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## Campaign Finance Reform "Dollar for Votes"--The American Democracy

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# NOTE

## CAMPAIGN FINANCE REFORM “DOLLAR FOR VOTES” – THE AMERICAN DEMOCRACY

### INTRODUCTION

Campaign finance reform has become a pervasive element of our political discourse. There have been constant allegations of abuse of the existing financing regulations. Individuals and groups are frequently using contributions to purchase access and influence to legislative channels. These contributions have led to a virtual replacement of our representative system of government by a dictatorship of the “moneyed elite.” This Note begins with a brief history of campaign finance regulations. Part two discusses the need for changing the existing system. Part three examines the various reform proposals suggested to bring about needed change. Part four recommends a course of action.

### I. HISTORY

Money and politics have had a long and sordid history.

Congress began its effort to control monetary influence in politics in 1907, with the passage of the Tillman Act (the Act).<sup>1</sup> This Act prohibited chartered banks and corporations from making contributions to political campaigns.<sup>2</sup> In 1925, Congress passed the Federal Corrupt Practices Act,<sup>3</sup> which focused on general election activities. It required candidates and political action committees ("PACs") to disclose contributions and expenditures.<sup>4</sup> Further legislative efforts at reform stagnated, until the 1970s when the ties between money and politics were notoriously exposed during the Watergate scandal.<sup>5</sup> The investigation that led to the exposure of Watergate also showed that many corporations had bought government favors through campaign contributions, despite the prohibition against such practices since 1907.<sup>6</sup> There were also instances of wealthy individuals buying

1 See Tillman Act, Act of January 26, 1907, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (1998)); Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503, 524-25 (1997) (stating that Tillman Act was Congress's first attempt at regulating money in elections); see also Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 358 (1994) (describing history of Tillman Act); Kirk J. Nahra, *Political Parties and the Campaign Financing Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 60-61 (1987) (stating that Tillman Act was passed to "minimize the influence of large corporate contributions").

2 See 2 U.S.C. § 441b(a) (indicating that "[i]t is unlawful for any . . . bank, or . . . corporation . . . to contribut[e] . . . to any political office"); Brown, *supra* note 1, at 525 (limiting political contributions); Burke, *supra* note 1, at 358 (stating corporations prohibited from making campaign contributions); see also Nahra, *supra* note 1, at 60-61 (indicating Act prevented corporate campaign contributions).

3 Federal Corrupt Practices Act of 1925, 2 U.S.C. § 256 (repealed 1972); see also *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (opining that Federal Corrupt Practices Act prevents corruption through political contribution).

4 See *Burroughs v. United States*, 290 U.S. at 41-42 (describing how Act functions); Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 21-22 (1997) (describing history and development of Act); Burke, *supra* note 1, at 358 (explaining extent of Act); see also Gary S. Stein, *The First Amendment and Campaign Finance Reform: A Timely Reconciliation*, 44 RUTGERS L. REV. 743, 744 (1992) (describing disclosure required by Act). See generally Nahra, *supra* note 1, at 62-63 (discussing loopholes in disclosure provisions of Act).

5 See Donald J. Simon, *Beyond Post-Watergate Reform: Putting an End to the Soft Money System*, 24 J. LEGIS. 167, 167 (1998) (describing depth of corruption during Watergate era); David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 39 (1998) (illustrating evils of fundraising during Watergate period); see also Joseph Lieberman, *The Politics of Money and the Road to Self-Destruction*, 16 YALE L. & POL'Y REV. 425, 432-33 (1998) (describing Watergate as circumstantial paradigm for campaign finance reform).

6 See Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 USC § 441b (1994) (banning corporate donations); Simon, *supra* note 5, at 167 (noting that solicited corporate donors yielded approximately \$749,000 to Nixon campaign, including donations from American Airlines, Goodyear Tire & Rubber, Gulf Oil, and Hertz).

ambassadorships with huge contributions.<sup>7</sup> These abuses, when added to governmental favoritism toward corporate contributors, led to widespread calls for reform.<sup>8</sup>

In 1974, Congress responded by amending the Federal Election Campaign Act of 1971.<sup>9</sup> The Act of 1971 did several things, namely: (1) repealed the Corrupt Practices Act; (2) required the disclosure of contributions exceeding \$1,000 by political committees; (3) required the disclosure of contributions by individuals in excess of \$100; (4) limited expenditures for use in the communications media; and (5) limited contributions and expenditures from a candidate's personal funds.<sup>10</sup> However, the Act had various deficiencies that rendered it ineffective.<sup>11</sup> Although it repealed prohibitions on contributions,<sup>12</sup> the expenditure limits applied only

<sup>7</sup> See Simon, *supra* note 5, at 167-68 (recognizing that Walter H. Annenberg, Ambassador to Great Britain contributed \$254,000; Shelby Davis, Ambassador to Switzerland contributed \$100,000; and Arthur K. Watson, Ambassador to France contributed \$303,000); The Final Report of the Senate Select Comm. on Presidential Campaign Activities, S. REP. NO. 93-981, at 493 (1974) (detailing Senate Committee's findings); see also Ian Ayres, Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity To Disrupt the Market For Political Influence*, 50 STAN. L. REV. 837, 858 (1998) (stating that mandated anonymity would eliminate longstanding practice of rewarding fundraisers with ambassadorships). See generally Ronald A. Cass, *Money Power and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1, 40-41 (1998) (recognizing that ambassadorships have historically been rewards for campaign fundraising).

<sup>8</sup> See Simon, *supra* note 5, at 168 (describing \$2 million campaign contribution by Associated Milk Producers which was linked to governmental support of increases in federal milk price supports, and \$400,000 campaign contribution by ITT which was linked to favorable antitrust ruling); see also Stanley I. Kutler, *In the Shadow of Watergate: Legal, Political, and Cultural Implications*, 18 NOVA L. REV. 1743, 1748-49 (1994) (discussing public demands for reform).

<sup>9</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1988) (*codified in 2 U.S.C. § 431 et seq.*). See Burke, *supra* note 1, at 359 (stating that plethora of campaign finance reform began with passage of FECA); Nahra, *supra* note 1, at 65 (noting Watergate repercussions compelled Congress to pass Federal Election Campaign Act in 1971). See generally Financing Campaigns: Growing Pressure for Reform, 31 CONG. Q. WKLY. REP. 1877 (1973).

<sup>10</sup> See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1988) (*amending Federal Election Campaign Act of 1971*); Smith, *supra* note 4, at 23-25 (listing FECA's components); Burke, *supra* note 1, at 359 (stating components of Act); see also Nahra, *supra* note 1, at 64 (detailing FECA's restrictions).

<sup>11</sup> See Burke, *supra* note 1, at 359 (discussing problems with FECA); see also Lisa Gordon, Note, *Colorado Republican Federal Campaign Committee v. Federal Election Commission: A Court Divided—One Opinion Properly Subjects Campaign Finance Jurisprudence to a Reality Check*, 81 MINN. L. REV. 1565, 1569 (1997) (stating that 1971 FECA had enormous deficiencies).

<sup>12</sup> See Burke, *supra* note 1, at 359 (creating "pattern of dependence from wealthy individuals and special interest groups"); Nahra, *supra* note 1, at 64 (stating that FECA repealed existing contribution limits); see also Robert O. Tiernan, *The Presidential Campaign: Public Financing Accepted*, 69 NATIONAL CIVIC REV. 133, 135 (1980) (indicating small percent of individuals provide most of campaign financing).

to the media.<sup>13</sup> The Act also failed to establish an administrative body to implement and enforce the law.<sup>14</sup>

The weaknesses of the Act of 1971 led to continued abuses of the system which were exposed during Watergate.<sup>15</sup> Congress enacted the Federal Election Campaign Act of 1974 ("FECA") to remedy the flaws in the Act of 1971 and the political system in general.<sup>16</sup> It initiated four basic reforms: (1) public financing, (2) disclosure, (3) limits on campaign contributions, and (4) limits on campaign expenditures.<sup>17</sup> FECA provided for the full public funding of presidential elections, the partial funding of presidential primaries, and the funding of national party nominating conventions.<sup>18</sup> It also allowed public funding of up to two million dollars for national party nominating conventions, and matching public funds in presidential primaries of up to \$5 million per candidate.<sup>19</sup> These funds were only available to candidates

<sup>13</sup> See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431) (stating limits on campaign expenditures); Burke, *supra* note 1, at 359 (allowing expansion of campaign budgets in all areas except media); see also Nahra, *supra* note 1, at 64 (stating that FECA placed ceilings on candidates' media expenditures).

<sup>14</sup> See Burke, *supra* note 1, at 359 (compelling compliance was difficult with lack of administrative structure); see also PAUL S. HERNSON, *THE HIGH FINANCE OF AMERICAN POLITICS: CAMPAIGN SPENDING AND REFORM IN FEDERAL ELECTIONS*, IN *CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE* 17, 19 (Arthur B. Bunlicks ed., 1993) (discussing inherent weaknesses of Act).

<sup>15</sup> See David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85, 91-92 (1999) (discussing abuses of Nixon's fundraising organization- "Committee for the Reelection of the President").

<sup>16</sup> See Pub. L. No. 99-443, 88 Stat. 1263 (codified as amended at 2 USC §431-456 (1994)). Smith, *supra* note 4, at 24-25 (discussing 1974 regulatory scheme); Nahra, *supra* note 1, at 53-54 (stating that FECA Amendments of 1974 were regulatory scheme designed to correct flaws in campaign finance system); see also David M. Ifshin & Roger E. Warin, *Litigating the 1980 Presidential Election*, 31 AM. U. L. REV. 485, 530 (1982) (stating that FECA Amendments were compelled by campaign finance abuses).

<sup>17</sup> See Schultz, *supra* note 5, at 34 (1998) (stating that limitations placed on campaign donations); Schultz, *supra* note 15, at 93 (detailing reforms of 1974 Amendments); Smith, *supra* note 4, at 25-26 (discussing 1974 changes); DANIEL H. LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* 507-8 (1995) (detailing new reforms); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609, 610 (1982) (stating that 1974 Act limited contributions and created federal agency to enforce laws).

<sup>18</sup> See 26 U.S.C. § 9001-42 (1988 & Supp. 1993) (stating funding provisions). See Simon, *supra* note 5, 168-69 (discussing public financing); see also Richard Briffault, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083, 2083 (1984) (stating that FECA provided public funding to presidential elections to "free the major party nominees from the need to solicit wealthy donors").

<sup>19</sup> See FECA of 1974, 2 U.S.C. § 431-455 (1988) (denoting financial contribution limits); Burke, *supra* note 1, at 363 (stating fiscal limits of public funding).

who met a fundraising requirement of \$100,000.<sup>20</sup> This money had to have been raised in amounts of at least \$5,000 in twenty states, through contributions of \$250 or less.<sup>21</sup> Campaign contributions were limited to \$1,000 per person, per candidate, and \$5,000 per political action committee.<sup>22</sup>

FECA also established various expenditure limits: (1) individual expenditures on behalf of a candidate were limited to \$1,000 per year; (2) Presidential and Vice Presidential candidates could spend a maximum of \$50,000 of their own personal funds, whereas, Senate and House candidates were limited to \$35,000 and \$25,000, respectively; (3) a \$10 million expenditure limit was imposed on Presidential primaries and a \$20 million limit for Presidential elections; (4) there was a \$100,000 expenditure limit imposed on Senate primaries, a \$150,000 limit imposed on Senate general elections, and a \$70,000 limit on House primaries and general elections.<sup>23</sup> To ensure compliance with these requirements Congress created the Federal Election Commission ("FEC"),<sup>24</sup> a regulatory body to oversee the implementation of funding restrictions. This filled the regulatory gap cre-

<sup>20</sup> See Burke, *supra* note 1, at 363; see also Ifshin & Warin, *supra* note 16, at 493 (stating that candidates must raise at least \$100,000).

<sup>21</sup> See FECA of 1974, 2 U.S. § 431-455 (1988) (stating limitations of funding for campaigns); Burke, *supra* note 1, at 363 (denoting limits placed on public contributions to campaigns for political office); see also Ifshin & Warin, *supra* note 16, at 493 (indicating that candidates for political office must raise minimum amount of money for their campaign).

<sup>22</sup> See 2 U.S.C. § 441a(a)(1)(A) (1994); Buckley v. Valeo, 424 U.S. 1, 27-38 (discussing contribution caps); Simon, *supra* note 5, at 175 (referring to limitations placed on financial contributions); Richard Briffault, *Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 CONST. COMMENT. 91, 119 (1997) (discussing contribution restrictions under FECA); see also Laurence Michael Bogart, *Buckley v. Valeo and Campaign Finance Reform After California Proposition 73: Why Don't You Love Me Like You Used To Do?*, 29 IDAHO L. REV. 235, 244-45 (1993) (detailing limits on contributions from PACs and individuals).

<sup>23</sup> See Bradley A. Smith, *Faulty Assumption and Undemocratic Consequences of Campaign Finance*, 105 YALE L.J. 1049, 1050 (1996) (stating that 1974 Amendments were great victories for reformers); Burke, *supra* note 1, at 363 (summarizing Act's expenditure limits).

<sup>24</sup> See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointment Clause*, 15 CONST. COMMENT. 87, 98 (1998) (discussing creation of FEC); see also *Federal Election Commission 10 Year Review* (Apr 1985) (stating that FEC oversees federal elections by performing major functions of administering public funding, disclosing campaign information, encouraging and monitoring compliance with law); Wright, *supra* note 17, at 610 (1982) (discussing creation of FEC).

ated by previous campaign financing legislation.<sup>25</sup>

### A. Buckley Dichotomy

Despite its seemingly positive impact on campaign reform, FECA's regulations were challenged in the basis of free speech<sup>26</sup> in the seminal case *Buckley v. Valeo*.<sup>27</sup> The Supreme Court held that regulations dealing with money in politics can raise First Amendment concerns; however, all such regulations are not *per se* unconstitutional.<sup>28</sup> In all First Amendment cases, the Court must employ a balancing test.<sup>29</sup> The Court must determine the strength of the First Amendment interest in the form of speech at issue and balance it against the strength of the governmental interest served by the proposed restriction on the speech.<sup>30</sup> To that end, the Court held that caps on campaign contributions could serve the compelling government interest of preventing ac-

<sup>25</sup> See Kenneth A. Gross & Ki P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 51, 51 (1998) (stating that FEC was created to fill need for civil enforcement mechanism); see also Frank J. Sorauf, *Politics, Experience, and the First Amendment: the Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1348 (1994) (stating that FEC was created as apart of "a virtually new structure of regulation"); Marty Jezer & Ellen Miller, *Symposium on Voice in Government-Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 486-87 (1994) (noting creation of new agency "to monitor contributions and expenditures and administer and enforce the law").

<sup>26</sup> See Simon, *supra* note 5, at 171 (stating that First Amendment was implicated by FECA's regulations); Briffault, *supra* note 22, at 96 (stating that FECA "impinges on the core First Amendment concerns of political expression and association"); see also Allison Rittenhouse Hayward, *Stalking the Exclusive Express Advocacy Standard*, 10 J.L. & POL. 51, 57 (1993) (stating "the Court established that the First Amendment protects political expenditure as political speech").

<sup>27</sup> 424 U.S. 1 (1976) (reviewing constitutionality of campaign contributions and limitations).

<sup>28</sup> See Simon, *supra* note 5, at 171 (discussing constitutionality of public financing system); see also Schultz, *supra* note 5, at 35 (1998) (stating that *Buckley* equated speech with money); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1289 (1994) (restricting spending by candidate is not form of speech regulation); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1395 (1994) (stating all campaign finance laws are not forbidden by First Amendment).

<sup>29</sup> See Schultz, *supra* note 5, at 47 (illustrating Court's balancing of different interests); Blasi, *supra* note 28, at 1286 (describing balancing equality of opportunity with limiting speech); see also Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 20-21, 28 (1997) (describing concerns weighed by Court in *Buckley*).

<sup>30</sup> See *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (demonstrating Court's use of balancing test); see also Neuborne, *supra* note 29, at 20 (stating that Supreme Court recognized prevention of "corruption" as compelling interest justifying regulation of campaign funding, despite inevitable restriction on political autonomy).

tual corruption, as well as the appearance of corruption,<sup>31</sup> the primary purposes of FECA.<sup>32</sup> Thus, *Buckley* upheld the contribution limits established by FECA.<sup>33</sup>

However, *Buckley* created a distinction between contributions and expenditures, permitting limitations on the former, but not the latter.<sup>34</sup> The Court justified this dichotomy by explaining that a contribution is a gift of money from one to another, and that second person spends the money on speech.<sup>35</sup> Whereas, an expenditure occurs when a person directly spends money on speech<sup>36</sup>, and is therefore too close to the essence of speech in a modern society.<sup>37</sup> Thus, expenditures are entitled to a higher degree of protection.<sup>38</sup> The Court held that advocating the election

31 See *Buckley*, 424 U.S. at 25-29 (stating purpose of Act is to prevent corruption); Simon, *supra* note 5, at 172 (noting corruption prevention as part of Court's balancing test); Schultz, *supra* note 5, at 44-45 (1998) (stating Court found primary purpose of preventing corruption as constitutionally sufficient justification); see also Sunstein, *supra* note 28, at 1395 (limiting political contributions justifiable attempt to prevent corruption).

32 See *Buckley*, 424 U.S. at 26 (discussing intentions and motivation surrounding passage of Act); see also Ky Henderson, *Ending Pay to Play: What are the Ethics Issues When Lawyers Contribute to Political Campaigns*, 25 HUM. RTS. 20 (1998) (asserting contribution limits "sought to enhance 'the integrity of our system of representative democracy' by guarding against corrupt practices"); Schultz, *supra* note 5, at 40 (discussing report prepared by Committee on House Administration stating that 1974 Amendments were necessary "to place limitations on campaign contributions and expenditures" because candidates were becoming increasingly dependent on special interest groups and large contributors).

33 See 2 U.S.C. § 441a(a)(1)(A) (1994); *Buckley*, 424 U.S. at 27-38 (stating corruption as leading factor for contribution limitation); Simon, *supra* note 5, at 172 (supporting contribution limits).

34 See *Buckley*, 424 U.S. at 29, 58-59 (1976) (stating that only contributions are limited); Neuborne, *supra* note 29, at 21 (1997) (stating Court's distinction); see also Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 796-97 (1998) (examining Court's distinction). See generally *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 519-20 (1985) (Marshall, J., dissenting), (stating that three Justices did not clearly support distinction).

35 See Neuborne, *supra* note 34, at 796 (1998) (stating that corruption necessitates strict campaign funding regulations); Simon, *supra* note 5, at 171 (describing contributions); see also Briffault, *supra* note 22, at 97 (stating that "the transformation of contributions into political debate involves speech by someone other than the contributor"); Briffault, *supra* note 18, at 2089 (1984) (contrasting contributions and expenditures).

36 See Simon, *supra* note 5, at 171 (describing expenditures); Briffault, *supra* note 18, at 2089 (discussing expenditures).

37 See Briffault, *supra* note 22, at 96-97 (stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment"); Burke, *supra* note 1, at 367 (discussing significance of speech in society).

38 See Neuborne, *supra* note 34, at 796 (spending constitutes expression and is accorded First Amendment protection); Briffault *supra* note 22, at 96 (stating that *Buckley* court held that 'money is speech'); see also Daniel Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 383 (1992) (interpreting *Buckley* to state that limits in spending are invalid).



of a political official was entitled to First Amendment protection, in the same way that discussion of political policy is entitled to protection.<sup>39</sup>

This distinction has made campaign finance reform difficult.<sup>40</sup> The difficulty can most easily be described in terms of an equation.<sup>41</sup> Contributions and expenditures are two sides of a political equation. The Supreme Court limited contribution caps, but left expenditures unrestricted, creating an imbalance that is perpetuated during every election cycle.<sup>42</sup> This equation has effectively permitted the translation of economic inequalities into political inequalities.<sup>43</sup>

### B. Soft Money

Campaign financing was further complicated by the advent of the concept of soft money. Soft money is an umbrella term that describes contributions to political parties from sources that are prohibited from making contributions in connection with federal elections.<sup>44</sup> Soft money became a

39 See *Buckley v. Valeo*, 424 U.S. at 48 (stating that First Amendment's broad protection).

40 See Schultz, *supra* note 15, at 86 (discussing federal and state court attempts to deal with finance reform efforts); see also Schultz, *supra* note 5, at 35 (focusing on link between money and speech); Briffault, *supra* note 22, at 126 (stating that Buckley's internal tensions make doctrine difficult to apply); Joseph Finley, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44 EMORY L.J. 735, 744 (1995) (stating while Buckley found spending limits violate First Amendment, Court did not disallow voluntary spending limits).

41 See Neuborne, *supra* note 34, at 797 (discussing demand aspects of campaign financing equation); see also Peter Dreier, *Symposium- America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1400 (1993) (describing American political process as an equation).

42 See Neuborne, *supra* note 34, at 797 (discussing inherent weaknesses of unbalanced equation); Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, 116 (1997) (stating demand for campaign money cannot be limited, but supply has been constrained); see also Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 294 (1993) (stating that majority of contributions come from wealthy).

43 See Sunstein, *supra* note 28, at 1413 (discussing conflict between *Buckley* and Constitutional system); Neuborne, *supra* note 34, at 797 (discussing inequalities in current system).

44 See Russell D. Feingold, *Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote"*, 35 HARV. J. ON LEGIS. 377, 379 (1998) (defining soft money); Ann McBride, *Symposium, Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 487 (1990) (describing soft money as campaign contributions raised from sources and in amounts that, if given directly to candidates, are illegal in federal elections); see also *Investigation of Illegal or Improper Activities in Connection With the 1996 Federal Election Campaign—Part VIII: Hearings Before*

part of the political fray through an FEC ruling.<sup>45</sup> The ruling allowed the parties to pay for party-building activities with money raised pursuant to federal rules (hard money), and money raised outside the federal rules (soft money).<sup>46</sup> The federal rules only apply to money raised for federal elections.<sup>47</sup> The Commission contended that party-building activities affect both federal and nonfederal elections, and thus should be paid for with both kinds of money.<sup>48</sup> Party-building activities originally included things such as voter registration drives and "get out the vote" activities.<sup>49</sup> However, the spectrum of party-building activities has vastly expanded, serving also to increase the supply of soft money.<sup>50</sup> Soft money circumvents existing regulations because it is not directly linked to any specific candidate.<sup>51</sup> Contributions are made to political parties at the national level, which then transfer them to state parties.<sup>52</sup> State parties then serve as conduits to inject the money into the political stream.<sup>53</sup> An example of this process is the contri-

*the Senate Comm. On Government Affairs, 105<sup>th</sup> Cong. 128 (1997) (statements of Prof. Anthony Corrado describing soft money as "unlimited funds raised by party committees that cannot be used for the express purpose of influencing Federal elections, but may be used for a wide array of activities that can indirectly benefit Federal candidates.")*

<sup>45</sup> See FEC Advisory Op. 1978-10.

<sup>46</sup> See FEC Advisory Op. 1978-10, [1976-1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) para. 5340, at 10, 335 (discussing FEC ruling creating hard-soft distinction); Simon, *supra* note 5, at 175 (describing creation of soft money loophole); Feingold, *supra* note 44, at 380 (1998) (discussing FEC ruling creating soft money loophole); see also Anthony Corrado, *Giving, Spending and "Soft Money"*, 6 J.L. & POLY 45, 46-48 (1997) (discussing 1979 FECA amendments which helped create soft money loophole).

<sup>47</sup> See Donald J. Simon, *Soft Money: The "End Run" Around Federal Campaign Finance Laws*, 10 STAN. L. & POLY REV. 75, 76 (1998) (describing distinction between monies subject to federal regulations, and money not subject to federal regulations); Corrado, *supra* note 46, at 47-48 (describing distinction between federal and nonfederal money).

<sup>48</sup> See FEC Advisory Op. 1978-10, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5340 (Aug. 29, 1978) (discussing pedagogical justifications of creating soft money loophole).

<sup>49</sup> See Frances R. Hill, *Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits*, 4 N.Y. L. SCH. L. REV. 881, 905 (1997) (describing exemptions provided to party-building activities); Corrado, *supra* note 46, at 47 (describing exemptions provided to grass roots movements).

<sup>50</sup> See Corrado, *supra* note 46, at 50 (examining newest addition to party-building activities—generic party advertising); see also Feingold, *supra* note 44, at 380 (discussing soft money and advertising).

<sup>51</sup> See Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 COLUM. L. REV. 1126, 1144 (1994) (contributing to parties avoids donation restrictions placed on individual candidates).

<sup>52</sup> See Corrado, *supra* note 46, at 48 (showing relaxed state laws often allow corporate and labor union contributions).

<sup>53</sup> See Corrado, *supra* note 46, at 48-49 (stating that relaxed state laws permit access to funds prohibited by federal law); Wertheimer & Manes, *supra* note 51, at 1145 (stating

butions of Mary C. Bingham in 1990.<sup>54</sup> She was a known supporter of Democratic Senatorial candidate Harvey Sloane.<sup>55</sup> Bingham contributed \$250,000 to the Democratic National Convention, which then transferred the funds to the Kentucky Democratic Party.<sup>56</sup> The Kentucky state party spent the money on an advertising campaign created by Sloane's media consultant, addressing federal issues.<sup>57</sup> This is one of many examples of soft money penetrating the federal scheme.<sup>58</sup>

## II. NEED FOR CHANGE

Professor Archibald Cox, former Solicitor General and a Watergate Special Prosecutor, was once asked whether he thought the American public would ever see meaningful campaign finance reform.<sup>59</sup> He replied, "[W]e can't survive as a self-governing people if it doesn't happen."<sup>60</sup> This statement prophetically describes the urgent need to reform the campaign financing system.

### A. Growth of soft money

The very basis of the electoral process, the principle of

that unpredictability of states' new role as conduit); see also William March, Doug Stanley & John Wark, *Campaign Money Comes in Corporate-Size Bags*, TAMPA TRIB., Apr. 11, 1999, at 1 (stating that state parties funnel money into candidates' campaigns).

<sup>54</sup> See Wertheimer & Manes, *supra* note 51, at 1147 (illustrating soft money loophole); Robert L. Garrett, *Mary Bingham's \$250,000 Gift to Democrats Buoyed, Sloane*, COURIER J. (Louisville, Ky.), Nov. 9, 1990, at 1 (discussing Bingham contribution); Mike Brown, *\$250,000 Bingham Gift to Democrats Raises Questions About 'Soft Money'*, COURIER J. (Louisville, Ky.), Nov. 10, 1990, at 1 (discussing Bingham contribution).

<sup>55</sup> See Garrett, *supra* note 54, at 1 (discussing political climate surrounding Bingham contribution); Brown, *supra* note 54, at 1 (discussing Bingham political loyalty).

<sup>56</sup> See Garrett, *supra* note 54, at 1 (illustrating funneling of money); Brown, *supra* note 54, at 1 (showing money transferred from federal party to state party).

<sup>57</sup> See Garrett, *supra* note 54 (stating that money used to benefit federal candidate); Brown, *supra* note 54 (showing money used to affect federal election).

<sup>58</sup> See Corrado, *supra* note 46, at 48-49 (providing examples of states filtering money into federal system); Wertheimer & Manes, *supra* note 51, at 1145 (describing process of soft money entering federal system).

<sup>59</sup> See John B. Anderson, *Campaign Finance: The Impact on the Legislative and Regulatory Process*, 50 ADM. L. REV. 81, 83 (1998) (citing Cox interview); *Conversation with Archibald Cox*, HARVARD L. BULL. at 10 (Summer 1997) (discussing importance of campaign finance reform).

<sup>60</sup> See Anderson, *supra* note 59, at 83. See generally Jim Drinkard, *'The Ask' Loopholes in Campaign Law are Gifts that Keep on Giving*, USA TODAY, Oct. 26, 1998, at 1A ("You couldn't design a system more dangerous to what civics-book democracy is supposed to be.").

“one person, one vote” is essentially being eroded by an influx of unregulated political contributions.<sup>61</sup> Between 1992 and 1996, there was an explosion in campaign spending.<sup>62</sup> One study estimates that contributions rose 33% during those four years: from \$1.6 billion to \$2.2 billion.<sup>63</sup> The growth of soft money contributions has also been dramatic: \$9 million in the 1980 presidential elections, \$12 million in 1984, \$45 million in 1988, \$75 million in 1992, and \$260 million in 1996.<sup>64</sup> As a result, soft money now threatens to overwhelm the campaign financing system.<sup>65</sup>

The danger of soft money is apparent in its quintessential quid pro quo relationship.<sup>66</sup> Soft money transactions are simply a means to barter for access to elected officials and government decision makers.<sup>67</sup> This is aptly illustrated by Democratic National Convention (“DNC”) fundraiser Johnny Chung’s statement, “I see the

White House is like a subway: You have to put in coins to open the gates.”<sup>68</sup>

61 See Feingold, *supra* note 44, at 380 (claiming that electoral process is drowning in flood of political money); Anderson, *supra* note 59, at 84 (increasing funds have “served to make a mockery of the idea of one man, one vote”); see also Wright, *supra* note 17, at 609 (1982) (stating demise of ideal of equality).

62 See Anderson, *supra* note 59, at 82 (noting general acceptance that 1992 to 1996 yielded “explosion” in campaign spending); Eric Pianin, *Money Machine: The Fund Raising Frenzy of Campaign '96: How Business Found Benefits in Wage Bill*, WASH. POST., Feb. 11, 1997 at A8 (noting spending by corporate PACs doubled).

63 See Anderson, *supra* note 59, at 82 (referring to Washington Post article by Miller and Sifry); Ellen S. Miller & Micah Sifry, *Move Over Big Money*, WASH. POST, April 7, 1997 at A17 (showing recent statistics).

64 See Simon, *supra* note 5, at 176 (detailing expanding soft money coffers); Karen Gullo, *Once Illegal 'Soft Money' Taints Political Climate 'Soft' Contributions Again Raising Queries on Curbing Big Money*, ROCKY MTN. NEWS, Oct. 12, 1997, at 14A (showing increasing amounts of soft money).

65 See Feingold, *supra* note 44, at 380 (comparing soft money to floodwaters).

66 See Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 497 (1985) (“The hallmark of corruption is the financial quid pro quo: dollars for political favors.”); Schultz, *supra* note 5, at 45 (arguing quid pro quo relationship surrounding contributions undermines integrity of system of representative democracy); Neuborne, *supra* note 29, at 7 (“At a minimum, we mean the quid pro arrangement that exists when a donor gives money in return for a promise that an official will perform official duties in a particular way.”).

67 See Neuborne, *supra* note 42, at 111-12 (contending that in post-Buckley world access to public officials is for sale). See generally Panel Discussion, *Revolutionizing Campaign Finance- An Appraisal of Proposed Reforms*, 13 J.L. & POLITICS 163 (1997).

68 See Simon, *supra* note 5, at 177; see also William C. Rempel & Alan C. Miller, *First Lady's Aide Solicited Check to DNC, Donor Says Fund-Raising: Administration Denies Account by Torrance Businessman Johnny Chung Who Gave \$50,000 Contribution to Hillary Clinton's Chief of Staff*, L.A. TIMES, July 27, 1997, at A1 (commenting on ties between political access and money).

There is an abundance of anecdotal evidence indicating that the effect of campaign contributions is to sway members of Congress to support positions that are not necessarily in the best interests of their constituencies.<sup>69</sup> This buy and sell relationship has led to widespread corruption among both major political parties.<sup>70</sup> This corruption was vividly depicted during the 1995-1996 election cycle, when the two parties raised over \$262 million in soft money<sup>71</sup> from unregulated sources, raised with the assistance of both Presidential candidates.<sup>72</sup> The candidates helped their parties raise funds under the pretense of issue advocacy, when in fact it was "electioneering", seeking to advocate their individual positions.<sup>73</sup> This pervasive deception resulted in widespread violations of the election laws.<sup>74</sup> This was seen in the scandals involving the Asian investors who bought stays in the Lincoln bedroom and attendance at White House coffees.<sup>75</sup>

69 See Anderson, *supra* note 59, at 88 (referring to experiences of former Representative Dan Hamburg of California and other unnamed representatives); Dan Hamburg, *Inside the Money Chase*, NATION, May 5, 1997, at 25 (describing personal account of cause and effect relationship between contributions and legislative process); Carl Bernstein, *The Nation Campaign Finance Draining a Swamp: Take Money Out of Politics*, L.A. TIMES, July 20, 1997, at M2 (quoting lobbyists Wayne Thevenot: "They [members of Congress] have become full-time fund-raisers and part-time representatives, whose actions reflect who gives them money and how much."); Wright, *supra* note 17 at 618-19 (discussing effect on Representatives' voting of political contributions).

70 See Simon, *supra* note 5, at 177 (discussing actions of DNC during 1996 campaign); see also Smith, *supra* note 5, at 32 (examining issue advocacy ads used by both parties).

71 See Feingold, *supra* note 44, at 380 (noting both parties raised more than \$263 million in soft money, an increase of more than three times that of 1991-92 presidential election cycle).

72 See *Waking Up the FEC*, N.Y. TIMES, Mar. 31, 1997, at A14 (discussing amount of soft money personally raised by both Clinton and Dole campaigns in 1996); Don Van Natta, Jr. & Jane Fritsch, *\$250,000 Buys the Best Access to Congress*, N.Y. TIMES, Jan. 27, 1997, at A1 (reporting that in January 1996, Republican National Committee offered private receptions with Republican congressional and presidential candidates in exchange for \$250,000 donations).

73 See Simon, *supra* note 5, at 174 (stating that in 1996, "[t]here was a flood of so-called issue advocacy that was plainly electioneering").

74 See Van Natta, Jr. & Fritsch *supra* note 72, at A1; Neuborne, *supra* note 34, at 795 (describing actions of Democrats (Lincoln bedroom) and Republicans (openly selling access to their candidate for \$100,000 contribution) during 1996 election).

75 See *Defiant Clinton Shows No Remorse Over His Fund-Raising Methods*, CHI. TRIB., May 2, 1997, at 12 (referring to Democrats' fundraising techniques); Stephen Labaton, *A Clinton Social With Bankers Included A Leading Regulator*, N.Y. TIMES, Jan. 25, 1997, at 1 (discussing White House coffees, where large Democratic donors met with high ranking regulatory officials); see also David Willman et al., *An Investigative Report: What Clinton Knew; How a Push for New Fund-Raising Led to Foreign Access, Bad Money and Questionable Ties*, L.A. TIMES, Dec. 21, 1997, at A1 (describing Asian contributions to Democratic party in 1996). See generally Frank J. Schuchat, *Foreign Investment in the*

### *B. Incumbency: Entrenchment of the Status Quo*

The constant focus on campaign financing has led to a public perception that politicians engage in a perpetual money chase.<sup>76</sup> This has engendered increasing public cynicism towards politics,<sup>77</sup> which manifests itself in voter apathy.<sup>78</sup> This apathy was evident in the lack of voter turnout in 1996, where only 48% of registered voters came to the polls, the lowest voter turnout in five decades.<sup>79</sup> Such low turnout is a sign of public alienation from the political process.<sup>80</sup>

The survival of a democracy depends upon the availability of electoral choices for the public.<sup>81</sup> However, the current campaign finance system provides incumbents with such an enormous fundraising edge over challengers that voters are deprived of choices.<sup>82</sup> Since 1974, campaign costs have sky-

*United States*, 32 INT'L LAW 287, 288 (1998) (describing FECA's prohibition on foreign contributions).

<sup>76</sup> See Simon, *supra* note 5, at 174 (discussing public attitude of general cynicism towards politics); see also Wertheimer & Manes, *supra* note 51 at 1133 (describing money chase as permanent part of politician's life); Blasi, *supra* note 28, at 1304 (describing failure of representation due to excessive fundraising).

<sup>77</sup> See Wertheimer & Manes, *supra* note 51, at 1127 ("The extraordinary public cynicism we see today profoundly threatens our democracy"); Neuborne, *supra* note 42, at 17 ("To the extent officials are perceived as acting under the undue influence of large concentrations of wealth, many voters lose faith in the process.").

<sup>78</sup> See Simon, *supra* note 5, at 174 (commenting on widespread public disaffection from political process); see also Neuborne, *supra* note 42, at 17 (noting that low voter turnout).

<sup>79</sup> See Simon, *supra* note 5, at 174 (stating that statistics on voter turnout); Neuborne, *supra* note 42, at 112 (stating that only 48.8% of eligible electorate voted in 1996 Presidential campaign); Fred Kindecke, 'A Done Deal': Clinton's Wide Lead Kept Voter Turnout Low, ST. LOUIS POST, Nov. 7, 1996, at 17a (discussing voter turnout in 1996 election); see also Barbara Vobejda, *Just Under Half of Possible Voters Went to the Polls*, WASH. POST, Nov. 7, 1996, at A30 (discussing recent trends of low voter turnout). See generally Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, WIS. L. REV. 1, 51-53 (1990) (comparing declining American voting trends to increasing European voting patterns).

<sup>80</sup> See Simon, *supra* note 5, at 174 (discussing public flight from political process); Neuborne, *supra* note 42, at 113 (stating that Americans feel "left out" of political process); see also David Cay Johnston, *Voting, America's Not Keen on, Coffee is Another Matter*, N.Y. TIMES, Nov. 10, 1996, at 2 (explaining that Americans do not vote because they feel it is futile).

<sup>81</sup> See Neuborne, *supra* note 34, at 794 (stating existence of Democratic crisis); see also Wertheimer & Manes, *supra* note 51, at 1127 (stating that "[d]emocracy depends for its survival on having real elections with real choices if the people are truly to have the power to elect representatives that can be held accountable").

<sup>82</sup> See E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 892 (1998) (noting that incredible advantages incumbents have against challengers in fundraising capacities); Wertheimer & Manes, *supra* note 51, at 1133 (discussing fund-

rocketed, placing political office out of the reach of most challengers.<sup>83</sup> Spending in Senate races has increased from a total of \$38.1 million in the 1976 cycle, to \$210.8 million in the 1992 elections.<sup>84</sup> Similarly, spending in House races has increased from \$60.9 million in 1976, to \$326.9 million in 1992.<sup>85</sup> While admittedly costs have increased, challengers' access to money has decreased.<sup>86</sup> In 1996, House incumbents raised \$282 million in campaign funds, compared to \$75 million by their challengers.<sup>87</sup> Incumbent senators raised more than twice as much money as their challengers.<sup>88</sup>

This contrast in campaign earnings has resulted in a stagnation of the political process because campaign funds translate into electability.<sup>89</sup> Candidates who raise and spend the most money are generally elected to office.<sup>90</sup> In-

raising gap that exists between incumbents and challengers); *see also* 137 Cong. Rec. § 5876 (daily ed. May 15, 1991) (statement of Sen. Boren) (contending incumbents have great advantage over challengers). *See generally* Smith, *supra* note 23, at 1073-74 (describing advantages of incumbency).

<sup>83</sup> *See* Blasi, *supra* note 28, at 1293 (discussing obstacles deterring challengers); Wertheimer & Manes, *supra* note 51, at 1132-35 (discussing costs of running election); *see also* Edwin Chen, *Local-Level Suits Keep Campaign Reform Alive*, L.A. TIMES, Oct. 20, 1997, at A1 (stating that "[i]f you can't raise \$200,000, you can't be a senator.>").

<sup>84</sup> *See* Wertheimer & Manes, *supra* note 51, at 1132 (providing Senate election spending statistics and citing 1992 Senate Campaign Financing, Press Release, Common Cause Washington, D.C. (Spring 1993)); Fed. Election Comm'n, FEC Disclosure Series No. 6: 1976 Senatorial Campaign Receipts and Expenditures 3 (1977) (providing Senate election expenditures).

<sup>85</sup> *See* Wertheimer & Manes, *supra* note 51, at 1132 (providing House election spending statistics and citing 1992 House Campaign Financing, Press Release, Common Cause, Washington D.C. (Spring 1993)).

<sup>86</sup> *See* Wertheimer & Manes, *supra* note 51, at 1133 (discussing limited fundraising abilities of challenger).

<sup>87</sup> *See Financing of Campaign '96: One More Cause For Reform Once Again the Current System's Injustice is Made Obvious*, L.A. TIMES, Nov. 13, 1996, at B8 (providing funding statistics); *see also* Wertheimer & Manes, *supra* note 51, at 1133-34 (stating that in 1992, House incumbents outspent their challengers on average by 4 to 1).

<sup>88</sup> *See* Wertheimer & Manes, *supra* note 51, at 1133-34 (stating that in 1992 average senate incumbent spent almost \$4.2 million on their campaign, average challenger only spent \$1.7 million).

<sup>89</sup> *See* Marty Jezer et al., *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 338-39 (1993) (discussing importance of money to election process); Burke, *supra* note 1, at 376 (discussing ties between funding and electability); *see also* Wright, *supra* note 17, at 622 (providing statistical data to illustrate correlation between campaign spending and winning).

<sup>90</sup> *See* Jezer et al., *supra* note 89, at 338 (stating that "the candidates who raise and spend the most money continue to be elected to political office"); *see also* Burke, *supra* note 1 at 376 (stating that "[i]nvariably, those candidates who raise and spend the most money are those who are elected to office"). *See, e.g.*, Wright, *supra* note 17, at 622 (illustrating correlation between funds and electability).

cumbents have consistently raised more than their challengers and since 1974, have been re-elected with a corresponding consistency: the Senate- 85%, the House- 89%.<sup>91</sup> Recent elections continue this trend. Approximately 95% of Congressional incumbents won their elections in 1996.<sup>92</sup> In 1992, 279 of the 349 House incumbents ran unopposed, ran opposed by challengers who raised less than \$25,000, or ran noncompetitive races against challengers who raised less than half of the amount that incumbents raised.<sup>93</sup> Of these incumbents, 98% won.<sup>94</sup> In the 1990 House elections, 91% of House incumbents were unopposed, financially unopposed, or in noncompetitive races.<sup>95</sup> Of these, incumbents won 99% of the races.<sup>96</sup>

These results are mirrored in the Senate. In 1992, Senate incumbents outspent their challengers in 27 out of 28 races, and only four lost.<sup>97</sup> In 1990, Senate incumbents outspent

<sup>91</sup> See Neuborne, *supra* note 42, at 113 (stating that “[h]istorically the incumbent reelection rate hovers in the mid to upper nineties”); Burke, *supra* note 1, at 376 (discussing ties between incumbency and reelection); Blasi, *supra* note 28, at 1294 (stating that electoral playing field is tilted to benefit of incumbents); see also Jezer et al., *supra* note 89, at 339 (discussing benefits of incumbency); Raskin & Bonifaz, *supra* note 42, at 293 (focusing on reelection statistics); L. SANDY MAISEL, *THE INCUMBENCY ADVANTAGE IN MONEY, ELECTIONS, AND DEMOCRACY* 119, 121 (Margaret Latus Nugent & John R. Johannes eds., 1990).

<sup>92</sup> See Ceci Connolly & Juliet Eilperin, *GOP Grip on House Hinges on Close Races; Democrats Buoyed as Incumbents Fall*, WASH. POST, Nov. 4, 1998, at A27 (analyzing incumbent reelection rates and finding “that virtually all lawmakers seeking another term will get it”); *Financing of Campaign ‘96: One More Cause for Reform Once Again the Current System’s Injustice is Made Obvious*, L.A. TIMES, Nov. 13, 1996, at B8 (noting that incumbent reelection rate).

<sup>93</sup> See Wertheimer & Manes, *supra* note 51, at 1134 (discussing competitiveness of 1992 House races in terms of economics); see also 1992 House Campaign Financing, Press Release, Common Cause, Washington D.C. (Spring 1993) (analyzing incumbent fundraising). See generally Janet Hook, *Wealth of Uncontested House Races Reflects Parties’ Strategies With GOP in Slight Majority, Democrats, Republicans, Focus Mostly on Competitive Districts*, L.A. TIMES, June 29, 1998, at A5 (discussing competitiveness of 1998 House races).

<sup>94</sup> See Wertheimer & Manes, *supra* note 51, at 1134 (discussing incumbents’ reelection); see also Connolly & Eilperin, *supra* note 92, at A27 (noting incumbent reelection rates); 1992 House Campaign Financing Press Release, Common Cause, Washington D.C. (Spring 1993) (providing incumbents’ reelection statistics).

<sup>95</sup> See Wertheimer & Manes, *supra* note 51 at 1135 (discussing 1990 House races financially); *Home Field Advantage*, COMMON CAUSE NEWS (Common Cause, Washington D.C.), Mar. 26, 1992, at 34 (discussing 1990 House races).

<sup>96</sup> See Wertheimer & Manes, *supra* note 51 at 1135 (discussing incumbents’ reelection); *Home Field Advantage*, COMMON CAUSE NEWS (Common Cause, Washington D.C.), Mar. 26, 1992, at 34 (providing incumbents’ reelection statistics).

<sup>97</sup> See Cornelius P. McCarthy, *Campaign Finance: A Challenger’s Perspective on Funding and Reform*, 6 J.L. & POL’Y 69, 71 (1997) (noting that 1998 saw 98% re-election rate among House incumbents); Wertheimer & Manes, *supra* note 51, at 1135 (discussing



their challengers in 26 out of 28 races, and only one Senate incumbent lost to a challenger.<sup>98</sup> Thus, there is a clear tie between finance and electability.<sup>99</sup> This connection, coupled with the tremendous fundraising power wielded by incumbents, has disenfranchised the American public by effectively denying them any possibility of change and entrenching the status quo.<sup>100</sup>

### C. Special interests

#### 1. Political Action Committees

Incumbents' financial advantages stem largely from political action committees (PACs).<sup>101</sup> PACs are created to exert political influence on the basis of financial contributions.<sup>102</sup> Since 1974, the influence of PACs has substantially increased and they now constitute almost 50% of the con-

competitiveness of 1992 Senate races in terms of economics); 1992 House Campaign Financing, Press Release, Common Cause, Wash. D.C. (Spring 1993) (discussing competition in 1992 Senate race).

<sup>98</sup> See Wertheimer & Manes, *supra* note 51, at 1135 (discussing 1990 Senate races from financial perspective); see also *Nearly Half of Senate Incumbents Seeking Election in 1990 Were Unopposed or Financially Unopposed*, COMMON CAUSE NEWS (Common Cause, Washington D.C.), Feb. 28, 1991, at app. III.

<sup>99</sup> See Wertheimer & Manes, *supra* note 51, at 1133-34 (quoting Senator David Boren: "When we see the influence of money itself on the system, and we realize that more and more people are being elected not on the basis of their qualifications, . . . but based upon which one can raise the most money, we know that something is wrong. . ."); Jezer & Miller, *supra* note 25, at 474 (stating that empirical evidence indicates money determines which candidates are likely to win political office); Jamin Raskin & John Bonifaz, *Symposium - the Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1177 (1994) (stating that election results indicate that money is decisive factor).

<sup>100</sup> See Neuborne, *supra* note 34, at 794 (discussing public's limited choice of candidates); Neuborne, *supra* note 42, at 114 (1997) (stating that current system favors status quo); Wertheimer & Manes, *supra* note 51, at 1133 (discussing entrenchment of status quo). See generally Sunstein, *supra* note 28, at 1401 (providing tabular information of incumbency and reelection).

<sup>101</sup> See E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 874 (1998) (analyzing PACs preference for contributing to incumbents' campaigns); Lawrence Schlam, *Legislative Term Limitation Under a "Limited" Popular Initiative Provision?*, 14 N. ILL. U. L. REV. 1, 22 (1993) (stating that PACs overwhelmingly support incumbents); Kimberly Coursen et. al., *Restoring Faith in Congress*, 11 YALE L. & POL'Y REV. 249, 270 (1993) (stating that incumbents monopolize PAC contributions); Stein, *supra* note 4, at 747 (noting PAC contributors favor incumbents).

<sup>102</sup> See Sunstein, *supra* note 28, at 1396 (discussing use and creation of PACs); Thomas Stratmann, *The Market for Congressional Votes: Is Timing of Contributions Everything?*, 41 J.L. & ECON. 85, 96 (illustrating that PACs attempt to influence political votes via contributions).

tributions to Congressional election coffers.<sup>103</sup> PAC contributions are overwhelmingly made to incumbents.<sup>104</sup> In 1992, House incumbents received \$91.4 million from PACs, whereas, challengers received a \$8.7 million—a 10.5 to 1 advantage.<sup>105</sup> Senate incumbents raised more than \$38 million from PACs, six times as much as their challengers.<sup>106</sup> PACs overwhelmingly support incumbents because their self-professed purpose is to secure access and influence with elected officials.<sup>107</sup>

PACs tend to use one of two strategies to achieve their goals—either the “electoral” strategy or the “legislative” strategy.<sup>108</sup> Under the electoral strategy, PACs contribute to candidates who are likely to pursue policies that are favorable to the contributors.<sup>109</sup> Under the legislative strategy, they make contributions to the candidate that they think is most likely to win.<sup>110</sup> Under either approach, the

<sup>103</sup> See Burke, *supra* note 1, at 376 (focusing on magnitude of PAC contributions to elections); see also Jezer et al., *supra* note 89, at 336-40 (demonstrating importance of PAC contributions to candidates); George S. Mitrovich, *Public Funding of Elections: Money and the Politics of Betrayal*, 57 VITAL SPEECHES OF THE DAY 435, 436 (May 1, 1991).

<sup>104</sup> See Burke, *supra* note 1, at 376-77 (stating that incumbents usually receive PAC contributions); Mitch McConell, *Campaign Finance Reform: A Senator's Perspective*, 8 J.L. POL'Y 333, 336 (1992) (discussing PAC contributions); Wright, *supra* note 17, at 615 (stating that PACs are more likely to donate money to incumbents).

<sup>105</sup> See Wertheimer & Manes, *supra* note 51, at 1135 (discussing fundraising advantage of House incumbent); see also 1992 House Campaign Financing, Press Release, Common Cause, Washington D.C. (Spring 1993).

<sup>106</sup> See Wertheimer & Manes, *supra* note 51, at 1136 (discussing fundraising advantage of Senate incumbent); see also Senate Campaign Financing, Press Release, Common Cause, Washington D.C. (Spring 1993).

<sup>107</sup> See Wertheimer & Manes, *supra* note 51, at 1138-39 (stating that “PAC officials also have acknowledged their preference for incumbents”); Sunstein, *supra* note 28, at 1409 (stating that PAC contributions are often given with intention of influencing lawmakers); see also Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 903 (1988) (stating that “Political Action Committee’s are simply vehicles that permit individuals to pool their spending in order to advance their political views”).

<sup>108</sup> See Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1273 (1994) (stating that donation strategy chosen has serious consequences); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of all Evil is Deeply Rooted*, 18 HOF. L. REV. 301, 308 (1989) (discussing donation strategies of interest groups).

<sup>109</sup> See Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 427 n. 35 (1992) (distinguishing ideological PACs, which rely on electoral strategies); Sunstein, *supra* note 28, at 1409 (discussing electoral strategy).

<sup>110</sup> See Smith, *supra* note 23, at 1075 (discussing concerns related to legislative strategy); Lowenstein, *supra* note 108, at 308 (discussing legislative strategy); see also BeVier, *supra* note 108, at 1273 (reflecting on contributions made on basis of future electability); Wright, *supra* note 17, at 615 (discussing donation strategy of PACs).

association has nefarious implications.<sup>111</sup> PACs destroy the ties between a representative and the republic's citizens, and instead make the representative accountable to their financial constituents.<sup>112</sup> At the very least this makes representatives ineffective, because the divergent agendas of the interest groups cancel each other out and further entrench the existing system.<sup>113</sup> At worst, politicians abdicate their power to the "moneyed elite" who dictate the nation's policy.<sup>114</sup> At both ends of the spectrum the average citizen is the victim of this "representative" system.<sup>115</sup>

## 2. Corporations

Corporate donations have long been banned.<sup>116</sup> However,

<sup>111</sup> See Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1 (1996) (discussing Congressional awareness of catering to contributing constituencies). See, e.g., Sunstein, *supra* note 28, at 1396 (discussing dangers of PACs). But see Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 493 (1985) (arguing that PACs pose no danger to political process).

<sup>112</sup> See Blasi, *supra* note 28, at 1305 (arguing that representatives should have incentive to serve all their constituents well); Wertheimer & Manes, *supra* note 51, at 1126-27 (quoting John Gardner's speech: "Hold power accountable. That means, among other things, that we can no longer tolerate a system of campaign financing that makes our leaders accountable to donors rather than voters, that makes it possible for money to buy political outcomes, to buy politicians."); *The Road to Anarchy- Excessive Campaign Spending*, Statement of Sen. Barry Goldwater Before the Commission on National Elections, Sept. 17, 1985, at 6. The fact that liberty depended on honest elections was of the utmost importance to the patriots who founded our nation and wrote the Constitution. They knew that corruption destroyed the prime requisite of constitutional liberty, an independent legislature free from any influence other than that of the people. Applying these principles to modern times, we can make the following conclusions. To be successful, representative government assumes that elections will be controlled by the citizenry at large, not by those who give the most money. Electors must believe their vote counts. Elected officials must owe their allegiance to the people, not to their own wealth or to the wealth of interest groups who speak only for the selfish fringes of the whole community. *Id.*

<sup>113</sup> See Blasi, *supra* note 28, at 1305 (making politicians accountable to numerous special interest groups does not increase their effectiveness); see also David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1375-80 (1994) (discussing political effectiveness); Wright, *supra* note 17, 614-620 (comparing PACs to "a form of legalized bribery").

<sup>114</sup> See Russell D. Feingold, *Special Interests and Soft Money*, 10 STAN. L. & POL'Y REV. 59, 60-61 (1998) (describing political parties as water carriers for wealthy); Richard L. Hasen, *Clipping Coupons for Democracy: an Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 9 (1996) (stating that wealthy individuals enjoy disproportionate influence).

<sup>115</sup> See Feingold, *supra* note 44, at 382 (concluding that representative democracy becomes a corporate democracy where donations determine representation); Wertheimer & Manes, *supra* note 51, at 1129 (stating that interest groups dictate policy).

<sup>116</sup> See 2 U.S.C. § 441 b (a) (1996) (stating that it is illegal for corporations to make contributions to electoral campaigns of candidates); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 659 (1990) (citing Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 500-01); Hill, *supra* note 49 at

the development of soft money has provided corporate America with a direct inlet to politics.<sup>117</sup> A study of the country's largest companies showed that corporate donations rose 75% from 1993 to 1997.<sup>118</sup> Also, the overall number of corporations donating has increased, from 366 in 1992 to 403 in 1996.<sup>119</sup>

It is interesting to note that the largest corporate contributors are the corporations that have become the focus of federal investigations, that are highly regulated by the government, or are highly dependent on it for subsidies.<sup>120</sup> Successful corporations such as Intel and Merck, which are not dependent on government aid, are not comparatively large corporate contributors.<sup>121</sup> On the other hand, corporations such as Philip Morris and Archer-Daniels-Midland rank high on the corporate contributor list.<sup>122</sup> Philip Morris

899-900 (detailing prohibition on corporate donations). *See generally* Robert Kutner, *The Other Scandal*, BOSTON GLOBE, Sept. 27, 1998, at C7 (stating that "with unlimited private donations, rich individuals and corporations have more influence than ordinary voters-and politics becomes an oligarchy").

117 *See* Ayres & Bulow, *supra* note 7, at 867 (explaining donations are often given by unions and corporations attempting to avoid statutory rules); Hill, *supra* note 49, at 899 (discussing corporate ability to make unlimited soft money contributions); Ralph Vartabedian, *Big Business, Big Bucks*, L.A. TIMES, Sept. 21, 1997, at B7 (discussing influence of global companies over electoral politics).

118 *See* Vartabedian, *supra* note 117, at B7 (discussing corporate donations); *Corporations, Not Citizens, Dominate Political Giving*, CHI. TRIB., Oct. 18, 1996, at 3 (detailing corporate donations); *see also* Todd J. Gillman, *Fortunately for Dallas, Art Transcends Partisanship*, THE DALLAS MORNING NEWS, Jan. 2, 1999, at 24A (noting number of corporations giving \$100,000 or more increased 62% over past four years). *See generally*, Charles Lewis, *Capital Gains on Capitol Hill, Special Interests use Campaign Contributions to Purchase Influence in Congress*, DALLAS MORNING NEWS, Oct. 25, 1998, at 1J.

119 *See* Vartabedian, *supra* note 117, at B7 (discussing increasing number of corporations donating).

120 *See* Vartabedian, *supra* note 117, at B7 (discussing status of corporations contributing); Wright, *supra* note 17, at 616 (stating that largest contributions from corporate PACs are from more highly regulated industries). *See generally* Ann McBride, *End Corporate Welfare*, IDAHO STATESMAN, July 23, 1998, at 9A.

121 *See* Thomas Sowell, *Blame Big Government, Not Big Business*, CHIC. SUN-TIMES, Oct. 6, 1997, at 23 (stating that Intel ranks low on list of corporate contributors); Thomas Sowell, *Bribes or Protection Money*, TAMPA TRIB., Oct. 3, 1997, at 15 (stating that Intel is comparatively small corporate donor); Ralph Vartabedian, *Top Corporations aren't Top Political Donors, Analysis Finds*, THE DALLAS MORNING NEWS, Sept. 28, 1997, at 10A (stating Intel and Merck rank far down list of corporate contributions to political campaigns); Vartabedian, *supra* note 117, at B7 (stating that Intel is 45<sup>th</sup> largest company, but 307<sup>th</sup> largest contributor; Merck & Co. is 50<sup>th</sup> largest corp. and it is 129<sup>th</sup> largest contributor).

122 *See* Vartabedian, *supra* note 117, at B7 (listing financial importance of various contributors); Charles R. Babcock, *Parties Raised Nearly \$60 Million in 'Soft' Money 1995 Donations*, WASH. POST, Mar. 11, 1996, at A17 (listing corporate contributors); *Fuel Subsidy Unfair to Competitors*, THE ATLANTA JOURNAL AND CONSTITUTION, June 17, 1997, at 08A (stating that Archer-Daniels-Midland is large contributor to political parties).

was the largest contributor at \$3.9 million,<sup>123</sup> the company has also long been under attack for its cigarette marketing and manufacturing practices.<sup>124</sup> Similarly, Archer-Daniels-Midland, which is perceived to be at the bottom of the agribusiness industry, is the largest recipient of federal tax credits for ethanol production.<sup>125</sup> Corporate contributors candidly admit that they seek access to the nation's leaders, and use contributions to achieve this purpose.<sup>126</sup> Thus, not only is unfair access being provided, but it is being provided to the nation's most controversial organizations.<sup>127</sup>

### III. PROPOSALS

There have been various attempts to reform the current ailing system and limit the flow of soft money.<sup>128</sup> The primary impediment to such reform seems to be the judicially created tie between political contributions and free

<sup>123</sup> See *Phillip Morris Donates 4.2 million*, FIN. TIMES (London), Dec. 3, 1997, at 4 (stating that biggest contributor to political campaigns in 1995-96 was Phillip Morris); Vartabedian, *supra* note 117, at B7; *Party Favors: An Analysis of More than \$67 Million in Soft Money Given to Democratic and Republican National Party Committees in 1997*, Common Cause (Feb. 1997) (analyzing contributions of tobacco companies); see also Lieberman, *supra* note 5, at 443 (stating that tobacco companies in general gave nearly \$6 million to Republican party and almost \$1 million to Democratic party).

<sup>124</sup> See Vartabedian, *supra* note 117, at B7 (discussing political climate surrounding Philip Morris); see also Charles Lewis, *Capital Gains on Capital Hill, Special Interests Use Campaign Contributions to Purchase Influence in Congress*, DALLAS MORNING NEWS, Oct. 25, 1998, at 1J (noting that Congress has bestowed a kind of "most favored industry" status on tobacco companies).

<sup>125</sup> See Vartabedian, *supra* note 117, at B7 (discussing status of Archer-Daniels-Midland); see also Steven Mufson, *Andreas Steps Down, ADM Chief Took Politics to a New Level*, WASH. POST, Jan. 26, 1999, at E1 (stating that ADM has "been the most prominent recipient of corporate welfare in recent U.S. history"); *ADM to Keep Ethanol Break, Gingrich Forecasts No Repeal*, CHIC. TRIB., June 4, 1997, at 5 (stating that subsidy for ethanol production primarily benefits Archer-Daniels-Midland). See generally Ann McBride, *End Corporate Welfare*, IDAHO STATESMAN, July 23, 1998, at 9A.

<sup>126</sup> See Ralph Vartabedian, *Where Big Donors Treat, Big Favors Seem to Follow Politics*, L.A. TIMES, Sept. 23, 1997, at A1 (quoting corporate PAC vice-president as saying "[t]he influence of corporations on public policy is growing"); Vartabedian, *supra* note 117, at B7 (quoting corporate PAC directors as saying contributions provide access); .

<sup>127</sup> See Vartabedian, *supra* note 117, at B7 (finding that corporations with strong political interests are more likely to contribute); E. Joshua Rosenkrantz, "Faulty Assumptions": *A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 872 (1998) (stating that reformers see officeholders as favoring those who have bankrolled their campaigns).

<sup>128</sup> See Neuborne, *supra* note 34, at 810 (discussing difficulties facing reformers); Jeremy Paul, *Campaign Reform for the 21<sup>st</sup> Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 790 (1998) (explaining reform proposals); Michael J. Sandel, *Votes for Sale*, NEW REPUBLIC, Nov. 18, 1996, at 25 (discussing reform attempts).

speech.<sup>129</sup> Contrary to popular belief, however, this tie is not as strong as politicians would have us believe.<sup>130</sup> The First Amendment does not allow the moneyed classes to use their wealth to subjugate the remainder of society.<sup>131</sup> A letter from the Brennan Center for Justice at the New York University School of Law, signed by 126 constitutional scholars, stated that banning soft money was actually in line with existing federal regulations.<sup>132</sup> Thus, attempts to correct the system should not be thwarted by constitutional concerns.<sup>133</sup> Among the more recent proposals for change is the McCain-Feingold bill.<sup>134</sup> This bill has had a long and

<sup>129</sup> See Schultz, *supra* note 5, at 43 (discussing *Buckley*); see also Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688 (1997) (stating that “[w]ithout altering conventional free speech norms about informal political discourse, there are outer limits on the ability of any reform to limit these substitution efforts”).

<sup>130</sup> See Neuborne, *supra* note 34, at 796 (discussing weaknesses in link between speech and money); see also Schultz, *supra* note 5, at 50-51 (noting that tie between speech and money is not absolute); Neuborne, *supra* note 42, at 115 (stating that linkage of money and speech suffers from fallacy of fungibility).

<sup>131</sup> See Frank Askin, *Political Money and Freedom of Speech: Kathleen Sullivan's Seven Deadly Sins— an Antitoxin*, 31 U.C. DAVIS L. REV. 1065, 1078 (1998) (discussing First Amendment in terms of contributions); Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 687 (discussing First Amendment and campaign contributions); see also Edward B. Foley, *Equal-Dollars-Per-Voter: Why the Constitution Should Contain this Principle*, 94 COLUM. L. REV. 1204, 1206 (1994) (discussing equality and elections).

<sup>132</sup> See Feingold, *supra* note 44 (supporting ban on soft money); Letter from the Brennan Center for Justice to John McCain and Russell Feingold, Senators, *United States Senate* (Sept. 22, 1997) reprinted in 143 Cong. Rec. at § 10103 (daily ed. Sept. 29, 1997):

Soft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials . . . The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place. . . .

[C]losing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals' contributions to amounts that are not corrupting.

*Id.*

<sup>133</sup> See Neuborne, *supra* note 34, at 811 (discussing “the angle of repose” favoring reform); Stein, *supra* note 4, at 748 (stating that “coexistence between the First Amendment and effective campaign-finance reform is constitutionally permissible”); see also Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986) (critiquing contemporary First Amendment theory and arguing that some limitations are necessary to ensure freedom).

<sup>134</sup> The McCain-Feingold bill was sponsored by Senator Russell D. Feingold of Wisconsin (Democrat), and Senator John McCain of Arizona (Republican). See Helen Dewar, *Campaign Finance Resurfacing in Senate; Reform Advocates are Newly Hopeful of Winning GOP Support*, WASH. POST, Feb. 20, 1998, at A21; Mary McGrory, *Campaigning for Reform*, WASH. POST, Mar. 27, 1997, at A2.

difficult history.<sup>135</sup> Its primary goal is a complete ban on soft money.<sup>136</sup> This includes prohibiting federal officeholders and candidates for federal office from soliciting, receiving, or spending soft money.<sup>137</sup> The bill also includes restrictions on issue advertisements by outside groups as well as provisions to improve FEC disclosure and enforcement.<sup>138</sup> Although the bill seemingly has majority support in the Senate, it has not been able to overcome repeated dilatory tactics.<sup>139</sup> A similar proposal, the Shays-Meehan bill, has obtained House approval.<sup>140</sup> The Shays-Meehan bill would ban soft money donations to political parties.<sup>141</sup> It would also impose restrictions on issue advocacy advertising.<sup>142</sup> Passage of the Shays-Meehan bill led many to believe that campaign finance reform had finally overcome

135 The bill was first introduced in September 1995, but was amended and reconsidered by the Senate in June 1996. See Senate Campaign Finance Reform Act of 1996, S. 1219, 104<sup>th</sup> Cong. (1996). It was then reintroduced on January 21, 1997. See Bipartisan Campaign Reform Act of 1997, H.R. 493, 105<sup>th</sup> Cong. §25 (1997). A modified version was introduced on September 18, 1997. See S. 1191, 105<sup>th</sup> Cong. (1997). However, the bill has not been able to overcome a filibuster. New efforts have continued. See, e.g., H.R. 417, 106<sup>th</sup> Cong (1999); S. 504 106<sup>th</sup> Cong. (1999), H.R. 32, 106<sup>th</sup> Cong. (1999).

136 See Feingold, *supra* note 44, at 383 (describing centerpiece of bill as being ban on soft money).

137 See Feingold, *supra* note 44, at 383 (stating that federal officials would be prohibited from soliciting donations).

138 See Feingold, *supra* note 44, at 383 (discussing improved disclosure provisions); Claudia Deane & Ruth Marcus, *Politics*, WASH. POST, Feb. 8, 1998, at A12 (stating that bill enhances disclosure requirements); Helen Dewar, *Latest Campaign Finance Debate Opens; Threat of Senate GOP Filibuster Against Overhaul Remains Strong*, WASH. POST, Feb. 24, 1998, at A4 (noting that bill requires increased disclosure).

139 See Kathy Sawyer, *Sen. McConnell Criticizes Campaign Finance Bill; Republican Says Free Speech Would Be Violated*, WASH. POST, Feb. 22, 1999, at A4 (noting that bill has faced "flurry of filibusters"); Helen Dewar, *Campaign Financing Resurfacing in Senate; Reform Advocates are Newly Hopeful of Winning GOP Support*, WASH. POST, Feb. 20, 1998, at A21 (noting "dueling filibusters"); Feingold, *supra* note 44, at 386 (discussing repeated threat of filibusters).

140 See *A Victory for Shays-Meehan*, N.Y. TIMES, Aug. 7, 1998, at A1 (stating that House passed Shays-Meehan bill); *A Triumph for Campaign Reform*, N.Y. TIMES, Aug. 4, 1998, at A1 (noting passage of bill in House, 237 to 186); see also Smith, *supra* note 4, at 31-34 (analyzing Shays-Meehan proposal).

141 See H.R. 417, 106<sup>th</sup> Cong. §101 (1999) (amending section 323 of 1971 FECA); see also Helen Dewar, *House Approves a Bill for Campaign Finance: Overhaul Plans Vie to Face Senate Fight*, WASH. POST, August 4, 1998, at A2. See generally Allison Mitchell, *GOP Leaders in House Rebuffed on Election Funds*, N.Y. TIMES, June 20, 1998, at A6 (noting that ban was fiercely opposed by Republicans).

142 See H.R. 417, 106<sup>th</sup> Cong. §308 (1999) (limiting campaign advertising); Dewar, *supra* note 141, at A2 (noting bill would limit issue advocacy advertising); see also Brent A. Fewell, *Awash in Soft Money and Political Corruption: The Need for Campaign Finance Reform*, 36 DUQ. L. REV. 107, 126 (1997) (describing issue advertising as strategy used by candidates to avoid statutory prohibitions on campaign contributions).

partisan politics.<sup>143</sup> However, Senate refusal to pass the bill eviscerated any such hope.<sup>144</sup>

#### IV. SOLUTION

Congress should eliminate the partisan nature of campaign finance reform and initiate a complete ban on soft money.<sup>145</sup> This would eliminate the various corrupting influences that exist in electioneering.<sup>146</sup> Hard money, which is raised in accordance with existing financing regulations, should be the sole source of funding for elections.<sup>147</sup> This solution would create a bright-line test, eliminating any confusion or inaccuracy in the current system.<sup>148</sup> The current difficulty inheres in the hard-soft dichotomy.<sup>149</sup> Presently large amounts of unregulated money find their way into campaigns.<sup>150</sup> Parties, while claiming to focus on party-building activities, are actually using the funds to further

<sup>143</sup> See Dewar, *supra* note 141, at A2 (quoting Senator McCain as saying he thought House approval "might change some votes in the Senate").

<sup>144</sup> See Feingold, *supra* note 44 (discussing Senate's failure to pass bill); David Sara-son, *Politicians Behave Like Panhandlers*, STAR-LEDGER, Newark, Feb. 10, 1999, at 17 (noting filibuster prevented passage and that fight does not look "any easier" this year).

<sup>145</sup> See Feingold, *supra* note 44, at 386; Corrado, *supra* note 46, at 54 (eliminating soft money). See, e.g., Wertheimer & Manes, *supra* note 51, at 1149 (referring to divisive nature of Federal Election Commission).

<sup>146</sup> See Schultz, *supra* note 5, at 45 (discussing quid pro quo relationship surrounding campaign contributions); Neuborne, *supra* note 29, at 7 (noting dangers of quid pro quo in campaign finance).

<sup>147</sup> See Russell Feingold, *Special Interests and Soft Money*, 10 STAN. L. & POL'Y REV. 59, 60 (1998) (arguing that soft money should be banned); Archibald Cox, *The Case for Campaign Finance Reform*, 1 GREEN BAG 2D 289, 289-90 (1998) (arguing that soft money should be limited); see also Simon, *supra* note 5, at 176 ("[T]he entire soft money system is an edifice built on the foundation of a fallacy").

<sup>148</sup> See Lieberman, *supra* note 5, at 429-30 (noting complexities in current system); Cox, *supra* note 147, at 289-90 (claiming that eliminating soft money would "make a huge difference" to election laws); Joel M. Gora, *Campaign Finance Reform: Still Searching Today for a Better Way*, 6 J.L. & POL'Y 137, 153 (1997) (stating that unitary approach is needed); see also Simon, *supra* note 5, at 176 (noting that hard/soft dichotomy has created dual financing mechanisms).

<sup>149</sup> See Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 217-18 (1998) (noting that corruptive dangers of unregulated soft money are similar to corruptive dangers of regulated hard money); Donald J. Simon, *Soft Money: the "End Run" Around Federal Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 75, 78 (1998) (arguing that soft money is more dangerous because of its unregulated nature); Corrado, *supra* note 46, at 54 (stating that campaign laws should be clarified by eliminating hard/soft dichotomy).

<sup>150</sup> See Feingold, *supra* note 44, at 380 (noting that "the soft money channel, deeper than a well and far wider than a church door, has allowed millions upon millions of dollars that would have otherwise been barred by federal law to pour into our political system").



their candidates.<sup>151</sup> Regardless of the intention, soft money adversely affects federal campaigns.<sup>152</sup>

Any effective solution to the current problem must comply with the goal of campaign finance regulation, which according to the Supreme Court, is the prevention of corruption.<sup>153</sup> In this context, preventing corruption has at least four meanings: (1) preventing all forms of quid pro quo relationships; (2) preventing unequal access to

representatives based on financial considerations; (3) increasing a representative's ability to exercise independent judgment on issues; (4) enhancing respect for the democratic process.<sup>154</sup> The fulfillment of these goals is crucial to restoring faith in the social contract that underlies our political system.<sup>155</sup> All citizens should support the electoral process in a country with democratic political institutions, because a lack of support undermines the validity of such a system.<sup>156</sup> To restore such support, an effective ban on soft money should be enacted that includes three crucial components: (1) national political parties should be prohibited from soliciting or receiving any money that does not comply

151 See Feingold, *supra* note 44, at 380 (discussing use of soft money by political parties to fund advertising); Simon, *supra* note 5, at 176-77 (arguing that soft money is spent to influence federal elections); Corrado, *supra* note 46, at 51 (discussing use of soft money through issue advertising to affect federal elections).

152 See Feingold, *supra* note 44, at 380 (discussing federal implications of soft money); Simon, *supra* note 5, at 176-77 (discussing soft money effects on federal elections); Corrado, *supra* note 46, at 51 (discussing soft money dimensions of issue advocacy advertisements). See generally, Donald J. Simon, *Soft Money: the "End Run" Around Federal Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 75, 78 (1998) (arguing that soft money threatens the integrity of the federal electoral process).

153 See *Buckley v. Valeo*, 424 U.S. 1, 26-27 (noting that preventing corruption and appearance thereof preserves 'integrity' of democratic system); Simon, *supra* note 5, at 172 (discussing Court's reasoning); see also Sunstein, *supra* note 28 at 1394-5 (referring to Court's view); Burke, *supra* note 1, at 365 (noting that Court's emphasis on preventing appearance and actuality of corruption in *Buckley*).

154 See Neuborne, *supra* note 29, at 7-9 (demonstrating confusion surrounding corruption); Briffault, *supra* note 22, at 100-101 (stating complexities and dimensions of corruption); Wertheimer & Manes, *supra* note 51, at 1128 (discussing corruption, and appearance of corruption).

155 See Wertheimer & Manes, *supra* note 51, at 1130 (stating that "when money and privilege replace votes, the social contract underlying the political system is abrogated"); See also RICHARD C. HARWOOD ET AL., *CITIZENS AND POLITICS: A VIEW FROM MAIN STREET AMERICA*, at V (1991) (documenting public perception that campaign contributions are more likely to influence political outcomes than voting).

156 See Burke, *supra* note 1, at 379 (noting importance and significance of "clean elections"); Myles V. Lynk, *Regulating Political Activity: Notes on a Hypothetical Statute to Regulate Presidential Primary and General Election Campaigns*, 8 J.L. & POLITICS 259, 266 (1992) (discussing proposals for clean elections).

with federal law; (2) federal candidates and officeholders should be prohibited from raising or soliciting any money that does not comply with federal law; (3) state parties should be bound by the current federal law.<sup>157</sup>

The concept of democracy presumes that all citizens have equal access to the political sphere, yet the current system discriminates against citizens that do not possess the wealth to fund an effective campaign.<sup>158</sup> This results in a fragmentation of society where special interest groups can eliminate the representation of various sectors and their values, from political consideration.<sup>159</sup> Thus, the removal of soft money, which is the very symbol of corruption in the political system today, would seem to be the only solution to the current deterioration.<sup>160</sup>

#### CONCLUSION

The task of campaign finance reform is filled with political turmoil, public outrage, and a general feeling of frustration. However, the difficulty of the task does not absolve the duty to perform it. The country has faced many political scandals, from Watergate to those associated with the Clinton presidency. These scandals have always caused upheaval, but have resulted in positive change. There is now an opportunity for Congress to continue in this tradition and slay the fundraising dragon that has been the source of recent scandal. This would not just be a victory for the political parties, but for the general public, who would once again have a voice in the political system. As Judge J. Skelly Wright wrote, “[w]e have failed to remind

<sup>157</sup> See Campaign Finance Investigation, 1997; Hearing Before the Senate Governmental Affairs Comm: 105<sup>th</sup> Cong (1997) 143 Cong. Rec. S2239-02, S2255 (containing letter from President of Common Cause, Anne McBride, supporting ban on soft money); Simon, *supra* note 5, at 178 (describing three dimensions of soft money that must be prohibited for effective ban).

<sup>158</sup> See Simon, *supra* note 5, at 177 (describing abandonment of ideals of equality); Burke, *supra* note 1, at 381 (stating that current system magnifies special interest concerns at expense of general populace).

<sup>159</sup> See Burke, *supra* note 1, at 381 (noting lack of effective representation).

<sup>160</sup> See Simon, *supra* note 5, at 178 (banning soft money is crucial to prevent corrosive effect it is having upon public attitudes towards democracy); *Panel Discussion: Revolutionizing Campaign Finance- An Appraisal of Proposed Reforms*, 13 J.L. & POL. 163, 174 (stating that key element to reform is elimination of soft money contributions).

ourselves, as we moved from town halls to today's quadrennial Romanesque political extravagances, that politics is neither an end in itself nor a means for subverting the wills of the people."<sup>161</sup>

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<sup>161</sup> See Wright, *supra* note 17, at 645 (describing evolution of American politics).