called for a reassessment of the press exemption that would strip much reporting and editorializing of First Amendment protection. Most recently, in the state of Washington, a lower court has ruled that a radio station must report as a campaign contribution the value of on-air commentary made by talk radio hosts.<sup>26</sup>

Subjecting the press to campaign finance laws is, in fact, not a fanciful notion, once one has decided that preventing corruption and promoting equality of influence is sufficiently important to override the First Amendment.<sup>27</sup> Of course, many talk radio and cable television programs are strongly opinion-oriented, and many broadcasters routinely endorse candidates and invite those candidates to appear on their programs. But it is not merely the openly partisan commentary of radio talk hosts, or even editorial page endorsements that is at issue. In 2004, Sinclair Broadcasting, which owns television stations across the country, ordered its affiliates to show a documentary movie, "Stolen Honor," that many Democrats viewed as little more than a lengthy anti-Kerry commercial.<sup>28</sup> It takes neither a long stretch of imagination nor a fondness for conspiracies simply to observe that news reporters and broadcasters do have political biases, and that these may from time to time make their way into ostensibly neutral news coverage. Even mainstream television programming is not immune. Many situation comedies contain regular political references. Other programming can be accused of working more subtly—in 2005, with Hillary Clinton considered a front runner for the Democratic nomination for President and many still wondering whether Americans would support the idea of a woman president, ABC launched a program, *Commander in Chief*, with a relentlessly positive view of a woman president. As Mitt Romney, a Mormon, rose to prominence among Republican candidates for the 2008 presidential nomination, and with issues such as the definition of marriage caught up in political debate, HBO launched a series, *Big Love*, based on a family of Mormon polygamists.

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<sup>24</sup> Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1251–53 (1994). Professor Foley would go on to serve as Ohio's State Solicitor under Republican Attorney General Betty Montgomery, and is now Director of ElectionLaw@Moritz, the organizer of this symposium.

<sup>25</sup> Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1630 (1999).

<sup>26</sup> *San Juan County v. No New Gas Tax*, No. 05-2-01205-3, slip op. at 2 (Wash. Super. Ct. Oct. 26, 2005).

<sup>27</sup> See *McConnell v. FEC*, 540 U.S. 93, 283–84 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>28</sup> Bill Carter, *Broadcaster Plans to Show Parts of Film*, N.Y. TIMES, Oct. 20, 2004, at A21.

Either show could influence the 2008 campaign. Whether this was intentional, I have no way of knowing—but it would certainly be possible in the future to make intentional use of such corporate broadcast power to influence an election.

### 3. *Movies and Books*

Documentary movies, which can be easily and inexpensively distributed in DVD form or even over the world wide web, pose another problem. The 2004 election saw a number of highly partisan “documentaries” about various candidates. The most famous was Michael Moore’s *Fahrenheit 911*, but several others made appearances, including the conservative rejoinder, *Celsius 41.11*. Additionally, mainstream fictionalized movies can make references to political candidates and issues. It seems all but inconceivable that movie censorship would be tolerated under campaign finance laws, but in the summer of 2004 the FEC determined, in separate and underreported actions, that the production and advertising of both *Celsius 41.11* and another documentary, *The Rights of the People*, a pro-Second Amendment documentary by independent filmmaker David Hardy that included praise for President Bush, would violate campaign finance laws.<sup>29</sup> However, at the same time, the FEC used a procedural maneuver to avoid ruling on *Fahrenheit 911*.<sup>30</sup> It is hard to imagine that the FEC could have successfully prosecuted so prominent a film and so prominent a filmmaker as *Fahrenheit 911* and Michael Moore—and equally hard to see how that film could escape prosecution under the rulings on *Celsius 41.11* and *The Rights of the People*. Hence the procedural dodge. The question of movies will almost certainly be back in 2008.

Books, which are also typically published and distributed by large corporations, are also not covered under a literal reading of the statutory press exemption. Although historically the FEC has never attempted to censor books, there would seem to be no statutory reason why it could not. And with books with titles such as *Bush Must Go*<sup>31</sup> appearing more frequently, why shouldn’t it? It might be easy to amend the law, of course, to protect books. But then the question arises, when published by whom? Long ago, Phyllis Schlafly’s 1964 book, *A Choice, Not an Echo* was a partisan plea published by what would today be called a “vanity” press. It sold thousands

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<sup>29</sup> David T. Hardy, Op. 2004–15 (Fed. Election Comm’n June 25, 2004); Citizens United, Op. 2004–30 (Fed. Election Comm’n Sept. 10, 2004).

<sup>30</sup> Michael Moore, MUR 5467 (Fed. Election Comm’n Aug. 4, 2004).

<sup>31</sup> BILL PRESS, *BUSH MUST GO: THE TOP TEN REASONS WHY GEORGE BUSH DOESN’T DESERVE A SECOND TERM* (2004).

of copies, however, topping best seller lists nationwide.<sup>32</sup> Today, Amazon.com sells not only traditional hard cover books, but thousands of pamphlets and political tracts, including electronic publications and tapes of speeches and lectures. In an era of self-publishing, an exemption for “books” may be an exemption for anything anyone wants to print. Once anyone can publish most anything with corporate funds, what is left of campaign finance restrictions?

#### 4. *The Internet*

The Internet poses another problem for “reform,” largely due to the press exemption. In its regulations implementing McCain-Feingold, the FEC largely exempted the Internet from the law’s coverage. The principle House sponsors of McCain-Feingold, Representatives Marty Meehan and Chris Shays, sued in federal court, eventually winning a decision that ordered the FEC to develop a new rule regulating at least some Internet activity.<sup>33</sup> Although a majority of the House of Representative voted to codify the FEC’s Internet exemption into law, reformers ultimately beat back the effort.<sup>34</sup> The FEC then passed new regulations which still leave the Internet largely unregulated, though as a matter of administrative grace rather than statutory or constitutional protection.

Absent the press exemption, however, it is clear that the websites of newspapers and broadcast stations, to the extent that they cover political news or include editorial comment on candidates, would be prohibited under the law as corporate expenditures. Thus, they can operate only through an expansive interpretation of the press exemption. But the question then becomes, what of Internet-only publications, such as *Slate* and *Salon*? It is assumed that it would be simply too unpopular politically, if not a constitutional problem, to regulate such publications. The logic extends further, to popular blogs such as Glenn Reynolds’s *Instapundit* and Markos Moulitsas’s *Daily Kos*, especially as such bloggers incorporate for liability purposes, or, in a growing number of cases, to raise capital to expand their sites. But if websites are covered by the press exemption, then it becomes very difficult to regulate other corporate websites. It should be noted that a

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<sup>32</sup> Schlafly spent \$3000 to self-publish the book under the made up label, “Pere Marquette Press.” Within two months, over 600,000 copies were in circulation. RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 349 (2001).

<sup>33</sup> *Shays v. FEC*, 337 F. Supp. 2d 28, 65–71 (D.D.C. 2004), *aff’d* 414 F.3d 76 (D.C. Cir. 2005).

<sup>34</sup> Ben Pershing, *House Shelves Blog Bill After FEC Acts*, ROLL CALL, Mar. 30, 2006; Rick Klein, *Internet Campaign Exemption Defeated*, BOSTON GLOBE, Nov. 3, 2005, at A1.



corporation can always buy a newspaper or broadcast station and take advantage of the press exemption, but few do because of the cost. The Internet doesn't pose that cost problem, thus allowing easy access. To many, this is a good thing, but within the reform movement this is seen as an alarming avenue for corporate political participation.<sup>35</sup> However, at some point, government efforts to determine which websites are protected and which are not begins to look suspiciously like a government press licensing system.

Public opinion polls have long shown surprising support for licensing and regulating the press,<sup>36</sup> but nonetheless we are probably a long way away from seeing that come to pass. Certainly it is hard to take seriously any theory of the First Amendment that forthrightly calls for censorship and licensing of political speech. The point here, once again, is not to explore all facets of this difficult issue. It is instead merely to point out that McCain-Feingold, like the FECA before it, has shifted the nature of inequalities and corruption, rather than reduced them. It will have accomplished little if it cannot come to grips with all aspects of modern media—books, movies, talk radio, the Internet—and it is difficult, frankly, to see how it can come to grips with the issue under any type of meaningful First Amendment regime.

### C. *Taxpayer Financing—the Forlorn Hope*

I have recited here just a few of the many conceptual problems that the regulatory project faces. What should be noted is that none of these problems are addressed at all by the holy grail of reform, taxpayer-financed campaigns.<sup>37</sup> Straightforward subsidies to campaigns with no corresponding limits may have some salubrious effects on the electoral system. They might lead to more and better candidates; they might decrease the time officeholders spend fundraising; they might lessen the influence of large contributors. I am skeptical that this is so, or even that all of these are goals inherently worthy of pursuit. But if government financing is not accompanied

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<sup>35</sup> See, e.g., Editorial, *Cyber Loophole*, WASH. POST, Oct. 11, 2005, at A16; Editorial, *The Internet Campaign Loophole*, N.Y. TIMES, Mar. 15, 2006, at 26; Democracy 21, *Letter from Democracy 21 and Other Reform Groups Urging Members to Vote Against Bill that Would Open Internet Loophole in the Campaign Finance Laws*, Oct. 31, 2005, <http://www.democracy21.org/> (follow “Key Documents” hyperlink; then follow “Democracy 21 Letters and Reports” hyperlink, scroll to article).

<sup>36</sup> See, e.g., Richard Harwood, Op-Ed., *The Press and “The People,”* WASH. POST, Oct. 15, 1997, at A21 (discussing results of American Society of Newspaper Editors study finding majorities of seventy to ninety percent in favor of regulation of various commentary).

<sup>37</sup> I try to avoid the euphemism “public” financing. After all, campaigns are already funded by the “public,” through tens of thousands of voluntary contributions.

by other limits on contributions and independent spending, it cannot address the primary complaint of the reform community, the influence of money and the alleged inequalities and corruption it creates. If people can still give and spend, they will probably do so, with all the allegedly attendant evils. And as soon as government subsidies are combined with restrictions on giving and spending, all of the thorny issues mentioned above immediately reappear.

In summary, after thirty-plus years of heavy regulation, beginning with the 1974 amendments to the FECA, the campaign finance regulatory system lies in shambles, an utter failure, and reformers are bereft of any new ideas as to how to tackle the most difficult issues facing it. Like Napoleon invading Russia, the reformers find that no matter how much territory they “conquer,” there is still more left to conquer. The *McConnell* majority’s banal attempt at closing wisdom—“We are under no illusion that BCRA will be the last congressional statement on the matter”<sup>38</sup>—never seemed so true, or so empty of promise.

### III. CAN THE COURTS FIND AN EXIT STRATEGY?

#### A. *Three Historic Phases of Reform*

Campaign finance regulation in the United States has had three basic phases. The first was an era of *de jure laissez faire* that existed from the nation’s founding until very late in the nineteenth century, when some states began to prohibit corporate campaign giving, followed by the passage of the Tillman Act banning corporate contributions in federal campaigns in 1907. From the end of this period until passage of the 1974 amendments to the Federal Election Campaign Act, the nation operated under a *de facto laissez faire*. During this time, regulation slowly crept forward, with the passage of the Corrupt Practices Act in 1925, the Hatch Act in 1939, and the Taft-Hartley law, banning direct contributions from union treasuries, in 1947.<sup>39</sup> Nevertheless, during this time there was little effective enforcement, and corporations, unions, and individuals remained largely free to spend and contribute as they chose.<sup>40</sup> Finally, since 1974, the American body politic has functioned under a system of heavy regulation of campaign finance.

During the first of these phases, of course, there was little for the courts to do. During the second phase, the Supreme Court issued rulings that gradually accepted the notion that campaign speech (in the form of

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<sup>38</sup> *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

<sup>39</sup> The Taft-Hartley Act actually made permanent a temporary ban passed in the 1943 Smith-Connally Act.

<sup>40</sup> See BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* 21–30 (Princeton University Press 2001).

contributions and spending) could be regulated, but the Court could be said to have worked overtime to avoid facing the constitutional issues head on.<sup>41</sup> The extensive regulation of the 1974 Amendments to FECA, and the nature of plaintiff's challenge in *Buckley*, however, forced the Court to tackle the issues. *Buckley* can be seen as an effort to appease large post-Watergate legislative majorities without totally abandoning the First Amendment.<sup>42</sup> The early post-*Buckley* decisions, most notably *First National Bank of Boston v. Bellotti*,<sup>43</sup> gave *Buckley* a reasonably robust First Amendment hue.

Over time, however, the Court seemed to grow tired of defending the First Amendment, with all its messiness, and making the countless distinctions required by the *Buckley* paradigm.<sup>44</sup> The Court gradually gave way to the largely self-serving regulatory impulses of the legislature, but each retreat from a strict reading of the First Amendment merely triggered more necessary hair-splitting.<sup>45</sup> *McConnell* might be interpreted as the Court washing its hands of the matter. The results, however, have been less than stellar.

## B. *McConnell*, *WRTL*, and *Randall*

If the Court thought it was rescuing the nation from political crisis through its *McConnell* decision,<sup>46</sup> it ought to be disabused of that notion by now. McCain-Feingold certainly did not reduce either corruption or its appearance. Meanwhile, by signaling that the constitutional policeman was going to turn his back on events, *McConnell* helped launch the type of political war that the First Amendment has historically helped to avoid.<sup>47</sup> Even before the opinion was issued, Republicans in Congress claimed to rely on McCain-Feingold in issuing subpoenas to a variety of Democratic-

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<sup>41</sup> See generally *Newberry v. United States*, 256 U.S. 232 (1921); *United States v. Cong. of Indus. Org.*, 335 U.S. 106 (1948); *United States v. UAW*, 352 U.S. 567 (1957).

<sup>42</sup> See JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* 211–219 (2006).

<sup>43</sup> 435 U.S. 765 (1978) (holding that corporations have a constitutional right to spend funds in support of a ballot initiative).

<sup>44</sup> Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 382–83 (1992); see also SMITH, *supra* note 40, at 134.

<sup>45</sup> See Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places*, 2 CATO. SUP. CT. REV. 187 (2003) (tracing the trajectory of post-*Buckley* cases).

<sup>46</sup> See Bruce E. Cain, *Reasoning to Desired Outcomes: Making Sense of McConnell v. FEC*, 3 ELECTION L.J. 217 (2004).

<sup>47</sup> See Bradley A. Smith, *McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. 345, 351–52 (2004).

oriented organizations and donors.<sup>48</sup> Literally within days of the *McConnell* decision, the Republican National Committee was attempting to use the newfound regulatory freedom to attack the political spending of the President's prominent critics, through an aggressive and improbable interpretation of the law.<sup>49</sup>

Moreover, *McConnell's* hands-off approach did not even spare the Court the difficulty of deciding tough cases. Within twenty-four months two new cases were before the Court, with the dilemmas facing the Court being more prickly, not less, than those faced before. One would like to think that the Court might have approached these cases somewhat chagrined. However, this is probably not the case. The results in *Wisconsin Right to Life* and *Randall* were of a different sort than the results in *McConnell*, but this appears to be the result of a change in Court personnel, not any reflection by the remaining members of the *McConnell* majority on the fruits of their labors. Professor Briffault argues that the unanimous opinion in *WRTL* "masks a deep division," on the Court,<sup>50</sup> and this is almost certainly true. Indeed, Justice Breyer seemed annoyed that he even had to hear the case, sort of as if a B- student had interrupted an intriguing conversation in the faculty lounge.<sup>51</sup>

It bears mention that the case was heard on the last day of oral argument before Justice O'Connor left the Court in favor of Justice Alito. The Court's decision can in some ways be interpreted as an effort to avoid another 5-4 decision on the issue just before Justice Alito replaced Justice O'Connor and, possibly, shifted the Court's majority. The consensus seems to be that Justice Alito's arrival dramatically increases the odds that the Court will carve out

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<sup>48</sup> See Brian DeBose, *House Panel to Subpoena Section 527 Fund-Raisers*, WASH. TIMES, Nov. 21, 2003, at A04.

<sup>49</sup> See Glen Justice, *A New Battleground in Political Fund-Raising*, N.Y. TIMES, Dec. 11, 2003, at A38.

<sup>50</sup> Briffault, *supra* note 1, at 814.

<sup>51</sup> Transcript of Oral Argument at 10-11, *Wis. Right to Life, Inc. v. FEC*, 126 S. Ct. 2479 (2006) (No. 04-1581), 2006 WL 164632:

All of us—or almost all of us who are here—spent an entire summer reading through one of the longest sets of opinions I've ever seen from the lower courts and going through a record that they had compiled over months reflecting six years of congressional effort. And what that record showed with dozens, hundreds I think, of examples was the basis for Congress' conclusion that there's simply no way to know whether an ad like yours is a genuine issue ad or isn't. And the only way that we have a hope of stopping rich people or corporations or labor unions from simply trying to defeat candidates by writing sham ads is to have the rule that we had.

Now, you have a very good argument, but it's an argument that I heard right in that case.

as-applied exceptions to BCRA's ban on "electioneering communications." But Professor Briffault points out that this is more easily said than done. A rule that allows no as-applied exceptions seems unconstitutionally overbroad; but any effort to draw a reasonable exemption threatens to swallow the rule. The *McConnell* Court seemed to think it could solve the problem by washing its hands of it. In doing so, it overlooked the insatiable appetite of campaign finance law. There is always more speech out there, giving some people "undue" influence and thereby posing at least the threat of the appearance of corruption; and thus always attacks on speech. The First Amendment exists to set boundaries; the task cannot be avoided.

If *WRTL* demonstrated the emptiness of *McConnell*, *Randall* may be a more concrete sign that the Court has a new majority—albeit a narrow one—prepared to push back and try to reinstate some limits on the legislature. Professor Hasen sees in Justice Breyer's plurality opinion a rear-guard action to hold back an attack on *Buckley* itself.<sup>52</sup> I think this is probably correct. For one thing, Breyer may have done this trick before. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,<sup>53</sup> he wrote a narrow plurality opinion, taking an approach, not argued by counsel, of finding a campaign finance law unconstitutional while avoiding the larger question, presented by the litigants, on which he quite likely would have been on the losing side. When that larger issue again reached the Court five years later, the shift in Justice O'Connor's thinking left Justice Breyer in a narrow, 5-4 majority upholding the regulation.<sup>54</sup> And it should be noted that Justice Breyer has carefully left himself an out to overrule *Buckley* in the other direction, in favor of the constitutionality of spending limits, in some future case.<sup>55</sup> Beyond that, for reasons discussed by Professor Briffault, the

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<sup>52</sup> Hasen, *supra* note 2 at 852.

<sup>53</sup> 518 U.S. 604 (1996).

<sup>54</sup> At the time of *Colorado Republican I*, as the case is now referenced in shorthand, Justice O'Connor still appeared to be in the pro-speech camp, having dissented in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). By 2001, when the original issue returned to the Supreme Court, O'Connor had moved in the regulatory direction, and her vote was decisive in the 5-4 ruling upholding limits on coordinated spending of regulated "hard" money by political parties and candidates. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (now known colloquially as "*Colorado Republican II*")

<sup>55</sup> Justice Breyer argues that the *Buckley* precedent should stand absent "special justification," which is not found "here." *Randall v. Sorrell*, 126 S.Ct. 2479, 2424 (2006). This may merely have been an evidentiary problem in this case:

We cannot find in the respondents' claims any demonstration that circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions. The respondents have not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem.

opinion is both weak in its logic and inconsistent in its approach to the questions of expenditure limits and contribution limits, clinging slavishly to precedent in the former, and all but ignoring recent precedent such as *Shrink Missouri Government PAC* as concerns the latter.<sup>56</sup>

### C. *The Simple Problem of "Values" Based Interpretation*

#### 1. *Justice Breyer Takes a Stab*

Whatever may or may not lie behind Justice Breyer's thinking, the question remains, what to do. Can the Court come up with some type of unifying principle to prevent the wholesale degradation of speech rights, while indulging the "particular expertise" the *McConnell* majority so credulously found in the legislature?<sup>57</sup>

Justice Breyer attempts to do through his "active liberty" approach. But "active liberty" turns out to be a mushy standard, indeed:

Does the statute strike a reasonable balance between electoral speech-restricting and speech-enhancing consequences? Or does it instead impose restrictions on speech that are disproportionate when measured against their electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restriction in order to secure them?

... [C]ourts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself. That risk is present, for example, when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of incumbency to the point of insulating incumbent officeholders from effective challenge.<sup>58</sup>

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*Id.*

It is not at all fanciful that in a future case, with a new majority and a plaintiff now instructed in how to frame its argument, that "*Buckley's* critical factual assumptions" are "undermined," or that corruption—or at least the thoroughly malleable "appearance of corruption"—has dramatically increased.

*Id.* at 2488–89.

<sup>56</sup> Briffault, *supra* note 1, at 826–28.

<sup>57</sup> *McConnell v. FEC*, 540 U.S. at 137. *Cf. Smith, supra* note 47, at 349 (noting that fully one year after BCRA was signed into law, the ranking member on the House committee with campaign authority was unclear if the law had yet taken effect, and House leaders asked the Federal Election Commission for a special program to brief them on the law that they had passed).

<sup>58</sup> STEPHEN BREYER, *ACTIVE LIBERTY* 49 (2005).

Say what? There is nothing here that would actually help a judge, legislator, or citizen know what was permissible or what was not. Only Breyer's final sentence asks a more meaningful question: does the law "insulate" officeholders from effective challenge? Breyer echoes this line in *Randall*.<sup>59</sup> In short, he focuses on competition.<sup>60</sup> But the answer to this question is an empirical one that courts are ill-prepared to address.<sup>61</sup>

The problem with these and similar theories based on First Amendment "values" is that they simply: a) provide no workable guidelines under which courts, legislators, and citizens can make decisions, and b) fail to protect free speech.

On the first point, Professor Hasen notes that the *Randall* plurality opinion allows judges to "hear what they want to hear about how particular campaign contribution limits are likely to affect the competitiveness of close elections."<sup>62</sup> The fact is, what creates competition is a point of dispute hinging not only on empirical issues, but also on political outlook and philosophy. To take the particular law at issue in *Randall*, Professor Hasen notes that empirical evidence about the effects of contribution limits is somewhat mixed. It was not all that long ago that there was a near consensus among political scientists that limits harmed competition by indirectly reducing overall spending, which was considered anti-competitive.<sup>63</sup> But studies continue, and that near-consensus is now being re-evaluated.<sup>64</sup> In

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<sup>59</sup> 126 S. Ct. at 2492.

<sup>60</sup> For scholars such as Professors Pildes and Issacharoff, the creation of competition would play an even more central role in the Court's analysis. Professor Pildes praises the decision for establishing that "courts have an essential role . . . in protecting the democratic system against various structural harms insiders are capable of causing to it." Posting of Richard H. Pildes, *Today's Opinion in the Vermont Cases*, to SCOTUSBlog, [http://www.scotusblog.com/moveabletype/archives/2006/06/todays\\_opinion\\_11.html](http://www.scotusblog.com/moveabletype/archives/2006/06/todays_opinion_11.html). (June 26, 2006). Professors Pildes and Issacharoff have developed this position in Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). The roots of this approach, focused on keeping those in power from using government to lock out competition, has its roots in John Hart Ely's classic work. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harvard University Press 1980).

<sup>61</sup> Hasen, *supra* note 2, at 858.

<sup>62</sup> Hasen, *supra* note 2, at 886.

<sup>63</sup> See, e.g., Gary C. Jacobson, *Money in the 1980 and 1982 Congressional Elections*, in MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980s 38, 57 (Michael J. Malbin ed., 1984); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. POL. SCI. 334, 343 (1990); JAMES C. MILLER, *MONOPOLY POLITICS* 90-91 (Hoover Institution Press 1999); Alan F. Abramowitz, *Explaining Senate Election Outcomes*, 82 AM. POL. SCI. REV. 385 (1988).

<sup>64</sup> Hasen, *supra* note 2, at 880.

truth, it is quite possible that there is no one answer: whether a law harms or advances competition may depend on both time and place. Identical laws may lock in majorities in one jurisdiction, but not in another; a law may advance competition in a jurisdiction when passed, but over time lead to partisan lock-up. It may depend on the shifting variables, advantages and disadvantages that differing candidates and political actors bring to the table.

The Court has, perhaps, less bias in looking at this issue than a legislature, but no added competency. Justice Breyer claims his position is one of “judicial modesty,”<sup>65</sup> because it defers to the legislature (except when it doesn’t), but it’s hard to see much modesty in a standard that calls for the Court to second guess the legislature on the basis of such complex evidence and political theory. Justice Breyer suggests deferring to the legislature on matters “about which the legislature is comparatively expert, such as the extent of the campaign finance problem.”<sup>66</sup> But what does he mean by, “the campaign finance problem”? Is that, “the appearance of corruption”? If so, that is deferring not to the legislature, but to the public at large, and by definition to an incorrect public at that.<sup>67</sup> Does the Court otherwise have the expertise to serve as free-floating arbiter of these empirical questions? Probably not, given Justice Breyer’s insistence at oral argument in *McConnell* that the McCain-Feingold law would not allow George Soros to continue spending millions on politics,<sup>68</sup> or the mistaken belief, voiced by justices at oral argument in *McConnell*, that a group could simply form a PAC and start soliciting anyone for contributions,<sup>69</sup> or the mere quality of the decrepit *McConnell* opinion.

Does this mean that the Court should not consider competition? No. But it needs to think of the issue a bit differently. The importance of avoiding partisan lock-ups in the political process does not mean that each and every regulation passed by a legislature should be examined by a court for its anti-competitive effects, or even that the Court should examine in detail the effect of the overall system of regulation at any point in time. Nor does it mean that the law must help establish some minimal level of competition to be constitutional. A judge who attempts to engage in these difficult evaluations of social science will almost certainly be in over his head. Rather, the First Amendment relevance of competition is that there will be a general tendency,

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<sup>65</sup> BREYER, *supra* note 58, at 49.

<sup>66</sup> *Id.*

<sup>67</sup> If the public were correct, of course, then we would have real corruption, and its mere “appearance” would not need to be advanced in defense of the laws.

<sup>68</sup> Transcript of Oral Argument at 18, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-1674.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1674.pdf).

<sup>69</sup> *Id.* at 117, 141–42.



over time, to use regulation to insulate the “ins” from challenge by the “outs.” Those who hold power will have a tendency—not manifest in every action, or at every moment, but a general tendency congruent with human nature—to allow the campaign finance system to remain at rest, when that is to their advantage, and to change the regulatory system when that is to their advantage.<sup>70</sup> Thus, the First Amendment imposes a wise restraint generally on government power to manipulate the system, and an interpretation faithful to the Constitution will note this problem as one more reason to be skeptical about laws infringing on speech. It is, shall we say, another heavy burden that such a law must bear on constitutional review. A judge who simply defers to Congress is abandoning his duty—those in Congress cannot be generally entrusted with the task of regulating political speech.

## 2. Professor Hasen: Coherency Through Transparency

Professor Hasen correctly notes that asking courts to engage in a battle of experts is unlikely to develop coherent results. Professor Hasen’s solution is to call for “careful balancing.”<sup>71</sup> This was impossible in *Randall*, he argues, because of the Supreme Court’s consistent refusal, in accordance with *Buckley*, to consider the promotion of equality as a legitimate rationale for silencing some speech.<sup>72</sup> I think this is correct. Indeed, it is fair to say that *Randall v. Sorrell* went to the Supreme Court on a record that could only be called a fraud, with the state making preposterous claims about the corrupt state of politics in Vermont and the time legislators spent fundraising.<sup>73</sup> For years, *Buckley* has required reformers, who favor reform for egalitarian

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<sup>70</sup> SAMPLES, *supra* note 42, 189–92.

<sup>71</sup> Hasen, *supra* note 2, at 886.

<sup>72</sup> *Id.*

<sup>73</sup> See Posting of Bradley A. Smith, *Fooling the Court*, to *Election Law @ Moritz* blog, <http://moritzlaw.osu.edu/electionlaw/etable06/060301-smith01.php> (Mar. 1, 2006) (noting in regards to the corruption argument that “none of those lawmakers [claiming that contributions were corrupting the legislature] have resigned their positions; none have pointed to any specific acts of ‘corruption,’” and that in campaigns these same officeholders “have and will continue to vociferously deny that they are corrupt or failing in their duties to represent their constituents effectively,” and that at oral argument Vermont’s Attorney General admitted that he had not prosecuted any politician for corruption; and further noting in regards to the “time saving” argument that based on historic spending patterns in Vermont, a typical member of Vermont’s part-time legislature, “who presumably has other income off which to live, could finance his campaign and never spend a moment fundraising by saving about one-quarter of his gross legislative salary”); see also Transcript of Oral Argument at 26–29, *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (No. 04-1528), [http://www.supremecourtus.gov/oral-arguments/argument\\_transcripts/04-1528.pdf](http://www.supremecourtus.gov/oral-arguments/argument_transcripts/04-1528.pdf) (questioning of Attorney General Sorrell by Chief Justice Roberts and Justice Scalia).

reasons, to couch their legal arguments in terms of corruption. We should note that in *Austin*, and again in *McConnell*, the Court bit—one reason why both opinions are so unsatisfactory, regardless of their holdings.

Professor Hasen argues that if the corruption façade were abandoned, and the equality rationale faced squarely, from this “transparency” and “careful balancing” a coherent doctrine would emerge. But why should it? Certainly, “careful balancing” is better than careless balancing, but Professor Hasen’s standard is no more likely, I submit, to lead to coherency than the current system. Professor Hasen states: “[C]ourts should engage in a careful and honest balancing that gives considerable deference to the value judgments made by states in enacting campaign finance laws, but then use close scrutiny to make sure the measure is carefully drawn to meet those goals.”<sup>74</sup> If the social science evidence makes it “plausible” that the statute “promotes some version of political equality,” then the Court would have to “consider the costs of such laws to individuals or groups.”<sup>75</sup>

[T]he task of social scientists in this second stage is to examine the change in campaign finance laws *as a whole* and, considering the hydraulic effect of campaign money and the adaptation phenomenon, ask whether significant election-related activity is likely to be curtailed by the new law. Social scientists can then point out the likely costs of such a system and then judges can make an independent judgment in balancing the state’s interests against potential costs.<sup>76</sup>

Hasen argues that this approach has “political scientists asking easier-to-answer questions.”<sup>77</sup> What are those questions?

Will the law open or close doors of election-related communication? Considering the expense of election-related communications in the jurisdiction, is vibrant political debate likely to occur under the new system? How does the new system compare to the old system in terms of the expected vibrancy of political debate?<sup>78</sup>

I would suggest that if we thought it was hard to determine the effects of contribution limits on competition, the questions Professor Hasen puts forth are not easier, but far more difficult to answer than the question of the effect of contribution limits on competition. If there are debates now over the

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<sup>74</sup> Hasen, *supra* note 2, at 853.

<sup>75</sup> *Id.* at 888.

<sup>76</sup> *Id.* (emphasis in original).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

proper measure of competition,<sup>79</sup> wait until we start discussing what amounts to “vibrant debate.” It is, of course, a major source of contention whether or not a law fosters debate. And it has long been a fundamental part of the “drowning out” argument popular in “reform” circles that some doors of communication must of necessity be closed in order to open others.<sup>80</sup> Indeed what might be termed Professor Hasen’s own “breakthrough” article, published a decade ago, adopted a version of this paradigm in calling for strict restrictions on privately funded speech in order to promote equality.<sup>81</sup> This is less an empirical issue than a normative issue of constitutional interpretation. It may be that Professor Hasen means for this test to allow essentially any regulation that one can realistically envision to pass constitutional muster—the example Professor Hasen gives of a law that would fail the test is an implausible law prohibiting all election-related advertising.<sup>82</sup> But if so, this is just another recycling of the view that the First Amendment should not stand in the way of efforts to legislate equality. If not, it is a test that provides no more guidance, I think, than that of Justice Breyer, and there is little reason to think that there will be some social science consensus on these issues any time soon. Nor is there reason to think that this will improve the Court’s “honesty.” That is, if litigants are willing to call an appeal to equality an appeal to corruption in order to improve their odds of winning, as in *Austin* and *Randall*, and if the Court might bite, as in *Austin*, why think that the same gamesmanship—and judicial error—won’t be perpetuated in dealing with complex issues of political science?

#### *D. An Alternative Approach: The Constitution as a Means to Various Ends*

This leads me finally to my second point—theories based on “values” simply fail to protect free speech. Justice Breyer unwittingly but nicely sums up the problem: “democratic objectives . . . lie on both sides of the equation.”<sup>83</sup> This will almost always be the case. It is, I submit, all but impossible to read any clause of the Constitution, no matter how specific, without finding constitutional values “on both sides.” Thus, if we look

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<sup>79</sup> See Nathaniel Persily, *The Place of Competition in American Election Law*, in *THE MARKETPLACE OF DEMOCRACY* (Michael McDonald and John Samples eds., 2006).

<sup>80</sup> See, e.g., CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 209 (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1425 (1986).

<sup>81</sup> Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 *CAL. L. REV.* 1 (1996).

<sup>82</sup> Hasen, *supra* note 2, at 888.

<sup>83</sup> BREYER, *supra* note 58, at 48; see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

merely to values, Court precedent will indeed keep swinging with transient Court majorities. But the Constitution is not just about values—it is primarily about means to achieving values.

The First Amendment does not provide that Congress shall pass such laws as are necessary to promote informed debate, or assure vibrant political competition, or promote political equality. It does not say that Congress shall have the power to pass such laws. It does not even say that Congress shall not pass laws that infringe on these goals. Rather, it says that “Congress shall make no law abridging the freedom of speech.” We need not get into sophomoric quibbles over the meaning of “no law”—yes, we all grasp that you can’t yell “fire” in a crowded theatre—to understand that the means chosen to fulfill the values and goals behind the Constitution was to prohibit government regulation of speech.

I believe that the values behind the Constitution generally and the First Amendment specifically do include equality, competition, and even some version of “active liberty.” It should also be obvious that the intended means to fulfill these goals was through an absence of legislative regulation. And I believe that one reason for this approach was a recognition that the various “values” approaches urged by Justice Breyer and others are roads to nowhere—better to simply keep the government out of the game, to the extent possible. Justice Breyer argues that there should not be a “strong presumption against constitutionality” of speech restricting measures. But of course there should. That is exactly the presumption that ought to exist. I can think of no more obvious interpretation of the First Amendment, and it seems to me that thirty years of trying to find some other interpretation just hasn’t worked that well.

All that said, we are left at *Randall*. It is a good holding, as far as it goes. But the plurality opinion in *Randall* is probably unworkable over time, in large part for reasons Professor Hasen discusses.<sup>84</sup> What approach can take its place?

#### IV. A STRATEGY FOR A MODERATELY PRO-SPEECH COURT

##### A. *The Court and the Rule*

In thinking about where the Court might go from here, we must first recognize that there is a good chance that the Court’s ideological balance on the question of campaign finance may be stable for another decade or more. Although occasional rumors surface about the health of Justices Stevens and Ginsberg, there is no particular reason to think that either will announce retirement within the next year. If it is not already too late for a politically

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<sup>84</sup> See Hasen, *supra* note 2.

damaged President Bush to make any appointment, let alone a conservative appointment, to the Court, it will certainly be so by the dawn of 2008. After that, who knows? Although there has been some rethinking of the issue in Democratic circles,<sup>85</sup> Democratic party orthodoxy still holds that limits are constitutional and must be in place, so that a Democratic President after 2008 is likely to nominate individuals who would uphold most laws. Meanwhile, the current Republican front-runner, Senator John McCain, is the one candidate who would likely make support for *McConnell* a litmus test for any nominee. The other two GOP front-runners, Rudy Giuliani and Mitt Romney, have said little on the subject. But if it is relatively unlikely that the pro-speech side will gain votes on the Court, it is not terribly likely that it will lose votes either. The oldest of the five member pro-speech majority are Justices Kennedy and Scalia, both of whom are just 70 years old and in good health. There is every possibility that these five justices could have another ten to fifteen years together on the bench.

Of course, five justices make a majority. But even assuming that there is a five justice majority that recognizes that the Court's jurisprudence has strayed far from the Constitution, while doing nothing to foster Justice Breyer's "active liberty," would this majority be prepared to overrule *Buckley* and declare all limits out of bounds? I suspect not.

Justices Thomas and Scalia have clearly staked out that ground. But Justice Kennedy, while consistently emphasizing a robust First Amendment, has never gone so far as to join them in stating that he would overrule *Buckley's* holding on contribution limits. We should note that this is characteristic of Justice Kennedy—he is a justice who prefers never to say "never,"<sup>86</sup> and there is much wisdom in such an approach. To hold that all contribution limits are constitutionally prohibited would be to allow Bill Gates to contribute \$1 billion to a candidate. This has never struck me as a particularly plausible or even alarming event, but one hears it a lot and the possibility seems to viscerally upset many Americans. One suspects that Justice Kennedy would balk at ruling out regulation of such sums, if only out of concern for a backlash that would make the holding untenable. Similarly, Justices Roberts and Alito seem to be cautious men by disposition, as their opinions in *WRTL* and *Randall* may indicate. One suspects that, given a clean slate, both might join Thomas and Scalia; but writing on a slate filled with *Buckley* and its progeny, and 100 years of the Tillman Act, both may feel

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<sup>85</sup> See Robert Bauer, *More Soft Money Hard Law*, <http://www.moresoftmoneyhardlaw.com> (last visited Feb. 8, 2007). Mr. Bauer is an attorney who has represented a major Democratic presidential candidate and both the Democratic National Congressional Committee and the Democratic National Senatorial Committee.

<sup>86</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006).

constrained, especially if overruling the *Buckley* precedents would come on a 5-4 vote. Having passed on using *Randall* as a vehicle to overrule *Buckley*, it will be still tougher to take that step in a future case.

That leads us back to *Buckley*. Few Supreme Court decisions have been more maligned than *Buckley*.<sup>87</sup> But the decision is not without considerable merit, at least as interpreted for its first two decades, before what Professor Hasen calls the “new deference quartet.”<sup>88</sup>

As much as *Buckley*'s distinction between contributions and expenditures has been criticized, it is not wholly without merit. Large contributions are plausibly more connected to corruption or its appearance than expenditures.<sup>89</sup> Limiting contributions to a particular candidate may involve less interference with speech than limiting expenditures, at least so long as contributions for independent expenditures are unlimited, thereby providing an alternative speech outlet.

*Buckley* struck a balance that was displeasing to most observers, particularly those who seek to muzzle more political speech. But it allowed political discussion to continue relatively unfettered, within a paradigm that, if not altogether coherent, was remarkably stable. Direct contributions to candidates—the element of campaign funding most likely to create, in the public mind, an appearance of corruption, and perhaps most likely to lead to actual corruption, however slim the possibility—could be regulated. So could explicit advocacy of a candidate's election or defeat, also speech more likely to foster these concerns, while meeting a clear standard for speakers wishing to avoid regulation. Other speech remained outside of the government's grasp, through the express advocacy rule. Rarely has the Court uttered a more fatuously incorrect statement than its description, in *McConnell*, of the express advocacy rule as “functionally meaningless.”<sup>90</sup> The rule was perhaps the most meaningful part of *Buckley*, which is why it was at the center of the argument in *McConnell*. It was the line that marked the difference between lots of speech, with little regulation, and lots of regulation, with little protected speech. To say that the line was “functionally meaningless” was to ignore that, for speakers, it was a clearly demarcated boundary that protected most core political speech from regulation, and gave clear notice as to what they could and could not say or do without facing government restriction.

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<sup>87</sup> Cass Sunstein is only one of the more prominent scholars to directly compare *Buckley* to *Lochner v. New York*, 198 U.S. 45 (1905), a case which, in a law faculty lounge, ranks somewhere between the Great Depression and the McCarthy hearings as the blackest moment in twentieth-century America. See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397 (1994). *Buckley* and *Lochner* appear on many lists of the worst Supreme Court decisions ever.

<sup>88</sup> Hasen, *supra* note 2, at 850.

<sup>89</sup> See Lowenstein, *supra* note 44.

<sup>90</sup> 540 U.S. 93, 193 (2003).

Plus, it was an all but impenetrable barrier to any effort to abuse the law to silence criticism, or to manipulate it for partisan gain.

First Amendment doctrine, and indeed the Constitution generally, are full of lines that may greatly restrict the ability of the government to regulate but exist to protect constitutional rights. “Express advocacy” is no more “functionally meaningless” than “fighting words”<sup>91</sup> or “clear and present danger”<sup>92</sup> are in denying the state leeway to prevent public disorder. Both doctrines exist, but have been interpreted so as to preclude most prosecutions. Express advocacy is no more “functionally meaningless” than the *Miranda* rule is when it excludes from consideration what are obviously voluntary confessions.<sup>93</sup> To suggest that because the rule is “functionally meaningless,” speech on the once protected side of the line can now be regulated is a non-sequitur: the line is only “functionally meaningless” once the Court has decided that political speech on the other side of the line is not worthy of much protection under the First Amendment.

Thanks largely to the meaningful express advocacy standard, by the late 1990s the *Buckley* paradigm was widely understood. It allowed the government to limit that which most viscerally offended many segments of the public—large contributions directly to candidates—and which most plausibly could result in actual corruption. It allowed most other speech to carry on unregulated; and it allowed governments to experiment with taxpayer financing systems to attempt to address equality concerns.<sup>94</sup>

Although the “new deference quartet,” and in particular the revisionist interpretation given to *Buckley* in *McConnell*, dramatically altered the holdings of *Buckley*, the *McConnell* majority maintained the fiction that it was being true to *Buckley*. As such, then, *Buckley* remains good law, and so can be a viable starting point for a Court majority interested in taking the First Amendment seriously, yet respectful enough of precedent and public opinion at the margin so as not to throw out all campaign finance regulation. How might this take place?

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<sup>91</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). Since *Terminiello v. Chicago*, 337 U.S. 1 (1949), winning a prosecution for “fighting words” has been extremely difficult. See, e.g., *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>92</sup> See *Dennis v. United States*, 341 U.S. 494 (1951). Since then, winning a conviction for “clear and present danger” has been exceedingly difficult. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>93</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>94</sup> That such efforts have not found much success in actually eliminating “undue” influence is another matter. See, e.g., Robert J. Franciosi, *Elections in Arizona, Clean and Unclean*, in *WELFARE FOR POLITICIANS: TAXPAYER FINANCING OF CAMPAIGNS* 49, 64–68 (John Samples ed., 2005); U.S. GENERAL ACCOUNTING OFFICE REPORT, *CAMPAIGN FINANCE REFORM: EARLY EXPERIENCE OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES* 44–50 (2003).

## B. *Creating a Pro-Speech Regime in a Post-Randall World*

### 1. *Extinguishing Spending Limits*

The most obvious result of *Randall* is that expenditure limits are a dead letter. In this regard, a First Amendment Court's heavy lifting is done. There was an audacious quality to the challenge in *Randall*—to the extent that Vermont argued that lawmakers had to spend too much time fundraising, it was a problem of the state's own making, through low contribution limits—and in any case it was patently false.<sup>95</sup> Having infringed on speech rights, the State then argued that its infringements provided a compelling state interest for further infringement. It is unlikely that there will be many more legislative efforts to impose spending limits. There may be some clean-up litigation in the lower courts, however, and it would be nice if the justices found a vehicle to make clear that the state may not use its encroachment on First Amendment rights as the rationale for still further encroachment.

### 2. *Placing Upward Pressure on Contribution Limits*

The \$1,000 contribution limit passed in 1974 and upheld in *Buckley*, would have been, in inflation adjusted dollars, \$4,089 in 2006.<sup>96</sup> In the years since *Buckley*, several states have imposed limits considerably lower than \$1,000. Colorado, for example, limits individual contributions in the governor's race to \$500, or what would have been the equivalent of less than \$125 in 1974.<sup>97</sup> Whether the Court would have upheld a \$125 limit in 1974 is questionable. In the interim, the cost of campaigning has grown considerably faster than the general rate of inflation. Even the individual federal limit, doubled and indexed for inflation in 2002, has barely half the buying power of a maximum contribution in 1974. Other federal limits, such as those on PAC giving, have not been raised at all for inflation. Thus, there is ample room to argue that many current state and even federal limits no longer deserve deference under *Buckley*. While *Shrink Missouri Government PAC* looked like the death knell for any judicial policing of contribution limits, *Randall* has returned that tool to the judiciary. It does so in a most clumsy fashion, to be sure, but it does so nonetheless. But how will that play out?

It is doubtful whether or not the "competition" test penned by Justice Breyer can hold. First, as Professor Briffault points out, the *Randall* test is

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<sup>95</sup> See Smith, *supra* note 73.

<sup>96</sup> BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX, <http://www.bls.gov/cpi/#data> (follow "inflation calculator" hyperlink) (last visited Feb. 8, 2007).

<sup>97</sup> COLO. CONST. art. XXVIII, § 3(1)(a).



almost totally disconnected from *Buckley*.<sup>98</sup> Breyer's plurality opinion in *Randall* is concerned with competition; *Buckley* was concerned with free speech and preventing corruption.<sup>99</sup> Furthermore, as Professor Briffault again demonstrates, the *Randall* test is absurdly complex and provides almost no guidance to legislators or lower courts called on to determine when a contribution is so low as to pass the line from being an expression of "active liberty" to being an infringement on liberty.<sup>100</sup> Thus, while the *Randall* plurality returns some measure of meaning to *Buckley*'s "closely drawn" test for contributions, it does so in a way that will have to be further refined. That refinement could come in further efforts to define and micromanage political competition, but it could equally come from a return to *Buckley*'s core concern: free speech—which, after all, has the advantage of explicitly appearing in the Constitution. *Randall* does not reject *Buckley*'s core concern—it just ignores it, in the same way it ignores *Shrink Missouri Government PAC*'s lazy standard of review. The difference is that *Shrink Missouri Government PAC* is totally ignored and left in oblivion, whereas *Buckley* is reaffirmed. Once it is reaffirmed that the "closely drawn" standard has some teeth to it, it is easy to apply that standard to strike down laws for reasons other than those given in *Randall*. Therefore, if the Supreme Court and lower court judges link *Buckley*'s original rationale to *Randall*'s reinvigorated scrutiny, they will have a powerful tool with which to work.

Yet, even using the plurality opinion in *Randall* could place substantial upward pressure on limits. For example, Professors Briffault and Hasen both argue that Vermont's limits may not have been so low as the Court seemed to think, at least relative to the size and cost of campaigning in the state.<sup>101</sup> But with the limits struck down, this argument now runs the other way—state and federal limits which have not come close to accounting even for general price inflation since 1974 would all seem up for grabs. If a \$200 limit is unconstitutional in a Vermont legislative district of 4000 people, can a \$2100 limit be justified in a federal House district comprising approximately 700,000 people, or in a Senate race in New York or California?

The *McConnell* majority opened its opinion with a quote from the late nineteenth century bureaucrat/statesman Elihu Root, stating:

More than a century ago the "sober-minded Elihu Root" advocated legislation that would prohibit political contributions by corporations in order to prevent "the great aggregations of wealth, from using their corporate funds, directly or indirectly," to elect legislators who would

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<sup>98</sup> Briffault, *supra* note 1, at Part III.

<sup>99</sup> *Id.* at 755.

<sup>100</sup> *Id.* at 753.

<sup>101</sup> *Id.*; Hasen, *supra* note 2, at 865.

“vote for their protection and the advancement of their interests as against those of the public.”<sup>102</sup>

Had the Court read a bit further in the speech, however, it would have found that Root was specifically concerned with contributions of “\$50,000 or \$100,000.”<sup>103</sup> Even the lower of those two amounts, adjusted for inflation, would substantially exceed \$1 million in 2006. To the extent Justice Kennedy, and possibly Chief Justice Roberts and Justice Alito, are skeptical of contribution limits, they need not overrule *Buckley* on the point to substantially strengthen the First Amendment. There is ample room to push limits dramatically upwards, while remaining faithful to the doctrine of *Randall*, and, to the extent the *McConnell* Court chose Elihu Root as its spokesman, the rhetoric of *McConnell*.

### 3. Asserting Bright Line Rules

As noted, one great advantage of *Buckley* was that it did provide a bright line rule beyond which speech could continue largely unfettered. BCRA attempted to work within this framework. Its two main provisions banned national political parties from accepting unregulated money,<sup>104</sup> and prohibited organizations from using corporate or union treasuries to run broadcast ads mentioning a federal candidate within thirty days of a primary or sixty days of a general election.<sup>105</sup> Both provisions operated with the need for a bright line rule that avoided the vagueness problems in mind. *McConnell* upheld both provisions, the former against an equal protection challenge,<sup>106</sup> the latter against an overbreadth challenge.<sup>107</sup> It also held that express advocacy was not the only statutory construction that could meet the constitutional vagueness problem.<sup>108</sup> *McConnell* did not hold that vagueness was no longer an issue, or that previously rejected standards were suddenly constitutional. Unfortunately, some have interpreted *McConnell* as abolishing, or at least substantially weakening, the *Buckley* rule on vagueness.<sup>109</sup> The Court should reiterate that vagueness concerns remain

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<sup>102</sup> *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (quoting ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143 (R. Bacon & J. Scott eds., 1916)).

<sup>103</sup> ROOT, *supra* note 102, at 144.

<sup>104</sup> 2 U.S.C. § 441i (2000).

<sup>105</sup> 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa–bb) and 2 U.S.C. § 441b (2000).

<sup>106</sup> 540 U.S. at 187–88.

<sup>107</sup> *Id.* at 207.

<sup>108</sup> *Id.*

<sup>109</sup> See Op. FEC 2003-37 (2004), available at <http://ao.nictusa.com/ao/no/030037.html>; Edward B. Foley and Donald Tobin, *The New*

paramount under the *Buckley/McConnell* scheme. It can then re-evaluate *McConnell*'s ruling on overbreadth in the electioneering communications provisions of McCain-Feingold.

#### 4. Re-Evaluating "Electioneering Communications:" WRTL and McConnell

Reviewing *McConnell*'s ruling on electioneering communications is one obvious way for a pro-First Amendment Court to repair some of the damage of *McConnell*. The vehicle could be *WRTL*, already moving back through the courts.<sup>110</sup> Even if the Supreme Court were to decline to take the case, it is only a matter of time before some grassroots lobbying case makes its way to the Court.

It seems highly unlikely that a pro-First Amendment majority would refuse to recognize any as-applied exception to the electioneering communications ban of BCRA.<sup>111</sup> But the type of narrow category of exceptions that Professor Briffault endorses<sup>112</sup> seems so narrow as to be, dare we say it, "functionally meaningless" in the vast majority of cases. As Professor Briffault suggests, however, any meaningful exception could lead to an explosion of litigation.<sup>113</sup> One option would be for the Court to simply agree, as a lower court has now done, that the proposed actions of Wisconsin Right to Life are protected by the Constitution.<sup>114</sup> The Court might even do so while adopting a complex test of factors intended to ensure that the exemption promoted "active liberty." This might create a good deal of lower court litigation, but the Court may decide it is worth letting that litigation play out before trying to impose a uniform standard. This course would likely return to constitutionally protected status a significant swath of political speech, without overruling *McConnell*.

A bolder Court, however, might choose to overrule *McConnell* on the question of "electioneering communications." One of the most frivolous portions of *McConnell* is its discussion of the overbreadth issue as it pertains to "electioneering communications."<sup>115</sup> The opinion is cursory and weak, and it would be perfectly acceptable for the Court to recognize, having observed

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*Loophole?: 527s, Political Committees, and McCain-Feingold*, BNA MONEY & POL. REP., Jan. 7, 2004, available at <http://www.bna.com/moneyandpolitics/loophole.htm>

<sup>110</sup> See *Wis. Right to Life, Inc v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006).

<sup>111</sup> See Briffault, *supra* note 1, at 817–22.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 822.

<sup>114</sup> See *Wis. Right to Life v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006).

<sup>115</sup> See Briffault, *supra* note 1, at 844; James L. Gibson, *BCRA's Assault on the First Amendment: The Death of the Overbreadth Doctrine?*, 3 ELECTION L.J. 245 (2004).

the law in practice, that the decision is wrong on the question: there are “a significant number of situations where a law could be applied to prohibit constitutionally protected speech,”<sup>116</sup> and there is “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.”<sup>117</sup> By the most conservative estimate, accepting the fundamental notion that independent “campaign ads” can be subjected to blanket regulation close to an election, the *McConnell* decision still served to ban some thirty to sixty million group-to-citizen, constitutionally protected issue contacts.<sup>118</sup>

If thirty million contacts isn’t enough, there is ample evidence that neither the lower courts nor the Supreme Court understood the sweep of BCRA’s “electioneering communications” provisions. In a forthcoming article, Jason Owen and I demonstrate that the Court’s analysis dramatically understated the number of ads and the amount of time subject to “electioneering communications” limitations, at least as applied to presidential elections.<sup>119</sup> Both the Supreme Court and the district court analyzed the case under the presumption that BCRA affected ads only ninety days out of each election year.<sup>120</sup> We demonstrate that due to the effect of national conventions, in presidential election years the ban is automatically extended nationwide in excess of 120 days.<sup>121</sup> Further, due to market overlap, in many urban markets, the ban extends in excess of 200 days in the election year.<sup>122</sup> The Court should overrule this portion of *McConnell* on the basis of a better understanding of the law, plus the experience of two election cycles, or create a substantial constitutional exception to the “electioneering communications” provisions of BCRA. This would not be a perfect solution, but it would go a long way to freeing up the political system.

### 5. *Overruling* Austin v. Michigan State Chamber of Commerce

*Austin v. Michigan State Chamber of Commerce* is the case that stands most out of sync with the Supreme Court’s post-*Buckley* jurisprudence, at

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<sup>116</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 945 (3d ed. 2005).

<sup>117</sup> *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984); *see also* *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

<sup>118</sup> Gibson, *supra* note 115, at 247.

<sup>119</sup> Bradley A. Smith & Jason Robert Owen, *Boundary-Based Restrictions in Boundless Broadcast Media Markets*, 18 STAN. L. & POL’Y REV. (forthcoming 2007).

<sup>120</sup> *See id.* (noting that of 12 opinions in the *McConnell* litigation—four in the District Court and eight in the Supreme Court—not one mentioned any time frame other than 90 days).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

least until *McConnell* was decided in 2003. The *McConnell* Court nevertheless mustered four votes to overrule *Austin*—had Justice O’Connor, a dissenter in *Austin*, not switched her vote, the case would already be history. *Austin* stands out in the Court’s pre-*McConnell* jurisprudence because the Court in *Austin* abandoned the narrow definition of “quid pro quo” corruption that marked the Court’s prior decisions, in favor of a loose definition that might better be called “pollution.”

The *Austin* Court faced a statute that prohibited a non-profit corporation from making direct, independent, express advocacy expenditures from its corporate treasury. Because the expenditures were independent, they did not pose the same danger of corruption as contributions. The Court, however, announced that it was addressing “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>123</sup>

As others have pointed out, this is not the type of quid pro quo corruption present in *Buckley*—indeed it is not “corruption” at all, as the term is generally used to imply an ethical lapse, abuse, or use of public office for personal gain.<sup>124</sup> In fact, the Court simply swallowed an equality argument in the guise of corruption.<sup>125</sup> One reason for this was almost certainly the longstanding ban on corporate spending at the federal level. But there is little reason to assume that a \$2,100 contribution is more corrupting when it comes from a corporation than when it comes from an individual. A decision to that effect would harmonize the law with the *Buckley* precedent so strongly reaffirmed in *Randall*.

Overruling *Austin* would not be dramatic in its immediate political effect. With *Buckley* intact, legislatures would still be free to limit the size of corporate contributions, in order to prevent “corruption.” At the federal level, and in states that limit corporations to participating through PACs, the many corporations that already maintain PACs would be largely unaffected, except that they could contribute those amounts directly from their treasuries rather than absorbing the administrative cost of maintaining a PAC. Since small corporations are less likely than large corporations to maintain a PAC, overruling *Austin* would even have something of an egalitarian effect, strengthening small business vis-à-vis big business and organized labor. And

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<sup>123</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>124</sup> See e.g., Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley’s First Amendment*, 3 ELECTION L.J. 127, 129 (2004).

<sup>125</sup> See, e.g., Hasen, *supra* note 2, at 854.

overruling *Austin* would have no direct effect in state races in over thirty states that already allow some level of direct corporate contributions.<sup>126</sup>

A practical but not insubstantial benefit of overruling *Austin* would be to rationalize enforcement. At the federal level, and in states with bans on expenditures from corporate treasuries, the first dollar of general corporate expenditures is illegal. Thus, corporations can endorse a candidate, but not spend on a press release. The use of a single corporate postage stamp, or requesting a secretary to print out a letter, is a violation. Overruling *Austin* would take countless de minimis violations out of the system, reducing opportunities for politically motivated complaints in the process.

Overruling *Austin* would nevertheless draw tremendous opposition, but that opposition would in effect demonstrate the correctness, under the *Buckley* framework, of overruling *Austin*. The opposition to overruling *Austin* would focus almost entirely on the egalitarian concerns—the unconventional definition of “corruption” as being anything that upsets some preconceived notion of relative influence—rather than actual corruption as generally conceived—that is, trading political favors for financial or other gain. From a pro-speech side, overruling *Austin* would reaffirm a core holding of *Buckley*, that only corruption, and not equality concerns justify the state’s suppression of political speech.

Neither Chief Justice Roberts nor Justices Kennedy and Alito are judges inclined to readily overrule precedent. *Austin*, however, is the odd case out in the post-*Buckley* jurisprudence, at least until *McConnell*, and overruling the case would not be a radical move.

## 6. Limiting Disclosure

Disclosure has always been the favorite son of campaign finance regulation, with all but the most deregulatory Justices favoring mandatory disclosure of personal information about campaign donors.<sup>127</sup> Disclosure is generally viewed as a minimal intrusion on speech. However, the Court’s jurisprudence on disclosure of campaign contributors is out of step with its broader jurisprudence on anonymous speech, which is normally protected,<sup>128</sup>

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<sup>126</sup> See EDWARD D. FEIGENBAUM & JAMES A. PALMER, CAMPAIGN FINANCE LAW 2002: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS (2002), available at <http://www.fec.gov/pubrec/cfl/cf102/cf1102charts.doc>.

<sup>127</sup> See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting). The notable exception has been former Chief Justice Warren Burger in *Buckley*, who dissented from the Court’s holding on compelled disclosure of small contributions. *Buckley v. Valeo*, 424 U.S. 1, 235–41 (1976) (Burger, C.J., concurring in part and dissenting in part).

<sup>128</sup> See *McIntyre*, 514 U.S. at 334 (holding unconstitutional an Ohio law mandating disclosure for low-level, individual expenditures regarding a ballot initiative);

and disclosure does not come without a price in the invasion of privacy.<sup>129</sup> At the federal level, disclosure thresholds have not been raised since 1979, effectively meaning that contributions that are less and less likely to pose any danger of corruption are subject to compelled disclosure.

Moreover, the intrusion posed by disclosure has grown. Whereas disclosure in the 1970s meant that one's name appeared on rolls of microfiche at the central depository at the FEC, in the twenty-first century, it means that one's name and political inclinations are immediately available to all members of the public, at virtually no cost, over the Internet. Thus, the state's interest in disclosure at the current thresholds has declined, and the invasion of privacy of the citizenry has increased.

Whether a majority can be cobbled together to limit the intrusions of mandatory disclosure is questionable. Justice Scalia, one of the five conservatives, dissented in *McIntyre v. Ohio Elections Commission*.<sup>130</sup> On the other hand, all four Justices now composing the pro-regulatory side of the Court joined the *McIntyre* majority, as did Justices Thomas and Kennedy.<sup>131</sup> The views of Justices Roberts and Alito are unknown on the issue, but it may be possible to cobble together a majority for broader protections of small donors.

### 7. Reining in "Voluntary" Taxpayer Financing Systems

Finally, a pro-speech Court operating within the *Buckley* framework might work to limit coercion within government financing plans. *Buckley* held that the state could not force candidates to participate in a tax funded campaign system, nor prohibit them from raising any private funds. At the same time, it allowed the state to impose conditions, including spending limitations, on campaigns as part of voluntary participation in a tax financed campaign system.<sup>132</sup> In recent years, many states have passed tax financing schemes that increasingly seek to rig the game against any candidate who opts out. For example, Kentucky's law allows a participating candidate to raise funds over and above the voluntary spending cap—which are then matched at a two for one rate—if a participating candidate's non-

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Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150 (2002) (striking down a ban on anonymous solicitation); Talley v. California, 362 U.S. 60 (1960) (striking down a California law prohibiting anonymous leafletting regarding a commercial dispute); NAACP v. Alabama, 357 U.S. 449 (1958) (striking down a state law mandating disclosure of members).

<sup>129</sup> See generally William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1 (2003).

<sup>130</sup> *McIntyre*, 514 U.S. at 371.

<sup>131</sup> *Id.* at 335.

<sup>132</sup> *Buckley*, 424 U.S. at 90–108.

participating opponent exceeds the cap.<sup>133</sup> A non-participating candidate is cornered. If he believes that the voluntary limit is too low for him to gain the necessary name recognition to win—a common situation for challengers—and so declines to participate, his opponent is no longer held to his bargain, and in fact contributions to that opponent are trebled in value thanks to government largesse—all but ensuring that the non-participating candidate cannot compete.<sup>134</sup> Arizona's law provides that if an independent expenditure is made against a participating candidate, or for his opponent, the candidate gets an equal disbursement from the state fund.<sup>135</sup> This has the effect of forcing a citizen who wants to help one candidate to aid his opponent, and it also means that a candidate can be forced into a deal he did not bargain for—independent expenditures which he cannot control are used to change the terms of his bargain with the state.

In *Buckley*, Chief Justice Burger would have held that government funding is an unconstitutional intrusion into an inherently private process.<sup>136</sup> Such a holding does not, I think, appear in the cards. But a moderate pro-speech Court could and should require that “voluntary” tax financing systems be truly voluntary and not coercive.

## V. CONCLUSION

*WRTL* and *Randall* have shown us enough to know that the two new members of the Roberts Court, Justice Alito and the Chief Justice himself, are skeptical of campaign finance regulation; and further, that this alters the recent direction of the Court. How skeptical they are, we as yet do not know, and they may not know themselves. Furthermore, we cannot know what changes may occur in the Court's makeup. While I have suggested that no radical changes in the ideological make up of the Court are likely, it is also true that change often comes when we least expect it.

What ought to be clear, however, is that the lackadaisical approach of the “new deference quartet” failed to clean up or equalize political life, to take the issue out of the courts, or to assure a coherent approach to the Constitution. Values-based approaches, such as those favored by Justice Breyer and, less explicitly, Professor Hasen, will also, I think, fail. And the great legislative hope, more taxpayer financing, isn't going to make the issue go away either, even if it were widely accepted. In a more perfect world, the

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<sup>133</sup> See *Gable v. Patton*, 142 F.3d 940, 947–49 (6th Cir. 1998), cert. denied, 525 U.S. 1177 (1999) (analyzing KY. REV. STAT. ANN. § 121A.030(5)(a) (2004)).

<sup>134</sup> In fact, this underplays the difference, because the non-participating candidate will face a higher cost of fundraising as well.

<sup>135</sup> See ARIZ. REV. STAT. ANN. § 16-952 (2006).

<sup>136</sup> *Buckley*, 424 U.S. at 235 (Burger, C.J., dissenting).



Court might figuratively slap itself on the head, declare “Chief Justice Burger was right!,” and roll back those portions of *Buckley* that restrict speech. But precedent is a valuable and important part of constitutional law, and I am doubtful that the Court, as currently constituted and perhaps constituted for some time into the future, will seek to overrule *Buckley*. But within the *Buckley* framework, there is still much good that a moderately pro-speech Roberts Court can accomplish, and a good deal of the First Amendment to be salvaged.

