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Defending Liberty Pursuing Justice

Campaigns, Elections, and Campaign Finance Reform

PART I: Campaigns and Political Discourse

EDITOR (John Paul Ryan): What's wrong with political campaigns and political discourse today? Are the current methods of financing campaigns to blame?

RICHARD BRIFFAULT (Columbia University Law School): Two problematic

features of our current campaign finance system are the large number of financially noncompetitive elections and the dependence of most candidates on a small number of large donors. These problems are neither new nor attributable entirely to the campaign finance system. In her 1932 classic, *Money and Elections,* Louise Overacker pointed out the enormous role played by a very small number of very big givers in financing both the Republican and Democratic parties. The handful of big givers in the early decades of the twentieth century gave contributions in amounts that, even unadjusted for inflation, seem large by today's standards. And the large number of noncompetitive elections may be due to increasingly sophisticated gerrymandering and partisan polarization, as well as to the lopsided availability of funding.

Still, financially noncompetitive elections and candidate dependence on large donors, particularly groups of donors interested in government policy-making, pose a threat to the democratic system. In order to be an effective means of enabling the people to control their government and hold their elected officials accountable, elections need to give people real alternatives to vote against an incumbent or the party in power. That, in turn, requires that challengers be able to state their case and get their message across to the voters, which requires money. It is difficult for unfunded or underfunded challengers to be able to campaign effectively.

When officeholders owe something–if only gratitude–to their financial backers in the last election or are concerned about retaining and recruiting donors for the next election, fund-raising needs inevitably exert some pressure–sometimes subtle and sometimes not so subtle–on their official actions. At the very least, they are likely to give more time and attention to the interests and concerns of donors and putative donors. Campaign financing needs may also influence their decisions. With elected officials generally subject to fund-raising pressures, the campaign finance system may skew the policy agenda in the direction of donor interests. In a democracy the challenge for campaign finance is to develop a system that produces financially competitive campaigns without also producing officeholders who are unduly dependent on private wealth.

THOMAS RUDOLPH (University of Illinois/Political Science): One common

criticism of contemporary campaigns is their rapidly escalating cost. Increasingly, the free exchange of ideas in the political marketplace is anything but free. As campaigns become more expensive, candidates must raise ever-increasing sums of money if they are to compete effectively.

The rising cost of campaigns is alleged to have several negative consequences. First, it is said to narrow the field of viable candidates by privileging those who can raise large sums of money and those who are independently wealthy. Second, as legislators are forced to spend more time fund-raising, they may have less time for governing and other forms of constituency service. Finally, if quality challengers are deterred by incumbents' fund-raising advantages, the number of competitive races may decline. All three of these factors, many argue, may undermine electoral accountability and government responsiveness.

Editor's Note: *Nine social science and legal scholars discuss political campaigns and campaign finance reform, including the current state of political discourse, the impact of the Bipartisan Campaign Reform Act of 2002, and U.S. Supreme Court decisions on the financing of campaigns. They conclude by analyzing public financing systems and speculating on future issues and controversies. Resources, including works cited, can be found in the back. To view or download copies of this dialogue, go to: www.abanet.org/publiced/focus/home.html*

IN THIS ISSUE

Are the current methods of financing campaigns to blame for this? One would be hard pressed to argue that current financing methods are responsible for the rising cost of modern campaigns. However, one could argue that the current system, which forces most candidates to raise their money through relatively small increments, renders candidates more vulnerable to the purported consequences of expensive campaigns. A public financing system, though it may well introduce new challenges, could potentially insulate candidates from the financial pressures inherent in the current system.

From a public opinion perspective, I am struck by how little the problems of contemporary campaigns seem to interfere with both actual and perceived government responsiveness. According to the 2004 National Election Studies, a majority of Americans (56%) think that elections make the government pay "a good deal" of attention to what people think. While this percentage is admittedly smaller than the 68% of Americans who gave the same response in 1964, the current trend appears to be on the upswing. From 1964–1988, the percentage of Americans giving this response declined, reaching a low of 38% in 1988. From 1996–2004, however, this percentage has increased, surpassing the 50% mark in both 2002 and 2004. There is also reason for optimism regarding actual substantive representation in Congress. Public opinion scholars have shown that there is a strong relationship between the public's policy mood and the nature of policy outputs over time (Stimson, MacKuen, and Erickson, 1995; Erickson, MacKuen, and Stimson, 2002).

KENNETH MAYER (University of Wisconsin/Political Science): The biggest problem with contemporary political campaigns is that too many races fail to give voters meaningful alternatives. A lack of competition is not an issue at the presidential level. In Congress and the state legislatures, though, far too often there is only one option–usually the incumbent–Congressional incumbent reelection rates are at historic highs (close to 99% over the past two cycles); in 2006, only about 30 House seats appear to be remotely competitive.

There doesn't seem to be much doubt that campaign finance plays a role in this, as challengers find it nearly impossible to raise enough money to put together a credible campaign. But campaign finance is not the whole story; declining competition is as much a function of the institutionalization and professionalization of legislatures, gerrymandering, the decline of political parties, and changes in how elected officials communicate with voters.

The question of what's wrong with campaign discourse implies that things have deteriorated–i.e., that there once was a time when campaigns embodied the ideals of civic virtue and deliberation, a time when candidates engaged in rational debates over policy and philosophy, and when voters had enough information to make sensible choices about the collective good. Modern campaigns are, in this view, all about spin, 30-second spots, slogans and sound bites, self-interest, superficial promises, gloss, and character attacks. Past campaigns involved substance, meaningful discussion, lyceums, informative communication, and civic involvement–i.e., Joe Alsop and Edward R. Murrow, instead of Bill O'Reilly and Arianna Huffington.

But I don't think this is accurate. We overestimate the amount of reason and deliberation that existed in the past and vastly underestimate the amount of negativity and self-interest that governed political discourse. Congressional Democrats and Republicans may now despise each other, but they have nothing on the Federalists and Jeffersonians. Public debate leading up to the 1800 election was nastier than anything we see in contemporary politics, reflecting a time when there was legitimate fear that the republic would not survive and when partisans were able to throw their opponents in jail for criticizing public officials or challenge each other to duels. Alexander Hamilton criticized John Adams' "disgusting egotism" and "ungovernable indiscretion of temper," suggesting that the government would fall if Adams were reelected (Sharp, 1993: 240). And one Federalist newspaper asserted that "murder, robbery, rape, adultery and incest will all be openly taught and practiced" if Jefferson won. Certainly, campaigns have changed, but it is a mistake to compare the modern landscape to a false image of a utopian past.

PAUL HERRNSON (University of Maryland/Political Science): The financing of elections contributes to some of the shortcomings in today's cash-driven, candidate-centered political campaigns. Campaign financing also influences the quality of the political discourse in elections. In order to win a congressional election or to be remotely competitive, candidates must compete in two campaigns—one for votes and one for money and other resources (see Herrnson, *Congressional Elections: Campaigning at Home and in Washington,* 2004).

The campaign for votes requires a candidate to assemble an organization, target key groups of voters, select a compelling

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message, communicate that message, and get supporters to the polls on Election Day. The campaign for votes has traditionally begun around Labor Day.

The campaign for money and other resources requires candidates to convince the party operatives, interest group officials, political consultants, and journalists who play leading roles in the nation's political community that their races will be competitive and worthy of support. Gaining the backing of these various individuals is a critical step in attracting the money and campaign services that are available in Washington D.C., and other wealthy urban centers. These resources enable the candidate to run a credible campaign back home. Without them, most congressional candidates lose their bids for election. The campaign for resources usually begins much earlier than the campaign for votes. In the case of congressional incumbents, particularly those looking to retire campaign debts or build up a huge war chest to scare off potential opponents, it often begins within weeks of the most recent election.

The existence of these two campaigns means that candidates must appeal to two different sets of constituents–the individuals and groups who help finance their elections and the citizens who can legally vote in them. Candidates for the U.S. Congress devote significant amounts of time to the campaign for resources. Approximately 50% of all major-party candidates for the House of Representatives spend at least one-fourth of their personal campaign schedule raising funds. The time candidates spend asking others for money could otherwise be used to reach out to voters. It is not clear that the need to raise money from a financial constituency that differs from a candidate's electoral constituency has an impact on the nature of issues addressed in a campaign. However, voters who read about the special perks that candidates routinely bestow on members of their financial constituency may feel that these concerns take precedence over their own.

Moreover, the campaign for resources is not a campaign among equals. Incumbents are generally able to raise all of the money they need to run a robust campaign, often substantially more. One would be hard-pressed to find many incumbents who lost reelection as a result of inadequate campaign funding. However, it would be easy to identify hundreds of challengers in any given election cycle whose financial shortfalls left them unable to mount a competitive campaign. The pro-incumbent bias among the vast majority of those who make political contributions also serves to discourage qualified potential challengers from running for office. Most strategic politicians prefer to wait until a seat becomes open.

Campaigns that lack qualified, well-funded challengers are one-sided in terms of political discourse. Incumbents are able to trumpet their accomplishments unchallenged and to define their opponents in the worst possible light before they have a chance to introduce themselves to voters. By contrast, the typical challenger is unable to collect sufficient funds to raise above a whisper the issues that provide the rationale for his or her campaign or to point out shortcomings in the incumbent's performance in office. As a result, the outcomes of most congressional elections are lopsided, and only a few contests (mostly for open seats) are genuinely competitive. In sum, the financing of political campaigns contributes to the one-sided dialogue that defines most congressional elections and leads to lopsided incumbent victories.

Candidates must now compete in two campaigns—one for votes and one for money.

[PAUL HERRNSON]

ROBIN KOLODNY (Temple University/Political Science): I take issue with

the notion that the cost of campaigns is escalating so fast that it causes competition to go down. Indeed, we understand very little about campaign expenditures relative to our understanding of contributions. One major problem is that all campaign finance data reported by the Federal Elections Commission (FEC), and repeated by most scholars and journalists who write about money and politics, is in real dollars. Consequently, we are told that the 2006 congressional elections will be the most expensive ever! But three political scientists have found that when campaign spending is calculated differently–i.e., relative to the size of the economy as a whole, which tends to grow over time, it is not steadily on the rise but has "trendless fluctuation" (Ansolabehere, Gerber, and Snyder, 2001). I have extended their analysis to include recent cycles and have found that, while there does appear to be a slight rise in the 2002 and 2004 cycles, the magnitude of the increase is quite small. Even when we simply correct for inflation, the "big" increases don't look quite so large. If this is true, why do we think that there is so much more money in politics and that campaigns cost so much more today than they once did?

The answer is threefold. First, the money raised and spent in campaigns is concentrated in the most competitive races or goes to the campaigns and organizations headed by party leaders. Because the number of competitive campaigns continues to decline, the concentration of money in the most competitive races looks spectacular. Second, beginning with the 1996 election (after the change of party control of Congress), incumbents were expected to pass a good amount of their campaign receipts on to other candidates in competitive races or to the political party committees. Indeed, "dues" to these committees are now $100,000 and upwards. As recently as 1992, this was unheard of. Incumbents give to others because it is required to secure positions of power in legislatures or help with executive-legislative relations. If members of Congress aren't ambitious, they won't raise money to help others. But if they want to chair committees or serve in the leadership, then they must contribute. Starting with the 2004 cycle, the FEC now reports candidate transfers to party committees (which are unlimited). Third, issue advocacy and soft money upped the ante for the price of access in Washington. With the passage of the Bipartisan Campaign Reform Act (BCRA) in 2002, especially its higher contribution limits for individuals, incum-

bents did better getting more money out of their big donors than expected. I suspect it is not much harder to raise $2,100 than to raise $1,000. Donors and recipients see this as part of relationship building. After another cycle under BCRA, quality challengers will likely come to see this also.

In sum, candidates–especially incumbents–raise money to deter significant challenges, improve their political position in their institution, and build solid relationships with donor blocs so as to secure their positions or help prepare for runs for higher office.

BRADLEY SMITH (Capital University Law School): There are many problems

with campaigns today, but let me focus on one that is frequently overlooked: campaigns are too heavily regulated. During my time as Commissioner and Chair of the FEC (2000–05), we saw many cases that clearly did not involve violations of the law, many that clearly did, and many that were close calls. But virtually no cases had much to do with preventing corruption or addressing concerns of the average voter. Along the way, we fined parents for giving too much money to their children, sons for giving too much to their parents, and husbands for giving too much to their wives. We harassed citizens in Muleshoe, Texas, over a homemade sign supporting George Bush for President; fined a challenger for depositing campaign contributions into his personal account for one day before moving them to his campaign account (the city where the fund-raiser was held did not have a branch of the bank where his campaign account was); and fined many campaigns for failing to specifically note that their literature was "authorized" by the campaign.

Given the population of modern legislative districts, the availability of television and other mass media, and the size and scope of modern government, it's not realistic to think we can ever go back to some halcyon day of door-to-door campaigning and civics lesson-type discourse–if, as Kenneth Mayer notes, we can even imagine that such a day once existed. But the Byzantine web of rules that now envelops campaign finance makes it harder for challengers to face off against incumbents; it makes it harder for volunteer-driven campaigns to compete with ones employing highly paid professional lawyers, accountants, and consultants to manage the legal maze; it discourages grassroots activism; and it provides too many opportunities for legal maneuvering and expertise to influence election outcomes at the expense of candidates, issues, and voters. As one campaign volunteer being threatened with a $6,000 fine by the FEC put it to the agency, "What I have learned is that I will never be involved in politics again." Virtually all violations of campaign finance law in federal campaigns–even those by large corporations, unions, and major campaigns–are inadvertent. Compliance costs add about 10–20% to the costs of campaigning, and administrative costs of raising dollars in the small amounts required by law adds another 20 to 30%.

Campaigns are too heavily regulated … this is a serious and usually overlooked problem.

[BRADLEY SMITH]

I'm not saying this over-regulation is the greatest problem with political campaigns, but it is a serious problem that is usually overlooked. In *Randall v. Sorrell* [a pending Supreme Court case involving campaign expenditure and contribution rules in the state of Vermont], we should root for a judicial ruling that knocks down some of this complexity.

DEBORAH GOLDBERG (New York University/Brennan Center for Justice):

I agree with Bradley Smith that highly complicated campaign finance regulations, which can be understood only by a phalanx of highly specialized election lawyers, are *not* good for democracy. But that problem is a red herring at the federal level, where door-to-door, volunteer-driven campaigns are almost never a real option. Candidates who can build the operations and raise the sums needed to campaign for Congress rarely are too unsophisticated to comply with campaign finance laws. Donors who can afford to contribute $2,000 to a candidate–and then funnel an additional contribution through a spouse, parent, or child–rarely are, either. Regulatory complexity has little to do with what's wrong with political campaigns or political discourse, at least at the federal level.

What's wrong, in my view, has less do with how much is spent, how negative the ads are, or how complicated the rules are and more to do with who and how few people are involved. The candidates, the political parties, and a very small universe of wealthy individuals and interest groups largely monopolize the marketplace of political ideas. Moreover (at least before BCRA), the parties and the interest groups–which could have been organizing isolated individuals for collective political ends–functioned instead as fundraising agents for mass advertising campaigns. Plainly, this phenomenon cannot be laid at the doorstep of a federal regulatory structure that is too complex for the ordinary person to understand. Political participation could increase substantially without subjecting people to current campaign finance rules.

JAN BARAN (Wiley Rein & Fielding):

Popular responses to the two questions posed are usually "too much money" and "negative campaigning." Arguably, citizens of a democracy have consistently offered this response since the Roman Republic. However, the solutions to such discontent have never been clear or easy.

First, public opinion has usually been divided between general views of politics and specific views about one's own representative. Even recent polls that ask respondents' opinions about Congress and about their own legislator produce different results. Congress is held in generally low esteem, but respondents believe that their own representative is generally an

honorable person. Therefore, the problem with campaigns is usually created by someone other than one's own representative or the candidate one supports.

Similarly, losing candidates never concede on election night by saying: "I lost because my opponent was a better candidate or person." No, usually losing candidates ascribe sinister reasons for their losses such as "I was outspent" or "special interests stole the election" or "my record was misrepresented."

Under these circumstances, it becomes extremely dangerous and difficult to ask government to regulate politics, which like so much else in society is now a full-time industry. Is there too much money in politics? Well, how much is enough? Who gets to make that decision? Should we have confidence in incumbents who write the laws governing their own reelections? One gets to these questions only after resolving constitutional issues, such as whether and how campaign spending can be limited. Then, one must ask "What is good public policy?" Prohibition of alcohol was constitutional, but no one argues today that it was good policy.

The regulation of campaign discourse is even more problematic. Do we want to tell candidates what can and cannot be said in their ads? Should candidates be required to debate? We already have seen laws that require candidates to appear in their ads. Does that make sense when advertising time is so short and expensive and they must insert a message required by law?

Accordingly, assertions that money is a problem or negative campaigning is a problem must be critically analyzed and solutions must be greeted with skepticism. If this were a TV ad and I were a candidate, I would have to inform you that "I am Jan Baran and I approved this message." Does that make you feel better?

JONATHAN KRASNO (Binghamton University/Political Science): The standard complaints about political campaigns and discourse are that they are shallow, uninformative, and harshly negative. All of these objections are true, but it's hard to move beyond generalities to define what these terms mean in practice. What divides a high-minded appeal from an irrelevant one? Even facts may be debatable. And if it's acceptable, even desirable, to attack some aspects of a candidate's campaign (like an economic plan), which sorts of attacks aren't acceptable? There are no easy answers.

Ultimately, most of the blame for this state of affairs rests with the public. People's lack of interest in politics challenges campaigners to find ways to grab their attention and reduces the potential penalty for being misleading or negative. If citizens really wanted carefully reasoned policy debates, then candidates would have little choice but to provide them. I'm no different than most people in this regard; I find it easier to process biographical information than position papers.

Campaign finance reform involves a conflict between core democratic values.

[THOMAS RUDOLPH]

Still, it is clear from watching campaigns that candidates perceive a personal stake in their own rhetoric. Surrogates are charged with communicating the most controversial messages or leveling the nastiest attacks. This carries over to the paid campaign. One of the findings from *Buying Time* (Krasno and Seltz, 2000) is that candidate ads are much more positive than ads run by parties or groups. That doesn't necessarily make them better, but it does underscore how accountability works. The messages that emanate directly from the candidates are different than ones coming from their supporters.

Would greater accountability improve political campaigns and political discourse? It would probably help alleviate some of the concerns about negativity, but it might not make campaigns any more informative. Campaign finance laws can help make campaigns more transparent for the people who view them and enable citizens to reward or punish candidates whose messages delight or offend them. It's up to voters to take it from there.

PART II: Bipartisan Campaign Reform Act of 2002

EDITOR: What are the key reforms of the 2002 Bipartisan Campaign Reform Act (BCRA), often referred to as the McCain-Feingold Act? Are the reforms desirable? Enforceable? In your view, what impact (if any) did BCRA have on the 2004 campaigns/elections?

THOMAS RUDOLPH: BCRA is arguably the most significant piece of campaign finance legislation passed by Congress in the last thirty years. Among its many provisions, two are particularly important. First, BCRA essentially prohibits candidates and national parties from raising or spending "soft money" in federal elections [i.e., money not regulated by federal election laws]. Candidates must now rely even more heavily on their ability to raise hard dollars. Second, by forging a broader definition of electioneering communications, BCRA subjects issue ads to a greater level of scrutiny under federal campaign laws. When run within 30 days of a primary election or 60 days of a general election, issue ads must now comply with federal disclosure and contribution regulations–i.e., the same standards as campaign advertisements.

Are these reforms desirable? This is a normative question over which I am somewhat conflicted. As Tobin Grant and I argue in our book, *Expression vs. Equality: The Politics of Campaign Finance Reform* (2004), the issue of reform involves a conflict between core democratic values. It is easy to portray the issue of campaign finance reform, as proponents of reform often do, as a question of political equality and influence. Reform advocates commonly argue that large contributions of unregulated soft money threaten to undermine the value of political equality by facilitating the conversion of economic inequalities into political inequalities. From this perspective, BCRA's ban on soft money arguably promotes political equality by helping to level the playing field between large donors and average citizens. Such equality-based arguments in favor of reform have a natural appeal.

Yet there is another venerable democratic value at stake in the debate over campaign finance reform–freedom of expression. Indeed, opponents of reform con-

tend that campaign contributions and expenditures are entitled to constitutional protection as forms of political speech. From this perspective, BCRA's ban on soft-money contributions and its restrictions on electioneering communications are troubling because they place further restrictions on parties' and groups' ability to exercise their political voice. The desirability of BCRA's reforms may turn principally upon one's beliefs about which democratic value is more at risk.

Are the reforms enforceable? I do believe that the letter of the law can be adequately enforced, but enforcement of the new reforms will be fraught with some of the same difficulties and subjectivities that have plagued previous enforcement efforts. The distinction between coordinated and independent expenditures is, I suspect, often in the eye of the beholder. When it comes to the spirit of the law, though, I am much less optimistic with respect to enforcement. As the Supreme Court noted in its *McConnell v. FEC* (2003) decision, "money, like water, will always find an outlet" (Justice Stevens, Opinion of the Court).

RICHARD BRIFFAULT: The key provisions of BCRA prohibit the national political parties from accepting soft money, prohibit state political parties from using soft money for federal election activities, extend pre-existing disclosure requirements to issue advocacy, and extend the long-standing bans on corporate and union spending in federal elections to corporate and union issue advocacy.

Are these desirable reforms? Certainly, yes, if only from a rule of law perspective, whatever the substantive benefits of the restrictions. The Federal Election Campaign Act of 1971 (FECA) prohibits large individual donations in federal elections, requires the disclosure of expenditures above a threshold amount, and extends older prohibitions on corporate and union participation in federal elections. The rise of soft money and issue advocacy mocked and eviscerated these restrictions and requirements. Relying on formal distinctions between functionally equivalent types of campaign participation, the explosion of soft money in the 1990s brought very large donations to the parties (often solicited by federal candidates and officeholders) back into federal elections. So, too, the emergence of issue advocacy electioneering–that is, campaign statements that avoided the magic words of express advocacy but nonetheless effectively supported or opposed candidates–rendered disclosure rules and limits on corporate and union treasury funds meaningless.

Substantively, restricting very large contributions to candidates and parties makes sense in order to control the influence of great wealth in our political system. So, too, disclosure of the interest groups behind campaign advertising can help voters evaluate the advertising and factor it into their voting decisions. But, beyond the substance, there is a lot to be said for having legal restrictions and requirements work the way they are supposed to. BCRA largely restored the status quo created by FECA in the 1970s.

Franklin D. Roosevelt Campaigns from Train

Is BCRA enforceable? Early analysis of the 2004 election suggests that BCRA did in fact work according to its terms. Large soft money donations to the parties disappeared, electioneering communications were disclosed, and the corporate role in campaign finance dropped off sharply. Of course, some money–particularly large individual donations–was displaced to other vehicles, like the 527 committees. And as parties, candidates, and interest groups become more experienced with the law, new forms of evasion may emerge.

The problem is that BCRA addresses only half the problem. It seeks to reduce the large private wealth in supporting parties and candidates without providing new money to replace the funds it is trying to exclude. BCRA did raise and index the cap on hard-money contributions, but the need for money to finance campaigns remains. So long as campaign finance reform focuses largely on limiting the supply of money without meeting the demands of candidates and parties for the funds necessary to pay for effective campaigns, we will have both evasion of the law and inadequately and unequally funded campaigns.

JONATHAN KRASNO: Like others, I reduce BCRA to two basic components: the ban on soft money and the improved definition of electioneering communications. Both are desirable, in my opinion. The increasing emphasis on soft money for electioneering (or even to "build" parties) was a clear invitation to abuse. The barrage of phony issue ads indistinguishable from campaign ads (except, perhaps, for their negativity) threatened FECA and undercut accountability by allowing advertisers to hide behind new identities.

I am unconcerned that the provisions on electioneering communications place an excessive burden on outside groups. Organizations with the wherewithal to take to the airwaves surely have the resources to figure out what the law allows them to do. More important, BCRA actually clarifies the legal situation by making all advertisers abide by the same law–i.e., if anyone wishes to run ads featuring candidates in the period just before the election, then they must raise money in small and medium donations and disclose their spending to the FEC (as independent expenditures). If they would rather avoid these requirements, they can choose other ways of communicating or other times–or hire the lawyers to try to constitute themselves as 527s to evade the law. I care more that citizens can tell who is behind the ads they see. That is why independent expenditures are vastly preferable to phony issue ads and why the electioneering provisions of BCRA are so essential.

Did BCRA work in 2004? Yes. Soft money largely disappeared, and the number of unreported, phony ads plummeted, all of which is good. More interesting is

what did *not* happen. Parties did not suffer a fiscal reverse due to the loss of soft money. Rather, each side rededicated itself to expanding its list of hard-money donors, and they are now on much firmer footing. Turnout went up, not down, partly because outside groups faced with the electioneering provisions in BCRA chose to invest in grassroots organizing instead of TV ads (see the voter turnout experiments of Gerber and Green, 2000, to understand why grassroots activity increases voting). No one would say that 2004 was a perfect campaign, but in all of these areas it was far better than the 2000 campaign.

Will BCRA work as well in future elections? Probably not–campaign finance laws have a relatively short half-life, thanks to the efforts of candidates and election lawyers to extract every ounce of advantage. The Court majority in *McConnell* recognized that BCRA was a temporary fix to 2002's problems, and it practically invited legislators to revisit campaign finance law in the future. That day will come. Much as I believe BCRA improved the system, it neither realizes all of its own aims (because of the actions of some 527s) nor is the final word on what the campaign finance system should be.

KENNETH MAYER: With only one post-BCRA election cycle, it is too soon to know the law's full impact. Candidates, parties, interest groups, mass media, and independent groups will continue to adapt in ways that we can't predict. At the analogous point after FECA–we'll call it 1978–few people could have predicted the course that campaigns would take over the next two decades. From what we do know, it's hard to make the case that BCRA has–as of yet–transformed the campaign process.

Was the law beneficial? I don't think anyone outside of the national parties laments the demise of soft money, and it's not clear that the parties are still mad. The justifications for soft money had always been weak, and they were far outweighed by the corrosive effect of unlimited, often multimillion dollar, contributions from corporations, labor unions, and the superwealthy.

Unlike Jonathan Krasno, I was against BCRA's redefinition of electioneering communications. I recognize that issue ads had created a huge gap in the law, in which a bit of trivial word-smithing allowed anyone to completely evade the FECA rules. But I was–and still am–troubled by the notion that we are applying more conditions on the people and groups who want to express themselves during the campaign season. I think the default position should be to allow complete freedom for political speech, with exceptions drawn as narrowly as possible. If the electioneering rules do not move us down a slippery slope, I will be happy to say I was wrong.

One worry is the pressure to control the *content* of campaign debate through campaign finance regulation. We have already seen one example: the "I'm X and I approve of this message" disclaimer that must now be included in campaign ads. The avowed purpose of this language was to cut down on negative campaigning, because, presumably, candidates would hesitate before explicitly attaching themselves to a smear (that goal was more central than the transparency justification). It didn't work. But the content or tone of campaign speech is none of the state's business; it is the voters' job to police that, as well as to evaluate its truth or falsity.

The content or tone of campaign speech is none of the state's business.

[KENNETH MAYER]

Another example is the notion that outside groups–whether MoveOn or the Swift Boat Veterans for Truth–should be viewed as interlopers, whose involvement constitutes some sort of usurpation. Candidates complain that independent spending hijacks their campaigns and hurts their ability to control their message. I say, too bad. There is no reason candidates should be allowed to control their message; that just means they won't have to talk about anything that they don't want to talk about.

More broadly, I don't completely share Bradley Smith's enthusiasm for deregulation. Elections are not, or ought not to be, a pure marketplace. However, I do think that we have been too willing to impose rules on campaign speech in an elusive quest for a utopian past that I have argued never existed.

ROBIN KOLODNY: BCRA is not landmark law. It is a correction to a series of mistakes made in amendments and FEC rulings and regulations about the place of soft money. Disclosure of campaign finance has been of the utmost importance since Watergate. Soft-money issue ads allowed obscurity, because they were often funneled through state parties. The raising of soft money also invited an abuse of power by elected officials to induce incredibly large soft-money donations. BCRA and the 527 disclosure laws fixed most of these problems. However, BCRA was not intended to fix much more than that. In this sense, it is not a law of the stature of FECA.

DEBORAH GOLDBERG: Two key provisions of BCRA–which further complicated campaign finance law–moved the system in the right direction. By ending soft money, BCRA forces political parties intent on raising large sums to reach out to a larger base of contributors, and the parties have successfully done so. The electioneering communications provisions not only ensure more transparency but also require that corporate and union advertising campaigns are backed by some measure of real political (rather than only financial) support. BCRA also spurred additional independent spending on voter education and mobilization–a good thing for democracy that should not be overregulated under campaign finance law.

But a lot more could be done through the campaign finance system to open the political marketplace to more participants. In the current privately funded system, the vast majority of challengers cannot raise anywhere near what incumbents do. They never have, and they never will. The occasional candidate with multimillionaire friends who could bankroll a campaign is hardly the paradigm for the challenger facing insurmountable barriers to entry under the current system. Those who are really concerned about the ability of challengers to compete should be advocating for public funding systems with spending limits, not for deregulation. Public funding ensures that challengers will have funds with which to run meaningful campaigns, including the funds to pay

lawyers, accountants, and consultants. As Jonathan Krasno has shown in studies he conducted in connection with the litigation of California's Proposition 208, which included voluntary spending limits, the spending limits also help to make challengers more competitive, by reducing the gap between what they can spend and what incumbents spend. With a choice between two candidates capable of effective advocacy, more voters may be drawn into the political process.

Even without public subsidies for candidates, more could be done. Rebates, tax refunds, and tax credits for small donors could encourage participation by people who might otherwise not become involved in campaigns. Such mechanisms help, in Paul Herrnson's terms, to bring more overlap between the set of individuals who can finance elections and the set of individuals who can vote in them, a positive move for democracy. With the rise of Internet fund-raising, such measures might be especially effective. Once identified, the small contributor could be targeted for other political organizing. Again, the Internet is a perfect mechanism for a new style of grassroots politics. Here, too, we should be cautious about overextending campaign finance restrictions.

Campaign finance law is never going to be simple, any more than tax law is. We use both systems to advance a variety of ends, not all of which are always compatible. In campaign finance, there are competing concerns of constitutional significance, so we must be especially careful in the balancing. But the fact that people find and exploit loopholes is not a reason to deregulate campaign finance, any more than it is a reason to stop collecting taxes or prosecuting fraud.

PAUL HERRNSON: BCRA was intended to plug some of the holes that had arisen in the campaign finance reform system that was put in place by the FECA and its amendments. As Robin Kolodny noted, BCRA was modest in its scope and goals. Those who voiced the hope that the law would reduce the role of money in politics, increase the competitiveness of congressional elections, or eliminate political corruption surely have been disappointed. However, this does not mean that BCRA has been totally unsuccessful. One of the major provisions of the law sought to prevent party leaders from trading political access in return for large soft-money contributions. Thus far, BCRA has succeeded in accomplishing that goal.

Whether BCRA is, or will remain, enforceable depends on a number of factors. Some give rise to skepticism. Foremost is the Federal Election Commission (FEC), which historically has been handicapped by a structure that lends itself to stalemate and by a membership that has sometimes included individuals who have disagreed with the parts of the commission's mandate to regulate and disclose the financing of federal campaigns. At times, the FEC has been understaffed and underfunded. Not surprisingly, it has occasionally issued regulations that are at variance with the intention of campaign finance laws (at least according to the law's sponsors), and it does not have the best track record for enforcing the law.

That people find and exploit loopholes is no reason to deregulate campaign finance.

[DEBORAH GOLDBERG]

The enforcement of the law is likely to resemble that of other regulatory systems. Campaign finance laws, like regulations in general, typically proceed through a cycle wherein those governed by them first learn to adapt to the new rules, then they learn to participate effectively within them, and later they find ways to work around them.

Given that some of the best legal minds in the country are devoted to discovering loopholes in campaign finance regulations or finding ways to work around or undermine them, it would not be surprising if in the future a substantial portion of campaign financing was no longer regulated by BCRA. The history of FECA is telling in this regard. First, the law regulated virtually all party spending made in connection with federal elections. Then, it regulated the majority of party spending in such contests. By 2002, it regulated only about half of it. History should serve to remind us that reform is often an ongoing process, and periodic adjustments are needed to prevent corruption and the appearance of corruption, as well as to ensure a proper balance between liberty and equality in the electoral process.

BRADLEY SMITH: McCain-Feingold was sold to the American people like a 19th century patent medicine—"it's good for what ails ya." Think too much money is spent on politics? Support McCain-Feingold. Don't like negative ads? Support McCain-Feingold. Upset about Enron? Support McCain-Feingold. Office holders spending too much time fund-raising? Think elections aren't competitive? Do special interests have too much power? Concerned about low voter turnout? Support McCain-Feingold. McCain-Feingold was, in short, the all-purpose elixir for campaign reform.

While I agree with Kenneth Mayer that it is too early to assess the long-term impact of McCain-Feingold, it is clear that in the short term the bill has failed utterly. The 2004 campaign was expensive and negative, and 2006 is shaping up the same. No one seriously suggests that special interest influence is on the wane. Time spent fund-raising has not declined, and elections are not more competitive. Those who supported the law have been reduced to noting that the political parties are raising more money in small contributions—in other words, that they are now financed more like the campaigns of George Wallace and George McGovern than the campaigns of Teddy Roosevelt or the early campaigns of Ronald Reagan. Whether this is improvement is less certain. That it has not (so far, anyway) decreased public cynicism, reduced time spent fund-raising, or cut the influence of lobbyists and special interests is forgotten or ignored.

Paul Herrnson agrees that the law has not reduced the role of money, increased competitiveness, or eliminated corruption, but he nonetheless argues that it has prevented party leaders from trading political access in return for large soft-money contributions. This may be true insofar as party leaders may no longer solicit large soft-money contributions, but as the Abramoff scandal continues to rip through Washington, we see that the role of soft-money contributions in the Washington political culture was probably overstated. The purpose of the soft-money ban was to limit, if not eliminate, corruption. I see no evidence that it has done so, or is

likely to do so, because I believe it is based on a flawed understanding of how politics works (see Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform,* 2001).

Part of the problem is that McCain-Feingold was oversold. Its supporters now say things like, "It was not intended to reduce the amount of money spent"–which is true, if you look at the bill. But even a cursory review of the debate at the time shows that this is not how the bill was sold to the public. One saving grace is that not all aspects of the bill's failures are terribly damaging. Negative ads can be useful; higher spending can be a good thing.

While it is early to cast a final verdict on McCain-Feingold, I am hard pressed to see it doing much good. What is less clear is whether the law will be truly damaging over the long term or merely a minor nuisance. As Paul Herrnson notes, political practitioners are a resilient bunch. Given that the federal government spends nearly $3 trillion each year and claims sweeping regulatory authority over nearly every aspect of our lives, it is unrealistic to think that citizens will not continue to look for ways to influence political debate and legislation. It is true, of course, that we would not abandon all laws merely because some people break them. Nor should we keep extending the law merely because some things remain legal (in campaign finance debates, legal activity that the speaker doesn't like is typically called a "loophole"). But we need to consider whether a law that inherently involves limitations on political speech and participation can be truly effective and whether we really want to close every "loophole." Because short of that, someone will always be exercising their speech rights in a way someone else doesn't like.

Some of the goals behind McCain-Feingold were worthy, but if they are frustrated by the existence of "loopholes," that suggests the approach embodied in the law may not be able to achieve those goals. "Loopholes" can be closed–we can always make more things illegal and subject to jail time, but we do need to decide how much coercion we are willing to employ in our efforts to assure that the "right" people exercise the "right" amount of influence in the "right" way. I have always been of the impression that a primary reason for the free speech clauses of the First Amendment was the sense that it was very dangerous to give government the power to control political speech, to make those decisions about who has the "right" amount of influence.

This is not to say nothing can be done. Much can be done if we are willing to change our approach. But the "command and control" approach that has dominated American political regulation since 1970 has been, it seems to me, quite obviously unsuccessful. To the extent future efforts at "reform," like McCain-Feingold, rely on coercion–laws, regulation, fines, jail time–to control political participation, there will remain tremendous tension between campaign finance laws and political freedom and free speech rights. There will also remain "loopholes" that prevent the law from attaining its goals. Perhaps it is time to consider new approaches.

A constitutional analysis centered on the First Amendment slights other important interests.

[RICHARD BRIFFAULT]

PART III: Supreme Court Review of Regulations

EDITOR: On several occasions the U.S. Supreme Court has ruled on challenges to federal campaign finance regulations passed by Congress. What has been the impact of these Court decisions on campaigns and elections? In your view, has the Court struck an appropriate balance between First Amendment rights and political reform?

RICHARD BRIFFAULT: The Supreme Court has done three significant things: (1) it has framed campaign finance as a First Amendment problem; (2) it has drawn a sharp distinction between contributions and expenditures; and (3) it has upheld the grant of public funds, with conditions, to candidates and political parties.

The second of these actions has probably had the most direct impact on campaigns and elections. By upholding federal and state laws limiting contributions while striking down expenditure limits, the Court has contributed to some of the unhealthy features of our current system–the incessant fund-raising, the rise of bundlers and other intermediaries who can help candidates obtain the large number of contributions they need to participate in unlimited spending races, the special opportunities for wealthy candidates who can self-fund their own campaigns, and the ability of some candidates to wildly outspend their opponents. The Court alone has not been entirely responsible for this, but constitutional doctrine has played a role.

The significance of the first point–treating campaign finance as a First Amendment issue–has been to some extent muted because of the Court's acceptance of both contribution limits and disclosure requirements. Still, the First Amendment framework did lead directly to the invalidation of spending limits. Moreover, the Court's First Amendment rhetoric has operated to shape the campaign finance debate. As a constitutional matter, campaign finance is seen as primarily about the rights of donors and spenders (including candidates), rather than about the broader societal interest in a democratic campaign finance system. To be sure, campaign finance restrictions can have a direct impact on the dissemination of campaign communications. But a constitutional analysis centered on the First Amendment tends to slight many other important interests directly affected by campaign financing–competitive elections, equal representation of the vast majority of voters who are not donors, and the impact of fund-raising on elected officials and government decision making.

The third action–approval of public funding–has probably received the least attention, because other than the limited public funding system for presidential elections Congress has failed to take any action in this area. Nonetheless, the Court's approval of public funding continues to provide an important opening to Congress and state and local governments to adopt measures that can reduce fund-raising pressures and candidates' dependence on large donors and bundlers without limiting campaign speech.

ROBIN KOLODNY: I wish to put the spotlight on political parties. Much of BCRA's intent, in response to soft-money

abuses, was to change the standard operating procedures of political parties. But the key question is whether political parties are "corrupt conduits" or meaningful actors who manage elections. Campaign finance cases and laws treat parties as if they are the former, not the latter. As a result, we can expect the concerns of citizen participation, interest group influence, and attraction of candidates to the process (competition) to continue. Reducing the role of parties in elections creates more problems than it solves.

The rulings in the campaign finance cases that focus on the First Amendment rights of citizens in a democracy have given many expression rights to individuals, organized groups, and candidates. The Court has approved of regulation between these actors when it appears that one set may have too much influence over another set, particularly when there is the reality–or even the appearance–of a *quid pro quo* of political favors for cash. The thrust, of course, is that candidates are the ultimate actors in elections; anything that implicates their relationship with funders needs regulation.

But if political parties were believed to be the primary organizers of elections, rather than candidates, the regulatory environment would be set up differently, and we might see remedies to low voter participation, low competition, and channeled group activity. Established democracies in Western Europe view *parties* as the primary vehicle for election activity, and they have better luck than we do in all of these areas. Parties, not candidates, qualify for public subsidies to run elections. Parties, not candidates, choose the issues to present to the electorate and explain how policies will be formed around those issues. Parties select the candidates and mobilize the voters. But neither the Supreme Court nor our political culture views parties in this way.

The most problematic cases are *Colorado I* and *Colorado II*. The problem with *Colorado I* is that parties are viewed to have the same rights to expression as organized groups. I'm not concerned with the idea that parties can make independent expenditures–parties ought not to be beholden to the desires of their candidates if they are the central actors in elections and, yes, parties can carry out broader election activities uncoordinated with their candidates. Rather, I'm concerned with the decision to keep coordinated expenditures limited. Then, in *Colorado II* the Court assumes that parties cannot spend unlimited coordinated expenditures because, unlike the sense of its finding in the first case, parties are not actually like real interest groups–they are worse, because they don't care who gives them large contributions as long as they can spend the money in elections. So, parties are "conduits" for corruption (somehow worse than being corrupt themselves), because they might have large contributors give to them in the hopes that the funders' true agenda will be transmitted to the candidates they support. This is a preposterous view of political parties in both theory and practice, and I find myself in surprising agreement with Justice Thomas's dissent in this case. This treatment of parties continues in *McConnell*, though I agree with the decision to end the soft-money funding of sham party issue-advocacy advertising.

The Court sees political parties as conduits for corruption.

[Robin Kolodny]

Jonathan Krasno: It is hard to draw any general conclusions about the Court's decisions in campaign finance cases. My views are heavily influenced by my experience as an expert witness in three cases decided by the Court (*Colorado II, Nixon v. Shrink Missouri Government PAC,* and *McConnell*). My side won all three cases, so it is easy to be bullish about those outcomes. Unfortunately, there are plenty of other cases that turned out less happily.

The Court most frequently goes wrong when it seemingly ignores or makes light of the political impact of its decisions. Unlike Robin Kolodny, for example, I find the decision in *Colorado I* to allow political parties to make independent expenditures to be both astonishing and bad. The notion that parties are independent of the candidates that they recruit and work with seems divorced from reality, and the incentive it created for parties to distance themselves from their candidates is undesirable. The Court's majority was sympathetic to the argument that parties were denied free speech rights allowed to some other actors, despite the fact that FECA advantages parties by allowing them to accept larger donations and by giving them the opportunity to coordinate some expenditures with candidates. The First Amendment issue at stake here does not seem to be balanced against anything else.

One thing that bothers me, and probably most other advocates of reform, is the narrow rationale for regulating campaign financing. I would not minimize the importance of avoiding actual or perceived corruption, but those are not the only values at stake. Indeed, as an expert witness, I have been asked to testify about how various regulations would affect electoral competition, the health of political parties, or voter turnout. Presumably, if judges were to find that a law would have an adverse effect on one of these areas, it would be grounds to overrule it. Yet, the reverse is not true; campaign finance statutes cannot be justified for their positive effect on electoral competition or turnout. That is unfortunate, because all of these issues are fundamental concerns, and all are affected (often adversely) by the existing system of financing campaigns. It is especially unfortunate in today's cash-driven campaign economy, where financial regulations create incentives that influence candidates, parties, and groups.

I think the best we can hope for is a respectful relationship between legislatures and the courts, as well as a willingness to allow legislatures, especially in the states, some room to experiment. It is fair for courts to scrutinize campaign finance statutes carefully, even skeptically. Yet, the exchange between Justice Scalia and Solicitor General Ted Olson during oral argument in *McConnell*–when the Justice more or less said that any regulation passed by Congress must reflect the interests of incumbents versus their challengers–shows how the judiciary may overstep. Legislatures have a right to regulate campaigns, and they often have special insight that judges cannot share–insights that should not be dismissed out of hand, even when the First Amendment is implicated.

As for experimentation, we would be well served to allow jurisdictions to establish some record before overturning their regulations. Judges should recognize two important points. First, actors have shown

an enormous capability to adapt to different circumstances. Viewed from the outside, Vermont's low limits on campaign contributions and expenditures appear to be potentially problematic. I would need to know more about Vermont, and possibly see the system at work, before getting rid of it. Second, any system ought to be assessed against the status quo. I have been struck by the irony of defending statutes in California and at the federal level against the charge that they would harm challengers when the incumbent reelection rates already approach 100%. Surely, under those circumstances there is little to lose by trying a new approach.

Bradley Smith: The impact of the regulations has generally been bad. More than the Court decisions, the regulations themselves have been a problem. It seems to me somewhat odd that people take campaign finance reform seriously at all. If I asked what nations of the world were well-governed, and what campaign finance regime they had, I don't think one could draw any correlation, let alone causation, between regulation and good government. This is similarly true here in the United States. The Government Performance Project of Syracuse University's Maxwell School, funded by the pro-campaign finance reform Pew Charitable Trust, in partnership with *Governing* Magazine, has named Virginia the "best governed state." Virginia, we might note, allows unlimited individual and corporate campaign contributions. And I meet few people who believe that the United States is better governed now than it was prior to the advent of modern campaign finance regulation.

In part for that reason, I disagree with the framing of the question. To ask, "Has the Court struck an appropriate balance between First Amendment rights and political reform?" is, in my view, to ask the wrong question. First Amendment rights are "political reform." The Founders thought a great deal about political corruption, special interest influence, and effective government. Unlike so many of my colleagues, including many in this discussion, I view the First Amendment as a considered response to these questions, not some bizarre libertarian constraint on badly needed regulation. The question should be, "Has the Court properly interpreted the First Amendment?" My view is that it has not–the Court has allowed more regulation than the First Amendment ought to tolerate. The Supreme Court now gives less scrutiny to laws constraining political speech than it does to Internet pornography, tobacco ads, or cross burning, among others. Has that been good? I think few would argue that our politics today, in the era of campaign finance "reform," are better than they were during the presidencies of Teddy Roosevelt, Wilson, Coolidge, FDR, Truman, Eisenhower, or Kennedy.

Deborah Goldberg: One effect of the Supreme Court's decisions we have not yet mentioned is the increasing presumption in favor of *disclosure*. Even in Virginia, and in other states that do not limit

The Court frequently goes wrong when it ignores the political impact of its decisions.

[Jonathan Krasno]

contributions, candidates are required to file campaign finance reports. A sizable majority of states (40) also require disclosure of independent expenditures. Few opponents of other campaign finance regulations advocate for the right to make secret contributions or expenditures; the trend is plainly toward greater disclosure and more public access to information. Yet there are First Amendment interests involved in anonymous political speech.

The jurisprudence of disclosure is one area where the Court recognized an interest other than combating the reality and appearance of corruption as sufficient to justify First Amendment burdens on campaign giving and spending. The Court noted not only the disinfecting quality of sunshine in the campaign finance context, but also the value of knowing who is making contributions and expenditures as a clue to either the perceived policy preferences of candidates or the likely allegiances of candidates supported by identifiable interest groups. The Court has consistently upheld disclosure provisions, including disclaimers in broadcast advertising.

Plainly, disclosure affects campaigns and elections. Voters can connect the dots when the decisions of elected officials closely follow the priorities of their major donors. That record can become an issue in campaigns. In some elections, the mere fact that a candidate accepts contributions from a particular interest group (or lobbyist) can become a campaign issue. Disclosure thus affects not only the elections but also promotes a level of accountability that would be impossible without it. With disclosure, as with regulations of contributions and expenditures, the balance that must be struck is not between the First Amendment and political reform. Political reform is not an end in its own right but rather a means to more fundamental goals. The balance that the Court must strike is between the interest that people have in using personal wealth for political ends and the interests that people have in participating as equals in a democracy, in encouraging active civic engagement, in securing a government worthy of public trust, in having real choices among diverse candidates, in obtaining information that allows them to make rational electoral choices, and in other values of constitutional significance. Balancing these values is not always easy, and in my view the Court does not always get it right, but I'm hopeful that the Court will continue to recognize that such balancing is necessary.

Thomas Rudolph: The Court has long struggled to find an appropriate balance between First Amendment rights and political reform. Even in *Buckley,* the Court tried to strike a middle ground by upholding contribution limits while striking down expenditure limits. The legal landscape since *Buckley* has been marked by several efforts to maintain that delicate balance. Broadly speaking, I think the Court has achieved an appropriate balance between the twin goals of protecting political speech and promoting reform. One indicator that the Court may have done so is that neither side of the reform debate has been wholly satisfied since *Buckley*. The day that one side becomes satisfied is the day I'll worry that the Court has drifted too far in one direction.

Jan Baran: I first witnessed the Supreme Court grapple with campaign finance by attending the oral arguments in *Buckley*. Since then, I have represented nu-

merous parties before the Court on such issues, including the Colorado Republican party in its constitutional litigation over the rights of political parties and Senator McConnell in his challenge to McCain-Feingold. I offer two observations.

First, I am struck by the recent polarization of the Court. The *Buckley* decision was "*per curiam*." While principally authored by Justice Brennan, the opinion was intended to reflect the collective judgment of the Court and to impart to the public a sense of general agreement. *Buckley* established basic propositions, which arguably apply today and have not been overruled but may have been eroded. The propositions include the authority of government to carefully regulate campaign activity and political speech through mandatory public disclosure, limits on contributions to candidates and committees, and, when linked to public financing, limits on campaign expenditures. *Buckley* further decreed that government could not otherwise limit the rights of individuals and associations to spend money on independent communications.

In contrast, the *McConnell* decision was 5-4 on the major issues. While still relying on *Buckley* as precedent, the Court majority upheld provisions that the dissenters believed were anathema to First Amendment rights. Political parties were denied "soft money," and "electioneering communications" could be regulated. The dissenters, who could not have had a more divergent constitutional view of the legislation, would have struck down its major provisions. The majority literally invited more regulation of campaigns by legislatures.

Second, some of the Justices have changed position on campaign finance regulation during their service on the Court. Chief Justice Rehnquist was a dissenter in *First National Bank of Boston v. Bellotti* (1978), which established a First Amendment right of corporations to finance and disseminate communications about issues that appeared on state ballots and recognized a right of the public to receive those messages. In *McConnell,* the Chief Justice during oral argument renounced his *Bellotti* view that corporations were creatures of the state and should have no First Amendment rights; instead, he became one of the four dissenters who refused to sustain a ban on corporate or union pre-election funding of mass media ads. Justice O'Connor had been a steady defender of independent speech in cases such as *FEC v. Massachusetts Citizens for Life* (1986) and *Colorado I*. But in *McConnell* she joined the majority, disagreeing with Chief Justice Rehnquist over independent corporate or union speech.

Of course, Chief Justice Rehnquist and Justice O'Connor are no longer on the Court. Only future cases will reveal whether the Justices can revert to the *per curiam* approach of *Buckley* or whether the Court will continue to be polarized. Nevertheless, the result of recent decisions is constitutional incoherence. The Colorado cases reflect the beginning of the chaos. In *Colorado I,* the Court upheld the right of political parties to make independent expenditures, on the theory that parties should be treated the same as everyone else, even though every person on the street and every reader of American history knows they are not the same. In *Colorado II,* the Court extended the principle by upholding a statute that bars parties from spending as much hard money as they can raise for, and in collaboration with, candidates of their choice. The Court (5-4) concluded that, although parties do not corrupt their candidates, limits on candidate support were necessary to prevent circumvention by party contributors. The majority did not notice that such circumvention, if it exists, is easily avoided by lowering contribution limits. When McCain-Feingold was enacted, Congress *raised* the limits on contributions to political parties and even indexed them for inflation. Thus, the legislative response to the Supreme Court's perceived problem was to exacerbate the so-called problem. By the time of the *McConnell* decision, the Court majority deferred to the very same Congress for what laws were needed to save Congress from "corruption."

The Court's campaign finance jurisprudence has been inconsistent and incoherent.

[JAN BARAN]

In short, recent decisions of the Supreme Court have not balanced interests well, assuming balancing as opposed to strict scrutiny is the appropriate constitutional test. The spate of recent 5-4 decisions reflects intense internal disagreement. The Court has been inconsistent and incoherent and, some would say, a danger to the First Amendment.

EDITOR: Do you foresee any changes in the Court's view of federal (or state) campaign finance regulations?

THOMAS RUDOLPH: It's not clear whether the Court's view of federal campaign finance regulations is likely to change in the foreseeable future. The reason for this uncertainty is, of course, because Justices Roberts and Alito have yet to formally articulate their views on this subject. In both the *Colorado II* and the *McConnell* decisions, a narrow 5-4 majority upheld most of the regulations in question. In both of these cases, Justice O'Connor sided with the majority. Her departure from the Court leaves open the question of whether the Court will continue on its present course or change directions.

We will not have to wait long to get a sense of the path that the newly constituted Court is likely to take. Before the end of the 2006 term, the Court is expected to rule on a trio of cases (consolidated as *Randall v. Sorrell*) involving a Vermont law that limits contributions to and expenditures by state candidates. On the contribution side, the Vermont law allows individuals to contribute only $200 per cycle to state legislative candidates and $400 per cycle to statewide candidates. On the expenditure side, the law limits state legislative candidates and gubernatorial candidates to $2,500 and $300,000, respectively. If *Buckley* holds, the expenditure limits will likely be overturned. Indeed, they may have been overturned even if O'Connor were still on the bench. Given the new composition of the Court, I think it's likely that Vermont's contribution limits will also be overturned. The more interesting question may be how narrowly the Vermont law will be invalidated. Will the Court reject these particular limits because they are too restrictive, or will they use this case to revisit more broadly the *Buckley* standard on contribution limits?

RICHARD BRIFFAULT: In several decisions earlier this decade, most prominently in *McConnell*, the Rehnquist Court gave greater weight to the value of campaign finance laws in promoting democratic governance by curbing special interest influence on lawmakers. Most observers at the oral argument of the Vermont case concluded that the Roberts Court is unlikely to go any further in its acceptance of regulation and may very well reverse course. Although the Vermont case was initially seen as testing whether the Court would continue to adhere to its long-standing opposition to candidate spending limits, it may now provide the Court the opportunity to reconsider the extent of its deference to contribution limits. Presumably, we will know soon the new Court's approach to campaign finance regulation.

PART IV: Campaign Finance in 2008 & Beyond

EDITOR: Has public financing of presidential campaigns been successful or not? In 2004, both major party candidates (Bush and Kerry) opted out of the public financing system. Is this likely to happen again in 2008? What if McCain were the Republican nominee?

JONATHAN KRASNO: What criteria should we use to assess success? If the goal is combating actual or perceived corruption, then the system has largely achieved it (the only hint of scandal was the Clinton-Gore soft-money operation in 1996, later addressed by BCRA). It is also true that presidential elections have been fairly close, although no one would attribute this competitiveness to campaign financing. But while money has not been a barrier to candidate viability in presidential elections of late, it has been a problem in congressional contests and some past presidential races. Since FECA, presidential candidates have ended up on roughly equal financial footing in the fall, and money is barely discussed as a strategic advantage for one side or the other.

This account ignores the most obvious problem–the increasing number of presidential candidates who opt out of public funding in the primaries. This is almost certain to continue, as long as frontrunners like Dean and Kerry calculate that they can raise much more money on their own without accepting partial subsidies. I expect this will apply to McCain as well, even with his credentials as a reformer. Opting out is not always a terrible thing for the public. In 2004, Bush's huge glut of money for the uncontested primaries, coupled with the need to spend those funds before September, helped lead the campaign to invest more in grassroots organizing. The volunteers whom the Bush campaign paid to recruit and train in the spring proved to be a valuable resource in the fall, especially in mobilizing the GOP vote.

I worry, however, that inadvertent developments such as Bush's investment in

Inadequate public funding is an invitation to evasion, soft money, and 527s.

[RICHARD BRIFFAULT]

GOTV [the campaign acronym for "get-out-the-vote"] may not repeat themselves, and so there are several steps I would take to improve both halves of the presidential system and increase compliance. The state-by-state spending limits in the primaries are outmoded and ought to be eliminated. Among other things, that would simplify enforcement. The overall limit for primary spending should probably be raised, as should the dollar limit in the fall. I would stretch the public money by converting to a matching system. Presidential nominees would have little trouble quickly raising the maximum amount of money needed to match, and it would give supporters who do not live in the handful of battleground states a way to contribute to the campaign.

THOMAS RUDOLPH: If the purpose of the public financing system is to impose a ceiling on candidate expenditures, then, by recent standards, it would be difficult to judge the system successful. When presidential candidates opt out of the public financing system, expenditure limits do not apply. Even if one accepts the premise that a public financing system is desirable, it is not difficult to find fault with the system currently in place. For example, one problem is the existing incentive structure in presidential campaigns: front-loaded primaries encourage candidates to raise as much money as they can, as early as they can. Once they raise more than they would receive in matching funds, there is no incentive to remain in the system. Assuming that both presidential candidates are able to raise sufficient funds in 2008, there is little reason to expect that they will stay within the confines of the public financing system. This is particularly true if their opponent(s) have already opted out. From a practical standpoint, there is no incentive for candidates to unilaterally "disarm." Given current levels of polarization at the elite level, "mutual disarmament" seems equally unlikely.

Practical concerns notwithstanding, some candidates may have principled reasons for staying within the public financing system. Given his reformist credentials, John McCain may feel some pressure to stay within the system. In a competitive presidential campaign, however, principled considerations are likely to give way to strategic considerations, even for McCain. While he may decry the current system for allowing candidates to opt out, he will almost certainly do so if given the opportunity. McCain may argue that we need to change the rules of the game, but why should he subject himself to rules that are not yet in effect? In this respect, McCain can have his cake and eat it too.

PAUL HERRNSON: During the early years of FECA, public financing accomplished many of its goals. A wide array of candidates was able to compete financially in the nomination stage of the election, and the major parties' candidates were given equal financial resources in the general election. These candidates were able to communicate their messages to the public, wage competitive campaigns, and spend time they would have previously devoted to asking wealthy individuals and groups for money to voter outreach and the like. Moreover, there was little sign of corruption of the sort witnessed in Watergate.

As FECA began to unravel, some of the benefits of public financing became undone. The emergence of party soft money encouraged presidential candi-

dates to commit large amounts of time to raising these funds, which the party spent largely on their behalf during presidential election years and to assist other candidates during midterm elections. Soft money led both to corruption and the appearance of corruption in the financing of campaigns. By outlawing party soft money, BCRA has directly addressed at least part of this problem.

A serious and still unaddressed problem with the public financing system is that the amount of funds participating candidates can receive has not kept pace with the actual costs of campaigning. As a result, several of the frontrunners, including the eventual nominees, opted out of the public funding system. I predict that none of the potential frontrunners in 2008 will accept public funding for the nomination. Even a candidate who wishes to wear the reformist mantle, like Senator McCain, needs to have sufficient resources to communicate a reform message. Competing under the existing system requires making an unfavorable tradeoff.

RICHARD BRIFFAULT: In its initial years the presidential public funding system was quite successful. Both Republicans and Democrats enjoyed hotly contested nomination battles in 1976 and 1980, with public funding enabling a wide range of candidates to participate and incumbent presidents forced into intense primary battles. Public funding also assured parity between the major party candidates in the general elections in those years, with the challenger defeating the incumbent in two successive elections. And the general elections were largely publicly funded, with candidates not involved in fund-raising or dependent on large donors. In the 1980s public funding continued to support contested primaries–among the Democrats in 1984, 1988, and 1992 and among the Republicans in 1988–and to assure both major parties a base of funding. In 1992, once again a challenger ousted an incumbent. But in the early 1990s, the system began to unravel.

Inadequate levels of financial support in comparison to rising campaign costs led to the rise of soft money during the 1990s. Inadequate public grants tied to unrealistically low spending ceilings led some major candidates to opt out of pre-nomination public funding. In 2000, George Bush became the first major party presidential nominee to opt out of public funding in the primary elections, and in 2004, both major party nominees opted out of public funding in the primaries. In the 2000 general election, soft money provided a major private supplement to public funding. In the 2004 general election, 527 committees introduced a significant level of private spending into a publicly funded election.

The principal problem that public funding faces is a fixable one–inadequate funding. The public funding amounts are simply too low. They were low even in the early elections in which public funding was relatively successful. In 1972–the last presidential election prior to public funding–George McGovern spent $30 million in defeat. When Congress adopted public funding, it set the public grant (and general election cap) at $20 million–or one-third less than the cost of McGovern's highly unsuccessful campaign. The presidential public funds grant in nominal dollars did not reach Richard Nixon's successful 1972 spending level until 1996. And campaign costs have been rising even faster than the cost of living. As a result, the gap between the public grant and campaign needs has been growing wider. The inadequate funding level in the general election is a standing invitation to evasion and a stimulus to creative techniques like soft money and 527s.

Government funding of campaigns does little to eliminate corruption or inequality.

[BRADLEY SMITH]

The situation is even worse in the primaries, where the funding cap is half the general election level, funding is provided relatively late in the game, and the state-specific spending levels were adopted long before the front-loaded primary calendar made heavy levels of spending in small states with low spending limits essential. BCRA has made things even worse–it doubled, and then adjusted for inflation, the cap on hard money contributions, but it increased neither the amount of hard-money contribution that would be matched with public funds nor the match rate. As a result, the private funding alternative became much more attractive to candidates, even as the public funding amount and the spending cap became increasingly unrealistic. Under these conditions, it seems likely that the major contenders in both parties in 2008 will forego public funding in the primaries.

Unlike some of the other very complex issues in campaign finance law, the problems of public funding are eminently fixable. In the primaries, the matchable portion of private contributions should grow to keep pace with the increase in the hard-money limit. We might also want to consider increasing the match rate–from dollar-for-dollar to something like 2:1 or 3:1 for small contributions. The state-specific spending ceilings should be abolished, and the overall spending ceiling should be raised. So, too, the public grant in the general election should be raised to a level that is consistent with campaign costs. While it seems very unlikely that any of these changes will be enacted anytime soon, in the long run they could restore the public funding system.

BRADLEY SMITH: I consider taxpayer funding of campaigns to be something of a fraud. By that, I don't mean to impugn the arguments or good faith of those who support taxpayer funding. Rather, I mean that taxpayer funding inherently fails to address the issues that lead people to argue for it. It's a bit like arguing that the government should pay for prescription drugs in order to get baseball players off steroids. It's a solution that seems vaguely related if you don't look too closely, but it really has little to do with the perceived problem.

In this dialogue two major arguments are put forth for the need for campaign finance regulation, including government financing of campaigns. The first is to prevent corruption, and the second is to promote equality. Government-funded campaigns do not really address either issue, unless we are willing to impose draconian restrictions on private political speech. This is so because government-financed campaigns do not prevent private, voluntary means of influencing elections. Private citizens, organized through public interest groups, trade associations, unions, and corporations, continue to exercise political influence. You cannot just say, "No

one else should be allowed to give." What does it mean to "influence" an election? For the past two decades interest groups have figured out how to run "issue ads" that are little different from "campaign ads" (this result was specifically anticipated by the Supreme Court in *Buckley*, which nonetheless upheld the right to run "issue ads"). It is easy to say, "Let's ban 527s," but then the activity shifts to 501(c)(4) organizations. It is easy to say they shouldn't be allowed to run "sham" ads, but what is a "sham" ad? For example, if environmental groups run ads in Florida in 2002 and 2003 (which they did) criticizing the President's proposals for oil drilling in the Gulf of Mexico, are these "campaign ads," "issue ads" or "sham issue ads"? Congress is frequently in session during September and October of election years. Should citizen groups be prohibited from discussing public issues during that time? Recent years have seen Congress debating partial birth abortion, impeachment of a President, and major budget bills, to name just a few, in the weeks before an election. How do you shut the public out of those debates? How do you keep "issue ads" from influencing the election? The answer is that you can't. People will influence elections, and their levels of influence will be unequal. A better solution than trying to "equalize" with government financing is to allow the free interplay of citizen voices, without the government deciding what is the "right" amount to spend on an election.

Richard Briffault suggests that early elections under the presidential taxpayer financing system enabled many candidates to participate and assured parity between major party candidates. Really? Consider the elections immediately prior to the first federally funded election in 1976. In 1972, the Democratic nomination battle was a free-for-all (incumbent Richard Nixon won the Republican nomination over token opposition). In 1968, both parties had lively nomination battles between several candidates and a brutally close general election with an active third-party nominee who carried several states in the general election. The 1964 GOP nomination was hotly contested (the Democrats had an unopposed incumbent that year), and 1960 saw interesting battles for the nomination in both parties, even though Nixon, as sitting Vice-President, won the GOP nod rather handily. Incumbents lost in those days, too: Johnson was knocked out after the New Hampshire primary in 1968. Harry Truman did not seek re-election in 1952 in the face of near certain defeat. So I don't think the cause and effect implied by Richard Briffault is there.

Unless taxpayers want to pour a bunch more money into funding campaigns–merely using tax dollars to displace voluntary, private giving–the presidential system will soon become a relic, as others have noted. But this merely points up yet another problem: Government funding systems tend to grow obsolete. Government can't keep up with changes in campaign tactics and strategies, and those who benefit from the tax funding system will have some incentive to block changes. And once they grow obsolete, they merely gum up the system. Meanwhile, the government funding system does little or nothing to eliminate corruption or inequality; indeed, a strong argument can be made that it even contributes to both.

Bush-Cheney 2004 Television Campaign Ad

I agree that, in 2008, major party candidates will likely reject government funds for the primaries. Is this a bad thing? Kerry, Dean, and Bush all refused taxpayer financing in the 2004 primaries. It did not make any of these men corrupt. John McCain has long been one of the Senate's most prolific fund-raisers, and if no changes are made to the system, I believe he will refuse tax funds if he runs in 2008. But Senator McCain won't suddenly become more corrupt if he refuses tax funds in 2008, so I'm not sure why we would want to spend tax dollars to fund his campaign.

KENNETH MAYER: The public funding system for the general election has been successful, the primary matching system less so today. As Jonathan Krasno observes, there is the question of how to define success. I don't think there's any evidence that public funding has reduced the influence of interest groups on the election process, but public funding in the primaries does seem to have increased the number of candidates, and that's generally a good thing.

The major problem with the primary system, as others have also noted, is that the spending limits are completely outdated and bear no relationship to what candidates actually have to spend to run a credible campaign. In 2004, the national spending limit for publicly funded candidates was about $45 million, and both Bush and Kerry spent *five times* that amount. No rational candidate–at least no candidate who has a chance of actually winning the nomination–would agree to such a severe constraint. Unless the spending limit is at least doubled for 2008, the matching fund system is going to wither away.

For the general elections I think the system has worked, but I'm not exactly sure why I believe that. The public grants don't seem to have limited the scope of interest group involvement or made elections more competitive, but they have reduced the incentive to raise and spend unlimited amounts of money. Because–so far, at least–there is a political benefit to accepting public money for the general election, candidates recognize that they cannot spend $300 million between August and November, and they have to be a bit more strategic in how they run their campaigns. Without some limit, the prisoner's dilemma would take over, and the major party candidates would raise absolutely as much as they could.

DEBORAH GOLDBERG: In the past the public financing system has largely ful-

filled its principal goals—combating actual and perceived corruption, creating a more level playing field for competition, and affording the candidates time to focus on campaigning instead of fund-raising. The system could serve those goals in the future, but not as it is currently structured or funded. More generous financing is the key. If extending the matching system into the general election would mean that the requisite funds would be available, I would support that change. I, too, believe that unless available funds are increased, all of the serious contenders will opt out in 2008. Feingold might have unilaterally disarmed in his 1998 senatorial race, but I doubt that McCain would do so in a presidential election.

Restructuring involves a number of amendments to existing law. I support the revisions already mentioned—ending the state-by-state spending limits and overall spending limits in the primaries and increasing the match, although I would be inclined to increase it to 4:1, as is done in New York City. But I would add another two amendments to existing law. First, candidates should not be permitted to opt out of the primaries and then opt in for the general election. That is what both Bush and Kerry did in 2004, and it undermines the purposes of the program. Requiring participation throughout—or not at all—would likely make the program more expensive, however, because candidates would want greater assurance that they would not be grossly outspent by their opponents before opting in. Second, to provide that assurance, funds should be available to match high-spending, nonparticipating candidates and their independent supporters, at least up to two or three times the original spending limit. This mechanism is part of the most recent public funding systems at the state and local level, and it helps to encourage candidate participation. By putting money into the system, rather than trying to limit independent expenditures, it also addresses First Amendment concerns.

JAN BARAN: If success is measured by the number of candidates, including fringe candidates, who have run for president, then public financing of presidential campaigns has been an unqualified success. How else could disparate oddballs like Lyndon LaRouche and Dennis Kucinich be able to mount presidential campaigns? That, however, is not the objective of most people who support public financing. Most supporters want to limit campaign spending by linking public funds with mandatory spending limits. By that measure, public financing has been a failure.

Spending limits, which are the result of political legislative compromises, are uniformly too low. Bob Dole in 1996 basically ran out of money to spend legally by March, and thereafter he was defenseless while unopposed incumbent President Clinton spent most of his campaign funds attacking Senator Dole and the Republicans. Experience with spending limits demonstrates that they are ineffective, artificial, and ultimately counterproductive. Money will be spent if it can be raised.

The AFL-CIO and Christian Coalition have more to say about who runs for office than political parties.

[ROBIN KOLODNY]

Money should be spent if it can be raised. Spending is fundamental to a candidate's ability to get his or her message out through increasingly expensive media to growing numbers of voters whose attention is difficult to obtain. This is why Kerry, Bush, and Dean bypassed public funding in 2004. McCain-Feingold increased contribution limits and indexed them for inflation. As a result candidates will continue to be able to raise funds well beyond any spending limit that legislators are willing to establish with a straight face in the name of controlling spending. Accordingly, public financing for the purpose of controlling spending appears doomed for the foreseeable future.

Yet public financing can be beneficial in other contexts. As a member of the American Bar Association Commission on Public Financing of Judicial Campaigns, I supported public funding for state supreme court races. Public financing provides resources to candidates who may need them. In judicial races, the source of funding is particularly limited. Judicial candidates can expect funding mostly from the limited universe of lawyers and private interests who are likely to have cases before those courts. That is undesirable because such contributions may lead to recusals and are often inadequate to finance increasingly expensive campaigns. Public financing provides judicial candidates with more resources to finance their campaigns.

ROBIN KOLODNY: Let's look at this question from the perspective of political parties, rather than individual candidates. First, the determination of which parties' nominees can have access to public funding is problematic and entirely retrospective. It is almost impossible for anyone not pursuing the Democratic or Republican nominations to receive public money in advance. The only exceptions are for minor parties whose candidates did well at a previous election (retrospective, as for the Reform Party in 2000 based on its 1996 performance). Otherwise, only independent candidates who are billionaires can run a viable campaign. Thus, the major parties have no gatekeeping powers in the nomination phase, and we have perverse outcomes like matching funds being paid to the likes of Lyndon LaRouche on behalf of the Democratic party, as Jan Baran noted. As others have noted, the spending limits for the primary system are entirely too low for the pressures of modern campaigning. The front-loading problem is serious, but so is the need to carry a national campaign organization from Super Tuesday (in March) to the nominating convention (in July or August) when the full public funds for the two major parties' candidates for the general election kick in.

Public money is also used to subsidize the nominating conventions of the two major parties and (retrospectively) qualifying minor parties. As the work by the Campaign Finance Institute at George Washington University shows, the public subvention is a drop in the bucket compared to the money really spent on conventions. Furthermore, the exception in the law for donations to "host committees"—the business-booster organizations meant to help the locality hosting the election put on a good show—is tantamount to a soft-money exception one can drive a truck (of corporate cash) through. Given the current political state of conventions, I'm not sure it makes sense to continue funding them with public money.

The general election system is also not impressive, especially post-BCRA. Yes, the

general election candidates spend their allotment and nothing more. But the FEC now allows the Republican National Committee (RNC) and the Democratic National Committee (DNC) to make independent expenditures on behalf of their candidates. In the 2004 election, the DNC spent $120 million this way, and the RNC spent about $18 million and a large chunk ($50 million) on generic party advertising. This allowed the RNC and DNC to appeal to donors throughout the fall of 2004, and because they were raising hard money, Kerry and Bush signed those appeals. Thus, the general election funding did not interfere with the rights of donors to support their chosen presidential candidate.

In sum, the AFL-CIO, the Christian Coalition, [philanthropist] George Soros, and [Amway founder] Dick DeVos now have more to say about who will run for office and what issues will be discussed than the Democratic and Republican parties. In my view, the campaign finance regulatory environment is to blame.

EDITOR: What other trends, controversies, or new regulations in campaign finance might we see in the upcoming 2006 congressional elections or the 2008 presidential race?

JONATHAN KRASNO: With control of Congress at stake in 2006, the pressure to extract any sort of financial edge will be intense. I expect 527s to try to get involved much as they did in 2004. Other soft-money operations may air ads well before the general election, handing off to the campaigns in September. Given the experience of using 527s to evade BCRA, I suspect that parties, groups, and some intrepid candidates will try to explore ways to exploit different organizational mechanisms. It will be up to reformers and judges to stay abreast of these developments so as to keep the system relatively intact and sensible. Ultimately, the best system is one that lets the candidates, their supporters, and the media focus on the campaign itself and not the financial sideshow.

PAUL HERRNSON: Interest group-sponsored 527 committees most likely will continue to spend large amounts of soft money to influence both the presidential and congressional elections. Largely unregulated and financed by wealthy individuals, corporations, and labor unions, these organizations have little political accountability. Some go as far as to adopt innocuous names, such as "Citizens for Better Medicare" (CBM) and "Citizens for a Strong Senate" (CSS) in order to hide the identities of their financial backers and give greater credibility to their messages. CBM, for example, was backed by the pharmaceutical industry, and CSS was funded by those seeking to elect Democrat Kenneth Salazar over Republican Pete Coors in Colorado's 2004 Senate contest. Some 501(c)(5/6) organizations probably will carry out similar activities. The roles of these organizations, and of the wealthy individuals and interest groups that finance them, should continue to spark significant controversy.

BRADLEY SMITH: The only other major change I would see in the next two elections might be some effort to limit independent citizen groups (527s). Just as McCain-Feingold caused a boom in the use of 527s, limiting them will not eliminate influence, it will just change the form it takes. So long as we live in a democracy, people will find ways to influence elections. The only thing worse is prohibiting people from trying to influence elections.

JAN BARAN: I venture two predictions. First, more money will be spent on politics in the next election than was spent in the last. I note that almost 2,000 Republicans assembled in Memphis in March 2006 to hear from numerous prospective 2008 Republican presidential candidates and to conduct a straw poll. The race has already begun. Second, the growth in spending will be accompanied by an expansion of regulation. Like so many other enterprises in American society, politics has become a full-time regulated industry.

KENNETH MAYER: In the next 10 years, television and the Internet will merge, so that there will no longer be any meaningful difference between them. I don't know precisely how this will happen. But it will force the issue of how the Internet should be treated in campaign finance law—either generally unregulated like the print media or more controlled like current broadcasts. This will also force us to think more carefully about the media exemptions that allow newspapers, radio, and TV to make endorsements. The history of campaign finance reform has been an ongoing response to new patterns of political influence, in which new forms of organization and technology raise questions about who is exercising influence and whether that power is perceived as unfair. It took candidates and parties 15 years to figure out how to use television as a political tool, and another 15 years before they got good at it. We're at the very beginning of the Internet's power as a political tool. The ability to transmit unlimited amounts of information, at a marginal cost of near zero, is going to change the way that we organize ourselves politically. The urge to regulate this tool will prove irresistible. Whether it should be regulated, and whether regulations will work, are the questions that will keep us occupied for the next 30 years.

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